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GUEST EDITORIAL

IS BREXIT RIPPING UP THE UNWRITTEN CONSTITUTION OF THE UNITED KINGDOM?

*Justin O. Frosini**

Trick or Treat? The BBC couldn't resist the quip when news came through in the early hours of April 11 that the EU had granted the United Kingdom another extension up until the 31st October (i.e. Halloween…) thus avoiding the "hard thump" of a no deal Brexit. However, while there were certainly cheers from the Remain camp there were certainly also groans not only from the Leavers, but most of all from the many "agnostics" who cannot bear to hear the word Brexit anymore. Indeed for many in the British Isles Brexit is becoming a psychodrama. But something even worse is happening: Brexit is ripping up the unwritten constitution of the United Kingdom. Now in making this argument most scholars would begin with the very Brexit referendum itself. I am, however, not of this opinion. It is true that the former Conservative minister Francis Pym once asserted that the referendum was an "unknown beast in this country", but he made that statement before the United Kingdom held three nationwide referendums (1975, 2011 and of course 2016). The constitutional legitimacy of holding the Brexit referendum can be found in the Conservative Manifesto of 2015 where its leader promises a referendum on British membership of the EU before the end of 2017. Most observers (myself not included) thought that the Tories would not obtain an overall majority and would be forced to form another coalition with the Liberal-democrats and that the latter would have vetoed holding a referendum on EU membership.

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On the contrary Cameron's move to win back votes from the United Kingdom Independence Party with the slogan "you'll go to bed with Farage, but wake up with Miliband" was a success and he thus found himself with a majority albeit of just four seats. This Conservative majority meant that, according to constitutional convention, Cameron was obliged to fulfil his manifesto commitment to renegotiate British membership of the European Union and put the agreement to a referendum. And this is indeed what happened: on Feburary 19, 2016 David Cameron comes back from Brussels all smiles and, reminiscent of Chamberlain after the Munich Conference in 1938, proclaims "we have obtained an agreement with the European Union" and therefore Brexit has been thwarted. He then puts the agreement to a referendum on 23rd June 2016 and, as we all know, loses. Holding the referendum as such was not outside the bounds of the constitution, but there are two issues, one substantive and one procedural, that are constitutionally contestable. First, one could argue that the Brexit referendum (or more precisely Britain's withdrawal from the EU) is a violation of the Good Friday Peace Agreement. In fact that peace accord was brokered under the presumption that both the United Kingdom and the Republic of Ireland would remain members of the EU which indeed acted as a facilitator of the negotiations. Second, since 1999 Britain is a devolved multi-nation state and therefore one could argue that there should have been a double threshold required in order for Brexit to occur: a popular majority UK-wide but also a majority in all four of the constituent nations of the United Kingdom. As one shall see both these issues have returned to haunt the Brexiteers because the much debated "backstop" is a position of last resort, to maintain an open border on the island of Ireland in the event that the UK leaves the EU without securing an all-encompassing deal in line with the Good Friday peace accords, while the very future of the United Kingdom is being put at risk due to the fact that Scotland which voted heavily in favour of Remain is being dragged out of the EU against its will.

In any case if one puts aside these two elements of possible "unconstitutionality" of the Brexit referendum there is no doubt that it is after June 23 2016 the first rips to Britain's unwritten constitution

are carried. As public lawyers we should not forget that from a strictly legal point of view the referendum 2016 was not legally binding. This was clearly explained to Members of Parliament in a briefing paper published on 3rd June 2015:

«This Bill requires a referendum to be held on the question of the UK's continued membership of the European Union (EU) before the end of 2017. It *does not contain any requirement* for the UK Government to implement the results of the referendum, nor set a time limit by which a vote to leave the EU should be implemented»

It could not have been otherwise because, as any first year law student knows all too well, one of the two pillars of Britain's uncodified constitution, together with the rule of law, is parliamentary sovereignty. The Brexiteers also knew this. Indeed their alluring slogan – 'Take Back Control' – in actual fact was the rendering into simple and plain English of an intricate constitutional debate spanning over at least five decades. The core element of this debate is that the United Kingdom's entry into the EEC/EU has demolished parliamentary sovereignty. Eminent Eurosceptics such as Tony Benn, Enoch Powell, Douglas Jay and Bill Cash all argued that the EC was taking power away from the cradle of modern democracy, the British Parliament, and therefore it was taking control away from the British people. These arguments have also been voiced by eminent jurists such as Lord Denning who, in Bulmer v. Bollinger [1974], famously referred to the incoming tide of EU law, observing that 'it flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute'.

So Brexit had been a fight for parliamentary sovereignty (Westminster taking back control), but as soon as the referendum had been won there was what the German psychologist Wilhelm Wundt would have defined as a "heterogony of ends". Suddenly parliamentary sovereignty was no longer the main objective, but Brexit in itself. This was epitomized by the fact that the May Government claimed that, on the basis of the Crown's treaty-making prerogative, it had the power to trigger withdrawal under Article 50 without a vote in Parliament. The paradox is remarkable. After

decades of Eurosceptics and Europhobes claiming that Britain's membership of the EEC/EU was a violation of Parliamentary Sovereignty the implementation of Brexit was being carried out by side-stepping Parliament.

It is common knowledge that this was contested by numerous legal scholars and politicians. The British-Guyanese entrepreneur Gina Miller took her adversity a step further and challenged this assumption by way of judicial review in front of the High Court and indeed the latter handed down a decision in her favour. The "heterogony of ends" is further confirmed by the hysterical reaction of the Europhobic English tabloids. The Daily Mail defined the three judges "Enemies of the People!" posting their "mugshots" on its front page, the Sun spoke of a "bombshell judgment", the Daily Express evoked Churchill's famous speech, "we shall fight them on the beaches", and even the usually composed, albeit Eurosceptic, Daily Telegraph opened with "Judges vs the People". Never in the history of the United Kingdom had there been such a vehement attack against the judiciary, so much so that then then Justice Minister Lizz Truss was heavily criticised for her silence, and when the Minister finally intervened in defence of the British justice system, many observers in any case noted that it had been "*too little too late*".

At that point the May Government had to go through parliament in order to invoke Art 50, and again one can observe another rip in the constitution being made. Indeed May and her ministers insisted on the fact that parliament *must* vote the withdrawal bill without any amendments because otherwise MPs would go against the *will of the people*. It is highly likely that historians writing on Brexit in the years to come will consider this to be the moment when the centuries' old doctrine of parliamentary supremacy was definitely pushed aside. Indeed, with a few notable exceptions a fearful majority of the House of Commons voted in favour of the bill without any amendments.

Paradoxically it was the unelected House of Lords that provided some resistance to the trampling over of parliamentary sovereignty, but to no avail: the May Government refused any form of compromise and on March 29, 2017 she sent her letter to Donald

Tusk, President of the EU informing him of Britain's intention to leave the EU.

At this point we come to another violation of the constitution which has been generally ignored by commentators. Despite numerous promises that she would not ask for an early election on April 18 Mrs May announced the following outside Number 10 Downing Street: "I have just chaired a meeting of the Cabinet where we agreed that the Government should call a general election on the 8 June". Her opening statement is at the very least an anomaly if not a fully-fledged violation of the law because, following the approval of the Fixed Term Parliament Act in 2011 (FTPA 2011), the Government cannot "call an election", but as she explains later in her speech the government can only "move a motion in the House of Commons calling for an election". This motion requires a two thirds majority which to the surprise of many she subsequently obtained thanks to the decision of the Labour Party to support the motion. Looking at the then opinion polls one appeared to be in the presence of a very rare case of turkeys asking for the anticipation of Christmas… We all know that this move turned out to be a terrible boomerang: instead of obtaining the landslide majority forecast by most political pundits Mrs May accomplished the formidable feat of losing her albeit razor thin majority. One might argue that here we can find the origins of the Irish predicament of Brexit that has so far prevented the PM from getting her deal passed through Parliament.

Again the British Constitution was torn even further. After a truly disastrous election campaign Mrs May lost her overall majority, but the Tories were still the largest party in the House of Commons. With a certain imperturbableness May did not think for a minute that Brexit might require a dose of sane consociationalism rather than the usual confrontational politics so typical of Westminster. She thus sought the external support of the Democratic Unionist Party of Northern Ireland to form a minority government. Now, of course this was not the first time a British Government had had the support of the Unionists but the last time this had happened was in the 1970s well before the much-cited Good Friday peace agreement. Indeed, the latter implies that the Irish and British governments must be

bipartisan in ensuring the formation of a government in Northern Ireland. I think we can safely say that the fact that Northern Ireland still does not have a government after two years is the "proof in the pudding" that the present May Administration is not seen as a credible facilitator of the formation of a new executive in Northern Ireland. Sadly the centrality of this issue was demonstrated by the recent killing of journalist Lyra McKee by members of the self-proclaimed "New IRA" and is testimony of how precarious peace really is in that region.

Let us now come to the events of the last few months where, once again, the British Constitution has been put under enormous strain. A frequent question certainly begs: how has May's second cabinet survived for so long? It is a question that is frankly difficult to answer. Since forming her minority government on June 11, 2017 May has currently had 41 resignations with 31 of these relating to Brexit. I will leave it to the political scientists to verify whether this is a record breaker, but there is no doubt that this finds no equivalent in British parliamentary history. Some scholars have argued that the FTPA 2011 cited above is actually the reason for May's survival. In the past any Prime Minister who saw the resignation of key members of her/his cabinet would have considered this *de facto* a motion of no confidence, but when a motion of no confidence was formally presented by Jeremy Corbyn in accordance with FTPA 2011 it did not pass despite the fact that 24 hours earlier Mrs May had conceded the worse defeat of any incumbent government. Furthermore, just a few weeks earlier Theresa May had also defeated a leadership contest within her own party. This is counterfactual, but probably the peculiar circumstances of Brexit rather than the Fixed Term Parliament Act explain why Mrs May has held on for so long. The truth is that nobody wants the thankless task of resolving the Brexit enigma. But even in attempting to get her deal passed (and I say *her* deal and not the *UK government's* deal because this agreement was clearly negotiated by Theresa May without the full involvement of her cabinet) the Prime Minister has overstepped the boundaries. Indeed, when on March 18 the Speaker of the House John Bercow made reference to Erskine May and a precedent of 1604 to thwart a

another vote she decided to make a Machiavellian move and separate the actual deal from the political statement causing uproar from the opposition. This very un-British lack of fair play proved to be pointless because the deal was voted down once again albeit by a smaller margin. In the meantime the European Union (Withdrawal) (No. 5) Act has received Royal Assent and has become law. This law (better known as the Cooper-Letwin Act) prevents Britain from leaving the European Union and constitutes the legal basis for the extension of Art. 50 to October 31.

So what now? Well it would be easy to fall back on a much used (abused?) quotation and say that "predictions are hazardous, especially about the future", but frankly the incredible events of the last two and a half years make this citation more than credible. Despite being defeated three times Theresa May's deal could be approved, Britain could still leave without a deal although this would be in violation of its own statute law (the Cooper-Letwin Act), Parliament might finally muster up the courage to reaffirm its supremacy and revoke Art. 50, there could be another general election where a Brexit or Remain majority win or there could be another referendum. The discussions between the Conservative and Labour Parties (better late than never) might lead to the approval of May's deal plus Britain remaining in the custom's union (and even in the single market) something that has been dubbed Common Market 2.0 or Britain might obtain a Canada-style free trade agreement. In the meantime, there is another election which the UK might take part in (unless it leaves the EU by June 1) and those are the elections to the European Parliament. Five years ago those elections saw Nigel Farage's UKIP become the first party in Britain with 26.6% and led to David Cameron's decision in 2015 to promise a referendum. The latest poll by YouGov puts Nigel Farage's newly founded Brexit Party in first place with 23%, but the Remain parties would have more than 50% of the share of votes. Trick or Treat? Who knows…

ARTICLES

THE CONSTITUTIONAL DIMENSION OF DEMOCRACY WITHIN A DEMOCRATIC SOCIETY

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Abstract

This article aims to shed light on – at the time of the economic crisis – the emerging gap between, on one side, the ideal representation of democracy and its functioning, on the other side, the growing manipulation of popular consent and the related vehement attitude towards its political role. With an approach both historical and comparative, the author underlines the collapse risk of constitutional democracy as necessary form of legal institutions, when its reception within society loses the connections to the rule of law.

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1. Populism versus legal order. The role of formalism and the normativity of the Law

The intention is here to deal with populism and constitutional effectiveness or, in other words, to discuss the principle of people's legitimacy of the legal and constitutional systems. The complex relation between democracy and constitutional boundaries to political power is also at stake, among the risks emerging from an idea of democracy out – or without - of the legal limits of constitutionalism. This contribution moves from the widespread perception of the emerging divide between the ideal representation of democracy, its functioning on the one side, and the growing manipulation of popular consent and the subsequent vehement attitude toward its political role, on the other side. To deal with contradictions between democracy and the legal system generated by contemporary populisms. When the idea of democracy perceived within society loses its connections to the rule of law it could bring to the breakdown of constitutional democracy as the necessary shape of legal institutions.

Before referring plainly to the severe critical approach frequently manifested behind the use of the word *populism*, it might be essential for our discussion to stress the attention on some preliminary issues, in order to avoid whatsoever misunderstanding. First and foremost, in our opinion, the aforementioned paradigm may not prove to be a valid tool in interpreting a specific political context - such as the Italian one - except for minor findings possibly arising from the comparison with other contemporary political systems. That is, according to our point of view, purely because the simplification[1] hidden behind the dualism between alliances expressing populism on the one side and those representing party politics on the other hand, is not to be considered valid anymore.

Moreover, some of the basic assumptions frequently recalled about the emergence of populism are, in our point of view, simplifying. It is common ground that the radicalization of anti-Europe forces, specifically those who fight against the European Monetary Union, may feed populism. Nevertheless, the discussion cannot be confined to the analysis of this issue, since we strongly

[1] See, e.g., the critical remarks of Y. Stavrakakis, *Three Challenges in Contemporary Populism Research*, in https://www.socialeurope.eu/three-challenges-in-contemporary-populism-research, May 22nd, 2018.

believe that the critical attitude expressed towards party politics is more complex, that is, multifaceted.

In examining the emerging populist trend I will adopt an historical and comparative approach at the same time, which could help us in highlighting constant elements and features, essential to explain the multiple diversions of the reality from the ideal model of a democratic system. Of the different readings of the aforementioned phenomenon, i.e. the opposition between populism and formalism intended as normativity of the Law[2] and the Constitution, two in particular deserve our attention, as they are capable to help us in better interpreting the reality.

The first reading is rooted in the threat to individual rights represented by democracy, once this concept is interpreted outside the shield of protection of the rule of law. In other words, quite often, decisions formally taken in the name of the democratic principle deeply infringed individual rights, under an historical perspective, both in the past as well as in our contemporary world. Democracy is not just the people consent to whatsoever political decision.

Contrarily, the second reading focuses on the democratic origin of populism itself, which profoundly rests in the sovereignty of the people and in the affirmation of their will. To strengthen this reading, in a recent essay, Marco Revelli[3] points out how the word *populism* is rooted in the Latin word *populus*; analogously as the etymology of the original Greek word *democracy* refers to *demos*, the word used in the ancient Greek language to mean the contemporary concept of the people. To cope with this issue, at the same time, one may think about the possible conflict arising between democracy and individuals just recalling to mind its possible decay, represented by *demagogy* and the distance from the democratic concept of *politeia*[4]. This brings back to an es-

[2] Oriented by legal rules pointed out by a democratic political authority.

[3] M. Revelli, *Populismo 2.0* (2017).

[4] That is Platone, *La Repubblica*, Book VIII, chapt. I, 543a-544d, chapt. XI, 557a-558c, chapt. XIV, 562a-563e and Book IX, chapt. I, 571a-572b, in Id., *Opere complete*, vol. 6, it. translation by F. Sartori (2003), respectively 259 ff., 274 ff., 280 ff. and 291 ff.; Aristotele, *Politica*, it. ed. by L. Laurenti (2002), especially Book III, 6-8, 10; Book IV, 2, 4, 11. On these issues, masterfully, L. Canfora, *Il mondo di Atene* (2011), esp. 67 ff., 130 ff., 151 ff. and 156 ff.; Id., *La democrazia. Storia di un'ideologia* (2006), 31 ff., 52 ff., analysing in an historical perspective the evolu-

sential contradiction, as populism itself has anyway to do with democracy, being one of its expressions. Populism, the people and democracy sharing the same reference.

The main dilemma represented here has been already discussed by two prominent scholars; their writings may be considered in alternative but surely are to be read as complementary. Denis Gallighan, on the one side, affirms that "*the universal problem is how a people can both govern itself and have effective government*"[5]. While, Gianni Ferrara, in a work still unpublished[6] so far, highlights the tension between people sovereignty and the will of people, on the one side, and the quest for legal constraints which arises from the same need of affirmation of rights and guarantees for human beings, on the other side. Legal constraints which soon become a limit themselves for the expression of the individuals and their freedom[7]. The law arising as an answer to a need for protection for the individuals and a legal constraint at the same time; bringing this dilemma deeply inside the concept of democracy and democratic law as law based on the consent of the people, grounding legal bounds to individual freedom at the same time[8].

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tion of the effectiveness of the different forms of democracy. See, also, E. Gentile, *Il capo e la folla. La genesi della democrazia recitativa* (2016), esp. 3 ff., 8 ff., 22 ff.

[5] *The People, the Constitution, and the Idea of Representation*, in D.J. Galligan, M. Versteeg (eds), *Social and Political Foundations of Constitutions* (2013).

[6] G. Ferrara, *Sul diritto. Un'ipotesi*, forthcoming.

[7] This is a permanent question in political and legal theory. Among Italian scholars, e.g., see, G. Zagrebelsky, *Il «crucifige!» e la democrazia* (1995); M. Luciani, *Art. 75. Il referendum abrogativo*, in G. Branca, A. Pizzorusso (eds.), *Commentario della Costituzione* (2005), 1 ff., spec. 20 ff., 31 ff.; L. Carlassare, *Costituzionalismo e democrazia nell'alterazione degli equilibri*, in *Studi in onore di Gianni Ferrara*, I, (2005), 561 ff.; Id., *Sovranità popolare e Stato di diritto*, 1 Costituzionalismo.it (2006); L. Canfora, *La democrazia. Storia di un'ideologia*, cit. at 4, in an historical perspective; G. Ferrara, *Sulla democrazia costituzionale*, in *Scritti in onore di Lorenza Carlassare*, V, (2009), 1899 ff.; F. Bilancia, *Le forme della democrazia contemporanea e il germe della sua autodistruzione*, in F. Bilancia, F.M. Di Sciullo, A. Gianelli, M.P. Paternò, F. Rimoli e G.M. Salerno (eds.), *Democrazia. Storia e crisi di una forma politica* (2013), 135 ff, and bibliography there quoted; S. Cassese, *La democrazia e i suoi limiti* (2017).

[8] C. Thornhill, *The Citizen and the State. A paradoxical Relation*, Speech at the RCSL Annual Meeting, *Law and Citizenship beyond the States*, Instituto universitário de Lisboa, 12 September 2018, has spoken of "conflict between functional and normative dimensions of citizenship", qualifying it as a paradox.

2. Law and democracy: legal boundaries to democracy in the constitutional context

Yet, the Constitutional framework, in shaping constitutive procedures and rules, looks to be the primary way to gather shared consensus over the rule of law, which is a starting basis in order to promote political stability and legal certainty as well as legitimizing processes of the legal system.

At the same time, the role of the consensus of minorities as fundamental tool itself for legality cannot be denied. In two famous speeches, Gaetano Salvemini[9], rooted on the consensus of minorities the search for a balance between political rights and democracy. The consensus we refer to here, nevertheless, before being a consensus on the outcomes, on the contents of law, is represented by a shared conviction on deliberative requirements and procedures, which makes acceptable in its content any possible outcome, insofar as it may be considered as the output of the democratic process[10], consensus on the procedural machinery of democracy (Luhmann). Only a shared certainty on the law-making process can let its contents be accepted by anyone even when contrary to her personal interest, just because has been approved respecting the legal procedure, the rule of law.

Notwithstanding this, it is evident that the balance between the decisional power of the majority and the expression of the guarantees for the minorities represents a hard synthesis: nevertheless such a synthesis requires to stress the real significance of the democratic process in its capacity to express the will of the people through the mechanisms of political representation. If we turn our attention from limits and procedures, *id est* from the deliberative process to its outcome, one may argue that a serious risk of paralysis may arise, once democratic institutions tried to find out an unanimous consensus around the content of their decisions, on the one side. Unanimity is deeply in opposition with effective government. On the other side, one may consider as self-destroying any deviation who calls for an unlimited and un-ruled recourse to the will of people, once that is not shielded by any constitutional legitimacy. Such a perspective is not so odd, while it

[9] G. Salvemini, *Sulla democrazia. (Saggi)*, 1936-1937, 1940 (2007).

[10] I am referring here to the masterpiece of H. Kelsen, *Vom Wesen und Wert der Demokratie* (1929), it. ed. in Id., *La democrazia* (1995), spec. 101 ff.

has been limited over time and space, by the recourse to democratic institutions and to constitutional limits.

That is why it looks necessary to discuss the issue of what kind of limits we should cope with. To avoid a self-destroying form of exercise of democratic power[11], bringing people's consent, pretending to be democratic in itself, against the rule of law, insofar against constitutional democracy. Most limits, as expertise, merit system, counter-majoritarian institutions, have been brought in, in part, by *aristocratic* constituencies, as provided by professional institutions[12]. The same role vested by the judiciary is itself the expression of a limit and may itself be considered controversial, if we just think about the UK system and the still ongoing tension between political constitutionalism, on the one side, and judicial constitutionalism, expressed through the common law of the land through the judiciary, on the other side. Falling again on the dilemma of the apparent opposition of constitutional foundations of democracy and the legal system.

Yet, one cannot indulge in the temptation, expression itself of a populist point of view, to replace processes and procedures embedded by democratic institutions, relying on the power of a selective elite, potentially able to express the interests and the needs of the people. That would be the output of an aristocratic choice, this time intended as a paradigm of inequalities and political and social injustice so far, without being a solution to the original dilemma between the will of people and its translation into decisions taken in the interest of the people; between the need of democratic legitimacy and an effective government.

Therefore, our search for a synthesis between democracy and the affirmation of civil and political rights, may look at the traditional European legal culture as well at the history of legal thinking in Europe. In one of its masterpieces, Aldo Schiavone[13] affirms how western legal culture has been based on a synthesis between the Greek and the Roman paradigm. According to the former, the legal phenomenon is the output of popular assemblies, whose *democratic* nature is ensured by popular sovereignty. Ac-

[11] I have already dealt with these issues in F. Bilancia, *Le forme della democrazia contemporanea e il germe della sua autodistruzione*, cit. at 7.

[12] Recently on these issues, S. Cassese, *La democrazia e i suoi limiti*, cit. at 7.

[13] A. Schiavone, *Ius. L'invenzione del diritto in Occidente* (2005), esp. 12 f., 51 f., 76 ff., 92 ff., but *passim*.

cording to the Roman paradigm, on the contrary, the legal system is the output of the deliberative process expressed by an authority, even if encharged by *cives*, the citizens. Whose deliberation are driven instead by rational thinking, making use of conceptual formalisms[14], guided at the same time by the legal science and by rulings, where politics leaves space to form, to expertise and to knowledge[15]. Opposing *Jus* to *Lex*, where the class of lawyers rules in the name of *Princeps*.

And both paradigms proved challenging democracy itself, in their deviations. As both paradigms are deeply in crisis today.

The first one, the democratic one, may turn into (democratic) radicalism, which opens up to tyranny and to conflicts between legal norms and values, as well depicted in masterpieces of the Greek literature, such as the Socrates' Apology and Antigone[16]. While, the legalization of economic behaviour, the codification of rules on property, on contract may eventually lead the latter, the formal paradigm, to the paradox of legal inequality as a consequence of economic inequalities, in other words to the ruling of economy through the legitimation of law. In the Roman tradition driven by the doctors, for instance, coherently with the respect of the legal tradition, it is up to technicalities and formalisms generated by the judiciary to create *jus*. That is nothing more than the output of the hegemonic power of a social class made of high professionals, such as justices, lawyers, notaries. Destined to rule the world under a corporativist view, turning themselves into an oligarchy of professionals, although loyal to the prince, decades later in the medieval and modern era.

The thesis here is that the conflictual trend between democracy and populism nowadays arises from the blurring of boundaries between these two paradigms. From the loss of effectiveness of them both, from the failure to rule out society even before poli-

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14 A. Schiavone, cit. at 13, 171 ff., 194 ff., 214 ff., 233, 246 ff.

15 A. Schiavone, cit. at 13, 30, 66 ff., 90, 104 ff., 114 ff., 262 ff., 312 ff., 397 ff.

16 These conflicting paradigms emerge as almost deeply inside the same concept of *law* confronting conscience and common morals, law of the town and sense of justice, as well known, Platone, *Apologia di Socrate*, as well as Id., *Critone*, it. ed. with note by M. Valgimigli; *Introduzione* (v. XXXII ss.) and *Note aggiornate* by A.M. Ioppolo (2000). See also what is referred on this question by A. Schiavone, *Jus*, cit. at 13, 252 ff.

tics which opens up to the break point between political representation and the will of people, to the crisis of parliamentarianism.

The lost perception of the role of constitutional limits to democracy may be among the main evidences of populism, and one of the main pressures on democratic institutions by democracy itself. Where, undoubtedly the most important limits to the self-destroying forces of *kratos*[17] and *demos* are in the Constitution.

That is the main evidence of the *paradox* discussed in our opening remarks. The lost of effectiveness of constitutional limits as the main output of a democratic deficit, *id est* a deficit in representation and the subsequent fall of the principle of legitimacy of the democratic system. Legitimacy, which should be founded by the conjunction between the political power, popular sovereignty and the Constitution.

3. The origin of contemporary populisms and the economic crisis

As already pointed out, a major role in the affirmation of populism worldwide has been played by economic crisis everywhere[18]. To better understand, we could just analyse examples which are closer to our political culture or which simply look more meaningful. In doing this, we have to try to show how in contemporary democracy a correlation exists between the affirmation of populism and the fall of the middle-class.

From an empirical point of view, this class has recently experienced its powerlessness to act as a balance of the different needs within civil society. As one of the main outputs of the crisis of parliamentarianism, in fact, the loss of the capacity to find the common sense to drive the political community[19], within the constitutional boundaries, left the place to the conquer of political power through government, object of conquest among political parties and movements itself.

The fight for power brought the radicalization of political communication and a wide spread feeling of sharp criticism to-

[17] Whose meaning is, at the same time, *power*, *force* and *violence*.

[18] See historical analysis and critical considerations on this point by E. Laclau, *On Populist Reason* (2005), it. ed.by D. Tarizzo, *La ragione populista* (2008), esp. 110 ff.

[19] M. Revelli, *Populismo*, cit. at 3, *passim*.

wards political actors, referred to as *the establishment*. Where the common understanding has now turned into a sense of frustration, grudge, intolerance, radicalism, revenge, towards the dominant political class, translated into the choice to damage the establishment more then to find a valid alternative to it, exercising the right to vote more to damage the ruling class than to choose our own representatives.

Hence, the genetic and cultural transformation of the political elites, who left their original role of guide of the democratic process within political representative models, serving an aristocratic function in a broader democratic project. While, the new political actors are deeply performing a new role in interpreting and strengthening anti oligarchic feelings, coming out from the wide spread criticisms against globalization and economic integration, seen as enemies for the social and economic condition of wider classes of the population. To come to the most popular exemplification by an unrealistic slogan such as - just to quote one - the devotion to protectionism by President Trump, through "America first".

Such slogan may bring the political community far away from the sharing of responsible choices, its implications may confine it to the isolation in the "*turris eburnea*" of identity closure. And more, such a slogan may bring a community to follow one leader abandoning its original pluralistic dimension, where individuals share common aims and interests, instead.

The direction taken by the anti-political parties and anti-parliamentary movements, now, becomes a fight against political power, stressed by the utopian project to rule out the legal phenomenon without political mediation[20]. As if it were possible to have effective government without political mediation in contemporary conflicting societies. Already noted by Antonio Gramsci[21],

[20] Referring to the exemplary view of C. Lasch, *The Revolt of the Elites and the Betrayal of Democracy* (1995), it. ed.by C. Oliva, *La rivolta delle élite. Il tradimento della democrazia*, (2017).

[21] Antonio Gramsci has dedicated many different analyses on these issues. I will refer here at least to what he wrote in his *Quaderno* 12 (XXIX) of 1932 with the title *Appunti e note sparse per un gruppo di saggi sulla storia degli intellettuali*, in Id., *Quaderni del carcere*, III, Critical Edition by V. Gerratana (2001), 1513 ff. See also on this question what referred by L. Canfora, *Critica della retorica democratica* (2007), esp. 61 ff.

who referred to that as the intellectual betrayal[22], the new trend is now driven more by protectionism against cosmopolitanism – now globalization – far from a common sense of opening toward the world.

As we will immediately see, such cultural processes may be considered driven by real changes, which occurred both in the American experience of The National People's Party, of the Nineteenth Century as well as in contemporary Europe.

4. Economic crisis and its implications for the so-called middle-class

First, the economic crisis and its implications for the Middle Class. A meaningful explanation was given, e.g., in the US Experience, by the Census Bureau when announced in the late 1890 the closure of the American frontiers[23]. American consciousness over its territory and the limits to that brought the attention over the redistribution of wealth, as a social issue. The definition of American boundaries required to cope with the domestic gap between social classes, between the rich and the poor, against the risk to stabilize such a distinction. The end of territorial expansion to the west coast, eventually reached, put at stake the necessity to share the existing wealth among reach and poor people, so that the "social question" arose.

The loss of self awareness and confidence of the Middle Class[24], the growing sense of dependence from industrialization, the quest for social benefits, brought this class of individuals to escape from the democratic project and to give up to participation in a democratic way, to the political and economic life of their country.

A trend, which will become even stronger once the manufacturing industry will start leaving the place to the rise of the financial services economy. Which will become actually fatal when

[22] C. Lasch, *The Revolt of the Elites*, cit. at 20.

[23] C. Lasch, *The Revolt of the Elites*, cit. at 20, 75 ff.

[24] I found very useful the theoretical analysis, as set forth in an historical perspective, as well as the attention directly called on the evolution of public communicative processes by the stimulating essay of J. Lukacs, *Democracy and Populism* (2015), it. ed. by G. Ferrara Degli Uberti (2006), esp. 30 ff., 35 ff., 38 ff., 41 ff., 57 ff., 149 ff.

the last one will start experiencing its fall[25], thanks to the financial speculation bubble burst, bringing to the chronicity of physiological unemployment, technically required by the necessity to keep inflation low, to the widening of the gap between social classes and to the radicalization of social immobility.

The American example looks meaningful as a comparison with the most recent transformations in Europe, brought by the social crisis provoked by the evolution of the economy, which translated mainly into the dramatic stop to economic growth brought by the implementation of the internal market in Europe and by the subsequent delocalization of manufacturer industry elsewhere. Hence, momentous processes of major revisions, such as business restructuring, job market reforms, re-thinking of workers circulation across Europe.

Also in Europe, starting from the UK area and moving toward the continent and then to its Southern regions, a revolution in the system of production caused by the loss of productiveness of inputs generated as an alternative the growth of financial economy. This brought to the Middle-class loss of identity, loss of common sharing and to the abandoning of the normal paradigm of wealth deriving from employment. The subsequent financial crisis weakened the same Middle class, reducing the potential impact of keynesian economic policies, because of the role played by the new monetary policies.

No doubt on the close connection between the de-industrialization processes and the Middle-Class crisis, then. Which lead to the arising of a feeling of exclusion from the output of globalization, revenge and populist revolution, driven by the frustration coming from a loss of chances, brought by the loss of employment, wealth, welfare, conceived as the main representatives of civil rights.

Thus contemporary populism could be read as a phenomenon which finds its roots more in the real economic and social transformations before than in a political turnover, and which is able to deeply affect democratic processes and democratic institutions.

The process described above, and the subsequent rebellion of the left out, some of whom, initially included and immediately

[25] C. Lasch, *The Revolt of the Elites*, cit. at 20.

after emarginated, turned into a *secessio plebis*, as many times already occurred in the past of western history. This determined the loss of sense of direction, of inclusion and of confidence in democratic institutions as well as in the instruments, tools and procedures lead by popular sovereignty through the democratic representation model within the forms prescribed by contemporary constitutionalism.

If contemporary populisms lay down their roots in social stagnation connected to the industrial crisis and to the fall of the industrial economy, its main consequences are now experienced in the confidence on democratic institutions. Representation through mediation as designed by contemporary Constitutions as essential feature of constitutional democracies, the democratic institutions procedures and rules for its implementation are the main victim of such a phenomenon.

This lead to the loss of the main role performed by formal rules, both in term of determination and legitimization of the outcomes. And to the break in the relationship between *nomos* and *ius*, between the idea of a legal and political experience determined through popular consent expressed through assemblies on the one side, and the other paradigm, based on the legitimacy given by formalism and the expertise of the legal science, on the other side.

Hence, some final remarks which turn the attention from civil society, its turbulences, from the transformations on the economy, from the globalization on the political class, on political leadership, on the governing Elite.

5. The changing role of representatives (MP) as a symptom of the contemporary crisis of parliamentarianism

In a recent writing on political mediation and the weakness of political representation, Mario Dogliani[26] focuses on representation itself, as one of the key concepts in the public law field.

Recalling on the words pronounced by Umberto Terracini in the Italian Constituent Assembly, in the opening session of the general discussion on the Italian Constitution, Dogliani points out

[26] M. Dogliani, *Rappresentanza, Governo e mediazione politica*, in 2 Costituzionalismo.it (2017), 14.

the centrality of the capacity of the representative bodies to act as role model. Hence, Dogliani concludes that the actual situation has been determined by the incapacity of the political class, the ruling class, to set a good example for the governed. To be and act as example, as a guide for the people[27].

Hardly one could find a more proper way to explain the contemporary crisis of representativeness. To interpret the distance, if not the break, between political leadership and civil society, the cut between parliamentarian institutions and the people, cause and effect at the same time of the deep feeling of opposition and contempt towards the establishment and through them towards representative institutions. That the break of the representative circuit may have started from the top before then from the bottom[28] and may be read as the betrayal of the elites, is a crucial point for our discussion on populism. As pointed out by Dogliani, no representation there may be without a class of representatives aware of its role[29].

The potential implications of the fall of representation must never be under estimated in their destroying effects, and dangerous derives such as ochlocracy, demagogy, democracy without the institutions of citizenship.

Which brings us again to our starting premises. There cannot be any real, any substantial democracy without the forms of political representativeness, the sole model plausible after the universal *suffragium*, as there cannot be any democratic society, without a leadership able to incarnate the good example, expression of competence and meritocracy. Only in such a context the democratic process may orderly develop through the forms of a democratic experience as set in contemporary Constitutions. Once again we should focus our analysis on this topic: the crisis of representative democracy does not come from contemporary society and its

[27] M. Dogliani, *Rappresentanza, Governo e mediazione politica*, cit. at 26, 15.

[28] M. Dogliani, *Rappresentanza, Governo e mediazione politica*, cit. at 26, 15 ff., as already pointed out in Id., *La rappresentanza politica come rappresentanza del valore di uno stato concreto*, in *Scritti in onore di Gaetano Silvestri*, I (2016), 880 ff., quoted in his same work.

[29] In his speech on *Populism and Constitutional Change*, held during the Fermo Summer School 2018 on "*Sociology of Constitution. A System Theory Approach*", D. Galligan, quoting Niklas Luhmann on this point, has pointed out the importance of the "necessity of maturity for society to be democratically ruled", Fermo, August the 31st 2018.

weakness, as it is rooted instead on the ruling class fall and its loss both of responsiveness and responsibility.

In other words, the latest drifts defined by the wiser readers as *populism* may be well considered as the outmost output of the inability of the ruling political class to combine law and democracy, to give implementation to the will of people into a democratic framework, namely the one expressed by people sovereignty.

Populisms split the will of the people from its natural implementation through formal constitutional mechanisms. Riding the discontent will lead again finally to a betrayal of popular will, to tyranny, without a renewed, fair pact between the governed *plebs* and the governing *elites*, since no democracy can be conceived outside the boundaries set by the legal system. The *secessio plebis* being, once again in our political and legal history, the original shape of what we now namely call *populism*[30].

At the same time, a crucial role is played in this context by the aristocracy, whose meaning here is not referred to class belonging, but to their intellectual standing, who must be used in order to enrich democratic institutions instead then delegitimizing them. Populism can be read no more than the most evident output of the distance between the people and the intellectual aristocracy of the governing bodies. Therefore, as the main responsibility may stand in the crisis of the leadership as ruling class, it may be up to the legal culture the same responsibility in driving its recovery.

[30] See again the illuminating analysis by M. Revelli, *Populismo*, cit. at 3, 3 ff.

CONDITIONALITY AND ECONOMIC CONSTITUTIONALISM IN THE EUROZONE *

*Cesare Pinelli***

Abstract

The EU's approach to conditionality was for long centered on respect for human rights and democracy from third countries, including those of Eastern Europe after the break-up of communist regimes. In the aftermath of the 2008 financial crisis, "strict conditionality" instruments were instead adopted for making financial assistance to the Eurozone's Member States conditional upon their compliance with a fiscal consolidation plan, and reflected the idea that rules should supplant discretionary powers in the conduction of fiscal and economic policy.

A first question is whether strict conditionality corresponds to a new paradigm of EU economic constitutionalism, as assumed in the current theoretical debate on ordoliberalism. At this respect, I will shift the attention on the fact that, among the Constitutions of EU Member States, only the 2009 amendments to the German Basic Law on the debt-brake reflect an ordoliberal approach. Such difference reveals a deep cultural divide, that goes beyond these states' compliance with EU obligations.

A further question derives from the emergence of a "rule of law crisis" within various Member States, affecting the maintenance of certain fundamental principles to which all national Constitutions are committed, and that correspond to the "common values" enshrined in Article 2 TEU. Pressure for establishing a model of economic constitutionalism should thus be compared with the reluctance of EU political leaders in confronting with a crisis of the values on which the Union "is founded". Against such background, the suggestion of making delivery of EU funds conditional upon respect for democracy and the rule of law within the Member States might at least demonstrate that conditionality could exert a different function, that of connecting together the now dispersed paths of EU constitutionalism, namely the economic one and that founded on the "common values".

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1. The practice of conditionality and its different versions

The term conditionality denotes the practice of international organizations and States of making aid and co-operation agreements with recipient States conditional upon the observance of requirements such as financial stability, good governance, respect for human rights, democracy, peace and security. The EU's approach to conditionality was for long centered on respect for human rights and democracy from third countries, including granting formal recognition to the new States established in Eastern Europe after the break-up of communist regimes, and then ensuring accession to such States into the EU.

In the aftermath of the 2008 financial crisis, "strict conditionality" instruments were instead adopted on the ground of making financial assistance to the Eurozone's Member States conditional upon their compliance with a fiscal consolidation plan. While giving priority to the objective of discharging the financial debt at the expense of economic growth, strict conditionality is frequently criticized for having provoked a powerful job destruction process in the countries concerned[1].

(*) Paper for the University of Portsmouth Conference.

[1] See C. Pinelli, *Conditionality,* Max Planck Encyclopedia of Public International Law (2015).

My first question is where are we now with respect to this form of conditionality, particularly to its institutional premises, namely the idea that rules should supplant discretionary powers in the direction of fiscal and economic policy. Is this the new paradigm of economic constitutionalism within the EU, or it amounts rather to a series of measures that are likely to be overridden with the end of the financial crisis? Is strict conditionality, as well as the Fiscal Compact's rules, likely to bind the EU institutions' scrutinies, including those of the European Council, or are they rather interpreted according on different criteria? Which are the cultural roots of this version of economic constitutionalism, and are they related to the "common values" on which the EU claims to be founded? Finally, given the opening of "a rule of law crisis" within various Member States, could conditionality function in a different direction, namely by making delivery of EU funds conditional upon respect for democracy and the rule of law within its Member States?

While requiring contextual attention to their theoretical, legal, and political aspects, these questions appear crucial for an understanding both of the features and of the developments of European economic constitutionalism.

2. The IMF version

The first official document mentioning the term conditionality was the IMF 1979 'Guidelines on Conditionality', which corresponded mainly to a codification of practice that had already been shaped by the IMF[2]. The IMF's aid to developing countries was made conditional upon acceptance of structural adjustment programmes, i.e. economic reforms aimed at discharging their financial debts, and of performance criteria specifying the programmes' implementation. Failure to fulfil the criteria would result in a cutting off or suspension of balance of payment support. In turn, in helping members to devise adjustment programmes, the IMF pays 'due regard to the domestic social and political objectives, the economic priorities, and the circumstances of members, including the causes of their

[2] E. Denters, *New Challenges to IMF Jurisdiction,* XXIX NYIL 3–43, (1998).

balance of payments problems'[3]. The World Bank also used conditionality to ensure the achievement of structural adjustment programmes from developing countries, although with the aim of promoting economic growth, which corresponds to its own primary responsibility.

During the 1990s scholars demonstrated that structural adjustment programmes failed in changing national policies and reduced, rather than enlarged, the population's access to public services[4]. This failure became particularly clear in November 1999, when Joseph Stiglitz, the World Bank's chief economist, resigned partly due to disagreement over the Bank's continuing use of conditionality[5]. Finally, multilateral financial institutions changed their own approach. Since the IMF's 1996 'Heavily Indebted Poor Countries Initiative', the progressive reduction in the debts of poor countries was made conditional upon the governments launching social projects concerning education and housing, on the assumption that the success of the market economy requires public intervention aimed at reducing poverty and enhancing general welfare[6]. Such an approach, that was further reinforced in the Millennium Development Goals, agreed by nearly 150 heads of state and government at the 2000 UN Millennium Summit, obtained better results, although lack of democracy, maladministration and corruption still endanger the chances of sustainable development in many countries[7].

As for civil and political human rights and democracy, direct interventions by the IMF and the World Bank, as well as the WTO, are instead deemed to be inhibited by their own statutes,

[3] International Monetary Fund "Guidelines on Conditionality" Decision No 6056-(79/38) (2 March 1979) Selected Decisions and Selected Documents of the International Monetary Fund 24, 137.

[4] P. Klein, *Les Institutions Financières Internationales et Les Droits de la Personne*, 32 RBDI 97–114, (1999).

[5] J.T. Checkel, *Compliance and Conditionality*, Working Paper 00/18 ARENA/Universitetet i Oslo 2000.

[6] See particularly the 2005 operational policy statement of the World Bank "*Review of World Bank Conditionality*".

[7] Department for International Development "*Partnerships for Poverty Reduction: Rethinking Conditionality: A UK Policy Paper*", (2005).

entrusting these organizations with tasks exclusively driven by economic purposes[8].

3. The EU original version

Unlike the above mentioned organizations, the EU's approach to conditionality was for long centered on respect for human rights and democracy. This approach was common to diverse activities such as granting formal recognition to the new States established in Eastern Europe after the break-up of communist regimes, ensuring accession of these countries into the EU, and development assistance, bilateral trade and co-operation agreements with third countries.

In particular, conditionality deeply affected the enlargement process since the 1989 creation of a new relationship of the EU with Central and Eastern European countries through trade co-operation, co-operation agreements and development assistance. A decisive step was the Copenhagen European Council settlement in June 1993 of political criteria for accession to the EU of candidate countries, namely 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'[9]. Since then, human rights scrutinies have been taken within the framework of the so-called accession partnership, where the achievement of specific objectives for particular candidate countries, itemized within partnership documents, was assessed in regular annual country reports[10].

On the other hand, the EU had a pivotal role in promoting human rights and democracy in other continents, both in terms of procedures and means aimed at that end. Such special engagement reflects a tradition which goes back to the adhesion by EU Member States to the ECHR, testifying the first efforts at an international level to override national borders for the sake of human rights protection.

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[8] See among others I.F.I. Shihata, *La Banque Mondiale et les Droits de l'Homme*, 32 RBDI 86–96, (1999).

[9] European Council, *Conclusions of the Presidency,* at 13.

[10] W. Sadurski, *Charter and Enlargement,* ELJ 8, 343, (2002).

4. Resort to a macroeconomic conditionality in the context of the sovereign debt crisis

Since 2010, a series of measures subjected to conditionality were taken in the Eurozone from different entities (the EU, the EU Member States, the European Central Bank (ECB), and the IMF) with the aim of contrasting the sovereign debt crisis that affected some countries. In May 2010, the euro area Member States (except Greece) concluded an Agreement with Greece to coordinate a series of bilateral loans to that country. A Troika was established, composed of representatives of the IMF, the ECB and the European Commission, with the end of negotiating a program to assist Greece, and of further monitoring its compliance with a fiscal consolidation plan.

Although the EU was not formally involved in the Agreement, the Council adopted immediately a Regulation establishing a European Financial Stabilization Mechanism (EFSM) based on Article 122, para. 2, of the Treaty on the Functioning of the European Union (TFEU), which could be used in similar situations (Council Regulation 407/2010). Furthermore, wearing their intergovernmental hats, the ministers of the euro area adopted a Decision in which they committed themselves to support a separate and additional loan and credit mechanism, called the European Financial Stability Facility (EFSF). While differing on various grounds, both these mechanisms of lending money were subjected to general economic policy conditions aimed at re-establishing a sound economic or financial situation in the beneficiary State, and to monitoring compliance with policy conditionality from that State[11].

However, the legal basis of the Council Regulation 407/2010 was deemed controversial. While Article 122 TFEU presupposes that the beneficiary State is threatened with 'exceptional circumstances beyond its control', the governments of the countries involved in the financial crisis were suspected to have partially created their sovereign debt. Since only a treaty amendment could solve the problem, on 25 May 2011 a European Council's decision, adopted with the simplified revision procedure of Article 48, para. 6, TEU, added a new paragraph to

[11] See respectively Article 3 (3), b) and c), of Council Regulation 407/2010, and Article 2 (1), b) and c), of EFSF Framework Agreement.

Article 136 TFEU. It runs as follows: 'The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to *strict conditionality*'. It is worth noting that the European Council left aside the EP's proposal of adding to the words 'strict conditionality' the following text: 'in accordance with the principles and objectives of the Union, as laid down in the Treaty on European Union and in this Treaty' (EP Resolution, 23 May 2011).

With the stipulation by most of the EU Member States of the 2012 "Treaty on Stability, Coordination and Governance in the Economic and Monetary Union", or Fiscal Compact, this design was further integrated. While including quasi-automatic sanctions in case a Member State is found in violation of the deficit or debt rules, the Fiscal Compact was presented as initiating 'a substantially *new* rules-based regime' vis-à-vis "the portrayal of the pre-crisis regime as essentially dysfunctional, as rule-based only in name"[12]. "Exactly by suggesting that the existing rules-order was bogus", it is added, "its authors invoked the license needed to wield far-reaching discretion in the service of establishing a new one. The creative deployment of EU institutional powers (notably of the Commission), the circumvention or compression of national-parliamentary debate, as well as the rise of extra-EU mechanisms to marginalise the European Parliament, are just some of the actions taken to this effect"[13].

On the other hand, while giving priority to the objective of discharging the financial debt at the expenses of economic growth, not less than of the population's welfare, the Fiscal Compact is believed to rely on an "imbalanced conditionality", that, being referred to structural adjustment programs similar to those prospected by the IMF at the end of the 1970s, provoked "a powerful job destruction process" in the countries concerned, without putting the premises of "a sound fiscal consolidation"[14].

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[12] J.White, *Policy Between Rules and Discretion, Ordoliberalism*, at 297.

[13] Ibidem.

[14] See among others M.J. Rodrigues, *Youth Unemployment, Socio-Economic Divergences and Fiscal Capacity in the Euro Area*, Policy Paper 101 – Notre Europe,

In addition, authorities such as the Troika are entrusted with a strict monitoring of the beneficiary State's compliance with the fiscal adjustment programs, that may go the point of vanishing the role of democratically elected institutions.

In addition, on 6 September 2012 the ECB adopted a decision regarding the Eurosystem's outright monetary transactions (OMT) in secondary sovereign bond markets, aimed at 'safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy'. The OMT programme provided that the ECB would buy sovereign bonds of the issuing country under the condition that the latter agreed to a fiscal adjustment program within the terms of the EFSF or of its successor, the European Stability Mechanism (ESM). Even the ECB's creative resort to conditionality requires here attention, irrespective of its very different effects on the Eurozone crisis developments[15].

5. Conditionality in the ECJ case-law

The macroeconomic conditionality's mechanism was interpreted by the European Court of Justice in two well-known decisions. In *Pringle* the Court held that the reason why the grant of financial assistance by the stability mechanism is subject to strict conditionality under paragraph 3 of Article 136 TFEU "is in order to ensure that that mechanism will operate in a way that will comply with European Union law, including the measures adopted by the Union in the context of the coordination of the Member States' economic policies" (para. 69). More precisely, the

at 10, 2013; and Z. Darvas, *The Greek Debt Trap: An Escape Plan,* Bruegel Policy Contribution, Issue 2012/9, 1 (2012).

[15] According to M. Matthijs, *Powerful rules governing the euro: the perverse logic of German ideas*, Journal of European Public Policy, vol. 23, no. 3, 387, (2016), "As long as German policy-makers stuck to their strict ordoliberal crisis narrative of 'national' sin and the need for redemption – follow the rules, implement austerity measures and enact structural reforms – the eurozone debt crisis kept getting worse, and went from a containable Greek problem to a systemic crisis. Only when the crisis narrative shifted towards a more 'systemic' one – with the introduction of a eurozone banking union and single supervisory mechanism, as well as the need for the ECB to start acting like a real lender of last resort through OMT – did the crisis gradually start to wane, though only to morph into a more long-term crisis of deflation and economic stagnation".

Court stated that "While it is true that, under Article 3, Article 12(1) and the first subparagraph of Article 13(3) of the ESM Treaty, the financial assistance provided to a Member State that is an ESM Member is subject to strict conditionality, appropriate to the financial assistance instrument chosen, which can take the form of a macro-economic adjustment programme, the conditionality prescribed nonetheless does not constitute an instrument for the coordination of the economic policies of the Member States, but is intended to ensure that the activities of the ESM are compatible with, inter alia, Article 125 TFEU and the coordinating measures adopted by the Union" (para. 111)[16].

However, the very Court's admission that the additional paragraph to Article 136 TFEU was introduced with the aim of legitimizing a mechanism whose legal basis were strongly disputed under EU law proves that it consisted in establishing an emergency rule, such as that of making financial support dependent on loan agreements specifying not only the *level* of cuts to be made, but also *in what areas* they are to be made by a Member State[17]. To say that the mentioned provision renders 'strict conditionality' compatible with the coordination of national economic policies obliterates thus a crucial point. As it has been observed, 'The *Pringle* judgment endorses a shift in the EU's monetary constitution from crisis prevention to crisis management, when bailout funds are only granted in conjunction with the imposition of strict conditionality on beneficiary states. By making the imposition of strict conditionality a constitutional requirement, the Court has imported a concept with controversial reputation into EU law. This constitutional shift in the narrow sense also has constitutional implications in a broader sense; the imposition of strict conditionality is sure to change the constraints within which the political bargaining of the beneficiary states take place'[18].

Furthermore, the Court denied that the ESM was in breach of the general principle of effective judicial protection as enshrined in Article 47 of the Charter of Fundamental Rights,

[16] ECJ, C:2012:756 14 JUDGMENT OF 27. 11. 2012 – CASE C-370/12 PRINGLE
[17] J. White, *Authority under Emergency Rule,* 78 The Modern Law Review 4, 585-610, (2015).
[18] P.-A. Van Malleghem, *Pringle: A Paradigm Shift in the European Union Monetary Constitution*, 14 German L. J., 1, 163-164 (2013).

since "the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where, as is clear from paragraph 105 of this judgment, the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism" (para. 180).

The Court's approach to the interplay between EU law and an international instrument as the ESM Treaty was thus clearly formal, and led to a contradiction. While confining herself to the mere ascertainment of the Member States' purpose of legitimizing emergency measures through an amendment to the TFEU, the Court claimed the irrelevance of EU primary law (such as the Charter's provisions) vis-à-vis those measures, being enacted by international instruments. Alternatively, it had to admit that the amendment was not reconciliable with foundational principles of the European project such as equality, mutual respect and co-operation, transformed 'into command-and-control relationships'[19]. Such admission would certainly amount to challenge the European Council, which the Court did not dare to do.

Pringle, together with the EP's failure in convincing the European Council to add a reference to "the principles and objectives of the Union" as a limit to strict conditionality, and with the ancillary role played by the Commission in such context, is thus likely to confirm the weakness of the traditional EU supranational institutions vis-à-vis the rise of intergovernmentalism, combined with resort to international law instruments, that affected the Eurozone's response to the financial crisis. The sole supranational institution resisting such rise was the ECB, whose legitimacy rests however on technical expertise rather than on the principles that in the past decades guided the 'integration through law' project.

In *Gauweiler and others*, the European Court of Justice was asked whether a programme for the purchase of government bonds on secondary markets (OMT) could be covered by the ECB powers under the TFEU provisions. The Court, partly relying on

[19] C. Joerges, *The Overburdening of Law by Ordoliberalism and the Integration Project*, J.Hien & C.Joerges (eds.), *Ordoliberalism, Law and the Rule of Economics*, Hart, 196 (2017).

Pringle, affirmed that such programme "is intended to rectify the disruption to the monetary policy transmission mechanism caused by the specific situation of government bonds issued by certain Member States" (para. 55), and that it could not be "treated as equivalent to an economic policy measure" to the extent that it interfered only indirectly in the field of economic policy (para. 59).

Nor the fact that the ECB made implementation of the programme conditional upon full compliance with EFSF or ESM macroeconomic adjustment programmes brought the Court to a different conclusion: the purchase of government bonds on the secondary market subject to a condition of compliance with a macroeconomic adjustment programme could indeed be regarded as falling within economic policy when the purchase is undertaken by the ESM, with the difference, however, that the latter "is intended to safeguard the stability of the euro area, that objective not falling within monetary policy", while the ECB may use that instrument "only in so far as is necessary for the maintenance of price stability" (para. 64), and "is not intended to take the place of that of the ESM in order to achieve the latter's objectives but must, on the contrary, be implemented independently on the basis of the objectives particular to monetary policy" (para. 65).

On the other hand, the Court held that, when it makes choices of a technical nature and undertakes forecasts and complex assessments, the ECB "must be allowed…a broad discretion", subject to a proportionality test only for the obligation "to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions" (para. 69). Unsurprisingly, the conclusion was that the ECB's analysis of the economic situation of the euro area was not "vitiated by a manifest error of assessment" (para. 74).

Gauweiler needs to be compared with *Pringle* on the following respects. First, while in *Pringle* the Court recurs to a formalistic approach in distinguishing the ESM treaty from EU law far more than required from the former's nature of international treaty, *Gauweiler* reflects, to the contrary, a substantial approach with the aim of putting under the label of 'monetary policy' all the tasks that the ECB had decided to acquire beyond the TFEU's letter. Second, both approaches reveal an

extreme caution of the Court in scrutinizing under EU primary law how the conditionality mechanism is activated, be it by the ESM or by the ECB. Third, both these institutions should be considered as seats of an "unaccountable technocracy", with the crucial difference, however, that only the former is wrapped in a legal device virtually threatening the whole construction of the EU. While *Pringle* says the final word on the possibility for the ECJ of checking the legal constraints issued by the ESM Treaty, *Gauweiler* leaves of course entirely open the possibility of judicial scrutinies on the decisions of an EU institution such as the ECB.

Finally, while viewed contextually, the two cases reveal the paradox resulting from the measures adopted in the Eurozone as institutional responses to the crisis. The pretention of national governments to create a system based on automatisms, and the discretionary powers acquired by the ECB beyond the maintenance of price stability, contradict the premises on which functions are usually distributed between governments and central banks.

It is this double contradiction that characterizes the Eurozone's crisis management. Therefore, the issue at stake cannot simply consist in what is left of the powers of the Member States in the sphere of economic policy, on the presumption that *Gauweiler* has legitimized the ECB as "an extremely powerful actor, albeit one which needs the support of the machinery ensuring the targeted conditionality of financial assistance", and that "Europe's 'economic constitution' and its entire constitutional configuration has been replaced by the discretionary decision-making powers of an unaccountable technocracy"[20]. This is just one side of the coin. The other one consists of the imposition of structural convergence of the southern with the northern economies of the Eurozone: and "command-and-control interventions, which are guided by the presumption that one size will fits all, are accompanied by the risk of destructive effects. The imposition of changes with disintegrative impact is not only unwise it is also illegitimate"[21].

[20] C. Joerges, *The Overburdening of Law,* cit. at 19, 198.

[21] C. Joerges, *Comments on the Democratisation of the Governance of the Euro Area*, *European Papers*, Vol. 3, at 80 (2018).

Resort to macroeconomic conditionality is involved in both cases. And it is unlikely to be overridden with the end of the financial crisis, not only because it is enshrined in the TFEU, irrespective of a possible transformation of the ESM, but also because in the EU context decision-makers are unable to claim that they will not resort to extraordinary measures again. As it has been demonstrated, none of the following claims are plausible: 'a) that the conditions of crisis will not recur (e.g. because better policy-making will ward them off), or b) that, should crisis recur, new procedures are in place that will minimize executive discretion, or c) that the identity of the decision-makers has changed, such that those with a proclivity for extraordinary measures have left the political stage'[22].

6. A smoother form of conditionality

So far, we have examined why a typical mechanism of macroeconomic conditionality was inserted in the TFEU, which institutions recurred to it, and how it has been interpreted by the Luxembourg Court.

Attention needs now to be driven to Article 3, para. 2, of the Fiscal Compact, recommending to adapt national law to the herein mentioned rules 'through provisions of binding force and permanent character, *preferably constitutional*, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'. It expresses a smooth form of conditionality, certainly smoother than the "strict" one provided in Article 136 TFEU, but also more significant for exploring premises and implications of EU economic constitutionalism.

The TSCG, stipulated in March 2012, is frequently considered as mirroring "German positions rather than collective compromise"[23]. This is a rather inaccurate assumption, since the treaty's content corresponds to a great extent to EU regulations already in force (the "Two-Pack" and the "Six-Pack", in force since November 2011).

[22] J. White, *Authority under Emergency Rule*, cit. at 17, 3.

[23] See e.g. S. Dullien and U. Guérot, *The Long Shadow of Ordoliberalism: Germany's Approach to the Eurocrisis*, European Council on Foreign Relations, Policy Brief/49, 2 (2012).

There are exceptions though, the most significant of which for our purposes concerns Article 3, para. 2. It reflects an attempt of modelling the Constitutions of the Member States on the version of economic constitutionalism provided in the 2009 amendments to the German Basic Law centered on the 'debt-brake'. In particular, it sends a clear message to the Eurozone's most indebted countries such as Spain and Italy. These did adapt their own constitutional provisions to the TSCG rules, without including however the debt-brake rules that are expressly inserted in the Basic Law. Such omission is of course legally irrelevant on the ground of these States' compliance with their obligations under the TSCG and the EMU rules, that are 'guaranteed to be fully respected and adhered to throughout the national budgetary processes' in the terms of Article 3, para. 2, TSCG. It rather reveals the resistance of those States, notwithstanding their financial conduct was then under attack, to conform the respective Constitutions to the economic constitutionalism's model provided in the 2009 amendments to the Basic Law. Nor are the other Eurozone's Member States more prone to accept it. But where did this model come from?

7. The debate on ordoliberalism

In the aftermath of the TSCG's approval, it was observed that "An important but rarely discussed reason for Germany's emphasis on price stability is the influence on German economic thinking of 'ordoliberalism' – a theory developed by economists such as Walter Eucken, Franz Böhm, Leonhard Miksch and Hans Großmann-Doerth as a reaction both to the consequences of unregulated liberalism in the early years of the twentieth century and subsequent Nazi fiscal and monetary interventionism"[24].

Since then, a dense theoretical debate has taken place on whether the measures adopted in response to the Eurozone's financial crisis can be put under the label of ordoliberalism: it is in this perspective that scholars have addressed the topic of EU economic constitutionalism. Some reduce ordoliberalism to a

[24] S. Dullien and U. Guérot, *The Long Shadow of Ordoliberalism: Germany's Approach to the Eurocrisis*, cit. at 23, 2.

specific version of neoliberalism[25], namely the ideology forged during the Thatcher's and Reagan's governments that is still with us[26]. For others the former differs on many respects from neoliberalism, and it is neoliberal, rather than ordoliberal, principles that are reflected in the design of the monetary union[27].

Although macroeconomic conditionality resembles to that adopted by the IMF in the past decades, thus revealing its neoliberal imprinting, I will not engage in a war of labels aimed at establishing whether EU economic constitutionalism reflects a neoliberal and/or an ordoliberal conception. A larger approach is needed at this respect.

It should be borne in mind that ordoliberalism was launched against the totalitarian states as well as the rise of trusts and cartels in economy: it relied on rules, and contrasted resort to policy discretion, with the intention of limiting both public powers, which were correspondingly prevented from active intervention in the economy, and private powers through legal restraints aimed at ensuring market competition. It was a new generation of ordoliberal scholars, inspired by Friedrich von Hayek, that re-defined "the objectives and the methods of national and European competition law dramatically. From this time onward, their focus was on the critique of anti-competitive state activities and the promotion of entrepreneurial freedom, rather than the control of economic power"[28].

Reliance on rules remained instead as the core legacy of the ordoliberalism's original version. But it lost its significance with respect to the division of labor between the European Community and its Member States, depicted with the fortunate formula "Smith abroad, Keynes at home"[29]. Nor can the institutional set-up of EMU be traced back to the origins of ordoliberal monetary thinking; it is rather the rule-based focus in ordoliberal economic thought that might describe the German stance during the

[25] A. Wigger, *Debunking the Ordoliberal Myth in Post-war Europe*, *Ordoliberalism, Law and the Rule of Economics*, 169 ff.
[26] C. Crouch, *The Strange Non-Death of Neo-liberalism* (2010).
[27] B. Young, *Neoliberalism in Germany's and the EU's Crisis Management*, *Ordoliberalism*, at 137.
[28] C. Joerges, *The Overburdening of Law,* cit. at 19, 190.
[29] R. Gilpin, *The Political Economy of International Relations*, (1987).

Eurozone crisis[30]. Paragraph 8 of the EU Regulation 1175/2011 (Six-Pack) is telling at this respect: "Experience gained and *mistakes made* during the first decade of the economic and monetary union show a need for improved economic governance in the Union, which should be built on a stronger national ownership of commonly agreed rules and policies and on a more robust framework at the level of the Union for the surveillance of national economic policies". The alternative is here altogether clear: discretion is always mistaken, what can save the EU economic governance is only "national ownership of commonly agreed rules and policy", namely awareness by the Member States of the superiority of rules over discretion.

8. The 2009 amendments to the German Basic Law and the quest for stability of the fiscal rules

The debate on ordoliberalism affords a wide array of suggestions regarding both the historical roots and the current challenges of EU economic constitutionalism. In my opinion, it appears however at least incomplete, to the extent that it does not take into account of the 2009 amendments to the German Basic Law on the debt-brake. Such perspective is likely to give an understanding not only of the German conception of economic constitutionalism, but also of Germany's expectations of the financial conduct of the other EMU Member States.

The debt brake enshrined in Article 109, para. 3, of the Basic Law explicitly requires that, as a general rule, central and state government must achieve balanced budgets without incurring new debt, and it therefore differs substantially from the previous investment related borrowing limit. The debt brake does not merely set a target; it imposes a ceiling that must not be overshot. Suitable safety margins are therefore needed to allow governments fiscal leeway under the new rules. Exemptions to the ban on borrowing by central and state government budgets are permitted in order to offset cyclically induced burdens vis-à-vis a normal setting. However, this hinges on the condition that

[30] L.P. Feld, E.A. Köhler and D. Nientiedt, *Ordoliberalism, Pragmatism and the Eurozone Crisis: How the German Tradition Shaped Economic Policy in Europe,* CESIFO working paper no. 5368, (2015), at 9.

comparable surpluses be built up in good economic times in order to prevent a sustained rise in government debt caused by the long-term accumulation of burdens that were deemed to be cyclically induced. The borrowing limit on the central government budget is considered to have been observed if, after adjustment for cyclical effects, net borrowing does not exceed a threshold of 0.35% of gross domestic product (GDP). Further exceptions can be made in the event of specific emergencies that are beyond the government's control and place a great strain on its budgets. Compared with the loosely defined exemption clause for averting a disruption of the macroeconomic equilibrium, contained in the 1969 budget reform, much stricter requirements now have to be fulfilled. While the previous rules allowed unused portions of loan authorizations after invoking the exemption clause to be drawn down for further borrowing in later years, the new debt brake stipulates that additional debt must be tied to explicit repayment rules. This condition is designed to curb the incentive to make excessive use of the exemption clause and prevent a systematic rise in debt, even though neither specific repayment periods nor resolutions on consolidation measures are prescribed.

It is worth adding that also the 1969 amendments to the Basic Law provided a version of economic constitutionalism, although in the opposite direction. Theoretical approaches to macroeconomic management were then put into practice at all levels of government and were accounted for, in particular, in the provisions governing public finance set out in the Basic Law. In managing their respective budgets, the Federation and the Länder should take due account of the overall economic equilibrium; it was possible to regulate through federal law public borrowing or the creation of anticyclical reserves to avert disturbances of the overall economic equilibrium; borrowing by the Federation should not exceed investments, unless for averting a disturbance of the overall economic equilibrium between stability of price levels, a high level of employment and external balance, accompanied by steady and adequate economic growth.

The fact that since 1949 the Basic Law has been from time to time reviewed with the aim of establishing diverse versions of economic constitutionalism gives an idea of the recurring efforts of stabilising once and for all, namely at the constitutional level, the fundamental framework of economic and financial policy. In

his most celebrated dissenting opinion, Justice Holmes assumed, to the contrary, that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez-faire", being "made for people of fundamentally differing views" (US Supreme Court, *Lochner* (1905)). Similarly, many European Constitutions deliberately avoid to encapsulate whatever economic theory into the text.

In spite of this different inspiration, the Basic Law shares with the Constitutions of many EU Member States the notion that certain fundamental principles ought to stay outside the intrusion of constitutional amendments. In particular, the 'eternity clause' provided in Article 79 BL prevents the legislature from removing through constitutional amendment the principles underlying Articles 1 and 20, namely human dignity and fundamental rights as provided in Article 1, and the principles enshrined in Article 20 such as popular sovereignty and the rule of law. Significantly, provisions devoted to economic constitutionalism do not fall under that clause. Even in the German constitutional order, where efforts of stabilizing the rules on economic constitutionalism have been far stronger than elsewhere, these rules might thus be legally amended, as already occurred twice, in 1969 and in 2009.

9. Economic constitutionalism and constitutionalism in EU primary law

Interpretation of economic constitutionalism as recognized in the TEU and in the TFEU is at best problematic, due to "a poorly designed fiscal and financial architecture"[31], together with the deep controversies among Member States that affect reforms aimed at complementing it. But let us imagine that it is clearly settled, and that it reflects the rule-based approach that since 2009 characterizes the Basic Law. A question might then arise of how EU primary law's provisions regarding economic constitutionalism are related to the "values" of article 2 TEU, according to which "The Union is founded on the values of

[31] Centre for Economic Policy Research, *Reconciling risk sharing with market discipline: A constructive approach to Euro area reform*, Policy Insight n° 91, January 2018, 2.

respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". Even if no internal hierarchy emerges explicitly between EU treaties provisions, art. 2 TEU's wording suffice to demonstrate that other provisions could not contrast the herein mentioned values without jeopardizing the very foundation of the Union.

While looking instead at the concrete functioning of economic constitutionalism, a different question arises: not that of how, but that of whether such form of constitutionalism is related to EU common values. It is as if, in the practice, such dimensions were disconnected one from the other. Both do reflect a deep malaise of the EU as a common enterprise. But each one reflects it for different reasons, and exhibits different features. While the former reflects the failed attempts in dealing with a crisis management, together with a distorted enforcement of EU primary law by national governments, the "common values" are affected from the inertia of the EU institutions vis-à-vis what has been called "the purposeful destruction of the rule of law inside EU member states", departing from Hungary and Poland[32], in spite of the measures laid down in Article 7 TEU against such systemic violations[33].

Given the values that are respectively at stake, the 'rule of law crisis' should appear more acute than that of the Eurozone. But it is not perceived as such[34]. Article 7 TEU leaves to national governments, as represented in the Council ("alert procedure"), or in the European Council ("nuclear option"), the task of protecting the "common values" from violations perpetrated by a Member State within its own jurisdiction. And, first and foremost, an "alert procedure" has been recently initiated towards Poland, while no measure of that sort has been taken towards Hungary, in spite of numerous opinions of the Venice Commission and of EP's

[32] J.-W. Müller, *Reflections on Europe's 'Rule of Law Crises'*, in P.F.Kjaer - N.Olson (eds.), *Critical Theories of Crisis in Europe. From Weimar to the Euro*, 162 (2016).
[33] See C. Pinelli, *Protecting the Fundamentals. Article 7 of the Treaty on European Union and Beyond,* FEPS Jurists Network, (2012).
[34] *Ibidem.*

resolutions[35]. The hypothesis is far from being malicious that such diverse treatment depends mainly on the party affiliation of the respective governments.

10. A plea for a new use of conditionality

Reluctance of European political rulers in confronting the challenge of "common values" breaches is likely to endanger the EU constitutionalism's endurance, while pressure is contextually put for establishing a model of economic constitutionalism within the Eurozone. The latter appears thus increasingly detached from the values on which the Union "is founded", and, to this extent, risks to be viewed as a mere assessment of powers within the elite.

An attempt of bridging the gap appears in a Commission's document concerning the reform of EU budget, where it is held that "Upholding EU core values when developing and implementing EU policies is key. There have been new suggestions in the public debate to link the disbursement of EU budget funds to the state of the rule of law in Member States. Respect for the rule of law is important for European citizens, but also for business initiatives, innovation and investment, which will flourish most where the legal and institutional framework adheres fully to the common values of the Union. There is hence a clear relationship between the rule of law and an efficient implementation of the private and public investments supported by the EU budget"[36].

By linking the disbursement of EU budget funds, or of cohesion funds, as also recently proposed, to respect for the rule of law in the Member States, the "new suggestions" that the Commission seems to endorse launch a conditionality mechanism in an unexplored field, that of the rule of law crisis, where it would potentially circumvent the current stalemate affecting Article 7 TEU's enforcement. Conditionality would then exert a function different from that of its macroeconomic version, aimed

[35] See among others J. Nergelius, *The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania,* in A von Bogdandy and P.Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, 293 (2015).

[36] European Commission, *Reflection paper on the future of EU finance*, 22, (2017).

at hopefully connecting together the dispersed paths of EU constitutionalism.

TRUTH AND DECEPTION ACROSS THE ATLANTIC: A ROADMAP OF DISINFORMATION IN THE US AND EUROPE

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Abstract

This paper tries to offer a bird's eye view of the complex dynamics and legal constraints that shape the digital information ecosystem, and how lawyers and policy-makers should think about possible solutions to the issues at hand. The Authors believe that some action against disinformation is needed, and tend to favour actions that regulate platforms rather than direct regulation by the state, eg. ensuring that platforms have effective mechanisms for eradicating fake account and coordinate disinformation efforts, ensuring greater transparency and traceability of disinformation and the financial incentives related to it, ensuring appropriate remedies for individuals affected. It seems that governments and institutions around the world, including some European countries, are so eager to regulate fake news that they might overstep their legitimacy bounds in doing so. The Authors warn against that, advocating a nuanced approach which takes into account the specific political and technical circumstances in which platforms and states operate to devise adequate measures for regulating online speech in the digital economy.

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1. Introduction

When, in October 2017, Donald Trump claimed to have coined the term "fake news" many believed him.[1] The term in fact exists in the United States at least since 1890,[2] but the advent of the internet and digital culture seems to have exponentially increased its use and salience in at least two ways, being used both as a diagnostic for an increasingly complex and harmful information ecosystem, and as a kind of political shield which in turn contaminates public discourse.[3] With the renewal of interest in

* Full Professor of Constitutional Law and Media Law, Bocconi University, drafted sections 1-2.
** SJD Candidate at Harvard Law School, drafted sections 3-4. The paper is the product of a joint collaboration.

[1] C. Cillizza, *Donald Trump just claimed he invented "fake news"*, CNN (October 26, 2017) https://www.cnn.com/2017/10/08/politics/trump-huckabee-fake/index.html (last visited Jun 14, 2018).

[2] *The Real Story of "Fake News"*, Merriam Webster Blog, https://www.merriam-webster.com/words-at-play/the-real-story-of-fake-news (last visited Jun 14, 2018). An example is as follows: "*Secretary Brunnell Declares Fake News About His People is Being Telegraphed Over the Country*," headline of the Cincinnati Commercial Tribune (Cincinnati, OH), 7 Jun. 1890. More recently, the coining of this term has been attributed to the journalist Craig Silverman, see C. Silveaman, *This Analysis shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, Buzzfeed News (November 16, 2016), https://www.buzzfeednews.com/article/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook.

[3] *See* graph from Google Ngram, use of the term "fake news" in books from 1800 to 2008. One notices a peak from about 2000 onwards.

"fake news" and disinformation in a digital context comes increasing concern around the role of online intermediaries and the effects of information sharing and spreading in the networked information age.

In this paper, we present a roadmap to diagnosing and addressing the information ecosystem's present ills, through a comparison of the legal and regulatory landscape in the United States and Europe. We articulate how various layers of legal and regulatory complexity constrain the universe of possible solutions to disinformation in those two regions, and why a universal solution might be difficult to devise at present. Our core aim is to help lawyers and policy-makers refine the sets of questions they must ask before proposing regional regulatory solutions.

We proceed in two parts. In Part I we pose a definitional problem: what are "fake news" and "disinformation", what is the main issue that needs addressing and why should free speech scholars care? In a recent Public Data Lab report, "fake news" is defined as content that is false and widely shared:

"*If a blog claims that Pope Francis endorses Donald Trump, it's just a lie. If the story is picked up by dozens of other blogs, retransmitted by hundreds of websites, cross-posted over thousands of social media accounts and read by hundreds of thousands, then it becomes fake news.*"[4]

While acknowledging the expression's ambiguity and controversial nature, we identify three factors that in combination provide conceptual clarity on the identification of disinformation: factual accuracy, the actor's intent, and the resulting harm. Based on these factors, we develop an analytical framework for identifying where regulatory and legal intervention are necessary.

The second question, which we tackle in Parts II and following, we explore various questions that must be answered in order to determine how "fake news" and "disinformation" should be regulated. We start in Part II with current constitutional and transnational free speech doctrines in the United States and Europe, presenting various critiques of those doctrines. In Part III, we then turn to an analysis of intermediary obligations and safe harbors and their complex relationship and tension with free

[4] *Public Data Lab, A Field Guide to "Fake News" and Other Information Disorders,* at 62, http://fakenews.publicdatalab.org/ (last visited Jun 16, 2018).

speech guarantees. Finally, in Part IV we assess current regulatory possibilities and reforms in the 'fake news' and 'disinformation' space. Our conclusion is that for any reform to make sense, lawyers and policy-makers must carry out an in-depth review of the regional legal and regulatory landscape, as well as of the technical possibilities and constraints that the networked information ecosystem presents.

2. Mapping Disinformation: Definitions and Problems

2.1. Fake News and Information Operations in Context

Misleading and sensational news are not an isolated phenomenon, they are characteristic of media strategies used to capture attention in an ecosystem characterized by attention scarcity. To understand the phenomenon, one must understand how content is generated, shared and further re-circulated.

According to the European Commission's High Level Group on Fake News and Online Disinformation (HLEG), problems of disinformation are driven on the one hand by actors and on the other hand by manipulative uses of communication infrastructures, uses "*that have been harnessed to produce, circulate and amplify disinformation on a larger scale than previously, often in new ways that are still poorly mapped and understood*".[5] In Data & Society's report on *Media Manipulation and Disinformation Online*,[6] Alice Marwick and Rebecca Lewis offer an in-depth overview of media manipulation in context, with a focus on right wing misinformation efforts. Their story is one of a very complex interaction and collusion between hyper partisan right wing actors and trolls on the one hand, and the mainstream media on the other hand, highlighting the media's tendency to gravitate toward sensationalism, the need for constant novelty, and the aim of achieving profits instead of professional ethical standards and civic responsibility.[7]

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[5] European Commission, *A multi-dimentional approach to disinformation, Final report of the High Level Expert Group on Fake News and Online Disinformation* (12 March 2018), https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation, at 5.

[6] A. Marwick & R. Lewis, *Media Manipulation and Disinformation Online*, 106 (2017).

[7] *Id. supra*, at 47.

Platforms such as Facebook have acknowledged their role in the phenomenon and made significant efforts. Of course, as we discuss further below, appraising the success of their efforts depends on how we as a society and they themselves define the scope of their responsibility. In a white paper setting out their efforts, they lay out a taxonomy of information operations as a set of activities aimed at spreading inaccurate information and at shaping beliefs, emphasizing the role of different actors in the ecosystem and outlining how they propose to tackle the problem.[8] They define the umbrella category of "*Information (or Influence) Operations*" as the actions taken by governments or organized non-state actors to distort domestic or foreign political sentiment, most frequently to achieve strategic and/or geopolitical outcomes. "*False News*" are defined as news articles that purport to be factual, but which contain *intentional* misstatements of fact. "*False Amplifiers*" are ideologically-motivated coordinated activities by inauthentic accounts that are carried out with the intent to manipulate public opinion (e.g., by discouraging some speakers and encouraging or amplifying other speakers). The networks of accounts involved can be large networks of fake accounts used by dedicated professionals to share high volumes of information, or smaller networks of carefully curated online personas.[9] The goals of the creators and promoters of false amplifiers include the promotion or denigration of a specific cause or issue, the fostering of distrust in political institutions, or the general spread of confusion.[10] Financial gain is rarely their ultimate goal. "*Disinformation*" is a broader category which applies whenever

[8] Facebook, *Facebook and Information Operations* (April 27, 2017), https://fbnewsroomus.files.wordpress.com/2017/04/facebook-and-information-operations-v1.pdf. But see an update here: https://newsroom.fb.com/news/2017/09/information-operations-update/.

[9] Alice Marwick & Rebecca Lewis, *Media Manipulation and Disinformation Online, Data & Society* (May 15th, 2017), https://datasociety.net/output/media-manipulation-and-disinfo-online/, at 8.

[10] Facebook, *Facebook and Information Operations* (April 27, 2017), https://fbnewsroomus.files.wordpress.com/2017/04/facebook-and-information-operations-v1.pdf. But see an update here: https://newsroom.fb.com/news/2017/09/information-operations-update/.

inaccurate or manipulated content is spread intentionally.[11] Facebook see their responsibility as that of tackling devious speech whether it is somewhat true such as cherry-picked statistics, or outright falsehoods such as those that led to the *Pizzagate* scandal.[12]

The contributions and role of platforms, political and other actors to the spread of disinformation is controversial. Yochai Benkler, Robert Faris and Hal Roberts for instance have recently emphasized the important role of the political context, in particular the specific contributions of the right-wing media ecosystem to problems of disinformation in the United States, and have argued that the role of technology platforms, bots and foreign spies has tended to be overemphasized.[13]

2.2. Three Parameters to Understand Fake News and Disinformation

How to define "fake news" and "disinformation"? Is there a test that can guide lawyers, academics, policy-makers and platforms to consistently determine whether or not certain content deserves to remain visible and/or deserves constitutional protection?

According to the HLEG, "disinformation" is a more adequate term than "fake news" for at least two reasons: (1) the problem is not limited to news specifically but covers the spread of false or misleading information more generally including through fake accounts, videos and other fabricated media, through advertising and other organized information operations; (2) the term "fake news" has been adopted by politicians to contest information that is against their interests.[14] HLEG defines

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[11] Alice Marwick & Rebecca Lewis, *Media Manipulation and Disinformation Online*, *Data & Society* (May 15th, 2017), https://datasociety.net/output/media-manipulation-and-disinfo-online/, at 5.

[12] See "Facing Facts" (May 23, 2018), available at: https://newsroom.fb.com/news/2018/05/facing-facts-facebooks-fight-against-misinformation/.

[13] Y. Benkler, R. Faris, H. Roberts, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics* (2018).

[14] European Commission, *A multi-dimentional approach to disinformation, Final report of the High Level Expert Group on Fake News and Online Disinformation* (12 March 2018), https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation, at 10.

disinformation as "*false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit. The risk of harm includes threats to democratic political processes and values, which can specifically target a variety of sectors, such as health, science, education, finance and more.*"[15] HLEG distinguishes the notion of disinformation from that of "misinformation", i.e. "*misleading or inaccurate information shared by people who do not recognize it as such*,"[16] and excludes from the notion of disinformation all questions related to illegal forms of speech such as defamation, hate speech, incitement to violence, etc., and also issues related to the spread of parody and satire. While we agree that the notion of "disinformation" is a more accurate term than "fake news," we will be using both terms in what follows.

A possible way of conceptualizing some important distinctions between different types of manipulative and problematic information, is to take an analytical approach to fake news and disinformation, focusing on three parameters: the content's factual truth, the intent and strategic goals associated with the content's generation and initial sharing, the harm caused by the content's release into the public sphere. While each of these factors is difficult to ascertain in practice and heavy reliance on any one of them can be somewhat unreliable, a broad taxonomy can be developed through these three factors. The presence of some harm coupled with some level of factual inaccuracy presents regulatory issues, which can often be satisfactorily addressed through existing laws (eg. defamation laws). Instead, devising *ad hoc* legal and regulatory remedies is urgently needed where factual inaccuracy and harm are coupled with the existence, on the part of one or more actors, of a diffuse intentionality to manipulate, fabricate and propagate false or deceitful information. This includes the existence of significant levels of fault on the part of employers and intermediaries.

In an attempt to address the difficulties attached to understanding the various shades of intentionality that are at play, Claire Wardle of First Draft News identifies seven types of

[15] *Id. supra.*
[16] *Id. supra.*

misleading speech in a media context and places them on a spectrum loosely based on the intent to deceive:[17]

a. ***Satire or parody****, ie. news where there is no intention to cause harm but a potential to fool (eg. The Onion);*

b. ***False connection****, ie. news whose headlines, visuals or captions do not support the content, which is factually accurate. Often these include news whose headlines and imagery were crafted to attract large audiences;*

c. ***Misleading news****, ie. these are news that include misleading use of words or information to frame an issue or an individual and slightly change the meaning of the message;*

d. ***False content****, ie. where genuine content is shared with false contextual information and that changes the understanding and interpretation of the information provided;*

e. ***Imposter content****; ie. where genuine sources are impersonated with false, made-up sources. Here there is no longer an issue of presenting true information in ways that are more or less suited to the author's goals, but rather of constructing news that are deliberately false and giving them an appearance of truth;*

f. ***Manipulated content****, ie. where genuine information or imagery is manipulated to deceive;*[18]

g. ***Fabricated content****: content that is 100% false, deliberately designed to deceive and do harm.*

To guide our further discussion, we thus tentatively conclude that:

- innocent and inaccurate news that cause *de minimis* harm do not raise urgent issues from a legal and regulatory standpoint;
- (negligently) inaccurate news that cause harm require some legal and regulatory redress, where such redress is not already provided by existing laws (eg. defamation or journalistic codes of ethics), new obligations for media outlets and intermediaries must be envisaged to ensure that the spread of harmful information is reduced to a manageable level; and
- the intentional manipulation and fabrication of news and information, whether or not facilitated by intermediaries

[17] C. Wardle, *Fake news. It's complicated*, First Draft News (February 16, 2017), https://firstdraftnews.org/fake-news-complicated/ (Retrieved April 22, 2017).

[18] *See* eg.: https://blogwatch.tv/2017/10/fake-news-types/manipulated-content/

without the relevant intent, requires new legal and regulatory prohibitions in the digital media ecosystem.

Our approach can be summarized as follows:

Types of Information	Factual Inaccuracy	Intent to Deceive	Harm
Innocent	No	No	No
Inaccurate (non-Harmful)	Yes	No	No
Harmful Inaccuracies	Yes	No	Possible
Manipulated	Maybe	Yes	Yes
Fabricated	Yes	Yes	Yes

3. Free Speech and "Fake News"

In *On Liberty,*[19] John Stuart Mill makes the case for a generous understanding of freedom of speech arguing that truth as an ideal can only be achieved if both true and false statements and opinions are allowed to remain uncensored. In the United States, false statements in newspapers have been held to have no constitutional or moral value in themselves.[20] Instead, in the US and in Europe false statements are often given legal protection so as to protect other values such as diversity of opinion, a wider scope of debate, freedom of the press, etc.[21] In other words, it seems that false news have instrumental rather than intrinsic value, and they are valuable and worthy of constitutional protection only insofar as they enable the promotion of other values such as plurality or democracy. Yet it seems that in the current context, overgenerous constitutional protection for speech may be one of the factors leading to a loss of epistemic trust in democracy. Thus, some of the guarantees that are in place to allow for speech to flourish might need to be re-examined. It is arguable that most forms of false news and disinformation, if they are constitutionally protected, fall within this second broad category

[19] J. S. Mill, *On Liberty* (1859).
[20] *See* below *New York Times v. Sullivan*, 376 U.S. 254 (1964).
[21] *See* below *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

of speech. Our view is that such protected speech not only should be given less value, but that the existing normative claims against its protection should be given more weight in deciding whether to deny it protection.

Our aim in this section is to formulate this argument while providing an overview and comparison of United States and European free speech standards. In Parts III and IV, we then move to exploring the kinds of remedies and safeguards that ought to be put in place to reduce and eradicate disinformation efforts that have no constitutional or human rights value. The latter depends in large part on the role and responsibility of intermediaries and media organizations in preventing the spread of misleading and false information.

3.1. Constitutional standards of protection for false news in the United States under the First Amendment

The First Amendment, adopted on December 15 1791 as part of the US Bill of Rights, is worded as an absolute, with no carve outs specified:

"*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*"

The history of the First Amendment is a long and relatively silent one until the 1920ies when US courts began to interpret the provision as conferring onto US citizens a wide scope of protection for free expression. While First Amendment jurisprudence has developed as a complex patch of sometimes inconsistent doctrines, what an external observer sees as the high watermark of American free speech is its very wide scope of constitutional protection.

The most famous rationale for such wide scope of protection is the notion of the "*marketplace of ideas*", a notion imported into First Amendment jurisprudence in the 1920ies, as illustrated by Justice Holmes' famous dissent in *Abrams v United States*:[22]

"*[T]he ultimate good desired is better reached by free trade in ideas – that* ***the best test of truth is the power of the thought to get***

[22] *Abrams v. United States*, 250 U.S. 616 (1919).

itself accepted in the competition of the market*, and that truth is the only ground upon which their wishes safely can be carried out… I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threatened immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.*"[23] (emphasis added)

In *Reno v. ACLU*,[24] the Supreme Court applied the 'marketplace of ideas' analogy to the internet. Applying Holmes' metaphor, the court held that certain limitations on obscene online speech under the Communications Decency Act had the effect of curtailing speech that was not obscene, and therefore that the relevant portions of the Act were unconstitutional. This case highlighted for the first time the extent to which attempts to zone online speech can have spillover and chilling effects. It has also left a void in the regulation of online speech, which appears to be widening with time.

From a more theoretical point of view, as it has already been stated,[25] the reference to the "*marketplace of ideas*," should be handled with care. A metaphor implies knowledge transfer across domains (from the Greek *meta pherein*, to "carry over"): the free market of ideas metaphor carries over from the source domain of economic activity to the target domain of speech a systematic set of entailments that supersedes the limitations of the older free speech model. The economic context of Holmes' use of the metaphor should not be overlooked. In 1919, *laisser faire* market capitalism was triumphant. The concept of a free market provided a meaningful model for truth: like for any efficient allocation of goods and services which leads to market equilibrium, truth would arise as the end result of a free exchange of true and false ideas. Similarly, when the US Supreme Court borrowed the metaphor in 1997 calling the internet the "*new market place of ideas*," it was a relatively unregulated and open environment not yet characterized by the prevalence of monopolies and oligopolies. In this context, the metaphor of a free marketplace of ideas may have made perfect sense. By contrast, today, the same metaphor

[23] *Id. supra,* at 630.

[24] *Reno v. ACLU*, 521 U.S. 844 (1997).

[25] See O. Pollicino, Editorial, *Fake News, Internet and Metaphors (to be handled carefully)*, in this Journal, 2017 9(1), 1-5

appears inadequate. Digital markets, in particular, are today far from "perfectly" competitive, and instead appear to be concentrated and skewed in favor of a handful of businesses. Similarly, if fake news are arguably a significant and pervasive form of failure in the marketplace of ideas, this makes it reasonable to advocate for a degree of regulatory intervention in this area.

As regards freedom of the press, the First Amendment generally affords a wide scope of speech protection to the press and other speakers, shielding them from liability for the spread of false news and disinformation. One exception to this large protective shield is the *New York Times v. Sullivan*[26] line of cases which established that those who spread false information about public officials do not benefit from constitutional protection if they act maliciously. The rule is narrower than it seems in that it only applies to false defamatory speech against public officials, and only if actual malice is shown. Actual malice under the First Amendment means knowledge or reckless disregard of falsity, on the part of the publisher of false information. In that case Justice Brennansaid, relying on John Stuart Mill, that "*even a false statement may be deemed to make a valuable contribution to a public debate.*"[27] In *Gertz v. Robert Welch, Inc.*,[28] Justice Powell similarly stated that "*[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.*"[29] In attempting to strike a fair balance between the victims of false defamatory speech and freedom of the press, the Supreme Court in both cases acknowledged that a degree of inaccurate or misleading news is instrumentally necessary to achieve a healthy information ecosystem, and that therefore the protection of false news should be widely construed.

Outside the media context, in *United States v. Alvarez,*[30] the Supreme Court held that a law criminalizing false statements about having a military decoration or medal, the Stolen Valor Act, violated the First Amendment: thus that false statements deserve some constitutional protection. Mr. Alvarez had been convicted

[26] *New York Times v. Sullivan*, 376 U.S. 254 (1964).
[27] *Id. supra,* at 279 footnote 19.
[28] *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974).
[29] *Id. supra,* at 341.
[30] *United States v. Alvarez*, 567 U.S. 709 (2012).

under the Act for falsely stating in court that he was a retired marine who had been awarded a medal of honor. A majority of the Court agreed that the Stolen Valor Act was unconstitutional, albeit for different reasons.

Overall, in our view the moment has come for First Amendment law to be construed, if not more narrowly, at least in accordance with substantive notions of equality and pluralism, and compatibly with the necessary protection against private and commercial speech by powerful online actors. The state action doctrine negates the applicability of First Amendment protection between two privates, whether they are individuals, platforms or media organizations. Such doctrine proves somewhat problematic when it comes to speech harms that occur in a highly privatized digital public sphere. If private, public or a hybrid mix of actors are causing the spread of disinformation then it is wrong to keep them shielded from liability based on claims that First Amendment law requires an unregulated marketplace of ideas.[31]

3.2. European human rights standards of protection for false news

In the last sixty years or so, speech in Europe has evolved very differently from the United States. While in the United States, courts were willing to water down any restrictions on the ability of the media to publish inaccurate information, in Europe courts have followed a more cautious approach which focuses on the value of human dignity and pluralism. As a result, online speech and fake news regulation might predictably encounter more resistance in the United States than in Europe.

A "free marketplace of ideas" model of protection applies with difficulty to the European context, which becomes clear when one compares the wording of the First Amendment of the US Constitution with Article 10 of the European Convention on Human Rights. Article 10 of the ECHR has nevertheless played an important role, as EU Member States (and the EU itself, in the

[31] *See* M. D. Conover, J. Ratkiewicz, M. Francisco, B. Gonc¸alves, A. Flammini, F. Menczer, *Political Polarization on Twitter*, Proceedings of the Fifth International AAAI Conference on Weblogs and Social Media (2011) https://www.aaai.org/ocs/index.php/ICWSM/ICWSM11/paper/viewFile/2847/3275. Also *see* C. R Sunstein, #*Republic: Divided Democracy in the Age of Social Media* (2017).

future) join the Council of Europe and are bound by the Convention. The existence of such a binding 'constitutional' parameter is reflected in a common standard of protection within national legal systems. Contrary to the wording of the First Amendment, the wording of Article 10 of the European Convention on Human Rights (ECHR) places emphasis on the limits to free speech and is very clear in rejecting the view of free speech as an absolute.[32] The structure of this provision is twofold: Article 10(1) attaches to freedom of expression the value of a human right, while Article 10(2) admits for interferences with free speech that are necessary, in a democratic society, to meet certain social pressing needs. In other words, contracting states can then legitimately impose restrictions on freedom of expression, provided that the criteria set forth under art. 10(2) are respected.[33] The Article reads:

"*(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The difference is not only one of scope, but also of focus. Whilst the First Amendment addresses mainly the active

[32] See, for a comment on art. 10 ECHR, J. F. Flauss, *The European Court of Human Rights and the freedom of expression*, 84 Indiana Law Journal 809 (2009).

[33] As noted by Voorhoof, only a limited number of cases the Court came to the conclusion that the condition 'prescribed by law' was not fulfilled. According to Voorhoof, this condition requires foreseeability, precision, publicity or accessibility of the restriction. See D. Voorhoof, *Freedom of Expression under the European Human Rights System. From Sunday Times (n° 1) v. U.K. (1979) to Hachette Filipacchi Associés ("Ici Paris") v. France (2009),* 1–2 *Inter-American and European Human Rights Journal/Revista Interamericana y Europa de Derechos Humanos, Intersentia,* 3–49 (2009).

dimension of speech, i.e. the speaker's right to impart information freely, Article 10 of the European Convention and Article 11 of the EU Charter of Fundamental Rights emphasize the passive dimension of speech, i.e. the audience's right to be pluralistically informed and receive information. In this respect, it could be argued that false news and misleading or deceitful information do not fall within the scope of European free speech protection. European courts for instance would not adopt the US Supreme Court's approach in *Gertz* according to which "*[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction… on the competition of other ideas*."[34]

As noted by commentators, Article 10 ECHR protects 'several freedoms of speech', not just one.[35] A large number of decisions have been taken on complaints based on Art. 10. In this regard, the Strasbourg Court has introduced a distinction between political and commercial speech. Whereas in the first case contracting states enjoy a wider margin of appreciation, restrictions are less tolerable, in the Court's view, when rights to political speech are at stake.

In the leading case, *Sunday Times*,[36] the Court for the first time found that Art. 10 had been violated. The review concerned a judicial order preventing the publication by a newspaper of an article concerning a drug. The Court held that the restriction was not '*necessary in a democratic society*'. In this way, it becomes clear how review under art. 10 works as an additional layer of control over the protection of freedom of expression in Europe.

In an attempt to provide an overview of the same issues addressed by US Courts in the context of a free speech scrutiny, some remarks can be made.

With respect to hate speech,[37] it should be noted that the Court in Strasbourg often refers to art. 17 of the Convention, which encapsulates the 'abuse clause', preventing the exercise of

[34] *Gertz*, 418 U.S. 323 (1974), at 339-340.

[35] See J.F. Flauss (2009), cit. at. 33, 810.

[36] *The Sunday Times v. United Kingdom* App no 6538/74 (ECHR, 26 April 1979).

[37] Further to the contribution of Gillespie, Chapter 20, see also F. Tulkens, *Freedom of expression and hate speech in the case-law of the European Court of Human Rights*, in J. Casadevall, E. Myjer, M. O'Boyle (eds.), *Freedom of Expression. Essays in Honour of Nicolas Bratza*, Oisterwijk: Wolf Legal Publishers (2012).

the fundamental rights protected under the ECHR in a way that is likely to undermine the enjoyment of other freedoms established therein.[38] In other terms, the Court has pointed out that disputing the existence of 'clearly established historical facts'[39] amounts to an abuse of freedom of expression that Contracting States may legitimately restrict – upon certain conditions – when it is necessary to preserve other fundamental values underlying the Convention.[40]

This has allowed some Contracting States, including Austria, France and Germany, to enact laws against hate speech.[41]

The case of *Jersild*[42] is of particular importance, amongst others. The applicant was a journalist sentenced in Denmark for having conducted an interview with some members of a young racist organisation where offensive and insulting expressions were used. Although Mr. Jersild had clearly dissociated himself from these statements and rebutted part of them, he was convicted for aiding and abetting the youths interviewed. The ECtHR said that, under the circumstances of the case, such interference with the enjoyment of freedom of expression was not *necessary in a democratic society* and that, in particular, the means employed were disproportionate to the aim of protecting the reputation or rights of others.

A last case is worth mentioning *Handyside,*[43] a case where the Court rejected the complaint of an editor who had been convicted for having published a schoolbook containing sexually explicit contents. The Court found that the restrictions to freedom of expression imposed in the case, including the seizure of copies of the book, met the criteria set forth under art. 10(2) of the Convention. *Obiter dictum*, the Court stressed that:

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[38] For a more specific analysis of the abuse clause, see H. Cannie and D. Voorhoof, *The abuse clause and freedom of expression in the European Human Rights Convention*: An added value for democracy and human rights protection? 29(1) *Netherlands Quarterly of Human Rights* 54 (2011).

[39] *Lehideux and Isorni v. France* App no 24662/94 (ECHR, 23 September 1998).

[40] *Garaudy v. France* App no 65831/01 (ECHR, 7 July 2003). See also *Peta Deustschland v. Germany* App no 43481/09 (ECHR, 8 November 2012).

[41] See in this regard R. Kahn, *Why do Europeans ban hate speech? A debate between Karl Lowenstein and Robert Post*, 41 Hofstra Law Review 545 (2013).

[42] *Jersild v. Denmark* App no 15890/89 (ECHR, 23 September 1994).

[43] *Handyside v United Kingdom* App no 5493/72 (ECHR, 7 December 1976).

"Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."

3.3. Online speech

The complex question of how to balance harm with freedom of the press in defining the scope of protection for false news acquires further complexity in the context of the internet. However, if we analyse the most recent Court decisions taken, it appears that the limitations to speech in Article 10(2) have been widely construed in relation to the Internet.

The Court appears to have paid more attention to the cases where the Internet was likely to threatened the protection of fundamental rights – restrictions in those cases were then found justified – than to those cases in which the Internet appeared as a new opportunity for the enjoyment of speech.

Even though the Court has repeatedly held that the 'safe harbors' under Art. 10(2) must be construed strictly, the coming of the Internet has determined an increase of the consideration given to restrictions to free speech. In particular, in the European Court's view, the specific medium represented by the Internet has given rise to an amplification of the threats to fundamental rights compared to the past. This point emerged, for the first time, in *Editorial Board of Pravoye Delo and Shtekel v. Ukraina*,[44] concerning freedom of press:

"The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to technology's specific features

[44] *Editorial Board of Pravoye Delo and Shtekel v. Ukraina* App no 33014/05 (ECHR, 5 May 2011).

in order to secure the protection and promotion of the rights and freedoms concerned."

The assumption behind the reasoning of the ECtHR is that the internet raises new problems for the protection of fundamental rights and that the measures applying to traditional media do not effectively work in the digital environment. A new balance between freedom of expression and other human rights must be sought and, according to the court, such balance had to be resolved in favor of more restrictions on freedom of expression.

Compare the ECtHR's approach to that of the US Supreme Court which, in the aforementioned decision *Reno v. ACLU,* expressed a completely opposed view:[45]

"*The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.*"

In *K.U. v. Finland,*[46] the ECtHR highlighted the non-absolute nature of the protection of certain fundamental rights on the internet. The case concerned the dissemination of the personal data of a minor by an anonymous individual who had posted an online advertisement where he claimed to be in search of a sexual relationship. When the applicant filed a complaint with the local court, there were no legal grounds in domestic law to force an ISP to disclose personal data in a criminal case. Then, the domestic legislation failed to strike a balance between the right to data protection and other interests. Although the complaint was not based on Art.10, the ECtHR expressed significant remarks as to the enjoyment of freedom of speech on the Internet:

"*Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others … [I]t is nonetheless the*

[45] 521 US 844, 885.

[46] *K.U. v. Finland* App no 2872/02 (ECHR, 2 December 2008).

task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context."

The Court adopted a stricter approach where the limitations imposed on freedom of expression were disproportionate to their aim. For instance, in *Ahmet Yildirim v. Turkey*,[47] Strasbourg judges concluded that Turkey had violated Art. 10 of the Convention by imposing a disproportionate restriction on internet access. In the context of criminal proceedings against the owner of a website where expressions insulting Ataturk's memory had been posted, an administrative authority ordered the blocking of Google Sites as a whole to prevent access to the site in question, without ascertaining whether a less far-reaching measure could have been taken. The applicant, who owned a website where his academic works were published and which was affected by the extension of the blocking order, alleged a violation of his right to freedom of expression. The Court noted that the blocking of a website falls within the legitimate restrictions that Contracting States may adopt in accordance with Art. 10(2) of the Convention, but only upon the condition that such a restriction meets the requirements referenced therein. In the case at stake, both a strict legal framework defining the scope of the ban and a judicial review were lacking.

The approach of the ECtHR has proved to be very cautious. On the one hand, it concluded that a violation of Art. 10 had occurred when the restrictions to freedom of expression did not fulfill the conditions set forth under Art. 10(2). On the other hand, however, the Court conceded that free speech is not an absolute, nor a right to which a greater protection is attached compared to other fundamental rights: then, given the risks brought by the Internet, the right to freedom of expression can more likely be limited than in the non-digital context.

The same view is behind the decision in the *Pirate Bay*[48] case, where – on the contrary – the ECtHR rejected the application based on Art. 10. The applicants were the owners of a well-known online platform where users were provided with links to

[47] *Ahmet Yildirim v. Turkey* App no 3111/10 (ECHR, 18 December 2012).

[48] *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden* App n 40397/12 (ECHR, 13 March 2013).

download illegally copyrighted materials through the use of peer-to-peer systems. They had been sentenced under a Swedish law which criminalised copyright infringements but complained that their right to freedom of expression had been violated in this way. The Court declared the complaint inadmissible, as the restriction imposed on free speech met the conditions under Art. 10(2) and, in particular, was proportionate to the legitimate aim pursued.[49]

Thus, the view taken by the Court in Strasbourg is that new technologies, and the internet in particular, did not generally expand the scope of freedom of expression; rather, it created more opportunities for this right to enter into conflict with other interests protected under national constitutions.

This suggestion is confirmed by looking at how the ECtHR has reacted to freedom of the press in relation to the internet. Freedom of the press is regarded as an essential part of the freedom of speech and a pillar of democracy. In the case of *Stoll*,[50] the assumption behind the reasoning of the ECtHR is that by virtue of the new technologies the duties of journalists have become more onerous:

"*[T]he safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism ... These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance.*"

These observations are confirmed by similar cases in the offline environment. For instance in the case of *Yildirim v. Turkey*, where a single publication was found to be defamatory, then there were legal grounds to prevent its circulation, but not other publications. The problem of proportionality is crucially connected to the nature of the technical means that are employed

[49] See also *Ashby Donald and other v. France* App n 36769/08 (ECHR, 10 January 2013).

[50] *Stoll v. Switzerland* App no 69698/01 (ECHR, 10 December 2007).

in distributing the content: together, these factors are critical to the protection of freedom of expression on the internet.

Further, two cases demonstrate the Court's approach to intermediary liability: *Delfi v Estonia*[51] and *MTE v Hungary*.[52] In *Delfi* it was held to be lawful for Estonian courts to order a news portal to pay damages for defamatory comments posted on the site, even though these had been removed without delay after the news portal had been notified. The decision has been criticized as inequitable for failing to state an actual knowledge standard for platforms.[53] In *MTE v Hungary* the Court partly reviewed the *Delfi* ruling.[54] In this case the ECtHR held that punishing a non-profit self-regulatory body of Internet content providers (MTE) and an Internet news portal (Index) for offensive comments posted on their sites violated Article 10. The case was distinguished from *Delfi* because the comments here did not involve hate speech and also because the Hungarian courts in *MTE* had not carried out a thorough balancing exercise between the applicants' right to freedom of expression and the real estate websites' right to respect for their commercial reputation. The ECtHR has not clarified a clear position of principle on the extent to which platforms should be made responsible for policing online speech. Arguably, the ECtHR wants to avoid a conflict with European Union courts, who are also competent on such matters.

4. The Role of Online Intermediaries

Recent events such as the Cambridge Analytica scandal or the allegations of Russian interference into the 2016 US elections campaign have exposed how important online intermediaries and platforms are to the spread of disinformation. Jack Balkin has emphasized the important role that infrastructure plays in the protection of free expression.[55] In his view the protection of speech

[51] *Delfi AS v. Estonia* (2015) ECtHR 64669/09.
[52] *MTE v. Hungary* (2016) ECtHR 22947/13
[53] *See* R. Caddell, *The last post? Third party internet liability and the Grand Chamber of the European Court of Human Rights: Delfi AS v Estonia revisited*, 21 Commun Law 49–52 (2016).
[54] *Id. supra.*
[55] J. M. Balkin, *Freedom of the Press: Old-School/New-School Speech Regulation*, 127 Harv. L. Rev. 2296 (2014).

requires certain infrastructural affordances, and the hallmark of speech in the digital age, which is calls new-school speech regulation, is a revolution in such affordances. More recently, he has described speech in a digital setting as having a triangular structure which takes into account the importance of such intermediaries.[56] Rather than exclusively focusing on the traditional bilateral relationship between speakers and the state, regulators must adopt a broader view of speech as flowing between three groups of players: on the one hand the state, municipalities, transnational and supranational entities; on the other hand internet infrastructure, including social media companies, search engines, ISPs, payment systems and others; and finally speakers including mass media organizations, civil society, etc. According to Balkin, applying the laws and constitutional standards that have been developed for speech in the offline context to the internet would be fruitless.[57] In order to protect speech values in an internet context we must thus be ready to adopt technical, regulatory and legal solutions that go beyond the traditional forms of free speech regulation and that entail interventions at the platform level. While constitutional doctrines will keep guiding us on the proper scope of speech protection, we must look elsewhere for immediate solutions to the most harmful and widespread forms of false news and disinformation.

4.1. Immunity of Internet Intermediaries under US Law

In the United States, internet intermediaries have a large amount of freedom when it comes to speech violations. Section 230(c)(1) of the Communications Decency Act ("CDA") [58] confers full immunity on "*interactive computer service(s)*", for any content shared using their services, directing that "*no provider or user of an interactive computer service shall be treated as the publisher or speaker of*

[56] J. M. Balkin, *Free Speech is a Triangle*, 118 Columbia L. Rev., no. 7 (2018).
[57] *Id. supra*, at 20-22 and 29. Also *see* J. M. Balkin, *Free Speech and Press in the Digital Age: the Future of Free Expression in a Digital Age*, 36 Pepperdine Law Review 427–1161 (2009); J. M. Balkin, *Digital Speech And Democratic Culture: A Theory Of Freedom Of Expression For The Information Society*, 79 New York University Law Review (2004).
[58] 47 U.S.C. §230.

any information provided by another information content provider."[59] In other words, "interactive computer services" must not be treated as publishers responsible for the content being published, but as passive intermediaries that channel communications and have no responsibility for the content being communicated. Section 230(c) immunity is particularly strong in that it applies even if the intermediary knows of the defamatory content on their service and knowingly fails to remove it.[60] In the CDA, the notion of "*interactive computer service*" is defined as:

"*any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.*"[61]

The Act is unclear on the distinction between such a service and the notion of "*information content provider*" defined instead as:

"*any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.*"[62]

The relevant factor that differentiates "*interactive computer service*" from "*information content provider*" is the notion of "*creation or development of information*." What is questionable is that we could easily understand a platform to engage in acts that closely resemble creating or developing information, for instance by arranging the way in which the information is displayed or presented to the end-user. In a long list of cases, US courts have nonetheless protected intermediaries from liability by interpreting the notion of "*interactive computer service*" very broadly.[63] Lawsuits seeking to hold intermediaries liable for editorial functions such as

[59] Note that at §230(f)(3) information content provider is defined as follows: "*any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.*"

[60] M. Lavi, *Taking Out of Context*, 31 Harv. J. Law Technol. 145, 164 (2017).

[61] *Id. supra* section (f)(2).

[62] Communications Decency Act § 230(f)(3).

[63] *See* Zeran v. AOL, 129 F.3d 327 (4th Cir. 1997); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 254 n.4 (4th Cir. 2009); Giordano v. Romeo 2011 WL 6782933 (Fla. App. Ct. Dec. 28, 2011); Global Royalties v. Xcentric 544 F supp 2d 929 DIST(2008); Caraccioli v. Facebook, Inc., 2016 WL 859863 (N.D. Cal. March 7, 2016).

selection of content or decisions on how and when to display it, have generally been blocked by this section.[64]

The section 230(c) CDA immunity is thus understood to apply without exceptions to content sharing platforms such as Facebook, YouTube, Twitter and others, alongside internet service providers, web hosting services and other internet intermediaries that enable people to express themselves online. Yet the growing awareness that these platforms clearly engage in curatorial activities akin to those of publishers is generating debates over the appropriateness of the immunity. The line between being a publisher responsible for published content and acting as a 'passive' platform intermediary is no longer fully tenable.[65] The line between pre- and post-publication has become blurred because content can exist online yet not be spread widely or be visible or findable at all.[66] Jonathan Zittrain has suggested distinguishing between large and smaller intermediaries, using a size or level of activity threshold for immunity.[67] Jack Balkin on the other hand has suggested a procedural threshold. [68] His view is that if a platform complies with the Manilla principles,[69] which require a level of procedural fairness and transparency on the platforms' part, then it should benefit from immunity. If it does

[64] *See* Zeran v. AOL; Gentry v. eBay, Inc., 99 Cal. App. 4th 816 (Cal. App. Ct. June 26, 2002); Levitt v. Yelp Inc, 2011 U.S. Dist. LEXIS 124082 (N.D Cal. Oct. 26, 2011); Levitt v. Yelp! Inc., 2014 WL 4290615 (9th Cir. Sept. 2, 2014).

[65] M. Lavi, *Taking Out of Context*, forthcoming: Harvard Journal of Law and Technology (2018), J. Zittrain, *CDA 230 Then and Now: Does Intermediary Immunity Keep the Rest of Us Healthy?* The Recorder (Nov. 10, 2017), available at: https://www.law.com/therecorder/sites/therecorder/2017/11/10/cda-230-then-and-now-does-intermediary-immunity-keep-the-rest-of-us-healthy/.

[66] J. Zittrain, *CDA 230 Then and Now: Does Intermediary Immunity Keep the Rest of Us Healthy?* The Recorder (November 10, 2017), https://www.law.com/therecorder/sites/therecorder/2017/11/10/cda-230-then-and-now-does-intermediary-immunity-keep-the-rest-of-us-healthy/?slreturn=20180922190041.

[67] *Id. supra.*

[68] J. M Balkin, *Free Speech is a Triangle*, Columbia L. Rev., cit. at. 56, 44 (2018).

[69] In J. Balkin's own words, "*[t]he Manilla Principles require, among other things (1) clear and public notice of the content regulation policies companies actually employ; (2) an explanation and an effective right to be heard before content is removed; and (3) when this is impractical, an obligation to provide to post-facto explanation and review of a decision to remove content as soon as practically possible.*" *Id. supra*, at 41.

not comply, a platform cannot benefit from full immunity and must instead comply with constitutional limitations on intermediary liability, which are at present uncertain. This view, which is reasonable, falls short of the European safe harbor standards that we discuss below.

Revising the current immunities under section 230(c) CDA would be an important move, which legislators must avoid making without caution. They must focus on the various policy options that internet infrastructure allows. For instance, requiring a correction, an apology or a tweak in the algorithm that governs the spread of the problematic content in question, if practicable, may be more effective than monetary compensation by the company that contributed to such spread. As explained by Lawrence Lessig in response to the regulatory void left by the Supreme Court's ruling in *Reno*, one cannot leave harmful and deceitful online speech unregulated. The best approach requires taking into account the specificities of internet architecture and the possibilities it offers.[70]

Other kinds of limits on speech are in fact being placed indirectly through the copyright infringement notice and takedown procedure in place under the Digital Millennium Copyright Act.[71] The *Google Transparency Report* for instance reveals that a number of requests submitted through their copyright removal system have little or no connection to copyright, eg. a driving school requesting the removal of a competitor's homepage from search based on a very weak copyright claim, or requests for removal of non-infringing material publicising past copyright removal requests.[72] Further, in the US Google's policy is to remove libellous material upon presentation of a court order demonstrating its defamatory nature. Using the Lumen database,[73] Professor Eugene Volokh has brought new light on the practice of individuals and companies to

[70] L. Lessig, P. Resnick, *Zoning Speech on the Internet: A Legal and Technical Model,* in The Berkman Center for Internet & Society Research Publication No. 1999-06 12/1999.

[71] 17 U.S.C. § 512.

[72] *Google Transparency Report*, http://www.google.com/transparencyreport/removals/copyright/faq/#abusive_copyright_requests (last visited August 30, 2018).

[73] *See* https://www.lumendatabase.org/pages/about.

abuse of such removal system.[74] He has shown that companies and individuals are increasingly creating or obtaining fraudulent court orders to censor online content.[75] This and similar practices illustrate the complexity regulators face in designing effective solutions to the policing of harmful online content, in spite of the cooperative efforts of online platforms and other intermediaries concerned about the quality of the end product they offer, and increasingly also worried about their reputation.

4.2. EU Safe Harbours and Content Removal Obligations

As discussed above, one reason for the ECtHR's reluctance to express firm views regarding online content may have been the parallel and evolving nature of the EU law of intermediary liability.[76] The EU has a rich panoply of existing and prospective legislation for the digital single market. The e-Commerce Directive[77] confers partial immunity from liability for speech violations on intermediaries that passively transmit, cache or host online content, the so-called "safe harbours."[78] The Directive's safe harbours apply to "*information society service providers*" that act as:

- *Mere conduits*, providing a service "*that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network,*"[79]

[74] A. Holland, *Lumen Research In the News - Texas AG sues CA company over falsified court orders business model,* Lumen Blog (2017), https://www.lumendatabase.org/blog_entries/801 (last visited Aug 30, 2018).

[75] Adam Holland, *More apparently fraudulent court orders lumen blog* (2018), https://www.lumendatabase.org/blog_entries/802 (last visited Aug 30, 2018). Also see: E. Volokh, *Libel takedown injunctions and fake notarizations*, Washington Post, March 30, 2017, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/30/libel-takedown-injunctions-and-fake-notarizations/ (last visited Aug 30, 2018).

[76] Note that the ECHR and the EU are separate transnational governance frameworks that, to a large extent, operate independently of one another. The EU's accession to the ECHR is not yet finalized, see: http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI%282017%29607298

[77] Directive 2000/31/EC OJ L 178, 17/07/2000.

[78] *See* Articles 12-14 of the Directive.

[79] Article 12 of the E-Commerce Directive

- *Caching service providers*, enabling "*transmission in a communication network of information provided by a recipient of the service,*"[80]
- *Hosting service providers*, allowing for the "*storage of information provided by a recipient of the service.*"[81]

According to the Directive's recital (18) these include entities operating a marketplace such as eBay or Amazon[82] and media-sharing platforms such as YouTube and Facebook.[83]

Contrary to the US regime under section 230 CDA, in the EU intermediaries will benefit from immunity only as long as they remain passive and unaware facilitators. They become liable to remove the illegal content once they are aware of its presence on their service, for instance if they are notified by a user. In *Google France v Louis Vuitton*,[84] the EU Court of Justice stated that Article 14 of the Directive, which provides immunity to hosting providers, would only apply if the storage of content was "*of a mere technical, automatic and passive nature*"[85] and if the entity did not play "*an active role of such a kind as to give it knowledge of, or control over, the data stored.*"[86] In *L'Oréal v eBay*, neutrality was said to be unlikely where an intermediary optimizes or promotes users' stored content.[87] The question of whether the use of content sorting algorithms can fall within the Directive's definition of neutrality was interestingly explored by Advocate General Poiares Maduro in *Google France*. The Advocate General considered Google not to have a direct interest in the content being presented on its search platform, and concluded that its use of algorithms to sort search results was therefore neutral, save for the display of Google AdWords advertisements in which Google had a direct interest:

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[80] Article 13 of the E-Commerce Directive
[81] Article 14 of the E-Commerce Directive
[82] *See* eg. C-324/09 L'Oréal SA v eBay International AG EU:C:2011 [2012].
[83] *See* eg. Case No. 11/2014 *Gestevision Telecinco SA v YouTube LLC* [2014] 2 CMLR 13 (Court of Appeal of Madrid, 14 January 2014).
[84] C-236/08, C-237/08 and C-238/08 *Google France Sarl v Louis Vuitton Malletier SA* [2010] ECR I-2417.
[85] *Id. supra*, at paras 113-114.
[86] *Id. supra*, at para 120.
[87] *See* C-324/09 *L'Oréal SA v eBay International AG* EU:C:2011 [2012], at paras 140-146.

"Google's search engine… is neutral as regards the information it carries. Its natural results are a product of automatic algorithms that apply objective criteria in order to generate sites likely to be of interest to the internet user. The presentation of those sites and the order in which they are ranked depends on their relevance to the keywords entered, and not on Google's interest in or relationship with any particular site."[88]

The Advocate General's view on the neutrality of Google's content sorting algorithms is no longer as plausible today, especially in light of some of the significant antitrust investigations that the European Commission has carried out into Google's search activities, finding Google liable for displaying results in a way that advantages its own services.[89] This and other recent developments render Google and other content sharing and sorting platforms' activities less likely to squarely fall within the e-Commerce Directive's immunities.

On the question of whether it is appropriate for platforms to use automated content filtering mechanisms to filter out harmful content, the Court of Justice of the EU has expressed itself more than once against automated filtering and in favour of broad free speech guarantees. In its 2012 judgment in S*abam* v *Netlog*, [90] the Court of Justice of the EU held that Belgian content filtering requirements imposed on an intermediary violated Article 15 of the e-Commerce Directive, which exempts hosting service providers from a general obligation to monitor the content transmitted through their platform. [91] The Court also held that, requiring an intermediary to install the contested filtering system did not strike a fair balance between the right to intellectual property (Article 17 of the EU Charter), on the one hand, and the freedom to conduct business (Article 16 of the EU Charter), the right to protection of personal data (Article 8 of the EU Charter) and the freedom to receive or impart information (Article 11 of the EU Charter), on the other. EU Member States are thus arguably not allowed to require the placing of content filtering mechanisms

[88] *Google France case*, Opinion of Mr Advocate General Poiares Maduro delivered on 22 September 2009, para 144.

[89] *See* this EU Commission Press Release dated 29 June 2017: http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

[90] Case C‑360/10 *Sabam v Netlog*, 16 February 2012 ECLI:EU:C:2012:85

[91] The Court confirmed its *Scarlet Extended* ruling Case C‑70/10 Scarlet Extended [2011] ECR I-11959.

of their own initiatives. Our view is that in order to strike a fair balance between freedom of expression and other values on the internet, a proportionate and fact-specific approach is needed. Considering *Sabam v Netlog* as the EU's final word on the question of internet filtering would likely be a mistake.

One of the e-Commerce Directive's safe harbours' rationales was to "*secure the free flow of information*" and to maintain a "*free and open public domain*." [92] Yet another important objective of the Directive was to facilitate the functioning of the EU single market. Promoting the values of freedom of expression online does not go hand in hand with interpreting these safe harbours extensively. Indeed it seems that in some circumstances imposing obligations on intermediaries can lead to better functioning online markets, as in *L'Oréal v eBay*.[93]

The fact that internet intermediaries can be immune from content liability under EU law in fact does not mean that they have no obligations with regard to the content that they make available. A variety of intermediary obligations to monitor and police content are arising under EU law. The General Data Protection Regulation (GDPR),[94] alongside other instruments, strongly regulates intermediaries' obligations to police content. For instance, the GDPR imposes a number of monitoring and transparency obligations on intermediaries such as the responsibility to enforce EU citizens' right of erasure or "*right to be forgotten*" on the internet.[95]

In relation to harmful news, the conflict between speech and data protection typically arises where a newspaper publishes information that either harms or affects the reputation of an individual, and such individual requests the information's removal, first from the newspaper and subsequently from the online platform that hosts the content. In *Google Spain*,[96] the Court of Justice of the European Union recognized that search engines (Google) have an obligation to remove information searchable on

[92] J. Riordan, *The liability of internet intermediaries* (First edition. ed. 2016).
[93] C-324/09 *L'Oréal SA v eBay International AG* EU:C:2011 [2012].
[94] Regulation (EU) 2016/679 (General Data Protection Regulation) OJ L 119, 04.05.2016.
[95] *See* Article 17, the right to be forgotten, also see other obligations of intermediaries eg. under Articles 24, 25 and 33 in Chapter 4 of the Regulation.
[96] Case C-131/12, *Google Spain SL v AEPD and Mario Costeja González*, May 2014.

the web through an individual's name (Mr Gonzalez) upon the individual's request and provided it would be proportionate to do so. After establishing that the activities of a search engine constitute "processing" and that a search engine should be considered a "controller" under Directive 95/46, the antecedent of the current GDPR, the court went on to state that individual rights to privacy and data protection must be interpreted as requiring that upon request:

"*the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.*" [97]

Jonathan Zittrain has argued from a US perspective that the Court of Justice in this case went both too far and not far enough.[98] It went too far because it required a search engines to censor lawful speech that should not be delist-able under the First Amendment. It imposed a speech standard that was too stringent given the borderless nature of the internet and the different standards applicable in other countries. At the same time, the Court did not go far enough because it required Google to de-list the information, but did not require its complete removal from the internet. Information that remains on the internet can be further accessed and processed by third parties, arguably in violation of the individual's privacy rights. For Zittrain, the *Google Spain* ruling is disproportionate because it introduces dangerous internet censorship while insufficiently enforcing privacy rights. As we will see below, some of the legislative efforts that are being made to regulate fake news are objectionable on similar grounds.

No matter the jurisdiction and because of the borderless nature of the internet, the immunities and obligations of online intermediaries in relation to the content that they make available are extremely complex and any decisions as to how to strike a fair balance between immunity and other considerations must be very fact specific. This means that legislation that seeks to impose on

[97] *Id. supra*, at para 88.

[98] J. Zittrain, *Don't Force Google to 'Forget'*, New York Times (May 14, 2014), https://www.nytimes.com/2014/05/15/opinion/dont-force-google-to-forget

intermediaries an overarching and rigid obligation to police and remove harmful news content will hardly comply with constitutional and human rights free speech guarantees. On the other hand, immunities fall short of protecting the values underlying free expression when they are rigidly interpreted.

5. Tackling "Fake News": Intermediaries, Law and Technology

We explored the boundary between harmful speech that must be protected for its own sake, and speech that must be tolerated for the sake of other values, we have investigated the role of intermediaries and how they are currently regulated when it comes to online speech and news in particular. In light of jurisdictional differences in constitutional guarantees, platform immunities and monitoring obligations, regulating "fake news" is not only difficult, but may seem a flawed enterprise to begin with. In this section we try to debunk this cyberlibertarian misconception, outlining a series of possible approaches to the eradication of harmful forms of disinformation and false news.

5.1. From New Rights for Individuals to New Obligations for Platforms and News Organizations

Regulating news is difficult: the right of the press and of speakers to communicate their ideas freely requires a level of protection of harmful speech that, in jurisdictions such as the United States, makes disinformation hard to attack. One way of regulating harmful speech, which we alluded to above, is through the recognition and enforcement of competing individual or collective rights such as the rights of audiences and of the individuals affected by the harmful speech in question.

An example is the European "*right to be forgotten*" discussed above which resulted from the coming into force of data protection legislation and from the *Google Spain* judgment. As Jonathan Zittrain's view on *Google Spain* above illustrates, there is much disagreement on whether the "*right to be forgotten*" correctly balances third parties' rights to speak and access information online with individual privacy. Content can be removed from the internet even if it is completely lawful, provided there is no legitimate interest on the part of others in accessing it. This brings to light an aspect of speech that is reflected in commercial speech

discussions in the United States: in *Central Hudson*,[99] for example, the Supreme Court made clear that it was protecting the right of the public to receive information, not the autonomy of advertisers as speakers.[100] The right to speak and the right to receive or access information are two sides of a coin, and in some circumstances the right to speak freely may be trumped by competing considerations, provided the information that is being communicated is not information that others have a right to access. If we apply this consideration to the question of how to regulate disinformation: it seems that no one has a right to access disinformation per se. Therefore, any rights that compete with the speaker's right to intentionally utter false and harmful information will trump the speaker's rights unless excessive policing of that speech has a high likelihood of chilling other legitimate speech and turning into censorship. Thus, if in a hypothetical case, an audience or individual's right to prevent disinformation can be envisaged, then there would be no strong reasons for a court not to enforce that right over the speaker's right. In order to justify that their right should be protected, and not the audience's, a speaker would need to adduce strong empirical evidence showing that such an approach can chill other speech.

The broad transparency obligations and the data subject rights that the General Data Protection Regulation provides are also a fruitful ground for thinking about innovative solutions to the fake news problem. Indeed, being provided with a better understanding of how false news spreads, either through the operation of a "right of access"[101] or possibly even a "*right to algorithmic explanation*" under the GDPR is a first step toward being able to stop those news at source and also toward defending oneself from harmful information sources and bad actors. The European Data Protection Supervisor, in its *Opinion 3/2018 on*

[99] *Central Hudson Gas & Electric Corp. v Public Service Commission of NY*, 447 U.S. 557, 563 (1980).
[100] *See* J. M. Balkin, *Information Fiduciaries and the First Amendment*, 49 UC Davis Law Rev. 1183, 1213 (2016) and R. Post, A. Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. F. 165, 172 (2015).
[101] Articles 12 to 15 of the GDPR.

online manipulation and personal data,[102] emphasizes the need to combine formal rights with other mechanisms that make the effective exercise of those rights by individuals possible.[103]

The right to be forgotten, the right to an algorithmic explanation and the rights associated to the protection against disinformation can be a part of the answer, but they all appear to have an underlying collective dimension that pure rights language does not easily capture. In an attempt to clarify the relational nature of rights and obligations in a data intensive digital ecosystem, in the United States Jack Balkin introduced a new framework for thinking about online intermediaries and data processors as "*information fiduciaries*,"[104] also as a way of circumventing some of the First Amendment barriers to regulating these entities. He understands information fiduciaries as trustees that have a special relationship of trust and confidence with their customers under private law similar to that of financial advisors, doctors or lawyers, and that therefore have a fiduciary obligation to treat customer information with due care and in a way that is aligned with customers' interests:

"*Because of their special power over others and their special relationships to others, information fiduciaries have special duties to act in ways that do not harm the interests of the people whose information they collect, analyze, use, sell, and distribute. These duties place them in a different position from other businesses and people who obtain and use digital information. And because of their different position, the First Amendment permits somewhat greater regulation of information fiduciaries than it does for other people and entities.*"[105]

Whether or not fiduciary obligations as conceived by Jack Balkin are practicable, configuring new rights, imagining new fiduciary obligations, and ensuring that these rights and obligations are effectively enforceable and can be exercised could lead to a series of prospective improvements for the regulation of false news and disinformation: first, such solutions could

[102] EDPS Opinion 3/2018 on online manipulation and personal data (March 19, 2018), available at: https://edps.europa.eu/sites/edp/files/publication/18-03-19_online_manipulation_en.pdf (last visited September 13, 2018).
[103] *Id. supra*, at 20-22.
[104] J. M. Balkin, *Information Fiduciaries and the First Amendment*, 49 UC Davis Law Rev. 1183 (2016).
[105] *Id. supra*, at 1186.

contribute to the weakening of business models that rely on opaque data harvesting practices and on the support of unreliable data brokers to spread their news and increase their profitability; second, platforms would have to put more resources into explaining how they select, display and suggest content to a user, leaving online users more empowered with regard to how their beliefs are shaped; third, keeping track of information and of the value flows related to such information (including advertising revenues) would become an easier task for individuals and regulators. There seems to be an urgent need to enable the exercise of new rights, and in parallel to look beyond traditional rights-based models for new fiduciary and professional standards of care for platforms and news outlets respectively.

5.2. Is Self-Regulation a Solution to Disinformation?

Platforms are using artificial intelligence to improve and streamline news operations.[106] Journalists and media organizations are increasingly tapping into AI's potential to sort content, produce news articles, police comments, and now even to recognize fake news.[107] Yet as some recent documented experiences show, AI is far from being a perfect tool and its use and impact must be assessed with care, looking at wide societal impact and beyond narrow sets of operational technicalities.[108]

In Europe, the General Data Protection Regulation imposes restrictions on the use of machine learning and automated algorithms to make decisions that affect individuals without any human intervention.[109] This raises some questions on the legality

[106] *See* eg. J. B. Merrill and Ariana Tobin, *Facebook's Screening for Political Ads Nabs News Sites Instead of Politicians*, ProPublica (June 15, 2018), https://www.propublica.org/article/facebook-new-screening-system-flags-the-wrong-ads-as-political (last visited September 13, 2018).

[107] *See* eg. C. Underwood, *Automated Journalism - AI Applications at New York Times, Reuters, and Other Media Giants*, TechEmergence (January 17, 2018), https://www.techemergence.com/automated-journalism-applications/ (last visited Jun 29, 2018).

[108] K. Crawford and R. Calo, *There is a blind spot in AI research*, Nature (October 13, 2016), https://www.nature.com/news/there-is-a-blind-spot-in-ai-research-1.20805 (last visited Jun 29, 2018).

[109] *See* Article 22 of the GDPR, also *see* F. Kaltheuner and E. Bietti, *Data Is Power: Towards Additional Guidance on Profiling and Automated Decision-Making in the GDPR*, 2 Journal of Information Rights, Policy and Practice (2018).

of automated mechanisms put in place by platforms such as Facebook to remove harmful speech, such as terrorist content or fake news. But the exact scope of the GDPR restrictions on automated decision-making and on the use of algorithms for the moment remains far from clear.[110]

In relation to misinformation, in April 2017 Facebook announced four actions that they were taking to tackle misinformation:

1. Collaborating with others to find industry solutions to this societal problem;
2. Disrupting economic incentives, to undermine operations that are financially motivated;
3. Building new products to curb the spread of false news and improve information diversity; and
4. Helping people make more informed decisions when they encounter false news.[111]

Following the Cambridge Analytica scandal in early April 2018 during which it was discovered that Facebook had been tacitly accepting the harvesting of user data by Cambridge Analytica, a political consulting firm with ties to the Trump campaign, [112] Mark Zuckerberg was invited to testify before the Senate and before the House of Representatives.[113] At these and subsequent hearings, Zuckerberg and other prominent Facebook employees have been grilled about Facebook's role in the spread of political disinformation and propaganda, with mixed results. [114] In May 2018, Facebook made other announcements regarding its

[110] *Id. supra.*

[111] https://fbnewsroomus.files.wordpress.com/2017/04/facebook-and-information-operations-v1.pdf

[112] *See* N. Badshah, *Facebook to contact 87 million users affected by data breach*, The Guardian (April 8, 2018), https://www.theguardian.com/technology/2018/apr/08/facebook-to-contact-the-87-million-users-affected-by-data-breach.

[113] *See* coverage of the hearings, eg. Z. Wichter, *2 Days, 10 Hours, 600 Questions: What Happened When Mark Zuckerberg Went to Washington*, New York Times (April 12, 2018), https://www.nytimes.com/2018/04/12/technology/mark-zuckerberg-testimony

[114] *See* European Parliament hearings of May 22nd, see Senate Hearing of September 5th, well covered by Evelyn Douek, Senate Hearing on Social Media and Foreign Influence Operations: Progress, But There's A Long Way to Go, Lawfare (September 6, 2018), https://www.lawfareblog.com/senate-hearing-social-media-and-foreign-influence-operations-progress-theres-long-way-go.

efforts to tackle misinformation.[115] It importantly unveiled three new initiatives:[116] first, they released the "Facing Facts" Short Film;[117] second, they released an updated news literacy campaign which explains how to spot false news and provides information on what actions Facebook is taking; and third, they announced renewed efforts to work with an independent academic commission[118] to better understand the role of social media in misinformation and democracy:

"*the commission will lead a request for proposals to measure the volume and effects of misinformation on Facebook. They will then manage a peer review process to select which scholars will receive funding for their research, and access to privacy-protected data sets from Facebook. This will help keep us accountable and track our progress over time.*"[119]

In parallel, Facebook has been strengthening the transparency of political online advertising on their platform, including new transparency obligations for advertisers of political content, new forms of labelling of advertisements and the disclosure to the public of who paid for the advertisement's display.[120] In October 2018, they announced in their newsroom that three new independent studies confirmed that Facebook's efforts to tackle misinformation had been successful.[121] While it

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115 Published on May 23, 2018, available at: https://newsroom.fb.com/news/2018/05/facing-facts-facebooks-fight-against-misinformation.

116 Also *see* N. Thompson, *Exclusive: Facebook Opens Up About False News*, Wired, 2018, https://www.wired.com/story/exclusive-facebook-opens-up-about-false-news/ (last visited Jul 11, 2018).

117 *Id. supra.*

118 As announced in April 2018: https://newsroom.fb.com/news/2018/04/new-elections-initiative

119 "Facing Facts" (May 23, 2018), available at: https://newsroom.fb.com/news/2018/05/facing-facts-facebooks-fight-against-misinformation/.

120 *See* J. B. Merrill, A. Tobin, M. Varner, *What Facebook's New Political Ad System Misses,* ProPublica (May 24, 2018), https://www.propublica.org/article/what-facebooks-new-political-ad-system-misses; J. B. Merrill, A. Tobin, *Facebook's Screening for Political Ads Nabs News Sites Instead of Politicians*, ProPublica (June 15, 2018), https://www.propublica.org/article/facebook-new-screening-system-flags-the-wrong-ads-as-political (last visited September 13, 2018).

121 T. Lyons, *New Research Shows Facebook Making Strides Against False News*, Facebook Newsroom (October 19, 2018), https://newsroom.fb.com/news/2018/10/inside-feed-michigan-lemonde/.

shows that Facebook are making progress toward fulfilling their set goals, this does not show that their efforts are capable of addressing the problem of false news more generally.

As regards Google, in October 2017 it released a blogpost outlining their initiatives on information quality:[122]

"Over the past 18 months, we've undertaken a broad effort to highlight authoritative sources and minimize the spread of misinformation on our platforms. We are continuing these efforts:

1. Since the election we've made significant improvements to demote misleading and misrepresentative sites in search.

2. In 2016 we also introduced the Fact Check Label to provide useful context for people as they explore information online, which is now available globally in search and Google News.

3. *We are also concerned with sites abusing our ads systems by impersonating news organizations so we introduced a new policy against misrepresentative content for AdSense and Ad Exchange publishers and have since taken action against hundreds of publishers."*

Since then, criticism has mounted against Google's YouTube platform's capacity to polarize and radicalize.[123] Still, Google refused to attend the latest Senate Hearing on Social Media and Foreign Influence Operations on September 5th.

There are multiple weighty issues attached to the appropriateness and ability of large companies such as Facebook and Google to independently design their own disinformation policies and compliance programs, and also questions about the role of the state in facilitating or checking on private entities' self-regulatory behavior. On the one hand these companies have an incentive to self-regulate and comply to avoid excessive regulatory burdens and state interference. On the other hand, as it emerged from recent public hearings, they want regulators to intervene and clarify some of the basic rules of the game. In other words, companies want certainty about the rules that they must comply with, but flexibility on how they must comply, and of course they do not want penalties or public shaming. But these

[122] Google Blog: https://www.blog.google/topics/public-policy/security-and-disinformation-us-2016-election/

[123] Z. Tufekci, *YouTube, the Great Radicalizer*, New York Times (March 10, 2018) https://www.nytimes.com/2018/03/10/opinion/sunday/youtube-politics-radical.html.

companies' perspective is only one side of the complex regulatory puzzle that must be taken into account in designing solutions to the disinformation problem. The other side of the puzzle, as we have explained throughout this paper, is the question of who is best placed to regulate speech: is it the state, which according to US First Amendment doctrine must refrain from regulating news content, or is it private actors who have a degree of independence from public oversight but may sometimes be seen as equally powerful and intrusive as the state?

The answer is probably to be found in new forms of democratic accountability for the actions of companies. This might require some minimal state regulation within and across territorial boundaries, combined with other forms of self-governance including those that Balkin has started to grapple with through his idea of 'information fiduciaries'. Recently a number of large technology companies including Apple, Google, Facebook, Sony and Intel have joined forces with NGOs and research centers to form the Partnership on AI. We must look to this kind of initiative with a critical eye, while maintaining a curious and open mind when it comes to assessing the results of such joint efforts.

5.3. European Efforts to Tackle Fake News

5.3.1. The German NetzDG

In March 2017 German legislators proposed a new "fake news" law, the *Netzwerkdurchsetzungsgesetz* (NetzDG),[124] which was adopted in September 2017, came into force on 1st January 2018 and is the first of its kind. It makes platforms liable to remove hate speech and other offensive content from their platforms within 24 hours in obvious cases or within 7 days in other cases. The law has been widely criticized for being overbroad and misconceived by social media companies[125] as well as a variety of NGOs, academics and other stakeholders.[126]

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[124] For the original German version: http://www.buzer.de/s1.htm?a=1&g=NetzDG.

[125] S. Shead, *Facebook said Germany's plan to tackle fake news would make social media companies delete legal content* Business Insider (2017), http://uk.businessinsider.com/facebook-says-germany-fake-news-plans-comply-with-eu-law-2017-5 (last visited Jul 9, 2018).

[126] D. Sullivan, *Proposed German Legislation Threatens Free Expression Around the World Global Network Initiative* (2017),

The law applies to "social networks" defined in Section 1(1) as "*tele media providers who operate commercial platforms that are meant to enable users to exchange or share any kind of content with other users or to make such content available to the public*". This definition clearly includes Facebook, YouTube and Twitter. An initial draft also included instant messaging apps such as Whatsapp but the language was revisited and now appears to exclude individualized messaging services. The definition excludes platforms with journalist content for which the platform operator takes full responsibility, platforms that focus on 'specific topics' (such as LinkedIn, or gaming platforms), 'small' social networks with less than two million registered users.

The law imposes a duty on social networks to remove certain categories of content after being notified. Section 1(3) of the law identifies 21 different criminal offences that are eligible to be treated as removable "hate speech". Section 3(2) of the law imposes an obligation on "social networks" to take note of complaints and process them if applicable by removing or blocking the content within 24 hours for content that is 'obviously unlawful' under one of the 21 criminal offences and within 7 days for other content. "Notice" in the law occurs on receipt of the complaint whether or not the social network has actual knowledge of the infringement. This may raise compatibility issues with the European e-Commerce Directive, whose language under Articles 13 and 14, as discussed above, denies immunity only if there is 'actual knowledge' or 'awareness' on the part of the intermediary. "Social networks" must also provide effective and transparent mechanisms for addressing user-complaints. There is also a possibility for "social networks" to hand difficult cases to an independent body within 7 days. This measure has been contested because it still requires the platform to take an expedited decision on whether or not certain content is difficult content that needs to be referred.

The law has not been warmly welcomed. In an open letter to eight EU commissioners, a group of six civil society and industry associations argued that the law is in grave conflict with established EU law and would chill online speech by incentivizing

https://globalnetworkinitiative.org/proposed-german-legislation-threatens-free-expression-around-the-world/ (last visited Jul 9, 2018).

companies to drastically police and remove online content.[127] The law outsources decisions about free speech to private companies who are not well-placed to make such decisions, and it arguably imposes excessive fines of up to 50 million Euro for violations of rules that are not entirely clear. Technology companies for obvious reasons do not like the burden that the NetzDG imposes on them and would prefer for an independent public body to make determinations on the worthiness or accuracy of online content. Extremist right wing politician Beatrix von Storch was very unhappy to see her account suspended and some of her speech removed shortly after the law's coming into force.

A variety of other national efforts are emerging, inspired by the NetzDG,[128] also in countries without the same constitutional and procedural guarantees. Such laws have raised significant concerns from a freedom of speech perspective.

5.3.2. The European Union

In January 2018, the European Commission set up a high-level group of experts, "HLEG" as discussed above, to advise on policy initiatives to counter fake news and disinformation spread online. The Group issued a Report on 12 March 2018,[129] which advised the Commission to avoid narrow simplistic solutions and instead combine short and long-term solutions through a 'multi-dimensional' approach based on a number of parallel efforts organized along five main pillars: (1) a legal and regulatory effort to enhance the transparency of online news, including on data practices; (2) an educational effort to promote digital media literacy; (3) a technical effort to develop tools that empower readers and journalists and allow them to engage in positive public discourse; (4) a cultural effort to preserve and enhance the

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127 Open Letter to Eight EU Commissioners, *Germany's Draft Network Enforcement Law is a threat to freedom of expression, established EU law and the goals of the Commission's DSM Strategy -- the Commission must take action* (May 22, 2017), https://edri.org/files/201705-letter-germany-network-enforcement-law.pdf.

128 *See* some of the efforts that have been taken around the world in this article: D. Funke, *A guide to anti-misinformation actions around the world*, Polynter (July 24, 2018), http://amp.poynter.org/news/guide-anti-misinformation-actions-around-world?__twitter_impression=true.

129 https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation

diversity and sustainability of the European news media ecosystem, and finally (5) an effort keep promoting research on and monitoring of disinformation in Europe.

A public consultation was also carried out, [130] which resulted in the announcement of a number of measures not already presented by the HLEG Report.[131] These measures include:

- A Code of Practice on Disinformation through which platforms would jointly commit to ensuring advertising transparency, in particular by restricting targeting options for political advertising and reducing revenues for purveyors of disinformation; greater algorithmic clarity and third-party verification; exposure to a plurality of viewpoints and information sources; elimination of fake accounts and bots; and continuous monitoring of online disinformation. A Code of Practice was approved in September 2018 by large online companies including Google and Facebook;[132]
- An independent European network of fact-checkers and a secure European online platform on disinformation both of which will enable common working methods, the exchange of best practices, and the broadest possible coverage of factual corrections across the EU;
- A Coordinated Strategic Communication Policy whose aim is to counter false narratives about Europe and tackle disinformation within and outside the EU.

Other initiatives include media literacy campaigns, elections support against cyber threats in EU Member States, the promotion of voluntary online identification systems, the promotion of media plurality and information quality. New efforts are being made as we write. We are convinced that the HLEG is correct in advocating in favor of a careful approach that seeks to tackle the problem from various angles. What we are less

130 *See* https://ec.europa.eu/digital-single-market/en/news/summary-report-public-consultation-fake-news-and-online-disinformation

131 *See* European Commission Press Release Tackling online disinformation: Commission proposes an EU-wide Code of Practice (26 April 2018), http://europa.eu/rapid/press-release_IP-18-3370_en.htm.

132 S. Writer, *Google, Facebook Agree on EU 'Fake News' Code of Conduct* (September 26th, 2018), https://theglobepost.com/2018/09/26/eu-fake-news-code/.

convinced about is the legitimacy of some of these suggested policies. The Commission's stated goal of ensuring '*the protection of European values and security*'[133] and the proposed '*Coordinated Strategic Communication Policy*' aimed at '*countering false narratives about Europe and tackling disinformation within and outside the EU*'[134] may indeed be inappropriate if carried out by a transnational entity that is not only very far from being a government, but is also under increasing amounts of criticism, lacks democratic legitimacy and is losing public support. In other words, the European Commission should weigh the benefits and costs before acting with excessive hubris in an area as politically sensitive as that of disinformation and fake news in the digital age.

6. Conclusion

In this paper we tried to offer a bird's eye view of the complex dynamics and legal constraints that shape the digital information ecosystem, of how the 'fake news' and disinformation debate fits within this broader picture, and how lawyers and policy-makers should think about possible solutions to the issues at hand. On the one hand, we believe that some action against disinformation is needed, and the best actions focus on the regulation of platforms rather than direct regulation by the state, eg. ensuring that platforms have effective mechanisms for eradicating fake account and coordinate disinformation efforts, ensuring greater transparency and traceability of disinformation and the financial incentives related to it, ensuring appropriate remedies for individuals affected. On the other hand, it seems that governments and institutions around the world, including some European countries, are so eager to regulate fake news that they might overstep their legitimacy bounds in doing so. In this delicate area, we echo the High Level Expert Group and recommend a high level of caution. Free speech values in each territory can be debated and questioned, but they remain fundamental limits to what governments and private entities are allowed to do to fight bad actors in a democracy. A healthier digital news ecosystem cannot be brought about unless we seek an

[133] *Id. supra.*
[134] *Id. supra.*

epistemic common ground, which can only be achieved by understanding the important role of infrastructure and gatekeepers in shaping discourse and by testing new regulatory possibilities.

LEGAL IMMIGRATION AND LOCAL RESILIENCE IN ITALY: THE CASE OF THE INTEGRATION COUNCILS

*Marco Calabrò**

Abstract

Currently in Italy coexist different regulatory approaches not as much in the field of the entrance, but more in the field of the stay of legal immigrants. Local ordinances limiting social rights for foreigners, as well as some restrictive regional welfare laws are expression of "excluding" interventions, based on the cultural identity protection and on the formal citizenship enhancement (C. Schmitt). Nevertheless, some recent regional laws in the field of social integration, as well as local integration policy, reveal a different approach, founded on a new "permeable" concept of identity (J. Habermas): both those who welcome, and those who are welcomed, are supposed to place themselves in a mutual listening and understanding attitude. The sustainable development of our pluralist societies firstly needs the implementation of legal tools able to enhance local resilient approach – dynamic and open to change – supporting institutional (as well as spontaneous) moments of dialogue, discussion and mutual knowledge. Meanwhile, resilient attitudes should be considered even from the immigrants' point of view, through a differentiated analysis of several immigrant communities' behaviours: even if foreigners share common stress causes (language difficulties, sense of marginalisation, self-determination obstacles), the way each single ethnic group faces these difficulties is often deeply different.

That being stated, this paper moves from the consideration that national Italian legislation in the field of immigration recognizes to legal immigrant a specific right to be involved in social, political and economic policy at local level. However – distinguishing between policy of immigration and policy for immigration – the Italian Constitutional Court has stated the exclusive regional legislative power in the field of participation rights of immigrants. Hence, the aim of this paper is to examine the

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heterogeneous regional laws (and also their municipal implementation) concerning one of the most effective and interesting model of political participation for legal immigrants: the integration council. It consists in a collegial body, holder of advisory functions in the field of immigration local policy, partly (in some cases exclusively) made up of representatives of the legal immigrant population present locally. The study will have as its objects several points: the councils legal status; the members designation methods; the binding or not-binding effectiveness of acts issued by the integration council. The purpose is to underline the several points of distinction existing among the various models of integration councils operating in Italy at municipal and regional levels, in order to identify best practices, as well as critical issues and weaknesses.

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1. Preamble. The different models of resilience in the relational dynamics between the Italian legal system and regular immigrants.

The study of the *status* of the regular immigrant and, more specifically, of the rights and duties ascribable to him, intercepts the theme of resilience from a twofold perspective: on the one hand, it allows to examine how much and in what terms the community within which the foreigner is inserted is willing to take action in order to respond to the needs of integration coming from those who enter "from outside"; on the other, the profile of the level of adaptability and openness of the immigrant who approaches a new reality, in terms of both rules and values, emerges.

It is possible to report at least three different resilience models in the context being dealt with: a) mutual hostility (identification of strict limits in the recognition of the rights of the foreigner by the host system, and attitude of self-ghettoization by the immigrant community); b) full assimilation of the immigrant within the new system, with the relative irrelevance of the values and culture of origin; c) integration, through a slow and difficult process of mutual knowledge and understanding[1]. In literature, there are several studies that have tried to measure the degree of effectiveness of these models; effectiveness, in fact, understood as resilience, or as the capacity to adapt to changes without losing its essential characteristics[2]. But it is clear that the cited different models have a different degree of adaptability, depending on the "type of pressure" they undergo: in this light, it is therefore necessary to distinguish between irregular immigration, asylum seekers and regular immigration phenomena[3].

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[1] For a reconstruction of the traditional debate about the different models of State intervention towards the migration phenomenon, see C. Bertossi, *National Models of Integration in Europe*, ABS 1561 (2011); S. Castles, *How Nation-States Respond to Immigration and Ethnic Diversity*, in S. Vertovec (ed), *Migration and Social Cohesion* (1999).

[2] A. Caviedes, *European Integration and the Governance of Migration*, 12 Journal of Contemporary European Research 552 (2016); P. Bourbeau, *Migration, Resilience and Security: Responses to New Inflows of Asylum Seekers and Migrants*, 41 J. Ethn. Migr. Stud. 1958 (2015).

[3] S. Gozzo, *Quale integrazione? Politiche per l'accoglienza e percezione dell'immigrato in Europa*, 1 Autonomie locali e servizi sociali 17 (2017).

The huge and difficult to control (as well as to regulate) irregular migration flows that are affecting Europe in recent years have, among other things, led to a redefinition of public policies, increasingly inspired by assimilative, if not exclusionary, models[4]. To this must be added the incidence of the "terrorism factor", whose emergency character pushes away the perspective of integration in favor of that of security and of public order[5].

In the light of these phenomena, even in Italy the debate is now largely devoted to the issues of security and protection of fundamental rights related to initial reception[6]. The aim of this paper, however, will be to verify the effectiveness of Italian migration policies with regard to the phenomenon of regular immigration: it is clear that – in a long-term perspective – is no less important to study the public policies which are aimed at granting the construction of legal, social and cultural bases for the effective integration of those who come to Italy not to escape

[4] G. Rayap, I. Ruyssen, S. Standaert, *Measuring and explaining Cross-Country Immigration Policies*, World Development 141 (2017); L. Bjerre, M. Helbling, F. Römer, M. Zobel, *Conceptualizing and measuring immigration policies: A comparative perspective,* International Migration Review 555 (2015). For an analysis of the debate in the U.S. and Canada see C. G. Massey, *Immigration quotas and immigrant selection*, Explorations in Economic History 21 (2016).

[5] For a multi-level analysis of the effects of the recent terrorist events on the immigration policies, see Y. Young, P. Loebach, K. Korinek, *Building walls or opening borders? Global immigration policy attitudes across economic, cultural and human security contexts*, Social Science Research 83 (2018). On the difficulties arising from the absence of common European immigration and anti-terrorism policies, see N.D. Coniglio, K. Kondoh, *International integration with heterogeneous immigration policies*, International Economics 15 (2015). Denounces the tendency to make an improper confusion between the concepts of public order and security A. Fioritto, *L'amministrazione dell'emergenza tra autorità e garanzie* (2008).

[6] M. Interlandi, *Fenomeni immigratori tra potere amministrativo ed effettività delle tutele* (2018); N. Gullo, *Prevenzione del terrorismo, tutela dell'ordine pubblico e diritti fondamentali degli stranieri: riflessioni sull'espulsione degli stranieri prevista dall'art. 3, d.l. n. 144 del 2005*, Diritto e questioni pubbliche 461 (2017); M. Consito, *La tutela amministrativa del migrante involontario. Richiedenti asilo, asilanti e apolidi* (2016); F. Frattini, *Fenomeni migratori e sicurezza in Europa*, Gnosis 22 (2015); F. Duvell, *Fundamental Rights of Migrants in an Irregular Situation in the European Union*,http://fra.europa.eu/fraWebsite/attachments/FRA_2011_Migrants_in_an_irregular_situation_EN.pdf; M. Immordino, *Pubbliche amministrazioni e tutela dei diritti fondamentali degli immigrati*, Federalismi 1 (2014).

temporarily from unsustainable living conditions, but rather to lay the foundations of a new path of life[7].

As already noted, the first approach that can be registered in Italy with regard to immigrants, even if regulars, is of an exclusionary nature, aimed at defending the national identity through the enhancement of citizenship in its traditional sense[8]. In literature, the s.c. Social Identity Theory explains the defensive reaction of the host community with the fear of loss of national characteristics, which leads to a closing attitude by the dominant group[9]. A clear manifestation of this exclusionary attitude has emerged in those necessity and urgency local ordinances aimed at – pursuant to public security reasons – making the access criteria to the registry office more selective, by means of more stringent requirements than those provided by state law[10]. The Italian Constitutional Court intervened with a resolution stating the illegitimacy of the state provision which allowed Mayors to give life, through temporary ordinances, to permanent long-term effects capable of affecting fundamental rights and freedoms of immigrants [11]. Even more significant is the experience of the most recent regional laws on access to social services for foreigners who are regularly resident in Italy. In this regard, there is the issue of those welfare benefits which go beyond the fundamental rights, but are still recognized to all persons demonstrating to meet certain requirements, and – as will be highlighted in the next paragraph – in Italy, recently, there have been several attempts by some regional legislators to introduce very restrictive disciplines.

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[7] A.B. Anderson, *Commentary: The Migrant Crisis and Ethnic Minority Integration in Europe*, JEMIE 108 (2017).

[8] F. Bordignon, L. Ceccarini, F. Turato, *Migranti e cittadinanza al tempo delle crisi globali*, 4 Rivista delle Politiche Sociali 185 (2015); M. Savino, *Le libertà degli altri. La regolazione amministrativa dei flussi migratori* (2012).

[9] M.A. Cea D'Ancona, *What determines the rejection of immigrants through an integrative model*, Social Science Research 1 (2018); J. Hainmueller, D.J. Hopkins, *Public Attitudes Toward Immigration*, Annual Review of Political Science, 225 (2014).

[10] N. Zorzella, *I nuovi poteri dei sindaci nel pacchetto sicurezza e la loro ricaduta sugli stranieri*, 3-4 Dir. imm. cit. 57 (2008).

[11] Constitutional Court, April 7, 2011, n. 115. See also P. Cerbo, *Principio di legalità e «nuove ed inedite» fattispecie di illecito create dai Sindaci*, Le Regioni 2015 (2012).

The second relational model that may be established between a legal system and the regular immigrant, i.e. the inclusive type, is aimed at allowing a full assimilation of the immigrant within the community and refers to the notion of Habermas's "constitutional patriotism"[12], who theorized a rationality that is common to all men, which is discursive and communicative and should bring everyone to agree upon a "common constitution". However, such harmony of principles does not come to a universal dimension, since it can only be the reflection of the idea of man and community of the hosting nation. In this context it is possible to recall the Integration Agreement, a sort of contract between the Italian State and the foreigner through which the regular immigrant undertakes to acquire certain credits within a certain time, on pain of revocation of the residency permit[13]. Among other things, the immigrant is required to explicitly adhere to the Charter of Values of Citizenship and Integration[14], which is a document summarizing and explaining the fundamental principles and values of Italian law regulating the collective life: thus, the foreigner is required not simply to know and respect (which would evidently be shareable) the national culture and values, but rather to embrace them. The philosophy behind the Integration Agreement is not to integrate, but to "select" only those immigrants willing to give up their original identity and fully embrace Italian values and culture[15].

Ultimately, the Integration Agreement appears to be a classic product of the assimilation theoretical model, according to which only the complete adherence to the cultural system of the host Country would allow the immigrant to reach a satisfactory level of integration[16]. However, this approach was strongly

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[12] J. Habermas, *La costellazione postnazionale – Mercato globale, nazioni e democrazia* (2002).

[13] See http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/accordo-dintegrazione. The acquisition of the aforementioned credits takes place through the attendance of training courses covering the Italian language, the Constitution, the educational system, healthcare, etc.

[14]http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/documentazione/circolari/carta-dei-valori-della-cittadinanza-e-dellintegrazione.

[15] E. Gargiulo, *Integrazione o esclusione? I meccanismi di selezione dei non cittadini tra livello statale e livello locale*, 1 Dir. imm. cit. 41 (2014).

[16] R. Alba, V. Nee, *Rethinking assimilation theory for a new era of immigration*, International Migration Review 826 (1997).

criticized in the light of recent experiences of European immigration, where it emerged that assimilation policies do not lead to the same results if applied to different immigrant groups. Factors such as ethnicity, race and, more generally, the cultural system of origin, impose alternative models of integration, attentive to the ethno cultural specificity of each minority group[17].

A substantial evolution of these recent theoretical approaches is represented by the third and final relational model that can be registered in Italy between legal order and legal immigrant is based on the recognition and, when necessary, protection of cultural diversity, in a perspective that looks favorably on multiculturalism[18]. Our society is evolving towards an increasingly pluralistic dimension and, in the face of this process, an attitude aimed at protecting national cultural identity risks leading to a dangerous situation of plural mono-culturalism, of fragmented and non-dialogue communities[19]. On the contrary, it is only by recognizing the value of cultural diversity and enabling legal immigrants to integrate fully into the new society that the goals of security and social cohesion can be achieved[20]. For these purposes, as we will try to demonstrate in this paper, it is necessary to guarantee the foreigner an easy and wide access to welfare, but this operation will not lead to significant results if it is not accompanied by the contextual recognition of some rights of

[17] D. Maskileyson, M. Semyonov, *On race, ethnicity and on the economic cost of immigration*, Research in Social Stratification and Mobility 19 (2017); M.A. Painter, M.D. Holmes, J. Bateman, *Skin tone, race/ethnicity, and wealth inequality among new immigrants*, Social Forces 1153 (2015); M. Bommes, *Transnationalism or assimilation?*, in C. Boswell, G. D'Amato (eds.), *Immigration and Social System* (2012).

[18] C. Taylor, *Multiculturalism and «The Politics of Recognition»* (1992); G. Azzariti, *Multiculturalismo e Costituzione*, Politica del diritto 3 (2016).

[19] A. K. Sen, *Identità e violenza* (2008). More recently, on the same subjects, see P. Grajzl, J. Eastwood, V. Dimitrova-Grajzl, *Should immigrants culturally assimilate or preserve their own culture? Host-society natives' beliefs and the longevity of national identity*, Social Science Research 96 (2018).

[20] M. Calabrò, *Italian regular immigration public policy: between exclusion, assimilation and integration*, 3 EU Law Journal 34 (2017). Particularly interesting, from this point of view, is the study of B. Sahin, *Social Integration of Immigrants: a Swot Analysis*, Procedia-Social and Behavioral Sciences 110 (2016), where the author – starting from the analysis of the Syrian crisis – suggests possible policies for implementation of social integration and discusses their advantages.

participation in the public/political life of the community in which the legal immigrant resides[21].

The author is fully aware that this last scenario, however desirable, appears at the moment rather difficult to fully achieve, in the light of the disruptive consequences of the migratory phenomena that are affecting Europe, and Italy in particular, in recent years. The emergence of the "security" profile has led, inter alia, to a debate focused on the rights of the citizen, rather than those of the individual, adhering to a notion of citizenship understood in an exclusionary sense.[22]. As we will see below, today in Italy the citizen is often framed in a relationship of strong otherness with the foreigner, considered today an intruder, a problem to be solved, certainly not a resource to "include"[23].

2. The recognition of social rights as an essential prerequisite for genuine integration.

Despite the economic literature is substantially agreed that, above all in Countries with low birth rates such as Italy, international migration brings important economic and social benefits[24], it is still possible today to register a broad anti-migration sentiment into host societies, in relation to the impact of the phenomenon on welfare [25]. According to the s.c. Group Conflict Theory,

[21] V. Prudente, *In tema di partecipazione degli stranieri all'amministrazione locale*, 1 Nuove autonomie 149 (2013).

[22] T. Wotherspoon, *Migration, Boundaries and Differentiated Citizenship: Contested Frameworks for Inclusion and Exclusion*, 6 Social inclusion 153 (2018); S. Staiano, *Migrazione e paradigmi della cittadinanza: alcune questioni di metodo*, Federalismi (2008).

[23] P. Lombardi, *Giudice amministrativo e cittadinanza: quale contributo per un concetto giuridicamente sostenibile?*, Federalismi (in press); P. Chiarella, *Il terzo intruso: problemi del fenomeno migratorio in Europa*, 7 Federalismi (2017); A. Baraggia, *La cittadinanza "composita" in alcune esperienze europee. Spunti di riflessione per il caso italiano*, 18 Federalismi (2017).

[24] V. Bove, L. Elia, *Migration, Diversity and Economic Growth*, Word Development 227 (2017); D. Kancs, P. Lecca, *Long-term social, economic and fiscal effects of immigration into the EU: The role of the integration policy*, 8 Economics and Econometrics Research Institute Paper Series (2016); G.J. Borjas, *Immigration Economics* (2014).

[25] P. Poutvaara, M.F. Steinhardt, *Bitterness in life and attitudes towards immigration*, European Journal of Political Economy 1 (2018); M. Bommes, *Welfare systems and immigrant minorities: the cultural dimension of social policies and its*

negative attitudes towards immigrants mainly derive from the perception of the foreigner as a competitors in the acquisition of scarce resources[26].

In consideration of the above, with regard to the recognition of social rights of legally residing immigrants, Italy has recorded fluctuating positions, both at state and local level. Pursuant to art. 117 of the Italian Constitution, the matter of immigration falls within the exclusive legislative competence of the State, but the Italian Constitutional Court has long ago clarified that only the profiles relating to the entry and the modalities of stay of the foreigner in Italy are to be considered strictly the competence of the State, since they are connected to the area of public security[27]. On the contrary, different areas, connected to profiles of great importance for the life of the immigrant already residing in Italy – such as assistance, education and health – must be managed in close coordination between the State and the Regions[28].

This model of multi-level regulatory intervention, which is also necessary in view of the intrinsic complexity of the problems connected with the subject of immigration[29], therefore entrusts an important role to the Regions. This, however, in the absence of

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discriminatory potential, in C. Boswell, G. D'Amato (eds.), *Immigration and Social System* (2012); P. Huber, D. A. Oberdabernig, *The impact of welfare benefits on natives' and immigrants' attitudes toward immigration*, European Journal of Political Economy 53 (2016).

[26] S. Pehrson, E.G.T. Green, *Who we are and who can join us*, Journal of Social Issues 695 (2010). For a recent review of the several theories on the explanations of anti-immigrant attitudes, see M.A. Cea D'Ancona, *What determines the rejection of immigrants through an integrative model*, cit. at 9, 1.

[27] Constitutional Court, 13 April 2017, n.81; Constitutional Court, January 18, 2013, n. 2; Constitutional Court, April 15, 2010, n. 134; Constitutional Court, May 14, 2008, n. 131.

[28] Constitutional Court, February 25, 2011, n. 61; Constitutional Court, March 7, 2008, n. 50. See also L. Ronchetti, *I diritti di cittadinanza dei migranti. Il ruolo delle regioni* (2012); B. Pezzini, *Una questione che interroga l'uguaglianza: i diritti sociali del non-cittadino*, Vv.AA., *Lo statuto costituzionale del non cittadino* (2010).

[29] E. Di Salvatore, M. Michetti, *I diritti degli altri. Gli stranieri e le autorità di governo* (2014); F.G. Scoca, *Protection of diversity and legal treatment of the foreinger: the Italian model*, 1 Il diritto dell'economia 15 (2013); M.R. Spasiano, *Principi sull'immigrazione*, in F. Astone, F. Manganaro, A. Romano Tassone, F. Saitta (eds.), *Cittadinanza inclusiva e flussi migratori* (2009); C. Corsi, *Lo Stato e lo straniero* (2001).

organic state public policies, leads to a profoundly multifaceted and heterogeneous regulatory framework[30]. The non-degradable nature of (some) social rights does not appear to be the object of dispute: the Italian Constitutional Court has long ruled that the inviolable rights recognized by the Italian Constitution belong to individuals «not because they participate in a specific political community, but because they are human beings»[31]. Less obvious, however, is the concrete definition of such a "minimum core" constitutionally guaranteed, in the absence of a list of specific social benefits that can configure the essential core of each inviolable right[32].

The state regulations on the access to social assistance benefits for foreigners (non-European) appear rather insufficient. In fact, it limits itself to equating to Italian citizens only foreigners holding a long-term residence permit or a residence permit for a period of not less than one year[33]. The vagueness of the discipline

[30] C. Panzera, *Immigrazione e diritti nello Stato regionale. spunti di riflessione*, 1 Dir. Pubb. 141 (2018); F. Scuto, *Le Regioni e l'accesso ai servizi sociale degli stranieri regolarmente soggiornanti e dei cittadini dell'Unione*, 1 Dir. imm. cit. 56 (2013); D. Strazzari, *Stranieri regolari, irregolari, "neocomunitari" o persone? Gli spazi di azione regionale in materia di trattamento giuridico dello straniero in un'ambigua sentenza della Corte*, Le Regioni 1037 (2011).

[31] Constitutional Court, July 25, 2011, n. 245. See also, Constitutional Court, 7 December 2017, n. 258. On the constitutional legitimacy (in terms of non-configurability of a hypothesis of violation of fundamental human rights) of the current Italian regulation of irregular immigrant rejection, see Constitutional Court, 20 December 2017, n. 275.

[32] In the doctrine there are alternating positions aimed at guaranteeing foreigners all the inviolable rights, and approaches that instead support the need to verify, with regard to each right that the Constitution exclusively reserves to citizens, the existence or not of reasons suitable to support this choice [F. Crepeau, A. Purkey, *Facilitating Mobility and Fostering Diversity. Getting Eu Migration Governance to Respect the Human Rights of Migrants*, 92 Liberty and Security in Europe 1 (2016); P. Caretti, *I diritti fondamentali* (2005); C. Corsi, *Diritti fondamentali e cittadinanza*, Dir. pubbl. 805 (2000)]. For a review of the debate on the opportunity to use ordinary or exceptional legal instruments to guarantee fundamental rights in socio-economic emergency situations, see P. Bonetti, *Terrorismo, emergenza e Costituzioni democratiche* (2006). On the delicate relationship between the application of anti-terrorist policies and the protection of fundamental rights, see E. Shor, I. Filkobski, P. Ben-Num Bloom, H. Alkilabi, W. Su, *Does counterterrorist legislation hurt human rights practices? A longitudinal cross-national analysis*, Social Science Research 104 (2016).

[33] Art. 41 d.lgs. n. 286/1998.

at the state level leaves ample room for maneuver to the regional legislators, who, in the majority of cases, have, in reality, extended the access to welfare to all the legal immigrants, regardless of the duration of their stay, derogating, *in melius*, the state regulations. However, there has been no lack of regional legislation on the contrary, aimed at limiting access to social benefits for immigrants compared to what they are recognized in national legislation[34]. In some cases, the discriminatory element was based on the citizenship requirement (completely excluding non-Italians from access to welfare[35]); in other cases, the differential element was identified in residence, through the provision of different requirements for the citizen (for whom it is generally sufficient to prove simple residence) and for the foreigner (who was required to be resident, uninterruptedly, for 3, 5, if not sometimes 10 years[36]).

The Italian Constitutional Court has, however, declared the constitutional illegitimacy of these provisions, both of the regional laws that completely excluded non-citizens[37] from access to welfare, and of those that required an uninterrupted residence of a number of years that could not be justified by the type of social benefit provided[38]. Although the Court does not rule out the possibility that the element of precariousness of residence may be a legitimate criterion for the non-attribution of a social benefit, it does require a reasonable correlation between the conditions to which access to the benefit is subject and the purpose of that

[34] See art. 2, l.r. Emilia Romagna, March 24, 2014, n. 5; art. 14, l.r. Abruzzo, December 13, 2014, n. 46; art. 2, l.r. Campania, February 8, 2010, n. 6; art. 6, l.r. Toscana, June 9, 2009, n. 29; art. 10, l.r. Puglia, December 4, 2009, n. 32; art. 5, l.p. Bolzano, April 30, 1991, n. 13; art. 2, l.r. Umbria, April 10, 1990, n. 18; art. 2, l.r. Veneto, January 30, 1990, n. 9; art. 2, l.r. Lombardia, July 4, 1988, n. 38.

[35] See l.r. Lombardia, February 12, 2002, n. 1; l.r. Friuli Venezia Giulia, March 31, 2006, n. 6.

[36] See l.p. Trento, July 24, 2012, n. 15; l.r. Trentino Alto Adige, December 14, 2011, n. 8; l.p. Bolzano, October 28 2011, n. 12; l.r. Friuli Venezia Giulia, November 30, 2011, n. 16; l.r. Friuli Venezia Giulia, June 6, 2017, n. 13.

[37] See Constitutional Court., February 9, 2011, n. 40; Constitutional Court, December 2, 2005, n. 432. See also G. Corso, *Straniero, cittadino, uomo. Immigrazione ed immigrati nella giurisprudenza costituzionale*, Nuove autonomie 386 (2012).

[38] See Constitutional Court, May 24, 2018, n. 106; Constitutional Court, July 4, 2013, n. 172; Constitutional Court, June 7, 2013, n. 133; Constitutional Court, January 18, 2013, n. 2. For a recent decision of unconstitutionality of a state law restricting the right of legal immigrants to access facilities for the payment of the rent, see Constitutional Court, 20 July 2018, n. 166.

benefit[39]. Thanks to the Court corrective action, therefore, the regions will only be able to set limits on access to social benefits for legal immigrants if these limits constitute a not unreasonable discrimination between citizens and foreigners[40].

In Italy, therefore, the right of legal immigrants to access adequate levels of social benefits can now be considered guaranteed[41], but this does not appear to be able, on its own, to determine the conditions for achieving a real process of integration. As recent doctrine has shown, in the perspective of the future development of a safe and multi-ethnic society, in addition to the theme of access to social welfare services, there is the implementation of public integration policies operating at different levels, cultural, social and political[42], so as to put the immigrant in a position to feel an integral part of the (new) community to which he belongs.

3. The debate on the right of foreigners to participate in local public life.

The described progressive substitution of the criterion of residence to that of citizenship has oriented the debate towards the analysis of the evolution of the very notion of citizenship or, better, of citizenships, in order to verify if, and eventually within

[39] In the European context, is particularly significant the Long Term Residence Directive (2003/109/CE). As far as it concerns in this context, through the study of several cases dealing with this directive, has been underlined that «rights are not considered as a prize for an already successful and completed integration», D.A. Arcarazo, *Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Post-National Form of Membership*, 21 European Law Journal 321 (2015).

[40] I. Ciolli, *The new challenges of constitutional Courts: global markets, terrorism and immigration. The Italian case*, 3 Dir. Pubbl. Comp. Eur. 569 (2017), analyzes the important role played by constitutional Courts in situations of emergencies and frequent recourse to exceptional remedies.

[41] Despite of the recent emergence of anti-migrant attitudes, which risks to entail steps backwards (see previous paragraph 1). Lastly, on this issue, E. Ales, *Il diritto alle prestazioni sociali dei migranti economicamente non attivi: una parola definitiva dalla Corte di giustizia*, Giorn. dir. lav. rel. ind. 295 (2017).

[42] R.M. Niculescu, *In Search of a Dream at the Crossroads of Inculturation and the Integration Within an inTer-Cultural Society – Challenges of Immigration*, Procedia-Social and Behavioral Sciences 400 (2013); F. Fracchia, *Integrazione, eguaglianza, solidarietà*, 2/3 Nuove autonomie 229 (2013); J. De Lucas, *Migrazioni, diritti, cittadinanza nell'Unione europea. Sulle condizioni di legittimità della politica d'immigrazione*, 4 Dir. imm. cit. 13 (2004).

what limits, the formal meaning of citizenship still finds application[43]. As already mentioned above, due to phenomena such as irregular immigration and terrorism, it is possible to register a recent tendency to enhance the notion of citizenship in a formal sense, as a factor of exclusion[44]. However, not only in Italy, it is possible to register signals of opposite tenor, such as the recent bills under discussion in several European Countries on the subjects of *ius soli* and *ius culturae*[45].

As far it is more relevant here, the evolution of the community towards multicultural models raises the question of the degree of democratic participation, of active involvement in the public life of the community, to be recognized by the non-citizen[46].

In this regard, the Strasbourg Convention on the Participation of Foreigners in Public Life at Local Level, promoted by the Council of Europe, which was ratified by Italy and entered into force in 1997[47], is of considerable importance on the supranational

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[43] M. Savino, *Lo straniero nella giurisprudenza costituzionale: tra cittadinanza e territorialità*, 1 Quaderni costituzionali 41 (2017). The debate on the notion of citizenship has recorded several – and often completely opposed – positions. For a general overview see M. Coady, *Citizenship: inclusion and exclusion*, in J. Wyn, H. Cahill (eds.), *Handbook of Children and Youth Studies* (2014); F. Vetrò, *Oltre la cittadinanza: stranieri e diritti inviolabili*, in F. Astone, F. Manganaro, A. Romano Tassone, F. Saitta (eds.), *Cittadinanza inclusiva e flussi migratori* (2009); M. Bell, *Civic Citizenship and Migrant Integration*, 13 Eur. Public Law 311 (2007); C. E. Gallo, *La pluralità delle cittadinanze e la cittadinanza amministrativa*, 3 Dir. amm. 481 (2002).

[44] D.C. Mueller, *Rights and citizenship in a world of global terrorism*, Eur. Journal of Political Economy 335 (2004).

[45] G. Milani, *Cittadinanza e integrazione. L'influenza del diritto comparato sulla disciplina italiana e sulle proposte di riforma*, 4 Federalismi (2018); G. Zincone, *Citizenship Policy Making in Mediterranean EU States: Italy*, http://eudo-citizenship.eu (2010).

[46] With regard to the effects on the evolution of the traditional concepts of political community deriving from the process of substantial weakening of the concept of the State/Nation in favour of the State/Community, see P. Grajzl, J. Eastwood, V. Dimitrova-Grajzl, *Should immigrants culturally assimilate or preserve their own culture? Host-society natives' beliefs and the longevity of national identity*, cit. at 19, 96; B. Caravita di Toritto, *I diritti dei "non cittadini": Ripensare la cittadinanza: comunità e diritti politici*, www.associazionedeicostituzionalisti.it (2010).

[47] In fact, already art. 21 of the Universal Declaration of Human Rights of 1948 provided that «Everyone has the right to take part in the government of his country, directly or through freely chosen representatives», however, the majority orientation immediately understood the term "everyone" in a technical

scene. For the first time, it was stated in an official document that foreigners residing on national territory are now a permanent feature of European societies and that – since they are generally subject to the same duties as citizens at local level – they are entitled to be placed in the position of being able to integrate fully into the community, also by strengthening their possibility of participating in local public affairs[48].

In particular, this Convention is divided into three parts: a) freedom of expression, assembly and association; b) advisory bodies to represent foreign residents at the local level; c) voting rights at the local level. While the freedoms indicated in part a) are now indisputably recognized in Italy even to foreigners, in that they belong to the minimum nucleus of inviolable human rights[49], the most interesting ones are parts b) and c), the concrete implementation of which is still partially uncertain, as will be examined below.

Regarding to the analysis of the national legislation, it must be pointed out that – with a rather vague formulation – art. 9, § 12 of Legislative Decree no. n. 286/1889 (Italian Consolidation Act on Immigration) provides that foreigners holding long-term residence permits may participate in local public life, in the forms and within the limits provided by current legislation.

One of the few certain elements that can be inferred from the analysis of the meager national and supranational legislation of reference is that the context in which it is possible to imagine the recognition of the rights of democratic participation of non-citizens is the local one, certainly not the national one; this, moreover, is the natural consequence of the rationale of the extension of (some) political rights to the immigrant, to be identified in the link with the reference territory, in the residence (often the long term one). If it is true that local authorities are the

sense, as referring not to each individual but only to citizens [A. Lollo, *Note minime sulla partecipazione alla vita democratica del non cittadino*, www.associazionedeicostituzionalisti.it (2013)].

[48]https://www.coe.int/en/web/conventions/full-list/conventions/treaty/144. Currently, only 9 Countries have ratified the Convention: Albania, the Czech Republic, Denmark, Finland, Iceland, Italy, the Netherlands, Norway and Sweden.

[49] Pursuant to art. 11, p. 1 of the European Charter of Human Rights, "Everyone has the right to freedom of peaceful assembly and to freedom of association".

administrations that are most strongly invested by the impact of migratory flows in terms of management of health and safety emergencies linked to initial reception, it is also true that the same territorial areas represent the natural dimension within which it is possible to experiment with public policies aimed at facilitating the rooting of legal foreigners in the community[50].

On this point, the European Agenda for the Integration of Third-Country Nationals (2011)[51], which is one of the most significant documents in the European integration strategy[52], is of great interest. In this document, inter alia, it is strongly underlined that the essential elements to achieve effective results in terms of integration are the removal of obstacles that do not allow the

[50] M. Bommes, *Integration takes place locally: on the restructuring of local integration policy*, in C. Boswell, G. D'Amato (eds.), *Immigration and Social System* (2012); M. Brocca, *Il ruolo degli enti locali nella gestione della città interetnica: tra sicurezza e integrazione*, in M. Calabrò, L. Ferrara, M. T. Vogt (eds.), *Biopolitica dell'immigrazione* (in press).

[51] Communication from the Commission to the European Parliament, the Council, the European economic and social committee and Committee of the Regions (COM/2011/0455), in https://eur-lex.europa.eu/legal-content/EN/TXT/HTML. It is significant that this document clarifies from the beginning that «Effective solutions to integration challenges must be found in each national and local context but as these challenges are common to many Member States, experiences could be shared. Although it is not the prerogative of the EU to determine integration strategies, the EU can provide a framework for monitoring, benchmarking and exchange of good practice, and create incentives through the European financial instruments».

[52] Within the EU, cooperation between Member States on policies for the integration of third-country nationals began to develop starting from the *Tampere Program* adopted in 1999. Afterwards, in 2004, the European Commission approves the *Migrant Integration Information and good practices*, then updated in 2007 and 2010. Meanwhile, in 2009, the Lisbon Treaty provided a new legal basis on integration, providing that «The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonization of the laws and regulations of the Member States» (art. 79.4 TFUE). Most recently, in 2016, the European Commission presented the *Action Plan on Integration*, which includes an action framework and concrete initiatives to assist Member States in integrating about 20 million third-country nationals legally residing in the territory of the Union. For a recent overview on this topic, see V. Piergigli, *L'integrazione degli immigrati da paesi terzi nel diritto sovranazionale: limiti e potenzialità dell'Unione Europea*, Rivista Aic (2018).

democratic participation of foreigners in public life, as well as the active involvement of the local authorities in the implementation of social cohesion policies and the fight against segregation.

It is not by chance, therefore, that Article 8 of the "Italian Consolidated Act on Local Bodies" (d.lgs. n. 267/2000) provides for the promotion of forms of participation in local public life by legally residing foreigners, not in terms of a mere option, but as a compulsory content of municipal statutes[53]. Unfortunately, the same normative source does not expressly indicate specific institutes and models suitable to guarantee an adequate level of democratic participation to the legal immigrant, which leaves an excessive margin of discretion to the local authorities in determining the degree of "political" involvement that they intend to grant to the foreigner.

The enduring uncertainty, deriving from the largely merely expository nature of the reference State regulations, appears the result of the permanence, in the Italian debate, of a dominant orientation on the basis of which political rights (at least those of direct democracy) should be considered as inherent to the *status civitatis* and, therefore, their extension (not even partial) to non-citizens would not be legitimate[54]. Even today, in Italy, it is still possible to record a wavering evolutionary process in terms of the recognition of the foreigner's rights to participate in public life, which denotes a substantial contradiction between the continuing tendency to frame the deepest discrimination between citizens and non-citizens in the ownership of political rights and the principle of substantial democracy, on the basis of which the subject appointed to make public choices must be representative of all the subjects to whom the aforementioned decisions are addressed[55].

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[53] The Italian Constitutional Court has long ago also sanctioned the legitimacy of the possible introduction of institutions for the participation of foreigners in public life within the regional statutes, as a concrete implementation of principles already existing in the reference state legislation. (Constitutional Court, December 6, 2004, n. 379; Constitutional Court, July 22, 2005, n. 300).

[54] G. Vosa, *Sul riconoscimento dei diritti politici agli stranieri residenti: esperienze e prospettive*, in F. Rimoli (ed.), *Immigrazione e integrazione. Dalla prospettiva globale alle realtà locali* (2014).

[55] See S. Cassese, *Stato in trasformazione*, 2 Riv. Trim. Dir. Pubbl. 331 (2016), which also notes that the scale of recent migratory flows raises new questions

4. The difficult path of granting political rights to non-citizens: the right to vote.

As already noted, in the wake of the traditional legal logic of the State-Nation, it is customary to distinguish between individualistic rights of freedom, due to each person as an individual, and democratic rights, due to a subject as a part (formally recognized) of a State. Political rights, from this point of view, should be counted among those rights which – being an expression of the principle of popular sovereignty[56] – assume the existence, for the holder of the requirement of full membership of the community-State and, therefore, should not be legitimately extendable to non-citizens.

In Italy, the debate on the possibility of granting political participation rights to foreigners has in recent years focused mainly on voting rights[57]. To simplify, it can be affirmed that in order to recognize the right to vote to non-citizens, two paths can be followed: a) intervene in the legal regime of citizenship, providing for easier ways of acquisition of this "status"[58]; b) remove the existing link between the exercise of the right to vote and the status of citizen, enhancing, for example, the element of long-term residence[59]. In the following, we will focus, in particular, on the second option, which – as we will see – is theoretically

about the figure of the citizen and the elements that distinguish the identity of a community.

[56] F. Tolson, *The popular sovereignty foundations of the right to vote*, https://digitalcommons.law.umaryland.edu (2017); E. Grosso, *Straniero (status dello)*, in S. Cassese (ed.), *Dizionario di diritto pubblico* (2006); V. Crisafulli, *La sovranità popolare nella Costituzione italiana*, in *Stato, popolo, governo. Illusioni e delusioni costituzionali* (1985).

[57] P. Colasante, *L'attribuzione del diritto di voto ai non cittadini: prospettive di riforma e fonte competente*, 2 Rivista Aic (2016).

[58] For an overview of the heated debate in Italy about the need to reform the current regulation of the acquisition of citizenship, see E.A. Ferioli, *La cittadinanza "oltre" lo stato. Interferenze internazionali e sovranazionali nell'acquisto e conservazione della cittadinanza statale*, 1 Rivista Aic (2017); D. Porena, *Il problema della cittadinanza. Diritti, sovranità e democrazia* (2011).

[59] On the s.c. residential citizenship, that is the connection between residence and enjoyment of several social rights, regardless of the formal nationality, see S. Benhabib, *The Rights of Others. Aliens, Residents and Citizens* (2004); A. De Bonis, M. Ferrero, *Dalla cittadinanza etno-nazionale alla cittadinanza di residenza*, 2 Dir. imm. cit. 49 (2004).

more easily pursued, even if not without obstacles of both a legal and an ideological nature.

On this point, the European panorama offers a rather heterogeneous picture, even if almost all the EU Countries – with the prevision of major (Spain, Belgium, Portugal) or minor (Norway, Denmark, Netherlands) restrictions – provide for forms of recognition of the right to vote also to non-citizens, at least at a local level, with the exception, together with Italy, of the States with a greater presence of immigrants, such as France and Germany[60]. Moreover, there do not seem to be any binding supra-state provisions, either of European or international origin[61], that impose a certain discipline, even if it is true that Italy, like several other States – even though it has ratified the aforementioned Strasbourg Convention on the Participation of Foreigners in Public Life at the Local Level – has, however, formulated an express reservation with regard to Part C of the same document, that is the one dedicated to the conferment of the right to vote to foreigners at the local level.

That said, in Italy the main obstacle to the recognition of the right to vote of foreign residents is represented by Articles 48 and 51 of the Constitution, in which the right to vote and stand as a candidate is attributed only to Italian citizens. Nevertheless, in 2004, there were some initiatives, both at regional and local level, inspired by a policy of not only social, but also political integration towards legally resident immigrants. In particular, the Regions of Tuscany, Emilia Romagna and Campania have included in their Statutes provisions through which they have substantially

[60] M. Engdahlb, K. O. Lindgrenc, O. Rosenqvistd, *The role of local voting rights for foreign citizens – a catalyst for integration?*, https://www.ifau.se (2018); J. T. Arrighi, R. Bauböck, *A multilevel puzzle: Migrants' voting rights in national and local elections*, Eur. Journal of Political Research 619 (2017); M. Mezzanotte, *Il diritto di voto degli immigrati a livello locale, ovvero la necessità di introdurre una expansive citizenship*, www.formucostituzionale.it (2012).

[61] Art. 22 of the Treaty on the Functioning of the European Union only stable that «Every citizen of the Union residing in a Member State of which he is not a national has the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides». The European Agenda for the Integration of Third-Country Nationals (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML), as a non-binding document, recommends that Member States promote the exercise of the right to vote at local level of legal immigrants.

provided for the recognition of rights of political participation, including the right to vote, for foreigners residing in a municipality of the region[62]. However, these provisions have not been applied in practice, partly because the innovative power of the statutory measures has been greatly reduced following a number of rulings by the Constitutional Court, which have construed them as merely programmatic rules lacking preceptive force and, therefore, unable to innovate the legal system[63].

At a local level, in the same years, some municipalities (e.g. Genova City Council and Forlì City Council) have provided, always within their respective statutes, for the recognition of the right to vote in local elections to foreigners legally resident. Even on these occasions the "expansive impetus" of administrations in favor of the implementation of a notion of citizenship in a substantial sense has been held back by the judicial power. In this case, in particular, it is the Council of State that has censured the aforementioned statutory provisions, declaring them unlawful: however, the negative opinion of the Council of State was not based on the alleged contradiction to Articles 48 and 51 of the Constitution, but on the lack of a State law that would allow local administrations to intervene in this direction[64], given the exclusive legislative competence of the State in matters of the legal status of foreign citizens and electoral law.

Although negative, the aforementioned opinion of the Council of State is crossed by a spirit of openness, indicating a path that the Italian system could follow in an evolutionary perspective; the constitutional recognition of the right to vote to citizens would represent, in fact, not a foreclosure, but a minimum guarantee, subject to "enlargement" through an intervention of the State legislator intended to allow local and regional authorities to extend to foreigners the right to vote at the local level.

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[62] Statute of the Region of Tuscany, art. 3, par. 4 and 6; Statute of the Region of Emilia Romagna, art. 2, par. 1, letter f); Statute of the Region of Campania, art. 8, letter o).

[63] Constitutional Court, December 2, 2004, no. 372; Constitutional Court, December 6, 2004, no. 379. See also A. Anzon, *La Corte condanna all'«inefficacia giuridica» le norme «programmatiche» degli Statuti regionali ordinari*, Giur. Cost. 4057 (2004).

[64] Council of State, I, March 16, 2005, no. 9771; Council of State, I, July 6, 2005, no. 11074; Council of State, I, December 17, 2008, no. 3714.

Part of Italian doctrine, in fact, immediately criticized the spirit of "openness" shown by the Council of State, arguing that the state legislator would not be allowed to issue rules contrary to the clear constitutional dictation, aimed at admitting a single model of citizenship and, at the same time, at indissolubly linking the participation in the exercise of popular sovereignty to the possession of the status of citizen[65]. According to this tendency, therefore, the possible recognition of the right to vote to legal immigrants would be admissible in the abstract, but only following a procedure of constitutional revision[66]. An even more restrictive orientation can be added, according to which not even a modification of the Constitution in this direction would be admissible, under penalty of the "betrayal" of the entire constitutional system[67]: from this point of view – which lacks any solid reasoning – the only viable solution to allow migrants the right to participate in the social and political life of the country would be, therefore, to affect the discipline of citizenship, making the naturalization procedure less onerous[68].

In the light of these brief reflections, it emerges how far Italy is still from the recognition of a full and peaceful political dimension in relation to legal immigrants. Moreover, it is significant that Title IV of the Italian Constitution, dedicated to "Political Relations" is addressed only to citizens, both in relation to their rights (to vote, to join parties, to petition Parliament, to access public offices), and their duties (to defend the Country, to be faithful to the Republic), with the sole exception of the duty to pay taxes, extended to everyone.

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[65] A. Ruggeri, *I diritti dei non cittadini tra modello costituzionale e politiche nazionali*, www.giurcost.org (2005); M. Luciani, *Il diritto di voto agli immigrati: profili costituzionali*, www.cestim.it (1999), which, however, affirms that the extension of the right to vote, with an unchanged constitution, is admissible in all local elections, in which the construction of representation for entities that do not have legislative power is at stake.

[66] T. F. Giupponi, *Stranieri extracomunitari e diritti politici. Problemi costituzionali dell'estensione del diritto di voto in ambito locale*, www.forumcostituzionale.it 12 (2006).

[67] T. Martines, *Diritto costituzionale* 591 (2005). *Contra* G. Vosa, *Sul riconoscimento dei diritti politici agli stranieri residenti: esperienze e prospettive*, cit. at 54.

[68] P. Colasante, *L'attribuzione del diritto di voto ai non cittadini: prospettive di riforma e fonte competente*, cit. at 57.

The enduring reticence towards the recognition of the right to vote of the immigrants, even at the local level, seems the result of a vision according to which it is considered legitimate to assign suitable instruments to influence the process of definition of social rules only to those who are able to demonstrate a complete belonging to (and, therefore, a full loyalty to) a community. A sort of public policy of integration "by concentric circles" is outlined: with every step forward in the integration process (legal entry into the national territory; obtaining a residence permit; obtaining a long-term residence permit; acquiring citizenship by naturalization or marriage) there is the recognition of a higher nucleus of rights, up to the "widest circle", within which there is the right to vote only granted to the citizen[69].

5. Sustainable models for the recognition of a "political dimension" of legal immigrants.

On closer inspection, apart from the difficult process of extending the right to vote to foreigners, in Italy seems legitimate – even in the absence of changes to the constitutional order – to envisage the configuration of a political dimension for legal immigrants as well. The inclusion of non-citizens within the life of the local community passes through the enhancement of what is commonly defined *denizenship*[70], or that form of "half" citizenship, linked to the demonstration of the permanent residence in the territory and the real will to integrate within the new context. In

[69] For a similar approach, on the basis of which each "change of level" results in the recognition of rights that are qualitatively and quantitatively more extensive, see the reflections of A. Damonte, *La normazione dell'Altro. La partecipazione alle consulte regionali per l'immigrazione*, 3 Sociologia del diritto 83 (1997), where it is theorized the existence of a «hierarchy of strangeness towards the national community that suggests a citizenship structured in concentric rings, each of which corresponds to specific entitlements and different statuses», 93.

[70] The term "denizen" entered the language of immigration theory by Hammar, who first used it to refer to long-term residents with many of the rights of citizenship, but not the right to vote. (T. Hammar, *State, Nation, and Dual Citizenship*, in W.R. Brubaker (ed.), *Immigration and the Politics of Citizenship in Europe and North America* (1989). See also K. Groenendijck, *The Long-Term Residents Directive, Denizenship and Integration*, in A. Baldaccini, E. Guild, H. Toner (eds.), *Whose freedom, security and justice?: EU immigration and asylum law and policy* (2007).

Italy the last condition can be easily demonstrated by the signing of the Integration Agreement by the immigrant who requires a residence permit of at least one year, with which he undertakes to acquire not only an adequate level of knowledge of the Italian language, but also a sufficient knowledge of the fundamental principles of the Constitution of the Republic and of Italian civic culture.

One way to facilitate the adaptation of society to this process (resilience of those who "welcome") could be to identify the rationale for the recognition of certain rights to participate in local public life, not only in the satisfaction of legitimate claims of the foreign as an individual, but also in the need to facilitate the achievement of concrete results of effective integration. In other words, the rapid evolution of our cities in a multi-ethnic way means that – regardless of whether we want to include participation in democratic life in the rights of the individual (and not just of the citizen) – even reasons of public interest require the implementation of public integration policies that include openings in this regard[71].

This is the approach that seems to emerge from the analysis of several Italian regional laws[72], where it is strongly stressed that an effective public policy of integration must also aim at the introduction of tools to overcome the stress factor consisting of the inability of immigrants to actively participate in public life of the new community in which they live[73]. In this perspective, for

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[71] P. Grajzl, J. Eastwood, V. Dimitrova-Grajzl, *Should immigrants culturally assimilate or preserve their own culture? Host-society natives' beliefs and the longevity of national identity*, cit. at 19, 96; N.D. Coniglio, K. Kondoh, *International integration with heterogeneous immigration policies*, cit. at 5, 15.

[72] Public integration policies are part of what are commonly called policies *for* immigration, to differentiate them from policies *of* immigration, relating to access and expulsion profiles and linked to public security concerns. This means that, in accordance with the relevant principles laid down in state legislation, it is up to the regions at territorial level to provide the necessary instruments, in the form of legislation and planning, to facilitate the integration of foreigners into their communities. See S. Baldin, *La competenza statale sull'immigrazione vs. la legislazione regionale sull'integrazione degli immigrati: un inquadramento della Corte costituzionale*, www.forumcostituzionale.it (2005).

[73] «Almost all immigrants strongly feel that they don't want to lose their cultural identity. But they cannot neglect the necessity to fit with everybody else in the new land, and to contribute with their best efforts to the functioning of a society where all are to be effectively integrated, that is to belong to a

example, it is often planned to promote social and cultural initiatives carried out by the immigrant communities themselves, precisely in order to implement a model of shared integration. This, on the one hand, allows the foreigner to feel an "active part" of the community and not a weight extraneous to it[74], and on the other, promotes the adoption of approaches differentiated by ethnic-cultural groups, indispensable if we want to pay proper attention to the specificities of individual cultural identities, and not fictitiously consider all immigrants as a homogeneous entity[75].

Since it is more relevant here, there are also models of participation with a strong "political" nature, intended to express themselves in an institutional context. As already noted, the Strasbourg Convention on the Participation of Foreigners in Public Life at Local Level, ratified by Italy and entered into force in 1997, requires our Country to allow local authorities that have a significant number of foreign residents in their respective territories, to create advisory boards dedicated to immigration policies. In particular, pursuant to art. 5 of the Strasbourg Convention, these bodies are intended to ensure adequate representation of foreign residents in local communities, in order to «provide a forum for the discussion and formulation of the opinions, wishes and concerns of foreign residents on matters which particularly affect them in relation to local public life».

As mentioned above, Italy has implemented the Strasbourg Convention content with some provisions introduced in the "Italian Consolidation Act on Local Authorities" (Legislative Decree no. 267/2000), which promote forms of participation for foreigners in local public life: the openness to the establishment of new consultative bodies (dedicate *to* immigrants and composed *by* immigrants) evidently derives from the "sustainability" of such

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"healty and delicious salad in a new bowl for everyone"» R.M. Niculescu, *In Search of a Dream at the Crossroads of Inculturation and the Integration Within an inTer-Cultural Society – Challenges of Immigration*, cit. at 42, 401.

[74] For an analysis of the potential applications of the dynamics of active citizenship to the phenomenon of immigration, see M. Meini, *Nuovi percorsi di governance multiculturale. La cittadinanza attiva degli immigrati stranieri nelle città toscane*, in L. Cassi, M. Meini (eds.), *Fenomeni migratori e processi di interazione culturale in Toscana* (2013).; G. Arena, *Immigrazione e cittadinanze*, in R. Acciai, F. Giglioni (eds.), *Poteri pubblici e laicità delle istituzioni* (2008).

[75] D. Maskileyson, M. Semyonov, *On race, ethnicity and on the economic cost of immigration*, cit. at 17, 19.

interventions in terms of the absence of incompatibility with the Constitution, to the extent that they are bodies that do not affect (at least not directly) the local political direction[76]. The most significant expressions of this process of active involvement of the foreigner in the community public life are, in Italy, on the one hand, the Provincial councils for foreigners and the Additional municipal councilors, and, on the other, the so-called Integration councils.

5.1. Provincial councils for foreigners and additional municipal councilors.

A first timid attempt to allow the community of immigrants legally resident in Italy to "make their voices heard" within the institutional contexts is represented by the figure of the Additional municipal councilor, represent. For some years now, various regional laws have allowed (and do not require) municipal (and provincial) administrations to provide for the presence, within local elective assemblies, of a person elected by resident foreigners, not having the right to vote but only the right to speak (among other things, in some cases, exclusively on matters relating to immigration)[77]. The aim (and, at the same time, the limit of this initiative) is, evidently, that of entrusting to this single subject all the requests expressed by the local immigrant community, thus acting as an intermediary, as a "channel" for dialogue between groups, however, considered as separate realities (citizens and foreigners).

An examination of the most significant experiences[78] shows that, rather than a member of the assembly, the local councilor is a side element, a poorly regarded 'guest'. In that regard, the case-law has held that this figure is to be regarded as legitimate precisely because of the lack of the right to vote and the unsuitability of being part of the structural and functional quorum of the assembly; in short, his reduced capacity to have a significant effect

[76] M. Carta, *La partecipazione alla vita pubblica dello straniero nella prospettiva del diritto internazionale*, 5 Federalismi (2014).

[77] A. De Bonis, M. Ferrero, *Dalla cittadinanza etno-nazionale alla cittadinanza di residenza*, cit. at 59, 60.

[78] According to the latest available mapping (2013) in Italy there are 29 additional municipal councilors, working in as many municipal or provincial councils (www.integrazionemigranti.gov.it).

on the exercise of the function of government of the local authority[79]. Although undoubtedly a step towards greater involvement of the immigrant population in local public life, the figure of the additional municipal councilor is considered too weak, both in relation to the low degree of effectiveness of his work, and (especially) because of his limited representativeness of the presence of heterogeneous communities (in terms of origin and ethnicity) of foreigners on the territory.

The experience of the Provincial Councils for Foreigners is different, and undoubtedly more interesting in terms of the effectiveness of the potentially achievable results, through which it was intended – within the limits of what is allowed by the Constitution and state legislation – to extend with greater force the exercise of participatory instruments of direct democracy to the immigrant population as well. In particular, it refers to the Council for Foreigners of the Province of Florence, established in 2002, as a consultative body[80] of the Provincial Assembly on issues relevant to the interests of the immigrant population. From the examination of the Regulation of this body some peculiar characteristics emerge, clear indications of a sort of "regulatory uncertainty" about the role to be effectively attributed to the same. These are relevant elements: a) the rationale (the first of the goals indicated is not to allow the foreigner to exercise rights of political participation, but to promote dialogue and integration between immigrants and citizens); b) the function (the opinion issued by the Council for Foreigners – in any case only concerning decisions directly linked to the immigrant population – is not only not binding, but does not even impose any aggravated motivational burden on the local authority if it intends to depart from the same); c) the representativeness (the active and passive electorate is recognized not to all foreigners legally resident, but only to those who prove that they have a residence of at least one year).

A few years later, in 2007, the Province of Bologna also provided itself of a Council for foreign citizens and stateless persons, whose Regulation[81] contains provisions clearly aimed at perfecting

[79] Council of State, V, 9 June 2008, no. 2872.

[80] http://www.provincia.fi.it/statuto-e-regolamenti/regolamenti/regolamento-per-il-consiglio-degli-stranieri-della-provincia-di-firenze/.

[81] http://www.cittametropolitana.bo.it/portale/Engine/RAServeFile.php/f/NormeRegolamenti/Reg_cittadini_stranieri.pdf.

the model of Florence, overcoming some critical issues. Returning to the same elements upon which the analysis of the Florence Regulation was based, it is possible to observe, in the first place, how the rationale (a) of the body is, in this case, clearer, where it is provided that the Council must represent a specific part of the population excluded from the vote and must be considered the instrument for the entry of foreigners into the political dimension. Even the exercise of function (b) appears to be more extensive and incisive: the Council is not simply called upon to express opinions, but also to formulate proposals (proactive role) even on issues not strictly related to integration policies of the foreign population; to this it must be added that any willingness of the Council Assembly of the Province of Bologna not to comply with what is expressed in the opinion of the Council for Foreigners must be supported by a written justification. Finally, with regard to representativeness (c), it is of great interest not so much that the active and passive electorate be recognized to any (non-citizen) resident, therefore regardless of the duration of the stay in the territory[82], but rather that it be provided for the use of a "adjusted" electoral system, in order to ensure the presence in the Council of even the fewest ethnic groups on the territory.

From what has been examined, it emerges how the recent experience of the Provincial Councils for Foreigners, especially according to the "advanced" model of Bologna, can prove to be of great interest, as a place of institutionalized dialogue suitable for bringing the requests of the immigrant population to the fore within the local public debate. However, there is no lack of critical elements, consisting, on the one hand, in the still very limited diffusion of such a model (to date, there are only the cases of Florence and Bologna), and, on the other, in the risk that the forecasts of elected bodies representative only of foreigners could lead to an enhancement of the differences, rather than to the promotion of real integration: a sort of micro-community within a

[82] Indeed, as already noted, it is considered not only legitimate, but also desirable, to use the criterion of medium/long-term residence as a condition for access to the exercise of political rights, the rationale of which is therefore linked to belonging to a community and not to the individual as such (as happens, however, for social rights). See v. C. Corsi, *Immigrazione e ruolo degli enti territoriali*, in 1 Dir. imm. cit. 49 (2005).

macro-community, rather than an integrated multi-ethnic community.

5.2. The integration councils: regional legislation and local experiences in comparison.

In the panorama of the initiatives carried out in Italy to encourage the participation of foreigners in the local institutional life, there is also the experience of the so-called integration (or immigration) councils, which have a lesser "consistency" from the institutional point of view compared to the Provincial councils for foreigners, but perhaps also for this reason potentially more effective. In this regard, it is necessary, first of all, to underline once again how these bodies were created on the initiative of individual Regions; moreover, in Italy, the implementation of such innovative models for the exercise of rights of a political matrix by the foreign population is a matter of regional legislative competence. In particular, the Constitutional Court has clarified that in the exercise of this jurisdiction the Regions may provide for ways of consultation and participation aimed at individuals who take part «knowingly and with at least relative stability in the associated life, even regardless of the ownership of the right to vote or even Italian citizenship»[83].

That said, a distinction must be made between regional, provincial and municipal integration councils. The former, in fact, are expressly contemplated in the State legislation, and in particular in art. 42, para. 6 of Legislative Decree no. n. 286/1998 (Consolidated Act on Immigration), which recognizes the right of regions to set up regional councils «for the problems of non-EU workers and their families»[84]. Despite the fact that there is no legislation requiring the establishment of such bodies, they are still present in many regional contexts and include, as members (and not, therefore, only recipients), representatives of immigrant communities[85].

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[83] Constitutional Court, December 6, 2004, no. 379

[84] This provision was already present in the first organic Italian legislation on immigration, or rather, on immigrant workers, Law no. 943/1986 (Regulations on the placement and treatment of non-EU immigrant workers and against illegal immigration).

[85] To date, 14 out of 20 regions in Italy have established Regional Immigration Councils (www.integrazionemigranti.gov.it). For a transversal analysis of

In addition to regional initiatives, similar (and often more advanced) initiatives are undertaken by local administrations, which are entrusted with autonomous powers for the promotion of social integration, also on the implementation of specific regional laws. According to the latest official mapping (2013) there are 48 immigration councils in Italy at municipal level and 20 at provincial level[86]. These bodies – which are once again assigned essentially consultative and propositional functions – were created with the dual intention of actively involving the immigrant population in local public life and, at the same time, of making an essential cognitive contribution to the work of the public administration whenever the latter programmes to intervene with actions designed to assist the processes of integration and intercultural dialogue.

5.2.1 Organizational profiles.

Moving on to the specific examination of some of the most interesting profiles of the immigration councils, and dwelling first of all on the organizational-structural elements, it is noted that part of the doctrine looks unfavorably at the fact that among the members of the immigration councils there are not only foreigners, but also Italian citizens, as this would prevent «the former from having that reserved area of political elaboration necessary to express autonomous requests»[87]. On this point, in my opinion, the co-presence of Italians and foreigners in the immigration council represents a strong point of this body: in that, unlike what happens in relation to the Councils for Foreigners (see above), the heterogeneity of the composition stimulates the dialogue "between equals" and the exchange of opinions between individuals who are part of the same community. Certainly, the rationale behind the establishment of such bodies would recommend a majority presence of members belonging to the immigrant population, whereas, on the contrary, in most cases, such councils are com-

regional and local experiences spread over the territory see M. Brocca, *Il ruolo degli enti locali nella gestione della città interetnica: tra sicurezza e integrazione*, cit. at 50.

[86] See: www.integrazionemigranti.gov.it.

[87] V. Ferraiuolo, *Le nuove politiche regionali in materia di partecipazione degli stranieri*, www.dirittifondamentali.it 9 (2012).

posed of the most part of Italian citizens (regional or municipal councilors, members designated by the Prefectures, etc.).

To this must be added, with regard to representativeness, that most of the integration councils do not receive any "bottom-up" legitimacy, insofar as – with the exception of some municipal experiences – their members are not elected by the immigrant population, but designated by the associations of foreigners previously registered with the regional/municipal registry office, if not even identified (even in the component of non-citizens) directly by local institutions. In this regard, it should be noted how Italy is in clear breach of its obligations following the ratification of the Strasbourg Convention on the Participation of Foreigners in Public Life at the Local Level, where Article 5, paragraph 2 provides that «each Party shall ensure that representatives of foreign residents participating in the consultative bodies or other institutional arrangements referred to in paragraph 1 can be elected by the foreign residents in the local authority area or appointed by individual associations of foreign residents».

Apart from this consideration, the rules that in most cases supervise the composition of the immigration councils give rise to several critical issues: first of all, it seems clear that the described system of co-optation entails a limited degree of autonomy that the councils are able to express with respect to the majority political direction and, therefore, their reduced capacity to actively involve the immigrant population in the participation in political life[88]. In this perspective, therefore – even if positive experiences of effective impact are recorded – they often act as an instrument of legitimization of local public policies whose content is only formally "shared" with the immigrant population, as well as a means of co-opting (and assimilating) the leading associations of foreigners[89].

To this it must be added the fact that only the delegates of the most representative immigrant communities are generally called upon to participate in these bodies, with the consequent risk of exacerbating the conflicts between the different ethnic groups

[88] G. Vosa, *Sul riconoscimento dei diritti politici agli stranieri residenti: esperienze e prospettive*, cit. at 54.

[89] A. Damonte, *La normazione dell'Altro. La partecipazione alle consulte regionali per l'immigrazione*, cit. at 69, 98.

existing in the territory[90]. Lastly, there is a further and certainly not insignificant weakness, or rather contradiction, in the fact that the chairmanship of the councils is often entrusted to the Prefects: this risks distorting the body, as it seems to give it more a role of guarantor of security, of social control, than of an tool for participation in public life and integration.

5.2.2 Functional profiles

From an analysis of the functions attributed to the integration councils and the features through which these functions are exercised, it emerges with force, at least "on paper", that these bodies are called not only to intervene at the stimulus of local institutions, in a consultative key, but also independently, in a proactive key, in order to stimulate local and regional authorities in undertaking new and more effective social and cultural initiatives with an impact on integration policies.

In proceeding, however, to examine the works of the councils operating in the main Italian cities and provinces, it emerges that in most cases they are unable to express planning feasibility: the documents produced by these assemblies often end up limiting themselves to mere (and often unheard of) opinions on specific profiles of public policies impacting on the immigrant population, or, at most, contain general grievances lacking a sufficient degree of concreteness to guide the activities of local institutions[91]. It is not by chance that part of the doctrine configures these bodies not as a veritable places of political representation of the foreign population, but rather as negotiating table having limited capacity to give voice to the real demands of the immigrant communities present on the territory[92].

On this point, we must clear up any possible misunderstandings. Since these are participatory bodies and not institutes of

[90] L. Castelli, *Il ruolo degli enti locali nell'integrazione e partecipazione dei migranti*, in L. Ronchetti (ed.), *I diritti di cittadinanza dei migranti. Il ruolo delle regioni* (2012)

[91] «Within these bodies, the primary needs claimed in the few interventions of the immigrants' representatives are constituted by the scarce effectiveness of the rights formally granted to them effectiveness conceived in terms of equality and concreteness of the services, but never in terms of the negotiation of the contents for the recognition of cultural specificities», Damonte, *La normazione dell'Altro. La partecipazione alle consulte regionali per l'immigrazione*, cit. at 69, 102.

[92] M. Carta, *La partecipazione alla vita pubblica dello straniero nella prospettiva del diritto internazionale*, cit. at 76.

direct democracy, it is clear and undisputable that both consultative and proactive acts are not binding[93], since they are called upon to supplement and certainly not replace the decisions taken by the representative bodies[94]. However, what seems totally unacceptable, and what marks a clear weakness of these bodies, is the fact that – with the exception of rare cases – the regional and local regulations of the several immigration councils do not impose a specific motivational burden in the event that the local institutions intend to reach a decision that does not conform to the opinion given by the consultation, or intend not to take into consideration an act of proposal of the same.

6. Conclusions.

In the light of the above, it emerges first of all that, in relation to the figure of legal immigrants (long-term residents), today in Italy a distinction must be made between social rights and rights to political participation in public life on the one hand, and political rights that are expression of the principle of popular sovereignty (right to vote) on the other. Exclusively in relation to the latter, it now seems legitimate – due to the multicultural structure of our society – to recall the traditional concept of legal citizenship.

Even outside the ambit of universally recognized fundamental rights[95], in other words, the distinction between accessibility and non-accessibility to social welfare services and, for what is more relevant here, to the exercise of the rights of political participation, seems to be individuated in a certain degree of

[93] *Contra* M. Ferrara, *I diritti di partecipazione dell'immigrato: il Consiglio provinciale dell'immigrazione*, in E. Di Salvatore, M. Michetti (eds.), *I diritti degli altri. Gli stranieri e le autorità di governo*, cit. at 29, who states that it is admissible for participatory bodies such as immigration councils to be given binding consultative powers.

[94] E. Gianfrancesco, *Gli stranieri, I diritti costituzionali e le competenze di Stato e Regioni*, 5 Amministrazione in cammino 5 (2014).

[95] Pursuant to art. 2 of Legislative Decree no. n. 286/1998, to the foreigner however present on the territory of the State (therefore also to the irregular one) the fundamental rights of the human person are recognized.

"stability" of the relationship between the person and the territory, deducible from the length of the period of stay[96].

Having said that, the analysis of the state and regional legislation, as well as the examination of the several initiatives carried out by local authorities in the area of public integration policies, reveals how the figure of the legally residing immigrant still has a "fragile" legal connotation in Italy. In particular, while in terms of access to social welfare services there is now a situation that can be defined as satisfactory – in terms of certainty and adequacy[97] – a similar approach cannot be adopted with regard to the recognition of rights to participate in local public life. It is necessary to guarantee more effectively the exercise of these rights, with respect to which both quantitative and qualitative critical aspects emerge. From the first point of view, it is necessary for the state legislator to make the introduction at regional and local level of adequate institutions of political participation for the foreign population mandatory, overcoming the current situation characterized by the existence of wide margins of discretion for local institutions.

With regard to the qualitative dimension of the participation institutions, the previous pages have indicated a series of profiles of uncertainty and contradiction that risk making initiatives with great engraving potential, such as the establishment of immigration councils, missed opportunities. Regulatory measures aimed at implementing the rationality and efficiency of these bodies respond, in a nutshell, to a dual need: on the one hand, in a perspective of participatory democracy[98], they are suitable tools to strengthen the legitimacy of public decisions (most of which also impact on the lives of non-citizens resident[99]); on the other, they

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[96] Cassese points out that many European Countries have adopted the principle of «the longer the stay, the stronger the claim», S. Cassese, *Stato in trasformazione*, cit. at 55.

[97] For the "room for improvement" still desirable with reference to the effective attribution of social rights to legal immigrants, see M. Calabrò, *Livelli essenziali delle prestazioni sociali e politiche pubbliche per l'integrazione*, Giustamm 1 (2015).

[98] A. Michels, L. De Graaf, *Examining citizen participation: local participatory policymaking and democracy revisited*, 6 Local Government Studies 875 (2017); U. Allegretti, *Basi giuridiche della democrazia partecipativa in Italia: alcuni orientamenti*, Democrazia e diritto 151 (2006).

[99] «Democracies are in a standing dilemma. They need strong cohesion around a political identity, and precisely this provides a strong temptation to exclude

allow the public administration to directly acquire knowledge of the real needs coming from different communities living in the territory[100].

The current multi-ethnic society, and the correlated need for real integration, require, in other words, a further effort by the legal system, a change of perspective, aimed at recognizing a role of protagonist and not of mere user to the legally residing foreigner[101]. Accessibility to most social rights is undoubtedly an important step, but it does not seem sufficient, insofar as it ends up framing the immigrant in exclusively "passive" terms[102]: it risks containing him in a dimension of mere receipt of benefits, which does not facilitate the overcoming of persistent social and racial barriers[103]. On the contrary, policies aimed at determining the recognition and effective exercise of political rights (of indirect democracy) – through the enhancement of the requirement of long-term residence – would allow the immigrant to be configured as an active individual, a person with a political role (denizen), called to deal operationally with the interests of the community to which, in fact, in full legitimacy belongs.

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those who can't or won't fit easily into the identity which the majority feels comfortable with, or believes alone can hold them together. And yet exclusion, besides being profoundly morally objectionable, also goes against the legitimacy idea of popular sovereignty, which is to realize the government of *all* the people» C. Taylor, *Dilemmas and Connection* (2011).

100 On the need for a "plural approach" by public authorities and for the enhancement of the «concept of citizenship, one that is progressively inclusive and expansive», see D. D'Orsogna, *Cultural diversity, citizenship, migration flows*, 3 Il diritto dell'economia 617 (2012).

101 «Migrants' participation in the democratic process is important for their integration. Obstacles to migrants' political participation in terms of legislative and structural barriers must be overcome to the greatest extent possible. The involvement of migrant representatives, including women, in the drawing up and implementation of integration policies and programmes should be enhanced» (European Agenda for the Integration of Third-Country Nationals, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML).

102 T.H. Marshall, *Reflection On Powers*, 3 Sociology 144 (1969).

103 P. Scholten, *Beyond Migrant Integration Policies: Rethinking the Urban Governance of Migration-Related Diversity*, Croatian and comparative public administration 7 (2018).

THE POWER TO TAX WITHOUT DUE PROCESS OF LAW

Angela Ferrari Zumbini[*]

Abstract

This paper provides a case-study analysis that allows the highlighting of any inconsistencies or unequal treatment in adjudication procedures in tax matters, a sector particularly interesting and fruitful for an investigation concerning the tricky balance between the requirements of taxation and the protection of the freedoms and rights of the individual. First of all, tax is not a subject of harmonisation, so the procedural autonomy of the states is even more marked insofar as it is grafted on to a standardisation that varies greatly between the various states. Moreover, in this case European law interfaces with a traditional sort of administration rather than with a national regulatory authority. The methodology used is inductive, starting from an empirical analysis which considers both normative data, and a number of important and recent judgments of the Court of Justice, selected using the criterion of the invoked applicability of the right to be heard in disputes in tax matters. Both national proceedings in implementation of EU law, and composite proceedings in which tax administrations from various Member States intervene are included, in order to highlight any discrepancies related to the type of proceedings adopted.

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1. Introduction[1]

Chief Justice John Marshall said it very clear in the famous Supreme Court case, McCulloch v. Maryland: "The power to tax involves the power to destroy"[2]. When the government exercises its power to tax[3], it is crucial that it may be limited by some constitutional restraint. One of the most important restraint in fiscal adjudication procedures is the respect of the due process of law.

This study is aimed at developing a case study analysis that allows the highlighting of any inconsistencies or unequal treatment in adjudication procedures in tax matters.

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[1] This article is a re-elaborated version of a research carried out with the financial contribution of the Italian Ministry of Education, University and Research, PRIN Project 2012 (2012SAM3KM).

[2] McCulloch v. Maryland, 17 U.S. 327 (1819).

[3] On the power to tax, G. Brennan & J.M. Buchanan, *The Power to Tax: Analytic Foundations of a Fiscal Constitution* (1980), in which the Authors suggest a new paradigm of how governments do behave, considering the power to tax from the perspective of the taxpayers.

This sector, often overlooked by scholars of public law, instead appears to be particularly interesting and fruitful, since it has always represented a field of choice for the tricky balance between the requirements of taxation and the protection of the freedoms and rights of the individual[4].

First of all, tax is not a subject of harmonisation, so the procedural autonomy[5] of the states is even more marked insofar as it is grafted on to a standardisation that varies greatly between the various states.

Moreover, in this case European law interfaces with a traditional sort of administration rather than with a national regulatory authority.

The methodology selected is inductive, therefore the study will start from an empirical analysis, which will not be limited to a survey of the normative data, but will take into consideration a number of important and recent judgments of the Court of Justice.

The selective criterion used to identify the relevant cases was that of the invoked applicability of the right to be heard in disputes in tax matters.

With respect to the type of proceedings being investigated, it was decided to include both national proceedings in implementation of EU law, and composite proceedings in which tax administrations from various Member States intervene, in order to highlight any discrepancies related to the type of proceedings adopted.

This phenomenological analysis will allow us to delineate the concrete explication of one of the most important institutions

[4] As recently affirmed by the European Court of Human Rights, "tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant", European Court of Human Rights, Grand Chamber, 12 July 2001, *Ferrazzini vs. Italy*, appeal no. 44759/98, para. 29. Furthermore, it is known that the Court over time has shown a degree of reluctance to enforce Article 6 of the ECHR in the tax area. P. Craig defined as "complex and unsatisfactory" the criteria developed by the Court to establish the applicability of Article 6 of the ECHR, in the essay *The Human Rights Act, Article 6 and Procedural Rights*, in Public Law, 2003, 753, the quotation is from p. 754. On the applicability of Article 6 of the ECHR to administrative proceedings, see M. Allena, *Art. 6 CEDU. Procedimento e processo amministrativo* (2012).

[5] On procedural autonomy of member States see D.U. Galetta, *L'autonomia procedurale degli stati membri dell'Unione Europea: Paradise Lost?* (2009).

for the protection of individuals, namely the right to a hearing, in tax matters.

2. Empirical analysis

2.1. National procedures for the implementation of European Union law

2.1.1. The *Sopropè* judgment and its (partial) transposition at national level

The Sopropè company imports footwear from the Far East. By virtue of the generalised system of preferences provided for by European legislation, goods from some countries are subject to lower customs duties. In the early 2000s, Sopropè was involved in 52 operations importing footwear, declaring that they were from Cambodia, a country that benefits from the preferential customs treatment. Subsequently, the anti-fraud services of the Portuguese customs authorities (as part of an administrative cooperation mission initiated by the European Anti-Fraud Office – OLAF) launched an investigation to verify the true source of the merchandise. At the end of the control procedure, the customs authority formed the view that the certificates of origin were falsified, and therefore the footwear should not have benefited from the preferential rates.

The administration informed Sopropè of its intention to issue a post-dated recovery measure for the duty, giving the company an eight-day deadline to present its point of view. The company exercised its right, but the authority considered that the documentation produced was not persuasive, and, five days later, issued the recovery measure for the customs duties.

Sopropè appealed against this act both in the first instance (where it was unsuccessful) and at appeal, during which the *Supremo Tribunal Administrativo* decided to suspend proceedings to refer two questions to the Court of Justice of the European Union on the interpretation of the principle of respect for the rights of the defence.

The rules relevant to the case in question are two, one of European origin, the other national. The first is the Community

Customs Code then in force[6], the second is the general Portuguese tax law[7]. For the purposes of the case under consideration, it should be noted that the Community Customs Code in force at the time of this case did not provide for any right of participation for the individual before a decision was made regarding them.

The defensive acts of the Italian Republic, intervening in trials, are mainly aimed at highlighting that EU legislation for the sector does not provide for any right of the taxpayer to be heard during the procedure aimed at establishing the recovery of customs duties.

On the contrary, national law enshrined the right of the taxpayer to participate in tax proceedings, regulating in detail the procedures for exercising this right. In particular, Article 60 of the Portuguese tax law provides for the obligation to notify the taxpayer of the "the draft findings in the report" if, at the end of the investigation, the tax authority intends to issue an unfavourable provision for the taxpayer. This notification has to indicate, in addition to the draft order accompanied by the reasons, "a period of 8 to 15 days to allow the body which has been the subject of the inspection to express its opinion on the draft findings" (Article 60, para. 2).

Sopropè complained about an infringement of its right of defence, given that it had only been granted eight days to present its observations with regard to as many as 52 import transactions which took place over a period of two-and-a-half years. Furthermore, the Portuguese tax authorities had issued the provision to recover customs duties only five days after receiving Sopropè's observations, a circumstance which led to doubts that the administration had adequately considered the observations filed.

With the *Sopropè* judgment[8], the Court of Justice interpreted the principle of respecting the rights of defence, providing very important clarifications under three distinct profiles.

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[6] Reg. (CEE) no. 2913/92 of the Council of 12 October 1992, which establishes a Community Customs Code, as amended by Reg. (CE) no. 2700/00 of the European Parliament and the Council of 16 November 2000.

[7] The general tax law of Portugal, approved by law by decree no. 398 of 12 December 1998.

[8] Court of Justice, 18 December 2008, *Sopropè*, case C-349/07. It is interesting to note that the Court decided to define the case without the opinion of the

Firstly, the Court of Justice stated that the principle of the right to a hearing must be respected whenever the administration intends to adopt "a measure which will adversely affect an individual", since respect for the rights of defence constitutes a general principle of European Community law (para. 36). On this point, the Court declared it was inspired by shared constitutional traditions, while it did not recall Article 41 of the Charter of Fundamental Rights (at the time of the facts of the case the Charter had still not assumed the same legal value as the Treaties, but it had already been initialled).

Secondly, the Court specified that the obligation to hear the recipients of decisions lies with the authorities even if EU sectoral legislation did not expressly provide for this (para. 38).

Thirdly, the Court clarified that respect for the rights of defence required that the recipient of the provision should be able to "effectively" express their point of view, therefore the administration must examine with all the necessary attention, the observations of the person involved (para. 50).

The Sopropè judgment was greeted very favourably by many commentators, who for some time had been highlighting the lack of guarantees to protect the individual in tax proceedings[9].

Instead, the innovativeness of this suspension led to a different reaction in the national tax court, which was concerned with limiting its applicability in order to avoid a general fall in all post-dated recovery measures. In fact, in Italian law, there is no provision for taxpayers being heard prior to the issue of the provision for the recovery of duties. The principle established by the Court of Justice in the Sopropè judgment would therefore have led to the annulment of all the acts of the national customs

Advocate General, a circumstance which usually occurs when the judgment is part of a consolidated case law of the EUCJ, while the *Sopropè* judgment is decidedly innovative.

[9] By way of example, cf. M. Gambardella, D. Rovetta, *Principi generali del diritto comunitario, diritto di difesa e obbligazione doganale:cosa cambia nell'ordinamento nazionale in seguito alla sentenza della corte di Giustizia nel caso C-349/07*, in Dir. Prat. Trib., 4/2009 783; S. Marchese, *Diritti fondamentali europei e diritto tributario dopo il Trattato di Lisbona*, in Dir. Prat. Trib., 1/2012 241; Id., *Attività istruttorie dell'amministrazione finanziaria e diritti fondamentali europei dei contribuenti*, in Dir. prat. trib., 3/2013 493; A. Marcheselli, *Indefettibilità del contraddittorio in ogni accertamento tributario*, in Corr. Trib., 30/2012 2315.

authorities, with obvious repercussions on the Community budget.

To avoid this, the Court of Cassation[10] stated that the principles of the Sopropè judgment cannot be applied to previously issued acts, thus excluding retroactive applicability. This decision, which constitutes an exception to the general retroactive applicability of the judgments of the Court of Justice[11], was justified by pointing out that "the principle stated by the Court concerns a procedural formality whose generalised compliance was not required by the practices of the European Commission". The Supreme Court also recalls the protection of the custody of the customs authorities and European financial needs[12].

Therefore, at national level, the court of last instance considers that an interpretive ruling by the Court of Justice respecting the rights to a defence is not applicable retroactively. To justify this limitation of the scope of a decision by the European court, the national court refers to the need to protect a fundamental resource of the Community budget. In this way, the

[10] Cass., sez. trib., 9 April 2010, no. 8481.

[11] This decision of the Court of Cassation causes a degree of perplexity, as the temporal delimitation of the effects of judgments of the Court of Justice can be established only by the Court of Justice itself. Moreover, this temporal circumscription of the effects cannot contrast with the fundamental principle of judicial protection established by Article 24 of the Constitution, as can be seen from the judgment no. 232 of the Const. Court of 1989, regarding which cf. V. Angiolini, N. Marzona, *Diritto comunitario diritto interno: effetti costituzionali e amministrativi*, (1990), spec. 32 ff. The binding nature of the interpretive judgments of the Court of Justice has been recognised by the Constitutional Court since 1985, with judgment no. 113. On the evolution of constitutional and EU case law as well as on their relationship, we limit ourselves to referring to F. Sorrentino, *Profili costituzionali dell'integrazione comunitaria* (1996).

[12] "Considering that the application of the principle to the proceedings underway would result in a general annulment of any customs decision unfavourable to the importer, with very severe repercussions on a fundamental resource of the Community budget, this Court considers that the preference (not necessarily determined by an active behaviour on the part of Community organs) of the national customs authorities for a Community practice that did not consider it necessary to ensure the right to a hearing in the administrative phase, cannot result, for customs decisions taken before the Sopropè ruling, in the invalidity of such acts". Cass., Sez. trib., 9 April 2010, no. 8481.

administrative authorities prefer a previous Community practice to the protection of the right to a hearing.

2.1.2. The legitimacy of postponing the right to a hearing to a subsequent phase of the claim, the *Kamino* judgment

It is not only the national court that reshapes the applicability of the rights of defence as set out in the *Sopropè* judgment. The same Court of Justice does so in a subsequent decision again related to the post-dated recovery of customs duties.

In the ruling issued on 3 July 2014 in the combined cases C-129/13 (*Kamino*) and C-130/13 (*Datema*), the European court took significant steps backwards, legitimising national laws that provide for the right to a hearing only in a subsequent phase of the process against the provision of the customs authority[13].

The two companies are customs agents who imported goods described as "garden pavilions/party tents", applying the rate of 4.7% for "garden umbrellas". Two years after the import operations, the Dutch customs authorities maintained that the goods in question should be classified as "tents and camping goods" for which the rate is 12.2%, and then requesting the recovery of the duties. Neither company was heard prior to the issuing of orders for payment

Both companies challenged the measure complaining about the lack of opportunity to usefully express their point of view before a damaging act was adopted against them, being unsuccessful both in the administrative complaint, and in the first two degrees of proceedings before the Dutch courts. During the Cassation hearing, the *Hoge Raad der Nederlanden* made a preliminary reference to the Court of Justice, recalling the principle of the respect for the right to a hearing expressed in the *Sopropè* judgment.

The relevant European law for the case is again the customs code in force until October 2013[14]. This establishes that the

[13] On the difference between a pre-deprivation hearing and a post-deprivation hearing, highlighting that the temporal factor is crucial for preventing the harm, R.M. Lipton, *Procedural Due Process in Tax Collection: An Opportunity for a Prompt Postdeprivation Hearing*, 44 U.Chi.L.Rev. 594 1976-1977.

[14] The new Customs Code of the Union, established by Reg. (EU) no. 952/2013, of the European Parliament and Council, of 9 October 2013, instead provides for

calculation of the duties to be recovered must take place within two days from the moment in which the customs authority realises that it is necessary to recalculate the amount (Article 220, para. 1, of the Customs Code). This decision must then be communicated to the debtor. It has already been pointed out that the European legislation previously in force provided no obligation for the customs authority to hear the recipient before issuing the recovery measure. Moreover, as clearly stated by Advocate General Wathelet, "That mandatory time-limit of two days is difficult to reconcile with the obligation to hear the interested party prior to the decision to enter the amount of duty to be recovered in the accounts"[15].

The Dutch law on administrative procedure[16] affirms the right to be heard before a potentially injurious provision is enacted (Article 4.8). However, in proceedings aimed at constituting an obligation of a financial nature, the right to a hearing may be disregarded, provided that the final order can be re-examined at administrative level – during which the person concerned has to be heard – in such a way as to allow for the complete elimination of the negative consequences of the act (Article 4.12).

Furthermore, in a way that is partially similar to what is foreseen in Italian law, the administrative authority at the time of the complaint can confirm a decision taken in violation of a rule or

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the right to be heard. Recital 27 states "In accordance with the Charter of Fundamental Rights of the European Union, it is necessary to provide, in addition to the right to appeal against the decisions taken by the customs authorities, the right of every person to be heard before a decision is taken which could harm them". As a consequence, Article 22, para. 6 of the Code states that "Before making a decision that has unfavourable consequences for the applicant, the customs authorities shall communicate the reasons on which they intend to base the decision to the applicant, who is given the opportunity to express their point of view within a given term from the date on which the applicant receives the communication or is deemed to have received it". This article applies only to decisions taken on request.

[15] Para. 52 of the Conclusions presented by Advocate General Melchior Wathelet on 25 February 2014 in the united cases C 129/13 and C 130/13, Kamino International Logistics BV (C 129/13), and Datema Hellmann Worldwide Logistics BV (C 130/13) against Staatssecretaris van Financiën.

[16] The *Algemene Wet Bestuursrecht*, of 4 June 1992.

general principle if this violation did not cause harm to the interested parties (Article 6.22).

Therefore, in this case, neither European law nor national law provide for the right of the interested party to be heard before a provision for the recovery of customs duties is issued against them.

Furthermore, since the measures in question date back to 2005, the Charter of Fundamental Rights, which only came into force in 2009, does not apply.

The Court of Justice, after recalling that respect for the rights of defence is a fundamental principle of EU law, of which the right to be heard in any proceedings is an integral part[17], comes to a conclusion that seems to contradict the principle just stated.

The reasoning followed by the Court is based on the observation that fundamental rights – and among these the respect for the rights of defence – are not "unfettered prerogatives" (para. 42 of the decision), but may be subject to restrictions.

Such restrictions may be justified on condition that they pass a double test of legitimacy: on the one hand, they must pursue objectives of general interest; on the other, they must be proportionate.

Given this conceptual starting point, the Court of Justice intends to verify whether, in the cases submitted to its examination, the limitation of the rights to defence is justifiable.

So, in the premises to this analysis of justification, the Court betrays a partial approach, when it defines the functional profile of the right to be heard. Indeed, in illustrating the scope of the right to a hearing, the Court emphasises only its collaborative connotation ("to enable the competent authority effectively to take into account all relevant information", para. 38), overlooking the truly defensive and participatory-democratic components.

The effect of this imposition reverberates in the subsequent implementation of the double test of legitimacy performed on the limitations to the right to be heard.

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[17] Para. 28 of the *Kamino* judgment, recalling the *Sopropè* ruling on tax matters and the *M. M. vs. Minister for Justice, Equality and Law Reform* judgment of 22 November 2012, case C-277/11 concerning the recognition of refugee status.

With regard to the general-interest objectives that have to be pursued, the Court places them in the general interest of administrative simplification, which in this case is expressed in the interest of the European Union "in recovering its own revenue as soon as possible" (para. 54). On this point, curiously, the Court of Justice refers to the *Sopropè* judgment, even using the same words, to affirm that this general interest of the Union demands that the controls be carried out promptly. However, it seems appropriate to point out that in the *Sopropè* judgment this statement was made to justify the provision of a short term (between 8 and 15 days) for the taxpayer's exercise of their right to be heard. In this case, the legislation does not provide the right to a hearing at all, postponing it to some point after the act is issued. The Court, therefore, uses the same argument to justify two very different (if not opposed) situations: the interest in promptly recovering revenue is used the first time to justify a short deadline for the exercise of the rights of defence, reaffirmed in their existence, while the second time the Court of Justice uses the same argument to legitimise the lack of provision of a prior hearing.

With respect to the proportionality of the limitation, the Court considers that the deferment of the hearing to the complaint stage may be a proportionate measure to the interest of speeding up procedures, provided certain conditions are met. On this point, the Court refers to a previous judgment[18] with which it had deemed legitimate the imposition of a penalty in the absence of the right to a hearing because the filing of the appeal against the provision made it immediately unenforceable, initiating a process in which the recipient could fully express their right to be heard. Therefore, the immediate automatic suspension of the provision satisfactorily protected the interest of the taxpayer, who was allowed to express their position during the complaint phase.

In the wake of this case law, in the present case the European judge takes a further step towards the restrictions on due process in tax matters. In fact, in the *Kamino* judgment it is specified that in order for the deferment of the hearing to the complaint phase to be considered proportionate – and therefore legitimate – it is not necessary for the filing of the claim to have the effect of automatically suspending the act. It is sufficient – as

[18] Court of Justice, 26 September 2013, *Texdata Software*, case C-418/11.

in the case of Article 244, para. 2 of the Customs Code – that suspension might be granted when there are reasonable grounds for doubting whether the act conforms with the law or there is a risk of irreparable damage to the interested party.

Therefore, according to the Court of Justice, a subsequent hearing, in the context of an administrative appeal, is suitable to guarantee the right to be heard, provided that it is possible to suspend the execution of the provision, even if such a suspension is not automatic, but subject to certain conditions.

In the *Kamino* judgment, the right to a hearing is limited not only in its content (since it is not necessary that the right to a hearing takes place prior to the issuing of the act, a hearing being sufficient in the subsequent second-degree proceedings) but also in the effects connected to its possible violation. According to the Court of Justice a violation of the principle of respect for the rights of the defence involves the annulment of the decision in question only when, without such an infringement, the proceedings could have led to a different outcome (para. 80). Therefore, the failure to comply with a fundamental right, such as being heard before an offending act is adopted against them, entails the annulment of the act only if the proceedings could have had a different outcome if the interested party had been heard.

2.1.3. Limitations on the rights exercisable in the hearing, the *Unitrading* judgment

Shortly after the *Kamino* judgment, the Court of Justice again opined on the matter of the right to a hearing in proceedings for the recovery of customs duties, limiting the rights exercisable by the participants. The case arises from a dispute about the country of origin of the goods (as in the *Sopropè* judgment) in which the customs authority began the debate with the recipient of the provision. The latter, however, complained of a significant limitation of the rights that it could exercise during the procedural investigation.

The Unitrading company had released in free circulation a batch of fresh garlic heads, declaring they came from Pakistan, thus benefiting from a preferential rate. The Dutch customs authorities took a number of samples, and had them analysed by

the laboratory of the American customs authorities [19], who affirmed that it was actually Chinese garlic (to which a higher rate should apply).

Unitrading – in this case invited to participate in the proceedings – had presented three requests to the administration: to repeat the analysis at the American laboratory, to know the details and methodology of the analysis carried out by the American laboratory, and to have the samples examined at their own expense by another laboratory. Only the first of these three requests was granted. The American laboratory confirmed its analysis, refusing to provide any information about the operations they carried out. On the basis of this result, the authority issued a payment notice that Unitrading challenged both during the complaint and in court, after which the Dutch Court of Cassation made preliminary reference to the Court of Justice.

This case highlighted the rights exercisable by the interested parties during the procedure aimed at establishing the real origin of the goods placed on the market. Unitrading, although invited to participate, objected that it was unable to defend its point of view. Indeed, the customs authority based its measure solely on the result of the analyses carried out by the American laboratory, which refused to provide any information about the examinations carried out. This confidentiality was justified on grounds of national security, since it was "law enforcement sensitive information".

Thus, the applicant (as well as the customs authority itself that issued the act) knew nothing about the means and procedures adopted to establish the origin of the merchandise. This lack of information made it impossible to challenge the examination and, therefore, its result. Furthermore, the Dutch Government had denied Unitrading the possibility of having the remaining samples held by the administration examined at their own expense.

The Court of Justice stated that proof of the origin of imported goods can be based "on the results of an examination carried out by a third party, with regard to which that third party refuses to disclose further information *[...], as a result of which it is made difficult or impossible to verify or disprove the correctness of the*

[19] The laboratory of the US Department of Homeland Security, Customs and Border Protection.

conclusions reached, provided that the principles of effectiveness and equivalence are upheld"[20].

Furthermore, in accordance with the procedural autonomy of the Member States, the existence of the right of the interested party to carry out analyses at their own expense must be assessed solely on the basis of national law.

According to the European court, therefore, where the customs authority establishes the adversarial relationship with the taxpayer in proceedings for the post-dated recovery of customs duties resulting from a different country of origin being stated, European Union law and the protection of fundamental rights do not prevent, in principle, the proof of origin being based on analyses made by a third party whose accuracy cannot be verified or refuted (para. 32).

2.2. Composite proceedings, the *Sabou* judgment

Moving the point of view from national proceedings in implementation of EU law to composite proceedings[21] involving tax administrations from different Member States, taxpayers' rights certainly do not enjoy greater protection. In fact, with a recent ruling of the Grand Chamber aimed at interpreting the legislation on cross-border cooperation between the financial administrations of Member States, the Court of Justice stated that there was no obligation to inform the taxpayer or to invite the taxpayer to participate in the witness hearing[22].

The decision originates from the appeal by Mr Sabou against an assessment notice issued by the Prague tax office. Mr Sabou is a professional footballer who in his tax declaration for the year 2004 had deducted substantial expenses incurred in various European countries. These expenses were incurred during negotiations with a view to his transfer to a number of foreign clubs.

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[20] Court of Justice, 23 October 2014, *Unitrading Ltd*, case C-437/13, para. 30, emphasis added.

[21] For a comprehensive analysis of models (and problems) of composite procedures, see G. della Cananea, *The European Union's Mixed Administrative Proceedings*, 68 Law & Contemp. Probl. 197 2004.

[22] Court of Justice, 22 October 2013, *Sabou*, case C-276/12. It seems interesting to note that the Commission challenged the Court's jurisdiction to judge this case, as is apparent from the judgment reaffirming its jurisdiction.

The financial administration of the Czech Republic, doubting the veracity of these expenses, requested information from the tax authorities of the countries where the costs had been incurred (Spain, France, the United Kingdom and Hungary). In particular, the Czech Treasury asked their Spanish, French and British counterparts to contact the football clubs mentioned by Mr Sabou to ask them for confirmation of the negotiations, and they asked the Hungarian Treasury asked to verify the accounting of the company Solomon Group Kft for the invoices presented in connection with their brokerage activities with the foreign clubs.

The tax administrations replied that from their checks the foreign football clubs were unaware of the existence of Mr Sabou, and the Hungarian company was simply an intermediary for services provided by Solomon International Ltd. based in the Bahamas. On the basis of this information, the Czech authorities issue a notice of assessment that Mr Sabou opposed up to the Supreme Administrative Court, which made a preliminary reference to the Court of Justice.

The appellant complained of the infringement of his right to defence in multiple respects. Firstly, the Treasury had not informed him that it had requested the assistance of the foreign tax administrations, not allowing him to participate in the formulation of the inquiries. Secondly, he was not able to attend the witness hearings in the other states. Finally, from the answers provided, it was not possible to infer how the foreign administrations obtained their information[23], thus making it impossible for the taxpayer to challenge its accuracy.

Also in this case there are two relevant rules, one European, the other national.

The first is Directive 77/799/EEC on mutual assistance between the authorities of Member States in the field of direct taxation, which governs the exchange of information between tax administrations in order to allow proper a determination of income taxes. The directive deals with the relationship between the tax administrations of the Member States, establishing mutual

[23] Some administrations indicated the names of the people from whom the information had been requested, others referred generically to the football club. Furthermore, the methods for acquiring the information were not disclosed, whether by telephone, IT means or at a hearing.

obligations, while it does not deal with the relationship between taxpayers and administrations, therefore it does not attribute any rights to the interested parties.

The Czech legislation concerning the administration of taxes, in terms of its relevance here, grants for the taxpayer subject to tax assessment the right to question witnesses and experts during the hearing[24].

The Court substantially had to answer the question about whether or not the taxpayer has the right to be heard during the process of acquiring information from foreign tax authorities.

The Court considered three distinct sources of European law that could (abstractly) attribute such a right in this case, but came to the conclusion that none of them actually protected it.

First of all, obviously, Article 41 of the EU Charter of Fundamental Rights comes to the fore, the applicability of which is excluded for reasons of time, since the assessment notice was issued in May 2009 (para. 25 of the *Sabou* judgment).

Secondly, the Court examines the secondary legislation, or the European sector norms, to ascertain whether this attributes rights to taxpayers. Here too the answer is negative, since Directive 77/799/EEC regulates the exchange of information and the reciprocal obligations between the tax authorities of the States, and does not confer any rights on the interested parties (para. 36).

The third and last attempt to find a procedural right for the taxpayer is to have it descend from the principle of the protection of the rights of defence, thus making use of the general principles.

The Court recalls its own case law formed in the matter of composite proceedings, according to which the right to be heard constitutes a fundamental right[25]. However, the Court of Justice reiterates that this principle applies only to decisions by authorities that may have a negative impact on recipients[26].

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[24] Article 16, para. 4, lett. *e*) of *Zákon č. 337/1992 Sb., o správě daní a poplatků*.

[25] This refers to the judgment of the Court of Justice of 24 October 1996, *Lisrestal*, case C-32/95, on which we limit ourselves to referring to G. della Cananea (ed.), *Diritto amministrativo europeo. Principi e istituti* (2011) esp. 238 ff.

[26] This delimitation of the right to a hearing in tax matters reflects the orientation of the case law of Court of Justice in matters regarding the right to a hearing in general. In fact, the Court of Justice has over time reconstructed the right to be heard, limiting it to decisions that are potentially detrimental to the interested party. This approach was also accepted during the drafting of the

Therefore, the judge wonders whether the decision to request information from the treasury of another state constitutes an injurious act. On this point, the Court provides a rather apodictic reasoning, insofar as it limits itself to recalling the distinction in tax matters between the investigation phase – in which information is gathered – and the stage in which the right to a hearing must be guaranteed – which starts only with the rectification proposal.

From this it follows that the general principle of protection of the rights of defence does not apply to the request for information from another tax administration, even if the replies received form the basis of the assessment notices. Thus, the Court decided that EU law does not confer "on a taxpayer of a Member State either the right to be informed of a request for assistance from that Member State addressed to another Member State [...] or the right to take part in formulating the request addressed to the requested Member State, or the right to take part in examinations of witnesses organised by the requested Member State".

3. Morphology and functioning of the right to a hearing in adjudication proceedings in tax matters

From the phenomenological analysis carried out, it is clear that there can be a general agreement on the recognition – abstractly – of general principles, such as that of defence. However, there may be – and indeed there are – discrepancies in the sectoral discipline regarding the rights of the defence as well as in their concrete unfolding[27].

In the conclusions of one of the cases examined in this paper, Advocate General Kokott argued that "The constitutional traditions common to the Member States also have included a right to be heard in the context of administrative proceedings only

ReNEUAL Model Code, which provided for the right of all parties to be heard "before a decision is taken that has detrimental effects on them", Article III-23. For the text in Italian, cf. G. della Cananea, D.U. Galetta (eds), *Codice Reneual del procedimento amministrativo dell'Unione europea* (2016).

[27] On the point cf. C. Harlow, *At risk: National administrative procedure within the European Union*, in G. della Cananea, C. Franchini (eds), *Il diritto che cambia, Liber amicorum Mario Pilade Chiti* (2016) 31 ff., esp. 34.

in isolated cases and only recently"[28]. This statement appears questionable in its being formulated in such general terms[29].

In the more limited context of a sectoral analysis, such as the one carried out here on adjudication procedures in the tax area, there have indeed been particularly profound divergences both in the normative discipline of the right to a hearing and in its interpretive reconstruction by the Court of Justice in the light of general principles.

If administrative law in general presents itself as a two-faced Janus[30], since, on the one hand, it constitutes an instrument of control of power, and, on the other, it dictates the coordinates to allow the attribution and exercise of power, the authoritative side appears to prevail in tax matters. The needs of taxation can in some cases justify a different protection of the principle of the right to a hearing. However, "in a democratic society, taxation [...] is based on the application of legal rules and not on the authorities' discretion"[31].

The analysis carried out in this study has made it possible to highlight various inconsistencies and differences in treatment in adjudication procedures in the tax field. In particular, the critical issues that emerge in a more significant way regard the following four profiles.

3.1. Failure to provide the right to a hearing in European tax law

A first critical point is the fact that European regulations pertaining to the fiscal sector often do not provide for the right to

[28] Opinion of Advocate General Juliane Kokott delivered on 6 June 2013 in Case C-276/12, *Sabou*, para. 54, which refers to V. Kai-Dieter Classen, *Gute Verwaltung im Recht der Europäischen Union*, (2008).

[29] For a reconstruction of the *audi alteram partem* principle as a general one of the administrative procedure that has deep historical roots, cf. G. della Cananea, *Due process of law beyond the State* (2016) esp. 35 ff.

[30] As stated by M.P. Chiti, administrative procedures have to pursue a dual purpose, since they must at the same time "support the pursuit of the public interest while seeking to guarantee security for the affected individual". M. P. Chiti, *Are there the universal principles of good government?*, in Eur. Publ. L. 241 1/1995. The judgment quoted is on p. 247.

[31] Para. 7 of the dissenting opinion of Judge Lorenzon in the ECHR *Ferrazzini* judgment, cited in note 1.

be heard in proceedings, even when they are aimed at issuing damaging acts[32].

This gap is found both in regulations governing harmonised taxes (such as customs duties) and in directives governing administrative cooperation for non-harmonised taxes (such as direct taxes).

With regard to customs duties until just a few years ago, the European Customs Code did not provide for any right of the interested party to be heard before a damaging act was enacted against them[33].

In the area of direct taxation, Directive 77/799/EEC on mutual assistance between the tax authorities of Member States was concerned with defining the modalities for the exchange of information, as well as the mutual obligations of the financial administrations, without conferring any right on taxpayers. However, it has been seen that the process of requesting information can lead to unfavourable consequences for the interested party since it constitutes the basis for a possible assessment notice.

The absence of express provisions to protect the right to a hearing in proceedings has been dealt with in the area of customs duties, but not in cross-border administrative cooperation for the exchange of information for the proper determination of direct taxes. In fact, in this regard, there has been no impact at all with the repeal of Directive 77/799/EEC and its replacement with

[32] It might be interesting to consider that defence safeguards were provided even during the Age of inquistion, as demonstrated by M. Damaška, *The Quest for Due Process in the Age of Inquisition*, 60 Am. J. Comp. L. 919 2012.

[33] As stated above in para. 2.1.1., the previous Customs Code did not provide for the right to a hearing before the issue of a post-dated recovery of customs duties. The new European Union Customs Code (UCC) approved with Reg. (EU) no. 952/2013 provides for the right to be heard, regarding which cf. above, note 10. Furthermore, in the Delegated Regulation (EU) 2015/2446 of 28 July 2015 of the Commission integrating the UCC, subsection 1 is dedicated to the "right to be heard", in which are established: the deadline within which the applicant can express their point of view before a decision is taken which might have negative consequences for them, set at 30 days (Article 8), the means for communicating the reasons (Article 9) and the exceptions to the right to be heard (Article 10).

Directive 2011/16/EU currently in force, since this does not grant taxpayers any rights either[34].

3.2. The (contradictory) case law of the Court of Justice and the Court of Cassation

A second profile of criticality can be found in case law (both European and national), which in the tax field reconstructs the right to be heard in a way that is not entirely consistent.

Starting from the case law of the Court of Justice, it can be seen, first of all, that some decisions appear partially contradictory in affirming the very existence of the right to a hearing. The *Sopropè* and *Sabou* judgments are two very significant examples. In both cases, the European law in question did not provide for the right to be heard, while this right was protected by the general tax laws of the states concerned. In both cases, for reasons of time, the Charter of Fundamental Rights could not be applied, therefore it was necessary to resort to the application of the general principle of protection of the rights of defence. But in the *Sopropè* judgment, the Court affirms the existence of the right to usefully express a point of view, whereas in *Sabou* this right is denied.

Furthermore, there is a discrepancy about the time when the right to a hearing has to be guaranteed. If, in the *Sopropè* case, the right to a hearing must precede the emanation of the damaging act, in the *Kamino* case a subsequent protection is considered legitimate, or the postponement of the right to a hearing until the complaint phase.

So too the functional profile of the right to be heard is not uniformly defined at European level, since sometimes the Court of Justice highlights the collaborative component ("to enable the competent authority effectively to take into account all relevant information", para. 38 of the *Kamino* judgment), overlooking out

[34] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation states in Recital 28 that "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union". However, despite this statement of principle, the directive does not provide for any rights for taxpayers, being limited to the regulation of relations between financial administrations.

the properly defensive component which emerges instead with greater clarity in the conclusions of the Advocates General[35].

Finally, with regard to the effects deriving from the infringement of the right to a hearing, the CJEU admits that these are defined by national law; the useful effect of EU law does not require that flawed measures are always annulled. An infringement of the rights of the defence would involve the annulment of the damaging act only if the appellant proves that the act could have had a different content[36] (*Kamino* judgment, para 80).

Also on the national side, the case law of the court of last instance appears to be not without contradictions and critical issues.

It has already been pointed out that the Court of Cassation first affirmed – in a questionable manner – the non-retroactivity of the *Sabou* judgment with which the Court of Justice recognised the general validity of the right to be heard in tax-related matters.

Subsequently, with various judgments of 2014, the Supreme Court recognised the right to be heard as a fundamental principle of EU law, which must therefore also be guaranteed in tax matters regardless of whether it is expressly provided for by sectoral regulation[37].

However, this orientation was partially disregarded only a year later. Indeed, with a ruling in 2015 by the Joint Session, the Supreme Court ruled that in the Italian legal system there is a

[35] For example, cf. the Opinion of Advocate General Juliane Kokott presented on 6 June 2013 in Case C-276/12, *Sabou*, para. 55.

[36] The issue of the non-annullability of the measure adopted in violation of the rules on the procedure is examined here under the specific profile of the failure to provide the right to a hearing on tax matters. For the general terms of the question, cf.: V. Parisio (ed), *Vizi formali, procedimento e processo amministrativo* (2004) esp. the essay by F.G. Scoca, *I vizi formali, nel sistema delle invalidità dei provvedimenti amministrativi*, 55; D. Corletto, *Vizi formali e poteri del giudice amministrativo*, in Dir. Proc. Amm. 33 2006; for a comparative framing of the issue with German and European law, D.U. Galetta, *Violazione di norme sul procedimento amministrativo e annullabilità del provvedimento*, (2003); for an analysis of the current national legislation, also in relation to EU law and Article 41 of the Charter, P. Provenzano, *I vizi nella forma e nel procedimento amministrativo. Fra diritto interno e diritto dell'Unione europea* (2015), which also provides a comparative analysis with German and Spanish law.

[37] Cf. Cass., SS. UU., 18 September 2014, no. 19667 and no. 19668; Cass., Sec. V, 5 December 2014, no. 25759.

general right to a hearing in tax matters only for harmonised taxes, or when the tax administration directly applies EU rules. On the contrary, when the administration initiates a proceeding aimed at adopting a provision detrimental to the taxpayer's rights under a national rule, there is no general obligation to hear the taxpayer – and this non-hearing will result in the nullity of the act only if a specific provision explicitly foresees this. This decision of the Court of Cassation derives from the observation that in the European agreement there is a general right to a hearing also in the tax field, the violation of which involves the lapse of the act; instead "the national law, with the legislation of today, does not give the fiscal administration that is preparing to adopt a provision prejudicial to the taxpayer's rights, in the absence of a specific prescription, a general obligation of the right to a hearing during proceedings, leading, in case of violation, to the invalidity of the act"[38]. In the national context, therefore, the taxpayer would always have the right to be heard before the administration adopts an injurious measure in the matter of VAT or customs duties, while they would not have the same right – unless the sectoral regulation expressly provides for it – concerning IRES (corporation tax) or IRAP (regional business tax). This orientation of the Supreme Court raises delicate questions with respect to

[38] Cass., SS. UU., 9 December 2015, no. 24823. The quoted text is contained in the principle of law enunciated by the judgment, which continues: "It follows that, in terms of "non-harmonised" taxes, the Administration's duty to activate the right to a hearing within the proceedings, under the penalty of the invalidity of the act, exists exclusively in relation to the hypotheses for which such an obligation is specifically sanctioned; while in the matter of "harmonised" taxes, where the direct application of the law of the European Union takes place, the violation of the obligation of the right to a hearing within the proceedings on the part of the administration implies in any case, including in the tax field, the invalidity of the act, provided that, in judgment, the taxpayer expresses concretely the reasons they could have asserted, if the right to a hearing had been promptly activated, and which the opposition of said reasons (evaluated with reference to the moment of the lack of the right to a hearing), prove to be not purely specious and such as to configure, in relation to the general rule of fairness and good faith and the principle of a proper trial, a misuse of the defensive instrument with respect to the purpose of the proper protection of the substantial interest for which it was prepared".

multiple profiles, not least that of compatibility with the Constitutional principle of equality[39].

The contradictoriness and confusion are increased by the fact that some provincial tax commissions have not shared the distinction between harmonised and non-harmonised taxes imposed by the judgment of the Joint Session. Therefore, some – but not all – Tax Commissions have overcome this orientation and recognised the right to be heard before the enactment of an imposition act as a general principle applicable to all taxes[40].

3.3. Reverse discrimination in national proceedings implementing EU law

National disciplines in the tax field may present differences, even profound ones, in many ways[41]: the right to be heard can be expressly protected or not[42]; the moment in the proceedings where this right has to be protected, or if it is necessary to guarantee first (and when) that a measure with negative effects be enacted or if a

[39] On the constitutional principle of equality the studies of L. Paladin, *Considerazioni sul principio costituzionale d'eguaglianza,* are still indispensable, in Riv. Trim. Dir. Publ. 897 1962; Id., *Eguaglianza (dir. sost.)*, in Enc. Dir., Vol. XIV, (1965) 519. By making the appropriate distinctions, this situation of unjustifiable inequality of treatment might somehow recall the situation that occurred in the second half of the 1990s, when redress for legitimate interests was foreseen only in the area of procurement (in application of the Community directive), while it was excluded in other sectors, on which subject cf. R. Caranta, *Danni da lesione di interessi legittimi: la Corte costituzionale prende ancora tempo*, in Foro it., I, 3485 1998.

[40] For example, the Provincial Tax Commission of Campobasso stated in two recent judgments that a general obligation to activate the right to a hearing with respect to the adoption of measures that could negatively affect the rights and interests of taxpayers is always incumbent on the financial administration, overcoming the distinction between harmonised and non-harmonised taxes. Provincial Tax Commission of Campobasso, judgment no. 116 of 19 February 2016 and judgment no. 1094 of 20 December 2016.

[41] For a comparative description of the different rights and duties of the tax authorities and taxpayers, cf. the useful OECD study *Tax Administration 2015: Comparative Information on OECD and Other Advanced and Emerging Economies*, (2015). The differences between the 27 countries of the Union with respect to tax-audit procedures and related taxpayers' rights are highlighted in the book by L. Van Der Hel, *Intra-Community Tax Audit* (2011).

[42] For example, in addition to the disciplines mentioned above, the *Abgabenordnung* (German Tax Law) dedicates para. 91 to the hearing of the parties (*Anhörung Beteiligter*).

deferred protection of the same is sufficient, after the emanation of the act; what the function is connected to the participatory institution; what modalities are foreseen, in written or oral form or both; what additional rights are connected to it (access to documents, the right to present briefs and documents, the obligation for the administration to take into account what is expressed by the taxpayer); in which cases there are exceptions to the legal guarantee; what are the consequences for the violation of the right to be heard.

As has been underlined, there are national regulations on tax proceedings that more fully protect the right to a hearing with respect to European sectoral disciplines. In these cases there is a reverse discrimination against the citizens of the Member States with more protective guarantees.

Indeed, in these cases in tax proceedings governed solely by national law, the taxpayer enjoys greater safeguards than in tax proceedings in which EU law applies.

Therefore, the procedural autonomy granted to the Member States can in this area generate an unequal treatment which appears difficult to justify.

Furthermore, in the context of two actions for failure to comply proposed to the Court of Justice by the Commission for the delay of States in making available Community resources (concerning proceedings for the post-dated recovery of customs duties), the Member States had justified this delay precisely with the obligation to respect the rights to defence of the taxpayers. In both cases, the Court clarified that respect for the rights of defence relates solely to the relations between taxpayers and States, while it is not relevant for relations between Member States and the Communities; therefore, it cannot be invoked to justify a delay in the determination of the duties to be collected within the time limits laid down by European Community law[43].

[43] Cf. para. 45 of the judgment of the Court of Justice of 17 June 2010, *Commission vs. Italy*, case C-423/08, "However, although the principle of observance of the rights of the defence applies in regard to relations between a debtor and a Member State, it cannot, as regards the relations between the Member States and the Communities, result in a Member State being entitled to disregard its obligation to enter into the accounts, within the time-limits laid down in the Community legislation, the Communities' own resources

3.4. Failure to apply the right to a hearing in composite proceedings

Also in the composite proceedings provided for by the European legislation on administrative cooperation in tax matters, the right to a hearing is highly restricted, as was shown in the *Sabou* case.

In cross-border cooperation between tax administrations, the taxpayer's right not only to participate, but also to be informed of the initiation of the procedure, is not foreseen. When a tax administration requests information from the Treasury of one or more foreign states – in order to correctly determine the taxes due from a taxpayer – it is not obliged to inform the citizen, even if the replies received will lead to the issuing of notices of assessment.

In this case too, the circumstance of the application of EU law leads to discriminations that are difficult to justify. If Mr Sabou had made the deductible expenses in his own country (the Czech Republic), he would have had the right to participate in the proceedings, also intervening in the hearing of the witnesses, as required by the Czech tax laws. However, since the expenses allegedly incurred were made in other Member States, he not only did not take part in the procedure to verify the correctness of the costs, but was not even informed of the initiation of that procedure.

The Court of Justice justifies these limitations on the right to a hearing by recalling the distinction between the investigation phase and the debate. However, at the end of the investigation phase (in which the right to be heard is not protected), the tax administration issued the assessment notice directly. Therefore, there can have been no debate.

So too in composite proceedings, for nationals of states with statutory tax guarantees there is a difference in treatment that derives from the place where expenses are incurred. Whoever deducts costs incurred in their own country enjoys greater protection than those who had to incur expenses abroad as well.

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entitlement", which recalls the previous judgment of 23 February 2006, *Commission vs. Spain*, case C-546/03, para. 33.

Since what applies is the law of the State where the request is made[44], the taxpayer's rights depend on the rules of the states in which they incurred the expenses. Therefore, in composite proceedings aimed at verifying the expenses incurred in different countries, the taxpayer could be asked to participate by some foreign tax administrations, and not receive any information from others.

And that is not all. In countries with protective tax laws, non-residents (to whom the request for information will be received from the state of residence) will be more protected than residents (who will not receive a similar communication from the state from which the information is requested).

Information from foreign tax administrations constitutes acts within the tax assessment procedure. In many countries it is not possible to challenge acts during proceedings. Thus, the taxpayer is forced to challenge the act from the foreign tax authority together with the final sanctioning act, at a time when the cooperation between the tax authorities has ended and it may be difficult to challenge the content of the document. The difficulty is greater, considering that there is no obligation in relation to the minimum content of the document to be transmitted: the foreign tax authority is not obliged to indicate how it has gathered the information, what procedure it followed, nor has it any obligation to provide motivation.

Furthermore, in the administrative cooperation between tax authorities, only the relationship between taxpayer and the requesting state is considered, while the relationship between the taxpayer and the state to which the request is made is not considered. This appears to be not entirely justifiable, since in the various procedural stages the taxpayer is the holder of various interests to be protected against both states. In the initial phase of the request for information, the individual has an interest (in their relationship with the requesting state) to be informed and possibly to participate in the formulation of the investigations. In the subsequent phase of the inquiry, as well as in the drafting of the response, the individual has an interest (in their relationship with

[44] Article. 6, para. 3 of Directive 2011/16/EU states that "the requested authority shall follow the same procedures as it would when acting on its own initiative or at the request of another authority in its own Member State".

the state to which the request is made) to participate in the investigations and contest the content of the response before an assessment notice can be based on this.

The current European directive does not provide any right to be heard at any stage of the administrative cooperation.

Furthermore, the information received from foreign tax authorities can also be used for purposes other than those for which they were requested[45] and may be forwarded to a third Member State (the right to object to such sharing is recognised to the state to which the request is made, and not to the taxpayer[46]).

Finally, a linguistic aspect should also be emphasised. In fact, if the right to receive a reply in one's own language is protected in the relationship between citizens and European institutions, in the case of reciprocal assistance such a right is not guaranteed. Pursuant to Article 21, para. 4 of Directive 2011/16/EU, answers can be provided "in any language agreed between the requested and requesting authority", so they could also be written in a language that is not understood by the taxpayer.

4. Conclusions

It is clear that even if there can be a general agreement on the abstract recognition of general principles, such as the due process of law, there are discrepancies in the sectoral discipline regarding the rights of the defence as well as in their concrete unfolding.

The analysis carried out has made it possible to highlight various inconsistencies and differences in treatment in adjudication procedures in the tax field. In particular, the critical issues that emerge in a more significant way regard four profiles.

Firstly, European regulations pertaining to the fiscal sector often do not provide for the right to be heard in proceedings, even when they are aimed at issuing damaging acts.

Secondly, the case law of the Court of Justice and the Italian Court of Cassation is contradictory, as it reconstructs the right to be heard in a way that is not entirely consistent.

[45] Article 16, para. 2, Directive 2011/16/UE.
[46] Article 16, para. 3, Directive 2011/16/UE.

Thirdly, in some cases there is a reverse discrimination in national proceedings implementing EU law. In fact, there are national regulations on tax proceedings that provide for higher guarantees with respect to European sectoral disciplines. In these cases in tax proceedings governed solely by national law, the taxpayer enjoys greater safeguards than in tax proceedings in which EU law applies.

Finally, in the composite proceedings provided for by the European legislation on administrative cooperation in tax matters, the right to a hearing is not foreseen. The current European directive does not provide any right to be heard at any stage of the administrative cooperation.

TERRITORIAL REPRESENTATION IN UNITARY STATES. REFORMING NATIONAL LEGISLATURES IN ITALY AND IN THE UNITED KINGDOM

Barbara Guastaferro[*]

Abstract

Important reforms of constitutional significance have recently affected national legislatures in Italy and the United Kingdom. In both cases, those reforms modified—or attempted to modify—the composition of national Parliaments by creating or bolstering territorial representation, and responding to a call for territorial differentiation in one of the Houses of Parliament. In the case of Italy, the 2014 constitutional reform—rejected by the 2016 referendum—required the Senate to represent "territorial institutions"—and no longer "the Nation"—as it happens in many Second Chambers of fully-fledged federal States. In the case of the United Kingdom, the 2015 House of Commons Standing Orders reform introduced the "English Votes for English Laws" procedure: legislation at the UK level affecting England (and Wales) will be enacted only with the consent of Members of Parliament for constituencies in England (and Wales), thus excluding MPs representing devolved legislatures. Against this

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backdrop, the article will be divided into two sections. Section I will analyse the above-mentioned constitutional reform of national legislatures both in Italy and in the United Kingdom, also focusing on the connections between this sort of "territorialization" of national legislatures and the vertical allocation of powers between central State and territorial autonomies/devolved legislatures. Section II will explore the possible rationale, functions, and constitutional significance of territorial representation for *unitary*, rather than *federal* States. It will then highlight the theoretical and empirical difficulties in embedding territorial representation in unitary States, where the trustee model of political representation and the dogma of unitary sovereignty are still dominant.

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Section I. Territorializing national legislatures: recent "constitutional" reforms in Italy and the United Kingdom

Important reforms of constitutional significance have recently affected national legislatures in Italy and the United Kingdom. In both cases, those reforms modified—or attempted to modify—the composition of national Parliaments by creating or bolstering territorial representation. In both cases, those adjustments were significantly intertwined with the division of legislative competences between the central State and territorial autonomies.

As far as the United Kingdom is concerned, on 22 October 2015 the House of Commons approved Standing Orders changes introducing the "English Votes for English Laws" procedure: legislation at the United Kingdom level affecting England (or England-and-Wales) should be enacted only with the consent of Members of Parliament (MPs) for constituencies in England (or England-and-Wales), thus excluding MPs representing devolved legislatures. This reform was expressly presented by the Conservative Government as a response to the long-standing "West-Lothian Question", which asks why Scottish MPs should vote on English-only affairs when English MPs have no right to vote on comparable issues in the Scottish Parliament. In this respect, the EVEL reform, which, to a certain extent, "territorializes" the House of Commons, is clearly triggered by the devolution of legislative powers to the Scottish Parliament. These

powers have been further increased by the Scotland Act 2016, which followed the 2014 Scottish independence referendum.

As far as Italy is concerned, a Constitutional Bill aimed at revising Italian Constitution was presented by the Government on 8 April 2014. If entered into force, it could have amended in a dramatic way the so-called "perfect bicameralism" characterizing the Italian legal order, which sees both the Houses of Parliaments directly elected and performing the same functions. Also in this case, the constitutional reform attempted to "territorialize" of one of the House of Parliaments. While the House of Deputies should have represented "the Nation", with the exclusive power to grant and revoke confidence to the Government, the Senate should have represented "territorial institutions". Against this backdrop, Italian Second Chamber (which in the Government proposal should have been named the "Senate of the Autonomies") was no longer directly elected by citizens. It should have been composed by a certain amount of majors of Italian municipalities and by representatives of regional legislative assemblies. Also in this case, the reform was extremely linked with the vertical allocation of powers between the State and the Regions, reshaped by the very same constitutional bill: the necessity of involving the Regions into the national legislative process—giving them adequate representation at the central level through a Second Chamber—was indeed meant to decrease the huge amount of competence conflicts between State and Regions brought before the Constitutional Court.

In this first section, the article will illustrate the above-mentioned constitutional reforms of national legislatures both in Italy and in the United Kingdom. In section II, the paper will explore the possible constitutional and political significance of territorial representation for *unitary* (rather than *federal*) States, also focusing on the connections between this sort of "territorialization" of national legislatures and the vertical allocation of powers between central State and territorial autonomies/devolved legislatures. The final part of the article will analyze the theoretical and empirical difficulties in embedding territorial representation in unitary States, where the trustee model of political representation and the dogma of unitary sovereignty are still dominant.

1. The case of the UK: English Votes on English Laws in the House of Commons

1.1. The rationale behind EVEL: responding to the "English Question"

The introduction, in October 2015, of "English Votes for English Laws" procedure within the House of Commons was presented as a response to the longstanding *West Lothian Question,* animating the late 1970s debate on the very first attempts to introduce devolution in the United Kingdom. In that occasion, in light of the proposal to transfer to sub-national legislative assemblies—such as the Scottish Parliament—some of the powers exercised by the national Parliament, Tam Dalyell, the Labor MP representing the "West Lothian" constituency, asked "for how long will English constituencies and English hon Members tolerate….at least 119 ho. Members from Scotland, Wales and Northern Ireland exercising an important, and probably often decisive, effect on English politics, while they themselves have no say in the same matters in Scotland, Wales and Ireland".[1]

While these concerns were partially put aside because of the failure of the Scottish and Welsh devolution referendums in 1979, they were raised again during the 1990s, when, under the Labor Government, the Westminster Parliament eventually voted to proceed with devolution within the United Kingdom. The "West Lothian Question" emerged at that time under the label of the "English Question", and reached its apex when some bills mainly affecting England only (such as the ones related to the increasing of tuition fees and the establishment of foundation

[1] The parliamentary debate of the seventies is reported in House of Commons, Public Administration and Constitutional Affairs Committee (PACAC), *The Future of the Union, part one: English Votes for English laws,* Fifth report of Session 2015-16, 11 February 2016, p. 6. The issue of the over-representation of Scottish MPs within Westminster Parliament, indeed, is a long-standing one, dating back to the 1707. Even in the very first Parliament of the United Kingdom, "Scotland was over-represented with forty five members in the Commons: but this was done by reference to an argument that has continuing resonance. Since a whole country was being incorporated into a larger, there was special reason to secure that its interest could not be ignored or belittled. There was also concern about un fair discrimination against the interest of a minority with a long prior history of conflict with the new majority", as reminded by N. MacCormick, *Questioning Sovereignty. Law, State, and the Nation in the European Commonwealth* (1999).

hospitals) were approved without holding a majority among English MPs, and, consequently, thanks to the vote of non-English MPs.[2] More recently, the English Question exploded after the decision to devolve further powers to Scotland, after the failure of the 2014 referendum on Scottish independence. During the referendum, indeed, many leaders promised Scotland more devolved powers if it remained part of the United Kingdom.[3] In its turn, devolving more powers to the Scottish Parliament triggered a strong desire of "fairness" by English constituencies. In the reading of the Conservative Government, allowing only English MPs to have a say on English-only legislation, could mitigate this sense of unfairness and balance the asymmetries created by devolution. Hence the Conservative Government proposal to introduce "English Votes on English Laws" (EVEL) within the House of Commons.[4]

Despite being one of the key-point of the Conservative Manifesto for the 2015 elections, the EVEL proposals were already

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[2] This happened during the 2001-2005 legislature (Health and Social Care Bill 2002-03 and the Higher Education Bill 2003-04), as reported in D. Gover & M. Kenny, *Finding the Good in EVEL: an Evaluation of English Votes for English Laws in the House of Commons,* Centre on Constitutional Change Report (2016). For a recent analysis on the impact of EVEL, arguing that it failed to provide meaningful English representation at Westminster, see D. Gover & M. Kenny, *Answering the West Lothian Question? A Critical Assessment of English Votes for English Laws in the UK Parliament* (2018). On the West Lothian Question more generally, see B. Winetrobe, *The West Lothian Question* (1995) and R. Hazell (ed.), *The English Question* (2006).

[3] This agreement, known as "the Vow", took the form a joint statement by the leaders of the three main unionist parties (David Cameron, Ed. Miliband, and Nick Clegg). The Scottish independence referendum took place on 18 September 2014 with a turnout of 84.6% of the electorate. In replying to the question "Should Scotland be an independent country?" 55.3% of Scottish voted No and 44.7% voted Yes. See S. Tierney, *Legal Issues Surrounding the Referendum on independence for Scotland,* 9 Eur. Const. Rev. 359 (2013); T. Mullen, *The Scottish Independence Referendum 2014,* 41 J. L. & Soc. 627 (2014).

[4] In the words of the Cabinet Office (*English Votes for English Laws: an Explanatory Guide to Proposals,* July 2015), the reform "addresses the so called West Lothian Question – the position where English MPs cannot vote on matters which have been devolved to other parts of the UK, but Scottish, Welsh and Northern Ireland MPs can vote on those same matters when the UK Parliament is legislating solely for England. As devolution to Scotland, Wales and Northern Ireland is strengthened, *the question of fairness for England* becomes more acute".

on the floor in the past.[5] Nevertheless, past proposals, while being equally concerned with the necessity to give a louder voice to England within the Parliament, put forward "softer" versions of the EVEL procedure.

In fact, a Commission of experts, chaired by Sir William Mc Kay, a former clerk of the House of Commons, and established by the Coalition Government in January 2012 to consider how the House of Commons might deal with legislation affecting England only, issued a report, entitled "Consequences of Devolution on the House of Commons", and published on 25 March 2013[6]. The report called for the adoption of a resolution of the House of Commons endorsing the following constitutional principle: decisions at the United Kingdom level with a separate and distinct effect for England (or for England-and-Wales) should *normally* be taken only with the consent of a majority of MPs for constituencies in England (or England-and-Wales). It has been argued that this position rested on the principle of reciprocity. "Devolved legislatures' wishes with respect to incursions by Westminster into area of devolved competence are *normally* respected (via the use of legislative consent motions under the Sewel Convention), but are not *necessarily* respected (because Westminster could, at least in theory, override their wishes by asserting its legislative supremacy, which is undiminished by devolution)".[7] Consistently with this principle of reciprocity, the several procedural options proposed by the McKay Commission to receive the consent of English MPs on issues affecting England only, did not end up attaching a veto power to English MPs (which is what the amended Standing Orders actually do). The Commission, indeed, characterized its procedural suggestions "as a "double-count" rather than a "double-lock": relevant bills (or parts of bills) would

[5] Some scholars deemed it as a "less radical option" if compared with the idea to create an English Parliament. See in particular P. Leyland, *The multifaceted constitutional dynamics of U.K. devolution,* 9 Int'l J. Const. L. 267 (2011).

[6] The Report of the Commission for the Consequences of Devolution on the House of Commons (published on 25 March 2013) is available here: http://webarchive.nationalarchives.gov.uk/20130403030652/http://tmc.independent.gov.uk/report-of-the-commission-on-the-consequences-of-devolution-for-the-house-of-commons/

[7] M. Elliot, *Bogdanor on "English Votes for English Laws". A response*, http://publiclawforeveryone.com/2014/09/25/bogdanor-on-english-votes-for-english-laws-a-response/ (25 September 2014)

be considered and voted upon by the whole House of Commons *and* by a committee of English MPs, but the latter would not be able to overrule the former". [8] The argument of the Mc Kay Commission was basically that the position of the English Members should be visible to all the MPs, which should vote accordingly.[9]

After the McKay Commission, possible procedural options to implement EVEL were presented in December 2014 in a Command Paper issued by the Government.[10] Some of these options gave English/English and Welsh MPs a decisive say over the content of the legislation without introducing any new stages to the legislative process.[11] Nevertheless, the 2015 Manifesto of the Conservative Party decided to sponsor the procedural option which most detached from the recommendation of the McKay Commission, providing English MPs with and effective *veto* rather than a strengthened *voice* on English affairs.[12] Eventually, the latter option was the one implemented by the Conservative Government through the changes to the House of Commons Standing Orders introduced on 22 October 2015.

1.2. The changes to the House of Commons Standing Orders

The new EVEL procedure amends the House of Commons legislative process. While Government Bills[13] affecting the whole

[8] M. Elliot, cit. at 7.

[9] Executive Summary of the McKay Commission Report cit. at 6, in particular paragraph 15.

[10] "Implications of Devolution for England", Cm 8969, December 2014, outlining some of the Conservative and Liberal Democrat proposals, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387598/implications_of_devolution_for_england_accessible.pdf

[11] This by simply reforming the Amending Stage of bills without excluding non-English MPs. See Option 1, named "Reformed consideration of Bills at all stages", and Option 2, named "Reformed Amending Stages of Bills" of the Command Paper are summarised in the of the PACAC Report, *infra* footnote 1, at pp. 12-13.

[12] Option 3 of the Command Paper, entitled "Reformed Committee Stage and Legislative Consent Motion"

[13] Private Members' Bills are not subject to the new rules (see Art. 83 J, par. 10 of the Standing Orders). The amended version of the Standing Orders (Public Business, 2016) is available here:

of the UK will be adopted through the ordinary legislative procedure, those Bills that either in their entirety or in single parts affect England (or England and Wales) only, will be subject to special procedures: the latter ensure that decisions affecting England, or England and Wales, can be taken only with the consent of the majority of Members of Parliament representing constituencies in those parts of the UK.

The first step of the newly introduced procedure is the certification of Government bills (or elements of Bills, proposals to change Bills and secondary legislative instruments) which will be subject to EVEL. Through an act of certification—as per Art. 83J, par. 1 of the Standing Order—the Speaker must assess that the bill (or any clause or schedule of it): a) relates exclusively to England or England and Wales, and b) is within devolved legislative competences. As explained in the cabinet office explanatory memorandum, "the two elements of the test are both required: in general, a clause that relates only to England will often be on a matter which is devolved, but this will not always be the case."[14] In certifying if a Bill applies to England only, the speaker might "disregard any minor or consequential effects outside the area in question"[15]. Moreover, the same Speaker, who may be assisted by two MPs, must announce to the House the decision for certification without giving reason for it.[16]

After the certification, the legislative process starts. Normally, the legislative process within the House of Commons is divided into the following steps: an Introduction and a First Reading (where the Bill is presented and there is no debate); a Second Reading allowing for a debate on the general principle of the Bill; a Committee Stage, which is the first opportunity to consider amendments to the Bill; a Report Stage in the whole House, which is the second opportunity to amend the Bill; a Third Reading, which gives the whole House the final opportunity to approve or reject the Bill before it goes to the House of Lords. In

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http://www.publications.parliament.uk/pa/cm201516/cmstords/0002/so-2.pdf

[14] Cabinet Office, *English Votes for English Laws: Revised Proposed Changes to the Standing Orders of the House of Commons and Explanatory Memorandum*, October 2015, p. 24

[15] No. 83 J, par. 2, of the House of Commons Standing Orders.

[16] No. 83 J, par. 9 of the House of Commons Standing Orders.

case the Speaker opts for a certification—and then solicits the House to legislate through the EVEL—there are two different paths to follow, which are related to the nature of the bill. In case of an entirely English-only bill, the EVEL mechanism occurs at an earlier step of the legislative process—the Committee stage. In case of a bill with just some provisions affecting England only, the EVEL mechanism occurs after the Report stage.

More specifically, in the latter case, a bill will be discussed by all MPs throughout the first and second Reading, the Committee, and Report Stage. Nevertheless, if at this stage the bill is amended by the whole House of Commons, it must be reconsidered by the Speaker for certification. This because, if there are new provisions affecting England (or England and Wales) only, the consent of English (or English and Welsh) MPs is required. In order to gain this consent, a new legislative stage has been created soon after the Report stage. It contemplates the creation of a Legislative Grand Committee—composed only of English/English and Welsh MPs—which vote on "legislative consent motions" to accept and/or reject the certified provisions.

By way of contrast, as to the first case (entirely England-only bills), soon after the discussion of the general principles of the Bill within the whole House at the Second Reading, the EVEL procedure steps in already at the Committee Stage: this means that since from the very first possibility to amend the bills only MPs representing English constituencies are involved. Then the bill will be considered on Report Stage, which is the second opportunity to amend the Bill and takes place in the whole House. If there are no changes, the England-only bill will proceed to Third Reading. If there are changes, the consent of only English MPs will be asked again through the Legislative Grand Committee called to issue a legislative consent motion.

For both the cases, there is a Reconsideration stage, namely a sort of dispute resolution mechanism between the House as a whole and English/English and Welsh MPs, in the event of a legislative consent motion being rejected. If, after reconsideration, the Legislative Grand Committee continues to withhold consent to a bill as a whole, then the bill may not be given a third reading. The same holds true for any vetoed provisions: they need to be amended or removed in order to allow the Bill to reach the third

reading.[17] Also the Lord amendments to Bills will be certified by the Speaker if they relate to England/England and Wales only. In this case, a double majority of both the whole House and of English/English and Welsh MPs is needed, which is why the votes of this two parts will be ascertained in a single vote but "recorded separately".[18]

1.3. The main criticisms

Several criticisms surrounded the introduction of EVEL into the House of Commons. Before discussing the merit of the amendments, the very same choice to use Standing Orders to implement such a far-reaching constitutional change was heavily criticized by those who pushed the Government to use primary legislation to introduce EVEL.[19] Moreover, the sustainability of the Standing Orders' amendments itself seems not to be sound, if we consider that in the division on 22 October 2012, all 312 MPs voting in favor of the amendments came from the Conservative benches, which means that all the other political parties voted against the introduction of EVEL via Standing Orders. This would endorse the thesis that EVEL might be a political instrument in the hand of the Conservative party to accommodate their electors—mainly belonging to English constituencies—and to obstacle a possible future Labor government. The latter might indeed loose its majority within the House of Commons when English-only issues are discussed and MPs from Scotland and other devolved areas—allegedly belonging to Labor party—would not be allowed to vote.

As noted by the Public Administration and Constitutional Affairs Committee (PACAC), the current standing Orders "may be unlikely to survive the election of a Government that cannot command a double majority of both English and UK MPs". In this respect, the PACAC Committee suggested "to develop proposals that are …more likely to command the confidence of all political

[17] See No. 83 L, M, N of the House of Commons Standing Orders.

[18] See No. 83 O of the House of Commons Standing Orders.

[19] The position of those arguing that using Standing Orders to implement a major constitutional change was "an abuse of process" is well explained in the House of Commons Library, *English votes for English laws,* Briefing Paper Number 07339, 23 October 2015 (by Richard Kelly), p. 17.

parties represented in the House of Commons and therefore likely to be constitutionally durable".[20]

Turning to the merit of the changes to the Standing Orders, the very first criticism related to the complexity of the procedure. The fact that Sir William McKay, a former clerk of the House of Commons, described the new Standing Orders as a "forest in which I lose myself", worried particular the PACAC Committee. Also the Procedure Committee found the procedures potentially burdensome and suggested not to implement them on every Government Bill, but only when there was a clear political necessity for an English/English and Welsh majority on specific issues. The Procedure Committee suggested that decisions on whether to subject bills to EVEL should have been voted by the whole House. The Government rebuffed such a proposal, and now it is upon the Speaker to certify whether a Bill can be qualified as English/English and Welsh only and be subject to the English/English and Welsh vote only.

The politicization and strong discretionary power conferred to the Speaker was another major concern of the critiques of the reform. First, the power of certification of the Speaker is very arbitrary in the sense that he/she is not required to give any reason for it. Second, in exercising this power the Speaker is likely to be influenced by the Government, at the point that some MPs suggested that the Government's view on the scope of a bill should not be asserted "overtly or aggressively".[21] Third, and most importantly, it is quite difficult, even for judicial authorities and experienced clerks, to understand where the boundaries of devolution lie. The Speaker will be called to have an unusual technical role, in selecting those Bills considered to be as English only and belonging to devolved matters, and in disregarding any "minor or consequential effect" on devolved territories to that end. As noted by Professor Tomkins in his written evidence to the PACAC, the wording of the Standing Orders are similar to that of the Scotland Act 1998, according to which an Act of the Scottish

[20] PACAC Report (*infra* footnote 1), p. 27.

[21] In the words of Mr. Charles Walker MP during the Emergency debate on EVEL of July 2015, as reported in the PACAC Report, p. 19. Nevertheless, evidence show that, during the first year of EVEL, there was little influence of the Government on the activities of the Speaker D. Gover & M. Kenny, *Finding the Good in EVEL* cit. at 2.

Parliament is outside competence if it "relates to reserved matters". In light of the growing body of UK Supreme Court case law on "border disputes" and competence conflicts, usually characterizing federal countries, Adam Tomkins concludes that "determining what legislation "relates exclusively" to England may not always be straightforward and may on occasion be contested and open to different reasonable interpretations".[22] Asking the Speaker to enter such a debate "appears inevitably to invite judicial challenge sooner or later".[23]

The third, and maybe most important, criticism is that the new Standing Orders create "a veto" rather than a "voice" for English MPs on England-only bills, since any vetoed bills or provision within the Legislative Grand Committee is prevented from reaching the Third Reading Stage. As Angela Eagle—then the Shadow Deputy Leader of the House of Commons—pointed out, this solution goes much further than the McKay Commission envisaged in its 2013 Report. In the reading of the Commission, English MPs' voice on English affairs should have been strengthened through a declaratory resolution (similar to the *Sewel* Convention) *normally* requiring the consent of English MPs on Bills affecting England only. In no case, such a *voice* should equal a *veto,* and, accordingly, "the right of the House of Commons *as a whole* to make the final decision should remain"[24]. By way of contrast, after the introduction of the EVEL procedure, MPs representing devolved legislatures are excluded from some stages of the legislative process. As per Standing Order No. 83 W (8), "any Member who is not a member of a legislative grand committee may take part in the deliberations of the committee *but shall not vote or make any motion or move any amendment*". It is telling that the McKay Commission explicitly warned against such an exclusion, stating that "MPs from outside England should not be prevented from voting on matters before Parliament", since this would create "different classes of MPs". [25] Not surprisingly, this

[22] Written evidence from A. Tomkins, *English Votes for English Laws and the Future of the Union – Part 1* (2015).
[23] P. Reid, *English votes on English law: Just Another Running Repair*, U.K. Const. L. Blog (2015)
[24] Executive Summary of the McKay Commission Report, cit. at 6, par. 14.
[25] T. Fairclough, *Constitutional Change, Standing Orders, and EVEL: A Step in the Wrong Direction?*, U.K. Const. L. Blog (22nd Feb 2016). According to some

kind of narrative related to the "two tiers of MPs", was very present during the parliamentary debates related to the adoption of EVEL procedure.

Last but not least, another line of criticism warned against the possibility for these procedural novelties to spread into other type of proceeding calling for a stronger representation of England, such as the one hypothesized by Lord Lisvane who asked, during the parliamentary debates: "what about other ways of calling the Executive into account? Might there be the pressure for an English-only Question time, for example?".[26] This latter provocation, together with the strong reaction of Scottish MPs during the discussion of the Housing and Planning Bill—the first ever to be approved through the EVEL procedure—clearly show that the recent reforms risk to "territorialize" the House of Commons—namely a "national" legislature—along divisive lines following the "sub-national entities" composing the United Kingdom. EVEL, indeed, can be regarded as "an attempt to create an English Parliament in the House of Commons".[27]

scholars, while the double veto "does not necessarily rebut the argument that EVEL has created two classes of MP, it does mean that MPs from outside England (or England and Wales) are in no weaker position to block legislative changes than they were previously: all legislation continues to require the backing of the whole House. They are, however, in a weaker position to force through legislation that applies only in England (or England and Wales) against the wishes of English (or English and Welsh) MPs" (D. Gover & M. Kenny, *Finding the Good in EVEL* cit. at 2, 23).

[26] House of Commons PACAC Report (*infra* footnote 1), p. 22. Similar fears were expressed also in scholarly literature, see for example V. Bodganor, *The New British Constitution* (2009) (related to the possible "bifurcation" of Government).

[27] In the words of Pete Wishart MP (SNP) during the emergency debate on EVEL (7 July 2015), as reported in House of Commons Library, Briefing Paper Number 07339R. Kelly, *English votes for English laws* (2015).

2. The case of Italy: a Second Chamber representative of territorial institutions

2.1. The rationale behind the reform: overcoming "perfect bicameralism" and streamlining the vertical division of powers

A constitutional bill aimed at amending the Italian Constitution was presented by the Government on 8 April 2014[28]. Although the Parliament voted in favor of it, the constitutional reform failed because the popular vote rejected it through a referendum held on 4 December 2016. If entered into force, the reform would have affected two pivotal features of Italian legal order, namely the "perfect bicameralism" and the vertical division of power between the central State and territorial autonomies characterizing Italian regionalism.[29]

As to the first point, the Government proffered a territorialization of national legislature, by changing the composition of one of the Houses of Parliament, namely the Senate, in order to create a Second Chamber representative of territorial autonomies. This was a bold revision of the "perfect

[28] Disegno di legge costituzionale N. 1429, "Disposizioni per il superamento del bicameralismo paritario, la riduzione del numero dei parlamentari, il contenimento dei costi di funzionamento delle istituzioni, la soppressione del CNEL e la revisione del titolo V della parte seconda della Costituzione" (herein after "constitutional bill"). It is worth recalling that a previous attempt to modify the Italian Senate in a federal way was presented in the past and equally rejected. For a general overview see A. D'Andrea, *La riforma del bicameralismo italiano al traino dell'inesistente federalismo ovvero quando il bluff delle parole è smascherato dal niente dei fatti,* 1 Costituzionalismo (2012) and G. Serges, *Crisi del bicameralismo e rappresentanza degli interessi regionali. Qualche spunto sulla riforma del Senato*, in S. Bonfiglio (ed.), *Composizione e funzioni delle seconde camere. Un'analisi comparative* (2008), on the reform rejected by the 2006 constitutional referendum.

[29] Early comments on the constitutional bill presented by the Government can be found, among others, in P. Costanzo, A. Giovannelli & L. Trucco (eds.) *Forum sul d.d.l. costituzionale "Renzi-Boschi". Dieci studiosi a confronto* (2015) and A. Lucarelli & F. Zammartino, *La riforma costituzionale "Renzi-Boschi". Quali scenari?* (2016). For interesting comments in English see R. Bifulco, '*A New Senate? A First Look to the Draft Constitutional Bill,* 1 IJPL (2014); V. Cerulli Irelli, *On the Constitutional Reform in the Process of Being Approved in Italy*, 1 IJPL (2014); G. della Cananea, *The End of (Symmetric) Bicameralism or a Novus Ordo?*, 1 IJPL (2014); G. Vigevani, *The Reform of Italian Bicameralism: the First Step,* 1 IJPL (2014); L. Violini, *The Reform of Italian Bicameralism: Current Issues,* 1 IJPL (2014). B. Guastaferro, *Constitutional Reform in Italy: the Senate as a Second Chamber Representative of Territorial Institutions,* 2 Dutch Const. L. J. (2016).

bicameralism", according to which the two Houses of the Parliament (namely the House of Deputies and the Senate of the Republic), besides having the same kind of legitimation, hold almost the same functions. Indeed, despite few differences related to the electoral laws and to the requirements to become a Member of the two Houses, in Italy both the Deputies and the Senators are elected by universal direct suffrage for five years. Both Houses are entitled with the legislative functions (in that each law requires the consent of both the Chamber of Deputies and the Senate) and both Houses must give the confidence to the Cabinet, in line with the parliamentary form of government requiring the Executive to be accountable to the political majority within the Parliament.[30]

As to the vertical division of power, Italy can be qualified as a unitary State organized in regional autonomies. The Regional State can be "distinguished, on the one hand, from the Napoleonic model of State, to the extent that Regions are invested with legislative, and not only administrative functions, and, on the other hand, from the federal model, usually presupposing a fusion into a Federation of formerly sovereign State".[31] The Constituent Assembly drafting the Italian Constitution soon after the second Word War, indeed, rebuffed the federal option, but insisted to acknowledge the autonomist principle as one of the core founding principles of the legal order. As per Article 5 of the Italian Constitution, "The Republic, *one and indivisible*, *recognizes* and *promotes local autonomies*". The strong recognition of territorial pluralism notwithstanding, Article 5 has often been used by the Italian Constitutional Court as glue keeping the system together, fostering the unitarian spirit of the Republic. In this respect, the history of Italian regionalism is characterized by a sort of "ambivalence". On the one hand, Regions have expressed their "identitarian" claim, resulting in a propensity for differentiation of objectives and rules in their policy-making choices. On the other hand, Regions have been conceived as an essential instrument of political decentralization, representing the executive branches of

[30] On the main features of the Italian constitutional order G. Martinico, B. Guastaferro & O. Pollicino, *The Constitution of Italy: axiological continuity between domestic and international level*, in A. Albi (ed.), *The Role of National Constitutions in European and Global Governance* (2018).

[31] C. Pinelli, *The 1948 Italian Constitution and the 2006 Referendum: Food for Thought*, 3 Eur. Const. L. Rev. 333 (2006).

the central State.[32] As a matter of fact, the establishment of the Regions only occurred in the 1970s, namely almost twenty years after the drafting of the 1948 republican Constitution. Nevertheless, a major constitutional reform in 2001 significantly bolstered the powers of the Regions, allowing them to legislate—as it happens in many federal States—in all those areas that the Constitution does not explicitly reserve to the central power of the State.[33]

The Italian Government, while presenting the 2014 constitutional bill before the Parliament, clearly stated the rationale of the reform. Indeed, differentiating perfect bicameralism by creating a Second Chamber representative of territorial autonomies, responded to the urgent need of an institutional settings able to voice the interests of territorial autonomies and try to coordinate them with the public policy outcomes set out by the central State. In this respect, the first aim of the reform was that of rationalizing the multilevel system of governance creating more coordination between the interests of the central State and those of territorial autonomies. Such coordination was deemed to be necessary to face the challenges coming from the new European economic governance and to meet Italian international commitments. In a related fashion, the reform also wanted to revisit the constitutional allocation of power between the State and the Regions trying to avoid the growing expansion of competence conflicts before the Italian Constitutional Court. In the reading of the Government, a Senate representative of territorial autonomies could allow a preventive composition of possible conflicts between the varying interests of each level of government. The resolution of the possible tensions at the (*ex ante*) political level could possibly reduce the (*ex post*) judicial overloading of competence conflicts before the Constitutional

[32] G. De Martin, *Le autonomie regionali tra ambivalenze, potenzialità, involuzioni e privilegi,* Amministrazione in Cammino (2013).

[33] On this kind of "federal" reform see L. F. Del Luca, P. Del Luca, *An Italian Federalism? The State, its Institutions and National Culture as Rule of Law Guarantor,* 54 Am. J. Comp. L. 799 (2006). A diachronic analysis from the "first regionalism" sponsored by the Constituent Assembly to the 2001 reform can be found, among others in A. Lucarelli, *Percorsi del regionalismo italiano* (2004).

Court.[34] Last but not least, the reform wanted to bolster the efficiency of the legislative process avoiding a burdensome duplication of the roles of the two Houses of the Parliament, which were provided with different functions.

Turning to the most important aspect, we will now explore the envisaged composition of the new Senate. As in the United Kingdom, the reform was an attempt to "territorialize" one branch of national legislature—in this case the Second Chamber of the Italian Parliament—called to represent territorial autonomies.

2.2 The new composition of the Senate

Consistently with one of the functions performed by Second Chambers in other constitutional systems[35], Italian Second Chamber imagined by the 2014 constitutional bill should have represented territorial autonomies, so to be named, as per the very first governmental draft, "Senate of Autonomies". It is interesting to note that the draft presented by the Government opted for "the arithmetical, rather than the geometric, principle in the makeup of the Second Chamber", thus giving "equal representation to the Regions irrespective of the extent of the territory and/or population".[36] By way of contrast, the members of Parliament rebuffed this proposal. According to the final draft, differently from fully fledged federal system such as the US, each Region was not represented in the Senate in an equal number. The numbers of Senators attributed to each Region were proportional to the varying size of the population of the Regions, although each Region had no less than two Senators.

Against this backdrop, the constitutional bill amended the notion of political representation provided by the 1948 Republican Constitution according to which both the Houses of the Parliament represent the Nation, and specified that while the House of Deputies represented "the Nation", the Senate of Republic represented "territorial institutions".[37] For this reason,

[34] Report of the Government attached to the constitutional bill, p. 16, available at https://www.senato.it/service/PDF/PDFServer/DF/302471.pdf

[35] S. Mannoni, *The Second Chamber: a Historical and Comparative Sketch,* 1 IJPL (2014).

[36] R. Bifulco, *A New Senate?*, cit. at 29, 49.

[37] Article 1 of the constitutional bill, modifying Art. 55 of the Italian Constitution.

the members of the new Senate were no longer directly elected by citizens, but by the legislative assemblies of the Regions (called regional Councils). The members of the Senate were chosen among the regional councilors themselves and among the majors of the local municipalities belonging to each Region.[38]

If we consider that both the regional Councilors and the Majors, in their turn, are directly elected by the citizens during the regional and municipal elections, some scholars argued that the members of the new Senate were basically chosen through a system of "indirect" democratic election. Nevertheless, during the Parliamentary debates, this choice—contained in the very first draft of the constitutional bill—was sharply criticized. Many scholars and politicians noted that this system would have deprived citizens from their constitutional right to directly elect the members of one of the Houses of Parliament.[39] In light of this, the final version of the draft states that Senators will still be elected by regional Councils, but in accordance "with the choices expressed by the electors in voting for the renewal of regional Councils".[40] The addition of this sentence seemed to entail that at any elections scheduled to renew the legislative assemblies of the Regions, citizens could know, in advance, which of the candidates running for the office of regional Councilor would also become a member of the Senate.[41] In light of this sort of "functional coupling" between members of the Regional Councils and members of the Senate, the latter did not receive any parliamentary additional compensation. The appointment of the Senators equaled the duration of their mandate as either regional councilors or Majors. In this light, the Senate was imagined as a

[38] Some opponents to the choice to include majors argued that, in case of delegation having only two representatives, the necessity to have one major for each regional delegation would create a strong imbalance in favour of the majors, L. Violini, *Note sulla riforma costituzionale*, 1 Le Regioni 300 (2015).

[39] Among others, A. Pace, *La riforma Renzi-Boschi. Le ragioni del no*, 2 AIC (2016); G. Zagrebelsky, *Dite con parole vostre*, in Aa.Vv., *La Costituzione bene comune* (2016) and F. Sorrentino, *Sulla rappresentatività del Senato nel progetto di riforma costituzionale*, 2 AIC (2016).

[40] Art. 57, par. 5 of the Constitutional Bill.

[41] On the possible interpretation of this clause see, among others, V. De Santis, *La "doppia investitura" dei senatori consiglieri e le difficoltà di rappresentare "al centro" le istituzioni territoriali, Considerazioni sull'emendamento all'art. 2, co. 5 del d.d.l. cost. n. 1429-B*, 11 Forum Quad. Cost. (2015).

permanent body with a varying composition following the electoral mandate of each of its members, rather than a body periodically renewed every five years through a direct suffrage as for the House of Deputies.

The constitutional bill also provided for a "non elective" quota of Senators, to be appointed in light of their distinguished contributions in the social, scientific, literary and artistic fields. This quota, which was quite significant in the draft presented by the Government, was drastically reduced in the parliamentary debates, also because many members of Parliaments—as well as many scholars—found this quota inconsistent with the idea of a Second Chamber representative of territorial autonomies.

2.3 The new legislative process

In light of the different composition of the two Houses of Parliament, the "perfect bicameralism", which actually sees the Senate and the House of Deputies performing the same functions, was amended by the 2014 constitutional bill. Only the House of Deputies—directly elected by the citizens and representing the Nation—could give and revoke confidence to the Executive—consistently with what happens in other federal States such as Germany. Accordingly, only the House of Deputies will hold the genuinely political functions aimed at holding the Government accountable to the Parliament. In its turn, the Senate—representing territorial institutions—had other important functions, such as the coordination between the State and lower levels of government, the participation to the decision aimed at implementing EU law, the impact assessment of public policies, and the evaluation of the impact of EU policies on local territories.

At a general level, the constitutional bill seemed to attach to the Senate not only a function of representation of territorial autonomies but also a function of guarantee. Indeed, in light of its exclusion by the genuine political dynamics related to the giving and revoking of the confidence to the Government, the Senate also acted as a "second thought" chamber, called to amend the Constitution and appoint important institutional offices such as the President of the Republic and the Judges of the Constitutional Court: all functions which should not be in the hand of a political majority but should find a broader consensus in the political arena. More specifically, with regard to the legislative process, the

constitutional bill presented by the Government deeply streamlined the legislative process. It attached to the House of Deputies the main legislative function, but quite accurately envisaged the modalities through which the Senate could intervene in the legislative process, in an attempt to overcome the perfect bicameralism requiring, for any law to be approved, the full agreement between the two Houses of Parliament.

According to the last version of the constitutional bill, the legislative process could be both unicameral (i.e. exercised mainly by the House of Deputies) and bicameral, but, as to the latter possibility, only in those cases expressly enumerated by the Constitution.[42] As per Art. 70 (1) of the Constitution, as amended by the constitutional bill, the Senate was a co-legislator in case of laws amending the Constitution and establishing the participation of Italy in the formation and implementation of EU law, in case of laws regarding the protection of linguistic minorities, popular referendum, the fundamental functions of lower level of governments—such as municipalities and metropolitan cities—and in other cases provided by the same article. In all other cases, as per Art. 70(2), the legislative function was mainly attached to the House of Deputies. Nevertheless, even in this generalized "unicameral" legislative procedure, the Senate was not completely ousted. Art. 70 (3) allowed the Senate—upon request of one third of its members—to examine the draft legislative proposal issued by the House of Deputies and ask for any amendments. Nevertheless, it was up to the House of Deputies to approve the final version of the law, thus holding a discretionary power in accepting or disregarding the amendments coming from the Second Chamber. By way of contrast, in specific cases in which State laws were likely to encroach upon the legislative prerogatives of the Regions, the "weak" intervention of the Senate was abandoned, and the House of Deputies was called to take in due consideration the opinion of the Second Chamber representative of territorial autonomies, thus strengthening its involvement into the legislative process.

[42] On the novelties introduced to the legislative process see, among others, S. Staiano, *Le leggi monocamerali (o più esattamente bicamerali asimmetriche)*, 1 AIC (2016); R. Romboli, *Le riforme e la funzione legislativa,* 4 AIC (2015); E. Rossi, *Procedimento legislativo e ruolo del Senato nella proposta di revisione della Costituzione*, 1 Le Regioni (2015).

Sec. II. Territorial representation in unitary States

The reform of national legislatures analyzed so far is an interesting phenomenon because it highlights—notwithstanding the differences between Italy and the United Kingdom—a call for a territorial differentiation within national Parliaments which usually characterizes *federal*, rather than *unitary* States, and is usually expressed in the Second Chambers. It has been noted that "amongst the 22 states which are federations, 18 have upper houses", but "in all of these cases the upper houses represent the subnational units of the federation".[43] The questions this section wants to address are: what does territorial representation mean in unitary rather than federal states? What are its political and constitutional implications? Why there is a growing demand to design one of the branches of Parliaments along territorial lines also in unitary States? Does this demand respond to growing identity claims from territorial autonomies?

As it has been argued, "in a country with devolved tiers of government, there may be many benefits from using the second chamber to provide links from the territories to the national parliament. Such an arrangement has the potential to bind the nation together, minimize the dangers of fragmented decision-making and encourage common positions to be found which are to the benefit of both the nation and its component territories".[44]

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[43] M. Russell, *The Territorial Role of Second Chambers, The Journal of Legislative Studies* (2001). It is worth recalling that, in the in-depht debate on the federal or regional nature of the Italian Republic, also the scholars considering the federal/regional dichotomy as strong at the theoretical level but very weak at the empirical level, deem the presence of a Second territorial Chamber (ant its participation into the revision of the Constitution) as almost the sole distinctive feature of a federal (rather than a regional) State. So, for example, A. D'Andrea, *Federalismi, regionalismi e autonomie,* 21 Federalismi 9 (2007), while arguing that "La differenza tra Stato regionale e Stato federale…tende nella realtà a sfumare e a divenire prevalentemente teorica", states that "l'unico elemento che potrebbe segnare…una differenza apprezzabile sul piano della struttura dello Stato tra ordinamento regionale e ordinamento federale è la presenza, costante nel secondo caso, di una Camera degli Stati". A summary of the debate on the distinction between federalism and regionalism can be found in B. Caravita Di Toritto, *Stato federale*, in S. Cassese (ed.), *Dizionario di Diritto pubblico* (2006).

[44] M. Russell, *The Territorial Role of Second Chambers*, cit. at 43, 109. At a more general level, it is worth stressing that the issue of territory recently started to puzzle Italian constitutional law scholarship. See the recent interesting work by L. Antonini, *Alla ricerca del territorio perduto. Anticorpi nel deserto che avanza*, 3

In this respect, any country with a multilevel system of government—independently from its professed federal or unitary nature—may benefit from one of the Houses of Parliament performing the territorial role usually played by upper chambers of federal States. On the one hand, this role entails representing the territories (and their interests) at the national level and, more generally, linking the national parliament to territorial autonomies (what I will name the *federal concern*). On the other hand, another possible meaning of territorial representation in unitary states is that of responding to the identity claims of some sub-national units, through institutional arrangements accommodating those claims to bind the nation together and avoid the risk of secession (what I will name the *unity concern*). Both the *federal* concern and the *unity* concern seems to drive—with obvious different intensity—the debate on constitutional reform in Italy and in the UK, as it will be showed in the following paragraphs.

3. Possible rationale and functions of territorial representation in unitary States

3.1. A *federal* concern? Voicing territorial interests at the national level

The territorial role of upper houses in federal States consists in representing territorial interests at the national level. Such a goal is basically achieved: a) by giving the members of the house representing sub-national units extended powers over legislation which affects these units particularly; b) by ensuring that the representatives of autonomies within national Parliaments are accountable to the territorial institutions they represent. Here, the "sample" model might be Germany, where the seating and voting arrangements within the *Bundesrat*, together with its legislative functions, attach to the Second Chamber a proper territorial function. Indeed, the members of the *Bundesrat* sit in delegations representing the Government of each *Land* and expressing a single weighted vote. Moreover, they are accountable to their respective assemblies through an intense activity of scrutiny. Last but not least, the involvement of the *Bundesrat* into the legislative process

AIC (2017), E. Gianfrancesco, *La riorganizzazione territoriale: un puzzle anche per il costituzionalista,* 2 Federalismi (2019) and in-depht study of I. Ciolli, *Il territorio rappresentato. Profili costituzionali* (2010).

is strengthened on bills possibly affecting the *Länder*: here the Second Chamber holds a veto power, rather than the delaying power that it has on ordinary bills.[45]

This kind of "federal concern" clearly animated the debate on Italian constitutional reform. As we have seen, in creating a Second Chamber representative of territorial institutions, the 2014 constitutional reform explicitly aimed at voicing the interests of territorial autonomies within the national Parliament. In this reading, the Senate was supposed to become the institution through which territorial autonomies could monitor draft legislative acts, could possibly amend them, and could assess their impact on local territories. In sum, the Second Chamber could allow for coordination between the central and the regional levels of government composing the Italian Republic, thus solving possible conflicting interests within the political arena rather than before a judicial body such as the Constitutional Court. Moreover, the legislative process envisaged by the reform strengthened the involvement on the Senate in case of bills particularly affecting the Regions or possibly encroaching upon their legislative competences.

This was for example the case of bicameral laws (requiring the consent of both the Houses of Parliament) and of bills approved under the so called "national interest" clause. The latter clause, interpreted as a sort of "safeguard of unitarianism", and similar to Article 72.2 of the Basic Law of the Federal Republic of Germany[46], allowed central legislature to act in subject areas devolved to the Regions in case this would be necessary to protect national interest and the legal and economic unity of the State[47].

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[45] M. Russell, *The Territorial Role of Second Chambers*, cit. at 43. Interesting considerations on the connections between the autonomy of subnational entities and their participation at the national decision-making process are in the recent comparative analysis edited by F. Palermo & K. Kössler *Comparative Federalism. Constitutional Arrangements and Case Law* (2017), in particular Part II dedicated to Self-rule and Shared-rule

[46] Art. 72(2) of the German Basic Law allows the Federation to legislate in some of the subject areas belonging to the concurrent legislative power "if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest".

[47] Art. 117(4) of the Italian Constitution as amended by Art. 31 of the Constitutional bill. A similar strengthened role of the Senate was also required

Since through the activation of this clause, the State was clearly likely to encroach upon the prerogatives of the Regions, a major involvement of the Chamber representing territorial autonomies was required within the legislative process, in order to avoid an arbitrary use of it. Indeed, as per Art. 70(4), if an absolute majority of the Senate proposed to amend a draft legislative act based on the "national interest" clause, the House of Deputies could disregard the amendment only by an absolute majority voting. In this respect, in case of draft legislative acts able to circumvent the constitutional allocation of powers between the State and the Regions, the participation of the Senate to the legislative process—while not being equal to a veto power—was significantly strengthened, if we consider that in the "ordinary" unicameral legislative procedure, the House of Deputies hold a complete discretionary power (i.e. not linked to any majoritarian threshold) in disregarding the amendments of the Senate.

If in Italy the constitutional reform explicitly reshaped the Second Chamber to allow it to perform a territorial function, in the UK the call for territorial differentiation of national legislature elucidated in the first section came from the House of Commons, rather than from the Second Chamber (namely the House of Lords).[48] For this reason, the federal concern of voicing territorial interests within national legislature seem to be less straightforward if compared to the Italian debate. Nevertheless, EVEL procedure explicitly address what has been defined the "constitutional anomaly related to the current imbalanced representation of England's national voice within the UK", which emphasizes that "whilst Scotland, Wales and Northern Ireland's devolved assemblies have direct powers over some policy areas, there is no equivalent institution or process that *represents*

in those specific cases in which art. 120 of the Constitution allows national power to substitute regional one.

[48] Nevertheless, it is worth recalling the 2000 Wakeham Report proposal to elect some of the Lords on a regional basis, and the Ed Miliband mention to a "Senate of Nations and Regions" in his 2014 Labour Party Conference Speech. An endorsement of such a solution is in P. Leyland, *The Second Chamber debate in the UK revisited: life, afterlife, and rebirth?*, 2 AIC (2017). On the past and possible future proposals for the House of Lord reform see M. Russell, The contemporary house of lords (2013).

England's sub-state national interests".[49] Also in this case, the "federal concern" of representing a sub-national interest at the national level is present. But rather than creating a second chamber, such a goal is achieved by create an "English Parliament within Westminster Parliament". Moreover, similarly to the extended powers which are given to the house representing sub-national units in legislation affecting these units particularly, EVEL modifies the legislative process in a sense that the right to vote a bill is expressed only by those affected by it. This shows how, in both the unitary states, the process of "territorialisation" of national Parliaments was triggered by the "federal concern" of voicing or strengthening sub-national interests at the central level or, more specifically, within the legislative process.

3.2. A *federal balance*? Linking territorial representation to the vertical division of competences

In order to understand the legal and political implications of territorial representation in unitary states, it is worth exploring not only the "federal concern", namely the necessity to voice the interests of territorial autonomies at the central level, but also what I name a "federal balance", namely the strict connection that seems to exist between the territorialisation of national legislatures and the vertical division of competences. Indeed, both in Italy and in the United Kingdom, the bolstering of territorial representation at the central level has been coupled with a reshuffling of the division of competences between State and territorial autonomies. More specifically, there seems to be a sort of causal link between the territorialisation of national Parliaments, on the one hand, and the devolution of competences to the Regions/devolved legislatures, on the other.

This link is very clear in the case of the Italian constitutional reform, where a single text, namely the constitutional bill, addressed at the same time both the changing composition of the Senate and the vertical allocation of powers. More specifically, the Government explicitly presented the new vertical division of competences "as a result of" the changing composition of the Senate: the representation of territorial autonomies within the

[49] Written evidence from A. Mycock & A. Giovannini, *PACAC Inquiry on the constitutional implications of EVEL* (2016).

Senate could justify the reallocation of powers between the State and the Regions at the expense of the latter. In other words, the institutional design presented by the Government outlined a sort of compensation mechanism between the loss of power of legislative assemblies at the local level, and a gain of power in their being represented, for the very first time, at the central level within the Parliament. Such a "compensation" mechanism was nevertheless sharply criticized, being "the configuration of the legislative process …not able to compensate for the net loss of legislative powers by the Regions".[50]

As a matter of fact, this net loss was evident. Differently from the 2001 constitutional reform, which devolved more legislative powers to territorial autonomies, the 2014 constitutional reform reshuffled the vertical division of competences at the expense of the Regions. Indeed, since 2001, Italian Constitution enumerates both the exclusive competences of the States, and the competences to be shared between the State and the Regions, thus leaving to the Regions the power to legislate on the remaining (unspecified) subject areas. This "federal" allocation of power wanted to strengthen the powers of territorial autonomies, left with significant residual legislative competences. By way of contrast, the 2014 constitutional reform clearly enumerated the competences of the State, on the one hand, and the competences of the Regions, on the other. Most importantly, the reform abolished the category of shared competences and attached many of them to the exclusive power of the State.

This "centripetal" taste of the amended division of competences was compensated by the new composition of the Senate, called to represent territorial autonomies and, most importantly, to be significantly involved within the legislative process. In the rationale of the reform, if Regions are directly involved into the legislative process, thanks to their representation

[50] R. Bifulco, *A New Senate?*, cit. at 29, 53. But see also A. Ruggeri, *Una riforma che non dà ristoro a Regioni assetate di autonomia*, 1 Le Regioni 246 (2015). Another important criticism, related to the inconsistencies of the reform, is raised by Michele Belletti. According to the Author, "l'odierna riforma costituzionale pare un po' "strabica", poiché, elimina la potestà concorrente, ma prevede la supremacy clause e la Camera di rappresentanza territoriale che, in un certo senso la presuppongono", see M. Belletti, *Le materie di potestà legislativa concorrente*, 2 Oss. AIC 19 (2016).

within the Senate, they can promote national legislation which is less intrusive into the competences of the Regions. The "autonomist principle" enshrined in Article 5 of the Italian Constitution would be then safeguarded through the Regions involvement at the central level, without requiring an expansion of their competences at the territorial level. In other words, between the two institutional and political strategies to implement the autonomist principle, *enhancing central representation* or *strengthening territorial autonomy,* the Italian Government sponsoring the reform favored the first.

This kind of compensation mechanism between the (decreasing) legislative powers of the Regions and their (increasing) involvement within the national legislative process—through their representation within one of the Houses of the Parliament—is typical of federal States. Just to give an example, in Germany, after the Second World War, the growing intervention of the State, legitimized by the principle of the welfare state, concentrated many tasks and responsibilities at the federal governmental level, especially in terms of social spending. The consequent contraction of the political autonomy of the *Länder*, was compensated by the constitutional institutionalization of cooperation mechanisms between State and Regions, and, most importantly, by extending the powers the *Bundesrat*—namely of the House representing the *Länder*—in the law-making process.[51]

Along similar lines, in the United States, in the early decades of the twentieth century, the 1929 Great Depression triggered strong nationalist policies within the framework of the New Deal, backed by a shift in the case law of the Supreme Court. Instead of defending States' prerogatives vis-à-vis the expansion of Federal competences, the Supreme Court stressed that it was already the "political process" to "ensure(s) that laws that unduly

[51] E. Bockenforde, *Stato sociale federale e democrazia parlamentare,* in M. Nicoletti & O. Brino (ed.), *Stato, costituzione, democrazia. Studi di teoria della costituzione e di diritto costituzionale* (2006), with reference to the growing use of the laws requiring the Second Chamber approval (*Zusimmungsgesetze*) – different from the ordinary laws merely allowing for the Second Chamber opposition (*Einspruchgesetze*) – as a compensation for the increasing powers of the Federation.

burden the States will not be promulgated".[52] The representation of States within the Senate, and the Senate's involvement within the legislative process, constituted a "political safeguard of federalism"[53] which was sufficient to prevent national legislation to infringe upon States' powers. In the words of the Court, "the principal and basic limit on the federal (commerce) power is that inherent in all congressional action – *the built-in restraints* that our system provides *through state participation in federal governmental action*".[54] Both in Germany and in the US, the shrinking of States' power has been always justified by recurring to—and sometimes strengthening—the "political safeguard of federalism". This notion, which actually dates back to James Madison and John Marshall, expresses the idea that US Constitution "primarily protects federalism indirectly: rather than entrenching a rigid allocation of authority directly, the Constitution entrenches rules for representation and procedures for law-making. Those rules and procedure then create a *political* dynamic that, in turn, protects federalism and other fundamental structural values"[55].

Interestingly enough, this kind of "federal balance" seems to characterize also the current reform of constitutional legislatures in *unitary* States, witnessing the same sort of compensation mechanism between *autonomy* and *representation*. In Italy, the constitutional bill intended to *increase* the representation of Regions at the central level through the new Senate, while *decreasing* regional legislative competences. Also in the UK, we have an analogous compensation mechanism, which nevertheless follows an opposite direction: the *increasing* devolution of powers to Scotland (and other devolved legislatures), comes at the expense of a *decreasing* representation of representatives of devolved territories within the national Parliament.

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[52] Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), 550-1 and 556, quoted in R. Schutze, *Looking Outside: A Comparative Federal Perspective,* paper presented at the conference "The United Kingdom: Federalism Within and Without", Durham Law School, 26 and 27 November 2015.

[53] H. Wechsler, *The Political Safeguards of Federalism: The Role of the States on the Composition and Selection of the National Government,* 53 Col. L. Rev. 543 (1954).

[54] Garcia v. San Antonio Metropolitan Transit Authority, cit. at 52.

[55] E. Young, *What British Devolutionaries Should Know about American Federalism,* in J. Fedtke & B. Markesinis (eds.), *Patterns of Regionalism and Federalism* (2001).

Indeed, even without a grand constitutional momentum amending at the same time both the vertical division of competence and the composition of national legislature—such as the launch of a constitutional reform witnessed in Italy—in the United Kingdom all the debate on the time and pace of devolution has been always accompanied by a necessity to reconsider Scotland's representation within the House of Commons. The very same title of the McKay Commission—"Commission on the *consequences of Devolution for the House of Commons*"—shows that the issue of further transfer of power to devolved legislatures could not be pushed too far without reconsidering the question of parliamentary representation at the central level. Most tellingly, the decision to introduce EVEL—which is a clear measure to affect representation within Westminster Parliament—was extremely linked to the decision to expand Scotland's power.

Indeed, on 19 September 2014, the same day in which Scotland voted to remain within the Union, the Prime Minister announced a cross-party Commission, chaired by Lord Smith of Kelvin, to devolve further powers to Scotland in the field of tax, spending, and welfare. In the very same occasion, the Prime Minister stated that "the question of English Votes for English laws required a definitive answer" and launched a Cabinet Committee, chaired by William Hague, to explore possible proposals to implement the new procedure. Those proposals needed to be taken forward "in tandem with, and at the same pace as" further devolution to Scotland. In this respect, I consider EVEL to be a measure which goes into the same direction of the shrinking of Scotland representation within the House of Commons triggered by the first wave of devolution, when Scottish seats were reduced from 72 to 59 by way of the Scotland Act 1998 as amended. In other words, also in recent times, a causal link emerged between the Scotland Bill 2015-16 decision to *increase the autonomy* of devolved legislatures, and the decision to *decrease representation* at the central level for non-English MPs. The difference is that through EVEL, the institutional strategy undermining central representation of Scottish MPs did not take the form of a reduction of seats, but of their "exclusion" from some stages of the legislative process.

3.3. A *unity* concern? Binding the nation together

Another possible meaning of territorial representation in unitary States might be that of minimizing the risk of fragmented decision making and binding the nation together.

In Italy, this function should have been explicitly attached to the Second Chamber. The Senate, indeed, was supposed to coordinate the positions of the two levels of government (the central State and the Regions) at the legislative level, both with an internal goal (that of preventing competence conflicts before the Constitutional Court), and with an external goal (that of minimizing fragmentation in the implementation of EU law).[56] Moreover, the unity concern of the Italian constitutional reform was visible in the attempt to strengthen the voice (but not the veto) of the Regions (via their representation within the Senate) any time that, in order to protect national interest, the State was allowed to legislate in areas belonging to regional competences (by recurring to the national interest clause).

To sum up, the territorial representation introduced in the Second Chamber should have managed to bind the nation together in a double sense: first, by promoting coordination between levels of government in the law-making process; second, by preventing the central level of government to encroach upon regional legislative autonomy.

Also the UK institutional and political history shows that the issue of territorial representation (paradoxically) has a strong unitary impetus. As to the past, the very same launch of devolution, although transferring some competences to sub-national units thus giving the impression to *divide* powers, was characterized by a strong unity concern: that of binding the nation together.[57] Indeed, in some cases, devolution responded to the

[56] G. Amato, *Conclusioni al convegno "Il sindacato di costituzionalità sulle competenze legislative dello Stato e delle Regioni. La lezione dell'esperienza", Roma, Palazzo della Consulta, 15 maggio 2015.*

[57] It is not a case that almost all the devolution proposal are somehow linked to the growing consent of the Scottish National Party. On the unitary character of devolution, see, among others, V. Bogdanor, *Devolution in the United Kingdom* (2001) and N. Burrows, *Unfinished Business: The Scotland Act 1998,* 62 Mod L. Rev. 2 (1999). Also more recently the response to the risk of secession represented by the 2014 referendum on Scottish independence has been more devolution, as shown by "the Vow". On the complexity of public policies used to manage national diversity in a unitary States such as the UK see S.

identity claims of some sub-national units through institutional arrangements which—in partially accommodating those claims—avoided the risk of secession. As to the present, the issue of ensuring unity—and avoiding the dissolution—of the kingdom seems to be the major concern of the new institutional arrangements facing the sensitive issue of UK territorial constitution.[58] The anxiety on a lack of a wider constitutional strategy in managing devolution[59] is significantly growing both in legal and political discourse.

The recent House of Lords report on *The Union and Devolution* makes clear that the "devolve and forget" strategy used all over the years needs to be dropped if the Kingdom wants to remain united. In considering the referendum on Scottish independence an "existential threat" to the longstanding flexibility and resilience of the UK Constitution, the report complains the lack of a "*guiding strategy …to ensure that devolution develops in a coherent or consistent manner and in ways which do not harm the Union*. Instead, successive Governments have responded individually to demands from each nation…with different constitutional conversations taking place separately in different parts of the country".[60] By way of contrast, "devolution needs to be viewed through the lens of the Union, with appropriate

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Tierney, *Giving with one hand: Scottish devolution within a unitary state,* 5 I-CON 730 (2007); M. Keating, *The independence of Scotland: Self-Government and the Shifting Politics of Union* (2009).

[58] To this purpose, S. Tierney proposed to keep more attention to the "shared-rule" than to the "self-rule" side of federalism, thus binding devolved legislature more closely within the institutional structure of the central state, 'Is a Federal Britain Now Inevitable?' (27th November 2014) (available at http://ukconstitutionallaw.org). According to the Author, the "minimal role for the devolved territories in central decision-making within a system driven only by the imperative of the autonomy" would create a "representation deficit" (S. Tierney, *Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017,* in R. Schuetze & S. Tierney (eds.), *The United Kingdom and the Federal Idea* (2018).

[59] P. Leyland, *The multifaceted constitutional dynamics of U.K. devolution* cit. at 5, 251, considered also the late nineties devolution launched by the New Labour government "a radical constitutional change … not undertaken as part of a wider strategy of constitutional transformation".

[60] House of Lords, Select Committee on the Constitution, *The Union and Devolution,* HL Paper 149, 25 May 2016, p. 109-110.

consideration given to the needs of, and consequences for, the Union as a whole".[61]

In this respect, also the call for territorial differentiation enshrined in "English Votes for English Laws" seems to be driven by a sort of unity concern. Indeed, simply conceding more devolution to Scotland soon after the independence referendum, would have meant, once again, to respond to the autonomy claim of one part of the nation without considering the "consequences for the Union as whole". By way of contrast, in the very same day of the launching of the Smith Commission, English constituencies were to a certain extent appeased by the launch of English Votes for English laws[62], so that the *autonomy* claims of Scotland were satisfied without harming the *representation* claim of England.

Without underestimating the political reasons which pushed the Conservative to launch EVEL, it is submitted that the latter procedure, from a constitutional point of view, promotes a form of "territorial representation" which, rather than pushing towards diversity, pushes towards unity. In this respect, in the recent reform of the House of Commons, a *constitutional argument* – we need to safeguard the unity of the Kingdom accommodating the desire of *fairness* of English constituencies – seems to prevail upon a *popular argument* – we need to grant more voice to English MPs accommodating the desire of *distinctiveness* of English constituencies.

On the one hand, indeed, the issue of "fairness" was very present in the legal and political discourse surrounding EVEL and it was the primary concern underlying the Prime Minister launching of the reform: "as the people of Scotland will have more power over their affairs, so it follows that the people of England, Wales and Northern Ireland must have a bigger say over theirs".[63] On the other hand, the popular or "identity-related" nature of the

[61] *Idem.* For a recent excellent debate on the legal and political implications of the 2014 Scottish referendum see M. Keating (ed.), *Debating Scotland* (2017).

[62] "We have heard the voice of Scotland - and now the millions of voices of England must also be heard. The question of English votes for English laws…requires a decisive answer." Prime Minister's office, *Scottish Independence Referendum: statement by the Prime Minister* (19 September 2014).

[63] *Ibidem.*

reform was very week,[64] as proved by two different but intertwined aspects.

First, other solutions brought to the fore to solve the English Question and much more suitable than EVEL to express a sense of English identity—such as the creation of an English Parliament or of Regions within England[65]--never gained the same kind of consent. Indeed, in the last years surveys, EVEL emerged as the favorite option for the governance of England[66], and, most importantly, this kind of support seemed to be shared by Welsh and Scottish electorates, namely by non-English people.

Second, EVEL supporters in English constituencies, more than by a desire of cultural differentiation, were driven by a sense of discontent related to the awareness that public services were being delivered differently in Scotland and Wales. The future of England Survey found evidence of a growing correlation between "a gradual strengthening of English national identity…and a sense of discontent about England's position within the domestic union".[67] As a matter of fact, complaints by the lack of an equivalent level of representation came from the socially disadvantaged English Regions bordering Scotland and Wales.[68]

In my opinion, more than accommodating an identity claim, EVEL represents an institutional response to the constitutional imbalance created by devolution. In this reading,

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[64] More generally on "Englishness" see M. Kenny, *The Politics of English Nationhood*, Oxford University Press, 2014.

[65] On the failure of the referendum held in 2004 under the Regional Assemblies (Preparations) Act 2003 and on the difficulties in creating an English Parliament, possibly a strong competitor to the Westminster Parliament see P. Leyland, P. Leyland, *The multifaceted constitutional dynamics of U.K. devolution* cit. at 5, 266. More generally, P. Leyland, *Post Devolution; Crystallising the Future for Regional Government in England,* 56 N. Irel. Leg. Q. 435 (2005) and J. Tomaney, *The evolution of Regionalims in England,* 36 Reg. Stud. 721 (2002).

[66] As to the Written evidence from the Mile End Institute, Queen Mary University of London (EVE 8), p. 2, "on the question of whether Scottish MPs should no longer be able to vote on legislation that affects only England, data from the British Social Attitudes and Future of England surveys record a steady increase in the proportion why strongly agree, from 18 % in 2000 to 55 % in 2012".

[67] *Ibidem*.

[68] "This is where one finds the strongest perception of having missed out economically in comparison with the devolved parts of the U.K.", P. Leyland, *The multifaceted constitutional dynamics of U.K. devolution*, cit. at 5, 265.

the strengthening of territorial representation through the introduction of EVEL—which gives voice to the interests of England within Westminster Parliament—holds a strong unitary impetus, in that it balances and compensates the unfairness of devolution, rather than fostering a sense of English diversity. It is telling that the last report on EVEL, issued by the House of Lords, seems to put more emphasis on presenting this instrument "as a pro-Union–and not as a narrowly pro-English–measure.".[69]

4. Unitary sovereignty and political representation under stress: the winding road of territorial representation in unitary States

The first section of this article analyzed very recent reforms of national legislatures in Italy and in the UK, both responding to a strong call for territorial differentiation within national Parliaments. The first part of the second section showed how territorial representation might perform some important functions also in *unitary* states, especially when the decentralization process have developed so far to create some of the needs shared by *federal* States, such as the necessity to balance unity with diversity in compound polities. I showed how territorial representation in unitary states served the purpose to respond to some "federal claims" such as the necessity to voice sub-national units at the central (parliamentary) level, or the necessity to use the "political safeguard of federalism" to counter-balance the loss of powers of local autonomies. I also showed how territorial representation could help minimizing the risk of fragmented decision making among level of governments. Last but not least, in some cases, territorial representation avoided the risk of dissolution of the State by responding to the identity or constitutional fairness claims of some sub-national unities.

Notwithstanding the important functions potentially or actually performed by territorial representation in *unitary* States, it is submitted that in these States this form of representation does

[69] House of Lords, Select Committee on the Constitution, English Votes for English Laws (2 November 2016), HL Paper 61, par. 84, p. 24, reporting the suggestions of the Mile End Institute evidence. On the unity of the Kingdom under stress, see R. Jones et al., *England and Its Two Unions: The Anatomy of a Nation and Its Discontents* (2013).

not develop smoothly, since it ends up overtly clashing with the dogma of unitary sovereignty[70] and with the modern notion of political representation based on the *trustee* rather than on the *delegate* model or representation. Both in Italy and in the UK, indeed, the above-analyzed institutional responses to territorial differentiation did not have easy life. For the sake of clarity, they will be analyzed separately.

4.1. The problematic aspect of EVEL and its constitutional implications on the concept of political representation

The Standing Orders' amendment introducing EVEL, *de facto*, "territorializes" the House of Commons. Indeed, the veto power attached to MPs belonging to English constituencies is likely to introduce a new territorial cleavage within the House of Commons: in the specific cases in which EVEL applies, MPs will be called to vote upon Bills not necessarily in light of their political affiliation, their personal opinions or their constituency's demands, but in light of their belonging to a specific territorial sub-national entity. This belonging, in its turn, can trigger exclusionary dynamics towards other MPs. Against this backdrop, a crucial question arises: "How consistent is EVEL with the House of Commons' status as a United Kingdom legislature?".

Although the Public Administration and Constitutional Affairs Committee posed—among many others—this question in its call for evidence on the Government's proposal to establish EVEL, the issue has not been extensively addressed in the written evidence. Few opinions raised the possibility that EVEL will foster divisive territorial disputes[71] and will accentuate tensions, in particular when non-English MPs will feel overruled by the application of the procedure in case of indirect consequences of a Bill on their constituencies.[72]

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[70] On the challenges to the understanding of unitary sovereignty see K. Armstrong, United Kingdom, Divided on Sovereignty?, in N. Walker (ed.), Sovereignty in Transition, Oxford Hart, 327 ss. and N. Walker, Beyond the Unitary Conception of the United Kingdom Constitution, Public Law, 2000.

[71] Written evidence from the Federal Trust for Education and Research (EVE 13), PACAC inquiry into English Votes for English Laws, p. 5.

[72] Mile End Institute evidence, *infra* fn. 66, point 16. Some evidence on how this happened in the course of the Charities, Protection and Social Investment Bill in D. Gover & M. Kenny, *Finding the Good in EVEL*, cit. at 22, 21.

In my opinion, EVEL is not completely consistent with the House of Common's status as a United Kingdom legislature, because it channels legislative deliberation through territorial lines, deprives some MPs of their right to vote in specific sub-stages of the legislative process, and solicits MPs to pursue their particular sub-national interest rather than the general interest of the United Kingdom.

While this is exactly what territorial representation *should do* in *federal* States, it is not clear how it could be consistent with the institutional arrangements of a *unitary* State. The House of Commons is not the Second Chamber of a fully-fledged federal state, where the single sub-national entities are empowered by the Constitution to express their interests and voice their claims within the Parliament. The House of Commons is, still, a UK legislature, and any attempt to draw a divisive line among different territories could affect the integrity of the Parliament[73] and challenge the very same modern notion of political representation.[74]

Modern legislative assemblies endorse a *trustee model of representation,* where the Members of Parliament pursue the general interest rather than the particular interests of their constituencies, and challenges the *delegate model of representation,* where the representative acts as an agent strictly bound by the mandate of his/her principals[75]. This latter model of representation, indeed, characterized the Parliament of the fourteenth century, which was simply a body authorizing the King to raise revenues. Consistently with the parliamentary power of bargaining with the Crown, the Parliament represented the interests and the grievances of those who selected its members.

[73] *Contra,* see A. Tomkins, *infra* fn. 22, who thinks that Westminster parliament might be also an English Parliament.

[74] B. Guastaferro, *Disowning Edmund Burke? The Constitutional Implications of EVEL on Political Representation*, U.K. Const. L. Blog (2016).

[75] H.F. Pitkin, *The Concept of Representation,* Berkeley: University of California Press, 1967. For an in-depth conceptual analysis on the category of representation see S. Staiano, *La rappresentanza,* in *Rivista AIC,* n. 3/2017, pp. 1-42. On the similar specific dichotomy scrutinized by Pitkin, opposing the "private" and the "public" nature of representation Sandro Staiano argues: "E' questo, tra gli approcci dicotomici alla rappresentanza, il più compatto e il più resistente, anche in ragione del pregio della sua costruzione teorica, che trova compiutezza nella distinzione-opposizione tra *Vertretung* e *Repräsentation*" (5).

The mandate of the MP was not free, but legally bound by the instructions of the groups and territories—such as counties and boroughs—it meant to represent. By way of contrast, when the Parliament acquired the function to legislate (rather than bargain) with the Crown, the free mandate of the Member of Parliament emerged. Any representative entering the legislative assembly with a pre-constituted peculiar interest or with an onus to refer back to his constituency, would have precluded the soundness of the deliberation and jeopardized the genuine search for the common interest.

The trustee model of representation, currently embraced by several democratic Constitutions, found its first codification in the 1791 post-revolutionary French Constitution, which explicitly prohibited any form of mandatory instruction upon the elected representatives, and explicitly stated that they could not represent a particular department, but the entire nation.[76] Nevertheless, such a modern notion of representation—looking at the representative as a trustee rather than an agent of his/her electors—is a legacy of the common law tradition. Indeed, it can be traced back to Edmund Burke's speech to its electors, delivered on 3 November 1744, according to which, although chosen in a specific constituency, he did not feel "a member of Bristol", but "a member of Parliament". "Parliament is not a *congress of ambassadors* from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates" but rather "a *deliberative assembly* of one nation, with one interest, that of the whole".[77] Burke's fierce opposition to constituents' "authoritative instructions" — also inspiring US constitutionalism — was based on the assumption that "government and legislation are matters of reasons and judgment and *not of inclination*".

In this respect, even if EVEL seems to be the most favored option to solve the English Question, this form of territorial representation *within* the House of Commons—considered as a legislature of the entire Kingdom rather than of England only—has some constitutional implications on the modern notion of political representation, where MPs should be called to represent

[76] Title I, Chapter I, Section 3, Art. 7 of the 1791 French Constitution.
[77] E. Burke, *Speech to the Electors of Bristol*, 3 November 1774.

the *whole*, consistently with Edmund Burke's legacy. As far as English MPs are concerned, it is not difficult to understand the ambiguities that EVEL creates around their status and their "additional English role". Indeed, while "MPs elected directly to an English Parliament would possess a specific mandate for performing this role…MPs elected in a General Election to the UK Parliament …would not enjoy the same democratic legitimacy in so doing".[78]

English MPs, indeed, have not been elected to rule on English affairs—as if they were members of a sub-national English Parliament—but as Members of a UK legislature. By way of contrast, in light of the new procedure, English MPs could be highly responsive to the threat of sanction by their constituencies if they do not act as the guardian of English interest, which is something more familiar to a *delegate* than to a *trustee* model of representation. In this respect, the refusal of Labor English MPs to take part in the EVEL procedure during the approval of the Housing and Planning Bill—namely the first Bill approved with the new procedure—shows the difficulty of embedding territorial representation in unitary state: Labor MPs made their political affiliation prevail upon their territorial one.

4.2. The possible divisive nature of EVEL and the House of Lords "unity" concerns

If the first paragraph focused on the puzzling implication of EVEL on the modern notion of political representation, this paragraph will highlight the strong divisive potential of the procedure, also emerged during the parliamentary debate on the Housing and Planning Bill, the very first Bill subject to EVEL procedure in February 2016. "For the first time in the history of this House and this Parliament" —a non-English MP from the SNP noted[79]—"Members of Parliament will be banned from participating in Divisions of this House, based on nationality and

[78] Written evidence from the Federal Trust for Education and Research (EVE 13), PACAC inquiry into English Votes for English Laws, p. 4-5: "MPs in the House of Commons are more than simply representatives of a particular geographic locale. They are part of a collective that deliberates on behalf of the UK as a whole"

[79] See the link to the parliamentary debates: publications.parliament.uk/pa/-cm201516/cmhansrd/cm160112/debtext/160112-0003.htm#16011280004400

the geographic location of their constituencies". This clearly highlight how the territorial cleavage created by EVEL within the House of Commons affects not only the status of English MPs, but, most importantly, the status of non-English MPs, treated as "international observers"—as provocatively declared by Pete Wishart MP during the above-mentioned parliamentary debate. As a matter of fact, throughout the years, the devolution process significantly decreased non-English MPs' capacity to be fully representative of the devolved territories they belong to. Having already "no say" in policy fields for which the devolved Parliaments, rather than Westminster Parliament, are responsible, after the introduction of EVEL non-English MPs will suffer from a further exclusion from some stages of the legislative process. Against this backdrop, EVEL might lead to a paradoxical outcome: introduced to address the desire of *fairness* of English MPs in order to keep the Kingdom united, the new procedure might increase a sense of *unfairness* among non-English MPs (possibly fueled by the SNP). In this respect, the procedure holds a possible divisive potential within Westminster Parliament.

The 2013 McKay Commission's report, called to find a solution to the "English Question", was aware of this. Indeed, the report had the merit to propose two suggestions aimed at reducing the divisive potential of EVEL. First, "the concerns of England should be met *without provoking an adverse reaction* outside England".[80] Most importantly, "the right of the House of Commons *as a whole* to make the final decision should remain…MPs from outside England would then continue to vote on all legislation but with prior knowledge of what the view from England is".[81] Unfortunately, these suggestions have not been completely followed in changing the House of Commons Standing Orders, although it has been argued that "….by opting for the double-veto form of EVEL, the Government has attempted to balance the need for a separate English 'voice' in the House of Commons with the need for Parliament to remain a sovereign chamber representing the whole of the UK".[82]

[80] Executive Summary of the McKay Commission Report cit. at 6, point 15.
[81] *Ibidem*, point 14.
[82] House of Lords report on EVEL report, *infra* fn. 69, p. 3.

It is interesting to point out that also the House of Lords Report on the Union and devolution recommends the Government to worry about "the political effect of the veto within parliament. *Although the government intends that the veto should stabilize the union, there is a danger that the proposals could instead serve to promote territorial rivalries or accentuate tensions.* The most serious dangers are likely to arise where a UK government lacks an English majority—particularly if a single opposition party has a majority of English MPs instead—potentially providing the basis for rival claims of legitimacy in governing England".[83]

If the divisive nature of EVEL has not emerged so far despite in the last year several pieces of primary legislation have been certified as subject to EVEL by the Speaker[84], it is basically because during the first year of the procedure, the Government was able to command a sound majority of both the whole House and those members representing English (and Welsh) constituencies. To say it with First Parliamentary Counsel, Elizabeth Gardiner, "*given the current makeup of the House of Commons, I would say that EVEL has not been tested in anger*".[85] In mentioning this quotation, the House of Lords report on EVEL added that "the next few years will see a series of votes on matters relating to the UK's exit from the EU which may well provide a "stress test" for the procedures".[86] In this respect, in light of the changed composition of the Parliament after the last general election[87] and, most importantly, in light of the split between Scotland (voting to remain part of the EU) and England (voting to leave the EU), it is likely that the procedures related to Brexit

[83] House of Lords report on The Union and Devolution, *infra* fn. 60, pt. 16, p. 5.

[84] An overview of the legislation passed through EVEL is in D. Gover and M. Kenny, *infra* fn. 2, pp. 39-40. According to the Authors during EVEL's first 12 months of operation the Speaker certified half of the bills that were eligible to be considered for certification, namely 9 out of 20. These were the Housing and Planning, the Childcare, the Charities, the Energy, the Enterprise, the Policing and Crime, the Finance (No.2), the Higher Education and Research, the Neighborhood Planning Bills (p. 20).

[85] House of Lords report on EVEL, *infra* fn. 69, p. 12.

[86] *Ibidem*.

[87] Some consideration on what could happen after the last elections are in R.B. Taylor, *The West Lothian Question, EVEL and the 2017 General Election*, U.K. Const. L. Blog (2017).

might well constitute a test for assessing the possible divisive nature of the procedure within Westminster Parliament.

It is interesting to note that the Government, called to revise the EVEL procedure after one year from their implementation, has recently issued its report on 30 March 2017, from which a clear intention not to adopt "any substantive change" is visible, notwithstanding the criticisms of many scholars.[88]

4.3. The puzzling contradiction of the Italian constitutional reform: a territorial Second Chamber embracing the *trustee* model of representation

Also in Italy the legitimate expectation to introduce territorial representation within Parliament to give voice to sub-national entities into the legislative process turned out to be problematic. Also in this country, indeed, the attempt to territorialize one of the Houses of Parliament clashed with the dogma of unitary (popular) sovereignty and created some puzzling contradictions with the modern notion of representation.

As to the latter point, while the professed function of the reformed Senate was that of "representing territorial institutions", leaving to the sole House of Deputies the function to "represent the Nation", the new composition of the Senate seemed not suitable to achieve this goal.

At a general level, it must be highlighted that, besides the representatives of Regions, the new Senate should have included also mayors and a non-elective quota of people representing and honoring the Nation by virtue of their professional achievements. In this vein, the constitutional bill seemed to be informed by *pluralism* rather than *federalism*: the main concern seemed to render the legislative process more inclusive and open to different (and not necessarily similar) voices coming from both Regions and local municipalities rather than creating a "corporative" Second Chamber defending the interests of territorial autonomies vis-à-vis those of the central State.

More specifically, a crucial question animated the scholarly and political debate: was the new Senate envisaged by the 2014

[88] D. Gover & M. Kenny, *The government's "English Votes for English Laws Review": an assessment,* posted on 5 April 2017, by the Constitution Unit. Another recent study on EVEL is J. Gallagher, *The Problem of EVEL: English Votes and the British Constitution* (2015).

constitutional reform really able to voice the interests of territorial autonomies? At first glance, the fact that the Senate was composed by representatives of territorial autonomies and local communities—rather than being directly elected by citizens—provided the new Second Chamber with a strong territorial representation. Indeed, while direct election is more likely to tie Senators to a political party affiliation, the coincidence of the political mandate of the Senators with their electoral mandate as regional councilors or as mayors, strengthened the idea that Senators could sit in the Parliament to represent a territorial community.[89] Nevertheless, on closer inspection, the Second Chamber envisaged by the reform did not empower the representatives of territorial autonomies to genuinely promote their "territorial interests".[90] Indeed, the Senate did not include members of the executives of each Regions (as it happens with the *Bundesrat* in Germany and as it was proposed by the first Government draft[91] and by several scholars[92]), but only members of the legislative assemblies of the Regions. In addition, the reform required regional delegations in the Senate to be chosen through a proportional vote, thus including also regional councilors not belonging to the political majority of the specific Region. This means that the regional delegation could not voice a coherent representation of the need and interests of a specific Region, being

[89] It was noted also that the constitutional bill did not oblige the Senate to organize itself into Parliamentary Committee which proportionally represents the political parties, thus opening to the possibility of forming parliamentary groups according to not necessarily political affiliations (See, among others, E. Catelani, *Venti risposte o quasi su Regioni e riforme costituzionali: occorre ancora far chiarezza sul ruolo dello Stato e delle Regioni*, 2 Federalismi (2016) and N. Lupo, *La (ancora) incerta natura del nuovo Senato. Prevarrà il* cleavage *politico, territorial o istituzionale?*, 2 Federalismi (2016).

[90] This is why some scholars pointed out that more than being representative of "territorial interests", the Senate seemed to be representative of "territorial institutions". Di Cosimo, *Incoerenze fra fine e mezzi*, 1 Le Regioni 153 (2015).

[91] Nevertheless it was argued that the silence of the Constitutional Bill did not exclude the possibility for Presidents of the Regions to seat within the Senate, following a possible and desirable agreement between regional councillors (N. Lupo, *infra* fn. 89, p. 4).

[92] L. Violini, *Note sulla riforma costituzionale*, cit. at 38; C. Fusaro, *Venti questioni su Regioni e riforma costituzionale*, 1 Le Regioni (2015).

possibly fragmented along the lines of the majority/opposition cleavage embedded within the regional legislative assembly.[93]

In other words, although the new Senate was conceived to perform a "territorial function", that of representing territorial autonomies at the central level, its composition was more likely to favor a *political*, rather than *territorial* cleavage, within the Senate[94]. This impression was strengthened by the fact that the constitutional bill, in accordance with a legal tradition embracing the *trustee* model of representation, kept on banning for all the members of Parliament (namely also for the Senators) the *delegate* model of representation. This was perceived by many scholars as a clear obstacle to the possibility for each regional delegation to express a single vote as it happens in the German model.[95] Without a delegate model of representation, it was also less likely to develop an effective scrutiny system ensuring the accountability of the Senators to the territorial institutions they represent.[96]

Indeed, if the Senate was supposed to "represent territorial institutions", it should have been composed by representatives of the Regions able to speak with one voice and, most importantly, receiving authoritative instructions by the members they were representing. By way of contrast, the constitutional bill generated a puzzling contradiction. On the one hand, the bill amended the principle according to which all MPs represent the Nation,

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[93] R. Bin, *L'elezione indiretta del Senato: la peggiore delle soluzioni possibili,* in forumquadernicostituzionali.it (20 marzo 2015)

[94] See, among others, G. Tarli Barbieri, *Venti questioni su Regioni e riforme costituzionali,* in Le Regioni, No. 1/2015, p. 258: "Una camera siffatta appare uno strano ibrido che non sembra rispondere alla *ratio* della sua istituzione e che per le modalità della sua elezione (elezione da parte dei consigli regionali, assenza di vincolo di mandato), potrebbe ben atteggiarsi come una Camera politica svincolata dal rapporto fiduciario"; and P. Caretti, Venti questioni su Regioni e riforma costituzionale, Le Regioni 1/2015.

[95] According to some scholars could have a positive impact on diminishing constitutional conflict and facilitating the double mandate of Senators. See, among others, R. Bifulco, *Osservazioni sulla riforma del bicameralismo (d.d.l. cost. A.C. 2613-A)*, 1 Le Regioni (2015) and E. Gianfrancesco, *Regioni e riforme costituzionali. Alcuni (non pochi) profili problematici,* 1 Le Regioni (2015).

[96] Comparative analysis shows that it is not automatic that members of the upper house are elected by sub-national assemblies are accountable to those assemblies by virtue of their double mandate. "Unless mechanisms are put in place for formal reporting to assemblies, this may not happen" (Spain is the example). See M. Russell, *The Territorial Role of Second Chambers*, cit. at 43, 112.

creating a dividing line between the Members of the House of Commons—still representing "the Nation"—and the Members of the Senate, representing "territorial institutions". On the other hand, the bill did not amend the Article of the Italian Constitution enshrining the *trustee* model of representation, currently characterizing almost all modern legislative assemblies, and stating that each Member of Parliament "carries out his/her duties without a binding mandate".[97] The inconsistency of the 2014 constitutional bill was to create a Senate representative of territorial institutions where, nevertheless, in accordance to the modern notion of political representation, its members were not provided by appropriate means to genuinely pursue their territorial interests.

4.4. The 2016 failure of the Italian constitutional reform and the "democratic" concerns of its opponents

The interesting aspect of the Italian debate on the constitutional reform was that, on the one hand, some of its critiques found the new Senate "not enough federal", calling for some institutional devices—such as the inclusion of regional Executives, or the introduction of authoritative instruction—which would have better enabled the Senate to pursue the professed goal of representing territorial autonomies.

Nevertheless, on the other hand, the 2014 constitutional reform found its opponents also among people, and scholars, deeming the reform "too federal". According to this line of criticism, direct elections of legislative assemblies would be a supreme principle of Italian Republic which could not be subject to constitutional amendment.[98] The *Bundesrat* model, which was advocated by some scholars and by some drafters of the reform, would be completely inconsistent with Italian democratic culture built on popular sovereignty. It would be possible only in fully-fledged federal States such as Germany, sharing a long-standing history where the single constituent units of the Empire (then turned into the *Länder*) needed to be represented at the central level and speak with one single voice.[99]

[97] See Article 67 of the Italian Constitution.
[98] A. Pace, *La riforma Renzi-Boschi*, cit. at 39.
[99] M. Dogliani, *Audizione alla I Commissione Affari Costituzionali, Senato della Repubblica*, 3 agosto 2015.

Indeed, according to some critiques of the reform, the idea of creating a Second Chamber representative of territorial institutions was overtly inconsistent with article 1 of the Constitution, and with the principle of popular sovereignty herein enshrined. Article 1, paragraph 2 of Italian Constitution states that "sovereignty belongs to *the* people who shall exercise it in the forms and limits of the Constitution". The fact that the 1948 Constitution wants the Parliament to be directly elected by the people—who holds the popular sovereignty—would exclude any form of "indirect election" as the one proposed by the Renzi Government: here, the Senate was no longer directly elected by the people (conceived of as the holder of unitary sovereignty), but was composed by representatives of territorial autonomies (elected by the legislative assemblies of the Regions). The same critiques based the inconsistency of the indirect election of the Senate with article 1 of the Constitution also on one important judgement of the Italian Constitutional Court, related to the electoral law. In that occasion, indeed, the Court stated that "the will of the people expressed through the elections is the main instrument of the manifestation of popular sovereignty".[100]

It is not a coincidence, indeed, that during Parliamentary debates the draft initially presented by the Government was partially revised to respond to this kind of criticism and—to a certain extent—to bring "the people" back in. Eventually, indeed, the idea of an "indirect election" of Senators was adjusted to allow people to know in advance which of the Regional councilors could have become Senators so to bolster the direct link which should exist between the citizens and the Parliament, and which lies at the heart of the democratic principle.

It is worth mentioning that also another aspect of the constitutional reform initially presented by the Government and significantly bolstering territorial representation, was then adjusted and revised by the Parliament since it clashed with the

[100] Italian Constitutional Court, Judgement No. 1/2014. For a recent analysis on popular sovereignty and the role of Parliament in the Italian legal order see S. Cassese, *La democrazia e i suoi limiti* (2017). On the Italian model of judicial review, V. Barsotti, P. Carozza, M. Cartabia & A. Simoncini (eds.), *Italian Constitutional Justice in Global Context* (2016).

dogma of the sovereignty of the people.[101] While the Governmental draft contemplated the same numbers of Senators for each region, the final draft tempered this sort of arithmetical criteria in composing the second Chamber—typical of federal States such as the US—with a geometrical criteria taking into account the demographic consistence of each of the Regions. If in the Madisonian architecture providing an equal representation to each of the States was a necessary argument to convince the anti-federalist to join the federation—ensuring that at least one of the Houses of Parliament genuinely represented the States—the notion of popular sovereignty which should characterize the Parliament represented a clear obstacle to the reform of the Senate launched by the Renzi-Government. In other words, the federal principle enshrining the equality of the constituent units of the Federation clashed with the democratic principle of one man, one vote, which in the final draft reallocated the seats for each Region in a way which was more representative of the demographic principle.

Sec. III. Concluding remarks

The analyzed empirical evidence stressed the difficulty to embed forms of territorial representation—typical of federal States—in unitary States, even when, from the functional point of view, introducing territorial representation within national Parliaments seems to be the most suitable institutional response to territorial differentiation. Indeed, in both Italy and the UK, the recent reforms territorializing national legislatures pursued a legitimate goal: coordinating the multilevel system of government as well as preventing the State to encroach upon the legislative powers of the Regions, in the case of Italy; responding to the constitutional imbalances created by the devolution, in the case of the UK.

My argument is that the territorialisation of national Parliaments—although responding to objective functional needs—did not have easy life because, in unitary states, it turned out to be

[101] On the concept of popular sovereignty in the Italian legal order see, among others, G. Amato, *La sovranità popolare nell'ordinamento italiano,* in *Rivista trimestrale di diritto pubblico* (1962) and L. Carlassare (ed.), *La sovranità popolare nel pensiero di Esposito, Crisafulli, Paladin* (2004).

inconsistent, on the one hand, with the dogma of unitary—whether popular or parliamentary—sovereignty, and, on the other, with the *trustee* model of representation, characterizing modern legislative assemblies.

In the case of the UK, EVEL, by creating distinctions between MPs at some points of the legislative process, introduced a territorial cleavage within the House of Commons which is not related to the "neutrality" of the constituency as an electoral district but to the potentially "exclusionary" sense of belonging to a particular sub-national entity. This new cleavage might affect both the modern notion of political representation and the status of the House of Commons as a UK legislature. Although the Government decided not to revise the procedure, it is worth pointing out that the recent report of the House of Lords on EVEL share the same kind of fears: "attempting to provide a separate voice for England through the membership and institutions of the UK Parliament carries risks. Parliament is a unifying body at the center of the political union, where all citizens, regardless of where they live, have the same say in the laws and policies that govern them. Using the same institution to provide a separate and distinct role for England could risk undermining Parliament's position as a UK, rather than English, institution".[102]

In the case of Italy, the 2014 constitutional reform attempt to introduce territorial representation within the Senate—by transforming it into a Second Chamber representative of territorial autonomies rather than of the entire Nation—was deeply jeopardized by its inconsistency with the dogma of unitary popular sovereignty and with the modern notion of political representation. If, in line with the principle of popular sovereignty, national Parliament represents the people, than it should be political representation—rather than territorial representation—to drive the composition of both of its Chambers. It is worth pointing out that all the adjustments made by the Italian Parliament to the initial governmental draft made the constitutional bill less *federal* and more *democratic,* cutting out all the provisions bolstering territorial interests (such as the inclusion of regional Executives within the Senate, or the equal representation of Regions within the Senate) and trying to bring

[102] House of Lords EVEL Report, *infra* fn. 69, p. 2.

the general interest of "the people" back in (allowing for example the citizens to choose their representative within the Senate).

To conclude, this study on the difficulties in embedding territorial representation in unitary States shows how constitutional culture might affect institutional arrangements. The recent reforms of national legislature in Italy and the UK aimed at strengthening a typical feature of federal States (namely territorial representation within national Parliament) in two States that—at several stages of their institutional history and for different reasons—rebuffed federalism[103], and opted for a unitary conception of sovereignty.[104] I am sure this is not the only reason explaining the failure—in case of Italy[105]—or the strong opposition—in case of the UK—that those reform needed to face. Nevertheless, the analysis of "new" constitutional reforms allowed me to reflect on an "old" problem: that on the inconsistencies—rather than commonalities—between federalism and democracy, well exemplified in the imaginary dialogue—reported by Robert Dahl in his pivotal work on democracy—opposing *James* and *Jean-Jacques.*[106]

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[103] It is not possible to outline here all the arguments against federalism. For the UK, see, at least, the 1973 Royal Commission on the Constitution, dismissing the federal option as inappropriate for Great Britain and J. Kendle, *Federal Britain. A History,* Routledge, 1997 and the recent contribution edited by Robert Schuetze and Stephan Tierney, *The United Kingdom and the Federal Idea,* Oxford Hart, 2018. For Italy, see the extensive debate within the working documents of the 1948 Constituent Assembly drafting the Italian Constitution and favouring a "regional" rather than a "federal" form of State.

[104] In his seminal work on the independence of Scotland, M. Keating (*The Independence of Scotland,* OUP, 2009) emphasized how he wide range of constitutional reforms which, short of independence, could provide Scotland with more devolved powers found an obstacle in the unwillingness of English opinion to abandon the unitary conception of the State.

[105] For a recent reflection on the possible causes of the failure of the Italian constitutional reform in comparative perspective M. Russell, *The failed Senate Reform in Italy: international lessons on why bicameral reforms so often (but not always) fail,* posted on *The Constitution Unit* (20 July 2018), available at constitution-unit.com/2018/07/20/the-failed-senate-reform-in-italy-international-lessons-on-why-bicameral-reforms-so-often-but-not-quite-always-fail/#more-6849.

[106] R. Dahl, *Democracy and its critiques* (1989). On federalism as a system dividing power see K. Lenaerts, *Constitutionalism and the Many Faces of Federalism,* 38 Am. J. Comp. L. 205 (1990): "As a system of divided power, federalism proceeds from the very essence of constitutionalism, which is limited government operating under the rule of law".

ANTI-MAFIA CONFISCATION AGAINST CORRUPTION: THE NEW FRONTIER OF HUMAN RIGHTS

*Miriam Allena**

Abstract

The Italian lawmakers have recently extended the anti-Mafia non conviction based confiscation to the persons suspected of belonging to a criminal association aimed to corruption or to the commission of various crimes against public administration. This provision, although apparently in line with the tendency increasingly widespread on a supranational level to use instruments of a broadly preventive character to fight serious crimes, raises some issues, especially in terms of compliance with human rights protection. Indeed, although these measures focus on property and not on individuals, in many cases they significantly affect the life and well being of the people involved.

After analysing the European Court of Human Right (ECtHR) case law on administrative measures having criminal nature and on Anti-Mafia non conviction based confiscation, the article investigates the legitimacy of the extension of this specific form of non-conviction based confiscation to the crimes against public administration.

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> *Se alcuni hanno sostenuto che le confische sieno state un freno alle vendette e alle prepotenze private, non riflettono che, quantunque le pene producano un bene, non però sono sempre giuste, perché per esser tali debbono esser necessarie, e un'utile ingiustizia non può esser tollerata.*
>
> Cesare Beccaria, *Dei delitti e delle pene*, 1764 (reprint 1973, 66-67)
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> *(While some have maintained that confiscations have curbed revenge and private abuse, they fail to think that, whereas penalties produce good, they are not always fair because in order for them to be fair they have to be necessary and a useful injustice cannot be tolerated)*

1. Introduction: Fighting crime through prevention

With Act 161/2017, amending Legislative Decree 159/2011 (so-called "Anti-Mafia Code"), Italian lawmakers extended the application of a specific form of non-conviction-based confiscation of assets, so-called "*preventive confiscation*", that had been traditionally used to cope with the Mafia[1], to the «*persons suspected*» of belonging to a criminal association aimed to corruption or to the commission of other crimes against public

I had the opportunity to present an earlier version of this paper in a panel session at the 2018 ICON-S Conference *Identity, Security, Democracy: Challenges for Public Law* -Hong Kong, June 25-27, 2018. I would like to thank the other panelists, as well as all the participants, for their valuable comments. The usual disclaimers apply.

[1] Preventive measures against individuals were first introduced under Italian law by Act 1423/1956. Act 575/1965, repealing Act 1423/1956, extended the application of such measures to Mafia offences. Anti-Mafia preventive measures concerning property were first introduced by Act 646/1982, which amended Act 575/1965. After many legislative reforms, the new "Anti-Mafia Code" (consolidating the legislation on anti-Mafia and preventive measures concerning both individuals and property) came into force in September 2011. On the different types of confiscations under Italian law see T. Epidendio-G. Varraso (eds.), *Codice delle confische* (2018).

administration (e.g., embezzlement of public funds, extortion, undue reception of money doing damage to the State). In other words, the assets of the persons suspected of having committed, as part of an association, one or more of such offences, can now be (seized and) confiscated following a judicial order with no need for a prior criminal conviction[2].

Subsequent to this piece of legislation, the Anti-Mafia non-conviction based confiscation took on a primary role as an instrument to combat organized crime in Italy[3]: indeed, it attacks the very economic foundation of the latter using lean, fast and effective non-criminal prevention instruments. Moreover, the success of this measure seems to be fully in line with the tendency, which is increasingly widespread on a supranational level, to use such instruments as have a broadly preventive character in response to the need for security generated by phenomena such as terrorism[4], money laundering[5], drug trafficking, organized

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[2] Indeed, Art. 4(1), lett. i-*bis*) of Legislative Decree 159/2011, as amended by art. 1(1), lett. d) of Act 161/2017, includes amongst the targets of preventive measures concerning property «*the persons suspected of the offence under Art. 640-bis* [aggravated fraud aimed to obtain public funds] *or of the offence under Art. 416 of the Criminal Code* [criminal association], aimed to commit any of the offences under Articles 314, sub-section one [non-temporary embezzlement of public funds], *316* [embezzlement of public funds by profiting from a mistake made by others], *316-bis* [misappropriation of funds doing damage to the State], 316-*ter* [undue reception of money doing damage to the State], *317* [extortion], *318* [corruption through the performance of duties], *319* [corruption through an act contrary to one's duties], *319-ter* [judicial corruption], *319-quater* [undue inducement to give or promise utilities], *320* [corruption of a person in charge of a public service], *321* [punishability of the corrupter], 322 [incitement to corruption], *and 322-bis* [embezzlement of public funds, extortion, undue inducement to give or promise utilities, corruption and incitement to corrupt the members of the International Criminal Court and the bodies of the European Community as well as the officers of the European Communities and foreign States].

[3] N. Gullo, *Emergenza criminale e diritto amministrativo. L'amministrazione pubblica dei beni confiscati* (2017), 35; V. Manes, *L'ultimo imperativo della politica criminale:* nullum crimen sine confiscatione, Riv. It. Dir. e Proc. Pen. 1259 (2015).

[4] See G. della Cananea, *Administrative Due Process in Liberal Democracies: A Post 9/11 World*, 2 IJPL 195 (2011); A.T.H. Smith, *Balancing Liberty and Security? A Legal Analysis of the United Kingdom Anti-Terrorist Legislation*, 13 Eur. J. Crim. Pol'y & Res., 73 (2007); L. Zedner, *Terrorizing Criminal Law*, 8 Criminal Law and Philosophy 99 (2014).

[5] G. Stessens, *Money Laundering. A New International Enforcement Model* (2000).

transnational crime and corruption. Still, it should be borne in mind that administrative preventive measures can be, like traditional punishments, particularly afflictive. Besides, in many cases, there is a fine line between such instruments as are actually preventive and those which, instead, are more or less clearly punitive[6].

The inclusion of the anti-Mafia "*preventive confiscation*" under preventive measures has always been – despite the name – a matter of debate among Italian scholars[7]. However, so far the domestic well-established case law has acknowledged its preventive character[8].

The broader picture of this article therefore addresses the question of what sort of procedural protection the anti-Mafia "*preventive confiscation*" should have. In particular, the aim of the article is to analyse the compatibility of the anti-Mafia "*preventive confiscation*" with the (criminal and civil) procedural guarantees provided for by the European Convention on Human Rights (ECHR) each time that a measure by public authorities is capable of affecting individual rights. The article argues that the extension of the scope of application of the anti-Mafia "*preventive confiscation*" to a broad series of crimes against public administration makes its lack of substantial due process protection even more controversial.

Drawing on the above, this article is structured as follows. After describing the traits of anti-Mafia non-conviction based confiscation (Section 2), it explains the weaknesses of its classification as a preventive measure in the light of the guarantee

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[6] In general on this topic A. Ashwort, L. Zedner, and P. Tomlin (edited by), *Prevention and the Limits of the Criminal Law* (2013); see also J. Simon, *Governing Through Crime*, (2007), arguing that in the US the war on crime has transformed government.

[7] G. Corso, *Profili costituzionali delle misure di prevenzione: aspetti teorici e prospettive di riforma*, in G. Fiandaca, S. Costantino (eds.), *La legge antimafia tre anni dopo. Bilancio di un'esperienza applicativa* (1986), 125, 137.

[8] See Italian Supreme Court (*Corte di Cassazione*), Plenary Session, judgement no. 4880, 26 June 26, 2014, *Spinelli*, which ruled out the criminal character of the anti-Mafia preventive confiscation acknowledging its preventive character instead in light of the 'objective dangerousness' of the assets unlawfully acquired. In particular, in the Court's view, the latter could lead the holder to commit further crimes besides contaminating the market through their circulation.

parameters set out by the Strasbourg case law *vis-à-vis* other measures (including confiscation ones) that provide for prevention as well as more or less explicit punitive purposes (Section 3). Then the article will move on to show how the broadly deferential attitude of the ECtHR in relation to non-conviction based confiscation (Sections 4 and 5) is doomed to eventually find itself in difficulties given the broad extension of the scope of application of the anti-Mafia confiscation by Italian lawmakers in 2017 (Section 6).

The red thread of the analysis is the need to prevent the concept of prevention – which has always been central in both administrative and criminal law – from eventually taking on poorly supervised meanings to the detriment of the very foundation of the Rule of Law[9].

2. Distinctive traits of the Anti-Mafia non-conviction based confiscation

The Italian non-conviction based confiscation is, in many regards, unique in the international scenario of the different forms of property confiscation in that it combines a number of distinctive traits that can hardly be found, all together, in other forms of confiscation provided for in liberal democracies[10].

Firstly, despite its name (which expressly refers to a preventive measure) it provides for the confiscation of the property allegedly acquired through criminal activities which the person concerned is suspected of having already committed in the past. The underlying rationale is therefore one of after-the-fact reaction (also but not only) to formally criminal offences rather than one of before-the-fact prevention.

Secondly, the measure under examination can entail the deprivation of the availability of the entire property and corporate assets, without it being necessary for the prosecutor to

[9] A. Ashworth and L. Zedner, *Preventive Justice*, Oxford University Press (2014). See also L. Ferrajoli, *Teoria del garantismo penale* (1989).

[10] See F. Viganò, *Riflessioni sullo statuto costituzionale e convenzionale della confisca "di prevenzione" nell'ordinamento italiano*, 2 Riv. It. Dir. e Proc. Pen. 610 (2018); S. Milone, *On the Borders of Criminal Law. A Tentative Assessment of Italian "Non-Conviction" based extended confiscation*, 8(2) New Journal of European Criminal Law 150 (2017).

demonstrate that the assets are the proceeds from the assumed offences. In particular, it is sufficient that the assets at issue appear disproportionate to the income or the business activity of the targeted person and that the latter is unable to justify their lawful origin. Therefore, the disproportion between assets and income, as ascertained outside criminal proceedings, assumes an "unlawful build up" or "unlawful origin" and justifies the non-existence of a link between the assumed offence and the asset being confiscated. Moreover, also when confiscation is ordered, as may be the case, of assets that are considered to be the fruit of illegal activities, the prosecutor is not required to prove the unlawfulness of the assets according to the standards of evidence applied in the criminal proceeding[11].

Thirdly, as a result of this measure, the assets concerned are finally removed, there being no particular requirements in terms of urgency or contingency and as it is permanent, save that the court of appeal can revoke the decision where «*the original defect of the assumptions for its application* »[12] is proven.

Finally, and this is one of the elements that raise most perplexities, it is particularly vague in describing the assumptions and reasons that may underlie its infliction. Indeed, the law refers to the «*persons suspected*» of having committed specified offences against the civil service but in no way specifies what this means in practice. The only thing that is clear is that "something less" is required compared to what is required to ascertain, including only as a matter of precaution, the criminal liability (indeed, it is not required to prove that the two typical prerequisites of interim measures, i.e. "*fumus boni iuris*" and "*periculum in mora*" have been met). Still, this "something less" is ultimately evanescent and it is not by accident that oftentimes its application is a matter of controversy in case law. In any case, it is significant that in order for the measure at issue to be inflicted, according to the prevailing

[11] See Art. 24(1) of Legislative decree 159/2011, whereby confiscation is not only in respect of «*the assets that turn out to be the fruit of unlawful activities or are a reuse of the latter*» but, more in general, in respect of all «*the assets of which the person* vis-à-vis *whom the proceedings were started is not able to justify the lawful origin and of which, including through an individual or legal entity, turns out to be the owner or to have availability of the same in a value that is disproportionate to the declared income (…) or business activity*».

[12] See Art. 28 of Legislative Decree 159/2011.

case law, it is sufficient to register the person whose assets are referred to in the register of the persons under investigation or, in any case, to initiate criminal proceedings against such person in order for this measure to be inflicted.

Therefore, on the one hand the court has broad discretion in the determination of the conditions that justify the application of the *preventive confiscation*, i.e., in identifying the de facto pre-requisites and conditions which, when met, allow to deem that the person is «*suspected*» of committing one of the offences under discussion and hence confiscate its assets. On the other hand, this measure is ordered outside criminal proceedings and the related guarantees[13].

The strongly afflictive character of the confiscation (potentially extended to the entire estate and being permanent) which is inflicted subsequent to a mere circumstantial ascertainment (and as such, is partial and incomplete) of the liability for committing the offences that have already been committed, raises doubts as to whether its nature is in fact intrinsically criminal and even that it is a "penalty based on suspicion", that is to say that the "*preventive confiscation*" is at times required (and obtained) when for the prosecutor it is not possible, due to the lack of evidentiary findings, to react by using the instrument of criminal repression.

As stated above, a number of weaknesses of this institution emerge especially in light of the procedural guarantees established by the Strasbourg case law in relation to other broadly preventive measures adopted by the various Member States of the Council of Europe. Indeed, in the ECtHR's view, the anti-Mafia "*preventive confiscation*" does not entail application of the criminal-head guarantees of Art. 6 §§ 2 and 3 ECHR (i.e., the presumption of innocence and the rights of defence). At the same time, the civil-head guarantees of Art. 6 ECHR do not apply with their full stringency[14]. Moreover, the principle of legality under Art. 1 First Protocol ECHR tends to be less stringent.

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[13] The procedure for applying the measures is governed by the anti-Mafia Code under Article 16 and following.

[14] The only aspect that determined a condemnation of Italy for a violation of the civil limb of Article 6 ECHR has been the lack of the possibility to request a public hearing: see Decision ECtHR, no 399/02, *Boccellari and Rizza v. Italy*, 13 November 2007, §§ 39-41; no 4514/07 Bongiorno v. Italy, 5 January 2010, §§ 37-

This is the topic in focus below.

Before addressing it, it is worth recalling that the theme of compliance with the ECHR procedural guarantees by the Italian law is far from irrelevant: indeed, the conventional rights (i.e., the rights enshrined in the ECHR) impacted by this particular non conviction based confiscation (i.e., the right to property, the right to a fair trial and, in case it is classified under criminal law, the presumption of innocence, the principle of strict legality and non-retroactivity as well as that of *ne bis in idem*) are reflected by the corresponding rights of the European Charter of Fundamental Rights (CFR)[15] and, since the latter has the same legal value as the EU Treaties[16], they are already part of the European legal system. Moreover, as is well known, Art. 52(3) of CFR clearly states that the meaning and scope of rights that correspond to ECHR rights shall be same as their ECHR meaning (as resulting from the ECtHR case law)[17].

31. Subsequently, the Italian Constitutional Court no. 93, 8 March 2010, acknowledged the violation of Art. 117 of the Constitution, as it refers to Art. 6 ECHR, since the proceeding for the application of the "*preventive confiscation*" did not allow a public hearing. On this point see M. Panzavolta, *Confiscation and the concept of punishment: can there be a confiscation without a conviction?*, in K. Ligeti, M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (2017), 25. On the applicability of Art. 6 ECHR to the Italian administrative proceeding and trial see M. Allena, *Art. 6 CEDU. Procedimento e processo amministrativo* (2012).

[15] In particular, Art. 17 CFR, «*Right to property*», is based on art. 1, First Protocol, ECHR; Art. 47 CFR, «*Rights to an effective remedy and to a fair trial*», corresponds to Art. 6(1) ECHR; Art. 48 CFR, «*Presumption of innocence and right of defence*» is the same as Art. 6(2) and (3) ECHR; Art. 49 CFR, «*Principles of legality and proportionality of criminal offences and penalties*» corresponds to Art. 7(1) and (2) ECHR; Art. 50 CFR, «*Right not to be tried or punished twice in criminal proceedings for the same criminal offence*» has the same meaning and the same scope as the corresponding right in Art. 4, Protocol 7, ECHR, in case of the application of the principle within the same Member State.

[16] See Art. 6(1) TFEU.

[17] See Art. 52(3) CFR: «*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention*».

3. The Strasbourg Case Law that classifies as criminal offences the interdictory and confiscation measures with both punitive and preventive aims

The question of which procedural guarantees are appropriate for the anti-Mafia "*preventive confiscation*" arises because Italian law does not label it as a penalty, but rather as a measure aimed at neutralising illegal profits and hindering contamination of the licit economy.

As is known, since the 1970s, abundant ECtHR case law has addressed the issue of distinguishing between substantially punitive measures and other measures (not criminal in nature). Indeed, the Strasbourg Court wanted to prevent the traditional instruments labelled as administrative or civil from being used to the detriment of the principles of *nulla poena sine iudicio* and *nulla poena sine lege* under Articles 6 and 7 of the European Convention on Human Rights (ECHR).

Starting from the renowned *Engel and Others v. the Netherlands* decision, which deals with military disciplinary sanctions (classified as non-criminal in the relevant body of law), the ECtHR has therefore enucleated a number of criteria that make it possible to identify the essentially criminal nature of a measure adopted by public authorities, regardless of its formal classification under the body of laws to which it belonged. This because, as the Court clearly observed, «*if the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will*»[18].

In particular, the ECtHR has identified two material criteria for classifying a measure by public authorities as "criminal": its nature (in particular, its afflictive and deterrent character) and its severity[19].

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[18] Decision ECtHR, no 5100/71, *Engel and Others v. The Netherlands*, 8 June 1976, §§ 81.

[19] In *Engel*, § 82, the Court established three criteria for determining whether a measure is 'criminal' within the meaning of the Convention, namely (a) the domestic classification, (b) the nature of the offence, and (c) the severity of the potential penalty which the defendant risks incurring. However, the Court has specified that the first criterion provides no more than a starting point, while

In its orientation to protect human rights, the Court verifies whether such pre-requisites have actually been met by adopting an approach of maximum extension of the criminal scope. Therefore, on the one hand the severity is evaluated, as the case may be, having regard to the severity of the applicable penalty rather than the one actually inflicted[20]; or else considering the subjective situation of the person involved[21]. On the other hand, the two criteria of the punitive character and severity are considered to be alternative and not cumulative. As a result, also a measure in which the punitive character does not prevail but which has severe consequences for the person involved can be of a "criminal" nature. This is the case of interdiction measures, which are commonly considered to be the expression of a generic power of care of the public interest but which, according to the Strasbourg judges, under certain conditions can be included in the criminal scope: just think of the measures to withdraw the driving license[22], the measures to interdict from public offices[23] or the orders to close down shops[24].

Against this background, the ECtHR not surprisingly did not hesitate to classify as criminal the measures of confiscation of assets, as specifically qualified and governed in the relevant legal systems as administrative or in any case deemed to be excluded from the criminal guarantees because of the allegedly prevailing preventive purpose aimed in practice at caring for the public interest (rather than punitive). Indeed, from the point of view of the Court, the concept of criminal charge that is relevant for the

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the very nature of the offence and the degree of severity of the penalty are factors of greater importance.

[20] Decision ECtHR, no 11034/84, *Weber v. Switzerland*, 22 May 1990, § 34, that classified as criminal a fine of 500 Swiss francs which, however, could be converted into a term of imprisonment in certain circumstances.

[21] Decision ECtHR, no 61821/00, *Ziliberberg v. Moldova*, 1 February 2005, § 34, that classified as "criminal" a fine of few euros inflicted on a student for participating in an unauthorized demonstration assuming that such amount was in any case significant in relation to the income of the person involved.

[22] Decision ECtHR, no 1051/06, *Mihai Toma v. Romania*, § 26.

[23] Decision ECtHR, no 38184/03, *Matyjec v. Poland*, § 58, relating to the imposition of measures providing for a 10-year interdiction from public offices and the exercise of specified professions provided for by Polish law with respect to those who had collaborate in the communist regime.

[24] Decision ECtHR, no 6903/75, *Dewer c. Belgique*, 27 February 1980, relating to the order to close down a butcher's shop for violating domestic laws on prices.

purposes of ECHR pursues both afflictive and dissuasive purposes and respectively aims to care for public interest (in terms of remedying the damage suffered by public interest as well as for the purposes of prevention)[25].

The well-known 1955 *Welch* decision, on the confiscation of proceeds from drug trafficking is explicit on this point. Indeed, faced with a measure that was rather controversial in the English legal system, the ECtHR acknowledged that «*the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment*»[26].

Likewise, the ECtHR classifies as essentially criminal the confiscation for unlawful construction and site development in the Italian system under art. 44 of the Construction Code[27] even though, also in this case, the preventive aim, i.e. to protect the orderly development of the territory and protection of the environment, are pursued alongside punitive/afflictive aims. So much so that almost all domestic case law, since the 1990[28], considered the measure at issue as a real property measure of restorative nature that could be inflicted by merely assuming that specified works are contrary to urban-planning laws and hence, regardless of a criminal ascertainment of the subjective liability of

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[25] On this point see F. Goisis, *La tutela del cittadino nei confronti delle sanzioni amministrative tra diritto nazionale ed europeo* (2014).

[26] Decision ECtHR, no 17440/90, *Welch v. The United Kingdom*, 9 February 1993, § 30, that also provides that: «*The preventive purpose of confiscating property that might be available for use in future drug-trafficking operations as well as the purpose of ensuring that crime does not pay are evident from the ministerial statements that were made to Parliament at the time of the introduction of the legislation. However, it cannot be excluded that legislation which confers such broad powers of confiscation on the courts also pursues the aim of punishing the offender*». In the case at issue, claimant argued that the confiscation (inflicted pursuant to the 1986 Drug Trafficking Offences Act) had been applied retroactively (for violations committed by it before 1986) and hence in contrast with Art. 7 ECHR.

[27] See Art. 44, Presidential decree 380/2001, repealing and substituting Art. 19 and Art. 20 of Law 47/1985, according to which: «*In a "final judgement" establishing that there has been unlawful site development, the criminal court shall order the confiscation of the unlawfully developed land and the illegally erected buildings. Following the confiscation, the land shall pass into the estate of the municipality on whose territory the site development has been carried out*».

[28] Starting from Corte di Cassazione, judgement no 16483, *Licastro*, 12 November, 1990. Subsequently, in its decision no 187/1998 also the Constitutional Court acknowledged the administrative nature of this confiscation.

the target (such that the confiscation was also commonly ordered against third parties that had acquired in good faith title to abusive real estate or when the criminal proceedings were time barred).

Under a line of thought that started with the 2007 *Sud Fondi v. Italy* decision (in respect of the confiscation of areas relating to the so-called "eco-monster" of Punta Perotti in the Puglia region)[29] and later re-confirmed a several times – lastly also by the Grand Chamber[30] – the Strasbourg Court has however inverted this approach, affirming the essentially criminal nature of the confiscation at issue by reason of its being in any case «*connected to a criminal offence*» (this being further endorsed, amongst other things, by the fact that, as a rule, it is inflicted by criminal courts) and that its aim is affliction rather than compensation/reparation[31] and its severity[32].

More in general, having regard to the first requirement mentioned, the Grand Chamber specified that, in order to determine whether a measure constitutes a punishment, a formal conviction is not required: «*while conviction by the domestic criminal courts may constitute one criterion, among others, for determining whether or not a measure constitutes a "penalty" (…), the absence of a conviction does not suffice to rule out the applicability of that provision*»[33].

In sum, a non-conviction based confiscation like the one provided for under Italian laws in relation to construction is a criminal measure in all regards and, as a result, benefits from all the guarantees under articles 6 and 7 of the ECHR.

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[29] See Decision ECtHR, no 75909/01 *Sud Fondi S.r.l. and Others v. Italy*, 30 August 2007.

[30] Decision ECtHR, Grand Chamber, no 1828/06, *G.I.E.M. S.r.l. and Others v. Italy*, 28 June 2018, §§ 215-233.

[31] As demonstrated, according to the Court, by its mandatory character and by its being not subject to ascertainments of the actual prejudice caused by abusive works to the territory and the environment.

[32] Which was inferred, amongst other things, from the fact that, within the boundaries of the site concerned, it could be applied not only to the land that was built upon, together with the land in respect of which the owner's intention to build or a change of use had been demonstrated, but also to all the other plots of land making up the site.

[33] Decision ECtHR, Grand Chamber, *G.I.E.M. S.r.l. and Others v. Italy*, cit. at 25, § 217.

Therefore, according to the Court, any formal argument or declaration of particular interests aimed at prevention (as in the case of confiscation for unlawful construction and site development, the protection of the territory or of the environment) does not, per se, prevent a given measure from being classified as a criminal one, for the simple and intuitive reason that, otherwise, domestic lawmakers could always exclude from criminal matters any sanction by simply stating that it aims at public interest and prevention.

4. The Strasbourg Case Law on Anti-Mafia non conviction based confiscation: a "Preventive Measure"?

The extensive and substantial approach adopted by the Strasbourg Court on the possible coexistence in a given measure, of prevention/restoration and afflictive purposes, does not however seem to have been consistently developed by the ECtHR case law on the anti-Mafia "*preventive confiscation*"[34].

Indeed, until now the latter has been classified not as a criminal measure but rather as a mere preventive measure in that it aims to prevent assets suspected of having an unlawful origin from being put on the market and, in general, used «*to the detriment of the community*»[35]: as stated several times «*according to the case-law of the Convention institutions, the preventive measures prescribed by the Italian Acts of 1956, 1965 and 1982, which do not involve a finding of guilt, but are designed to prevent the commission of offences, are not comparable to a criminal "sanction"*»[36].

All of this according to a rationale of macro-prevention, i.e. that considers not so much the profoundly afflictive effects on the

[34] On the inconsistency of the ECtHR case law on confiscation see also M. Simonato, *Confiscation and Fundamental Rights Across Criminal and Non-Criminal Domains*, ERA Forum Journal of the Academy of European law 365 (2017).

[35] See, among the first, ECtHR, no.12954/87, *Raimondo v. Italy*, 22 February 1994, § 30: «*Like the Government and the Commission, the Court observes that the confiscation (…) pursued an aim that was in the general interest, namely it sought to ensure that the use of the property in question did not procure for the applicant, or the criminal organisation to which he was suspected of belonging, advantages to the detriment of the community*».

[36] See ECtHR, no. 52024/99, *Arcuri and Others v. Italy*, 5 July 2001, § 2 and the decisions referred to therein.

individual whose assets are confiscated but rather the "necessity" to combat what is perceived as a real social emergency.

Still, under a strict application of the *Engel* criteria it would be easy to classify the anti-Mafia confiscation within the criminal scope: there is a clear link between a formally criminal offence (to which confiscation reacts). In sum, a *malum* (immediate and essentially definitive one, because it is permanent) is inflicted that correlates to an alleged commission of offences, though on the basis of entirely attenuated and undefined evidence of liability. Likewise, one can hardly deny the severity of the consequences, in economic terms and on life as well as in terms of the damage to the good name and image of the target person/enterprise. The latter will likely suffer severe repercussions also on its private and relational life.

A sensitive issue of such measures is, amongst others, their aptitude to target not only the person directly suspected of belonging to the Mafia organization but also his/her family: indeed, the governing provisions make it very easy to confiscate the assets of the persons "close" to the person suspected of belonging to the Mafia association, as they require that the investigations on the assets «*be carried out also in respect of the spouse, the children and those who, in the last five years have lived*» with that person, as well as «*in respect of the individuals or entities, companies, consortia or associations, the assets of which the persons at issue can use in all or in part, directly or indirectly*»[37]. In case of death of the person suspected, the heirs are certainly capable of being subject to confiscation[38].

This results in a process of "collective sanction" or, in any case, of "family sanction", that is particularly eccentric compared to modern criminal law.

Ultimately, in this case one cannot even apply the distinction introduced by the ECtHR starting from the 2006 *Jussilla v. Finland* decision, between the sanctions belonging to the «*hard core of criminal law*» which are entirely subject to the guarantees under criminal laws and «*minor offences*» with respect to which «*the criminal-head guarantees do not necessarily apply with their full*

[37] Art. 19(3), Legislative decree 159/2011.
[38] Art. 18(2), Legislative decree 159/2011.

stringency»[39]. Indeed, the objective severity in terms of the property and reputational consequences (i.e. stigma) of the measure at issue undoubtedly speaks to its belonging to the «*hard core of criminal law*».

Moreover, in some decisions the ECtHR went so far as to affirm that, as the imposition of such measures «*does not depend on the prior conviction for a criminal offence* (…), *they cannot be compared to a penalty*»[40]. In sum, the lack of a stringent ascertainment of the criminal liability is here enhanced, somehow paradoxically, to rule out application of the criminal guarantees despite the presence of a *malum* that, as said, is particularly afflictive and in any case absolutely significant.

This is in stark contrast with the most recent conclusions of the Grand Chamber with respect of the Italian confiscation for unlawful construction and site development: in the *G.I.E.M. s.r.l. and Others v. Italy* case, as seen, the Court upheld a broad and substantial notion of "criminal conviction" (deeming that a declaration of criminal liability made in a criminal-court judgement formally convicting the accused was not necessary) so as to be able to classify as criminal and subject to the guarantees under art. 7 ECHR also the confiscation for unlawful construction and site development ordered in respect of a person who had been prosecuted for illegal site development but had not been convicted because the offence had become statute-barred[41].

Vice versa, in the ECtHR decisions on anti-Mafia measures there is a vicious circle, a de-escalation whereby the absence of the guarantees of a fair trial – including only in terms of fully ascertaining criminal liability according to the criterion *in dubio pro reo* – is not followed, contrary to what one could expect, by a strengthening of other guarantees to offset such absence (providing that this can be assumed). To the contrary, there even follows a loss of any further guarantee arising from classifying this measure as a criminal one.

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[39] Decision ECtHR, Grand Chamber, no 73053/2001, *Jussilla v. Finland*, 23 November 2006, § 43.

[40] As expressly decided by the ECtHR under no. 24920/07, *Capitani and Campanella v. Italy*, 17 May 2011, § 35, only available in the French and Italian translation.

[41] Decision ECtHR, Grand Chamber, *G.I.E.M. S.r.l. and Others v. Italy*, cit. at 22.

So much so that, even if the measure is formally ordered by the Court (at the request of the public prosecutor or of the police), it is inflicted after a procedure of the Chamber regulated by the anti-Mafia Code, in the absence of the most stringent guarantees of the right of controverting and defence that characterize the adversarial criminal trial, i.e. a fair trial that is undoubtedly in line with the provisions of art. 6 ECHR.

It is as if the Court did not realize that, in point of fact, the farther from the guarantees of the criminal trial (admitting, like in the case under examination, a merely evidentiary ascertainment based on allegations), the more the measure imposed becomes afflictive, dangerous and ultimately needs a strengthening of the procedural and trial rules.

Not only that, though. Also, as noted in the *G.I.E.M. and Others v. Italy* decision, as a result of the reasoning described earlier, the definition of "criminal matter" rests entirely with domestic lawmakers who would therefore simply need to connect their sanctioning to a generic prevention aim, regardless of a full ascertainment of liability, in order to rule out in criminal law guarantees in their entirety: «*In the Court's view, if the criminal nature of a measure were to be established, for the purpose of the convention, purely on the basis that the individual concerned had committed an act characterized as an offence in domestic law and had been found guilty of that offence by a criminal court, this would be inconsistent with the autonomous meaning of "penalty". Without an autonomous concept of penalty, States would be free to impose penalties without classifying them as such, and the individuals concerned would then be deprived of the safeguards under Article 7 §1. That provision would thus be devoid of any practical effect*»[42].

5. Anti-Mafia non-conviction based confiscation and property right: towards a harder-edged principle of legality?

Aside from the inconsistencies identified earlier, in fact the Strasbourg Court has fully included the preventive confiscation in what art. 6 ECHR defines as the «*determination of civil rights and obligations*» as opposed to the «*determination of criminal charge*».

[42] Decision ECtHR, Grand Chamber, *G.I.E.M. S.r.l. and Others v. Italy*, cit. at 22, § 216.

That is to say that it has deemed that the confiscation measure is not a penalty to be imposed subject to the criminal law guarantees under articles 6, §§ 2 and following and 7 ECHR, but rather a measure that impacts the property right. Just as if it were eminent domain rather than the consequence of an offence, though ascertained only as a suspicion.

The *preventive confiscation* ultimately comes close, to some extent, to the *actiones in rem* that are typical of Anglo-Saxon countries, where the confiscation of the proceeds from the offence is not considered as a sanction but as a limitation of the property right warranted by the consideration that "the offence does not pay" and that, therefore, no lawful purchase of property can derive from it[43].

However, with respect to the institution under examination, also the guarantees in respect of the property right and, in particular, the principle of proportionality between the sacrifice imposed on the latter and the need to protect the public interest, are applied by the ECtHR in a very flexible manner.

Indeed, the Court acknowledges that, obviously, the preventive confiscation is an "interference" with property rights that is subject to Article 1, Protocol 1 of the Convention, but nonetheless deems that it is entirely proportioned to the severity of the Mafia crimes in Italy and to the difficulties of the Italian State in combating it[44]. Significantly, some decisions refer to the *preventive confiscation* as being «*an effective and necessary weapon in the combat against this cancer*»[45].

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[43] See N. Taifa, *Civil Forfeiture vs. Civil Liberties*, 39 N.Y. Sch. L. Rev. 95 (1994). More recently, J. Boucht, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (2017), 67, 75; I. Smith-T. Owen-A. Bodnar (eds.), *Asset Recovery: Criminal Confiscation and Civil Recovery* (2015); J.P. Rui, (ed.) *Non-conviction-based confiscation in Europe* (2015); C. King and C. Walker (eds.), *Dirty Assets. Emerging Issues in the Regulation of Criminal and Terrorist Assets* (2014).

[44] Decision ECtHR, no. 52024/99, *Arcuri and others v. Italy*, 5 July 2001: «*The enormous profits made by these organisations from their unlawful activities give them a level of power which places in jeopardy the rule of law within the State. The means adopted to combat this economic power, particularly the confiscation measure complained of, may appear essential for the successful prosecution of the battle against the organisations in question*».

[45] Decision ECtHR, no. 12954/87, *Raimondo v. Italy*, 22 February 1994, § 30.

Clearly, this approach can only be explained in light of the emergency represented by Mafia crimes.

In fact, the very historical origins of the *preventive confiscation* explain its extraordinary nature. This institution, established for the first time by Act 646/1982 (so-called Act Rognoni-La Torre)[46] was conceived as a measure intended to target the Mafia with an innovative approach hinging on the "incapacitation" of individuals and legal entities, however connected, "to own property", in a period that is, objectively, an emergency for Italy, triggered by the Mafia attacks of the early 1980s. With the introduction of this non-conviction based confiscation the lawmakers wanted to change the strategy used to combat this particular form of organized crime in consideration of its endemic nature, of its increasing infiltration in the economy of the country and, ultimately, acknowledging the need to put in place reaction instruments other than the ones that are typical of the traditional criminal repression.

Indeed, save for the fascist period[47], this measure is unprecedentedly pervasive, capable of combining the sufficiency of doubt, of suspicion and the conversion in *custodia legis*, on the basis of an inversion of the burden of proof, potentially also of the entire estate of the target.

Moreover, also in terms of respect of the principle of legality, as a guarantee of the actual possibility for the individual to foresee the consequences arising from its action or omission, the case law of the ECtHR on preventive confiscation seems to be pervaded by a rationale of emergency and derogatory.

If, indeed, in general, the Strasbourg Court believes that in the presence of measures that impact the property right, the principle of legality operates in a manner that is not substantially different compared to criminal measures (save that in relation to the non-retroactivity of the Act, which is only guaranteed in

[46] See Act 646/1982, that modified the anti-Mafia Act 575/1965 by introducing, alongside personal preventive measures, also property-related ones, i.e. seizure and confiscation of estates.

[47] The royal decree 773/1931 introduced a specific form of confiscation of assets of associations, organizations and institutions conducting activities contrary to the fascist ideology.

relation to the criminal offences)[48], this, again, does not seem to apply to the anti-Mafia non-conviction based confiscation.

So, the assumption of the necessity to prevent severe criminal phenomena seems to distract from one fundamental problem, i.e. that the objective requirement of the measure, that is to say the suspicion of belonging to a Mafia association, appears to be entirely evanescent here.

Indeed, the referrals to (persons) «*suspected of belonging to the associations under art. 416-bis of the criminal code*»[49] are silent on the practical behaviours that warrant application of the measure. Nothing more is said on the minimum level of evidence of the commission of criminal activities required in order to be considered to be «*suspected*»[50].

In reality, the criterion was probably left undefined because the purpose of the lawmakers, when introducing the preventive confiscation, was that of having available a most agile and straightforward instrument that is capable of adapting to every specific need to prevent the Mafia crimes. Clearly, this can be understood in terms of an emergency but raises considerable doubts in relation to guarantees[51].

In this regard, it is significant that recently the Strasbourg Court criticized the Italian provisions that govern the preventive measures against individuals, in terms of infringement of the principle of legality.

In particular, in the *De Tommaso v. Italy* decision, the ECtHR Grand Chamber deemed that the preventive measure of special

[48]But see Decision ECtHR, no 14902/04, *OAO Neftyanaya kompaniya Yukos v. Russia*, 8 March 2012, § 567 ss. which stated, in relation to an administrative sanction that: «The Court reiterates the principle, contained primarily in Article 7 of the Convention but also implicitly in the notion of the rule of law and the requirement of lawfulness of Article 1 of Protocol No. 1, that only law can define a crime and prescribe a penalty. While it prohibits, in particular, extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy».

[49] See Legislative Decree 159/2011, Art. 4(1), lett. a). Art. 416-*bis* of the Criminal Code is the rule that punishes the Mafia association.

[50] See Legislative Decree 159/2011, Art. 4(1), lett. a).

[51] See P. Edwards, *Counter-terrorism and counter-law: an archetypal critique*, 2 Legal Studies 279 (2018), arguing that counter-terrorist legislation systematically undermines the rule of law.

supervision with compulsory residency order in relation to the categories of persons under art. 1 of Law 1423/1956 (the current art.1, let. *a* e *b* of Legislative decree 159/2011) was not sufficiently precise and, thus, did not satisfy the foreseeability requirements established in the Court's case law.[52] Indeed, the referral, in Art. 1 mentioned above, to the «*individuals who, on the basis of factual evidence, may be regarded as habitual offenders*» and to the «*individuals who, on account of their behaviour and lifestyle and on the basis of factual evidence may have been regarded as habitually living, even in part, on the proceeds of crime*», did not allow to foresee *ex ante* what types of behaviour could lead to the application of the aforementioned personal preventive measure. In particular, the Grand Chamber noted that «*the imposition of such measures remains linked to a prospective analysis by the domestic courts, seeing that neither the Act nor the Constitutional Court have clearly identified the "factual evidence" or the specific types of behaviour which must be taken into consideration in order to assess the danger to society posed by the individual and which may give rise to preventive measures*»[53].

The *De Tommaso* case concerned personal preventive measures which impacted the freedom of circulation under Art. 2 of Protocol no 4 of the Convention, which is quite different from the property right. However, ultimately the Italian Constitutional Court has applied the same reasoning followed by the ECtHR in *De Tommaso* to "*preventive confiscation*": indeed, in the judgement no. 24 of 2019, the Court has acknowledged that the referral, in Art. 1, lett. a) of Legislative decree 159/2011, to the «*individuals who, on the basis of factual evidence, may be regarded as habitual offenders*» is a too vague and open-textured formula also to justify measures that impact property rights.[54]

Moreover, it is interesting to notice that, both in *De Tommaso* and in the Italian Constitutional Court decision no. 24 of

[52] See Decision ECtHR, Grand Chamber, no 43395/09, *De Tommaso v. Italy*, 23 February 2017, § 117.

[53] See *De Tommaso v. Italy*, cit., § 117.

[54] See Italian Constitutional Court (*Corte costituzionale*), judgement no. 24, 24 January 2019, which ruled that the claim of unconstitutionality of Art. 1, lett. a) of Legislative Decree n. 159/2011 was founded on the grounds of Art. 117, par. 1, It. Constit. (which provides for the obligation of the Italian legislation to respect international treaties such as the ECHR) and of Art. 1, First Protocol ECHR.

2019, the criticism relating to the lack of foreseeability and certainty was in respect of regulatory provisions that were not, one can believe, more obscure than the generic referral, set out in Legislative Decree 159/2011, to those «suspected» of committing specified offences (which is the objective requirement for the adoption of the "*preventive confiscation*"), be they Mafia offences or of another nature.

6. Anti-Mafia non-conviction based confiscation and crimes against public administration: the emergency that does not exist

It has been said that the broadly deferent attitude maintained by the ECtHR *vis-à-vis* the choices of Italian lawmakers in relation to anti-Mafia confiscation seems to be hardly consistent both with its orientation on other measures that are, broadly speaking, preventive (including for confiscation) and, more in general, with the approach that has always characterized it that tends to extend individual guarantees.

The decisions on the anti-Mafia preventive confiscation seems to express a political rather than judicial position, along lines that, per se, are rather debatable.

Still, the perplexities about whether such instrument is compliant with conventional guarantees are stronger now that Italian lawmakers extended it to a fairly broad series of offences against public administration including corruption offences.

Indeed, in relation to such offences, at least two elements are missing which could possibly, if not fully justify, at least explain, the flexible approach of ECtHR to anti-Mafia confiscations.

First and foremost, that we are faced with an emergency: indeed, it has in no way been proven that in Italy there is today, compared to the remaining issues on the criminal front, a specific emergency in relation to "crimes against public administration" that justifies the use of wholly exceptional instruments.

However, it does not seem that, inversely, reference can be made to the well-known decision of the Strasbourg Court in the *Gogitidze and Others v. Georgia* case relating to a non-conviction based confiscation ordered in respect of a former minister of the government of Georgia charged with several offences against

public administration. In this case, several assets available to the politician and to some of his close relatives had been confiscated as they had been considered overtly disproportioned to the income declared.

Now then, in the case at issue, while rejecting the criticism raised by claimant that complained about the disproportionate interference with its property right, the Court decided that the confiscation at issue (expressly classified under the relevant laws as an *actio in rem* and, in many regards, not dissimilar to the anti-Mafia "*preventive confiscation*") had been ordered in compliance with a special piece of legislation passed in Georgia at the request of several international experts concerned for the alarming levels of corruption in that country. Indeed, the decision specifies that «*the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), the Group of States Against Corruption (GRECO) and the OECD's Anti-Corruption Network for Transition Economies, noticing the alarming levels of corruption in the country at all levels, repeatedly advised the Georgina authorities that they undertake legislative measures to ensure that the confiscation of proceeds, including value confiscation, applied mandatorily to all corruption and corruption-related offences and that confiscation from third parties should also be possible*»[55].

The decision seems to confirm that emergency is the leading criterion followed by the Strasbourg justices to justify the use of particularly extended non-conviction based confiscations of assets based on presumption and ascertained circumstances.

So much so that, when it had to decide on hypotheses of non-conviction based confiscations adopted in the absence of a particularly alarming social situation, the ECtHR did not hesitate to find that the conventional criminal guarantees had been violated.

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[55] See Decision ECtHR, no 368862/05, *Gogitidze and Others v. Georgia*, 12 May 2015, § 106, which also specifies that, following the adoption of the measures, commended the Georgian authorities for having largely complied with the instruction and in particular, «*they noted that, thanks to the introduction of civil proceedings* in rem *in addition to the possibility of confiscation through criminal proceedings, the Georgian legislation had been brought into line with the appropriate requirements of the international legislation and in particular with the relevant Council of Europe Conventions, although they still warned the Georgian authorities against possible misuse of that procedure, calling for the utmost transparency in that regard*».

For example, in the *Geering v. the Netherlands* case, the Court found that «*if it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained, such a measure can only be based on a presumption of guilt. This can hardly be considered compatible with Article 6 § 2*»[56]. Significantly, in this case, the measure at issue, based on domestic legislation, was «*not designed or intended to determine a criminal charge or a criminal penalty, but to detect illegally obtained proceeds, to determine their pecuniary value and, by way of a judicial confiscation order, to deprive the beneficiary of these proceeds*». Instead, according to the ECtHR, the purpose of this measure was on the one hand «*to remedy an unlawful situation*» and, on the other, «*to bring about a general crime-prevention effect by rendering crime unattractive on account of an increased risk that proceeds of crime will be confiscated*»[57].

Moreover, also in the European Union the non-conviction based confiscation is not particularly welcome: indeed, Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, provides for non-conviction based confiscation only as an exception, when reaching the conviction is impossible due of illness or absconding of the suspected or accused person (Art. 4, § 2)[58].

Besides, while the very recent EU Regulation on the mutual recognition of freezing and confiscation orders has imposed the mutual recognition of confiscation orders (including without conviction), providing that they are adopted as part of criminal proceedings, to all Member States, including those that have not

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[56] Decision ECtHR, no 30810/03, *Geerings v. the Netherlands*, 1 March 2007, § 47.

[57] See *Geerings* cit., § 24.

[58] «Art. 4 – Confiscation: (1) *Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia. (2) Where confiscation on the basis of paragraph 1 is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial*». See also Recital 15 of the Directive 2014/42/EU.

adopted that model[59], through this course, the "minimalist" avenue of mutual recognition has been taken, and the impossibility has been pointed out, though implicitly, of harmonizing the various European systems by building a common European model of non-conviction based confiscation (as had been requested by the European Parliament and Council)[60].

Secondly, in the new hypotheses of non-conviction based confiscation introduced by Italian lawmakers there is no stability over time (i.e., permanence) and the serial accumulation of profits that enable the Mafia association to control the territory through widespread investments in the productive activities and, ultimately, to take on a role that, not accidentally, is often compared to the one that ought to be carried out by the State.

Indeed, the lawmakers are content with the existence of an association, even entirely occasional and not stable. Still, in ordinary criminal associations, the coordination of three or more persons in the commission of an offence is, in general, aimed to the commission of a single crime.

In these cases, on the sociological and criminological fronts, what is entirely missing is a possible justification in terms of "incapacitation" of an organization "to own property", given that such objective can only be assumed in relation to a permanent association.

In addition to the above, in order to combat the offences against public administration, it probably makes more sense to rely on the inhibition and expulsion measures already in place (such as prohibition to participate in tenders, temporary ban or

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[59] Regulation (EU) of the European Parliament and of the Council of 14 November 2018, on the mutual recognition of freezing orders and confiscation orders.

[60] When adopting Directive 2014/42/EU, the European Parliament and the Council, in a joint statement, called on the Commission «*to present a legislative proposal on mutual recognition of freezing and confiscation orders at the earliest possible opportunity (…)*» and «*to analyse, at the earliest possible opportunity and taking into account the differences between the legal traditions and the systems of the Member States, the feasibility and possible benefits of introducing further common rules on the confiscation of property deriving from activities of a criminal nature, also in the absence of a conviction of a specific person or persons for these activities*». See A.M. Maugeri, *Le tipologie sanzionatorie: la prevenzione patrimoniale e la legittimità della confisca di prevenzione come modello di "processo" al patrimonio tra tendenze espansive e sollecitazioni sovranazionali*, 2 Riv. It. Dir. e Proc. Pen. 559 (2017).

dismissal of officials) rather than on forms of incapacitation of the persons involved to own property.

7. Conclusion: the risks of the "Emergency Rationale"

The foregoing analysis shows that balancing guarantees and efficiency is the main criticality in the relationship between domestic crime-prevention measures and conventional European guarantees.

Clearly, measures such as the "*preventive confiscation*" can turn out to be very effective in combating certain permanent, organized criminal activities because they undermine the ability of the offender to infiltrate and control society[61].

Still, it is equally true that prevention cannot become the new formal "label" which, as was the case in the past with the "administrative sanction", allows to avoid conventional guarantees.

For this reason, the approach of the Strasbourg Court to the anti-Mafia confiscation is not convincing: the Court that has imposed that we rethink the borders between administrative and criminal matters (reclassifying as criminal many sanctions that, in the various national States, were undisputedly considered to be administrative), curiously pulls up when faced with a measure that is evidently much more dangerous and to be feared than an administrative sanction for speed driving or of a fine of few hundreds of Euros (both undisputedly criminal according to the ECHR)[62].

It has been said that such case law can only be explained in light of emergency and exceptional situations. Therefore, it does not seem that it can legitimate the new provisions introduced by Italian lawmakers in 2017 given that in the case of crimes against

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[61] Even though it should be said that many have pointed out that the impact of preventive measures on individuals and property is, based upon factual evidence, often overestimated including because of the impact (which is in point of fact very strong) on the consensus in the public opinion: see M. Ceresa-Gastaldo, *Misure di prevenzione e pericolosità sociale: l'incolmabile* deficit *di legalità della giurisdizione senza fatto*, Diritto Penale Contemporaneo 1 (2015).

[62] For example, respectively, Decision ECtHR, no 35260/97, *Varuzza v. Italy*, 9 November 1999, and Decision ECtHR, Grand Chamber, no 73053/2001, *Jussilla v. Finland*, cit. at 33.

public administration, it should at least be demonstrated that there is an emergency.

In any case, it is useless to deny that also such explanation (i.e., the exceptional nature) is not entirely satisfactory.

First and foremost because the rationale of emergency is different from that of guarantee. And emergencies, as is well known, can always change and, sometimes, also depend on more or less well-grounded collective perceptions[63]. The extension of the *preventive confiscation* to crimes against public administration is a clear example of this.

Secondly, because guarantees, especially supra-national ones, should by definition disregard emergencies, just as they disregard the political choices of the signatories of the Convention. Indeed, oftentimes, behind assumed emergencies are hidden political options which it is not clear why they should prevail over conventional obligations.

In fact, in terms of defence of human rights, as one would expect from the ECHR, the severity of the consequences of a specified offence can justify the severity of the consequences for those who have been found liable, but not the removal of the guarantees altogether. Quite to the contrary, particularly (and understandably) afflictive measures should, out of consistency, be accompanied by a particular strength of the latter.

In other words, the severity of certain offences and the social alarm that they create require reasonably dissuasive punishments rather than instruments that are capable of avoiding the guarantees that must always accompany a punitive response.

If the ECHR, which was initially conceived as an instrument to effectively and substantially guarantee human rights, loses its connotation in terms of defence of human rights and focus on the reality of things, it is not only ultimately inconsistent with its broad principle on the boundaries of criminal matters but, more radically, risks forgetting its own reason of being.

The Strasbourg Court will have to take this into account in the future when, as is likely to be the case, it will be called upon to decide on whether the "*preventive confiscation*" regime as extended

[63] S. Cassese, *Misurare la corruzione serve per studiare interventi mirati*, *Corriere della Sera* (2017), 12 December.

to offences against public administration is compatible with the ECHR guarantees. Moreover, this is an increasingly topical issue, considering also the very recent decree law 113/2018, so-called security decree, enacted into law as 132/2018, which, though slightly changing the 2011 Anti-Mafia Code, fully re-confirmed the rules that govern "*preventive confiscation*" and its extension to offences against governmental agencies[64].

[64] See Law 132/2018 dated 3 December (that amends and enacts into law Decree Law 113 dated 4 October 2018) which sets forth urgent measures relating to international protection, immigration and public security.

THE PROBLEMS OF *RES JUDICATA* IN THE ITALIAN ADMINISTRATIVE JUSTICE SYSTEM

*Stefano Vaccari**

Abstract

The aim of this paper is to study '*res judicata*' in the Italian administrative justice system. After providing an overview of some essential concepts of the general theory of proceedings, the paper seeks to conduct a critical analysis of the main solutions developed by legal commentators and in administrative case-law, highlighting the various issues raised in the national legal debate. The objective of the paper is to set forth a new concept of administrative *res judicata* – defined as having a "stabilising entitlement" – that is more consistent with the values of full, effective and stable procedural protection underpinning the current system governed by the Code of Administrative Proceedings (Italian Legislative Decree No 104/2010).

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1. Introduction

This paper seeks to examine the main problematic issues associated with 'administrative *res judicata*'[1]: an institution of fundamental importance for the administrative justice system dedicated to resolving disputes between the public administration holding the administrative power and the private individual asserting a right to satisfy his subjective legal position known as his 'legitimate interest'[2].

Within the framework of a broader discussion, the aim of the paper is to assess the balance between the two essential components underpinning administrative *res judicata*: the inexhaustibility of the administrative power and the corresponding constant duty to protect the public interest[3], on one hand, and the procedural values of effectiveness, satisfactoriness and stability of the outcome of proceedings, on the other[4].

To do this, a preliminary review shall be conducted on the key points of general theory on the concepts of *res judicata* and effectiveness of the judgment, with specific attention being given to the concept of 'objective limits' of *res judicata*, representing the main aspect of interest for the answer to the question posed above.

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[1] On administrative *res judicata* see, in legal literature, in addition to the fundamental paper by M. Clarich, *Giudicato e potere amministrativo* (1989), at least F. Satta, *Brevi note sul giudicato amministrativo*, 2 Dir. proc. amm. 319 ff. (2007); A. Travi, *Il giudicato amministrativo*, 4 Dir. proc. amm. 912 ff. (2006); C. Cacciavillani, *Giudizio amministrativo e giudicato* (2004); C. Calabrò, *Giudicato – Diritto processuale amministrativo (voce)*, 15 Enc. giur. (2003). More recently, S. Valaguzza, *Il giudicato amministrativo nella teoria del processo* (2016), and, if I may suggest, S. Vaccari, *Il giudicato nel nuovo diritto processuale amministrativo* (2017).

[2] On 'legitimate interest' in the Italian administrative law system, see simply F.G. Scoca, *L'interesse legittimo. Storia e teoria* (2017).

[3] See simply M. Trimarchi, *L'inesauribilità del potere amministrativo* (2018).

[4] See F. Guzzi, *Effettività della tutela e processo amministrativo* (2013); G. Mari, *Giudice amministrativo ed effettività della tutela. L'evoluzione del rapporto tra cognizione e ottemperanza* (2013); M. Renna, *Giusto processo ed effettività della tutela in un cinquantennio di giurisprudenza costituzionale sulla giustizia amministrativa: la disciplina del processo amministrativo tra autonomia e "civilizzazione"*, in G. della Cananea, M. Dugato (eds.), *Diritto amministrativo e Corte Costituzionale* 505 ff. (2006). On transformation of the Italian administrative process due to the impact of European principles concerning judicial protection see V. Cerulli Irelli, *Trasformazioni del sistema di tutela giurisdizionale nelle controversie di diritto pubblico per effetto della giurisprudenza europea*, 2 Riv. it. dir. pubbl. com. 433 ff. (2008).

Secondly, it shall be necessary to reconsider the main theories developed by Italian legal commentators on the matter of administrative *res judicata*, in order to show the reader the distinctive characteristics of disputes that are brought before the authorities of the national administrative justice system.

If the outcome of this analysis should highlight a number of significant imbalances in the relationship between the guarantee that the administrative power can be re-exercised post-judgment and the stability of the protection afforded to the successful applicant, a number of reconstructive proposals shall be put forward with the aim of achieving the ambitious solution of administrative *res judicata* that is fully effective and that actually manages to 'stabilise' the legal relationship between public administration and private individuals.

The proposed construction shall expand on the 'paradigm shift' introduced by the new Code of Administrative Proceedings, in force since 2010, which in many respects has created a new system of administrative procedural law that marks the passing of many limits traditionally linked to the original framework of the Italian administrative justice system.

2. *Res judicata* and effectiveness of the judgment: brief overview of general theory

In general theory on proceedings, the term '*res judicata*' usually refers to the final and permanent judgment issued for the purpose of resolving a dispute – or an issue – by a body called to perform its judicial role[5].

Therefore, as a legal institution *res judicata* mainly pursues the aim of putting an end to disputes that have arisen, while at the same time contributing to legal certainty and to peace between associates.

[5] See, of the most important Italian literature, at least S. Menchini, *Regiudicata civile*, Dig. disc. priv. (1998); A. Attardi, *Diritto processuale civile* 416 ff. (1997); E.T. Liebman, *Giudicato (voce)*, Enc. Giur. (1989); G. Pugliese, *Giudicato civile (dir. vig.)* 18 Enc. Dir. 785 ff. (1969); E. Redenti, *Il giudicato sul punto di diritto*, Riv. trim. dir. proc. civ. 258 ff. (1949); G. Chiovenda, *Istituzioni di diritto processuale civile* 342 ff. (1935).

This concept also appears related to the concept of 'judgment'[6], although the two do not overlap entirely.

More specifically, the relationship between *res judicata* and judgment can be summarised by using the image of the relationship between the 'content' and the 'container', where *res judicata* is the 'matter judged', which is contained and conveyed by the 'means' represented by the judgment, meaning the formal measure.

This distinction is especially relevant in terms of effectiveness.

In fact there is no unequivocal correlation between all the effects set out by the judgment and the judgment becoming *res judicata*, given that some of its effects are also produced when it has not yet 'become *res judicata*', because it is still subject to ordinary means of appeal or challenge[7].

In any case, a study of *res judicata* (even where administrative proceedings are concerned) must start from the few provisions of positive law that enable a "minimum definition" of the institution to be gathered.

Reference is obviously made to Article 2909 of the Italian Civil Code on one hand and Article 324 of the Italian Code of Civil Procedure on the other.

The first provision which, as the heading suggests, is dedicated to "*res judicata*" (we could add 'substantive'), provides that "[*the*] *finding contained in the judgment that has become res judicata is conclusive for all intents and purposes between the parties, their heirs or assigns*".

Instead the second article governs, as opposed to 'substantive' or 'material' *res judicata*, "*formal res judicata*", attributing the authority of formal final judgment to a "[…] *judgment that is no longer subject to rulings on jurisdiction, appeal, petition to the highest court or revocation for the reasons set forth in Article 395(4) and (5)*".

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[6] On civil judgments see A. Chizzini, *Sentenza nel diritto processuale civile*, Dig. Civ. (1998); E. Fazzalari, *Sentenza civile*, Enc. Dir. (1989); A. Rocco, *La sentenza civile* (1906). Instead, on administrative judgments see F. Patroni Griffi, *Forma e contenuto della sentenza amministrativa*, 1 Dir. proc. amm. 17 ff. (2015); Id., *Sentenza amministrativa*, in S. Cassese (ed.), *Trattato di diritto amministrativo* vol. V 4457 ff. (2003).

[7] See G. Pugliese, *Giudicato civile (dir. vig.)*, cit. at 5, 787.

The fact the Italian legal system dedicates two different provisions to *res judicata* has led legal commentators to question the existence of a twofold concept of *res judicata*, namely 'material/substantive *res judicata*'[8] (Article 2909 Italian Civil Code) and 'formal/procedural' *res judicata*[9] (Article 324 Italian Code of Civil Procedure) and to reflect on the reciprocal relations.

In particular, for many years two opposing theories were developed around the issue. One approach held that the '*res judicata*' formula could be broken down into two different legal concepts corresponding to Articles 2909 Italian Civil Code and 324 Italian Code of Civil Procedure respectively, while the other held that there was only one concept of '*res judicata*' and therefore that the two provisions referred only to the different scope of application – procedural or substantive – of the same institution[10].

Today the majority of legal scholars[11] tend to criticise the approach endorsing a twofold concept of *res judicata*, as their explanations increasingly favour the unitary approach.

In other words, it is considered preferable to treat the concept of *res judicata* as a single issue, only making an internal distinction between the various formal or substantive implications. More specifically, the 'formal' aspect of *res judicata* emerges when we only look inside the process, while the 'substantive' aspect is evident when the focus is also placed on substantive law, that is, on the substantive legal position or on the legal relationship,

[8] On this matter see, mainly, F.C. Von Savigny, *System des heutigen Römischen Rechts* 274 ff. (1847); and consequently, in Italian legal literature, F. Carnelutti, *Lezioni di diritto processuale civile* 270 ff. (1925); and, subsequently, A. Attardi, *La cosa giudicata*, 1 Jus 16 (1961); F.D. Busnelli, *Considerazioni sul significato e sulla natura della cosa giudicata*, Riv. trim. dir. proc. civ. 1317 ff. (1961); M. Vellani, *Appunti sulla natura della cosa giudicata* (1958); E. Allorio, *Natura della cosa giudicata*, 1 Riv. dir. proc. civ. 215 ff. (1935); Id., *La cosa giudicata rispetto ai terzi* 3 ff. (1935).

[9] On this matter see, mainly, A. Von Brinz, *Lehrbuch der Pandekten* 348 ff. (1873); and consequently, in Italian legal literature, C. Vocino, *Considerazioni sul giudicato*, Riv. trim. dir. proc. civ. 1485 ff. (1962); E. Betti, *Diritto processuale civile italiano* (1936); E.T. Liebman (despite some peculiarities in the reconstruction), *Ancora sulla sentenza e sulla cosa giudicata*, Riv. dir. proc. civ. 237 ff. (1936); S. Satta, *Premesse generali alla dottrina dell'esecuzione forzata*, 1 Riv. dir. proc. civ. 352 (1932).

[10] For a summary of the various positions, see G. Pugliese, *Giudicato civile (dir. vig.)*, cit. at 5, 802 ff.

[11] G. Pugliese, *Giudicato civile (dir. vig.)*, cit. at 5, 805.

raised in court, which shall be subject to the series of effects (declaratory, constitutive, etc.) typically produced by the various types of judgments[12].

Accordingly, the subject of '*res judicata*' is identified as the decision contained in the judgment by which the court issues a permanent ruling on how to settle a certain dispute and on the practical framework to be given to a certain substantive legal relationship.

That said, the next question that logically arises is how to identify the extent of the area covered by *res judicata*.

For this purpose the concept of 'objective limits of *res judicata*'[13] is used. This formula serves to indicate 'what' has been made immutable and permanent by a certain judgment that has acquired formal finality and, above all, what shall be the scope of the preclusion arising from the *res judicata* effect for future proceedings dealing with an identical case to the one that has been decided.

In this respect it is important to underline the close relationship existing between the concepts of 'subject of *res judicata*', 'objective limits of *res judicata*' and 'identification features' of the application.

Some clarification needs to be provided on the matter.

In general theory, emphasis is very frequently placed on the specific nexus between the 'subject of the application' and the 'subject of the ruling'. This is because the precise purpose of the jurisdictional role is to satisfy the need for protection arising from a certain situation of substantive law brought before the court through the plaintiff's application, on which the court shall decide by a judgment establishing how the disputed legal relationship is to be handled.

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[12] On the distinction between the concepts of 'effectiveness of the judgment' and of 'res judicata', see E.T. Liebman, *Efficacia ed autorità della sentenza* (1935).

[13] See the fundamental paper by E. Heinitz, *I limiti oggettivi della cosa giudicata* (1937); and again, in legal literature, C. Consolo, *Oggetto del giudicato e principio dispositivo. Parte I. Dei limiti oggettivi e del giudicato costitutivo*, 1 Riv. trim. dir. e proc. civ. 215 ff. (1991); A. Attardi, *In tema di limiti oggettivi della cosa giudicata*, Riv. trim. dir. proc. civ. 475 ff. (1990); S. Menchini, *I limiti oggettivi del giudicato civile* (1987); A. Proto Pisani, *Osservazioni sui limiti oggettivi del giudicato*, 1 Foro it. 89 ff. (1972); E. Heinitz, *Considerazioni attuali sui limiti oggettivi del giudicato*, 1 Giur. it. 755 ff. (1955).

Accordingly, there tends to be an overlap between the concepts of 'subject of the application', 'subject of the proceedings', 'subject of the ruling' and 'subject of *res judicata*'[14]: the subject of the application defines the subject of proceedings which in turn identifies the subject of the court's decision and, as a necessary consequence, the subject of *res judicata*.

In light of these preliminary considerations, from a methodological point of view any study on the 'objective limits of *res judicata*' must firstly investigate the concept of 'subject of the proceedings'[15]. As this is inevitably dependent on an action being brought by the plaintiff[16], it shall be tantamount to studying the criteria for identifying the action[17] and in particular the '*petitum*' and '*causa petendi*'[18], in other words the claim and the factual and legal basis for the claim.

To conclude, by studying the criteria for identifying the action the court shall be provided with theoretical tools to dispel doubts concerning the boundary of *res judicata* and specifically the identification of its 'objective limits'. This shall help to resolve the complex issues of identity between actions, especially when the court has already decided on certain such issues with a judgment that has become final.

In this respect it is worth noting that in Italian civil proceedings, in order to attribute the maximum stability and completeness to a judicial decision, case-law almost unanimously[19] holds that the objective limits of *res judicata* should

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[14] See F.P. Luiso, *Diritto processuale civile* 150 ff. (2007).

[15] See A. Romano, *La pregiudizialità nel processo amministrativo* 48 ff. (1958); and recently, S. Valaguzza, *Il giudicato amministrativo nella teoria del processo*, cit. at 1, 60.

[16] To this effect, C. Mandrioli, *Diritto processuale civile* 149 (2007); G.F. Ricci, *Diritto processuale civile* 296 (2005).

[17] E. Heinitz, *I limiti oggettivi della cosa giudicata*, cit. at 13, 130.

[18] On the correlation between res judicata and the criteria for identifying the action see, in case-law, Supreme Civil Court, Div. I, 24 March 2014, no. 6830. More generally see, in legal literature, G. Chiovenda, *Identificazione delle azioni. Sulla regola "ne eat iudex ultra petita partium"*, in Id., *Saggi di diritto processuale civile* 175 ff. (1931); E. Allorio, *Per una teoria dell'accertamento giudiziale*, 2-3 Jus 266 ff. (1955); E. Redenti, *Diritto processuale civile* 48 ff. (1952); P. D'Onofrio, *Identificazione delle azioni in rapporto alla teoria della litispendenza e della cosa giudicata* (1924); M. Bellavitis, *L'identificazione delle azioni* (1924).

[19] See, among the many, Supreme Civil Court, Labour Div., 23 February 2016, no. 3488; Supreme Civil Court, Labour Div., 16 August 2012, no. 14535;

cover both the pleas of fact and law raised in court by way of action or objection (and as such expressly contemplated in the decision – referred to as 'what has been pleaded'), and – evidently using a 'legal construct' – all the issues which, even though not specifically pleaded, form a logical and irreproachable basis for the decision (referred to as 'what could be pleaded')[20].

Lastly, attention shall be drawn to the heated debate in legal literature and case-law on the relationship between the operative part of the judgment and the statement of reasons with regard to marking the boundary of the subject of *res judicata*.

From a theoretical point of view, the 'operative part' of the judgment refers to the ruling on the applications lodged to resolve, with the binding force that the legal system assigns to the courts, the dispute between the parties to proceedings.

Instead the 'statement of reasons'[21] refers to the part of the judgment that contains "*a brief explanation of the legal and factual reasons behind the decision*" (as generally stated in Article 132(1)(4), Italian Code of Civil Procedure): in other words, an explanation of the logical and legal reasoning followed by the court to reach the decision stated in the operative part.

This however gives rise to the question as to whether *res judicata* covers – with its objective limits – only the rulings contained in the operative part or whether it also extends to the issues contained in the statement of reasons for the judgment.

Interpreters are deeply divided on the matter.

Supreme Civil Court, Div. I, 28 October 2011, no. 22520; Supreme Civil Court, Div. III, 6 July 2009, no. 15807; Supreme Civil Court, Labour Div., 10 March 2009, no. 5723. As shall be further clarified below (point 3), the majority of legal commentators and prevailing case-law are instead firmly against the extension of such a rule within final administrative proceedings, holding that the objective limits of res judicata should only cover 'what has been pleaded' and not 'what could be pleaded'.

[20] However, this is without prejudice to factual 'contingencies' and new situations that arise after res judicata has been declared or, at least, that could not 'be pleaded' in the proceedings where res judicata was established.

[21] See further M. Taruffo, *Motivazione della sentenza (voce)*, Enc. giur. (1990); and Id., *La motivazione della sentenza civile* (1975).

A substantial part of legal literature[22] and of case-law[23] believes that when the operative part is patchy or incomplete it is possible to also refer to parts of the statement of reasons to achieve a precise reconstruction of the scope of the judicial decision. Accordingly, the use of the statement of reasons as an aid to interpretation is included within the objective limits of *res judicata*.

On the other hand, another part of legal literature[24] holds that the statement of reasons for the judgment must be excluded from the objective area of *res judicata*. It is believed that extending the objective limits of *res judicata* to include issues examined by the court in order to decide on the parties' applications could excessively strain the ruling and give rise, not only to possible uncertainties and ambiguities, but also to the risk of *ultra petita* rulings.

3. The problems of administrative *res judicata*: the pros and cons of the main constructions developed within the modern Italian administrative justice system (Sandulli, Benvenuti, Nigro, Piras)

After making these basic observations on general theory, the same concepts should now be developed with regard to administrative proceedings[25] and in particular to disputes between a public administration, holding a certain administrative power, and the private individuals allegedly harmed by exercise (or failed exercise) of said power within the wide range of actual administrative relationships.

The singular characteristic of this type of proceedings consists in the particular position taken by the public

[22] See simply G. Pugliese, *Giudicato civile (dir. vig.)*, cit. at 5, 864; V. Denti, *Ancora sull'efficacia della decisione di questioni preliminari di merito*, 4 Riv. dir. proc. 569 (1970).

[23] See, at least, Supreme Civil Court, Div. III, 17 June 1966, no. 1559; Supreme Civil Court 18 February 1965, no. 266; Supreme Civil Court 23 July 1964, no. 1988; Supreme Civil Court 27 August 1963, no. 2366.

[24] See, in particular, E.T. Liebman, *Giudicato (voce)*, cit. at 5, 13; E. Heinitz, *Considerazioni attuali sui limiti oggettivi del giudicato*, cit. at 13, 756; A. Proto Pisani, *Osservazioni sui limiti oggettivi del giudicato*, cit. at 13, 89.

[25] On the 'special' nature of administrative jurisdiction in the Italian legal system, see A. Police, *Administrative Justice in Italy: Myths and Reality*, 7 I.J.P.L. 34 ff. (2015).

administration, respectively party to the proceedings and – at the same time – holder, at substantive level, of the administrative power[26].

This factor should not be underestimated. In fact the relationship between administrative power and administrative proceedings could be represented using the following pattern: power – proceedings – power.

In other words, the administrative proceedings would appear to fulfil the symbolic role of "parenthesis"[27] between the first tangible manifestation of the power by the public administration and the subsequent second post-judgment exercise of said power.

The purpose being not only to comply with the judgment issued, but also and above all, to constantly pursue the public interest to which the executive function appears to be functionalised [28] in light of the traditional principle of the inexhaustibility of administrative power[29].

This means that the conclusive judgment in the administrative proceedings, with its effectiveness and authority of '*res judicata*', acts as a "nexus"[30], so to speak, for resumption of the administrative action.

And it is precisely for this reason that, with regard to the type of proceedings under review, the study of the objective effectiveness of the judgment, or perhaps more appropriately, of the 'objective limits' of *res judicata*, is of key importance. This is because it is essential to be able to understand the scope of the

[26] See C. Calabrò, *Giudicato – Diritto processuale amministrativo (voce)*, cit. at 1, 5; and, if I may suggest, S. Vaccari, *Il giudicato nel nuovo diritto processuale amministrativo*, cit. at 1, 55 ff.

[27] M. Clarich, *Giudicato e potere amministrativo*, cit. at 1, 1.

[28] On the 'functionalisation' of administrative action, understood as the directing of administrative power towards the achievement of tangible public interests, see R. Villata, M. Ramajoli, *Il provvedimento amministrativo* 70 ff. (2017).

[29] On which see, for further details, M. Trimarchi, *L'inesauribilità del potere amministrativo*, cit. at 3; M. Clarich, *Termine del procedimento e potere amministrativo* (1995); C. Leone, *Il principio di continuità dell'azione amministrativa* (2007).

[30] F. Francario, *La sentenza: tipologia e ottemperanza nel processo amministrativo*, 4 Dir. proc. amm. 1045 (2016).

stabilising capacity that the administrative judgment can ensure in relation to the power of public administration.

Legal literature and case-law have taken different approaches to the matter when establishing the relationship between the objective limits of *res judicata* and the subsequent exercise of administrative power, narrowing or widening the relationship of inverse proportionality between the two terms of the relationship.

In fact if the objective limits of *res judicata* are extended to a wider degree, there shall be less room left for the public administration to enjoy freedom of action when re-exercising its power. On the contrary, if the scope of the judgment's effectiveness is narrowed, the administration's room for manoeuvre shall extend considerably, even to the extreme possibility of being able to lawfully issue a measure of the same content – albeit justified by a different basis of power – as the one previously challenged and annulled during the first instance proceedings.

The various theories on the matter lie along a spectrum where one extreme is the construction of *res judicata* with a 'minimum' objective extension, while the other is the configuration of *res judicata* with a 'maximum' objective extension.

These two diametrically opposed theories in turn represent the legal translation of the following fundamental 'value-based' options: the propensity to protect the administration's needs and maximum concern for public interest on one hand and the implementation of a series of principles inherent in the jurisdictional role, such as the stability, fullness and effectiveness of the protection given to the successful party.

To provide an insight into the current state of the scientific debate on the matter, a number of brief references shall be made to the main theories developed in literature and in many cases also endorsed by administrative case-law.

One of the first theories was developed by Aldo Mazzini Sandulli[31] who, at a time when a strictly appeal-based procedural model was preeminent, reconstructed the objective restriction

[31] See A.M. Sandulli, *Il giudizio davanti al Consiglio di Stato e ai giudici sottordinati* 38 ff. (1963); Id., *Consistenza ed estensione dell'obbligo delle autorità amministrative di conformarsi ai giudicati*, by Multiple Authors, *Atti del convegno sull'adempimento del giudicato amministrativo* 17 ff. (1962).

arising from administrative *res judicata* by using the '*causa petendi*' element as criterion for identifying actions.

More specifically, the authoritative legal commentator held that each ground for appeal – and therefore each ground of illegality of the challenged measure – identified an independent *causa petendi* and consequently an independent and different action[32].

Hence, this led to the objective limits of administrative *res judicata* being interpreted as having a narrow scope, with the obvious consequence that the stability of the outcome of proceedings was limited compared to the room for freedom left for re-exercise of the administrative power[33].

Moreover, this approach implied a relationship between the administration and citizens based on the supremacy and authority of the former over the latter. In fact in its intent to safeguard as far as possible the action of the administrative machinery, this theory appears strongly biased towards ensuring full freedom in re-exercise of the administrative power, to the detriment of the stability of the outcome of proceedings for the successful party.

In other words the idea was to do the upmost to release the administration from the "tight constraints" of *res judicata* in order to allow it to effectively look after public interests by retaining wide margins of discretion and choice.

However this approach put forward an idea of the 'subject of proceedings' [34] that fully coincided with the "classic" conception [35] (which was therefore subject to progressive criticism [36] and obsolescence over the years) of administrative

[32] A.M. Sandulli, *Il giudizio davanti al Consiglio di Stato e ai giudici sottordinati*, cit. at 31, 54.

[33] In the case-law of that time, this approach was endorsed by Council of State, Div. IV, 13 March 1963, no. 161; Council of State, Div. IV, 2 May 1962, no. 351; Council of State, Div. V, 14 April 1962, no. 359.

[34] See A.M. Sandulli, *Il giudizio davanti al Consiglio di Stato e ai giudici sottordinati*, cit. at 31, 52.

[35] See the approach of G. Roehrssen, *Giurisdizione amministrativa*, 7 Noviss. dig. it. 1004 (1961).

[36] See, simply, the criticisms raised by G. Greco, *L'accertamento autonomo del rapporto nel giudizio amministrativo* 22 ff. (1980); M.S. Giannini, A. Piras, *Giurisdizione amministrativa e giurisdizione ordinaria nei confronti della pubblica amministrazione*, 19 Enc. Dir. 255 ff. (1970). On the need for forms of "full protection" in the Italian administrative justice system (that is, in addition to

proceedings as appeal proceedings centring on the simple 'loss of effect'[37] of the challenged measure[38].

In other words, an administrative proceedings framework which, aside from eliminating the unlawful administrative measure with retroactive effect, failed to clarify the scope for assessing the wider 'administrative relationship' existing between the administration and the individual. In this regard, it is mentioned that as the Italian administrative justice system evolved (see below), this aspect became increasingly central and inherently "forward-looking" rather than "backward-looking", and also considered as an effect of the administrative court's judgment, the finding on the correct procedures for re-exercising the administrative power in order to achieve an outcome that guarantees the successful party more effective and stable protection.

While this approach was being developed, the theory of Feliciano Benvenuti[39] was also widely propagated. Benvenuti regarded administrative *res judicata* as a simple "fact", based on the assumption that jurisdiction and administration were fully equivalent and independent. Like Sandulli's position, the result of

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the simple annulment of the challenged measure) see A. Police, *Il ricorso di piena giurisdizione davanti al giudice amministrativo* (2000-2001).

[37] It should be noted that – as a rule – an administrative measure is effective and enforceable; therefore, in order to protect legal positions impacted by the effects produced by a certain unlawful administrative measure an equal and contrary judicial ruling is required: the annulment of the challenged measure. Only a constitutive ruling is able to retroactively remove from the legal system the effects produced by a measure issued through the exercise of administrative power. For a further study on the evolution of the Italian administrative justice system, see E. Codini, S.A. Frego Luppi, *The Transformation of Dual Jurisdiction in the Italian System of Administrative Justice*, 22 E.P.L.O. 78 ff. (2010); F.G. Scoca, *Administrative Justice in Italy: origins and evolution*, 2 I.J.P.L. 118 ff. (2009); G. Falcon, *Judicial Review of Administrative Action in Italy*, in L. Vandelli (ed.), *The Administrative Reforms in Italy: Experience and Perspectives* 207 ff. (2000); A. Piras, *Administrative Justice in Italy*, in W. Leisner, A. Piras, M. Stipo (eds.), *Administrative Law. The Problem of Justice*, Vol. III, *Western European Democracies (Germany – Italy)* 237 ff. (1997); G. Treves, *Judicial Review in Italian Administrative Law*, 26 U. Chi. L. Rev. 419 ff. (1959).

[38] See, in the case-law of the time, focused only on the constituting/quashing effect of the administrative judgment of annulment, Council of State, Div. V, 5 May 1962, no. 367; Council of State, Div. VI, 27 September 1951, no. 402.

[39] F. Benvenuti, *Giudicato (dir. amm.)*, 18 Enc. Dir. 896 ff. (1969).

this approach was to greatly reduce the objective limits of *res judicata*.

Based on a "rigid" conception of the principle of separation of powers, Benvenuti construed the relationship between the two "mandatory orders", represented by the judgment and by the challenged administrative measure [40] respectively, as the manifestation of the exercise of two different sovereign functions[41]. In the relationship between these two functions a distinctive role is played by the administration's original and specific power to independently govern the actual relationship between the administration and the citizens.

On this authoritative basis, legal commentators developed the idea that the effectiveness of administrative *res judicata* extended no further than the simple decision on the specific grounds of illegality raised against the challenged administrative measure[42].

This gave rise, as far as is relevant here, to a weak preclusive effect for the subsequent administrative activity.

In fact, an infringement of the operative part of the judgment by the renewed exercise of the administrative power did not so much constitute an 'infringement of *res judicata*', but rather a less serious 'misuse of power' because of conflict with a weaker "restriction on administrative discretion" arising from *res judicata*[43].

Hence administrative *res judicata* tended to play the role of a simple "fact" [44] to be measured against the renewal of the administrative power and given the same standing as the various factors that the administration is required to consider and align when once again exercising its power.

To sum up, once again this approach appears to be excessively biased towards the administration, to the detriment of the need for full and effective protection of the subjective legal positions asserted by citizens in proceedings brought before national administrative courts.

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[40] On the mandatory nature of administrative powers, see B.G. Mattarella, *L'imperatività del provvedimento amministrativo* (2000).

[41] See F. Benvenuti, *Appunti di diritto amministrativo* 37 ff. (1959); and Id., *Disegno dell'amministrazione italiana* 276 ff. (1996).

[42] F. Benvenuti, *Giudicato (dir. amm.)*, cit. at 39, 901.

[43] See, in case-law, Sicilian Regional Council, 15 May 1952, no. 68.

[44] F. Benvenuti, *Giudicato (dir. amm.)*, cit. at 39, 903.

The principles of effectiveness and satisfactoriness in public law disputes received a pivotal boost from the papers by Mario Nigro[45]. This author devoted his scientific work to attempting to overcome the shortcomings of the administrative proceedings model of that period, which was structured according to a purely appeal-based logic.

To this end, Nigro embarked on a work that would extensively influence subsequent case-law, consisting in an analytical "breakdown" of the effects of administrative judgments of annulment, with the final objective of helping to strengthen the restriction produced by *res judicata* on the subsequent activity of the public administration.

The basis for the work arose from the assumption that anyone appealing against an administrative measure considered unlawful was not just pursuing the "immediate objective" of its elimination from the legal system, but was in actual fact seeking a much wider and more satisfactory "mediated objective"[46], consisting in the satisfaction of the material claim – also termed 'essential right' – underlying his legal position of legitimate interest.

More specifically, to enable the administrative court's decision to go beyond (what has been defined as) the "shield"[47] of the challenged administrative measure to achieve the correct procedure for re-exercising the power, the author no longer focused on just the traditional and quintessential 'constitutive effect' of a judgment of annulment, but rather on seeking a different and additional content containing 'indications'[48] – and

[45] The summary of the author's view illustrated in the following pages has been drawn from the following papers: M. Nigro, *Giustizia amministrativa* (1983); Id., *Esperienze e prospettive del processo amministrativo*, 2 Riv. trim. dir. pubbl. 401 ff. (1981); Id., *Il giudicato amministrativo ed il processo di ottemperanza*, Riv. trim. dir. proc. civ. 1157 ff. (1981); Id., *Trasformazioni dell'amministrazione e tutela giurisdizionale differenziata*, 1 Riv. trim. dir. proc. civ. 3 ff. (1980); Id., *Linee di una riforma necessaria e possibile del processo amministrativo*, 2 Riv. dir. proc. 271 ff. (1978); Id., *Il giudice amministrativo oggi*, 2 Foro it. 249 ff. (1978); Id., *Processo amministrativo e motivi di ricorso*, 5 Foro it. 17 ff. (1975); Id., *L'appello nel processo amministrativo* (1960).

[46] M. Nigro, *Giustizia amministrativa*, cit. at 45, 396.

[47] M. Nigro, *Il giudice amministrativo oggi*, cit. at 45, 166.

[48] M. Nigro, *L'appello nel processo amministrativo*, cit. at 45, 26.

before that 'findings' – which should represent the real cornerstone of the administrative judgment.

To this end, the theory clearly showed that the outcome of the proceedings could have different degrees of "utility"[49] for the plaintiff – while still retaining the effect of eliminating the challenged measure – depending on the different grounds of illegality on which the judgment of annulment was based.

Consequently, a second legal effect began to emerge, in addition to the traditional 'loss of effect', serving to complete the constitutive scope of the ruling, known as the 'reinstatement effect'[50].

The reinstatement effect obliges the administration to modify the factual situation – as far as possible – in order to remove any material changes made by enforcement of the challenged measure with the ultimate objective of re-establishing the previously existing situation (*status quo ante*). In other words, adjusting the factual situation to the new rule of law produced by the judgment of annulment.

Furthermore, while considering the other aspect of the resumption of the administrative action, the legal theory under review also went on to isolate a third effect that is typical of an administrative judgment of annulment.

It was noted that the judgment also has the capacity to restrict the phase of post-judgment re-exercise of the administrative power. This additional effect of the administrative judgment took the name of 'conformative effect'[51], according to a formula that was instantly taken up on a wide scale.

The conformative effect makes it possible to discern the correct way to re-exercise the administrative power by using a 'reverse' technique, i.e. by translating into "positive" practices (such as specific behavioural obligations) all that, by definition, the administrative judgment traditionally assesses in "negative" terms, that is, as specific grounds of illegality of the administrative action in question.

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[49] M. Nigro, *L'appello nel processo amministrativo*, cit. at 45, 435.

[50] M. Nigro, *Giustizia amministrativa*, cit. at 45, 386.

[51] M. Nigro, *Giustizia amministrativa*, cit. at 45, 389 ff. See in the case-law of the period, Council of State, Plen. Meeting, 22 December 1982, no. 19; Council of State, Plen. Meeting, 10 March 1978, no. 10.

Therefore, given the natural tendency for the administrative power to be re-exercised after the jurisdictional "parenthesis" has been closed, the rules of action translated into "positive" practices thanks to the aforesaid conformative effect then take the lead in the renewed phase of exercise of the power and, serving as a restriction, form part of the objective limits of administrative *res judicata*.

Nonetheless, the set of "positive" restrictions arising from administrative judgments of annulment varies depending on the nature of the administrative power and in particular on whether it is 'discretionary' or 'restricted', as well as on the type of defects found and used as the basis for the constitutive ruling.

While the effect of elimination remains inherent in each declaration of annulment, this difference in objective limits means that the 'preceptive' force of *res judicata* cannot be inferred from the operative part of the judgment alone, but also requires a joint examination of the relevant statement of reasons[52].

However, the frequent co-existence of administrative *res judicata* and free areas (of a greater or lesser size) of administrative action means that in individual cases it is difficult to establish the real scope of the "stabilising" effect of the objective limits of administrative *res judicata*. This is precisely why the legal theory in question defines administrative *res judicata* as an 'implicit' and 'subordinate' rule of the relationship, as well as being characterised by 'elasticity' and 'incompleteness'[53].

The consequences of this reconstruction of administrative *res judicata* are seen in the subsequent compliance proceedings, which take on a "mixed"[54] character, dealing with aspects of enforcement of the judgment and at the same time areas of cognisance in order to complete the (often incomplete) "rule" laid down in the proceedings on the merits. The expression

[52] See, in case-law, Council of State, Div. V, 12 September 1986, no. 442; *contra*, however, Council of State, Div. VI, 23 May 1962, no. 425; Council of State, Div. VI, 4 July 1962, no. 522.

[53] See M. Nigro, *Il giudicato amministrativo ed il processo di ottemperanza*, cit. at 45, 1168 ff.

[54] M. Nigro, *Il giudicato amministrativo ed il processo di ottemperanza*, cit. at 45, 1190.

'progressively formed *res judicata*' is also used to explain this phenomenon[55].

However, as this approach entrusts identification of the legal rules to be followed in the subsequent administrative action to the statement of reasons for the judgment of annulment, it introduces a strong degree of subjectivity and consequent uncertainty.

In fact, while the operative part of the judgment offers reliable protection of the claim involved in the action, the statement of reasons is instead influenced by the argumentative intention (and even capacity) of the individual judge, who must translate the grounds of illegality found into a series of directives, guidelines and limits for future administrative action[56].

However this approach runs the risk of subjugating the effectiveness of the protection to "subjective" factors that are therefore difficult to foresee. In other words, the stability of the outcome ends up being correlated to the different propensity of each administrative judge to clarify, in the statement of reasons for the judgment of annulment, the conformative content inferable from the illegalities found in the challenged measure.

The real danger lies in the fact that appeals based on the same grounds of illegality can give rise to conformative restrictions that vary in scale depending on the different drafting technique used by the administrative judges to draw up the statement of reasons for the judgment of annulment.

Precisely on account of this state of uncertainty, in the majority of cases it proves necessary to conduct further compliance proceedings in order to "complete" the spaces that were not covered by (or that were often implicit in) the final judgment of annulment of an administrative court. Although this consequence is consistent with the above-mentioned theories of the "mixed" nature of the compliance proceedings and of progressively formed *res judicata*, it seems to be clearly at odds

[55] See M. Nigro, *Giustizia amministrativa* 288 (1979). See, in case-law, Council of State, Plen. Meeting no. 10/1978; Council of State, Div. V, 16 November 1973, no. 874; and recently, Council of State, Plen. Meeting, 9 June 2016, no. 11.
[56] See R. Villata, *L'esecuzione delle decisioni del Consiglio di Stato* 567 ff. (1971).

with the principles of effectiveness and concentration of protection, and reasonable duration of proceedings[57].

While this theory was being formed, a new approach, again seeking to overcome the numerous shortcomings in the rigidly appeal-based Italian administrative justice system, was developed on the basis of the studies of Aldo Piras[58]. This approach regarded administrative proceedings as a judgment on the 'relationship' rather than on the 'measure' which had traditionally been the focus of attention.

The new approach sought to identify the subject of the administrative proceedings for annulment not so much in the measure challenged due to a series of specific irregularities, but rather in the 'administrative relationship'[59], meaning the legal relationship between an administration holding a certain public power and a private individual holding a subjective legal position entitling to a legitimate interest linked to a certain 'essential right'.

The change in approach draws on a reconstruction of the administrative judgment in terms of an 'ascertained fact'[60], regarding the overall 'relationship' on which the decision to recognise or deny the essential right claimed by the plaintiff is based, and which must consequently be explained in the judgment in sufficient detail to guarantee immutability of assignment of the 'right'.

The bringing together of the concepts of administrative relationship and subject of proceedings produces a theory of administrative *res judicata* that differs from those developed until

[57] See the criticisms raised by M. Clarich, *Giudicato e potere amministrativo*, cit. at 1, 111; and F. La Valle, *Azione di impugnazione e azione di adempimento nel giudizio amministrativo di legittimità*, 1-2 Jus 169 ff. (1965).

[58] See A. Piras, *Interesse legittimo e giudizio amministrativo* voll. I-II (1962); and also M.S. Giannini, A. Piras, *Giurisdizione amministrativa e giurisdizione ordinaria nei confronti della pubblica amministrazione*, 19 Enc. Dir. 229 ff. (1970).

[59] On the concept of 'administrative relationship' see, furthermore, M. Protto, *Il rapporto amministrativo* (2008).

[60] See A. Piras, *Interesse legittimo e giudizio amministrativo* vol. II, cit. at 58, 140 ff.; M.S. Giannini, A. Piras, *Giurisdizione amministrativa e giurisdizione ordinaria nei confronti della pubblica amministrazione*, cit. at 58, 255. *Contra*, viewing administrative proceedings as 'control' activity concerning the 'measure' and not the 'relationship', E. Capaccioli, *Per l'effettività della giustizia amministrativa (Saggio sul giudicato amministrativo)*, in Id., *Diritto e processo. Scritti vari di diritto pubblico* 457 ff. (1978).

that moment and, more importantly, is able to achieve the result of stable assignment of the essential right sought by the plaintiff.

A natural consequence of this theory is that in proceedings the respondent administration is obliged not only to put forward pleas and defence arguments in respect of the individual grounds of illegality raised by the plaintiff, but also to prove the overall validity of its action[61]. In other words, the burden on the respondent expands as far as having to prove that the framework of interests established by the challenged measure created an administrative relationship compliant with the conceptual configuration imposed by the legislator[62].

This means that if the public administration is unable to justify the full validity of its administrative decision through additional factual and legal arguments submitted in the investigative phase, the subsequent final judgment of annulment shall establish a total preclusion to prevent any possible new exercise of the power for the purpose of issuing a measure of equal substantive content.

The legal expedient that enables the final judgment of the administrative court to have stabilising effectiveness on the 'relationship' consists in use of the preclusion of 'what has been pleaded and what could be pleaded'[63]. This is the only possible

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[61] A. Piras, *Interesse legittimo e giudizio amministrativo* vol. II, cit. at 58, nt. 101.

[62] This implies that the traditional prohibition on late supplementation of the statement of reasons is obsolete. This rule, followed by the most important administrative case-law, and recently critically reviewed in some legal literature and case-law (see below), seeks to prevent the administration from putting forward before the courts (and therefore ex post) new substantive justifications of the measure issued, with a view to guaranteeing the position of the private plaintiff. On the prohibition on late supplementation of the statement of reasons see, in legal literature, at least A. Zito, *L'integrazione in giudizio della motivazione: una questione ancora aperta*, 3 Dir. proc. amm. 577 ff. (1994); P. Virga, *Integrazione della motivazione nel corso del giudizio e tutela dell'interesse alla legittimità sostanziale del provvedimento impugnato*, 3 Dir. proc. amm. 516 ff. (1993); A. Romano Tassone, *Motivazione dei provvedimenti amministrativi e sindacato di legittimità* 393 (1987); A. Azzena, *Natura e limiti dell'eccesso di potere amministrativo* 311 ff. (1976); in case-law, see Council of State, Div. IV, 20 May 1992, no. 546; Council of State, Div. V, 13 November 1990, no. 776.

[63] See A. Piras, *Interesse legittimo e giudizio amministrativo* vol. II, cit. at 58, 581; M.S. Giannini, A. Piras, *Giurisdizione amministrativa e giurisdizione ordinaria nei confronti della pubblica amministrazione*, cit. at 58, 257. *Contra*, on non-applicability of the preclusion of 'what could be pleaded' within administrative

way to extend the objective limits of *res judicata* to the widest degree, while remaining within the confines of proceedings generating a ruling within which the court cannot extend the scope of its cognisance by its own motion.

Application of the aforesaid preclusion places a proper 'burden' on the respondent administration to justify the decision contained in the administrative measure. If the administration were unable to justify the validity of its action, this would produce preclusion capable of absorbing every subsequent possibility of re-exercise of the administrative power (without prejudice, obviously, to the impact of 'contingencies' of a factual or legal nature).

That said, leaving aside the positive results in terms of effectiveness and stability of the protection, this theory was – and still is – widely criticised.

More specifically, the main criticism concerns the generalised use of procedural preclusions for the purpose of ensuring full and stable assessment of the substantive legal relationship in every administrative proceedings.

Firstly, attention is drawn to the absence of an explicit legal basis for precluding 'what has been pleaded and what could be pleaded'[64], and secondly to the frequent occurrence of situations where, even applying such a preclusion, it would still not be possible to extend the objective limits of *res judicata* to the entire administrative relationship. This occurs with particular frequency in appeal proceedings against negative administrative measures of a 'pre-trial' or 'preliminary' nature[65]: i.e. measures resulting from exercise of power which, for various factual or legal reasons, had to be halted before its natural conclusion.

In these cases, even application of preclusion of 'what could be pleaded' would not help to achieve the result of full stabilisation of the relationship, for the simple reason that it could not, by definition, be included as part of the matter to be decided in proceedings, either on a direct or presumptive basis, as the challenged measure does not concern the definition of the

proceedings, R. Villata, *L'esecuzione delle decisioni del Consiglio di Stato*, cit. at 56, 580 ff.; G. Greco, *L'accertamento autonomo del rapporto nel giudizio amministrativo*, cit. at 36, 182.

[64] See the criticisms raised by the authors mentioned in the previous note.

[65] On the relevant conceptual categories, see F. Ledda, *Il rifiuto di provvedimento amministrativo* 150 ff. (1964).

relationship but only refers to its propaedeutic or preliminary aspects[66].

To conclude, the weaknesses pointed out in the theory of administrative *res judicata* on the (overall) 'relationship' are the natural consequence of the difficulties in combining an advanced theoretical approach, specifically focusing on achieving full, effective and stable protection, and an administrative justice system which at the time was still too limited in 'structure' (in terms of the actions available, investigative techniques, etc.).

This is why the search for a definitive solution to the substantive conflict between administration and private plaintiff needs to be developed and resumed from the perspective of a new study on *res judicata* within the current 'administrative procedural law', meaning with regard to the changes made to the Italian administrative justice system by the new Code of Administrative Proceedings (Italian Legislative Decree N 104/2010).

4. Some reconstructive proposals for setting forth a principle of administrative *res judicata* with a "stabilising entitlement" that can be adapted to current administrative procedural law

Italian administrative proceedings underwent a significant structural transformation following the entry into force of the new Code of Administrative Proceedings, enacted by Italian Legislative Decree No 104 of 2 July 2010, in implementation of the guiding criteria contained in Article 44 of the relevant enabling law (Italian Law No 69 of 18 June 2009)[67].

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[66] See, on the matter, G. Greco, *L'accertamento autonomo del rapporto nel giudizio amministrativo*, cit. at 36, 30 ff.

[67] See, in particular, Article 44 of Italian Law No 69/2009 in the part where it delegates the Government «[…] *to adopt, within one year of the date this law enters into force, one or more legislative decrees for the restructuring of proceedings brought before regional administrative courts and the Council of State, in order to adjust the current rules to the case-law of the Constitutional Court and of the higher courts, to coordinate them with the rules of the code of civil procedure insofar as expression of general principles and to ensure concentration of protection. The legislative decrees referred to in paragraph 1,* […] *concern the following guiding principles and criteria: a) ensure that protection is simple, concentrated and effective, in order to guarantee the principle of reasonable duration of proceedings, also by using computer and electronic procedures,* […]; *b) regulate the court's actions and functions: 1) reorganising current*

From a study of the various parameters established by the enabling law it is immediately apparent that specific attention has been dedicated to a series of "functional values" of proceedings, such as, concentration, simplicity, effectiveness of protection, etc.

A general tendency has developed, also on the basis of more recent case-law of the Joint Chambers of the Supreme Court[68], requiring these procedural values to be stated in each type of proceedings and also to be used to support the interpretation and reconstruction of the various procedural institutions.

This means that in the current system of administrative procedural law, the full and effective protection of the 'need' to safeguard and satisfy a certain substantive legal position (and obviously also the legitimate interest) requires the use of procedural protection models and techniques – i.e. 'actions' – that differ according to the type of 'claim' asserted by the private individual[69].

In other words, given that the 'remedies' must follow the 'rights'[70], the forms of judicial protection must adapt to and serve

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rules on the jurisdiction of the administrative court, also in respect of other jurisdictions; 2) reorganising cases where jurisdiction extends to the merits, also by eliminating cases that no longer comply with the current system; 3) regulating, and possibly reducing, the time limits for lapse or time barring of available actions and the types of measures that can be issued by the court; 4) providing for declaratory, constitutive or conviction rulings capable of satisfying the successful party's claim; […]». In literature, on the new 'codification' of Italian administrative proceedings pursuant to the aforesaid legislative delegation, see A. Pajno, *La giustizia amministrativa all'appuntamento della codificazione*, 1 Dir. proc. amm. 119 ff. (2010). In general, on the current framework of Italian administrative justice, see E. Silvestri, *Administrative Justice in Italy*, 3 Brics Law Journal 67 ff. (2016).

[68] See in particular the landmark judgment of the Supreme Civil Court, Joint Chambers, 22 December 2014, no. 26242 (with note by S. Menchini, *Le sezioni unite fanno chiarezza sull'oggetto dei giudizi di impugnativa negoziale: esso è rappresentato dal rapporto giuridico scaturito dal contratto*, 3 Foro it. 931 ff. (2015)).

[69] See F. Luciani, *Funzione amministrativa, situazioni soggettive e tecniche giurisdizionali di tutela*, 4 Dir. proc. amm. 979 ff. (2009). To the same effect, A. Carbone, *L'azione di adempimento nel processo amministrativo* 31 (2012); and recently, I. Pagni, *La giurisdizione tra effettività ed efficienza*, 2 Dir. proc. amm. 413 (2016).

[70] According to the combined reading of Articles 24(1), (*Anyone can bring legal action to protect their legitimate rights and interests*) and 113(1), (*Against measures of public administration it is always possible to seek judicial protection of legitimate rights and interests before ordinary or administrative courts*) of the Italian Constitution, see

the various protection requirements arising from the many and varied situations occurring in legal relationships governed by substantive law[71].

This approach forms the basis of current administrative procedural law[72], where thanks to a new system of actions[73],

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the important paper by V. Bachelet, *La giustizia amministrativa nella costituzione italiana* (1966); and more recently A. Pajno, *Per una lettura "unificante" delle norme costituzionali sulla giustizia amministrativa*, 4 Giorn. dir. Amm. 459 ff. (2006). On the impact of supranational sources in the evolution of the Italian system of administrative procedural law see A. Carbone, *Il contraddittorio procedimentale. Ordinamento nazionale e diritto europeo convenzionale* (2016); M. Allena, *Art. 6 CEDU. Procedimento e processo amministrativo* (2012).

[71] On the 'fullness' of the review conducted by the administrative court see Article 1 of the Italian Code of Administrative Proceedings: «[t]*he administrative court ensures full and effective protection in accordance with the principles of the Italian Constitution and of European law*». In case-law see Council of State, Div. VI, 23 April 2002, no. 2199. More generally, on the 'instrumentality' of proceedings with regard to substantive law see A. Proto Pisani, *Introduzione sulla atipicità dell'azione e la strumentalità del processo*, 5 Foro it. 1 ff. (2012); Id., *Appunti preliminari sui rapporti tra diritto sostanziale e processo*, 1 Dir. e giur. 1 ff. (1978).

[72] On the 'paradigm shift' (according to the well-known theory of T. Kuhn, *La struttura delle rivoluzioni scientifiche* (1969)) achieved by the new Italian Code of Administrative Proceedings, see A. Pajno, *Il codice del processo amministrativo tra "cambio di paradigma" e paura della tutela*, 9 Giorn. dir. amm. 885 ff. (2010). On the Italian legal system's transformation from a system of 'administrative justice' to a more advanced and modern system of 'administrative procedural law', see G.P. Cirillo (ed.), *Il nuovo diritto processuale amministrativo* (2014); B. Sassani, R. Villata (eds.), *Il codice del processo amministrativo. Dalla giustizia amministrativa al diritto processuale amministrativo* (2012). For a comparative reading of the transformations of national administrative justice systems see E. García De Enterría, *Le trasformazioni della giustizia amministrativa* 65 ff. (2010).

[73] See, once again, Article 44 of enabling law no 69/2009, in the part where it invites the Government to reform the administrative courts «[…] *providing for declaratory, constitutive or conviction rulings capable of satisfying the successful party's claim;* […]». On the multiple actions available within the new Italian system of administrative procedural law see, in legal literature, V. Cerulli Irelli, *Giurisdizione amministrativa e pluralità delle azioni (dalla Costituzione al Codice del processo amministrativo)*, 2 Dir. proc. amm. 436 ff. (2012); B. Sassani, *Arbor actionum. L'articolazione della tutela nel Codice del processo amministrativo*, 6 Riv. dir. proc. 1356 ff. (2011); A. Pajno, *Il codice del processo amministrativo ed il superamento del sistema della giustizia amministrativa. Una introduzione al libro I*, 1 Dir. proc. amm. 100 ff. (2011).

central importance has been given – in line with a model of 'subjective' jurisdiction – to the plaintiff's claim[74].

In this regard, in Articles 29 ff. the Code laid down a "catalogue" of actions available to the plaintiff[75], such as the action for annulment, action for conviction, action against silence, action for declaration of nullity, action for performance, in addition to the other actions implicitly permitted (consider for example the action of simple assessment) on the basis of the more general principle that the forms of protection may be 'atypical'[76].

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[74] See V. Cerulli Irelli, *Legittimazione "soggettiva" e legittimazione "oggettiva" ad agire nel processo amministrativo*, 2 Dir. proc. amm. 359 ff. (2014); A. Carbone, *Different Remedies in the Judicial Review of Administrative Decisions: the Introduction of the Azione di Adempimento in Italy (from a Comparative Perspective)*, 25 E.P.L.O. 1225 ff. (2013). In case-law, Council of State, Div. V, 6 July 2002, no. 3717. *Contra*, S. Valaguzza, *Il giudicato amministrativo nella teoria del processo*, cit. at 1, 112; G. Romeo, *La cultura del narcisismo e l'assenza del "limite" nella giurisdizione amministrativa*, 1 Dir. proc. amm. 40 ff. (2015). On the various theories developed in Italian legal literature (even in the past) on the complex issue of the 'subject' of administrative proceedings see, in general, L. Mazzarolli, *Il processo amministrativo come processo di parti e l'oggetto del giudizio*, 3 Dir. proc. amm. 463 ff. (1997); R. Villata, *Nuove riflessioni sull'oggetto del processo amministrativo*, by Multiple Authors, *Studi in onore di Antonio Amorth* 705 ff. (1982); S. Giacchetti, *L'oggetto del giudizio amministrativo*, by Multiple Authors, *Studi per il centocinquantenario del Consiglio di Stato* vol. III 1483 ff. (1981). More specifically, on the theory that considers the subject of administrative proceedings to concern a 'question of the lawfulness of the challenged measure', see A. Romano, *La pregiudizialità nel processo amministrativo*, cit. at 15, 260; on the theory that considers the subject of administrative proceedings to concern a 'potestative right to annulment of the challenged measure', see M. Nigro, *L'appello nel processo amministrativo*, cit. at 45, 18; on the theory that considers the subject of administrative proceedings to concern a combination of the 'frustration of a legitimate interest and the question of the lawfulness of the challenged measure', see R. Villata, *L'esecuzione delle decisioni del Consiglio di Stato*, cit. at 56, 526; U. Allegretti, *L'imparzialità amministrativa* 175 ff. (1965).

[75] See the actions typified in Articles 29 ff. of the Code of Administrative Proceedings (Article 29 – action for annulment; Article 30 - action for conviction; Article 31 – action against silence and declaration of nullity; Article 34(1)(c) – action for performance). See S. Raimondi, *Le azioni, le domande proponibili e le relative pronunzie nel Code del processo amministrative*, 3 Dir. proc. amm. 913 ff. (2011); F. Patroni Griffi, *Riflessioni sul sistema delle tutele nel processo amministrativo riformato*, Giustizia-amministrativa.it (2010).

[76] See M. Ramajoli, *Le tipologie delle sentenze del giudice amministrativo*, in R. Caranta (ed.), *Il nuovo processo amministrativo* 573 ff. (2011); E. Scotti, *Tra tipicità e atipicità delle azioni nel processo amministrativo (a proposito di ad. plen. 15/2011)*, 4 Dir. amm. 765 ff. (2011). *Contra*, in favour of a more cautious 'moderated

The recovery of greater consistency between the substantive claim and the corresponding form of procedural protection also produces important consequences from the point of view of administrative *res judicata*.

In fact, given the evident links between the concepts of 'subject of proceedings' and 'objective limits' of *res judicata*[77], the claim brought before the court by the plaintiff and falling within (as far as possible) the matter to be decided, shall form part of the content of the judicial decision, which shall also be subject to the stabilising effect of *res judicata* and its preclusive force.

Nevertheless, even the new administrative proceedings based on the availability of multiple actions are still hampered by a series of obstacles that frustrate the ambitious objective of constructing *res judicata* that can really "stabilise" the substantive administrative relationship and can fully achieve the values of effective and satisfactory protection for the successful plaintiff.

Consider firstly subjective legal positions carrying a legitimate interest 'involving an opposition' to something[78] and concerning the entitlement to retain a certain 'essential right' that has been affected by the exercise of power by the public administration. As we know, for holders of this type of subjective position the most suitable means of protection to satisfy their claim is an action for annulment of the harmful administrative measure[79].

However, the claim brought before the court by the plaintiff shall only be truly satisfied when recognition of 'entitlement'[80] to the essential right is characterised by stability and finality.

The issue clearly raises the delicate question of the extension of the objective limits of administrative *res judicata* that is formed on judgments annulling unlawful measures.

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typicity', A. Travi, *La tipologia delle azioni nel nuovo processo amministrativo*, by Multiple Authors, *La gestione del nuovo processo amministrativo: adeguamenti organizzativi e riforme strutturali* 87 (2011).

[77] See paragraph 2 of this paper.

[78] See M. Nigro, *Giustizia amministrativa*, cit. at 55, 131 ff.

[79] F. La Valle, *L'interesse legittimo come profilo di ulteriore rilevanza delle libertà e dei diritti*, 3 Riv. trim. dir. pubbl. 844 (1969).

[80] Concept developed in Italian legal literature by G.D. Falcon, *Il giudice amministrativo tra giurisdizione di legittimità e giurisdizione di spettanza*, 2 Dir. proc. amm. 287 ff. (2001).

More specifically, when the reconstruction of the concept of administrative *res judicata* is centred on the criterion of the '*causa petendi*' – which, as stated earlier, causes a contraction of the objective limits – each event shall end up corresponding to an independent action and, accordingly, to an independent exercise of administrative power. The obvious consequence of this approach is that the plaintiff's claim shall be satisfied on a merely formal, and consequently, unstable basis.

In fact in all likelihood, a hypothetical plaintiff who obtains satisfaction of his claim in proceedings, could find that – very soon after conclusion of the administrative proceedings – his 'essential right' is once again called into question as a result of re-exercise of the administrative power. The justification would be based on a different source of power taken from the (broader or narrower) set of conditions envisaged by the law assigning the power[81].

Hence, real and effective satisfaction of the plaintiff's claim can be achieved, not only through a simple judgment on the merits upholding the application for annulment, but rather when the ruling is accompanied by administrative *res judicata* that is able to give 'stability' to the decision. In other words, the final administrative judgment has to be characterised by objective limits with a range of effect that prevents the administration from once again exercising its power in such a way as to deprive the successful plaintiff of the essential right recognised in proceedings.

This is the only possible way to limit the wide freedom of action that the administration normally retains in the post-judgment phase, because of the traditional restricted approach to the objective limits of a final administrative judgment of annulment.

However, this problem cannot be solved by simply calling for case-law to also apply the abovementioned preclusion of 'what has been pleaded and what could be pleaded' to the public administration holding the power. Indeed, it cannot be denied that – at least in terms of establishing procedural principles – this solution is weak, given that it lacks a precise positive legal basis to justify the existence of this preclusion[82].

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[81] See M. Clarich, *Giudicato e potere amministrativo*, cit. at 1, 129 ff.

[82] In addition to the criticisms raised in note 63, see also C. Ferri, *Profili dell'accertamento costitutivo* 110 ff. (1970).

Conversely, a different approach could be taken (as explained in greater detail below) to reconstruct the matter in a way that, in order to seek a different basis for exhausting the administrative power, widens the investigation beyond the proceedings phase to also include the earlier procedural phase conducted by the administration itself at substantive level[83].

Instead with regard to subjective legal positions carrying a legitimate interest 'involving a claim' to something[84], the new Code grants the possibility – by bringing a special 'action for performance'[85] – of raising the claim directly as the subject of proceedings. This occurs in the form of an application for an order against the respondent administration for the issue of a favourable measure after it has been established that the claim is well-founded.

It is immediately clear that the extension of the remedies available to holders of legitimate interests involving a claim shall have evident repercussions on administrative *res judicata*.

Under the new system of administrative procedural law, the upholding of an action for performance allows the formation of objective limits of *res judicata* corresponding to a full and stable and therefore truly final assessment of the claim[86]. In other words, an assessment that is consistent with the hypothesised model of administrative *res judicata* with a "stabilising entitlement".

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[83] See M. Nigro, *Procedimento amministrativo e tutela giurisdizionale contro la pubblica amministrazione (il problema di una legge generale sul procedimento amministrativo)*, 2 Riv. dir. proc. 263 ff. (1980).

[84] This refers to subjective legal positions of a private individual concerning an application to obtain a certain 'essential right' through the issue of a favourable administrative measure by the competent public administration (e.g. a building permit or a business authorisation).

[85] See, in case-law, Council of State, Plen. Meeting, 23 March 2011, no. 3. In legal literature, see simply A. Carbone, *L'azione di adempimento nel processo amministrativo*, cit. at 69. On the distinction between 'models' of action (performance and annulment), see F. La Valle, *Azione di impugnazione e azione di adempimento nel giudizio amministrativo di legittimità*, cit. at 57, 152. It should also be noted that the action for performance currently provided for by the Italian Code of Administrative Proceedings is based on the German model of '*Verpliflichtungsklage*' set forth in paragraph 42(2) of the V.W.G.O.

[86] See P. Cerbo, *L'azione di adempimento nel processo amministrativo ed i suoi confini*, 1 Dir. proc. amm. 30 ff. (2017); A. Travi, *Alla ricerca dell'azione di adempimento*, 3-4 Riv. amm. Reg. Lomb. 161 ff. (2011).

However, this result cannot be achieved in every case where there are limits to the upholding of the action for performance brought by the plaintiff[87]. This occurs above all in cases where there is still room for administrative discretion, perceived by the court as a limit to its own fact finding and decision-making activity, to avoid taking over the administration's role in breach of the fundamental principle of separation of powers[88].

However, the very fact that the Italian Code of Administrative Proceedings admits the possibility of the public administration being ordered to act even in cases where «[...] *there is no longer any margin for discretion* [...]» (Article 31(3) Italian Legislative Decree No 104/2010) indicates the absence, at least at theoretical level, of an *a priori* incompatibility between the action for performance and discretionary administrative powers.

In other words, even 'theoretical' discretionary activity could 'in practice' be restricted as the result of its progressive exhaustion within the administrative proceedings, thanks to the further details and additional investigative input provided at that stage[89].

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[87] See Article 31(3) of the Italian Code of Administrative Proceedings, which provides that «[t]*he court may rule on the merits of the claim raised in proceedings only when carrying out its mandatory activity or when there are no further margins for the exercise of discretion and no further investigative obligations to be fulfilled by the administration*».

[88] On relations between 'jurisdiction' and 'administration' in the Italian administrative procedural law system, see G. Tropea, *L'ibrido fiore della conciliazione: i nuovi poteri del giudice amministrativo tra giurisdizione ed amministrazione*, 3 Dir. proc. amm. 965 ff. (2011). On the existence of assessments 'reserved' to public administration, see D. Vaiano, *La riserva di funzione amministrativa* (1996).

[89] On the distinction between 'theoretical' discretionary powers and 'practical' restriction see M. Clarich, *Manuale di diritto amministrativo* 128 (2017). The exhaustion of discretionary powers in practice is well-known in German legal literature, which has developed the theory known as '*Reduzierung auf Null*' (see K.A. Bettermann, *Die Verpflichtungsklage nach der Bundesverwaltungsgerichtsordnung*, N.J.W. 654 (1960); F. Schoch, E. Schmidt-Assman, R. Pietzner (eds.), *Verwaltungsgerichtsordnung. Kommentar* Section 113(27) (2009); and, in Italian legal literature, see A. Carbone, *L'azione di adempimento nel processo amministrativo*, cit. at 69, 97; S. Rodolfo Masera, *Contenuto della sentenza amministrativa e sua esecuzione in Spagna, Francia e Germania*, in G.D. Falcon (ed.), *Forme e strumenti della tutela nei confronti dei provvedimenti amministrativi nel diritto italiano, comunitario e comparato* 205 (2010);

As for the problem of stable and definitive protection of legitimate interests involving an opposition, the solution to the problems regarding legitimate interests involving a claim could also be found by extending the inquiry to the time before the proceedings, that is, by examining the extent to which discretionary powers may be exhausted in proceedings.

As already mentioned, the possible limits to administrative *res judicata*, which can be defined as having "stabilising entitlement"[90], depend on both the presence of 'administrative alternatives' not covered by the objective limits of *res judicata* in cases where the exercise of a certain administrative power is justified on a number of different bases, and on the impossibility

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C. Fraenkel-Haeberle, *Giurisdizione sul silenzio e discrezionalità amministrativa: Germania – Austria – Italia* 93 ff. (2004); L. Tarantino, *L'azione di condanna nel processo amministrativo* 47 ff. (2003), to which explicit reference has also been made in a number of judgments by Italian case-law (see Regional Administrative Court of Trento, Div. I, 16 December 2009, no. 305). As we know, in Section 42 of the *Verwaltungsgerichtsordnung* – VwGO (on which see, simply, E. Eyermann, L. Fröhler (eds.), *Verwaltungsgerichtsordnung. Kommentar* Section 42 (2019)), the German legal system provides, in addition to the action for annulment of unlawful administrative measures (*Anfechtungsklage*), also an action for enjoinder (*Verpflichtungsklage*), which formed the main model of inspiration for the solution recently introduced to the Italian Code of Administrative Proceedings (see, in particular, among the differing views put forward by legal commentators before the Code was issued, M. Clarich, *L'azione di adempimento nel sistema di giustizia amministrativa in Germania: linee ricostruttive e orientamenti giurisprudenziali*, 1 Dir. proc. amm. 66 ff. (1985)). More specifically, when the German court hands down a conviction against public administration involving the issue of a favourable measure (*Vornahmeurteil*), the 'question' must be 'ready' for the decision (Section 113(5), VwGO - '*wenn die Sache spruchreif ist*'): according to the interpretation provided by German case-law, this occurs (see, in this respect, A. Carbone, *Different Remedies in the Judicial Review of Administrative Decisions: the Introduction of the Azione di Adempimento in Italy (from a Comparative Perspective*, cit. at 74, 1239 ff.) «[…] *where its adoption is mandatory for the public authority, or where, despite the presence of administrative discretion, there is no room left for it to be exercised, either because the discretionary choice has already been made or because any decision other than the adoption of the measure requested would be unlawful due to misuse of discretion. In the latter cases, even though there is not a proper statutory duty upon the authority, the public body is bound to adopt the decision requested, since its discretionary power, conferred by the law, can no longer be lawfully exercised; it is, in other words, "reduced to zero" (Ermessensreduzierung auf null)*».

[90] Reference is made furthermore to S. Vaccari, *Il giudicato nel nuovo diritto processuale amministrativo*, cit. at 1, 252 ff.

of upholding the action for performance because there are still non-"exhausted" margins for exercising administrative discretion[91].

However neither of these situations appears relevant to the framework of administrative proceedings.

Today, thanks to the new system introduced by the Italian Code of Administrative Proceedings, it is possible to find a symmetrical correspondence between claims and protective measures available for the plaintiff's specific protection needs.

Hence it may be more appropriate to place the problem in the phase leading up to the dispute brought before the court, and namely when the administrative power is exercised within specific proceedings on the merits of the case.

It is easy to see that a direct relationship exists between the scope of the analysis carried out in the preliminary proceedings and the exhaustiveness or completeness of the subsequent protection (that may be) provided in proceedings, meaning both the scope of the 'relationship' to be examined by the court, as well as the exhaustion – due to the absence of further 'alternatives' – of the original discretionary powers of the administration.

In this respect there is a series of legal principles, rules and arguments that can lead to the identification of a 'duty of procedural preclusion'[92] to be fulfilled by the administration, which can produce preclusive effects right from the first time a certain administrative power is exercised.

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[91] In case-law, on the real risk of giving rise to an "endless" dispute between a private individual and the public administration, see Council of State, Div. IV, 6 October 2014, no. 4987; and Regional Administrative Court of Liguria-Genoa, Div. I, 21 February 2002, no. 164.

[92] See the theory drawn up towards the end of the 1980s by M. Clarich, *Giudicato e potere amministrativo*, cit. at 1, 189 ff., but also *passim*; and of which a re-proposal was attempted – taking into account the changes in the Italian administrative law system – in S. Vaccari, *Il giudicato nel nuovo diritto processuale amministrativo*, cit. at 1, 282 ff. *Contra*, however, G. Greco, *Giudizio sull'atto, giudizio sul rapporto: un aggiornamento sul tema*, 2 Dir. e soc. 242 (2016); L. Ferrara, *Dal giudizio di ottemperanza al processo di esecuzione. La dissoluzione del concetto di interesse legittimo nel nuovo assetto della giurisdizione amministrativa* 189 ff. (2003); C. Consolo, *Per un giudicato pieno e paritario a prezzo di un procedimento amministrativo all'insegna del principio di preclusione*, 1 Dir. proc. amm. 188 ff. (1990).

This means that the administration would be encouraged to 'problematise' its practical decision right from the start, justifying it in the light of all the possible sources on which it could be based. In this way, if the public administration did not intend to clearly express all the bases for its power, in order to retain a chance to adopt a second measure with the same substantive content after an unfavourable judgment, this possibility would be precluded.

The hypothesised duty of procedural preclusion would apply according to a mechanism that is similar – albeit transposed in a different substantive phase of the administrative procedure[93] – to the well-known procedural rule of extension of *res judicata* to 'what could be pleaded' (in addition to 'what has been pleaded', obviously).

The legal basis for this duty could be drawn from a number of essential principles of administrative action[94].

Firstly, mention is given to compliance with the principles of fairness, protection of legitimate expectation and good faith (in the objective sense)[95] in administrative relations.

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[93] On Italian administrative proceedings (Italian Law No 241/1990) see, in general, G. Pastori, *The Origins of Law No 241/1990 and Foreign Models*, 2 I.J.P.L. 259 ff. (2010); and – on the evolution of relations between administration and citizens in the Italian system – Id., *Recent Trends in Italian Public Administration*, 1 I.J.P.L. 1 ff. (2009).

[94] As well as from a number of institutions of positive law, such as for example, the 'notice of dismissal', under Article 10-*bis*, of Italian Law No 241 of 7 August 1990: «[i]*n ex parte proceedings, before formally adopting a negative measure, the body responsible for the proceedings or the competent authority promptly informs the applicants of the reasons why the application cannot be upheld. Within ten days of receipt of the notice, the applicants are entitled to submit their observations in writing, possibly attaching appropriate documentation. The notice referred to in the first sentence suspends the time limits for concluding the proceedings which recommence from the date the observations are submitted, or if none are submitted, from the expiry of the time limit referred to in the second sentence. If the observations are not upheld, this shall be explained in the statement of reasons for the final measure.* […]». See, in legal literature, S. Tarullo, *L'articolo 10-bis della legge no. 241/90: il preavviso di rigetto tra garanzia partecipativa e collaborazione istruttoria*, Giustamm.it (2008); L. Ferrara, *La comunicazione dei motivi ostativi all'accoglimento dell'istanza nel riformato quadro delle garanzie procedimentali*, by Multiple Authors, *Studi in onore di Leopoldo Mazzarolli* vol. II 83 ff. (2007); E. Frediani, *Partecipazione procedimentale, contraddittorio e comunicazione: dal deposito di memorie scritte e documenti al preavviso di rigetto*, 4 Dir. amm. 1003 ff. (2005). See, in case-law, Regional Administrative Court of Piedmont, Div. I, 7 February 2007, no. 503.

[95] See the fundamental paper by F. Merusi, *L'affidamento del cittadino* (1970).

Full application of these principles should mean that an institutional body, such as every public administration, shall be prevented from providing incomplete disclosure – by concealing constituent facts that are already present and that therefore 'could be pleaded' – of all the reasons justifying an unfavourable decision that damages the legal status of a certain private individual.

On the contrary, in compliance with the more general principle of impartiality under Article 97 of the Italian Constitution[96], the public administration should always provide full disclosure, both on the facts and on all the public and private interests involved, in order to ensure that the statement of reasons for the final measure fully covers all the hypotheses supporting a certain decision.

By proceeding in this way, even an administrative power 'abstractly' configured as discretionary by the attributing law, could in practice exhaust every residual margin of choice by increasing the level of detail of the investigative phase.

Secondly, mention is given to the principle of completeness and exhaustiveness of the statement of reasons [97] for the administrative measure, in which the administration is required to explain all the factual and legal reasons to support the decision set forth in the operative part of the measure.

If the statement of reasons has these characteristics, the recipient of the administrative measure shall be able to submit a potentially full and exhaustive challenge during proceedings, producing – or at least being able to produce – evidence of the entire administrative relationship.

This shall be achieved without obliging the administrative court to conduct its own assessment of the areas of the administrative relationship not explicitly submitted by the

[96] Article 97(2) of the Italian Constitution: «[p]*ublic offices are organised according to provisions of the law, so as to ensure the administration's smooth functioning and impartiality*». See, in legal literature, the important paper by U. Allegretti, *L'imparzialità amministrativa*, cit. at 74.

[97] Article 3(1) of Italian Law No 241/1990: «[e]*very administrative measure, including those concerning administrative organisation, the conduct of open competitions and personnel, must be justified, except in the cases established by paragraph 2. The statement of reasons must specify the factual conditions and legal reasons that led to the administration's decision, in relation to the results of the investigation*». In legal literature see, simply, A. Romano Tassone, *Motivazione dei provvedimenti amministrativi e sindacato di legittimità*, cit. at 62.

plaintiff, but rather as the result of complete administrative proceedings that allow the private plaintiff to dispute exercise of the administrative power in its potential entirety.

This is the only way that it is seriously possible to advocate the formation of administrative *res judicata* that is capable of definitively concluding the dispute with stabilising effectiveness.

Certainly it could be argued that the assertion that public administrations must fulfil a duty of procedural preclusion risks making the proceedings excessively cumbersome [98] and is therefore at odds with the principle of 'smooth functioning' [99], which is also set forth in the Italian Constitution (Article 97(2)).

However, an objection can be raised to rebut the theory that the extra investigation entailed in the duty of procedural preclusion makes proceedings excessively cumbersome and therefore frustrates the requirements of administrative efficiency and effectiveness[100].

Notably, the observation that attributes to the traditional "administrative power – administrative proceedings – administrative power" model a series of major complications to be dealt with whenever the measure issued by the public administration is then challenged before the court: once the procedural "parenthesis" has been concluded, the administration may or shall have to once again rule on the matter, justifying its 'second' decision on the basis of different sources of power, therefore paving the way for new and continuous challenges before the court.

However it is also possible to think in terms of a different model that can be summarised by the formula "administrative power – administrative proceedings with *res judicata* with stabilising effectiveness".

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[98] For a critical view, C. Cacciavillani, *Giudizio amministrativo e giudicato*, cit. at 1, 316.

[99] Principle set forth, in turn, in the rule of prohibition on 'making the investigation more cumbersome', pursuant to Article 1(2) of Italian Law No 241/1990: «[p]*ublic administration cannot encumber proceedings unless this is required by extraordinary justified grounds imposed by the investigation conducted*». In legal literature, see F. Saitta, *Interrogativi sul c.d. divieto di aggravamento: il difficile obiettivo di un'azione amministrativa "economica" tra libertà e ragionevole proporzionalità dell'istruttoria*, 4 Dir. e soc. 491 ff. (2001).

[100] To this effect see M. Clarich, *Giudicato e potere amministrativo*, cit. at 1, 196.

Although this alternative approach requires more detailed investigations to be conducted when the administrative power is 'first' exercised, also in order to fulfil the duty of procedural preclusion, more immediate exhaustion of the administrative discretion would be achieved, because it would be necessary to provide a full and exhaustive statement of reasons for the final measure considering all the potential grounds that could support that particular decision.

Furthermore, if the measure was challenged before the courts this approach would contribute to reaching a definitive conclusion of the dispute at the end of proceedings, either in favour of the plaintiff or of the respondent administration. Hence the objective limits of the final judgment would be defined in full and this would only leave room for a possible judgment enforcement phase, but not for new and undefined re-exercise of the same administrative power in substantive terms.

In any case, case-law has raised the question of how to avoid the serial, and potentially endless, re-proposal of administrative proceedings arising from continuous exercise of "fractions" of administrative power in the phase after the final judgment.

The solution that appears to be endorsed by prevailing case-law is to allow the respondent administration – using the expression found in numerous judgments – a 'second shot' at exercising its administrative power[101]. That means guaranteeing the administration the possibility of once again exercising the same power with regard to areas left uncovered by the first judgment, often 'incomplete' and therefore with narrow objective limits.

However, in order to avoid the problem of an endless exchange of exercise of power and subsequent procedural challenge by the plaintiff, the 'second shot' at administrative power must be complete and exhaustive: that is, capable of exhausting – under penalty of preclusion – every residual area of discretion, or in other words, founded on all the remaining sources of power not yet covered by *res judicata*.

[101] See, among the many, Council of State, Div. V, 6 February 1999, no. 134; and, recently, Council of State, Div. VI, 11 January 2016, no. 53.

This solution may be interpreted as a judicial trade-off between the opposing requirements of continuity of administrative action, on one hand, and effectiveness and satisfactoriness of procedural protection, on the other[102].

And yet, it is not fully convincing, at the very least because it lacks a positive legal basis to justify an interpretative choice of this kind[103]: accordingly the 'second shot' theory ends up being more the product of a purely case-law phenomenon than an inevitable consequence extrapolated from the current system of administrative procedural law.

Therefore, if the idea of constructing truly stable and final administrative *res judicata* is to be pursued, it appears preferable to endorse the more radical theory of the 'one-shot' exercise of administrative power[104].

This formula corresponds to the theory (already mentioned above) that seeks to establish a duty of procedural preclusion for the administration, so as to ensure every possible objection regarding the exercise of power is dealt with in the subsequent (and only) administrative proceedings, thus achieving protection that is effective, definitive and stable.

As it has been attempted to show, the 'one-shot' theory is preferable because it has a firm legal basis in procedural principles and rules, unlike the alternative 'second-shot' approach (prevailing in current administrative case-law) which appears more like a kind of privilege granted to public administration to remedy inadequacies in the first procedural phase.

However, even if the theory of the administration's duty of procedural preclusion should not be fully convincing, there is

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[102] In these terms, clearly, Council of State, Plen. Meeting, 15 January 2013, no. 2.

[103] In legal literature, see the criticisms raised by G. Greco, *Giudizio sull'atto, giudizio sul rapporto: un aggiornamento sul tema*, cit. at 92, 237; L. Ferrara, *Domanda giudiziale e potere amministrativo. L'azione di condanna al facere*, 3 Dir. proc. amm. 622 (2013); A. Travi, *L'esecuzione della sentenza*, in S. Cassese (ed.), *Trattato di diritto amministrativo. Diritto amministrativo generale* vol. V 4643 ff. (2000).

[104] In favour (in addition to the authors cited in note 92) also F. Patroni Griffi, *Riflessioni sul sistema delle tutele nel processo amministrativo riformato*, cit. at 75, 9 ff. *Contra*, however, the – virtually unanimous – administrative case-law. See Regional Administrative Court of Sardinia-Cagliari, Div. I, 18 June 2015, no. 880; Council of State, Div. III, 23 June 2014, no. 3187.

room for a further solution that would achieve the same objective of stable administrative *res judicata*.

This refers to the possibility of exhausting the remaining administrative power during proceedings, using the investigative phase to the maximum advantage[105], rather than leaving power to be exercised after the final judgment, as maintained by the case-law criticised earlier.

More specifically, it is necessary to ask ourselves whether the administrative court has the tools and, more in general, the power to "provoke" the exhaustion of every residual area of discretion and the using up of every administrative 'alternative' during the declaratory proceedings[106].

For this purpose the 'unofficial' measures of inquiry[107] provided for by Article 63 of the Italian Code of Administrative Proceedings[108] could prove useful. These include the 'request for documents' and 'clarification', to be interpreted as mechanisms for establishing a proactive dialogue with the administration for the purpose of involving all those aspects of the administrative action that were given 'little attention' in the concluded procedural phase and which, in the pending proceedings, represent obstacles to a final judgment on the plaintiff's claim.

To the same end, consideration could also be given to introducing the precautionary technique of '*remand*'[109] to the investigative phase of the declaratory proceedings[110].

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[105] On the constant tendency to expand the administrative court's cognisance to the 'facts' underlying the challenged measure, see Regional Administrative Court of Lombardy-Milan, Div. III, 6 April 2011, no. 904. On the investigative phase of Italian administrative proceedings, see A. Crismani, *The Rules of Evidence in the Italian System of Administrative Justice*, 7 I.J.P.L. 298 ff. (2015); and the fundamental paper by F. Benvenuti, *L'istruzione nel processo amministrativo* (1953).

[106] A. Carbone, *L'azione di adempimento nel processo amministrativo*, cit. at 69, 242.

[107] See for full clarification on the 'model' N. Saitta, *Sistema di giustizia amministrativa* 272 (2012).

[108] Article 63(1) Italian Code of Administrative Proceedings: «[w]*ithout prejudice to the burden of proof that they must meet, the court may ask the parties to provide clarification or documents, even on an ex officio basis*». See, for further details, A. Police, *I mezzi di prova e l'attività istruttoria*, in G.P. Cirillo (ed.), *Il nuovo diritto processuale amministrativo*, cit. at 72, 455 ff.

[109] The '*remand*' consists in a type of precautionary order with a 'propulsive' content which not only imposes the traditional suspension of the effectiveness and enforcement of the challenged measure, but also requires certain 'positive'

The generalised use of 'remand', not only in the interim phase of proceedings, would "prompt" the administration to reconsider some aspects of the underlying facts and contribute to ensuring exhaustion of the remaining margins of discretion and therefore to extending the pending declaratory proceedings to facts or assessments that did not come to light in the previous phase.

And yet this new logic of exhausting the residual discretion by "concentrating" it in court proceedings appears to be met with resistance from traditional case-law[111] in favour of maintaining the 'prohibition on late supplementation' of the statement of reasons[112].

In fact whenever it has been suggested that the respondent administration should be obliged to provide full justification of all

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actions from the administration or, more in general, a review of the challenged measure in light of precise guiding criteria set forth in the statement of reasons, without prejudice obviously to the area of the public administration's discretion and responsibility. See, for further details, A. Travi, *Misure cautelari di contenuto positivo e rapporti fra giudice amministrativo e pubblica amministrazione*, 1 Dir. proc. amm. 168 ff. (1997).

[110] In line with this thinking, in some aspects, Regional Administrative Court of Lombardy-Milan, Div. III, 8 June 2011, no. 1428.

[111] See, among the many, Council of State, Div. VI, 12 November 2009, no. 6997; Council of State, Div. IV, 12 March 2001, no. 1396; Council of State, Div. VI, 1 August 1999, no. 1026; Council of State, Div. IV, 26 June 1990, no. 519. *Contra*, Regional Administrative Court of Campania-Naples, Div. IV, 20 November 2006, no. 9984.

[112] That is, the rule that the statement of reasons must precede and not follow the administrative order, in compliance with the principles of transparency, responsibility of the public administration and demarcation of legal control. This gives rise to the corresponding prohibition for the administration to supplement the statement of reasons for the challenged administrative measure during proceedings, especially by means of its own defence arguments. The spirit and purpose of the prohibition is to guarantee and defend the private plaintiff, who would otherwise be obliged to dispute the lawfulness of a certain administrative measure without full knowledge of all the reasons justifying the decision and, in the event that supervening reasons are stated, to supplement his original appeal with 'additional reasons'. In legal literature, see G. Ferrari, *Integrazione della motivazione del provvedimento amministrativo nel corso del giudizio*, 10 Giur. mer. 2189 ff. (2012); N. Paolantonio, *L'integrazione postuma della motivazione ed il problema dei cc.dd. vizi formali*, Giustamm.it (2007); G. Tropea, *La c.d. "motivazione successiva" tra attività di sanatoria e giudizio amministrativo*, 3 Dir. amm. 531 ff. (2003); A. Zito, *L'integrazione in giudizio della motivazione del provvedimento: una questione ancora aperta*, 3 Dir. proc. amm. 577 ff. (1994).

the reasons why the private individual's claim cannot be upheld (in the case of 'extended' administrative measures) or, vice versa, of all the grounds for a certain decision to sacrifice the rights of a holder of a legitimate interest involving an opposition for reasons of public interest, prevailing case-law has always categorically prohibited the supplementation of the statement of reasons of the administrative measures during court proceedings on the basis of arguments to protect the private plaintiff.

More specifically, the legal arguments used by prevailing administrative case-law to deny such a possibility can be summarised as follows[113]: the necessary concomitance of the statement of reasons for, and the formation of, the measure, which must already contain a clear and complete account of all the factual and legal elements justifying the decision; the fact that, by allowing a late supplementation of the statement of reasons, the private individual would essentially be forced to take legal action "in the dark", that is only for the purpose of ascertaining the reasons behind a certain administrative measure that damages his/her legal status; the fact that the management of public interest must be left outside the final administrative proceedings[114], also because the public administration is represented in court through the advocacy of a defence lawyer (belonging to the state legal advisory service) whose mandatory defence cannot take decisions or accept responsibilities associated with exercise of the essential administrative function.

However, as this logic is the legacy of a traditional model of appeal-based administrative proceedings centring on the 'measure'[115], it could now be considered obsolete in view of the developments in the administrative procedural law system where the plaintiff's 'claim' and the related 'essential right' take centre stage[116].

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[113] See, for a comprehensive summary, G. Tropea, *Motivazione del provvedimento e giudizio sul rapporto*, 1 Persona e Amministrazione 247 ff. (2017).

[114] See, more extensively, the arguments put forward on the matter by F. Ledda, *Efficacia del processo ed ipoteca degli schemi*, by Multiple Authors, *Per una giustizia amministrativa più celere ed efficace. Atti del Convegno (Messina, 15-16 aprile 1988)* 93 ff. (1993), recently in F. Ledda, *Scritti giuridici* 307 ff. (2002).

[115] See the criticisms raised by G. Corso, *Processo amministrativo di cognizione e tutela esecutiva*, 5 Foro it. 428 (1989).

[116] See, in case-law, Regional Administrative Court of Campania-Naples, Div. IV, 20 November 2006, no. 9984; Council of Administrative Justice for the

Consequently, according to the new administrative proceedings it would appear possible to adopt a truly 'procedural' logic, as occurs in civil procedural law. This means that in response to the claim raised by the plaintiff, the respondent (i.e. the public administration) would have to set forth, in appropriate pleadings, all the grounds for preclusion, impediment or amendment that could lead to dismissal of the plaintiff's application[117], even if they concern facts giving rise to power not yet "spent" during the first administrative proceedings[118].

5. (Contd.): Towards administrative 'compliance' proceedings as a process of 'enforcement'

The suggested reconstruction also produces important consequences in terms of the relationship between the procedural phases of 'cognisance' and 'compliance'[119].

Firstly, it is sufficient to remember that the approach widely endorsed in legal literature[120] and in case-law[121] seeks to

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Region of Sicily, Jurisdictional Div., 20 April 1993, no. 149; Regional Administrative Court of Veneto-Venice, Div. I, 10 June 1987, no. 648. In legal literature, see G. Virga, *Motivazione successiva e tutela della pretesa alla legittimità sostanziale del provvedimento amministrativo*, 5 Dir. proc. amm. 520 ff. (1993); V. Caianiello, *Manuale di diritto processuale amministrativo* 411 (1988).

[117] See the general rule on the 'burden of proof' set forth in Article 2697 Italian Civil Code: «[a]*nyone wishing to assert a right in court must prove the facts on which it is based. Anyone who alleges the ineffectiveness of said facts or that the right has been altered or has lapsed must prove the facts on which the allegation is based*».

[118] See the interesting observations made on the matter by the Regional Administrative Court of Molise-Campobasso, Div. I, 9 May 2011, no. 238. See, in legal literature, A. Carbone, *L'azione di adempimento nel processo amministrativo*, cit. at 69, 255.

[119] On the matter, see first of all, the important paper by R. Villata, *L'esecuzione delle decisioni del Consiglio di Stato*, cit. at 56.

[120] See F.G. Scoca, *Aspetti processuali del giudizio di ottemperanza*, by Multiple Authors, *Il giudizio di ottemperanza. Atti del XXVII Convegno di studi di scienza dell'amministrazione* 208 ff. (1983); C. Calabrò, *L'ottemperanza come "prosecuzione" del giudizio amministrativo*, 4 Riv. trim. dir. pubbl. 1167 ff. (1981); A.M. Sandulli, *Consistenza ed estensione dell'obbligo delle autorità amministrative di conformarsi ai giudicati*, by Multiple Authors, *Atti del convegno sull'adempimento del giudicato amministrativo*, cit. at 31, 17 ff.

[121] See simply, Council of State, Div. V, 21 August 2009, no. 5013; Supreme Civil Court, Joint Chambers, 31 March 2006, no. 7578; Council of State, Plen. Meeting, 17 January 1997, no. 1.

contextualise administrative compliance in terms of 'mixed' proceedings[122] (entailing cognisance and enforcement) according to the traditional theory of 'progressively formed *res judicata*'[123].

This interpretation attributes compliance with a "substitute" role that serves to supplement the content of the declaratory judgment[124], by nature incomplete due to the structural limits associated with the merely appeal-based conception of administrative proceedings that is still widespread in much of legal literature and case-law[125].

In this context, when faced with a final judgment of an administrative court with narrow objective limits, in order to enhance the effectiveness of protection for the (all too often only 'formally') successful plaintiff, it is necessary to develop a compliance phase that is able to translate into 'positive' findings those stated only in the 'negative' in the statement of reasons for the judgment for annulment, i.e. as grounds of illegality of the challenged measures.

However, the frequent need to conduct two trial phases (cognisance and then compliance) before achieving permanent recognition of the plaintiff's claim, often entails the inconvenience of having to strike the balance against a number of (factual and legal) contingencies[126] representing a serious obstacle to practical fulfilment of the claim[127].

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[122] According to the 'famous' formula conceived by M. Nigro, *Il giudicato amministrativo ed il processo di ottemperanza*, cit. at 45, 1190.

[123] On this matter see, recently, Council of State, Plen. Meeting, 9 June 2016, no. 11 (with note by S. Vaccari, *"Ius superveniens" e giudicato a formazione progressiva*, 4 Foro it. 204 ff. (2017)); Council of Administrative Justice for the Region of Sicily 17 September 2015, no. 601; Council of State, Div. V, 23 March 2015, no. 1558. On the theoretical development of the concept of 'progressively formed res judicata' see, simply, M. Nigro, *Giustizia amministrativa*, cit. at 55, 288. *Contra*, S. Valaguzza, Il *giudicato amministrativo nella teoria del processo*, cit. at 1, 188; M. Lipari, *L'effettività della decisione tra cognizione e ottemperanza*, Federalismi.it 8 (2010); A. Travi, *Il giudicato amministrativo*, cit. at 1, 915 ff.

[124] On the "polysemic" nature of compliance proceedings, see Council of State, Plen. Meeting, no. 2/2013.

[125] See, for a critical evaluation, G. Corso, *Processo amministrativo di cognizione e tutela esecutiva*, cit. at 115, 421.

[126] For a general outline of the problem see the paper by R. Caponi, *L'efficacia del giudicato civile. L'efficacia del giudicato civile nel tempo* (1991). With regard to the specific relationship between administrative res judicata and '*jus superveniens*' see, at least, F. Trimarchi Banfi, *L'interesse legittimo alla prova delle sopravvenienze*

An opposite stance to this scenario is taken by some interpretations in favour of regarding administrative compliance proceedings as a process of enforcement, taking the model contained in Volume III of the Italian Code of Civil Procedure as a paradigm[128].

The issue is certainly of interest for a study on administrative *res judicata*.

The relationship between the procedural phases of cognisance and compliance in fact reflects, from a widened perspective encompassing the proceedings in their entirety, the problem of the completeness and stability of the final judgment. To use as metaphor, this represents the very "nexus"[129] between the two procedural phases mentioned above.

Therefore, the fact that the central focus of the current system of administrative procedural law has shifted to the 'claim' has also had significant consequences on debate on the relationship between the cognisance phase and the subsequent phase of compliance with the administrative judgment.

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normative, 2 Dir. proc. amm. 505 ff. (2018); G. Sigismondi, *Jus superveniens e giudicato amministrativo*, 10 Giorn. dir. amm. 967 ff. (1999); C.E. Gallo, *Giudicato amministrativo e successione di leggi nel tempo*, 3 Foro it. 99 ff. (1980); G. Paleologo, *Tempo logico dei provvedimenti successivi alle sentenze del giudice amministrativo favorevoli al ricorrente*, by Multiple Authors, *Il processo amministrativo: scritti in onore di Giovanni Miele* 393 ff. (1979).

[127] In favour of the 'permanence' of administrative power, see Council of State, Div. VI, 19 January 1995, no. 40. *Contra*, in favour of the effectiveness of protection, see Regional Administrative Court of Sardinia-Cagliari, Div. I, 15 February 1995, no. 146. For a summary of the main approaches taken in legal literature and case-law see, most recently, G. Pepe, *Giudicato amministrativo e sopravvenienze* (2017).

[128] See in legal literature, L. Ferrara, *Dal giudizio di ottemperanza al processo di esecuzione. La dissoluzione del concetto di interesse legittimo nel nuovo assetto della giurisdizione amministrativa*, cit. at 92, *passim*; M. Clarich, *L'effettività della tutela nell'esecuzione delle sentenze del giudice amministrativo*, 3 Dir. proc. amm. 550 (1998); R. Villata, *Riflessioni in tema di giudizio di ottemperanza ed attività successiva alla sentenza di annullamento*, 3 Dir. proc. amm. 369 ff. (1989); G. Corso, *Processo amministrativo di cognizione e tutela esecutiva*, cit. at 115, 433 ff.; A. Pajno, *Il giudizio di ottemperanza come processo di esecuzione*, 1 Foro amm. 1645 ff. (1987); G. Verde, *Osservazioni sul giudizio di ottemperanza alle sentenze dei giudici amministrativi*, 4 Riv. dir. proc. 642 ff. (1980).

[129] See, once again, F. Francario, *La sentenza: tipologia e ottemperanza nel processo amministrativo*, cit. at 30, 1025 ff.

More specifically, an increasingly complete cognisance phase should be able to overcome the traditional problem of the widespread uncertainty over the preceptive content and effects of the final judgment, which is also a source of doubt as to the administration's conduct after the final judgment [130] and the virtually generalised need to supplement the content of the judgment in the compliance phase.

This is why the development of a model of administrative *res judicata* with "stabilising entitlement" set within the new procedural framework introduced by the Italian Code of Administrative Proceedings should once again see the compliance phase characterised, pursuant to Articles 112 ff. of the Italian Code of Administrative Proceedings, as a genuine 'process of enforcement'[131].

6. Conclusions

The points set out in this paper highlight one of the specific problems of administrative *res judicata* in the Italian legal system and namely the fact that it tends to serve as a weak "parenthesis" in the broader circular "administrative power – administrative proceedings – administrative power" sequence, as it lacks the real stabilising effectiveness that should characterise the institution of *res judicata*, according to the general theory of proceedings.

More specifically, the study of the objective limits of administrative *res judicata* has shown that there is a relationship of inverse proportionality between the effectiveness and stability of protection, on one hand, and the inexhaustibility of administrative power, on the other. When the objective scope of the final judgment is broader, the room for free post-judgment exercise of the administrative power is narrower.

However, the issues concerning the gaps in the effectiveness of the protection offered by the administrative court and, insofar as is relevant here, the pathological absence of stability in administrative *res judicata*, historically arise from the

[130] See G. Sciullo, *Il comportamento dell'amministrazione nell'ottemperanza*, 1 Dir. proc. amm. 64 ff. (1997).

[131] See M. Lipari, *L'effettività della decisione tra cognizione e ottemperanza*, cit. at 123, 4 ff. Once again, the observations made by the Regional Administrative Court of Lombardy-Milan no. 1428/2011 prove fundamental.

original purely 'appeal-based' structure of this type of proceedings, traditionally focused only on the action for annulment of unlawful administrative measures.

The structural change introduced by the entry into force of the new Italian Code of Administrative Proceedings (Italian Legislative Decree No 104/2010) makes it possible to transcend the traditional debate linked to the administrative proceedings model on the 'measure' or on the 'relationship'[132], as the range of actions now available in public law disputes allow the plaintiff's 'claim' to be placed at the centre of the proceedings. And it is precisely the claim which, having become the 'subject of proceedings', contributes to restoring the natural correlation between the 'need for protection' and the corresponding 'procedural protection techniques' forming the cornerstone – according to a certain interpretation of our Constitutional Charter – of the relationship between 'rights' and 'remedies'.

In order to create a theoretical framework for a new form of administrative *res judicata* with a "stabilising entitlement", it has been suggested that (under penalty of subsequent preclusion) the public administration should be required to exercise its administrative power in a complete and exhaustive manner within the administrative proceedings (one-shot exercise of administrative power), or if the identification of this duty of procedural preclusion is not accepted, to exploit the potential of the investigative phase and in particular the 'unofficial' measures of inquiry (clarification, remand, etc.) in order to ensure that the administrative discretion is exhausted within the proceedings.

As a natural consequence of this approach the balance between the administrative court's duties in the respective cognisance and compliance phases shall also be redressed. In fact the more the administrative *res judicata* proves complete, the more the subsequent compliance proceedings shall take on the nature of a true process of enforcement, rather than a "hybrid" and "mixed" procedure which, as we have seen, often led to ineffective protection for the private individual.

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[132] See, for a summary of the problems involved in the debate, G. Greco, *Giudizio sull'atto, giudizio sul rapporto*, in M. Andreis (ed.), *Trasformazioni dell'amministrazione e nuova giurisdizione* 35 ff. (2004).

ASSESSMENT OF THE EFFECTIVENESS OF ANTI-CORRUPTION MEASURES FOR THE PUBLIC SECTOR AND FOR PRIVATE ENTITIES

Nicoletta Parisi and Francesco Clementucci***

Abstract

The article examines the "philosophy" (nature and objectives) of the anti-corruption measures provided in the Italian legal system, assessing how and why they relate one another, in consideration of the areas covered individually and in combination, and presenting few final considerations regarding their effectiveness.

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1. Introduction

Three anti-corruption measures are currently in place in the Italian legal system. The first one has a *typically public sector nature*: it is the system implemented by the "Severino Law" (n. 190/2012) and by all the provisions set out under this law, including the "Madia Law" (n. 124/2015, together with its delegated decrees), Law n. 69/2015 and the Public Contracts Code adopted under Legislative Decree n. 50/2016 as integrated by Legislative Decree n. 56/2017[1].

Previously, the Italian legislator (with Legislative Decree n. 231/2001) had set out provisions that established the implementation of a *model for the prevention of typically private sector corruption*: this procedure was the result of obligations derived from urgent demands placed on Italy by the international instruments to which it participates. The adaptation of the Italian legal system to the Organisation for Economic Co-operation and Development (OECD) Convention of 1997 (on combating the corruption of foreign public officials in international business transactions) and the three conventions drafted within the European Union (to combat fraud against the financial interests of the Organisation[2]) required a domestic adjustment that also

[1] This issue is discussed in greater detail in N. Parisi, *Invece di una conclusione*, in D. Rinoldi, V. Petralia (eds.), *Il contrario della corruzione. Integrità e nuovi mariuoli, nuova autorità nazionale di prevenzione, nuovi strumenti interni e internazionali di repressione* (2019).

[2] This relates to the Convention on the Protection of the European Communities' Financial Interests adopted on 26 July 1995; this is supplemented by three Protocols: the first (27 September 1996) relates to the corruption of Community officials; the second (19 June 1997) concerns the liability of legal persons and the respective sanctions, money laundering and confiscation, cooperation between the services of the European Commission and Member States, as well as data protection; the third (29 November 1996) confers jurisdiction on the European Court of Justice to interpret the Convention through preliminary rulings. Italy adopted the Convention and the first and third Protocols following the authorisation for ratification and the enforcement order issued with Law n. 300 of 31 October 2000 (which also gives authorisation to the government for its full implementation: see Legislative Decree n. 231 of 8 June 2001). The second Protocol was executed and authorised for ratification with Law n. 135 of 4 August 2008. With reference to the Convention, its Protocols and their impact on the legal systems of Member States, among many publications, see: S. Manacorda, *La corruzione internazionale del pubblico agente. Linee dell'indagine penalistica* (1999); L. Salazar, *Genèse d'un droit pénal européen: la protection des intêrets financiers communautaires*, in Rev. int. dr. pén. 39 (2006); A.

covered rules regarding the obligations of legal persons and entities in general. It dealt with considerations on how to prosecute legal persons for acts of corruption committed to its benefit[3] by individuals that are either in senior executive positions or subject to the supervision or direction of those senior officials. In response to this requirement, our legislation adopted a regulation that allows private entities to be exonerated from liability in the event that the organisation model it has adopted is proven to be - despite the occurrence of unlawful acts - suitable and effectively implemented for combating corruption[4].

Finally, an anti-corruption model that is relevant as much to the *public* as to the *private sector* (including non for profit) was adopted in 2016: the *UNI ISO 37001*[5]. This is the result of self-regulatory activities issued by economic actors and public institutions, organised within private associations - at global,

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Venegoni, *La Convenzione sulla protezione degli interessi finanziari della Unione europea*, in L. De Matteis, C. Ferrara, F. Licata, N. Piacente, A. Venegoni (eds.), *Diritto penale sostanziale e processuale dell'Unione europea* (2011), I, 40 and II, 10. The Convention and its Protocols are destined to be substituted by the regulation set out under the Directive of 5 July 2017, to which Member States must adapt within two years of its adoption. On this subject, see N. Parisi, D. Rinoldi, *La protezione del bilancio dell'Unione tramite il diritto penale. Spunti a partire dalla direttiva relativa alla lotta contro la frode che lede gli interessi finanziari dell'Unione*, in 3-4 Il diritto penale della globalizzazione (2017).

[3] The reform introduced to implement the EU framework decision on private corruption (discussed below in note 4) states that it is not necessary for corruption to cause harm to society in order for the crime to occur.

[4] Articles 5-7 of Legislative Decree n. 231/2001. The decree has been amended on many occasions, mainly for the purpose of extending the list of offences to which the regulation is applicable; in relation to the issue in question - preventing the commission of acts of corruption - this was amended by Legislative Decree n. 38/2017 to fulfil the European rules on private sector corruption (Framework Decision 2003/568/JHA), which, in amending Article 2635 of the Italian Civil Code, also removed the condition of the entity having to derive an advantage from the act of corruption as a criterion used to assess the entrenchment of its liability.

[5] The UNI ISO acronym is derived from the manner in which the standard was adopted; or rather, it is applied when the *Ente Nazionale Italiano di Unificazione* (UNI, Italian National Standardisation Body) adopts (even by supplementing it) a standard that has already been approved universally by the International Organization for Standardization (ISO); if European bodies are also involved, that is, if the European Committee for Standardization (CEN) assisted in drafting the standard, then the applicable acronym is UNI EN ISO. The UNI represents the interests of Italy at the CEN and ISO.

European and national levels - dedicated to harmonize procedures and sectorial rules. Its scope (as suggested by the title: "Anti-bribery management system") is to establish adequate measures to prevent cases of corruption.

In this brief paper, we will discuss the "philosophy" (nature and objectives) of the three models, assess how and why they relate one another (in consideration of the areas covered individually and in combination) and then present few final considerations regarding their effectiveness.

2. The essential features of an effective model for preventing corruption

The fundamental question considering the phenomenon from the perspective of the procedures of the Italian Anti-Corruption Authority (ANAC) led us to explore the essential characteristics of a strong structure designed to prevent corruption. Reference is made to a general model, regardless of the sector (public or private) it is intended to operate in.

Considering the procedures of ANAC, Authority should assess the three-year plans for the prevention of corruption and transparency in the public bodies (aka institutional plans), in light of four central criteria.

2.1. First of all, the organization must move towards a *risk based* approach [6], to use a term (and therefore a technique) developed in the international context, particularly in terms of the cooperation built within the OECD. This means that the entity must consider the risk of corruption stemming from its specific activity, within its particular context, and consider how the risk can be mitigated.

This technique includes a list of conceptual and operational steps divided into two basic wings: the first one (*risk assessment*) is meant to verify the existence of risks, identify their factors, indicate actions to deal with those, and establish control procedures. The second part (*risk mitigation and management)*

[6] In relation to the international origins of the Italian regulation, please refer to N. Parisi, *Il contrasto alla corruzione e la lezione derivata dal diritto internazionale: non solo repressione, ma soprattutto prevenzione*, in Diritto comunitario e degli scambi internazionali 185 (2016).

concerns the adoption of decisions, which must be taken in order to manage the identified risk[7].

It is important to underline the procedure to identify the risk in light of an analysis of both the external and internal context of the organization. The process that each entity adopts must be considered a unique product[8]: in other words, the detection of the specific risk is a necessary process for the entity, which relates on the intrinsic nature of the compliance model adopted to prevent corruption. The events that led to the formulation of the "legislation 231 models" are very informative in this respect, in the sense that they explain why they suffered from the problems of inefficiency and lastly, of bureaucratisation within private entities. In fact, at the time they were first introduced, many initiatives had been put forward to package the models proposed by consultancy firms, forgetting that, by obtaining outside assistance, the organization could not truly learn to recognise its own risks. Needless to say, the criminal courts have considered ineffective those models[9].

2.2. The second characteristic of a constructive approach to preventing corruption within an organisation is the presence of individuals in *top management* who are genuinely committed to combating the risk of corruption. This is a typically private sector term: if one were to limit discussion to the public sector, then we would need to refer to the leaders of public entities and their senior managers. We have chosen "top management" to use a more general term (that covers both the public and private

[7] The process as it is applied in the Italian legal system by the "Severino Law" has been described and praised at the international level: see OECD, *Rapporto sull'integrità in Italia. Rafforzare l'integrità nel settore pubblico, ripristinare la fiducia per una crescita sostenibile* (2013), specifically 106-107 (http://www.keepeek.com/Digital-Asset-Management/oecd/governance/rapporto-ocse-sull-integrita-in-italia_9789264206014-it#.WgCDWo_Wzow#page2).

[8] It has been correctly pointed out (in relation to the organisational model required by Legislative Decree n. 231/2001) that this must be "*tailor made*": M. Zecca, A. Paludi, *Corruzione e modelli di organizzazione delle imprese. Un'analisi giurisprudenziale,* in A. Del Vecchio, P. Severino (eds.), *Il contrasto alla corruzione nel diritto interno e nel diritto internazionale* (2014), 117.

[9] See the procedure discussed in M. Colacurci, *L'idoneità del modello nel sistema 231, tra difficoltà operative e possibili correttivi,* in 2 Diritto penale contemporaneo 66 (2016).

sectors), also considering that the public sector may learn efficiency from the private companies.

Decision-makers of the entity must be involved in the activity of identifying, analysing and managing the risk of corruption. The absence of a real interest in this type of approach is what many people within public bodies, who are tasked with being in charge of transparency and preventing corruption, complain about, having encountered the great difficulty of engaging the political leaders in the process of formulating a good anti-corruption strategy.

ANAC has tried to alleviate this lack of support, with some positive results. During the annual meetings for RPCTs (i.e. the person in charge of transparency and the prevention of corruption situated in each public body), held in May 2015, 2016 and 2017, there was a very clear change in the attitudes of the participants. At the first meeting, RPCTs complained (almost exclusively) about their isolation within the entity. At the second meeting, the same RPCTs explained that, despite the persisting isolation, it had been possible to design some strategies for sharing the burden of the tasks associated with the role. On 24 May 2017, the event was very constructive, well above expectations: there was a widespread proactive attitude enshrined in the Three-year Plans for Preventing Corruption and Transparency (aka PPCTs or institutional plans), which presented the operative solutions they had been able to prepare and even introduce into the procedures of their respective public bodies.

This difference in attitude can be explained through the strategy that ANAC had been implementing through the National Anti-Corruption Programme (aka NAP or the Programme), since October 2015[10]. In this context, the Programme suggests that each public entity should use structures and persons within its organisation to guide them in preventing corruption in accordance with – and to enhance – their specific competences and respective roles. Attention is thus given to the method according to which the institutional plan is the last shield in an internal process in which many "agents" participate, namely: the Internal Supervisory Body (ISB), leaders and senior management, as well as each employee, with the aim of preventing institutional corruption.

[10] The NAP adopted this with Decision n. 12 of 28 October 2015, par. 4.

With regard to this last point, we could explore the role of public sector employees who report instances of corruption and other offences taking place within their places of work (whistleblowing). Who better than employees can know how certain internal strategies are functioning, how the "ritual" of clocking-in and out works. This is the time to promote the role of public sector employees, who represent a different way of behaving: the way of the employee who knows that the Constitution demands him to perform his job "with discipline and honour"[11], given that he works for a public entity that ensures "the proper functioning and impartiality" of public sector work[12]. In this context, he is directly and individually involved in the responsibilities associated with the safeguarding and promotion of the entity's culture of integrity. However, for this to happen the decision-makers need to be involved in the culture of integrity: only in this way will public sector employees feel at home, in a secure and confident environment.

With regard to this, it seems very important to mention some of the steps involved in the recommendations adopted by the Committee of Ministers of the Council of Europe on the protection of whistle-blowers[13], especially where it is stated that (emphasis added) "[t]he normative framework should reflect a comprehensive and coherent approach to *facilitating public interest reporting and disclosures*"[14]; and that "[t]he national framework should be promoted widely in order to develop *positive attitudes* amongst the public and professions and *to facilitate the disclosure of information* in cases where the public interest is at stake"[15].

Returning to the matter at hand: the lack of involvement by the entity's decision-makers leads directly to a lack of credibility for the Programme. A culture of integrity is established by example, just as one does with children: there is no point in giving

[11] Article 54 of the Italian Constitution.

[12] Article 97.2 of the Italian Constitution.

[13] Recommendation (2014) 7, adopted on 30 April 2014, identifies twenty-nine principles that the states must apply to establish "*a normative, institutional and judicial framework to protect individuals who, in the context of their work-based relationship, report or disclose information on threat or harm to the public interest*" (as per the 11th recital).

[14] Principle n. 7 doc. cit. in note 13.

[15] Principle n. 27 doc. cit. in note 13.

long lectures about virtuosity; what is essential is to practise integrity in our daily lives, if there is to be any chance that our efforts to instil good behaviour will be successful. Therefore, if the administrative and political leaders are involved in the culture of preventing corruption, then the entire work environment cannot fail to benefit from this favourable climate, providing the anti-corruption structure with a better chance of effectively penetrating the entity's culture.

2.3. The third feature of an effective anti-corruption model consists in creating procedures governing the different *risk based* operations, designing a specific *action plan*. Excellent opportunities arise for reorganising the entity from this process, among others, in terms of making it more efficient: the connection between mitigation and prevention of corruption is very clear.

This kind of procedures partly consists of the strategy adopted in many national legal systems, which is strongly supported by the context of international cooperation between institutions[16]. The strong point of this strategy is the programmes designed for short and medium term planning on how to combat the risk of corruption. In the Italian legal system, these schemes are called "compliance programmes" (for the private sector, in relation to the need to comply with Legislative Decree n. 231/2011) and Three-year Programmes for Transparency and the Prevention of Corruption (for the public sector, as established under the "Severino Law" and Legislative Decree n. 97/2016).

With regard to the advantages resulting from this strategy, we can refer again to the context of international cooperation: again the OECD claims that in Countries where they are practised, the programmes and plans are intended "to modernise the public service in general, and in particular to make the regulations more stringent, to ensure transparency in the administration and in financing political parties, to promote openness of government information and freedom of the media and to improve international cooperation in such efforts"[17].

2.4. Lastly, the fourth feature of a good model for preventing corruption consists in applying a stress test to the programme.

[16] On this subject, see at least OECD, *Trust in Government Ethics Measures in OECD Countries* (2000), https://www.oecd.org/gov/ethics/48994450.pdf.
[17] OECD, *Trust in Government*, 68 (doc. cit. in note 16).

Indeed, when a model is formulated for this purpose, rules for its operation, procedures for its implementation and functioning, monitoring and reporting systems and supervision methods, including checks during the process and afterwards, are established. In order to assess and guarantee the efficiency and effectiveness of the model, all these procedures need to be tested.

However, we must go even further. After a while, an anti-corruption structure tends to become obsolete, because the way it functions is known and shared. As a result, the entity needs to be prepared to continuously update the model and the assumptions on which it is based. Therefore, it must be considered a "dynamic" element, rather than a static one. It is not by chance that the "Severino Law", in relation to the public model, envisages a (three-year) programme on an annual rolling basis. This system offers an excellent opportunity for guaranteeing effectiveness: it enables everything that was learned from the previous year experience to be swiftly added to the Programme, and it enables checks on inadequate portions of the model in relation to corruption, as well as on other aspects in need of simple adjustment and other ones that were successful, therefore confirmed. It is not by chance that the case law, which evaluated the efficiency of an organisational model pursuant to Legislative Decree n. 231/2001, considered its capacity to be dynamic as one of its essential criteria[18].

3. Characteristics of the public sector model (under Italian Law n. 190 of 2012)

Law n. 190/2012 requires that each public body adopts a Three-year Anti-Corruption Programme which (under Legislative Decree n. 97/2016) must also include measures concerning transparency. Incidentally, the decision to merge the two different Programmes seems very appropriate. Transparency is the essential component of an anti-corruption strategy: it is clear that if we could achieve full transparency in the public sector, then our Country would almost entirely solve its corruption problems, which is facilitated by the persistence of opacity. It seems obvious,

[18] Order of the Preliminary Proceedings Judge of the District Court of Milan on 20 September 2004, in II Foro it. 528 (2005).

in fact, to say that transparency makes corrupt agreements more difficult to detect: maybe it is not too mean to think that for this exact reason in our legal system there are many obstacles to full transparency, in both the public and private sector.

The model advocated by the law, as mentioned earlier, is characterised by three elements: it operates on "*a rolling basis*", it is "*cascading*" and it is based on pursuing effectiveness.

3.1. Each entity (whether public or private) is not a static creature, but a body in motion. This means that we must continuously consider the needs that endlessly arise from the internal and external context. In order to be effective and thorough, the analysis must be able to consider the two sides of risk: both the "threats" side (i.e. the dangers that attack the system) and the "vulnerabilities" side (in their two sub-aspects: the negative aspect of problems and weaknesses, and the positive aspect of the capacity to resist and react, the so-called resilience).

Acknowledgement of this requirement leads us to recognise the need for an anti-corruption structure that is dynamic too. The Programme required under Law n. 190/2012 is defined as "rolling", in the sense that, even though it is adopted for a three-year period, it must be updated yearly. This process is not merely formal. Indeed, it should take place on the basis of two elements: additions and amendments should primarily be established through the experience of the entity itself, which is required to evaluate the indicators, the deficiencies and what data emerge from the analyses, so that they can be considered in the Plan and a more effective system for preventing corruption can be created. The second element, which contributes to the process of updating the Plan, consists of the National Anti-Corruption Programme, which ANAC adopts annually and which also operates on a "rolling" basis.

3.2. Reference is thus made to the second component of the anti-corruption strategy designed under Law n. 190/2012 and represented by the fact that it is "cascading", organised as it is on the basis of a double level (central and peripheral) response to the risk of corruption within the entity. The first level is administered by a National Anti-Corruption Programme (NAP) adopted by the governance body for the sector, i.e. ANAC; the second one is administered by the individual public administrations through their own three-yearly institutional plans. The NAP is, as

mentioned earlier, also three-yearly and "rolling", just like the plans established by individual public sector bodies.

The purpose of NAP is to identify "the main risks of corruption and the associated remedies (...) in relation to the dimension and different sectors of activity in which entities operate", in order to guide and support public sector bodies and the other parties to which the anti-corruption legislation is applied in the preparation of the institutional plans[19]. The national Programme contains recommendations; given that it also includes illustrative guidelines, there remains a need to contextualise the risks and remedies (the so-called measures) in relation to the specific organisational context of each entity. The method used therefore, supplemented by the two rolling and cascading actions, enables the creation of a continuous cycle of control, learning and application of personalised, made to measure instruments for prevention.

3.3 In this context it seems appropriate to note the change to the strategy that occurred between the approval by the CIVIT (*Commissione per la valutazione, la trasparenza e l'integrità delle amministrazioni pubbliche*, Commission for the evaluation, transparency and integrity of the public sector) of the first NAP (of 2013) and the adoption by ANAC of the subsequent NAPs (of 2015, 2016, 2017 and 2018). It was a change in strategy in some way instigated by the requests for support that reached the Authority from certain areas of the public sector, notably from the health service; but it was also noted by the Authority itself as necessary after the findings that emerged from its supervisory activity in the period immediately following the establishment of its new Council (July 2014). From this activity, in fact, it was noted that the quality of the institutional plans had to be considered "generally" unsatisfactory"[20].

The poor quality of the first institutional plans was without doubt partially due to the novelty of the compliance required: at that time, the public sector was not equipped to evaluate and manage the risk of internal corruption, since adequate time and appropriate occasions for developing the necessary

[19] Article 1.2*bis* of Law n. 190/2012, as amended by Legislative Decree n. 97/2016.

[20] ANAC, *Relazione annuale 2015* (2016), 79.

"revolutionary" skills had not been allocated, and the same applied to the Italian legal system. It is true that, due partially to this situation, in handling this new task, there was a tendency (which was also demonstrated in the first application of Legislative Decree n. 231/2001) towards a merely formal, slavishly compliance with the "Severino Law". Consider, by way of example, that the first round of supervisory activity revealed the case of a municipal authority that had adopted the institutional plan of another municipal authority (without even changing the heading of the organization and the name of the RPCT), and a large hospital in Campania region that had used the plan of a hospital based in a small province of Piedmont region.

This resulted, as mentioned before, in an evaluation of the sterility of a national programme, which in its generic and uniform application, lent to a "cut-and-paste" exercise, to mere vague proposals, and to cosmetic operations. The public sector was not put in a position, from the first introduction of Law n. 190/2012, to understand the logic and the benefits of the process, which consists in recognizing the specific, individual risks determined by the context (both external and internal) that characterises each entity.

The following national programmes, including the one that is about to be published, are based on the principle that the public sector is not an undifferentiated universe, consisting instead of very diverse components. These new generation of NAPs, consequently, include only few measures aimed at the public sector as a whole[21]; whereas most of them consist of clarifications directed at specific areas of the public sector[22]. ANAC has therefore abandoned the idea of issuing the same recommendations to all entities of public sector, regardless their function, size, whether central or local, and whether with a stable nature or otherwise. The aim is now to appreciate the diversity of the general and specific risks, the difference between the areas at

[21] The 2015 PNA contains 24 general pages; the 2016 PNA, 37; the 2017 PNA only 17.

[22] In the PNA, the clarifications pertain, in 2015, to the public tender and health service sectors; in 2016, small municipal authorities, metropolitan cities, professional associations and colleges, academic institutions, cultural heritage, territorial government and healthcare; in 2017, the port system authorities, official receivers and universities.

risk according to the function, the different external context, duration and stability of the entity, in a tailor-made style. Furthermore, this assessment was helped by a well-oiled technique: that is, through consultation with those who for different reasons have been made aware of the contents of the national programme via joint "working groups" in which the risks of corruption and the tools available were discussed.

This is the type of conceptual approach that ANAC considers more practical for guaranteeing that the recommendations for the public sector will be more effective. Only in this way can the organisational model for preventing corruption be truly operative.

The search for a substantial approach emerges from all the Authority's practices. Only one example is needed, which illustrates the practice of "copy-paste homework", so to speak. The "Severino law" establishes the obligation to impose sanctions on public bodies that do not have an institutional plan, regardless its effectiveness. ANAC has concluded that programmes that are copied verbatim, with no specific risk analyses, are in essence non-existent: therefore, these entities are liable for sanctions. This idea contradicts the assumption that anti-corruption procedures lead to a new, more intense (ineffective) bureaucratisation of the public sector, forcing the entity to spend human and financial resources into a model that has proven to be ineffective, given that it was not developed for its own context[23].

4. … the private sector model (pursuant to Italian Legislative Decree n. 231 of 2001)

The compliance model established under Legislative Decree n. 231/2001 does not find detailed instructions, which are helpful for identifying its contents and drafting techniques, in the guidelines of positive law[24]. Three parameters are stated therein:

[23] Furthermore, Article 2 of the Severino Law contains an invariance clause: this determines the illegitimacy of consultancy fees in relation to the preparation of the PPCTS (as established by ANAC with Decision n. 831 of 3 August 2016).

[24] On the conciseness of the provisions in question, see the recent publication by R. Sabia, I. Salvemme, *Costi e funzioni dei modelli di organizzazione e gestione ai sensi del D.Lgs. n. 231/2001,* in A. Del Vecchio, P. Severino (eds.), *Tutela degli investimenti tra integrazione dei mercati e concorrenza di ordinamenti* (2016), 434, 438 and 456.

on the one hand – with regard to the drafting of a possible strategy for combating risks (also) of corruption – it should be noted that the organisation, management and control model (essential for avoiding the possibility for the entity being considered liable for alleged offences) must respond to certain characteristics, namely: "a) identify the activities in the context of which offences may be committed; b) establish specific protocols intended to schedule the making and implementation of the entity's decisions with regard to the offences that need to be prevented; c) identify methods for managing financial resources, which are suitable for preventing the commission of offences; d) establish obligations to disclose information to the organisation assigned to supervise the functioning of and compliance with the models; e) introduce a suitable disciplinary system to penalise non-compliance with the measures set out in the model."[25] The model must also establish, "in relation to the type and dimensions of the organisation and the type of activity performed, suitable measures for ensuring the performance of the activity in accordance with the law and identifying and promptly eliminating risk situations"[26]. On the other hand, in terms of effectiveness, it was decided that the model must at least require "a) periodic verification and, where appropriate, amendments to the same when significant breaches of the rules are discovered or when there are changes to the organisation or the activity; b) a disciplinary system appropriate for penalising non-compliance with the measures set out in the model"[27].

On the conciseness of the regulatory provisions, the rulings of a few criminal courts provide relevant case law. On several occasions they have considered, in addition to the criminal liability of the natural person who effectively implemented the act of corruption, the possibility of reconstructing a liability[28] of the

[25] Article 6.2.

[26] Article 7.3.

[27] Article 7.4.

[28] The literature is divided on the type of liability of the entity under Legislative Decree n. 231/2001. For a reconstruction with a general scope, see P. Severino, *"Omogeneizzazione" delle regole e prevenzione dei reati: un cammino auspicato e possibile*, in A. Fiorella, A.M. Stile (eds.), *Corporate Criminal Liability and Compliance Programs* (2012), 427 ss. The administrative nature is affirmed by M. Romano, *La responsabilità amministrativa degli enti, società, associazioni: profili generali*, in Riv. soc. 398 (2002). For a discussion of the mixed nature, O. Di

entity on whose behalf the person acted[29]. It was thus that a system of rules was codified, a group of conditions through which the entity can presume it has an effective anti-corruption model: the so-called "Milan Handbook", supplemented by the case law of the Naples District Court (*Tribunale di Napoli*),[30] provides a useful summary. However, this analysis performed using case law is still weak to give certainty to the subjects who adopt the model in terms of the defence before the criminal courts, of an organisational and management model, and therefore, it does not help to make appealing the process of adopting a similar model appealing in substantive terms[31]. The absence of incentives to make this process effective and not a merely cosmetic operation has led to some attempts of reform[32].

5. …. and the UNI ISO 37001

ISO 37001 (on Anti-Bribery Management Systems) is aimed to support organizations (large and small, public and private), through a series of concrete measures, in the prevention of

Giovine, *Lineamenti sostanziali del nuovo illecito punitivo*, in G. Lattanzi (ed.), *Reati e responsabilità degli enti* (2015), 15 ss.; and similarly the Italian Supreme Court, Section VI, sentence n. 36083 of 9 July 2009. Claiming (and I agree) that this involves criminal liability, C.E. Paliero, *La responsabilità della persona giuridica nell'ordinamento: profili sistematici,* in F. Palazzo (ed.), *Societas puniri non potest* (2003), 23 ss. For a comparative discussion on the evolution at the European level of the legal regime of company liability and entrepreneur's liability, see F. Clementucci, *Comparative analysis of criminal law, procedures and practices concerning liability of entrepreneurs*, in https://rm.coe.int/16806d8140.

[29] Case law (up to 2012) is presented in S.M. Corso (ed.), *Codice della responsabilità "da reato" degli enti annotato con la giurisprudenza* (2015).

[30] This concerns the orders adopted respectively by the Preliminary Investigations Judge at the Milan District Court (Tribunale di Milano) on 20 September 2004, in 47 Guida dir. 69 (2004), and the Preliminary Investigations Judge in Naples on 26 June 2007, in 4 Resp. Amm. Soc. 163 (2007). For an effective comment on the contents of this case law, please refer to M. Zecca, A. Paludi, *Corruzione e modelli*, cit., 113.

[31] Regardless of the uncertain benefits of this internal compliance system in terms of court proceedings, the process of collecting and analysing data that it requires, it can enable the organisation concerned, if nothing else, to identify, acknowledge and understand some internal problems.

[32] On this point, see F. Centonze, M. Mantovani, *Dieci proposte per una riforma del d.lgs. n. 231/2001*, in Id. (eds.), *La responsabilità "penale" degli enti. Dieci proposte di riforma* (2016), 283 ss.

corruption and in promoting a culture of business integrity. The ISO 37001 standard is based on a system that adopts a structure common to all ISO standards: the so-called *High Level Structure* (*HLS*). This consists in seven conceptual stages, of an organisational model, namely leadership (*focus on the top*), planning, support, operational activities, evaluation of services and improvements. Methodologically, this seems more valuable than the two models described above which, on the contrary, are quite homogeneous. Published in October 2016 (following the work of the ISO/Technical Committee #309 on "Governance of organizations"[33]), ISO 37001 was adopted in December of the same year by the Italian *Ente Nazionale Italiano di Unificazione* (UNI[34]).

In comparison to previous domestic instruments, this one adds a system of reporting, monitoring, auditing and periodic verification (which was not specified under Law n. 190/2012, nor in Legislative Decree n. 231/2001); as well as the performance of investigations and the implementation of corrective actions (merely implied in the "Severino Law"). On the functioning of ISO 37001, one cannot disregard the fact that the standard gives attention to the continuously changing context, thus providing practical indications and concrete examples in order to avoid sanctions. The recurring verification is a crucial element in making fertilization smoothly flow and reinvigorate. A bit like artificial intelligence, this mechanism is able (and meant to) learn from the past and eliminate previous mistakes by taking improved actions for the future. This is the whole point of section n.10 of the standard (so called "Improvement", divided into 10.1 - nonconformity and corrective action - and 10.2 - continual improvement), with focus on self-adjusting the anti-bribery management system in the pursue of suitability, adequacy and effectiveness.

Concerning the public sector[35], we note how in some States (i.e. Indonesia[36], Malaysia[37] and Guatemala[38]) the standard

[33] More information at www.iso.org/committee/6266703.html.

[34] See (in italian) at www.uni.com/index.php#.

[35] See W. MacMurray "*The public sector: how did it use ISO 37001 in 2018? Creatively!*", in www.ethic-intelligence.com/en/experts-corner/international-experts/518-the-best-word-to-describe-public-sector-use-of-iso-37001-in-2018-creative.html.

receives soft usage, meaning that important public sector organizations require self or their partners' certifications. In other cases, States make hard use of the standard, when their prosecutors consider ISO 37001 certifications as conditions for judicial agreement (in Brazil[39] and Singapore[40]) or as part of companies' good faith remediation efforts (Denmark[41]).

6. The scope of the different models

Some interesting points emerge from a comparison of the contexts covered by the three anti-corruption models in force. The public sector model identifies seven criteria for any corruption risk management system: an analysis of the entity's internal and external context, along with a consultation with the stakeholders, the assignment of roles and competencies within the organisation; the analysis of risks of corruption; the identification of prevention measures starting with the areas of activity most at risk from corruption; the drafting of a plan with details regarding calendar and duties for its implementation; verification of what has been achieved and the connection of the results of the outputs established in the Plan with the system for evaluating the performance of the managers[42].

The proper criteria for a compliance programme (of Legislative Decree n. 231/2001) can be found in the

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[36] See: skkmigas.go.id/detail/2467/skk-migas-starts-implementing-sni-iso-37001-2016-on-anti-bribery-management-system-smap and skkmigas.go.id/detail/2641/skk-migas-resmi-terakreditasi-sni-iso-37001.

[37] See *Anti-graft system for high-risk depts,* at www.theedgemarkets.com/article/antigraft-system-highrisk-depts.

[38] See *Remarks at the Conference on Prosperity and Security in Central America*, at www.state.gov/secretary/remarks/2018/10/286571.htm.

[39] See For Odebrecht*, Agreement With CGU And AGU Strengthens Legal Certainty For Business Recovery*, at www.publicnow.com/view/F40A482B9E92DDB02E824064A66E9A0BF629A99C

[40] See Singapore Adopts ISO Standard on Anti-Bribery Management Systems, at www.cpib.gov.sg/press-room/press-releases/launch-singapore-standard-anti bribery-management-systems.

[41] See Atea Denmark reaches settlement with public prosecutor, at news.cision.com/atea-asa/r/atea-denmark-reaches-settlement-with-public-prosecutor,c2574577.

[42] L. Carrozzi, *Piani di prevenzione della corruzione. L'approccio dei sistemi di gestione e i fattori critici di successo*, in Gnosis 161 (2016).

aforementioned case law analysis, according to which "the effectiveness of an organisational model depends (...) on its suitability in practice with regard to creating decision and control mechanisms that can significantly eliminate or reduce the risk of liability and obviously effectiveness and must be linked to the efficiency of instruments suitable not only for penalising unlawful acts, but also for identifying the areas of risk in the company's activity"; this must be "specifically suitable for preventing the commission of offences in the context of the entity for which it was prepared; the model must be, therefore, specific, effective and dynamic, that is, such that it can adapt to changes to the entity concerned"[43]. In addition, the existence of this model is not enough. It is necessary that the entity "has implemented it effectively, by applying it in practice, through ongoing verification of the suitability of its functioning, through progressive updating, so as to ensure a constant adjustment to operational and/or organisational changes that have occurred"[44].

In practice, the two models tend to function according to methods that are in some ways similar. One should consider that even in relation to the anti-corruption sector *stricto sensu*, ANAC tends to apply a mode of conduct that is based on the beneficial process of collaborative supervision codified for the public tender sector[45], as a consequence of the desire (and the effort) to support the public sector in adopting virtuous conduct, instead of imposing sanctions. Conversely, long time ago, the judiciary launched a process that tends to establish methods of collaboration (during preliminary investigations) with the entity, invited to open internal defensive investigations to support and coordinate with the public prosecutors offices, in order to avoid the initiation of criminal proceedings, which often entail the application of cautionary measures, both pecuniary and interdictory[46], in a certain sense borrowing the (collaborative)

[43] Preliminary Investigations Judge District Court of Milan, Order of 20 September 2004, cit.

[44] Preliminary Investigations Judge District Court of Naples, Order of 26 June 2007, cit.

[45] Article 213, par. 3, letter h), Public Tenders Code; Article 4, par. 2, letter a), of the supervisory regulation of 15 February 2017.

[46] F. Palazzo, *Obblighi prevenzionistici, imputazione colposa e discrezionalità giudiziale*, in 12 Diritto pen. proc. 1545 (2016).

experience gained in other legal systems, where criminal prosecution is not even compulsory[47].

7. The process of cross-fertilization for preventing corruption in different contexts

Following the presentation of models for the prevention of corruption that exist in our legislation, the second theme that should be analysed concerns the process of inter-models fertilization that we are experiencing. This is a process defined by the fact that the underlying needs of the public and private sectors are identical in terms of the aspects relevant to our discussion, in the sense that they both require the establishment of effective responses to the risk of corruption.

This inter-models fertilization is very interesting, complex and characterised by a transnational influence. It takes place, primarily, through processes that are entirely domestic to the Italian legal system. It is certainly not original to observe, for example, that the anti-corruption measures established under the "Severino Law" are inspired by the compliance programmes system set under Legislative Decree n. 231/2001[48]. This process of,

[47] In France it was governed by the hypothesis of "*convention judiciaire d'intérêt public*»: Article 22 Law n. 2016-1691 of 9 December 2016 (*Loi Sapin II*), inserted into the new Article 41-1-2 of the French Code of Criminal Procedure; in the USA the model applied is the *Deferred Prosecution Agreement* ("DPA") introduced in 1999 by the United States Department of Justice (DOJ) with *DOJ Guidance for Proceeding Against a Corporation "Federal Prosecution of Corporations"* (*Holder Memo*).

[48] The inspirational function of the "231 model" in relation to the strategy of preventing corruption in the public sector originates from the work of the so-called "Garofoli Commission": "(…) the Commission waited for different proposals to be drafted on promoting mechanisms for preventing corruption. First of all, the development, within public entities, of methods for identifying and measuring corruption, as well as the establishment of a suitable management structure, based on risk management models, along the lines of the organisation and control models used in private companies and entities as established under Legislative Decree n. 231 of 8 June 2001": R. Garofoli (ed.), *Rapporto della Commissione per lo studio e l'elaborazione di proposte in tema di trasparenza e prevenzione della corruzione nella pubblica amministrazione, La corruzione in Italia. Per una politica di prevenzione. Analisi del fenomeno, profili internazionali e proposte di riforma*, 1 October 2012, par. 8.1, 35. The contamination between the two models, however, encounters certain limits, which arise from the intimate nature of each of these - as highlighted by the guidelines adopted

shall we say, "horizontal fertilization" within our legal system is evident even by observing how the strategy based on the programme initially became established in the banking and finance sector[49], later spreading to other fields of private economic activity and was finally generalised by the aforementioned legislative decree.

The process of fertilization among models could be useful in terms of the methodological enrichment that comes from UNI ISO[50]. However, a new element was introduced by model 37001 (the element that the pertinent literature considers the most important) in relation to which there is much to discuss. This is the fact that the UNI ISO model explicitly states the possibility of certifying how real and effective the anti-corruption organisational model is, for all types of organisation (small, medium, large, public and private). This development is not new: it was already suggested in the practices adopted during the period when the "231 models" were launched; the development was then re-proposed in the draft bill prepared by the Research

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by the National Anti-Corruption Authority with Decision no.8/2015 (*Guidelines for the implementation of the law on transparency and the prevention of corruption by private sector companies and entities owned or partially held by public sector bodies and for-profit public entities*, 11) - mainly attributable to two facts: the public model must address only corruption offences against the State (that is, only passive corruption); the notion of corruption assumed by this is much broader, since it considers not only criminally significant actions, but also those that consist of so-called "maladministration" (in relation which, please refer to N. Parisi, *L'attività di contrasto alla corruzione sul piano della prevenzione. With regard to public tenders and more ...,* in R. Borsari (ed.), *La corruzione a due anni dalla "Riforma Severino"* (2016), 91 ss.

[49] See, *mutatis mutandis*, the forty recommendations established by the Financial Action Task Force (FATF-GAFI) devised to combat money laundering and terrorist financing (www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html).

[50] It is very evident how much this model deviates from the public sector model and the "231 model". UNI ISO 37001 is a pervasive, very rigid and static instrument: it has to be fully adopted, with all its processes being applied to each entity that wants to use it; it "photographs" the condition of the entity at a particular moment in time and is not designed to adapt itself, through the fundamental support of the controls, to the dynamism of the flow of social life. Furthermore, a methodological function is performed by UNI ISO 31000/2010 in relation to the first PNA (2013), of which Appendix 6 contains the principles for the management of risk based on said model.

and Legislation Agency (*Agenzia di Ricerche e Legislazione* - AREL)[51].

No doubt, the process of certifying the effectiveness of a model has its own intrinsic benefits: indeed, it enables not only the standardisation of models, but also facilitates the use of a common language at the international level. From this perspective, certification could produce a positive effect on the entire strategy system for preventing corruption in the context of international trade. This characteristic also accounts for another factor: the UNI ISO model is suitable for business-to-business relationships (not by chance does it include business practices), but is much less suitable for dialogue between for-profit entities and public authorities (regardless of their nature: administrative or judicial).

However, looking first of all at the experience of the "231 models", one cannot but have some serious doubts about the role of certification in exonerating the entity of its liability for the commission of acts of corruption. The *Impregilo case* provides a good example in this respect: the District Court of Milan[52] first, and the Court of Appeal in the same city [53] later, have ruled that the organisational model implemented by the entity was adequate in relation to actions committed by those in top management positions who had fraudulently evaded the model itself. These decisions, however, were subsequently quashed by the Italian Supreme Court (Corte di Cassazione)[54]: in short, the Court did not feel bound by any certification (in the event arising from the model having adopted both the scanty provisions of Articles 6 and 7 of Legislative Decree n. 231/2001 and the Guidelines adopted by Confindustria) and ruled with full autonomy, having assessed the efficiency and effectiveness of the compliance model. Furthermore, ANAC will not feel constrained either by an ISO certification of effectiveness, whether in relation to a public body or a private for-profit entity, just because the strategy fulfils the criteria of model 37001 and, as a result, it received certification.

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[51] See in www.arel.it. On this subject see *La certificazione del Modello organizzativo ex Decreto Legislativo 231/2001,* in www.filodiritto.com.

[52] Judgment of 20 September 2004, in II Foro it. 528 (2005).

[53] Judgment of 21 March 2012, n. 1824, in www.penalecontemporaneo.it.

[54] VI Section, judgment of 18 December 2013, n. 4677, in Dir. pen. proc. 1429 (2014).

Secondly, and from the conceptual perspective, part of the literature points, rightly so, to "the impossibility and (...) inadequacy of the certification mechanisms in terms of managing blame within an organisation": this would have an influence, in fact, in a context that is "structurally not (...) subject to certification and instead (...) is totally incompatible with assessments of that type"[55].

Certainly, both the "231 model" and the UNI ISO 37001 standard share a common advantage (of the public sector model also): they enable the organisation to recognise and discover internal problems. Ultimately, they enable a sort of check up to be performed, which can photograph the structure and organisation of the entity's activities: what represents a beneficial outcome, even if not strictly essential, but only preparatory, for the measures needed to prevent corruption.

In conclusion, apart from the educational value that a different study of the compliance models could provide, nothing seems to have changed with regard to the framework used by the court as an assessment parameter, for the private sector, and by the authority in charge of preventing corruption, for the public sector.

We can now mention which are the incentives to cross-fertilization, both externally and internally, and horizontally or vertically. First of, the examination should distinguish between fertilization of models and fertilization of actors, public and private. While some incentives may have effects on both levels, others are more specific for either one. On the cross-fertilization of models, the interaction is between legal actors, operating on the normative space, both nationally or internationally. Therefore, any element that improves the size, quality and reliability of both normative environment and its operators has an effect on cross-fertilization of models. Making reference to the analysis above, drivers of this communication are, at international level: a) the globalization of legal norms (i.e. the dissemination, understanding and voluntary or binding compliance of international recommendations); b) the permeability and inclusiveness of

[55] On this, R. Sabia, I. Salvemme, *Costi e funzioni dei modelli di organizzazione,* cit., 462, reporting the judgment of C. Piergallini, *Paradigmatica dell'autocontrollo penale, Parte II*, in Cass. pen. 842 (2013), specifically par. 9.

international principles (i.e. the ability of international norms to recognize, elevate and enshrine national practices) and c) the appeal of national standards (in other words, the power of domestic norms to move internationally and influence foreign or international rules). At national level, the interaction between public and private sector will surely improve the cross-fertilization between models stemming from these two spaces. Therefore, at this level, drivers of fertilization will be: 1) the binding power of public model; 2) the measure (size, quality and dissemination) of compliance of the private sector vis-à-vis the public model and 3) the inclusiveness of the public model (i.e. the capacity to recognize good practices from the private sector and include them into the public model). In other words, the degree of proper absorption in the private sector: i.e. how much private actors are able to recognize and factor in good practices, and implement them a proper and effective fashion.

Additionally, we can also refer to the political will or ability to regulate the private sector. Provided that the italian market is under a situation of liberalism, we know that the economic activity can be regulated in light of social justifications[56]. Equally important, the Italian Constitution also prescribes the State to "*remove the economic and social obstacles which, (…) prevent the full development of the human person and the effective participation of all workers in political, economic organization, and social life of the Country*" [57]. In light of this combination of conditions and obligations, it would not be surprising, let alone illegitimate, for a legislator or executive authority to go so far as to address this concern by regulating competition of economic actors in a way to suggest, facilitate or initiate putting in place requirements for the prevention of corruption. In other words if, on one hand, the free and competitive market is a constitutional right, as a fundamental element of the person's dignity, and that the market shall be used

[56] Article 41 of the Italian Constitution reads (emphasis added) "Private economic initiative is free. It cannot be carried out in contrast with *social utility* or in such a way as to damage safety, freedom and *human dignity*. The law determines the appropriate programs and controls for public and private economic activity to be directed and coordinated for social purposes" (see at https://www.senato.it/1025?sezione=122&articolo_numero_articolo=41).

[57] See Article 3 of the Constitution of the Republic of Italy, at www.senato.it/1025?sezione=118&articolo_numero_articolo=3.

for social utility and, on the other hand, corruption is an unfair distortion of the competition, which affects the weakest members of society, then the State may engage in strong, well-distributed, inclusive but also binding requirements for the promotion of business integrity models. This would represent an undisputable accelerator of cross-fertilization, from the public towards the private models.

Concerning the reasons for such cross-fertilization, we understand that they are closely linked to self-survival. Basically, distorted competition represent an alteration of the market, which bring uncertainty of risks, rules and therefore higher costs. By nature, economic actors must foresee the consequences of their investment. They cannot survive long-term uncertainty. They can mitigate the risk in two ways: a) by "conquering" the market, meaning develop dominating size entities or coalitions or b) create a level-play field, by engaging and promoting corruption-adverse rules and models. If, like the example in this paper, actors engage in establishing and complying with integrity models, they have a strong interest in having all other competitors follow the same rules. They can exercise this pressure in different ways and directions. They may, for example, advocate policy makers in order to pass legislation and implement instruments for market integrity. Furthermore, they can develop peer pressure aimed at, like the example above, promote, support and reward integrity-strong partners and, on the other hand, demote, marginalise and discriminate integrity-weak actors. In conclusion, the reason for cross-fertilization is, at its heart, not really altruistic, rather the contrary is true. Economic actors will have a strong desire to push in different ways as to create an integral market in order to gain certainty, mitigate the risk and, ultimately, reduce the cost of doing business. In other words, the pursue of selfish individual interests, will have the unexpected but necessary virtuous effect to establish a clean economic space.

7.1. Intersections between the private and public sector models: private companies controlled by public bodies

A very interesting fertilization occurs by virtue of the transplantation aimed by the Legislative Decree n. 97/2016: due to the fact that the controlled private company can be a fertile environment for both active and passive bribery, the private entity

must get - in addition to the "model 231" - other tools for the detection and management of risk falling under the second type of (passive) corruption. On the other hand, if the entity has no "model 231", then it is obliged to adopt a "single model" (in Italian "*modello unificato*") that contains all the measures necessary to deal with the risk. The two briefly described models (public and private) have a point of contact in the construction of an anti-corruption strategy within private companies in which public entities hold a share. In accordance with the mandate contained in the "Madia law", Legislative Decree n. 175/2016 was passed and contains the Consolidated Act on reorganisation of State owned enterprises (SOEs). This codification is, however, unusually silent on the subject of anti-corruption and transparency: so much that we need to find the regulation relevant to our discussion in another piece of legislation with identical origins (Legislative Decree n. 97/2016), intended to regulate, in general terms, the subject of fighting corruption through prevention in public bodies (using administrative transparency measures also), which was already covered under the "Severino Law" and Legislative Decree n. 33/2013[58].

The solution identified in establishing rules on transparency and the prevention of corruption, even for so-called public companies, is built on the basis of the limited instructions that emerge in part from Law n. 190/2012[59], as enhanced by the 2016 NAP[60] as well as the current Guidelines adopted by ANAC[61], and

[58] On this subject, see R. Cantone, *Prevenzione della corruzione nel sistema delle società pubbliche: dalle linee guida dell'ANAC alle norme del D. Lgs. n. 175/2016*, in F. Auletta (ed.), *I controlli nelle società pubbliche* (2017), 17; A. Massera, *Gli statuti delle società a partecipazione pubblica e l'applicazione delle regole amministrative per la trasparenza e l'integrità*, cit., 45; M. C. Lenoci, D. Galli, D. Gentile (eds.), *Le società partecipate dopo il correttivo 2017* (2017); M. Lacchini, C.A. Mauro (eds.), *La gestione delle società partecipate pubbliche alla luce del nuovo Testo Unico. Verso un nuovo paradigma pubblico-privato* (2017); S. Fortunato, F. Vessia (eds.), *Le "nuove" società partecipate e in house providing*, in 408 Quaderni di giurisprudenza commerciale (2017); V. Sarcone, *L'applicazione delle misure di prevenzione della corruzione e sulla tutela della trasparenza (L. N. 190/2012 e decreti attuativi) alle società pubbliche*, in F. Cerioni (ed.), *Le società pubbliche nel Testo Unico* (2017), 220 ss.

[59] Originally the rule was stated in Article 1.2 of Law n. 190/2012; this was amended by Legislative Decree n. 97/2016, which added (thanks to the provision contained in Article 41) a new Article 1.2*bis*.

[60] PNA, 13 ss.

outlined by Legislative Decree n.97/2016, which was confirmed by the Council of State[62]. This requires that in relation to private companies owned by public bodies, the "231 model" (which is not compulsory for private entities),[63], must be supplemented by a programme of anti-corruption measures[64] (failing to do so would result on penalty of its pointless bureaucratisation). Specifically, in relation to the prevention measures intended to implement administrative transparency, the regulation established for public entities[65] is also applied to publicly owned private entities "as regards both its organisation and the range of activities performed"[66]. The solution collectively chosen by the Legislature originates from the desire to achieve a substantial assimilation (limited to these aspects) between the owned private entity and the public entity[67].

When a private entity is only partially owned or shared, then only the rules on transparency are applied (and not all the others on preventing corruption), establishing, moreover, that this regulation is to be used "only in relation to activities carried out in the public interest"[68]. This is a broad interpretation of the legislative structure that emerges from Article 22 of Legislative Decree n. 175/2016 and Legislative Decree n. 97/2016 (endorsed by the Council of State[69]) according to which any private entity that performs (even non-exclusively) public functions must be

[61] Decision n. 8/2015, cit.

[62] Opinion n. 1257 of 29 May 2017.

[63] In the sense claimed here, see Supreme Court, Section VI, judgment of 23 June 2006, n. 32627. *Contra*, even though authoritative, Council of State, opinion last citation, par. 9.1.

[64] This interpretation of the rules established by ANAC with the Guidelines passed with decision n. 1134/2017 on 8 November 2017, par. 1.3, *adopted for the implementation of legislation on transparency and the prevention of corruption in private companies and entities that are owned or partially owned by public administrations or for-profit public bodies*.

[65] See the new Article 2*bis* of Legislative Decree n. 33/2013 (introduced by Legislative Decree n. 97/2016).

[66] This is the confirmation of the legislation in force implemented in the Guidelines of ANAC cit. in note 50, par. 1.2.

[67] The legislative solution, furthermore, confirms what was already established in ANAC's Guidelines adopted with Decision n. 8 of 17 June 2015, fully replaced by the new Guidelines cit. in note 50.

[68] Op. cit.

[69] Opinion n. 1257 of 29 May 2017.

transparent with regard to these provisions. The structure has important consequences in terms of public access, which can, therefore, be exercised even with regard to partially owned private companies[70].

Listed companies are situated outside this sphere. Legislative Decree n. 97/2016 does not cover these, since it was not considered appropriate to extend to them the regulation established for non-listed companies due to the different interests involved, and refers to a subsequent legislative provision devised in consultation with the Ministry of Economics and Finance and CONSOB (the Italian National Commission for Corporations and Stock Market).

The recent Law n.179/2017 introduces provisions for the protection of those who report offences or irregularities, which they have become aware of in the context of a private or public sector job. It adds a useful element with regard to companies in which public entities hold a share. Its provisions, with regard to what is set out under Article 1, are fully applicable to subsidiaries due to their connection with the anti-corruption regime applicable to the public sector; and, with regard to what is set out under Article 2, to subsidiaries, with a regime that is certainly weaker because it is governed by only the "231 model", which the company itself has adopted.

This implantation has twofold consequences: on one hand, one enters an additional dimension of effectiveness and efficiency, which is typical of a public action, into the logic of the model 231, which in its original creation pertained to a mere prevention of crimes. Basically, it also includes a dimension that has to do with the so called "administrative corruption" and that perhaps it is only - but surely no little - the most careful and close evaluation of situations of conflict of interest. On the other hand, there is an extension of the supervisory powers of the National Anti-Corruption Authority in the private body, certainly limited to the scope of "supplementary measures".

7.2. The vertical cross-fertilization among models

This process of cross-fertilization operates vertically as well. It was already emphasised how anti-corruption strategies have

[70] Guidelines cit. in note 50, par. 3.3.3 and 3.3.4, 38-39.

been, in many ways and particularly for the Italian legal system, prepared on the basis of ideas originating in the international context, which has managed to influence the national legal system, guiding it towards certain basic principles of the anti-corruption model[71]. Furthermore, the process of "vertical cross-fertilization" operates in the opposite direction too: it is in fact true that the virtuous practices of some States are likely to continuously flow, back and forth, from the national stage into the international fora, through the many periodic working groups attended by representatives and entities from both the public and private sectors. Significant in this respect is what emerges from the work of the so-called "SPIO Working Party" (*Senior Public Integrity Officials Network*), established by the OECD within the *Directorate for Public Governance*, which is able to attract and circulate the best practices on integrity models of national public administrations among the thirty-six member States (plus the partners) of the organisation. Up to now, this body has produced two separate generations of recommendations, which inform national administrations to adopt virtuous models of conduct [72]. Furthermore, the Italian context has also contributed to enrich this circulation of good conducts: the definition of effective forms of institutional cooperation and procedures for the supervision of public tenders implemented by ANAC in coordination with the OECD[73], to mark EXPO 2015, was recognised by the OECD as a best practice of the Organisation[74]. Therefore, it was exported to other national contexts engaged in large construction projects, such as the new airport in Mexico city. Additionally, the

[71] Please refer *supra* to notes 2, 4, 6 and 7, in relation to the influence of the Italian experience of this issue on the international scene.

[72] On 26 January 2017 the OECD Council approved (after the complex and long consultation process that took place in the working group mentioned earlier with the public administrations of the member states) the new Recommendations C(2017)5 *on Public Integrity*, to promote the construction of a coherent, all-encompassing public system of integrity; these substitute the Recommendations of 1998 *on Improving Ethical Conduct in the Public Service.*

[73] Memoranda of Understanding of 6 October 2014 and 12 May 2016 (published on www.anticorruzione.it).

[74] See the *Reports* of the OECD of 18 December 2014 and 30 March 2015.

compliance programmes technique adopted by the OECD is based on the system applied in the USA[75].

The circulation of best practices at the international level tends, therefore, to develop a process of harmonisation and strengthening of national strategies, with significant fertilization being a result. Good national practices, once brought to the international cooperation level, do not remain unchanged, they influence each other, flowing back into the domestic context in a form improved and enriched by the many other experiences gathered in other national contexts. This process, with its circular manner of operation, is without doubt reciprocally enriching for all legal systems involved.

The UNI ISO 37001 model of 2016 (*Anti-bribery management systems*) certainly belongs to this type of "bidirectional fertilization" experience. It contains standards that have mainly been formulated at the national level. In fact, the model originates from the combination of two of the leading bodies for technical standards, the one established in the United Kingdom (pursuant to the UK Bribery Act of 2010, which implemented it[76]) and the other one in the United States (pursuant to the Foreign Corrupt Practices Act - FCPA - of 1977). Their contents have been elevated to the international level following a sophisticated debate and discussion at the International Standard Organisation (ISO)[77]; in the end, these standards re-entered our legal system, through the work of the Italian National Unification body (aka UNI).

7.3. Cross-fertilization among actors and offices

Regarding the cross-fertilization among private parties (typical for "model 231" and ISO 37001), the analyses concerns economic actors, i.e. those operating in the market. Therefore, any instrument that can improve the size, openness, speed, ease or

[75] On this subject, see C. De Maglie, *L'etica e il mercato: la responsabilità penale delle società* (2002), 102.

[76] This refers to BS 10500: see https://www.legislation.gov.uk/ukpga/2010/23/contents.

[77] See ISO 37001, *Anti Bribery Management Systems. Requirements with Guidance for Use*. Developed by a committee composed of representatives from the United Kingdom, the United States and other ISO member states, it was devised to help organisations reduce the risk of corruption and, through their widespread adoption, create a common baseline of minimum corruption levels that should be adopted by the organisations.

depth of commerce can have a side-effect and facilitate the movement of "integrity cross-fertilization". In this view, global and open markets are the natural space in which (good) economic actors can express their business potential. Global markets therefore reduce distance between very different actors (in terms of size, sector or type of governance) and increase the range and reach of cross-integration. Similarly, the ease of use of that market, in terms of harmonisation, understanding and certainty of rules, can unquestionably facilitate the circulation of positive integrity standards, as well as its recognition and penetration into other legal systems and organizations. In this group we should include both rules and customary codes, like common definitions, terms, principles of commercial contracts and other instruments of international private law[78] and initiatives.

Internally, meaning inside the organization, we understand that the size, impact and speed of fertilization will depend on the number, type of activities and interference level with other departments. Thus, endo-fertilization will depend on the number and openness of the exchanges among offices of one organization. It is additionally believed that, in a process of self-preservation, the compliant unit will terminate or drastically reduce contacts and interactions with risky (i.e. integrity-weak) offices. In other words, in a natural selection fashion, the weak cell will be targeted, marginalized and then definitively expelled by and from the body.

Externally, the procedure will be very similar to the one described above. We said that the organization may cast spilling effects outward, to the economic actors that consult for, cooperate with, and supply to the (ISO compliant) organization. The cross-fertilization here is proven by the fact that non-compliant consultants, partners, suppliers or service providers will see their business relationship terminated, unless they accept to comply with the new standard. Outwardly, the standard spreads effects on economic partners, clients and suppliers, pushing them to recognize, understand and embody the requirements into their own system. Lacking this compliance will result in de-risking, through the modification or termination of business with the

[78] For example, see UNIDROIT at www.unidroit.org/about-unidroit/overview or the International Chamber of Commerce https://iccwbo.org/.

compliant company. In other words, each organization that decides to be certified ISO 37001 automatically becomes a positive fertilizer that, like a healthy carrier of integrity, either transmits its positive anti-bribery values to each actor it interacts with, or it stops relations with non-compliant entities. Likewise, ISO 37001 certified organizations spread their expertise among their business partners, and those entities to their partners respectively, in a continuous, long-lasting and self-reinvigorating pandemic movement of good anti-corruption practices.

Additionally, concerning the direction of the fertilization, we must note that each organization is at the same time messenger and receiver. This means that while the organization spreads positive standards outward, the same company may also be demanded (by its business partners) to receive and internalize improved standards. It is interesting to note that this public communication, among meritorious partners, is surely by-directional, but it goes top-down only, with an improvement (not deteriorating) effect. In other words, horizontally the good (improved or higher) standard of integrity goes from one company to the other, and vice-versa. However, vertically the standard only goes from the top (the stronger, high compliant company) towards the bottom (the weaker, low or non-compliant company), and not the other way round. This is because, in a process of de-risking, an integrity compliant company will not seek new business (or will terminate ongoing one) with non-compliant companies. It is a one-way path. Understanding the sense of movement is very important in order to fully assess and appreciate the value of corruption prevention mechanism.

It is unquestionable that ISO 37001 has been conceived, from the its very beginning, in a way to seek for positive fertilization effects. ISO 37001 addresses bribery concerns both within the organization (either horizontally - among functions and departments - and vertically - among its employees) and outside the entity (to and from its business partners at large, including consultants, suppliers and clients). These two environments represent two channels the standard can forecast its effect through. Internally, the standard-compliant unit casts its improved integrity effects on other departments or branches of the same organization. The opportunities of fertilization are represented by the contacts with other departments. The size and

speed of fertilization, as well as its impact, will depend on the number, type of activities as well as interference level with other departments. In other words, the fertilization rate and depth are directly proportional to the number and openness of the exchanges (in terms of communications, collaborations or influence) among departments. This is because, in assessing its own risk, the complying department will evaluate the threats that other departments represent and it will accordingly mitigate this risk by: either demanding the weak department to improve its own level of integrity, therefore re-establishing a level play field or, by reducing the number, frequency or degree of interactions, thus decreasing the threat received by that fragile partner.

It is equally interesting to note that the movement of ISO 37001, and therefore its cross-fertilization effect, is greatly facilitated by its "regulatory independence" and completeness. In other words, like other new generation ISO standards, the 37001 has an improved quality in that it makes no reference to other regulations, it is self-sustained, with no relations to other norms. This lightness is a remarkable improvement and a boost for the open move of the standard, through a simple contract clause[79].

8. A few closing remarks on the effectiveness of these models: simple laws, effective procedural models and the ethical responsibility of public sector employees and economic operators

Academics, practitioners, economists and observers (national and otherwise) on the methods that underlie the strategy of fighting corruption through prevention increasingly claim that the procedures implemented in this respect represent an element that contributes towards (if not determines) the inefficiency of the public sector system and business activity due to the costs, delays and burdens that they involve. The common factor in their reasoning is their affirmation of the pointlessness, or rather the

[79] See in this sense S. Bonetto (President of technical committee on services, UNI) and A. Ruffini (President of arbitration council, UNI) at www.uni.com/index.php?option=com_content&view=article&id=5898:sistemi di-gestione-per-la-prevenzione-della-corruzione-le-novita-della-uni-iso-37001&catid=171:istituzionale&Itemid=2612.

unsuitability of the rules for changing the attitudes and the culture of a state and a nation.

On the contrary, the law (and therefore also the procedures that it implements) can be a powerful tool for establishing a different cultural approach towards corruption and the behaviours that support it and feed it from what we have now[80]. A cultural approach central to which is an awareness of the magnitude of the damages that a high, pervasive level of corruption such as that which has affected the "Italian system" for a long time entails[81].

The contradiction of an argument such as this is truly unique, when in other ways these same individuals consider themselves passionate supporters of the rule and primacy of law.

It is without doubt that the law and the associated procedures represent a victory and a defender for those who do not hold power (public power, since it is part of the government institutions, or private power, since it is economically strong). Bureaucracy in the modern sense of the word originated precisely for the purpose of achieving collective goals according to criteria of impartiality, neutrality of power and rationality: this forms an instrument for transmitting command that is contrary to the arbitrary exercise[82]. In principle, the existence of corruption in society cannot be attributed to the presence of laws and procedures: if anything, good rules lower the risk as instruments for affirming the principle of the supremacy of law over arbitrariness[83].

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[80] On the promotional function of the law, see, more authoritatively, N. Bobbio, *Dalla struttura alla funzione. Nuovi studi di teoria generale del diritto* (1977).

[81] On the damages that are summarised, for example, in the Preamble of the Merida Convention against the corruption, see, from among many, V. Mongillo, *La corruzione tra sfera interna e dimensione internazionale* (2012), 8 ss.; G.M. Racca, R. Cavallo Perin, *Corruption as a violation of fundamental rights: reputation risk as a deterrent against the lack of loyalty*, in G.M. Racca, C. R. Yukins (eds.), *Integrity and Efficiency in Sustainable Public Contracts* (2014), 23 ss.

[82] Of course reference must be made to the theorist of modern bureaucracy, M. Weber, *Economia e società*, in the edition edited by W.J. Mommsen, M. Meyer (2005); but also more recently, K.J. Meier, L.J. O'Toole, *Bureaucracy in a Democratic State: A Governance Perspective* (2006).

[83] On the principle of legality and the characteristics of the rule that permit it to be considered a "law", see the complex case law of the European Court of Human Rights with regard to the interpretation and application of Article 7 of

It is also said (with reference furthermore to historical legacies[84]) that the problem was caused by too many rules: of course, excessive legislation often leads to difficulties in terms of interpretation and application, contradictions; simplicity is a sign of good legislation. However, simplicity does not respond to objective and universal indicators, since each situation deserves a greater or lesser degree of legislation. In this context, here is an example taken from experience at the National Anti-Corruption Authority, which highlights how the quantitative reduction of rules does not necessarily lead to a better legislative structure. With regard to the performance of supervisory functions, the Authority had until recently only one regulation, that is, the one related to public contracts, which was extended to the other sectors covered by the Authority itself (conflicts of interest, anti-corruption, transparency). The authority decided to replace this single regulation with four separate regulations, one per areas of activity[85]. This decision was taken by the Authority's Board due to evidence that the certainty of the law and the protection of the individual prerogatives of people involved in supervisory proceedings are guaranteed better by a specific regulation for each area, different from the others.

Having considered the quantitative aspect, let us now consider the quality of the rules[86]. When a situation of widespread, pervasive illegality needs to be fought, the quality of the rule is measured by its effectiveness and, therefore, its capacity to combat that situation. To this end, there are few conditions that cannot be overlooked. Firstly, the incentivising capacity for anyone who has to apply the rules of conduct and its procedures; then the exercise of public power by a competent and ethical

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the European Convention on Human Rights, as reconstructed by D. Rinoldi, *L'ordine pubblico europeo* (2008), par. 41.

[84] The words of Tacito are notable - always used by those who claim the law is useless - "*Corruptissima re publica plurimae leges*" (Annales, III, 27): according to the intention of the author, this does not mean that many laws produce corruption, but instead that a corrupt state tends to multiply rules that produce corruption, since they are adopted *ad personam*.

[85] The regulations (adopted in February 2017) are available on the Authority's website (www.anticorruzione.it).

[86] With regard to rules, which themselves produce corruption, see F. Giavazzi, G. Barbieri, *Corruzione a norma di legge. La lobby delle grandi opere che affonda l'Italia* (2014).

administration; lastly, the presence of the same characteristics in the interlocutors for the public sector.

In conclusion, the question surrounding the interpretation and application of the rule: conceptual processes that must be informed by a criterion of substance. The law, in fact, is an instrument, not an end in itself: it is useful for achieving justice.

These are the conditions that cannot be improvised. From this perspective, perhaps it is easier to understand why it is argued that (good) procedures can contribute towards establishing a culture of individual responsibility, the precondition of an intact social and legal context, in which just a few rules are upheld by the best antidote to corruption: transparency. However, this condition (transparency in the public sector and in the management of private businesses) represents a victory that can be achieved at the end of a long journey supported and guided by rules that set out clear models of conduct and contain incentives for virtuosity[87], so as to accelerate the process of incorporating the models of integrity.

The fight against corruption is a process that cannot be completed instantly: it is a long and non-linear journey. Many of the instruments it uses could themselves be corrupt. We need, therefore, to initiate and launch a cultural process to change the social approach of individuals, starting with simple, crystal clear rules of conduct.

From this point of view, the question of providing the Country with a set of rules and procedures, which demands every entity an initial burden of work required by the risk based strategy is central. Nonetheless, these are the rules and procedures which, if followed, in a substantial, conscious and conscientious manner and not as a merely formal obligation, will lead in the long term to the creation of virtuous, highly cross-fertilizing, models of conduct. Furthermore, the awareness of the size of the damages caused by conduct that is now so pervasive should lead the healthy part of our country to react to corrupt practices with alternative models, which are capable of reversing the trend.

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[87] With regard to the need to equip the anti-corruption legislation with incentives, see F.M. Teichmann, *Eliminating Bribery. An Incentive-Based Approach,* in Compliance Elliance Journal 72 (2012); S. Rose-Ackerman, B.J. Palifka, *Corruption and Government. Causes, Consequences, and Reform* (2016); Aa.Vv., *Corruzione contro Costituzione*, in 1/2 Percorsi costituzionali 109 (2012).

RISE OF POPULISM AND THE FIVE STAR MOVEMENT MODEL: AN ITALIAN CASE STUDY

*Marco Bassini**

Abstract

The spread of fake news on the Internet, the educational divide, the adverse effects of the economic crisis and the emergence of international terrorism are often ranked among the factors that led to the rise of populism. However, quite rarely it is called into question whether (and how) the distrust of mainstream political parties had an impact on the rise of populism across the Western democracies. Adopting a constitutional law perspective requires looking at the rise of populism through the lenses of the crisis of democratic representation. The paper aims at exploring the Italian scenario, where the anti-establishment Five Star Movement has grown up as leading populist force fostering a direct political participation of voters through the use of the Internet that is supposed to bring, in the long run, to political disintermediation. In this respect, the goal of the paper is to explore from a constitutional law perspective the grounds on which the rise of this anti-establishment movement has relied and the constraints that the Constitution may place on the populist surge.

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1. Introduction

It is well known among scholars that working out a widely accepted definition of populism is very difficult and, in any way, problematic. This holds especially true in the field of legal research, where the concept of populism seems to be borrowed from the language of political science[1].

However, there are countless examples and forms of populism in the American and European political experiences[2].

For the purposes of this paper, I will particularly focus on those populist expressions that call into question the well-established, constitutional law category of representative democracy and accordingly, the role and responsibilities of traditional political parties[3]. There is, in fact, a natural tension between constitutionalism and the emergence of populist movements[4], which challenges the foundations of representative

[1] For instance J.W. Müller, *What is populism?* (2016), at 2-3, argues that for political actors to qualify as populist to be critical of elites is a necessary but not sufficient condition; also, populists are always antipluralist, as they claim to be the sole actors to represent the people; finally, they have a moral (and not merely empirical) claim of representation. However, from a legal standpoint, these features may be relevant to a limited extent only. See also M. Canovan, *Trust the People! Populism and the Two Faces of Democracy,* 47 Pol. Stud. 2-16 (1999).

[2] For an overview, see J.B. Judis, *The Populist Explosion* (2016). However, Judis points out that trying to define populism, as if it were a scientific term, is a mistake, as 'there is no set of features that exclusively defines movements, parties, and people that are called populist.' See among others D. Albertazzi, D. McDonnell (eds.), *Twenty-First Century Populism. The Spectre of Western European Democracy* (2008). See in particular L. Corso, *What does Populism have to do with Constitutional Law? Discussing Populist Constitutionalism and Its Assumptions,* 3 Riv. fil. dir. 443-470 (2014).

[3] See C. Pinelli, *The Populist Challenge to Constitutional Democracy,* 7 Eur. Const. L. Rev. 5-16 (2011).

[4] For an overview on the current debate regarding populist constitutionalism, and generally populism and public law see, among others, P. Blokker, *Populist Constitutionalism,* VerfBlog, 2017/5/04, at: http://verfassungsblog.de/populist-constitutionalism/; K.L. Scheppele, *Autocratic legalism,* 16 November 2017, at https://blogs.eui.eu/constitutionalism-politics-working-group/populist-constitutionalism-6-kim-lane-scheppele-autocratic-legalism/; J.W. Müller, *Populist Constitutionalism: A Contradiction in Terms?,* unpublished paper, at http://www.law.nyu.edu/sites/default/files/upload_documents/JWMueller%20-NYULaw-Populist%20Constitutionalism.pdf.

democracies. As noted by some authors[5], such an approach would dispute the very aim of constitutionalism, i.e. to protect individuals from abuses of power. But at the same time, populism can be the last resort when the functioning of representative democracy disregards people's will or even contradicts the interests of the people[6].

In this essay, I will focus, in particular, on movements and parties that stand out among anti-party or so-called anti-establishment parties. In this respect, the advent of new political actors has been fostered – according to a pretty rhetorical utterance – by a desire to disrupt long-standing dominant élites and let people's voices be heard[7]. I will argue that the spread of populist movements constitutes a reaction to the decline of traditional parties and the crisis of representative democracy. This paper will particularly explore the rise of the Five Star Movement[8] in Italy and will focus on the challenges that it poses from the perspective of constitutional law.

I will move from the constitutional background, exploring the status of political parties as well as anti-party and anti-establishment parties. Then, I will discuss the most relevant legal factors that led to the rise of the Five Star Movement and to its recent electoral successes[9]. I will then highlight some critical

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[5] See (in Italian) G. Grasso, *Le «Mouvement 5 etoiles» et les de´fis de la de´mocratie repre´sentative: a` la recherche d'une notion constitutionnelle de populisme?*, 1 Perc. Cost. 209-210 (2017).

[6] *Ibidem.*

[7] According to Y. Mény, Y. Surel, *The constitutive ambiguity of populism,* in Id. (eds), *Democracy and the populist challenges* (2002), the relevant 'calling people' may correspond to three different notions: when the calling people refers to the 'sovereign people,' the target of populists are the political parties, meant to be the traditional institutions of representative democracy; when it refers to the 'class people,' populist claims are directed toward certain parts of the population; eventually, if calling people refers to the 'nation people,' populist attacks affect those who do not fall within the relevant collective identity. See M.E. Lanzone, *The "Post-Modern" Populism in Italy: The Case of the Five Stars Movement,* in D. Woods, B. Wejnert (eds), *The Many Faces of Populism: Current Perspectives* (2014).

[8] In Italian, 'Movimento Cinque Stelle.'

[9] For a general introduction on the rise of the Five Star Movement, see I. Diamanti, *The Five-star Movement: A new political actor on the web, in the streets and on stage,* 6(1) Contemp. Italian Pol. J. 4-15 (2014); F. Tronconi (ed), *Beppe*

points of the Movement model and speculate on its compatibility with the Italian Constitution in the *pars destruens*. Finally, in the *pars construens*, I will explore which measures may be taken to respond to the populist surge by revitalizing representative democracy. I will conclude that given the tolerant attitude of the Italian Constitution vis-à-vis anti-establishment and anti-party parties, this phenomenon can be marginalized, but is unlikely to be defeated.

The reason why this paper focuses on the Five Star Movement instead of other populist movements that arose in Italy at different times (like the *Lega Nord*)[10] lies with the unprecedented constitutional challenges that this organization has brought about in the realm of political representation[11].

2. Political parties in the Italian Constitution

Before introducing the recent developments in Italy regarding the rise of populist movements, it is of utmost importance to explore the constitutional framework concerning political parties[12]. A full understanding of the most critical challenges posed by the rise of new anti-party and anti-

Grillo's Five Star Movement: Organisation, Communication and Ideology (2015); and (in Italian) P. Corbetta, E. Gualmini, *Il partito di Grillo* (2013) and M. Tarchi, *Italia populista. Dal qualunquismo a Beppe Grillo* (2015). See also T. Mueller, *Beppe's Inferno,* The New Yorker, 4 February 2008.

[10] In Italian, 'Lega Nord,' an anti-party party founded in 1991, at the sunset of the First Republic, advocating the secession of the North ('Padania') and inspired by the huge protest against traditional parties after the 'Tangentopoli' scandal. See, amongst others, M. Bull, M. Rhodes, *Crisis and Transition in Italian Politics* (1997).

[11] Marco Revelli, in a recent book (M. Revelli, *Populismo 2.0* (2017)), described three examples of populism that grew up in Italy: Silvio Berlusconi's 'video-populism,' Beppe Grillo's 'cyberpopulism' and Matteo Renzi's populism 'from the top.' For an overview of the current and emerging challenges for the concept of political representation see (in Italian) S. Staiano, *La rappresentanza,* 3 Riv. AIC (2017) and N. Zanon, F. Biondi (eds), *Percorsi e vicende attuali della rappresentanza e della responsabilità politica* (2001).

[12] See generally, among others (in Italian), in this regard, P. Ridola, *Partiti politic*i, Enc. dir., XXXII, 66-126; A. Predieri, *I partiti politici*, in P. Calamandrei, A. Levi (eds), *Commentario sistematico alla Costituzione italiana,* vol. I (1950); G. Ferri, *Studi sui partiti politici* (1950).

establishment parties, in fact, requires taking into account the relevant constitutional paradigm and the way political parties affect the Italian form of government[13].

Article 49 of the Italian Constitution reads as follows: '*Any citizen has the right to freely establish parties to contribute to determining national policies through democratic processes.*'

While granting citizens the right to assembly for political purposes, this provision does actually refer to a particular dimension of the freedom of association, which is protected, in general and broader terms, by Article 18, irrespective of the underlying purposes.

The Italian Constitution does not treat political parties as institutions or – better said – as parts of the frame of government. Rather, they are considered as bodies through which the several interests of political nature are represented[14], As noted by prominent scholars[15], the option to frame the constitutional coverage for political parties in terms of freedom of political assembly was very ambiguous and discussed at the origins. Article 49, in facts, compromised two different dimensions: on one hand, this provision is included in the section concerning political rights (Title IV) and not in the part of the Constitution regarding the organization of the Republic; on the other hand, however, this provision emphasizes the role of political parties as institutional intermediaries between the State and society.

In the light of this inherent connection with the freedom of association[16], political parties are immune from the State's

[13] In this respect see (in Italian), S. Staiano (ed), *Nella rete dei partiti. Trasformazione politica, forma di governo, network analysis* (2014); Id., *Trasformazioni dei partiti e forma di governo,* Federalismi.it, 7 October 2015; F. Giuffrè, *Crisi dei partiti, trasformazione della politica ed evoluzione della forma di governo,* Federalismi.it, 30 November 2016; S. Prisco, *Elogio della mediazione. Statuti dei gruppi parlamentari e libertà di mandato politico nelle democrazie rappresentative. Brevi annotazioni,* Federalismi.it, 13 June 2018.

[14] See Italian Constitutional Court, order no. 79/2006.

[15] See P. Ridola, *Partiti politic*i, cit. at 12, 72.

[16] Despite this framing, the provision does not contain any specific reference to the democratic nature of parties. As noted by Ridola, some members to the Constituent Assembly made a proposal (the so called amendment 'Mortati-Ruggiero') to require that political parties could ensure the democratic organization of the State. This amendment, that was later withdrawn, had been supported for various reasons: the need to guarantee, by the participation of

ideological influence. Freedom to assembly for political purposes is thus subject to the same limitations imposed by the Constitution to the freedom of assembly as such. Accordingly, even anti-party and anti-establishment movements enjoy full constitutional protection[17]. This is witnessed by the fact that even members of monarchist parties (pursuing the restoration of the Monarchy, in spite of Article 139 of the Constitution)[18] sat in the Parliament in the aftermath of establishing the Republic. The Twelfth Transitional and Final Provision places a specific limit on political parties, by prohibiting reorganization '*under any form whatsoever,* [of] *the dissolved Fascist party.*' The existence of this restriction does not *per se* deprive the Italian Constitution of its tolerant nature nor includes the Italian constitutional order within the scope of

different political views in the public opinion in the political arena, the correct functioning of the representative bodies; the safeguarding of the individual freedom to assembly vis-à-vis political parties to protect those who voluntarily waived this right. See P. Ridola, *Partiti politic*i, cit. at 12, 73.
Also, some scholars, following the entry into force of the Constitution, directed some criticism towards the option of regulating political parties. They argued, as noted by P. Ridola, *Partiti politic*i, cit. at 12, 78, that the democratic nature of political parties was better protected by the absence of legislation implementing Article 49 of the Constitution. Only a decade later, however, the degree of influence of political parties on the actual functioning of the form of government became material, and the polemic against the way parties were *de facto* replacing constitutional bodies and depriving voters of any real impact and choice ('particracy') emerged. See also (in Italian) G. Maranini, *Governo parlamentare e partitocrazia,* in Id. (ed), *Miti e realtà della democrazia* (1958).

[17] For a specific focus on the attitude of the Italian Constitution toward anti-establishment parties, see (in Italian) I. Nicotra, *Democrazia "convenzionale" e partiti antisistema* (2008). Generally, on political parties in the Italian Constitution see (in Italian) S. Gambino, *Partiti politici e forma di governo* (1977); V. Crisafulli, *Partiti, parlamento, governo,* in P.L. Zampetti (ed), *La funzionalità dei partiti nello stato democratico* 93-119 (1967); C. Esposito, *I partiti nella Costituzione italiana,* in Id., *La Costituzione italiana* 215-243 (1954); and, *passim*, T. Martines, *Contributo ad una teoria giuridica delle forze politiche* (1957). Among the most recent works, see E. Gianfrancesco, *I partiti politici e l'art. 49 della Costituzione,* Forum di Quaderni Costituzionali, 30 October 2017; P. Marsocci, *Sulla funzione costituzionale dei partiti e delle altre formazioni politiche* (2012).

[18] Article 139 of the Constitution reads as follows: '*The Republican form of government shall not be a matter for constitutional amendment.*' This is the only explicit limit to constitutional amendment. However, this clause has been interpreted extensively by constitutional scholars as referring to all the distinguishing features of the Italian Republican form.

'protected democracies'[19]. The Italian Constitutional Court, in fact, held that the pursuit of radical changes of the constitutional order is compatible with the Constitution as long as it is realized through a democratic process and without using violence[20]. The prohibition entrenched in the Twelfth Transitional and Final Provision, thus, is far from constituting an 'abuse clause' to exclude anti-establishment forces from the enjoyment of the right to political assembly. Rather, this provision clarifies the essence of the founding covenant of the Republic, i.e. rejection of the Fascist regime, which would be *a priori* incompatible with the Constitution. This is the only exception to the pluralistic principle regarding political parties, in addition to the limits generally placed by Article 18 on the freedom of association[21]. As pointed out by Paolo Ridola, Article 49 of the Constitution is then derogated from the Twelfth Transitional and Final Provision, and the origins of this compromise dates back to the founding covenant of the Constitution in 1947. On one hand, the goal of the latter provision was to avoid that the new constitutional order

[19] Other constitutions, such as the German Basic Law and the Spanish Constitution, provide more specific limits and fall within the category of 'protected democracies.' Article 21 of the German Basic law establishes that the internal organization of political parties must conform to democratic principles and stipulates that parties that, by reason of their aims or the behavior of their adherents, seek to undermine or to abolish the free democratic basis order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Tribunal is competent to rule on the relevant questions of unconstitutionality. Moreover, Article 6 of the Spanish Constitution provides that the creation and exercise of the activities of political parties are free, in so far as they respect the Constitution and the law. Additionally, their internal structure and functioning must be democratic. See (in Italian) S. Bonfiglio, *I partiti e la democrazia. Per una rilettura dell'art. 49 della Costituzione* (2013).

[20] See Italian Constitutional Court, order no. 114/1967.

[21] As noted by P. Ridola, *Partiti politic*i, cit. at 12, 113, the significance of this provision has been widely debated. On one hand, commentators saw in this restriction a necessary consequence of the democratic principle based on the natural coexistence of majority and minority groups, binding on any party proclaiming itself as totalitarian and aiming at establishing a totalitarian regime; on the other hand, commentators noted that the purpose of this clause, on the basis of the debates carried out in the Constituent Assembly, was to specifically ban the Fascist Party as such, and not any movement or party resembling the latter or reflecting the Fascist ideology.

could be indifferent to the variety of possible political actors: this way, the Twelfth Transitional and Final Provision encapsulates a specific evaluation made *a priori* by the Constituent Fathers to reject, by discriminating it in the political arena, the Fascist Party. On the other hand, the Twelfth Transitional and Final Provision aims at avoiding the re-establishment of the Fascist Party based on the overall consideration of its ideology rather than because of the threat that it represents for the democratic attitude of the State.

Against this background, another crucial provision, namely Article 67 of the Italian Constitution, prohibits subjecting Members of the Parliament (hereafter, MPs) to a binding mandate[22]. Even though the Constitution does not draw any qualified connection between political parties and MPs, it goes without saying that the constitutional framework relating to political parties is intertwined with this cornerstone of representative democracy.

By requiring the MPs to be free from any binding mandate, the Constitution has taken the option to protect their freedom of action vis-à-vis both their voters and the relevant political parties, with a view to sheltering them from the liability caused by any decision diverging from the original political address. In the words of the Italian Constitutional Court, every MP is free to vote in accordance with their political view and the party's address to which he/she belongs and also, not to adhere to the same[23]. This way, the Constitution shields the MPs from any legislative or

[22] More in detail on this see (in Italian) N. Zanon, *Il libero mandato parlamentare,* 288-289 (1992). See also F. Azzariti, *Cittadini, partiti e gruppi parlamentari: esiste ancora il divieto di mandato imperativo?,* 3 *Costituzionalismo.it* (2018) E. Rinaldi, *Divieto di mandato imperativo e disciplina dei gruppi parlamentari,* 2 *Costituzionalismo.it* 133-186 (2017).

[23] See Italian Constitutional Court, judgment no. 14/1964. As pointed out by Zanon (N. Zanon, *Il libero mandato parlamentare,* cit. at 22), this judgment took the view that, despite the apparent contradiction between the principle underlying Articles 49 and 67, the latter placed a limit preventing too much extreme implications of the democratic principle enshrined to the former, such as recall or loss of the seat as a consequence of exclusion or resignation from a party. In the view of Zanon, this understanding of Article 67 seconded by the judgment at hand was a restrictive one, as the Italian Constitutional Court focused only on the 'negative' and 'residual' significance of this provision, i.e., that of depriving any agreement or instruction given from parties and voters of effectiveness and binding value.

statutory provisions that may impose legal consequence as a result of 'disobedience' to their respective parties and constituents. This prohibition, therefore, assumes that the functioning of the parliamentary mandate does not aim at representing sectorial interests, rather at compromising the various societal interests mirrored by political parties. Against this background, measures like the *recall* or dismissal of MPs would be contrary to Article 67. However, as noted by Justice Zanon, the relevant scholarly debate includes a variety of views on the theoretical and practical effects of this ban. First of all, the ban may merely exclude that a mandate, whether given from the voters or from a party, has any relevance and effect. According to this construction, agreements and instructions for MPs are still be possible but deprived of any legal guarantee: thus, they are not be enforceable and MPs can depart from the instructions received. From a different perspective, the ban enshrined to Article 67 may constitute an actual prohibition, forbidding in any case agreements and instructions aimed at conditioning MPs. However, the critical point of this option lies with determining the consequences of a possible mandate: instructions and agreements could be considered 'void' (and not merely unenforceable) but from a practical standpoint this would make only a little difference compared to the aforesaid alternative interpretation[24].

Regardless of the specific understanding and the consequences of the ban in question, the ultimate goal thereof is to avoid a degradation of political representation where instead of a

[24] As Zanon observed (N. Zanon, *Il libero mandato parlamentare,* cit. at 22, 291), these alternative options for interpreting Article 67 rely on different views on the concept of political representation and the legal status of MPs. The latter interpretation highlights the importance of the prohibition and the well-established understanding of political representation as free from any influence: the idea itself of a mandate between parties/voters and MPs is rejected. Behind this construction is the assumption that MPs are a state's body which is separate from any other actor: the ban on binding mandate would aim at preserving specifically this separation. The former interpretation, instead, moves from an opposite view: it assumes that MPs are no longer as separate 'body' of the state, as they act as institutional connection between social stances and the state.

competition among ideas and political programs a compromise between sectoral interests would take place[25].

As I will specify more in detail below, this cornerstone, common to many constitutions, is confronted by the rise of parties, such as the Five Star Movement, that call for a return to direct democracy.

The prohibition of binding mandate embodied in the Italian Constitution is then a pivotal factor to bear in mind while considering the transformations in the recent political scenario, notably the rise of the Five Star Movement[26]. The Italian Constitution adheres to a liberal view of representation, where although representatives are chosen by voters, they remain free to take any steps for the pursuit of general interest[27]. On the contrary, according to the democratic theory of representation (inspired by Rosseau), representatives act in accordance with a specific mandate received from voters to bring into the parliamentary assembly the specific interests of the latter. As I will discuss more in detail, this is exactly the view of the Five Star Movement and its constituency.

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[25] N. Zanon, *Il libero mandato parlamentare*, cit. at 22, 299.

[26] Article 67 has been interpreted not as a general and absolute prohibition for every member of the Parliament to receive any instructions, but as the freedom to act without being bound by the same, that can be either disregarded or taken into account. This construction of Article 67 of the Constitution is consistent with the concept of *responsiveness* developed by some US scholars. See H. Pitkin, *The Concept of Representation* (1967); see also L. Disch, *Democratic Representation and the Constituency Paradox,* 10(3) Persp. Pol. 599-616 (2012).

[27] See the famous *Speech to the electors of Bristol* by Edmund Burke given on 3 November 1774: 'Parliament is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not member of Bristol, but he is a member of *parliament*. If the local constituent should have an interest, or should form a hasty opinion, evidently opposite to the real good of the rest of the community, the member for that place ought to be as far, as any other, from any endeavor to give it effect.'

3. How the Five Star Movement entered the political arena

Probably, the most distinguishing and telling feature of the Five Star Movement is that it grew out of its founder's blog – the former comedian Mr. Beppe Grillo[28]. Started in 2005, the blog quickly became a virtual agora, where the posts, reflecting Grillo's political opinion and ideology, generated thousands of interactions. Given the massive success, a mixture of contemporary outbreak of financial crisis and some controversies concerning traditional political parties made Mr. Grillo's blog the backbone of an organized structure with political purposes. This way, the Five Star Movement came into being in 2009 as a political actor and took part in the local and regional elections in 2010, 2011 and 2012. Eventually, the Movement was able to elect a couple of majors; in the 2013 general elections, it became the most-voted party, one of the 'big three minorities' that came up[29]. In the 2016 municipal elections, Ms. Virginia Raggi from the Five Star Movement became Rome's new major. In the 2018 general elections the Five Star Movement was again the most-voted party, gaining 32% of the vote, while the right-wing coalition captured the largest share of the vote, i.e. 35%. Since no majority premium was provided under the election law, known as 'Rosatellum', neither the Five Star Movement nor the right-wing coalition obtained the absolute majority of seats, while the Democratic Party reached a historical low (18%). However, as very turning point of the elections, *Lega Nord* (or '*Lega*'), led by Matteo Salvini, became the first party in the right-wing coalition (17%), overtaking Berlusconi's Forward Italy (14%). This factor proved to be all but irrelevant in the aftermath of the election, since the League is used to convey a more radical-right message than Berlusconi's center-right one and is commonly recognized as a far-right party. It is not by coincidence that 88 days after the general election and the failure of the Senate and Lower House speakers (Casellati Alberti and Fico) to reach a compromise different political parties and coalitions in their 'exploratory mandate', the Five Star Movement

[28] See www.beppegrillo.it.

[29] See (in Italian) I. Diamanti, *Introduzione. 2013: il Paese delle minoranze in-comunicanti,* in I. Diamanti, F. Bordignon, L. Ceccarini (eds), *Un salto nel voto. Ritratto politico dell'Italia di oggi* (2013).

and League formed a new government headed by Giuseppe Conte (an independent supported by the Five Star Movement) where Matteo Salvini and Luigi Di Maio (the respective parties' leaders) serve as deputy prime ministers. The advent of the Conte Cabinet was possible because the two parties managed to reach an agreement on a government program[30]. They symbolically entered into a contract[31] and this way made the life of the Cabinet conditional upon the pursuit of the compromised program (including the most sensitive matters for the respective constituencies)[32]. Such outcome, as I will more in detail point out below, contradicts one of the main claims made against traditional political parties by the Five Star Movement, i.e. the establishment of cross-movement coalitions blurring the lines of boundaries and differences. However, such an outcome is not unprecedented, as the Letta, Renzi and Gentiloni Cabinets demonstrate.

Which factors permitted the Five Star Movement to become the most-voted party in 2013 and 2018 general election?

The use of Internet has allowed the Five Star Movement to obtain broad consensus (facilitating the spread of populist

[30] For a critical overview on the aftermath of the 2018 general election see G. Martinico, *I-CONnect Sumposium-The Aftermath of the Italian General Election of March 4, 2018–Populism Versus Constitutionalism 101: What Can We Learn from the Italian Scenario?, Int'l J. Const. L. Blog*, 17 August 2018, at: http://www.iconnectblog.com/2018/08/i-connect-symposium-the-aftermath-of-the-italian-general-election-of-march-4-2018-populism-versus-constitutionalism-101-what-can-we-learn-from-the-italian-scenario. See also A. Torre, *I-CONnect Symposium–The Aftermath of the Italian General Election of March 4, 2018–Taming the Crisis*, *Int'l J. Const. L. Blog*, 16 August 2018, at: http://www.iconnectblog.com/2018/08/i-connect-symposium-the-aftermath-of-the-italian-general-election-of-march-4-2018-taming-the-crisis; and F. Clementi, *I-CONnect Symposium–The Aftermath of the Italian General Election of March 4, 2018–The Italian Political Elections: A Definitive Back to the Past?*, *Int'l J. Const. L. Blog*, 15 August 2018, at: http://www.iconnectblog.com/2018/08/i-connect-symposium-the-aftermath-of-the-italian-general-election-of-march-4-2018-the-italian-political-elections-a-definitive-back-to-the-past.

[31] See (in Italian) F. Di Marzio, *La politica e il contratto* (2018). As to the constitutional law issues raised by the choice of a 'contract' to define the political agenda of the Conte Cabinet, see (in Italian) M. Carducci, *Le dimensioni di interferenza del "contratto" di governo e l'art. 67 Cost.,* Federalismi.it, 13 June 2018.

[32] The 'contract' is available (in Italian) at this url: http://download.repubblica.it/pdf/2018/politica/contratto_governo.pdf.

counter-narratives) and supported the creation of an organization that is quite similar to political parties, notwithstanding Grillo's opposite claim[33].

Inspecting the content of its political claims, in the realm of anti-establishment and anti-party movements, the Five Star Movement is not alone. Taking the anti-euro sentiment as a common denominator, for example, the right-wing Lega Nord and Fratelli d'Italia[34] can also be considered on the same side.

However, the reasons to explore the rise of the Five Star Movement from the perspective of public law relate to the unprecedented constitutional issues and challenges that the advent of this new political actor has generated.

The most remarkable characteristic of the Five Star Movement is that while its political view reflects a distinctively anti-establishment attitude, it also emerges as an anti-party movement seeking emancipation from the model of traditional parties. Traditional parties are deemed as the enemy, the symbol of 'old politics' that led Italy to the brink of economic disaster. To highlight the distance marked from political parties, the Movement called itself a 'non-party' and its statute as 'non-statute.' Setting aside this rhetorical self-understanding that actually corresponds more to 'food for voters' than to a description of the movement, it is worth noting that the Five Star Movement model calls for a disintermediation of political representation from political parties[35]. In Grillo's view, the use of Internet is supposed to allow voters to directly participate in the political process, according to the model of e-democracy, and thus increase transparency and political accountability. The MPs are considered to be mere spokesmen bound by the will of their constituents, as debated on Grillo's blog, open to all registered users of the same.

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[33] See, more in detail, E. Falletti, *Direct democracy and the prohibition of the binding mandate: The Italian debate,* paper presented at the World Congress of Constitutional Law, Oslo, Norway, June 2014, 1–14; F. Bordignon, L. Ceccarini, *The Five-Star Movement: A catch-all anti-party party,* in A. De Petris, T. Poguntke, *Anti-party parties in Germany and Italy* 17–44 (2015).

[34] *Fratelli d'Italia* is a right-wing anti-establishment party founded in 2012 after a split from *Il Popolo della Libertà*, the party headed by Silvio Berlusconi.

[35] See N. Urbinati, *A Revolt against Intermediary Bodies,* 22(4) Constellations 477-485 (2015).

A recent comparative study on anti-party parties in Italy and Germany by Andrea De Petris and Thomas Poguntke[36] has focused on some distinguishing features of the Five Star Movement. De Petris, in particular[37], explored the following characteristics, that I find worth quoting:

a. The Five Star Movement is a personified party, as it has been 'built, developed and directed' by Beppe Grillo as a personal movement. Also, this characteristic depends on the strict relationship that the Movement's voters/supporters entered into with Grillo ('a link of mutual interdependence,' according to De Petris) mainly through his extremely popular blog.

b. The Five Star Movement is a 'non-association' with a 'non-statute': This character is an expression of 'a systematic refuse to adopt definitions and the lexicon in use by political parties.'

c. The mechanism for the creation of 'certified lists' and the selection procedures of candidates for national elections: The Five Star Movement has adopted a very detailed mechanism to allow citizens wishing to contest in the local elections to create their own lists of candidates. Once each list is created, it must undergo a certification process controlled by the Movement itself, and it must comply with a set of strict requirements. Likewise, the Movement has launched online primary elections for the selection of candidates at the general election held in 2013.

d. It is a political program 'under permanent construction' that is consistent with the understanding of the Five Star Movement as an open platform working according to a 'fluid' approach.

From a speculative point of view, one may wonder now whether this model is compatible with the Italian Constitution. As specified above, Article 49 does not place any limit to the freedom of association for political purposes, except for the dissolution of the Fascist party. Anti-establishment and anti-party parties are

[36] A. De Petris, T. Poguntke (eds), *Anti-party parties in Germany and Italy*, cit. at 33.

[37] See A. De Petris, *Programs, Strategies and Electoral Campaigns of the Five Stars Movement in Italy. A brand new Party Model or an "Anti-Party" State of Mind?,* in A. De Petris, T. Poguntke (eds), *Anti-party parties in Germany and Italy*, cit. at 33, 125–142.

therefore protected as such by the Constitution and entitled to take part in the democratic political activities. The very crucial point, however, does not relate to the qualification of the Five Star Movement as an anti-establishment and anti-party movement. It rather lies with the compatibility of the Movement's views with the Constitution, regarding direct and participatory democracy and the role of political parties[38].

4. Some key factors behind the rise of populism in Italy

Several factors have contributed to the rise and consolidation of populist parties and movements in Europe and other countries. Among others, the spread of fake news on the Internet, the educational divide, the adverse effects of financial crisis, and more recently, the emergence of international terrorism are often ranked among the causes for the populist surge. All these circumstances definitely had an impact. However, from the perspective of constitutional law, they fail to explain properly why Grillo's party has obtained such widespread support in Italy.

I will try to set aside the factors that may be relevant from the sole political-science perspective and pinpoint some elements related to the Italian form of government that, in my view, marked the transformation of the political scene.

The first point concerns the deep crisis of political parties and their ability to capture voters' attention and support. Like in other European countries, in Italy, the financial crisis that broke out in 2008 considerably impaired the relationship between people and political parties[39], and widened the gap between them. The financial crisis, indeed, served as an 'excuse' for populists to attack the political establishment, at both the national and European level.

However, in Italy, the relationship between voters and political parties had already been significantly weakened as a consequence of various scandals involving leading politicians and

[38] See (in Italian) G. Sartori, *Una violazione macroscopica,* in *Corriere della Sera,* 6 November 2013.

[39] P. Ignazi, *The Crisis of Parties and the Rise of New Political Parties,* 2(4) *Party Pol.* 549-566 (1996).

a predominantly self-referential view of politics by parties and their members.

Some commentators observe that the distrust of the mainstream political parties is also on account of the lack of a proper degree of internal democracy[40]. This aspect reflects in the actions of those party leaders who led the traditional parties to become more and more focused on the leader[41]. This is the reason why the strong leadership of Renzi caused splits recently in the center-left *Partito Democratico*, similar to what had happened to the center-right before – *Il Popolo delle Libertà* party, when Mr. Berlusconi was the Prime Minister. Pasquino has noticed that 'there is now no Italian party that can reasonably claim to be anything but personalistic'[42]. This holds true even for the Five Star Movement[43]. From the perspective of constitutional law, this

[40] See (in Italian) G. Brunelli, *Partiti politici e dimensione costituzionale della libertà associativa,* in F. Biondi, G. Brunelli, M. Revelli, *I partiti politici nella organizzazione costituzionale* 7–35 (2016); A. Lanzafame, *Sui livelli essenziali di democrazia nei partiti,* 1 Rivista AIC (2017).

[41] G. Pasquino, *Italy: The Triumph of Personalist Parties,* 42(4) Politics & Policy 548–566 (2014); See also (in Italian) M. Calise, *Il partito personale. I due corpi del leader* (2010).

[42] See also B. Manin, *The principles of representative government* (1997), at 219-220 who notes that 'Voters tend increasingly to vote for a person and no longer for a party or a platform. This phenomenon marks a departure from what was considered normal voting behavior under representative democracy, creating the impression of a crisis in representation. [..] It is equally possible to regard the current transformation as a return to a feature of parliamentarianism: the personal nature of the representative relationship'. According to Manin, this situation may have two causes, namely the fact that 'the channels of political communication affect the nature of the representative relationship: through radio and television, candidates can, once again, communicate directly with their constituents without the mediation of a party network'; secondly, 'the growing role of personalities at the expense of platforms is a response to the new conditions under which elected officials exercise their power'. Also, Manin observed that 'if a certain form of discretionary power is required by present circumstances, it is rational for candidates to put forth their personal qualities and aptitude for making good decisions rather than to tie their hands by specific promises. Voters too know that the government must deal with unpredictable events. From their point of view, then, the personal trust that the candidate inspires is a more adequate basis of selection than the evaluation of plans for future actions'.

[43] See M.E. Lanzone, *The "Post-Modern" Populism in Italy: The Case of the Five Stars Movement,* cit. at 7, 58. With respect to the impact of media on the

background leads us to wonder whether the absence of a comprehensive legal framework applicable to political parties may have had an impact. Currently, only a limited set of obligations apply to political parties. One of the most important pieces of legislation relates to public financing and has been subject to controversial changes over the past years[44].

In addition to the above, party switching is a very common practice in Italy, facilitated by the attitude to compromise parties' political views. It is often associated with corruption, as some resounding scandals have proven[45]. But generally, voters actually view this practice as a betrayal, reflecting the absence of responsibility of any MPs towards them. However, since MPs cannot be subject to a binding mandate pursuant to Article 67, any possible measure to prevent party switching would likely be unconstitutional.

As I will clarify below, the advent of Five Star Movement has further increased the distrust between voters and traditional parties. This newcomer, indeed, forced the moderate right-wing and left-wing parties (at least, some of them) to compromise their views and seek an agreement after the 2013 general election to form a coalition government that most likely both the left-wing and right-wing voters would not have supported *a priori*. It seems that Italy is back to the 'age of compromise,' a very distinguishing feature of the 'First Republic,' where the degree of fragmentation among parties was high (notwithstanding the dominant position of the *Democrazia Cristiana*) and a proportionate electoral system guaranteed fair representation in the Parliament for all the parties. Paradoxically enough, this 'new alliance' between the moderate left-wing and right-wing parties after the general election held in 2013 was facilitated by the success of the Five Star Movement and

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relationship between voters and political leaders, see (in Italian) G. Sartori, *Homo videns* (2000).

[44] See A. De Petris, *Is it all about money? The Legal Framework of Party Competition in Italy,* in A. De Petris, T. Poguntke (eds), *Anti-party parties in Germany and Italy*, cit. at 33, 79–106.

[45] Among others, in 2013, Silvio Berlusconi was accused of having bribed Senator De Gregorio to change sides and support his government in 2006. In 2015, the Court of Naples sentenced Berlusconi for three years' imprisonment. In the appeal proceedings, Berlusconi was eventually acquitted since the charge was time-barred.

its refusal to enter into a coalition with the *Partito Democratico*. Furthermore, in the months preceding the 2018 general election the alliance in a post-election coalition of the left-wing and right-wing parties was silently, but widely endorsed as the most likely scenario to defeat the Five Star Movement. This factor has probably discouraged voters from supporting the parties that were likely to form such coalition, namely the Democratic Party and Berlusconi's Forward Italy. It is not by coincidence that, on one hand, the Democratic Party got only 18% of the vote and, on the other one, Forward Italy was unexpectedly surpassed by the League in the center-right coalition. Also, both parties approached the election with no clear leadership, in a 'low-profile' mode that raised some suspect on the actual plans for the post-election scenario.

Another important factor that broadened the gap between the people and parties and thus, indirectly supported the rise of the Five Star Movement is the electoral legislation.

In 2005, a very weak and controversial electoral law came into force in Italy.

Two aspects were very challenging in particular.

On the one hand, the winning coalition was given at least 55% of the seats in the Chamber of Deputies in accordance with the majority premium. However, the winning coalition was not required to reach any specific threshold of votes to become entitled to the majority premium.

On the other hand, while casting their vote, the voters were not given the opportunity to express their preference for a candidate. Unlike the former electoral legislation, the candidates were chosen internally by the parties and included in large and closed lists. This element was also said to pave the way to corruption, on the assumption that the most powerful politicians were facilitated to retain their seats. Regardless of this possible downside, depriving voters of their expectation to express preferences for candidates has further weakened the relationship between people and parties. This mechanism created a deep dissatisfaction amongst voters, even though the assumption that expressing preferences is the best mechanism to match voters' expectations probably needs to be revisited. This law was labeled as a loophole for politicians to escape from facing their responsibilities towards the voters.

At the beginning of 2014, the law was eventually found unconstitutional by the Italian Constitutional Court[46]. Moreover, in the aftermath of this landmark decision, the legitimacy of the election of MPs was questioned, most notably by the Five Star Movement (at least, as far as the MPs who had been awarded a seat by virtue of the 'majority premium' being declared unconstitutional was concerned). Some politicians, with the support of certain constitutional law scholars, even called for the dissolution of the Parliament[47].

Finally, an element that may have influenced the growth of the Five Star Movement, which probably will strengthen its position as an anti-establishment party over the next few years, relates to the concrete functioning of the Italian form of government. The Italian Constitution does not provide for a direct election of the prime minister, nor does it the electoral law. As a matter of fact, in Italy, the President of the Republic normally appoints the leader of the winning coalition as the prime minister after the general election. In a system where political parties are organized according to a bipolar scheme, indeed, the prospective prime ministers are clear to the voters when elections take place, as they are reasonably confident that the leader of the winning coalition will be appointed. This is a distinguishing feature of the majoritarian parliamentary system that became the dominant scheme in Italy after the outbreak of the 'Tangentopoli' scandal and the end of the 'First Republic' at the beginning of 1990s. However, some circumstances radically changed this scenario. On 16 November 2011, the Monti Cabinet – an Experts' Cabinet – was formed with the purpose of leading Italy out of the overwhelming economic crisis. The Cabinet was headed by Professor Mario Monti, whom the President of the Republic appointed lifetime senator only few days before[48], and replaced the Berlusconi IV Cabinet. The Monti Cabinet was supported by majority of the

[46] Italian Constitutional Court, judgment no. 1/2014. See E. Longo, A. Pin, *Judicial Review, Election Law, and Proportionality,* 6(1) Notre Dame J. Int'l & Comp. L. 101-118 (2016).

[47] See (in Italian) A. Pace, *I limiti di un Parlamento delegittimato,* Osservatorio costituzionale, March 2014.

[48] Please note that the Constitution does not require the prime minister being a member of the Parliament to be appointed.

political forces (including the *Partito Democratico* and *Il Popolo delle Libertà*), while the sole Northern League withheld its support from Professor Monti. The adoption of a package of emergency austerity measures paved the way for Five Star Movement (not yet sitting in the Parliament) to strongly challenge the Monti Cabinet just a few months later, when the electoral campaign began. Then, after the 2013 elections, the *Partito Democratico* and *Il Popolo delle Libertà* were forced to form a new 'grand coalition' to support a cabinet headed by Enrico Letta (*Partito Democratico*). This scenario was the consequence of the Five Star Movement's refusal to support Pierluigi Bersani, leader of the left-wing coalition that 'formally' won the elections but was unable to obtain majority of the seats in both the chambers. One year later, as a consequence of the *Partito Democratico*'s internal withdrawal of confidence, the Letta Cabinet was replaced with a cabinet headed by Mr. Matteo Renzi, who at the time was serving as mayor of Florence. Then, Renzi resigned on 4 December 2016, after the failure of the constitutional referendum[49] that his government had drafted firsthand and supported[50]. Paolo Gentiloni, a former minister of the Renzi Cabinet, was eventually appointed prime minister.

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[49] In more detail, see E. Stradella, *Italy after the Constitutional Referendum: Legal and Political Scenarios, from the Public Debate to the Electoral Question,* Italian L.J, Special Issue 61-84 (2017); P. Blokker, "*Vote Yes for a Safe Italy*" *or* "*Vote No to Defend the Constitution*"*: Italian Constitutional Politics between Majoritarianism and Civil Resistance,* VerfBlog, 2016/7/27, at: https://verfassungsblog.de/italy-constitution-referendum-renzi-blokker/; C. Joerges, *After the Italian Referendum,* VerfBlog, 2016/12/09, at: https://verfassungsblog.de/after-the-italian-referendum/; F. Clementi, M. Steinbeis, *Italy before the Constitutional Referendum: "I do not see any Armageddon Scenario",* VerfBlog, 2016/12/02, at: https://verfassungsblog.de/italy-before-the-constitutional-referendum-i-do-not-see-any-armageddon-scenario/; M. Goldoni, *Italian Constitutional Referendum: Voting for Structural Reform or Constitutional Transformation?,* VerfBlog, 2016/8/11, at: https://verfassungsblog.de/italian-constitutional-referendum-voting-goldoni/. See also O. Pollicino, M. Bassini, *Nothing left to do but vote – The (almost) untold story of the Italian constitutional reform and the aftermath of the referendum,* VerfBlog, 2016/12/15, at: https://verfassungsblog.de/nothing-left-to-do-but-vote-the-almost-untold-story-of-the-italian-constitutional-reform-and-the-aftermath-of-the-referendum/.

[50] On the merits of the failed 'Renzi-Boschi constitutional reform' see generally the Italian Law Journal Special Issue 2017, and in particular: G. Romeo, *The Italian Constitutional Reform of 2016: An 'Exercise' of Change at the Crossroad*

On the basis of this scenario, the Five Star Movement often claims that voters have been deprived of their say in respect of the choice of the prime minister (a quite bizarre claim, in light of the recent appointment of Giuseppe Conte, an independent that had not even run for election). From a constitutional point of view, this claim has no grounds, since the Constitution does not provide for the direct election of the prime minister. In fact, the choice of the government depends on the existence of an agreement among the different political forces. Yet, it is true that between 2011 and 2017, the lack of stability – a very distinguishing feature of the Italian form of government – led to the rapid succession of a number of cabinets headed by prime ministers who were not even leaders of the competing coalitions at the general election.

The Five Star Movement's claim that voters have no longer say in the choice of the government is radically groundless; indeed, they never had say, since the direct election of the prime minister had never existed in Italy. However, it is true that the gap between the government and voters is growing, and the inability of parties to support longstanding governments has further increased the distrust.

These and other factors allowed the Five Star Movement to capture the frustration that voters were feeling towards incumbent governments and parties. Notwithstanding their relevant political agenda lacking clarity – being driven mainly by Grillo's personal opinions – the Five Star Movement became an outlet for political discussion and expression of protest. The target of the protest conveyed by the Five Star Movement, among the others, was political establishment. The latter includes similar movements like the *Lega Nord* that were born in opposition to the old parties of the First Republic as anti-establishment entities. In order to mark their distance from the target of the protest, the Five

between Constitutional Maintenance and Innovation, Italian L.J, Special Issue 31-48 (2017); G. Delledonne, G. Martinico, *Yes or No? Mapping the Italian Academic Debate on the Constitutional Reform,* Italian L.J, Special Issue 49-60 (2017); B. Caravita di Toritto, *The Constitutional Reform, between a Lost Opportunity and a Negative Outlook,* Italian L.J, Special Issue 85-90 (2017). See generally P. Blokker, *The Grande Riforma of the Italian constitution: majoritarian versus participatory democracy?,* 9(2) Contemp. Italian Pol. 124-141 (2017); Id., *Constitutional Paradigms: The Italian 1948 Constitution between Conservation and Reform,* in Id. (ed), *Constitutional Acceleration within the European Union and Beyond* (2017).

Star Movement regards itself as a non-party and questions the foundations of representative democracy by promoting a direct and participatory democracy.

I will develop now a *pars destruens* and a *pars construens.* In the *pars destruens,* I will argue that the model of direct democracy of the Five Star Movement is hard to reconcile with the Constitution and would most likely fail. In the *part construens*, in light of the aforementioned factors that led to the new populist surge in Italy, I will question whether some remedies can be taken with a view to marginalize the role of populist movements by revitalizing representative democracy and the traditional parties.

5. *Pars destruens* – Some critical remarks on the Five Star Movement

The model of political representation proposed by the Five Star Movement has been described as a hybrid between direct democracy and participatory democracy[51].

Actually, different aspects in the structure and functioning of the Movement reflect these underlying principles – the possibility of a certain number of voters to require introducing a bill to the Parliament; the extensive use of online consultations both for the selection of candidates and for debating the approval or repeal of bills (or again, for deciding whether an MP must be excluded from the Movement); and the direct involvement of the constituents in a range of activities.

If one places these developments against the background of the decline of political parties, increasingly depicted as closed oligarchies, they look promising in respect of the reduction of the divide between citizens and political actors.

However, far from entering into the merits of the controversial results of the Five Star Movement from a political standpoint, the impact of these novelties needs to be revisited.

In particular, more than the specific forms of direct and participatory democracy, it is the general attitude of the Five Star

[51] E. Falletti, *Direct democracy and the prohibition of the binding mandate: The Italian debate,* cit. at 33, 5.

Movement toward the representative system that appears unlikely to be reconciled with the constitutional framework.

In the view of the Movement, political parties would no longer act as the 'center' where different views are compromised, and the will of the people is 'filtered.' The exercise of representation is supposed to be emancipated from the intermediation of political parties, whose representative attitude is weakened because of the Internet's potential. New media, in fact, allow citizens to 'speak aloud,' participating in the political process without any filter or intermediary[52].

I feel that this construction of the relationship between the use of media and the lack of parties' intermediation is too simplistic. When it comes to debating the state of health of political representation, a fully disenchanted view is indeed necessary.

Norberto Bobbio, one of the most enlightened authors, wrote in 1994 that the claim to realize a 'computercracy,' allowing a direct democracy, was purely childish[53]. This scenario would have brought an excess of democracy – an even more dangerous option.

The rationale behind the Five Star Movement is that MPs are merely spokesmen while the determination of political stances rests in the hands of voters, who have the power to bind the MPs' actions in Parliament. As such, the MPs are subject to a binding mandate, in fair contrast with the Constitution. More recently, criticism has been expressed[54] with respect to the code of conduct adopted by the Five Star Movement that applies to the respective Members of the European Parliament (MEPs). The code expressly provides voters with the power to recall a member of the European Parliament if a 'serious infringement' occurs[55].

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[52] See, among others, M. Orofino, *The web 2.0 and its impact on relations between citizens and political representatives,* MediaLaws, 17 November 2017, at www.medialaws.eu.

[53] See (in Italian) N. Bobbio, *Il futuro della democrazia* (1984).

[54] See (in Italian) G. Grasso, *Mandato imperativo e mandato di partito: il caso del MoVimento 5 Stelle,* 2 Oss. cost. (2017).

[55] The recall of the MEP can be requested, in case of serious infringement, by at least 500 registered members of the Five Star Movement residing in the electoral district where the MEP was elected. Alternatively, a proposal of recall can, in

Furthermore, it establishes that a penalty of 250,000.00 Euros must be paid to the Five Star Movement in case the concerned member of the Parliament refuses to resign.

These internal rules are definitely incompatible with the prohibition of binding mandate. Apart from Article 67 of the Italian Constitution (that would not be enforceable in this specific case), both the Statute for Members of the European Parliament and the Rules of Procedure of the European Parliament do prohibit MEPs to receive a binding mandate or be bound by any instructions[56]. Then, in case an MEP failed to resign after having committed a 'serious infringement' of the code of conduct, the obligation to pay a fine would be most likely unenforceable.

A very similar provision applies to the MPs who belong to the Five Star Movement Parliamentary Group in the Chamber of Deputies and Senate of the Republic. Article 21, para. 5, of the relevant statute approved on 27 March 2018, in fact, provides that 'Any MP who leaves the parliamentary group because of either his/her exclusion or voluntary withdrawal or resignation based on political disagreement shall pay a fine amounting to Euro 100,000.00 to the Five Star Movement by ten days'. Also the wording of the 'contract' between the Five Star Movement and the League encapsulates suggests a normative claim to make binding the political mandate on MPs with a view to contrasting party-switching[57]. This claim was common to many documents with no legal effects, most notably codes of ethics and codes of conduct[58]

any case, be approved with the vote of majority of the registered members of the Five Stars residing in the electoral college where the MEP was elected.

[56] Rule 2 reads as follows: '*Members of the European Parliament shall exercise their mandate independently. They shall not be bound by any instructions and shall not receive a binding mandate.*'

[57] See p. 35 of the 'contract' under para. 20.

[58] See (in Italian) F. Scuto, *I pericoli derivanti da uno svuotamento dell'art. 67 Cost. unito ad un "irrigidimento" dell'art. 49 Cost. Alcune considerazioni a partire dalla vicenda dello Statuto del Gruppo parlamentare "Movimento 5 Stelle"*, Federalismi.it, 13 June 2018, 3-5. The Author notes that codes of ethics and codes of conduct aim at ensuring the respect of Article 54 of the Constitution, requiring citizens to whom public functions are entrusted to fulfill the same with 'discipline and honor', in addition to a general duty of loyalty to the Republic. Then, the adoption of said codes is up to the parties in the exercise of the organizational autonomy that they enjoy pursuant to Article 18 and Article 49 of the Constitution. These rules of conduct may have the effect of preventing

applying to Five Star Movement candidates and activists; now, it is enshrined to the statute of the parliamentary group, which is supposed to have also legal effects[59].

Notwithstanding the Five Star Movement calls for the repeal of Article 67 of the Constitution, the prohibition of binding mandate does make sense[60] still as a cornerstone[61] of representative democracy[62].

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members of a given party to run for election or other party offices but cannot in any case determine restrictions that are unconstitutional because either they contrast with the prohibition on binding mandate pursuant to Article 67 of the Constitution or are not compatible with the democratic standard for internal organization required by Article 49 thereof.

[59] The insertion of this clause into the statute of the Five Star Movement parliamentary group has given rise to a broad debate among constitutional law scholars on the nature of the clause and the legal remedies to challenge the imposition of the fine. See in particular R. Di Maria, *Una "clausola vessatoria" in bilico fra la democrazia rappresentativa e la tutela giursidizionale dei diritti,* Federalismi.it, 13 June 2018, 4-8; S. Curreri, *Costituzione, regolamenti parlamentari e statuti dei gruppi politici: un rapporto da ripensare,* Federalismi.it, 13 June 2018; A. Cerri, *Osservazioni sulla libertà del mandato parlamentare,* Federalismi.it, 13 June 2018; C. Martinelli, *Libero mandato e rappresentanza nazionale come fondamenti della modernità costituzionale,* Federalismi.it, 13 June 2018; see also P. Marsocci, *Lo status dei parlamentari osservato con la lente della disciplina interna dei gruppi. Gli argini (necessari) a difesa dell'art. 67,* Federalismi.it, 13 June 2018.

[60] According to a different interpretation (articulated by G. Grasso, *Qualche riflessione su statuti e regolamenti dei Gruppi parlamentari, tra articolo 49 e articolo 67 della Costituzione,* Federalismi.it, 13 June 2018), Article 67 of the Constitution does guarantee the free exercise of the mandate by MPs, but subject to the condition that such exercise is compatible with the Constitution, most notably with the duty of loyalty to the Constitution pursuant to Article 54. To a certain degree, in the view of Grasso, Article 21, para. 5, of the Statue of the Five Star Movement parliamentary group may play a role in securing MPs' accountability by ensuring that MPs act in accordance with a general political line (without prejudice to political dissent) and avoiding party-switching. Without prejudice to the above, the introduction of a penalty is considered in any case illegal.

[61] See among others (in Italian) C. Pinelli, *Libertà di mandato dei parlamentari e rimedi contro il transfughismo,* Federalismi.it, 13 June 2018; G. Demuro, *Il diritto individuale al libero mandato parlamentare,* Federalismi.it, 13 June 2018; A. Ciancio, *Disciplina di gruppo e tutela del parlamentare dissenziente,* Federalismi.it, 13 June 2018.

[62] Some authors, however, argue that introducing some elements of direct democracy could be the sound remedy to revitalize representative democracy: see (in Italian) M. Ainis, *Come salvare il Parlamento,* Repubblica, 28 April 2017.

The Italian experience, moreover, constitutes a litmus test of some difficulties that are related to the implementation of mechanisms of direct and participatory democracy[63].

First, these mechanisms have failed to convey a significant participation of voters in the political decision-making process. When the Five Star Movement launched (apparently) open consultations in order to give the floor to their constituents (e.g. on the selection of candidates or on the decision to exclude or not certain members from the Movement), just a very limited number of voters actually took part in the voting procedures. Were a political entity bound to bring to the Parliament the views that only a few voters had contributed to form, the content of the relevant political decision would be, by definition, non-democratic. In such a scenario, the promise of an actual representation of the will of people through disintermediation from political parties would be an empty one.

Additionally, since all the relevant decisions are taken on the basis of consultations held on a website, in order for such a model of direct and participatory democracy to work, access to the Internet platform should be universal (i.e. granted to the citizens of all generations and all areas of the country). The digital divide, however, is still a serious problem in Italy, like in Europe and in the US.

Finally, *quis custodiet ipsos custodes*? Examining the Five Star Movement, most of their relevant resolutions are not adopted by the voters, rather by a restricted group of individuals who determine the political line without any legitimacy. This leads to a general lack of transparency that affects the credibility of the Five Star Movement vis-à-vis the citizens. Furthermore, who guarantees that the outcome of the consultations carried out on the blog is correct and not subject to any alteration or manipulation?

The Five Star Movement, then, cannot escape reality and should confront the existing limits of the project of reaching a direct and participatory democracy through a 'non-party'.

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[63] See also C. Sbailò, *Presidenzialismo contro populismo: col mandato imperativo si dissolve la democrazia costituzionale, ma non basta dire "no"*, Federalismi.it, 13 June 2018.

In this respect, some courts have handed down interesting judgments that have lend doubts about the compatibility of the Five Star Movement with the legal order of certain internal mechanisms. A first decision was handed down in July 2016 by the Court of Naples[64]. The lawsuit originated from the exclusion of some members from the Movement. The plaintiffs were accused of having infringed the rules of the Movement (named '*non-statuto*,' 'non-statute,' with a view to emphasizing difference from the traditional parties) for having joined a Facebook secret group, facilitating the exchange of various political views. The exclusion from the Five Star Movement was communicated to the plaintiffs via email by an ill-defined 'Staff of Beppe Grillo,' a body that had no grounds in the (non)statute. As a consequence of the exclusion, the plaintiffs could not take part (in their capacity both as voters and as candidates) in the primaries launched on the website for the 2016 municipal elections. The Court of Naples suspended the exclusion and found that notwithstanding the choice of the name and organizational structure, the Five Star Movement does amount to a political party whose members enjoy freedom of political association. Accordingly, membership to the Five Star Movement is governed by the same rules provided by the Italian Civil Code for associations. Pursuant to the relevant provisions of the Civil Code, measures such as exclusion from an association may be taken upon a duly approved resolution of the assembly, unless otherwise provided by a statute of the association[65]. The very interesting point in the decision of the Court lies with the acknowledgment that even the Five Star Movement falls within the category of political parties and is accordingly subject to the (few) relevant statutory provisions that are applicable to the same.

Another remarkable judgment was delivered in April 2017, prior to the municipal elections in Genoa[66]. The local court

[64] Court of Naples, order of 14 July 2016, affirmed by Court of Naples, 18 April 2018, no. 3773.

[65] Precisely, the Five Star Movement argued that the power to exclude members from the association was stipulated in the Regulation published on the blog of Beppe Grillo. However, the Court of Naples noted that such a Regulation may not overrule the biding statutory provisions applying to private associations, unless a specific amendment to the statute of the association is approved to introduce such a power of exclusion.

[66] Court of Genoa, order of 10 April 2017.

suspended the resolution by which Beppe Grillo, in his capacity as 'guarantor' of the Movement, had invalidated the results of the primary elections held on the website, won by the list headed by Ms. Marika Cassimatis, in order to replace her with another candidate. The Court noted that the power to exclude some candidates granted to the guarantor was limited by the (non)statute to special circumstances and did not amount to a generic veto power (or the 'last say') by the leader of the Movement. Also in this case, the Court found that the adoption of this type of resolutions is regulated by the relevant provisions of the Civil Code, unless otherwise established by the (non)statute. Not even the 'ratification' of the exclusion of Ms. Cassimatis through an online vote among the members of the Movement was found to constitute a sound basis to remedy the infringement of the statute and keep the resolution immune from any possible claim.

6. *Pars construens* – Making political parties democratic again?

As the recent events show, populism has also flourished in Italy because of the deep crisis of the traditional political parties. Against this background, the Five Star Movement captured the sense of frustration felt by voters and channeled it into a critique of the model of representative democracy. I have outlined some factors that had an impact on the rise of the Movement from a constitutional-law standpoint. Some of these elements (e.g. the electoral system) directly relate to the form of government, whereas others (e.g. the advent of personalist parties) refer to how the form of government actually works. Both types of factors show that while anti-establishment and anti-party parties are not *per se* incompatible with the Constitution, there is nevertheless room to control the spread of populism by reinforcing representative democracy. Since the Constitution places no limits (except for reconstitution of the Fascist party) on the freedom of political association, some measures may be necessary, not to reject populism as such, but to strengthen the role of political parties and reduce the gap between them and the people. Evidently, the existing alternatives to representative democracy, such as the Five Star Movement model of direct and participatory

democracy, may prove unsatisfactory and even raise constitutional law issues.

But how is it possible to reverse the trend of distrust of the mainstream political parties?

First and foremost, the approval of an electoral law to guarantee political stability was essential before the general election of 2018. After the Italian Constitutional Court struck down the electoral law in 2014, a new law named 'Italicum' was passed in 2015. However, on 9 February 2017, the Constitutional Court ruled that some crucial provisions of the Italicum Law were unconstitutional[67]. But this decision turned out to be even more disruptive in light of the failure of the constitutional referendum held, meanwhile, in December 2016[68]. In fact, the scope of the Italicum Law was limited to the election of members of the Chamber of Deputies, as the Senate of the Republic was supposed to be reformed and converted to an assembly composed of representatives of the Regions and Municipalities who were not elected by voters[69]. Yet, the constitutional referendum failed and the election to the chambers of the Parliament was governed by two sets of completely different rules[70] - an almost insurmountable obstacle to political stability – until the approval,

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[67] Italian Constitutional Court, judgment no. 35/2017. See C. Caruso, M. Goldoni, *Halving the "Italicum": The Italian Constitutional Court and the Reform of the Electoral System,* VerfBlog, 2017/2/28, at: http://verfassungsblog.de/halving-the-italicum-the-italian-constitutional-court-and-the-reform-of-the-electoral-system; G. Delledonne, G. Boggero, *The Italian Constitutional Court Rules on Electoral System,* Int'l J. Const. L. Blog, 8 February 2017, at: http://www.iconnectblog.com/2017/02/the-italian-constitutional-court-rules-on-electoral-system.

[68] D. Schefold, *Constitutional Reform and Constitutional Unity. Reflections on the Constitutional Referendum of 4 December 2016 and on the Judgment of the Constitutional Court no 35/2017,* Italian L.J, Special Issue 147-156 (2017).

[69] The Five Star Movement campaigned against the reform focusing particularly on this profile, as the constitutional reform was supposed to deprive voters of the power to elect senators by replacing them with an assembly of 100 representatives of local authorities nominated by regional councils and municipalities.

[70] Namely, by the Italicum law as amended by the judgment of the Constitutional Court no. 35/2017 as to the Chamber of Deputies and by the so called 'Consultellum,' i.e. the electoral law of 2005 as amended by the judgment of the Constitutional Court no. 1/2014 as to the Senate of the Republic.

on 3 November 2017, of a new law named 'Rosatellum'. This law was estimated to make it difficult for Five Star Movement to win the general election of 2018, by allocating one third of the seats via a 'first-past-the-post' system based on single-member electoral districts and two third thereof proportionally without any chance for voters to pick their candidates. Contrary to all expectations, the Five Star Movement won most of the seats, especially in singe-member electoral districts.

So, in the age of the crisis of representative democracy, giving voters the power to indicate their preference among candidates seems a sound way to reduce the gap between parties and citizens. Despite the existence of a pressing need to bridge this divide, the Parliament has taken another road.

A second proposal aims at introducing legislation regulating the sole aspect of functioning of political parties that reflect on their representative functions. The (limited) legal framework applying to political parties in Italy mainly concerns financing of the same[71]. Italian Parliament passed a few provisions first in 2012[72] and then in 2014[73] with a view to ensuring 'transparency and democracy of political parties' in the context of the reform of party funding[74]. These provisions turned out to have a limited impact[75] as they merely introduce formal requirements concerning the content of the statutes of political parties. Respect of these requirements is a prerequisite for parties to be eligible for

[71] See (in Italian) F. Biondi, *Il finanziamento pubblico dei partiti politici. Profili costituzionali* (2012).

[72] Law 6 July 2012, no. 96 ('Provisions governing the reduction of public financing of political parties and movements and measures to ensure transparency and accountability').

[73] See Law 21 February 2014, no. 13 ('Passing into law Law-Decree 28 December 2013, no. 149, repealing public financing of political parties, regulating parties' transparency and democracy and governing voluntary and indirect contribution to political parties').

[74] On the 'changing landscape of structure and financing' of political parties see M.R. Allegri, M. Diletti, P. Marsocci, *Political Parties and Political Foundations in Italy* (2018).

[75] See (in Italian) R. Calvano, *La democrazia interna, il libero mandato parlamentare e il dottor Stranamore,* Federalismi.it, 20 June 2018, 7-9; F. Scuto, *La democrazia interna dei partiti: profili costituzionali di una transizione* (2018); Id. *Democrazia rappresentativa e partiti politici: la rilevanza dell'organizzazione interna ed il suo impatto sulla rappresentanza politica,* Federalismi.it, 2 October 2017.

indirect public contribution. First, Article 5 of Law no. 96/2012 requires that the statutes of political parties must be compatible 'with democratic principles in the internal organization, most notably with regard to the selection of candidates, the respect of internal minorities and the protection of the rights of party members'. Article 3 of Law no. 13/2014, in turn (included in a specific section on 'Internal democracy, accountability and transparency'), provides a comprehensive description of the content of party statutes, including: rights and duties of party members; modalities of participation in the party's political activities; criteria to ensure the representation of minorities in non-executive bodies; disciplinary measures applicable to party members; criteria for the selection of candidates running for European, general and local elections. In light of this limited legal background, the implementation of the democratic principle enshrined to Article 49 of the Constitution seems to be only on the paper. As noted by some scholars[76], the Five Star Movement could easily circumvent the application of these requirements, by simply avoiding applying for public indirect contribution.

In the age of the crisis of political parties, where there is an increasing use – amongst others – of primary elections, the relationship between citizens and parties could probably benefit from the approval of a specific (and long-awaited)[77] piece of legislation on political parties to ensure more directly and effectively the respect of the democratic principle[78]. As suggested by some scholars, the content of a possible law regulating political parties should be as minimal as possible, in order not to undermine the freedom that is guaranteed by Article 49 of the Constitution. But the specific mission of these kinds of association

[76] See again R. Calvano, *La democrazia interna, il libero mandato parlamentare e il dottor Stranamore,* cit. at 75, 8-9.

[77] Time is probably ripe for a law on political parties, to answer the question posed by L. Elia, *A quanto una legge sui partiti?,* in S. Merlini (ed.), *La democrazia dei partiti e la democrazia nei partiti* 51-58 (2009) (in Italian).

[78] See G. Brunelli, *Partiti politici e dimensione costituzionale della libertà associativa,* cit. at 40; A. Lanzafame, *Sui livelli essenziali di democrazia nei partiti,* cit. at 40. See also (in Italian) G. Amato, *Nota su una legge sui partiti in attuazione dell'art. 49 della Costituzione,* Rass. Parl. 1-13 (2012). See also (in Italian) A. Barbera, *La democrazia "dei" e "nei" partiti, tra rappresentanza e governabilità,* in S. Merlini (ed), *La democrazia dei partiti e la democrazia nei partiti*, cit. at 77, 231–252.

may justify (if not require) some form of regulation with a view to making political parties more democratic. If more internal-party democracy is secured, traditional political parties will be able to compete more with the only apparently democratic model of the new populist movements.

Now, a question that may lead to speculating on other possible remedies: Is there room for any form of accountability of the MPs that does not challenge the prohibition of binding mandate? Article 67 of the Italian Constitution is a cornerstone of representative democracy that should not be revisited at all. Yet, I am wondering whether, for instance, an extremely widespread practice of party switching – one of the most serious threats to the stability of governments in Italy – would actually be compatible with the Constitution from a perspective other than that of Article 67. But this is probably a very demanding question.

Finally, it would be wrong to 'throw the baby out with the bathwater' and consider the Five Star Movement model as the root of all evils. Indeed, some elements of this model may be implemented to bridge the gap between voters and parties, but only on the assumption that the relevant forms of direct and participatory democracy can complement, but never replace, representative democracy as such.

LAW ENFORCEMENT AGAINST CORRUPTION IN ITALIAN PUBLIC PROCUREMENT, BETWEEN HETERO-IMPOSED MEASURES AND PROCEDURAL SOLUTIONS

*Vinicio Brigante**

Abstract

This essay aims to analyze the complicated and impenetrable topic of corruption in public procurement into Italian law. Corruption is a multi-faceted phenomenon which has economic, legal and moral consequences. The first obstacle to overcome is to know actual data about corruption, because data based on perceived corruption are not realible; it is necessary to know the details of the problem, to set up an appropriate system of contrast. The so-called hetero-imposed measures, like administrative transparency, are not enough, because the Italian legislative landscape about this issue it is unclear and it was also demonstrated that we have to act on the proces of the administrative decisions. The solutions proposed in this essay concern the graduation of administrative discretion, which oscillates between law and equity. The original system of control did not work and revealed the necessity to combine prevention and repression to guide the choices of the contracting authority during invitation to tender. In this perspective, the legal tool of the collaborative surveillance is extremely appropriate in this debate because it is enhanced the issue of the continuous cooperation between different actors. The appropriate measures to tackle corruption must provide for ethical and moral values, to integrate legal arrangements.

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1. Definition of the subject

The issue of corruption in public procurement – despite being subject to a permanent and scrupulous analysis by academics [1] – shows some fundamental unknown factors, starting with the definition of corruption[2].

With sincere gratitude to professor Aristide Police for advice and guidance.

[1] To mention just the most recent works, see R. Cantone and E. Carloni, *Corruzione e anticorruzione. Dieci Lezioni*, Milano (2018); F. Pinto, *Il mito della corruzione*, Roma (2018).

[2] A. Police, *New instruments of Control over public Corruption: the Italian Reform to restore Transparency and Accountability*, in 2 Dir. econ. 190 (2015): "in the italian legal language, the term corruption has so far been essentially a term criminal law, with whom he has been referred to specific offences. This restrictive meaning is consistent with the fact that the fight against corruption took place mainly at the level of criminal persecution. There is, however, even in legal language, a broader sense of the term, which is related to the prevention of political malpractice and administrative, to operate with the proper tools of constituional law and administrative law. In administrative law, in fact, has been elaborated a notion of corruption broader than criminal law that refers to conduct that is source of liability or otherwise not exposed to any sanctions, but they are unwelcome to the lagal system: confilct of interest, nepotism, cronyism, partisanship, abuse of public office, wastage"; P. Langseth, *Prevention: an effective tool to reduce corruption*, in Global Program Against Corrupion 1 (1999): "anti-corruption action has produced a mountain of words and hardly a molehill of solid results in terms of positive change, or, reform, in institutional behaviour. Failure in this regard has much to do with the complexity, dynamism and pervasiveness of the corruption. Where corruption is choking development, a few with access systematically distort political and

The term corruption has multiple meanings, rangeing into a legal, economic and ethic dimension[3], but it is undeniable that the matrix of the term belongs to criminal law[4].

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economic decisions which might be made (systematically) with conflict of interest at play"; for a very interesting essay about the evolution of the notion of administrative corruption, see G.E. Caiden and N.J. Caiden, *Administrative Corruption* (1977). Revisited, in 38 Philippine Journal of Public Administration 1 (1994); H.R. Taboli, *Administrative corruption: why and how?*, in 1-12 International Journal of Advanced Studies in Humanities and Social Science 2568 (2013): "the term administrative corruption used as an antonym of administrative health, has long been under close attention of organizational intellectuals who made their efforts to eliminate it by proposing definitions in accordance to organizatinals principles, the common factors of which are bribery and occupational abuses for person interest"; P. Mousavi, M. Pourkiani and K. Branch, *Administrative corruption: ways of tackling the problem*, in 3 European Journal of Natural and Social Sciences 180 (2013): "Administrative corruption is one of a set of problems organizations experience during a period throughout their life. The problems are mainly rooted outside the organization but they have an impact on the organization. These problems always pose a challenge to managers. The organization has no control over the rootcauses of the problems. As a result, it can hardly handle them. Administrative corruption, to a large extent, is influenced by economic, social, cultural and political systems. For instance, high unemployment rate, the dominance of informal and traditional relationships on ties between people, the maturity of the political system. directly affect the scale of administrative corruption in any society. On the other hand, administrative corruption has a direct, adverse effect on the efficiency of administrative system, the legitimacy of the political system and the quality of sociocultural system of the society. This creates a vicious cycle that finally leads the country towards decline".

[3] S. Cassese, *Ipotesi sulla storia della corruzione in Italia*, in G. Melis (ed.), *Etica pubblica e amministrazione. Per una storia della corruzione nell'Italia contemporanea* (1999), 183; U. Von Aleman, *The unknown dephts for political theory the case for a multidimensional concept of corruption*, in 42 Crime, Law and Social Change 26 (2004): "there are five dimension for corruption: social decline, deviant behavior, logic of exchange, system of measurable perceptions and shadow politics"; for an analysis of the relations between economic growth and corruption, see S. Brianzoni, R. Coppier and E. Michetti, *Multiple equilibria in a discrete time growth model with corruption in public procurement*, in 49 Quality & Quantity 2387 (2015).

[4] See B. Boschetti, *Pathways of corruption in the global arena*, in 1 JusOnline 23 (2018); G. Cocco, *Le recenti riforme in materia di corruzione la necessità di un deciso mutamento di prospettiva nell'alveo dei principi liberali*, in 2 Responsabilità civile e previdenza 374 (2018), the fight against corruption seems to have become the fight against its perception, through the use of slogan and further tightening of existing measures; for a search of a common matrix for criminal and administrative law, see C. Cudia, *L'atto amministrativo contrario ai doveri di ufficio*

Obviously, the entire investigation cannot be addressed without reference to the logic intersections between criminal and administrative law, that may be settled given that the principle of legality is unique, even if the sanctions laid down are different. In other words, the exclusion of the criminal relevance does not prevent that the behaviour may lead to civil or administrative responsibility.

An interesting doctrinal approach has defined corruption as an "articulated texture of moral degeneration[5]", a worrying trend, that appears to be repetitive and cyclical[6].

In the significant and debated literary production about corruption, some academics tried to point out some positive aspects about corruption, defined as "latents functions" of corruption, namely a balancing of public authorities[7].

However, it has been demonstrated that the market distortion due to corruption is not part of the not-harmful market

nel reato di corruzione propria: verso una legalità comune al diritto penale e al diritto amministrativo, in 2 Dir. pubbl. 684 (2017), it is noted that there is an unresolved tension between different categories and needs, that can be resolved by applying the principle of legality; G. Balbi, *I delitti di corruzione. Un'indagine strutturale e sistematica* (2003), 80. The topic of the relations between the criminal judge and public administration is broad, so please refer to L. Mazzarolli, *Attività amministrativa e giudice penale*, in 4 Dir. soc. 663 (1978); M. Nigro, *Giudice ordinario (civile e penale) e pubblica amministrazione*, in 6 Foro amm. 2035 (1983), the invasion of the criminal judge into the administrative action has aggravated the already-existing defects; F. Palazzo, *Le norme penali contro la corruzione tra presupposti crimologici e finalità etico-sociali*, in 10 Cass. pen. 3389 (2015); Id, *Corruzione: per una disciplina 'integrata' ed efficace*, in 10 Diritto penale e processo 1177 (2011); M. Gambardella, *La disapplicazione degli atti amministrativi illegittimi nel sistema penale dopo le recenti riforme del diritto amministrativo*, in 4 Riv. it. Dir. proc. pen. 742 (2013).

[5] The definition was rendered by G. Melis in the intro speech on 25 February 2017, at Università degli Studi di Roma 'La Sapienza', then published as *La lunga storia della corruzione italiana*, in Nuova Etica Pubblica 2 (2017).

[6] See B.G. Mattarella, *Le regole dell'onestà. Etica, politica e amministrazione* (2007), 16.

[7] R. Klitgaard, *Controlling corruption,* 1st ed., (1988), 73, claims that there is an optimal amount of corruption to preserve, for a gain in total public expenditure, between cost of corruption and cost allocated to counteract corruption.

failures, that lead to the economic theory of "workable competition[8]".

Theories about the nature of corruption are built around the notion of legality, collective interests and public opinion; the perspective focused on breach of legality appears to be preferable, because corruption always reveals a betrayal of public tasks[9].

Bribery in public procurement cycle represents a collective problem that needs to be addressed not just with legal measures, but also with moral ones[10].

First of all, there is a shortage of reliable data about this subject in Italy, because the research is done in an hidden market; corruption has been defined as a karstic river[11], that fades in and out, which it is difficult to track the flow.

The figures about corruption provided by Transparency International cannot be used to give us a clear framework, because

[8] This theory has been developed by J.M. Clark, *Toward a concept of workable competition*, in 30 The American economic review 241 (1940) and is quoted by A. Police, *Tutela della concorrenza e pubblici poteri* (2007), 2.

[9] This interpretation dates back to a sentence issued by *Segunda Sala del Tribunal Supremo de España*, on 20 September 1990, under which corruption represents a betrayal of loyalty and probity related to public tasks; M. Borgi, *Droits de l'homme: fondment universal pour une loi anticorruption; le case de la Suisse*, in M. Borgi e P. Meyer-Bisch (eds.), *La corruption. L'envers de droits de l'homme* (1995), 4, corruption is the product of an inverted ethics; S. Rodotà, *Elogio del moralismo* (2011), 32, corruption is the death of public morality; F. Manganaro, *Il contrasto alla corruzione in materia di contratti pubblici*, in 11 Giustamm.it (2014), corruption is the crime committed by the heathens; B.G. Mattarella, *The Italian efforts on anti-corruption*, in G.M. Racca and C.R. Yukins (eds.), *Integrity and efficiency in sustainable public contracts: balancing corruption concerns in public procurement internationally* (2014), 61; E. Auriol, *Corruption in procurement and public purchase*, in 24-5 International Journal of Industrial Organizations 867 (2006); Z. Hessami, *Political corruption, public procurement, and budget composition: Theory and evidence from OECD countries*, in 34 European Journal of Political Economy 372 (2014).

[10] See A. Pajno, *Crisi dell'amministrazione e riforme amministrative*, in 3-4 Riv. it. Dir. pubbl. com. 582 (2017), the fight against corruption is extremely important because it intersects the two main issues of administrative law nowadays, that are regulatory simplification and restarting the authority of the administration.

[11] This metaphor is proposed by E. Guastapane, *Per una storia della corruzione nell'Italia contemporanea*, in G. Melis (ed.), *Etica pubblica e amministrazione. Per una storia della corruzione nell'Italia contemporanea*, cit. at 3, 20.

they are ontologically subjected to rapid changes not linked to objective reasons[12].

Corruption represents an imponderable issue, that is undetectable and intangibile like a "fine dust[13]"; data about corruption are marked by a genetic approximation, so it is difficult to have a real perception of this phenomenon[14].

Recently, however, it has been released an interesting research that breaks down the tender procedure into different stages in order to identify a truthful marker on the basis of an algorithm[15].

The issue investigated unveils its polisemic character; the present work will analyze the so-called grey corruption, which goes beyond the traditional and criminal notion and corresponds to "*maladministration*[16]", meaning an improper deflection of the public decision-making process.

Corruption undermines confidence of foreign investitors and has a negative impact on free competition[17]. In the field of public procurement, corruption is developed in the so-called agency relationships, that is, the external one, between the public administration and the private company, and the internal one,

[12] See P. Piras, *Il buon andamento nella pubblica amministrazione tra etica pubblica e corruzione: la novella del nemico immortale*, in 1 Dir. econ. 36 (2015), values of barometer of corruption are characterized by a wide range of imprecision.

[13] See A. Vannucci, *Il lato oscuro della discrezionalità. Appalti, rendite e corruzione*, in G.D. Comporti (ed.), *Le gare pubbliche: il futuro di un modello* (2011), 291, bribery is a ductile and polymorphic trend, that shows an impressive adaptability to different legislations.

[14] For a useful overview, see M. Gnes, *Italy*, in *Anticorruption strategies within the competences of the supreme audit institutions in the European Union* (2006), 283.

[15] About this issue, see, G. Arbia, *Aspetti statistico-metodologici nella costruzione di indicatori di corruzione e nella valutazione della loro efficiacia*, in B. Ponti and M. Gnaldi (eds.), *Misurare la corruzione oggi. Obiettivi, metodi, esperienze* (2018), 22.

[16] S. Cassese, *"Maladministration" e rimedi*, in 5 Foro it. 243 (1992); F. Merloni, *Controlli sugli enti territoriali e maladministration*, in 5 Le Regioni 847 (2009).

[17] Reference is made to a concept of market made by a dense series of relations, in this regard, see G. Corso, *Riflessioni su amministrazione e mercato*, in 1 Dir. amm. 4 (2016).

between the contracting authority and the public servant who is responsible for the procedure[18].

Anti-corruption measures can be summarised into two categories: hetero-imposed measures, like administrative transparency[19], and procedural solutions, aiming at guiding the administrative discretion. The present investigation will focus on the second aspect.

2. Anti-corruption measures and *codification à droit costant*: looking for a delicate balance

Isolating the reasons of corruption appears to be difficult, since they are connected with multiple factors.

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[18] See M. Clarich, *Considerazioni sui rapporti tra appalti pubblici e concorrenza nel diritto europeo e nazionale*, in 1 Dir. amm. (2016), 83; E. Morlino, *Fuga dalla responsabilità: gli appalti delle isituzioni europee tra regole e prassi*, in 2 Giorn. Dir. amm. 161 (2018).

[19] See M. Lunardelli, *The reform of legislative decree no. 33/2013 in Italy: a double track for transparency*, in 1 Italian Journal of Public Law 143 (2017); E. Carloni, *Fighting corruption through administrative measures. The Italian Anticorrpution policies*, in 2 Italian Journal of Public Law 282 (2017): "In term of transparency, the Italian experience is certainly of interest: the Italian regulation of "total transparency" creates a condition of widespread disclosure that is consistent with the cognitive dynamics of the internet, and that is notable for its immediacy, standardization, reusability, and easy accessibility, albeit within the limits of only involving information that is subject to a system of complusory publication. Each administration, with its specific transparency plan, is required to implement these publication requirements: the instituional website of every public administration in Italy therefore features a transparent administration section, which provides information about the organization, its activities, and the use of resources. It deserves attention the fact that, with the most recent legislative changes, this approach of transparency through the institutional websites of each administration, is supported (and partly replaced) by the increasing use of centralized databases accessible by anyone"; A. Simonati, *La ricerca in materia di trasparenza amministrativa: stato dell'arte e prospettive future*, in 2 Dir. amm. 311 (2018); I. Georgieva, *Using transparency against corruption in public procurement. A comparative analysis of the transparency rules and their failure to combat corruption* (2017), 259: "transparency emerged in response to society's need to fight corruption. It reflects the public's right to have access to a certain level of information on norms, rules, procedures and regimes and the actions of participants, presented in an understandable and clear manner; the information provided should at all times be sufficient for monitoring, verification and assessment".

First of all, the fragmentation of public demand transferred to several contracting authorities makes the legal instruments of monitoring difficult.

Another cause of corruption is considered to be the so-called "elephantitis regulation[20]", also known as "normative hypertrophy[21]"; the term is used to describe the great amount of laws dealing with public procurement, with transitional rules becoming definitive and forming a disproportionate number of rules. Infact, it has been highlighted that many rules and the inconsistency of laws feed corruption.

In order to find a remedy to this problem, during the past two decades administrative law has experimented a legislative technique called *codification à droit constant*[22], insipired by the French law.

This form of law-marking - that characterises the current Italian code of public procurement - leads to a temporary balances and carries out legislative microsystems, that are independent and autonomous.

In other words, the guarantee of formalism and the effectiveness of substantialism have both costs and benefits, this is the reason why it is appropriate to find a long-term balance.

These remarks have consequences on the lack of balance between repression and prevention in the anti-corruption

[20] On this topic, see M. Clarich and B.G. Mattarella, *Leggi più amichevoli: sei proposte per rilanciare la crescita*, in 2 Diritto e processo amministrativo 399 (2011), direct and indirect costs increase because the uncertainty resulting from unstable legal regimes and the excessive number of the law becomes a problem. The sacrifices and the constraints for firms must be reduced to a minimum. Furthermore, there is the problem of the poor quality of legislation, with a large number of transitional, urgent and not direclty applicable dispositions. A solution would be the use of the so called 'sunset law', that have an automatic expiry date. About this solution, see B. Baugus and F. Bose, *Sunset legislation in the States: balancing the legislature and the executive* (2015), 4.

[21] A. Di Mucci and D. Provvidenza Petralia, *Il principio di trasparenza tra ipertrofia regolamentare e debolezze del controllo sociale: il caso degli obblighi pubblicitari nel settore dei contratti pubblici*, in 4 Federalismi.it (2016), 2.

[22] See M. Ramajoli, *A proposito della codificazione e modernizzazione del diritto amministrativo*, in 2 Riv. trim. dir. pubbl. (2016), 362, the abandoment of the classic form of codification drove the administrative law to use this technique to legislate; G. Napolitano, *Il codice francese e le nuove frontiere della disciplina del procedimento in Europa*, in *1 Giorn. dir. amm.* (2016), 5.

measures[23]. All the rules amongst the various codes which have been adopted to fight corruption were taken without a long-term vision; on the contrary, they were approved on the emotional tide of judicial reporting.

These consideration impose to analyse the present issue in a chronological order.

2.1 A well known enemy: administrative discrection in Merloni-law and in decree no. 163/2006

As it has been analysed in the previous paragraphs, principles that inspired the proposal for amendments to public procurement law were not marked by uniformity.

The only constant finding in the various laws is the absence of a chapter of the laws entirely dedicated to anti-corruption measures.

In Italy, after the well-known *"Tangentopoli"* scandal, it has been commonly held that it was necessary to restict administrative discretion and was desirable to use the standardizations of procurement rules[24].

The Law no. 104 of 11 february 1994, also known as Merloni-law, was promulgated in a climate of distrust of public authorities and there was the will not to leave to the public procurement system the power to choose its private contractor.

This law, based on transparency and timeliness of public action, was founded on two wrong ideas.

First of all it was considered that corruption was more developed at the stage of the award of the public contract, than in other stages; among other things, this convinction was not rooted on any data or long-term studies.

In reality, the most permeable phase to bribery is considered to be the performance of the contract, because is less burdened by the paradigm of transparency[25].

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[23] From a historical perspective, see A. Algostino, *Prevenire o reprimere? Un dibattito parlamentare di fine Ottocento*, in 2 Dir. pubbl. (2015), 509.

[24] On this point, see K. Hunsaker, *Ethics in public procurement: buying public trust*, in 9 Journal of Public Procurement (2009), 411.

[25] F.J. Vazquez Matilla, *The modification of public contracts: an obstacle to transparency and efficiency*, in G.M. Racca and C.R. Yukins (eds.), *Integrity and efficiency in sustainable public contracts: balancing corruption concerns in public procurement internationally* (2014), 275; G.M. Racca, R. Cavallo Perin and G.L.

Furthermore, it was assumed that administrative discretion was itself a source of corruption[26], and therefore, it was necessary to limit the powers of contracting authorities during the award phase[27].

However, the decision to deprive the public administration of the discretionary power determining, infact, only a noticeable loss of efficiency, without having good results in the fight against corruption[28].

On the basis of a theory, developed by some economists, called "adverse selection[29]", the replacement of discretionary power with predefined template for the public awards can generate negative effects on the whole administrative action.

Albano, *Competition in the execution phase of public procurement*, in 41 Public contract law journal (2011), 89, usually, corruption in the execution phase manifests itself through the wide category of subcontracts; G.M. Racca and R. Cavallo Perin, *Material amendments of public contracts during their terms: from violations of competitions to symptompts of corruption*, in 8-4 European Procurement & Public Private Law Review (2013), 283, "in order to safeguard the principles of non-discrimination, transparency and competition, the European Court of Justice (ECJ) limited the possibility to change the terms of the procurement after the award. The ECJ maintained that material amendments are those modifications beyond the scope of the awardered contract that bidders could not have reasonably anticipated at the time of the original award when they joined the competition".

[26] On this issue, G.D. Comporti, *Lo Stato in gara: note sui profili evolutivi di un modello*, in 2 Dir. econ. (2007), 231, a costant finding into italian law with regard public procurement is the lack of trust in discretionary.

[27] M. Dugato, *Organizzazione delle amministrazioni aggiudicatrici e contrasto alla corruzione nel settore dei contratti pubblici*, in 3 Munus (2015), 667, the rigid procurement process is an obstacle to the investigations, the strict compliance of the formal rules prevented any substantial checks.

[28] G. Fidone, *Lotta alla corruzione e perseguimento dell'efficienza*, in 3 Riv. giur. Mezz. (2016), 753 ff.; C. Colosimo, *L'oggetto del contratto, tra tutela della concorrenza e pubblico interesse*, in G.D. Comporti (ed.), *Le gare pubbliche: il futuro di un modello*, cit. at 13, 65, to prevent discriminatory decisions was adopted a model called "command and control", to track thoroughly the administrative action.

[29] See J.J. Laffont and J. Tirole, *Adverse selection and renegotiation in procurement*, in 4 The review of economic studies (1990), 597.

In the case of particularly complex call for tenders it is necessary to use of flexible procedures to fill the cognitive gap suffered by the contracting authority[30].

In the law no. 104 of 11 February 1994, the legislator had to balance out flexibility and velocity of the procedure, on the one hand, and rigour and transparency, on the other hand[31].

Moreover, together with this law it was set up a widespread monitoring system managed by the supervisory indipendent authority for public procurement.

This regulatory framework caused a protectionist restrictions on the procurement market, cheating on the pro-competitive pressure originating from European Community. Following the adoption of the European Directives no. 17 and 18 of 2004, the legislative decree no. 163 of 12 April 2006, also-known as "Code on public works, service and supply contracts", failed to transpose the principles of flexibility set out in the European directives and disappointed the high expectations that surrounded its promulgation[32].

The several amendments that were led an influential expert to define this Code a "perpetually unstable legal framework[33]".

The spread of the so-called "emergency culture" justified the application of simplified calls for tenders which were not subjected to any control[34].

The decennial validity of the legilslative decree no. 163 of 12 April 2006 was characterized by several interpretative judgements issued by the Court of Justice of the European Communities and by the Italian Council of State that, as a result,

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[30] R. Burguet and Y.-K. Cee, *Competitive procurement with corruption*, in 1 The RAND Journal of economics (2004), 50, showed that with complete information and no corruption the efficient firm will win the contract for sure.

[31] For a thorough analysis see M. Clarich, *La legge Merloni tra instabilità e flessibilità*, in Corr. giur. (2002), 1400.

[32] R. De Nictolis, *Il nuovo codice dei contratti pubblici*, in Urb. e app. (2016), 504.

[33] G. Palma, conclusion to the conference '*Anticorruzione e trasparenza negli enti locali*', held in April 2016 in Torre del Greco; M.P. Chiti, *Il sistema delle fonti nella nuova disciplina dei contratti pubblici*, in Giorn. dir. amm. (2016), 436, originally it was a synthetic law, increased after three corrective decrees.

[34] D. della Porta and A. Vannucci, *Corruzione politica e amministrazione pubblica. Risorse, meccanismi, attori* (1994), 66, what constitutes an emergency is a vague concept.

have complicated the legal framework, instead of making it simpler.

In 2012 the law no. 190 was adopted, laying down rules for the prevention and punishment of corruption and illegality in public administration; the law required a total disclosure for the phase of the award of public contracts and enlarged the list of crimes that leading to unilateral termination of contracts by the administration.

Thereafter, the decree law no. 90 of 24 June 2014, then converted into law no. 114 of 11 august 2014, eliminated the supervisory indipendent authority for public procurement and introduced the new anti-corruption authority.

In this chaotic legal framework, and in order to traspose European Directives no. 23, 24 and 25 of 2014, Italy decided, instead of amending the previous code, to re-write a brand new one.

2.2 Code of 2016 and anti-corruption measures "out of competition"

The promulgation of the legislative decree no. 50 of 18 April 2016 completely changed the system of legal sources for the tendering of public contracts, in a public atmosphere characterized by a shared sense of willingness to contrast corruption.

Firstly, it was recognised how important the execution phase was, because the anti-corruption authority held for the first time a supervisory power over the so-called "variants in progress" of the object of the contract.

In order to tackle the fragmentation of the public demand, it was set an accreditation system for the procuring entities, subject to a positive assessment released by anti-corruption authority.

It is widely felt that the new anti-corruption authority has too many tasks, such as the enactment of guidelines, in addition to the traditional supervision and control tasks.

Infact, this new code provides for a rating of legality for the enterprises that wish to participate to public calls for tenders and upgrades the monitoring system for abnormally low tenders.

The whole legal framework for the award of public contracts is marked by the total disclosure of tender acts, because,

with the decree no. 33 of 14 march 2013, administrative transparency has been subject to a "genetic mutation[35]".

After the enactment of the legislative decree no. 97 of 25 May 2016, that introduces a corrective to the existing legal framework (the so-called Italian Freedom of Information Act), the issue of the right to administrative information - involving also public transparency - paradoxically appears to be less clear[36].

The excessively high area dedicated to anti-corruption measures in the new public procurement code makes the other aims appearing as less relevant; the law is inspired by the "culture of widespread mistrust that is the precursor of authoritarianism[37]".

However, administrative transparency can be cateogorised as an hetero-imposed measures, that has an impact on the administrative organization too[38].

The visibility of the award acts is an essential precondition useful to avoid corruption development but it does not have an impact on the decision-making process.

In Italy, anti-corruption instruments constitute a "confused patch-work[39]", unable to adapt to the variability of occurrences.

A possible solution is a kind of procedural one, consisting of an ideal declination of administrative discretion, in order to guide public choices to best results.

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[35] F. Patroni Griffi, *La trasparenza della pubblica amministrazione tra accessibilità totale e riservatezza*, in 8 Federalismi.it (2013), 3.

[36] See G. Gardini, *Il paradosso della trasparenza in Italia: dell'arte di rendere oscure le cose semplici*, in Federalismi.it (2017).

[37] Interview with S. Cassese, posted in the newspaper 'Il Foglio' on 24 january 2017.

[38] On this topic, see F. Fracchia, *L'impatto delle misure anticorruzione e della trasparenza sull'organizzazione amministrativa*, in 3 Dir. econ. (2015), 483, the two main action lines are the risk assessment and the administrative transparency; J.C. Bertot, P.T. Jaeger and J.M. Grimes, *Using ITCs to create a culture of transparency: E-government and social media as openness and anti-corruption tools for societies*, in Government Information Quarterly (20109, 264; T.T. Lennerfors, *The transformation of transparency on the act on public procurement and the right to appeal in the context of the war of corruption*, in Journal of Business Ethics (20079, 381.

[39] G. Sirianni, *Etica pubblica e prevenzione della corruzione: il problema del personale politico*, in Dir. pubbl., (2014), 934.

3. Multilayer discretion: a procedural solution

Administrative discrection, defined as "a permanent nagging worry[40]" for legal theorists, must be scrutinized by the parameters of proportionality and appropriateness[41].

Originally, in the sector of public procurement, discretion power was polarised around the only notions of auction and negotiation because the contracting authority could not select a middle way[42].

In administrative law, there are areas where competition and discretionary are antithetical concepts, as in the case of the so-called not-discretionary authorizations, but, in the case of public contracts, discretionary represents an incentive to competition[43].

Administrative discretion represents a multi-faceted power, in which the area of evaluation cannot be separated from the factual aspect[44].

In order to eliminate the options marked by corruption from the potential decisions, it is necessary to graduate the public power as to reach to a reasonable and balanced weighting between the various interests; this means that discretionary may not turn to be a full delegation with unrestricted powers for the contracting authority.

In view of the consideration made above, in any public decision there is an intangible decision-making core not subjected to any legislative influences[45].

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[40] S. Cassese, *Le basi del diritto amministrativo* (2000), 444.

[41] In a broad sense, see A. Orsi Battaglini, *Attività vincolata e situazioni soggettive*, in 1 Riv. trim. dir. proc. civ. (1988), 3, the exercise of administrative power is always supplemented by general clauses.

[42] M. Ricchi, *Negoauction, discrezionalità, dialogo competitivo e il nuovo promotore*, in G.D. Comporti (ed.), *Le gare pubbliche: il futuro di un modello*, cit. at 13, 145.

[43] F. Trimarchi Banfi, *Il principio di concorrenza: proprietà e fondamento*, in Dir. amm., 15 (2013), in the italian legal framework, administrative law seems to be guided by the principle of competition.

[44] On this point, see M. Clarich, *Contratti pubblici e concorrenza,* in Astridonline.it (2015); S. Civitarese Matteucci, *Funzione, potere amministrativo e discrezionalità in un ordinamento liberal-democratico*, in 3 Dir pubbl. (2009), 769, administrative discretion shall be composed of freedom, vagueness of law and a power conferred by an authority.

[45] This theory was drawn up by A. Orsi Battaglini, *Alla ricerca dello Stato di diritto*, (2005) 124, discretionary is always suspended between legality and

3.1 Instrumental discretion: a variable-geometry structure

Between the good side and the bad side of discretionary there are several actions that are not crimes but that can be measured by the benchmark of administrative corruption, that is the diversion of public power for private gain.

The full extent of administrative power in public procurement is in the phase of choice of private contractor and decreases during the execution phase.

During the public tender, the contracting authority can increase or restrict the interpretation of the subjective requirement or of the award criteria; this power is called instrumental discretion[46].

Instrumental discretion, from administration point of view, represents a self-imposed set of rules and it is defined as a "regulatory and decreasing power[47]".

The flexibility held by the contracting authority on the drafting of the invitation to tender may also be addressed for the identification of anti-corruption measures, additional to the legislative ones.

The graduation of the administrative decisions has to be ensured through a continuous flow of information between the administration and the firms; the upgrading of the cooperation between the public and the private sector can reveal risks of corruption in advance and more efficiently.

An interesting solution, adopted by legislative decree 50 of 18 April 2016 and just planned for public-private partnership, is the so-called strategic discretion, that enables the administration to amend the requirements for tender in accordance to what the market offers.

It is not entirely illogical to use this flexibility to fight corruption and, more generally, market distortions.

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substance, because there is always a mutual exclusion between power and consensus.

[46] See P. Portaluri, *La discrezionalità strumentale della stazione appaltante e il modello organizzativo ex d.lgs. 231/01*, in 2 Riv. giur. edil. (2012), 91, it is necessary to ensure an optimal inspection over the economic processes.

[47] S. Vinti, *I procedimenti amministrativi di valutazione comparativa concorrenziale: la diversificazione delle regole e la tutela dei principi* (2002), 1195.

3.2. Administrative equity and public ethics: the resposible discretion

The failures of the legislative measures impose to move the field of research on an extra-legal one, that involves topics like public ethics and equity[48], an issue consistently ostracized by administrative law[49].

Discretionary can be a possible source of corruption or, alternatively, a virtuous instrument for honorable administrations, through the promotion of ethical and moral values.

In the Italian legal framework, the discussion about equity in adiministrative law was affected by an original perspective drawn up by Cammeo[50], according to whom "equity can regulate administrative discretion[51]".

In the present work the issue of collective ethics is analysed; this issue has been declined as administrative ehtics or ehtics in government[52].

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[48] M.S. Giannini, *L'equità*, in *Archivio giuridico Serafini* (1941), 39, administrative equity can be interpreted as bonhomie, clemency, moderating the legal obligations or referral to ethics and moral values.

[49] L.R. Perfetti, *Discrezionalità amministrativa, clausole generali e ordine giuridico della società*, in 3 Dir. amm. (2013), 374.

[50] F. Cammeo, *L'equità nel diritto amministrativo*, in *Annuario della Regia Università di Bologna* (1924) 16; F. Merusi, *Sull'equità della pubblica amministrazione e del giudice amministrativo*, in 3 Riv. trim. dir. pubbl. (1974), 359, equity can integrate the legal framework; for a complete analysis, see. F. Merusi, *L'equità nel diritto amministrativo secondo Cammeo, alla ricerca dei fondamenti primi della legalità sostanziale*, in Quaderni fiorentini per la storia del pensiero giuridico moderno (19939, 413; K.G. Dehnhardt, *The ethics of public service: resolving moral dilemmas in public organizations* (1988), 3, "not only does a theoretical framework for administrative ethics need to be developed, but there is also a need to outline the pratical purposes and resulting research can be put. Four such purposes can be identified: to emphasize the need for ethical deliberation in all administrative decisions, to provide procedural and normative guidance for administrators in making those decisions, to foster organizational environments, to aid thhe process of holding administrators and public administration accountable"; D. Rendleman, *The triumph of equity revisited: the stages of equitable discretion*, in 15 Nevada Law Journal (2015), 1397, "equitable discretion shifted from discretion to arbitrariness and corruption".

[51] For a critical analysis, see A.R. Leys, *Ethics and administrative discretion*, in 1 Public Administration Review (1943), 10.

[52] J.S. Bowman, *Ethics in government: a national survey of public administrators*, in 3 Public Administration Review (1990), 345; J.S. Bowman and R.L. Williams, *Ethics in government: from a winter of despair to a spring of hope*, in 6 Public Administration Review (1997), 517; the first studies on public ethics were

Administrative equity serves as a bridge that connects collectively determined rules and the reality of a particular case. It refers to the substantive principles and norms that may justify individual exceptions to rules of general applicability[53].

The term equity refers to ethical and moral values assuming tasks that the law is unable to fulfil[54]; the notion of equity can synthesize prevention and suppression of corruption into just one measure, that is to raise the moral standards for public tenders.

The issue of public ethics is closely linked to the notion, drawn up by the German doctrine, of *regulierte selbstregulierung*[55], which includes codes of conduct for public employees and the adoption of best practices by public administration.

There are two different models of public ethics: a democratic *ethos*, which includes loyalty and political neutrality and a burocratic *ethos*, which includes the value of social equity[56]. The last model can be used by contracting authorities to prevent corruption during the entire stage of invitation to tender.

In other words, public ethics shall supervise the grey area between corruption and legality[57], through the so-called "moral suasion[58]".

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conducted in Great Britain, in 1880s, for all, see D.B. Eaton, *Civil service in Great Britain: a history of abuses and reforms and thir bearing upon American politics* (1880); R. Cavallo Perin, *L'etica pubblica come contenuto di un diritto degli amministrati alla correttezza dei funzionari*, in F. Merloni and R. Cavallo Perin (eds.), *Al servizio della nazione: etica e statuto dei funzionari pubblici* (2009), 159; H.G. Frederickson and J.D. Walling, *Research and knowledge in administrative etichs*, 2nd edition, in T. Cooper (ed.), *Handbook of Administrative Ethics* (2001), 53, "what we need to know about administrative ethics is traeted in four categories: knowledge of values, standards, context and behavior".

[53] A.C. Aman JR, *Administrative equity: an analysis of exceptions to administrative rules*, in 277 Duke Law Journal (1982), 276, "the inability of judicial review of administrative action to provide individualized relief is attributable to established constitutional and administrative law doctrines. The use of a rational-basis test almost ensures that the statute will be upheld".

[54] See M. Golden e L. Picci, *Corruption and the management of public works in Italy*, in S. Rose-Ackerman (ed.), *International Handbook of economic corruption*, 1st ed. (2006), the good regulation is not enough in order to prevent the spread of corruption.

[55] H. Stockaus, *Regulierte Selbstregulierung im europäischen* (2015).

[56] This theory was drawn up by J.A. Rohr, *Ethical issues in french public adminstration: a comparative study*, in 4 Public Administration Review (1991), 283.

[57] See N. Pasini, *Etica e pubblica amministrazione: analisi critica di alcune esperienze straniere* (1996), 31, public ethics can minimise the risks of corruption,

In the sector of public contracts, the adoption of this compliance and ethics program must be oriented to a responsible and aware decision by public administration.

The only structural limit of this solution is represented by the difficulty of using this equitable discretion outside the award phase, like, for example, in the phase of execution where the space for discretion is extremely limited.

4. Collaborative oversight procedure: relevant data from the annual report of the National Anticorruption Authority

In June 2018, the National Anticoruption Authority (namely, *ANAC*) submitted to the Italian Republic Senate the annual report for 2017 as provided by the article no. 213, subparagraph 3, letter e) of the current public procurement code.

The entire document presents and describes the several activities provided by the Authority and it is subdivided into fourteen chapters; the chapter no. 8 of the report is dedicated to the tasks related to the special and the collaborative supervision[59].

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because the complexity of public contracts impose to give more autonomy to the contracting authorities.

[58] R.W. Cox, S. Buck and B. Morgan, *Public administration in theory and in practice* (2015), 23.

[59] About this issue, see the document published by the European Commission, *Voluntary oversight on procurement procedures*, in *www.ec.europe.eu,* 2017, 3, "the precise scope of oversight generally includes the legality, tranparency and efficiency of procurement. Altough the main objective of oversight mechanism is ultimately to prevent and deter corrupt practises in procurment, it can bring a much wider range of benefits, such as increased transaprency and accountability, enhanced trust in authorities and government contracting, contributing to a good reputation among contracting authorities, saving costs and improving competition. In principle, it can be used for any type of public procurement; however, from a cost-effectiveness point of view, it is often used for high-risk or complex procurement, major risk project, or projects with high national or regional public interest and sensivity, where an addiotional layer of control is needed to ensure that public funds are handled correctly". With regard to Italy, this document points out that "the *ANAC* oversight an be imposed by law or may be requested by the contracting authority for a specific case. Typically requests are made for priority procurement procedures, such as major events or large-scale infrastracture projects. This marks a cultural shift, as collaborative suoervision is focused on preventive action in reducing risks in the integrity ofthe procurement process,

This part of the investigation is not dedicated to an overall analysis of the supervisory tasks held by *ANAC* in the area of the award of public works contracts but it aims to analyze a new operational mode that favours a constant cooperation between the procuring entities and *ANAC*. Furthermore, the legal arrangement under investigation in this subsection confirms the interpretative tendency, according to which the overall activity carried out by ANAC is marked by the principle of loyal cooperation, that is one of the leading principle under Italian adminsitrative law[60].

After the entry into force of the Code of 2016, the legal arrangement of the collaborative oversight is regulated by the article no. 213, subparagraph 3, letter h) of the legislative decree no. 50 of 2016; this rule provides that the Authority shall carry out supervisory activities through the conclusion of agreement protocols (memoranda of understanding) with the contracting authority for contracts of specific concern. In addition, on 28 June 2017, *ANAC* adopted a specific settlment act[61], published on the Italian Official Journal no. 178, that restricts the options of applying this kind of supervision.

In particular, the article no. 4 of this act enumerates the preconditions for the activation of the collaborative oversight procedure, among which it is worth mentioning the tender procedures in the context of extraordinary programmes at the occasion of major events, in the occasion of natural hazards and for the implementation of large-scale infrastructure. However, save in the cases provided for the abovementioned article no. 4, *ANAC* may dispose a supervision procedure, in front of high-level corruption index or during abnormal situations that could affect the smooth conduct of the tendering procedure.

Unlike the traditional forms of cooperation, this collaborative oversight allows the Authority to deter and prevent

instead of sactioning illicit behaviour *ex post*. Indeed, to underline the collaborative element of this supervision, no sanctioning by *ANAC* is foreseen during the process unless formalised procurement documentation exhibits illegal elements".

[60] About this issue, F. Giuffrè, *Le autorità indipendenti nel panorama evolutivo dello stato di diritto: il caso dell'Autorità nazionale anticorruzione*, in I. Nicotra (ed.), *L'Autorità nazionale anticorruzione. Tra prevenzione e attività regolatoria* (2016), 9.

[61] The entire document is available on the website *www.anticorruzione.it*.

unlawful activities *ex ante*, through the assessment of specific indicators.

The collaborative oversight procedure shall be conducted since the publication of the invitation to tender until the signature of the contract and it starts after the dispatch of the tendering procedure records on the part of the procuring entity; the Authority shall make its observations that have non-binding effectivness, because the administration can disregard them through the adoption of a well-founded act. Neverthless, if the Authority takes the view that the failure to make the adjustment by the contracting authority is particulary serious can unilaterally terminate the agreement.

It seems appropriate to refer briefly on the procedural aspects and the first data provided by *ANAC*, in relation to administrative dispute deflation too, and then to look at the experience of EXPO 2015.

4.1 Procedural aspects and impact on legal disputes

The entire framework of the collaborative oversight system is based on a kind on a reticular and continuous cooperation between the Authority and the entity subjected to this monitoring system.

A first interesting profile concerns the phase of the initiative, where the same procedure is activated in accordance with an application drafted by the contracting authority. The template set out seems to correspond to a *sub condicione* action, because for the completion of the application it is necessary an internal act by the board of *ANAC*.

The need to submit the iniative act to the board of *ANAC* seems to corrispond to an eligibility check, in order to ensure that the application (and the relative tendering procedure) complies with the conditions laid down for using the legal instrument under investigation (mentioned in the preceding subparagraph). However, because of the extremely vague statement of the current Regulation, it is unclear what are the parametres that shall be evalueted by *ANAC* in order to allow or to deny the access to collaborative oversight system and, therefore, it is uncertain the margin of discrection held by the board of *ANAC* in this instance. The circumstance that the conclusion of a Memorandum of Understanding (MoU) should be regarded as a prerequisite for the

implementation of this kind of supervision does not remove uncertainty factors[62].

The cooperative instrument studied at this point is reflected in consultative activities which concern both general situations and specific acts; the collaborative oversight, in such a way, turns into a preliminary and essential evaluation activity.

After the transmission of the tendering procedure acts (in particular, a draft version of the act) at the hands of the contracting authority, *ANAC* shall deliver an opinion in the event that there are some irregularities or if the acts transmitted do not comply with the Public Procurement Code provisions; after the view put forward by *ANAC* there are two alternate options.

In the event that the procuring entity will accept the observations made by *ANAC*, the tender acts need to be aligned with the advice; otherwise it starts an informations exchange between ANAC and the contracting authority which does not slow down the tender procedure; this regulatory option is fully compatible with the voluntary structure of the legal tool. If the procuring entity intends to deviate from this recommendations shall submit several well-founded observations before the adoption of the further tendering procedure acts.

The monitoring system defined in this way complements a traditional 'command and control' approach[63] with an integrated template for action on grounds of an ongoing relationship and an

[62] In this regard, see E. Frediani, *Vigilanza collaborativa e funzione "pedagogica" dell'ANAC*, in 23 Federalismi.it (2017), 6.

[63] S. Cassese, *The rise of the Administrative State in Europe*, in 4 Riv. trim. dir. pubbl. (2010), 1007, "the three paradigms of the administrative States have changed: the command and control paradigm, the unity paradigm and the paradigm of the administration as a higher body"; S.W. Schill, *Transnational legal approaches to administrative law: conceptualizing public contracts in globalization*, in 1 Riv. trim. dir. pubbl. (2014), 7, "Globalization, privatization, and new instrument of governance are bringing about fundamental strucutral and instituional shifts in respect of the traditional ordering paradigms of administrative law, that is, hierarchy (or command-and-control) as a principle of administrative law-relations and a method of governance, on the one hand, and the intrinsic connection between administrative action and domestic law, on the other. In that context, globalization leads to the dissolution of the most fundamental categorizations used to structure and define fields of law or even entire legal orders, namely the dichotomies of national and international law, on the one hand, and public and private law, on the other".

uninterrupted flow of informations bewtween *ANAC* and the procuring entities.

As a result, the aim of this legal tool is to ensure the proper conduct of the competitive procurement operations through the overcoming of the classic monitoring paradigm to change the perspecitve resulting in an almost educational role[64] of *ANAC*.

This approach is entirely consistent with the search for procedural solutions through the enhancement of new paradigms of public action, in which the *ANAC* measures play an ancillary role throughout the whole tendering procedure.

In the first quarter of 2018, the Anticorruption Authority analysed the legal disputes related to the tendering procedures subject to collaborative oversight procedures. These data from *ANAC* have shown an over reduction of the legal disputes but above all the bulk of the administrative litigations ended with a judgment in favour of the public administration[65].

These data - even if they are not very indicative because they refer to a limited amount of time - reveal the potential deflectionary effects of this legal tool in any dispute related to the award of public contracts.

4.2 The experience of EXPO 2015

The Decree Law no. 90 of 2014 assigned to the president of *ANAC* special supervisory powers in order to ensure the maximum transparency of the activities linked to the achievement of the public works for the EXPO held in Milan in 2015; this experience represented the first practical application of the collaborative surveillance.

In particular, the society EXPO *PLLCs* (the publicy owned corporation that hosted the event) was obliged to trasmit the tender procedure acts to a task force unit established within *ANAC.* It is widely felt that this burdersome procedure did not slow down the execution time of the works for the EXPO[66].

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[64] E. Frediani, *Vigilanza collaborativa*, cit. at 62, 10.

[65] These data are contained in the annual report developed by *ANAC*, available on the website *www.anticorruzione.it*., 156 ff.

[66] On this issue, see S. Busetti and B. Dente, *La vigilanza collaborativa a EXPO Milano 2015, ovvero i vantaggi della complicazione*, in 1 Riv. ital. Pol. Pubbl. (2017), 19; J. Buggea, *Corruzione e grandi eventi*, in Special Issue of the Review 87 Dir. econ. (2015), 151. More generally, on the issue of major events, see R. Cavallo

These repeated interactions has ensured a strong degree of interdependence [67] among all the actors concerned which has encouraged the success of this template.

Furthermore, the lack of coerciveness of the acts has led to a shift in perspective of the classical paradigm of the administrative control system that gets reconsidered through the abandonment of the traditional surveillance pattern.

However, it is important to underline that the judgements about the event under investigation have not unanimously been positive, because some scholar asserted that the acceleration and simplification of the procedures relating to the EXPO held in Milan have caused several damages in terms of administrative effectiveness and, above all, have not led to tangible results as regards the fight against corruption[68]. From this perspective - and this point is entirely accetable - administrative simplification and fight against corruption are joint objectives.

After this first experience, this legal tool was applied to other major events, but will be required most meaningful data flows in order to make a balanced assessement about the real impacts of the collaborative surveillance.

5. Concluding remarks

Corruption in public procurement is a significative and strategic issue, that must be fought on many fronts and with multi-faceted measures. The uncertainty of data about corruption

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Perin and B. Gagliardi, *La disciplina giurdica dei grandi eventi e le olimpiadi invernali "Torino 2006"*, in 2 Dir. amm. (2012); G. Locatelli, G. Mariani, T. Sainati and M. Greco, *Corruption in public projects and megaprojects: there is an elefant in the room*, in 35 International Journal of Project Management (2017), 252, "The megaproject is a particular class of projects that shares most of the aforementioned characteristics. Megaprojects are very large investment projects that tend to be massive, indivisible, and long-term artefacts, with investments taking place in waves"; A. Benedetti, *L'eredità di "Expo" Milano 2015 e la disciplina dei grandi eventi*, in 1 Amministrare (2016), 7.

[67] See R. Axelrod and W.D. Hamilton, *The evolution of cooperation*, in 211 Science (1981), 1390.

[68] C. Taccola, *L'attività amministrativa in occasione di grandi eventi: istituti di semplificazione e accelerazione amministrativa*, in Special Issue of the Review 87 Dir. econ. (2015), 47.

makes it hard to set up appropriate law enforcement measures and data based on the perceived corruption are not reliable.

The total disclosure of the award acts is not enough because the law enforcement action must be conducted in respect of administrative discretion.

A result of the research showed that there is no more a systematic corruption but, instead, we are dealing with an individual trend.

The risk of corruption affects not only the contracting authority but also private entities holders of public tasks, like attestation entity, the so-called *S.O.A.*, *Società organismo di attestazione*.

The prevention of corruption implies a multi-faceted strategy, based on public access to documents; this renewed perspective is due to the failure of the previously in force control framework, maybe the most despised legal arrangement of Italian law.

Administrative transparency can be a tool for a great change, but in the execution phase is not as good as in the award one and cannot be a solution for every troubles of corruption. The best solution seems to be the use of administrative equity, by which the public decision-making process can become more clear and harder to be involved in risks of corruption, without undermining the administrative action efficiency.

The current anti-corruption plan into Italian law seems to be adequate - even if the reform that have occurred have undermined part of the original rigour – with a clear political choice preceded by studies and analyses, such as rarely happened before.

The cornerstone of the entire framework is the notion of prevention that is entrusted not only to *ANAC*, but every public administration must have an office dedicated to this task; in this context a key role is performed by the anti-corruption plans, that every administration has to drawn up, after having performed a risk maps[69].

[69] Please refer to R. Bartoli, *I piani e i modelli organizzativi anticorruzione nei settori pubblico e privato*, in 11 Diritto penale e processo (2016), 1507; C. Tubertini, *Piani di prevenzione della corruzione e organizzazione amministrativa*, in 3 JusOnline (2016), 135; G. D'Onza, V. Zarone and F. Brotini, *Le determinanti della "risk*

In order to limit the conclusion to the field of public contracts, it is appropriate to limit the recourse of emergency at the very most, trying to implement the already-existing legal tools.

In other words, the epocal change that has occurred in recent years gave us a comprehensive and appropriate template, with a significant reduction in the number of the procuring entities and many already-existing legal tools that need to be applied in a specific way, by reducing exceptions to a minimum.

The allocation of regulation and supervision tasks to *ANAC* provides to widen the scope of the discussion, in order to read the complex issue of corruption through an overall strategy gained, once in a while, in a mature and informed legal framework.

disclosure" nei piani anticorruzione: uno studio sulle amministrazioni pubbliche italiane, in 1 Azienda Pubblica (2015), 10.

THE U.S. FREEDOM OF INFORMATION ACT IN LIGHT OF THE 2016 REFORM: SOME THEORETICAL ISSUES

*Marco Lunardelli**

Abstract

The purpose of this Article is to analyze the U.S. federal Freedom of Information Act (FOIA) in light of the FOIA Improvement Act of 2016. The Article starts by looking over the FOIA as a model for other legal systems in administrative transparency. After outlining the history of the enactment of the FOIA, the inspection deals with possible reasons for the widespread success of the FOIA abroad. Furthermore, it leads to pinpointing some paradoxes deriving from the implementation of this model in other countries. Subsequently, the Article addresses the FOIA Improvement Act. Firstly, it overviews the amendments. Secondly, it renders an assessment of their implications for the FOIA. However, only the amendments more closely related to the disclosure of records and information are considered. Special attention is devoted to disclosure, meant as a general category encompassing both proactive disclosure – thus, a subcategory – and access upon request. The Article argues that it is incumbent on scholars to make sure that there be no confusion between those concepts. Finally, the codification of the presumption of openness and the amendment brought to Exemption 5 to the FOIA are also addressed. While the former issue appears to be less problematic from a theoretical perspective, the latter raises some issues especially as for the scope of the time limit to applying the exemption.

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1. Introduction

In the last few decades, transparency and access to records held by public administrations have gradually emerged as a need deemed essential by the vast majority of countries[1]. Even though this need leads to very different regulations, there is a statute that has been capable of influencing many legal systems all over the world and thus became a model internationally recognized as such: the U.S. federal Freedom of Information Act (FOIA)[2]. On

[1] See S. Cassese, *Tendenze e problemi del diritto amministrativo*, 54 Riv. trim. dir. pubbl. 906 (2004). See, also, G. Napolitano, *The Transformations of Comparative Administrative Law*, 67 Riv. trim. dir. pubbl. 1019 (2017), identifying transparency as one of the key elements of contemporary administrative law "at every latitude."

[2] See D.E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. Pa. L. Rev. 1105-1106 (2017), noting that, since most countries of the world

June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016[3] [hereinafter – FOIA Improvement Act]. It bought to completion a reform process that had begun a few years before[4]. This statute affected – with different degrees of intensity – the main elements composing the structure of the FOIA.

The purpose of this Article is to analyze the FOIA in light of the FOIA Improvement Act. The Article starts by inspecting the FOIA as a model for other legal systems in administrative transparency. The inspection is conducted through a two-phase process. First of all, it seeks to find out why the FOIA is capable of having such a widespread influence abroad. Beforehand, this stage requires to stress that the FOIA was enacted as a reaction against the preceding regulation in the matter. Furthermore, the inspection leads to pinpointing some possible paradoxes deriving from the implementation of this model in other countries, most of the times characterized by a different legal tradition. Subsequently, the Article analyzes the FOIA Improvement Act in order to advance some observations concerning its impact on the FOIA. Such assessment requires beginning with an overview of the amendments brought by the 2016 reform. The amendments affected multiple aspects of the FOIA. However, only those closely dealing with disclosure of records and information are taken into account here to ensure consistency with the subject of the Article.

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passed legislation inspired by the FOIA over the past quarter-century, this statute "has become one of the United States' leading legal exports abroad." See, also, L. Tai, *Fast Fixes for FOIA*, 52 Harv. J. on Legis. 456 (2015); A. Roberts, *Blacked Out: Government Secrecy in the Information Age* (2006), 15-17, relating this phenomenon to a democratization process that began to unfold after the end of the Cold War era. As for foreign scholars, see, e.g., D.U. Galetta, *Trasparenza e contrasto della corruzione nella pubblica amministrazione: verso un moderno panottico di Bentham?*, Dir. soc. 50 (2017).

[3] Pub. L. No. 114-185, 130 Stat. 538 (2016).

[4] The statute turns into law S. 337, which contained the FOIA Improvement Act of 2015, i.e., the previous version of the reform. In March 2016, Senators Cornyn and Leahy sponsored an amendment, S.A. 3452, which entirely replaced the text of the bill and formally changed the title of the statute. See 162 Cong. Rec. 41, S1508-1510 (Mar. 15, 2016). However, the original S. 337 – in turn – addressed issued that had been already brought up by previous bills. The Senate Report accompanying S. 337, indeed, clarified that it constituted "a continuation of the efforts [made] in the 113th Congress." S. Rept. No. 114-4, 114th Cong., 1st Sess., Feb. 23, 2015, 7.

Special attention is devoted to disclosure, meant as a general category that encompasses two institutions: proactive disclosure and access upon request. The former – in turn – has publication in the Federal Record as its own subcategory. It is argued that it is incumbent on scholars to make sure that there be no confusion between those concepts. Finally, the codification of the presumption of openness and the amendment brought to Exemption 5 to the FOIA are also addressed. While the former issue appears to be less problematic from a theoretical perspective, the latter raises some issues especially as for the scope of the time limit to which the application of the exemption is now subject.

2. The FOIA as a model

2.1. A brief history of enactment of the FOIA

The FOIA was signed into law by President Johnson on July 4, 1966[5] and has been amended several times over the years[6]. The stated purpose of the FOIA is to strengthen the citizens' right of access to records and information held by federal agencies. Congress deemed that this purpose could be achieved by amending section 3 of the Administrative Procedure Act (APA)[7], i.e., the section titled "Public Information" and devoted to access to administrative records[8]. Therefore, the FOIA was conceived of as a way to overcome the disappointing experience of the APA as far as administrative transparency was concerned[9].

Even though section 3 of the APA already implied – at least formally – the basic content of administrative transparency[10], it

[5] Pub. L. No. 89-487, 80 Stat. 250 (1966). It entered into force exactly one year later by means of a subsequent statute – Pub. L. No. 90-23, 81 Stat. 54 (June 5, 1967) – and has since kept its location at section 552, title 5, U.S. Code.

[6] See P.L. Strauss, T.D. Rakoff, C.R. Farina, G.E. Metzger, *Gellhorn and Byse's Administrative Law*, 11th ed. (2011), 506, underlining the fact that the FOIA has been amended more frequently than the other components of the legislation on the administrative procedure.

[7] Pub. L. No. 79-404, 60 Stat. 237 (Jun. 11, 1946).

[8] It may be detected here an ambiguity that has survived the enactment of the FOIA and still exists: the one concerning the distinction between the concepts of records and information.

[9] See, for instance, *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1262 (2011).

[10] I am referring to the distinction between access to documents and publicity or – in order to use terms that turn out to be more suited to the U.S. legal tradition

had three major flaws. Firstly, this section consisted of vague, generic clauses agencies and executive departments used to exploit to deny access to records almost freely, as Senate Report No. 813 of 1965 – the report accompanying the FOIA bill (S. 1160) – pointed out[11]. Paradigmatic thereof was subsection (c), which assigned agencies the power to deny access whenever they deemed certain information "confidential for good cause found". They were conferred wide discretion in responding to access requests and, accordingly, – as administrative practice demonstrated – tended to use section 3 of the APA "more as an excuse for withholding than as a disclosure statute."[12] Secondly, the same subsection mentioned above provided that only "persons properly and directly concerned" were entitled to gain access to agency records. It means that those persons could claim not a full right but rather a qualified interest[13] and thus found themselves having a weaker position in their relationship with the public authority. As has been correctly observed, this provision granted individuals not a right to know but a mere need to know[14]. Thirdly, individuals could not judicially enforce the access to records recognized by section 3 of the APA[15].

– between access upon request and proactive disclosure. In addition to regulating the former, indeed, section 3 established some obligations to publish information, imposed upon federal agencies. For an analysis of those obligations, see K.C. Davis, *Administrative Law Text*, 2nd ed. (1959), §§ 6.09-6.10, pp. 108-110.

[11] According to this report, section 3 of the APA was characterized by "vague standards – or, more precisely, lack of standards – […]." S. Rept. No. 813, 89th Cong., 1st Sess., in Subcomm. on Adm. Prac. and Proc. of the Senate Comm. on the Judiciary, *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, 93rd Cong., 2nd Sess., Comm. Print, 1974 [hereinafter – *1966 Source Book*], 40. See, also, *EPA v. Mink*, 403 U.S. 73, 79 (1973).

[12] S. Rept. No. 813, id., 38.

[13] See M.E. Halstuck, B.F. Chyamberlin, *The Freedom of Information Act – 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To*, 11 Comm. Law & Pol'y 522 (2006).

[14] See G.L. Waples, *The Freedom of Information Act: A Seven-Year Assessment*, 74 Colum. L. Rev. 898 (1974).

[15] As a Senate Report had pointed out in 1964, indeed, citizens seeking information in possession of agencies could not rely on any legislative remedy to challenge a denial, even when the agency decision was manifestly devoid of any piece of soundness. See S. Rept. No. 88-1219, 88th Cong., 2d Sess., in *1966 Source Book*, cit. at 11, 95. This critical issue is also detected by H.R. Rept. No. 1497, 89th Cong., 2nd Sess., *id.*, 26.

That the FOIA determined a sort of revolution – at least from a strictly theoretical perspective – in the matter of disclosure of agency records[16] is proved by the key elements of FOIA, as set forth by then Attorney General Ramsey Clark in the foreword to his 1967 memorandum illustrating the (essence of the) statute[17]. Firstly, access to agency records and publicity constitute "the general rule, not the exception"[18]. Consequently, by contrast, all matters and domains wherein access may be limited or excluded are to be considered exceptions to the rule. Secondly, the right of access is conferred upon any person[19]. Thirdly, the burden to prove that, in a specific case, the withholding of information – i.e., the application of an exemption – is legitimate lies on the agency and not on the requester[20]. Fourthly, those who deem a negative response to their request illegitimate are entitled to challenge it

[16] See A.M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. Rev. 971 (2006), stressing that under the FOIA, access requests have records and not information as their own subject.

[17] See *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (1967), iii-iv.

[18] Lorch, too, puts stress on this aspect. See R.S. Lorch, *Democratic Process and Administrative Law* (1969), 113.

[19] See K.C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 765 (1967), maintaining that from the expression "any person" it must be inferred that the agency decision to release or not the information sought by a requester may not depend – respectively – upon the existence or absence of a specific interest in gaining that information. This argument leads to a further step, expressly identifies by the Supreme Court: even if such an interest can be detected, it is irrelevant to the decision. Indeed, as meant by Congress, the FOIA assigns "any member of the public as much right to disclosure as one with a special interest [in a particular document]." *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U. S. 132, 149 (1975)). To put it differently, an individual may file a FOIA request – as Herz has pointed out – "for any reason or no reason at all." M. Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 Cardozo Pub. L. Pol'y & Ethics J. 582 (2009). Consequently, agencies are entrusted with a more limited amount of discretion than occurred under the previous regime in responding to access requests. *Id.*, at 583.

[20] See H. Rept. No. 92-1419, 92d Cong., 2d Sess., Administration of the Freedom of Information Act, Sept. 20, 1972, 10, in Subcomm. on Government Information and Individual Rights of the House Comm. on Government Operations and Subcomm. on Adm. Prac. And Proc. of the Senate Comm. on the Judiciary, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502). Source Book: Legislative History, Texts, and Other Documents*, 94th Cong., 1st Sess., Comm. Print, 1975, 10.

before a court. The FOIA, therefore, establishes a right to judicial protection[21]. By doing so, the statute ensures that access to records be effective[22]. Fifthly, the FOIA called for a drastic change in the mindset and approach of agencies – *rectius*, of their personnel – towards disclosure of records and information[23].

2.2. Reasons for usage of the FOIA as a model for other countries' legislation on transparency

As already noted above, the U.S. FOIA has had a major influence on transparency legislation all over the world. Why has it happened? Firstly, the U.S. Congress came first in establishing a right of access to administrative records endowed with such a wide scope as far as both subjective and objective entitlement are concerned[24]. Congress definitely deserves credit for that[25]. The only national legislation having (partially) similar content and preceding the FOIA is the Swedish one. As early as 1766, indeed, Sweden passed a statute regulating both the freedom of the press and a right of access to administrative records[26]. Despite being

[21] Waples has highlighted the pivotal role played by this right within the overall statute. See Waples, *The Freedom of Information Act*, cit. at 14, 908.

[22] This feature, which – as already noted – lacked under section 3 of the APA, proves the significant improvement brought in by the new legislation. As a result of the ability to use a judicial action – i.e., to file suit – whenever the right of access is deemed to have been unlawfully violated, the common individual seeking information – it has been emphatically observed – did not act any longer "[as] a mere suppliant" vis-à-vis the federal agency holding that information. B. Schwartz, *Administrative Law* (1976), 128.

[23] The aforementioned House Report No. 1419 of 1972 has characterized the FOIA as "milestone legislation" because of this very element. H. Rept. No. 92-1419, cit. at 20, 9.

[24] By this phrase, I mean to refer to the number of potential requesters, on the one hand, and the types of records requested or domains of administrative activity, to which the sought information may pertain.

[25] See P. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Playbacks of Legislating Democratic Values*, 33 Emory L.J. 657 (1984), according to whom the fact that by simply filing a FOIA request – i.e., by simply submitting an application – to a federal agency an individual acquires the right to access Government records turned out – at the time – "virtually unprecedented" in a legal system. See, also, H.N. Foerstel, *Freedom of Information and the Right to Know* (1999), 44, defining the FOIA "trailblazing legislation."

[26] Freedom of the Press and the Right of Access to Public Records Act. On this statute, see, e.g., J.M. Ackerman, I.E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 Admin. L. Rev. 88 (2006), who have also

often described as the first example of FOI legislation[27], this statute had no significant impact on other national experiences, except for the other Scandinavian countries[28]. Substantially, it stands as proof of an early precursor in public sector transparency[29].

Secondly, the FOIA is essential to promoting transparency[30]. In order to link this point with the one set out above, it may be stressed that the FOIA came first not only at international level but also within U.S. federal legislation. Indeed, it turned out to be the head of a series of statutes addressing disclosure of records, openness of meetings, and some related

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underlined that the statute attests the close relation between freedom of expression (and of the press) and access to government records. See, also, B. Wennergren, *La libertà d'informazione in Svezia*, in L. Paladin (ed.), La libertà d'informazione (1979), 239. On Sweden's current transparency system, see P. Jonason, *The Swedish Legal Framework on the Right of Access to Official Documents*, in H.-J. Blanke–R. Perlingeiro (eds.), *The Right of Access to Public Information* (2018), 235; D.U. Galetta, *La trasparenza, per un nuovo rapporto tra cittadino e amministrazione: un'analisi storico-evolutiva, in una prospettiva di diritto comparato ed europeo*, 26 Riv. it. dir. pubbl. com. 1032-1035 (2016).

[27] See J.M. Ackerman, I.E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, *id*., *ibid*.; D. *Cuillier, The People's Right to Know: Comparing Harold L. Cross' Pre-FOIA World to Post-FOIA Today*, 21 Comm. Law & Pol'y 439 (2016); H.-J. Blanke–R. Perlingeiro, *Essentials of the Right of Access to Public Information: An Introduction*, in Id. (eds.), *The Right of Access to Public Information*, *id*., 2.

[28] See G. Paleologo, *Segreto e pubblicità nella pubblica amministrazione*, Impresa, ambiente e p.a. 23-29 (1978), describing the gradual enactment of legislation, modeled – more or less strictly – upon the Swedish experience, on public records in all Scandinavian countries. First of all, Sweden itself adopted in 1949 a statute granting to all citizens the right of access to public records. Finland, too, passed a statute on public records two years later. Finally, Denmark and Norway enacted similar legislation in 1970.

[29] See I.F. Caramazza, *Dal principio di segretezza al principio di trasparenza. Profili generali di una riforma*, 45 Riv. trim. dir. pubbl. 945 (1995), defining the Swedish legislation in the matter an "*enfant prodige*".

[30] The FOIA, indeed, regulates the two main instruments of transparency: access to agency records and proactive disclosure (or publicity/publication). American scholars, however, have focused especially on the former so far. On the fundamental role of access to records – as provided for in the FOIA – to realizing administrative transparency, see, e.g., S.J. Piotrowski, *Governmental Transparency in the Path of Administrative Reform* (2007), 1; A. Fung, M. Graham, D. Weil, *Full Disclosure: The Perils and Promise of Transparency* (2007), 26-27; M. Fenster, *The Opacity of Transparency*, 91 Iowa L. Rev. 897-898 (2006).

matters[31]. The core of this group is composed of four statutes[32]: other than the FOIA, Federal Advisory Committee Act (FACA)[33]; the Privacy Act[34]; the Government in the Sunshine Act (GITSA)[35]. From an international and comparative perspective, these statutes are the most important, as they had a crucial role in the construction of a universal FOIA regime, i.e. a regime that is eligible for implementation in any legal system[36]. However, larger groups have been identified in literature[37]. Regardless of the option one may choose, all those statutes have in common the purpose to strengthen transparency, to the implementation of which they are – more or less heavily – instrumental. However, U.S. scholars are cognizant that other institutions are essential to implementing transparency, such as the duty to set forth the reasons for a certain decision made by an agency[38].

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[31] See P. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Playbacks of Legislating Democratic Values*, cit. at 25, 654, pointing out that a FOIA was needed to bring citizens closer to their government and avoid an irreconcilable rift between the former and the latter. On the loss of trust of the American people in their politicians because of some domestic and international events that came about between the 1960s and the 1970s, see, e.g., H.N. Foerstel, *Freedom of Information and the Right to Know*, cit. at 25, 46-48; A.E. Rees, *Recent Developments Regarding the Freedom of Information Act: A "Prologue to a Farce or a Tragedy; Or perhaps Both"*, 44 Duke L.J. 1183 (1995).

[32] Davis, for instance, identifies this group. See K.C. Davis, *Administrative Law Treatise* [hereinafter – *Davis Treatise*] (1978), I, § 5:1, p. 309.

[33] Pub. L. No. 92-463, 86 Stat. 770 (Oct. 6, 1972), codified at 5 U.S.C. app. §§ 1-16 (2012 & Supp. V. 2017).

[34] Pub. L. No. 93–579, 88 Stat. 1896 (Dec. 31, 1974), 5 U.S.C. § 552a.

[35] Pub. L. No. 94-409, 90 Stat. 1241 (Sept. 13, 1976), 5 U.S.C. § 552b.

[36] See T. Mendel, *Freedom of information: A Comparative Legal Survey* (2008), 29-41, setting forth the essential features of a comprehensive FOI regime. The Author enumerates nine criteria every FOI legislation ought to meet. Except for the requirement concerning protection to ensure to whistleblowers, the other eight of them are directly related to the statutes mentioned above.

[37] See D.E. Pozen, *Transparency's Ideological Drift*, 128 Yale L.J. 115-117 (2018). See, also, J.R. Arnold, *Secrecy in the Sunshine Era: The Promise and Failures of U.S. Open Government Laws* (2014), 2. This Author excludes from the group the version of the FOIA that entered into force, while he encompasses in it the statute as amended in 1974 and 1976. Therefore, according to Arnold, the original FOIA did not reach the minimal threshold to be considered a transparency statute.

[38] See G. Staszewski, *Reason-Giving and Accountability*, 93 Minn. L. Rev. 1253 (2009).

Thirdly, the FOIA has a simple structure. The 2007 and 2016 reforms increased the length of the statute quite considerably, thus causing a more complex structure, but it is still possible to tell apart the different parts. The statute is divided into subsections, each of which addresses different issues. Some decades ago, a distinguished scholar argued that subsections (a) and (b) were the most prominent ones[39]. This assessment still holds true. The rationale on which the first two subsections are founded appears to be as plain as it is effective: subsection (a) deals with disclosure and subsection (b) establishes the limits to that disclosure, which are called exemptions. Subsection (a) regulates both proactive disclosure and access upon request, even though the latter prevails. Indeed, subsection (a)(3), which assigns the right of access – i.e., the right to obtain the records and information formally requested to a given agency – to "any person," has traditionally been interpreted as the "heart" of the FOIA[40]. Subsection (b) bears the same importance, since its comprehension is crucial to dealing with the majority of litigation concerning the statute[41]. More generally, the system of exemptions to disclosure is one of the typical feature of the FOIA[42]. Ultimately, it is from this system that the actual level of transparency ensured by the statute can be found out[43].

[39] See *Davis Treatise*, cit. at 32, § 5:4, p. 314.

[40] R. Zedalis, *Resurrection of Reynolds: 1974 Amendment to National Defense and Foreign Policy Exemption*, 4 Pepp. L. Rev. 92 (1977).

[41] See S.J. Cann, *Administrative Law*, 4th ed. (2006), 212.

[42] According to an entrenched judicial principle, agencies have to give a restrictive interpretation to the statutory provisions establishing the exemptions. See *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976), prescribing that the FOIA exemptions be "narrowly construed." See also, more recently, *Public Citizen, Inc. v. Office of Management and Budget*, 598 F.3d 865, 869 (D.C. Cir. 2010).

[43] See A. Sandulli, *La trasparenza amministrativa e l'informazione dei cittadini*, in G. Napolitano (ed.), *Diritto amministrativo comparato* (2007), 167, arguing that within the FOIA, to a large number of people entitled to gain access to agency records it corresponds a wide range of records or matters exempted from disclosure.

2.3. Some paradoxes deriving from implementation of this model abroad

A close look at the FOIA in its own context leads to pinpoint some paradoxes deriving from its role as model legislation. Firstly, it should never be forgotten that the FOIA fits a political and legal system characterized by a wide notion of federal government. This notion encompasses the three independent and equivalent branches into which the government is divided[44]. The FOIA applies only to the executive branch, which mainly consists of all federal agencies, including executive departments[45]. Even though this solution turns out the more

[44] See, e.g., K.M. Sullivan, G. Gunther, *Constitutional Law*, 17th ed. (2010), 249; L.H. Tribe, *The Constitutional Structure of American Government: Separation and Division of Powers*, New York, 1978; J.H. Ferguson, D.E. McHenry, *The American System of Government*, 4th ed. (1956). The book by Ferguson and McHenry, of which many editions were published over the years, may be considered deficient in details. See C.L. Berntsen, *The American System of Government, 4th Edition by J. H. Ferguson, Dean E. McHenry (McGraw-Hill Book Company, 1956)* (Book Review), 29 Aust. Q. 111 (1957). However, it contains adequate elucidation of the meaning of government in the United States and proves useful especially to foreign readers. For a reference to this book – in its 1953 edition – by an Italian administrative law scholar, see F. Satta, *Principio di legalità e pubblica amministrazione nello stato democratico* (1969), 246 nt. 9. For a traditional description of the U.S. federal government in French literature, see A. Tunc, S. Tunc, *Le système constitutionnel des Etats-Unis d'Amérique*, II: *Le système constitutionnel actuel* (1954). Separation of powers and federalism –as meant in the United States – may be regarded as two related issues, as Scalia did. See Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 Notre Dame L. Rev. 1417 (2008). For an analysis of Scalia's thought on this subject, see *Justice Scalia on Federalism and Separation of Powers*, 30 Regent U. L. Rev. 57 (2017).

[45] Section 551(1) establishes a broad definition of "agency," which applies to the whole Subchapter II ("Administrative Procedure") of Part I, Chapter 5, 5 U.S.C. See K.E. Hickman, R.J. Pierce Jr., *Federal Administrative Law* (2010), 7, pointing out that in enacting the FOIA, Congress meant the definition of agency as having a broader scope than that used pursuant to the APA. While this provision appears to be generic in defining an agency, it is specific in identifying what is not included in this definition, especially the other two branches of the federal government: Congress and the U.S. federal courts. 5 U.S.C. § 551(1)(A)-(B). Therefore, the FOIA does not apply to those two branches and their own structure. See *Dow Jones & Co. v. Dep't of Justice*, 917 F.2d 571, 574 (D.C. Cir. 1990), wherein the D.C. Circuit held that documents transmitted by an agency – namely, a letter sent by an executive department: the Department of Justice – to Congress – namely, the House Ethics Committee – are not subject to the FOIA and thus may not fall within exemption 5, for

commonly adopted among countries endowed with a FOI regime[46], it is not mandatory[47]. Furthermore – and above all – the dynamics ensuing from the structure of the federal government enables the three branches to oversee one another and, by doing so, to contain their respective power[48]. However, that mechanism works regardless of an effective FOIA in the legal system, as indeed happened before the enactment of the statute. In this context, the FOIA is an added value. Therefore, late Justice Scalia's criticism of the role played by citizens under the FOIA is untenable[49]. It underlies a sort of bias against private individuals'

Congress is not an agency pursuant to the FOIA. See, also, *Mayo v. U.S. Gov't Printing Office*, 9 F.3d 1450, 1451 (9th Cir. 1994), wherein the Ninth Circuit ruled that the Government Printing Office – now Government Publishing Office – is not subject to the FOIA because it is an agency within the legislative branch. Similarly, in 1993, the Ninth Circuit excluded from application of the FOIA the United States Sentencing Commission, an independent agency within the judicial branch. See *Andrade v. U.S. Sentencing Commission*, 989 F. 2d 308, 309-310 (9th Cir. 1993). Despite not being formally bound by the FOIA, the branches of government other than the executive are committed to ensuring disclosure of their own records also electronically. See R.G. Vaughn, P.J. Messitte, *Access to Information Under the Federal Freedom of Information Act in the United States*, in H.-J. Blanke–R. Perlingeiro (eds.), *The Right of Access to Public Information*, cit. at 26, 193. Accordingly, it may be the case that bodies belonging to either the legislative or the judicial branch adopt a policy on the release of records and information modeled upon the FOIA. For instance, the Government Accountability Office (GAO), formerly General Accounting Office, is included in Congress's administrative structure and thus may not be considered an agency under the FOIA. However, section 81.1(a) of title 4 of the Code of Federal Regulations (CFR) provides that "GAO's disclosure policy follows the spirit of the [FOIA] consistent with its duties and functions and responsibility to the Congress."

[46] For an analysis of the regulation of the right of access to records and information held by public authorities in many countries of the American, European, and Asian continents, see H.-J. Blanke–R. Perlingeiro (eds.), *The Right of Access to Public Information*, cit. at 26, *passim*.

[47] See, for instance, J.M. Ackerman, I.E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, cit. at 26, 100, noting that the Mexican FOI law formally covers records pertaining to all the branches of government, but substantially it vests the legislative and judicial branches with somewhat considerable margins of discretion in implementing the statute.

[48] See, *infra*, nt. 50.

[49] According to Scalia, indeed, one of the main flaws of the FOIA lied in citizens' entitlement to exercise an oversight on activities carried out by the government by simply submitting an access request. This oversight – in his view – ended up

ability to monitor the way their government operates[50]. Accordingly, it does not appear proper to refer to Scalia to highlight the difficulties in implementation the FOIA was still facing in the 1980s[51].

Secondly, the FOIA has become the archetype of a regulation of administrative transparency, even though the concept itself of transparency entered the U.S. scholarship quite recently[52]. Foreign scholars – especially French ones – first applied this term to the American experience[53]. In French and Italian literature, indeed, the term began having a moderate success in the 1980's[54]. The American legal culture, instead, was familiar

replacing "institutionalized checks and balances." A. Scalia, *The Freedom of Information Act Has No Clothes*, 6 Regulation 19 (1982).

[50] Scalia rejected the whole idea of – and need for – a FOIA. It is clearly confirmed by the fact that he brought his strongest attacks on the 1974 amendments, which were adopted to increase the achievement of the original purpose of the FOIA. *Id.*, at 15. In conformity with his renowned conservative approach, indeed, Scalia regarded the oversight power mutually exercised by the three branches of government as a more appropriate instrument to ensure transparency in the federal government itself. To support his theory, he mentioned some scandals, such as Watergate, which came to light as a result of the dynamics of the institutional checks and balances and not because of one or more FOIA requests. *Id.*, at 19.

[51] This reference is found in D.U. Galetta, *Trasparenza e contrasto della corruzione nella pubblica amministrazione: verso un moderno panottico di Bentham?*, cit. at 2, 51-52; Id., *La trasparenza, per un nuovo rapporto tra cittadino e amministrazione: un'analisi storico-evolutiva, in una prospettiva di diritto comparato ed europeo*, cit. at 26, 1025-1032, especially nt. 27, 29, 31, 56.

[52] See D. Metcalfe, *The nature of government secrecy*, 26 Gov't Inform. Quart. 305 nt. 1 (2009), underlining that the term "transparency" gradually migrated from Europe to the United States especially in the early years of the twenty-first century.

[53] See P.F. Divier, *L'administration transparente: l'accès des citoyens américains aux documents officiels*, RDP 59 (1975); J.M. Duffau, *La transparence administrative aux États-Unis*, 12 Annuaire européen d'administration publique 295 (1989) (also in C. Debbasch (ed.), *La Transparence administrative en Europe: actes du colloque tenu à Aix en octobre 1989* (1990), 295). An Italian scholar, Arena, employs instead the term "publicity" in a 1978 article describing the U.S. FOIA to an Italian audience. See G. Arena, *La "Legge sul diritto all'informazione" e la pubblicità degli atti dell'Amministrazione negli Stati Uniti*, 9 Pol. dir. 279 (1978).

[54] As far as France is concerned, see B. Lasserre, N. Lenoir, B. Stirn, *La transparence administrative* (1987); B. Lasserre, *Six ans après le vote de 14 loi du 17 juillet 1978: une "administration plué transparente?"*, E.D.C.E. 99 (1983-1984); A. Roux, *La transparence administrative en France*, 12 Annuaire européen d'administration publique 57 (1989) (also in C. Debbasch (ed.), *La Transparence*

with two terms characterized by a very similar meaning: "sunlight" and "sunshine." On a theoretical level, however, the differences between those two terms – on the one hand – and transparency – on the other hand – turn out more formal than substantial. When referred to administrative records, indeed, all these terms are capable of acting as a metaphor implying the need to ensure the maximum disclosure possible. A common element to the terms is the image of light, as two famous statements dating back to the early 1900s confirm[55]. The Oxford Dictionary recognizes that whether one refers to the physical or metaphorical meaning of transparency, light is tantamount to visibility[56].

administrative en Europe: actes du colloque tenu à Aix en octobre 1989 (1990), 57). See also G. Scoffoni, *Le droit à l'information administrative aux États-Unis, Paris* (1992), who, by combining a theoretical and a pragmatic approach, conducted a very interesting comparison between the U.S. and the French experiences – with a focus on the former – on access to records and information held by public administrations. For a recent analysis of the French system of transparency and access to records, see C. Chevallier-Govers, *Right of Access to Public Documents in France*, in H.-J. Blanke–R. Perlingeiro (eds.), *The Right of Access to Public Information*, cit. at 26, 265. As for Italian scholars referring to trasparency in public adminsitration in the 1980s, see A. Meloncelli, *L'informazione amministrativa* (1983); R. Villata, *La trasparenza dell'azione amministrativa*, 5 Dir. proc. amm. 528 (1987); R. Marrama, *La pubblica amministrazione tra trasparenza e riservatezza nell'organizzazione e nel procedimento amministrativo*, 7 Dir. proc. amm. 416 (1989).

[55] As far as transparency is concerned, Hon. Filippo Turati suggested that the public administration should be "a glass house". F. Turati, *Parliamentary Proceedings*, Chamber of Deputies, session 1904-1908, Jun. 17, 1908, 22962. As for sunlight, Justice Brandeis characterized it as "the best of disinfectants." L.D. Brandeis, *What Publicity Can Do*, 58 Harper's Weekly 10 (1913), reprinted in Id., *Other People's Money and How the Bankers Use It*, 92 (1914 and 1932). See E. Coyle, *Sunlight and Shadows: Louis D. Brandeis on Privacy, Publicity, and Free Expression in American Democracy*, 33 Touro L. Rev. 233-235 (2017), studying Brandeis' statement in light of his whole mindset. But, see, also, D.E. Pozen, *Transparency's Ideological Drift*, cit. at 37, 108-109, pointing out that Brandeis was actually referring to the financial sector rather than the federal government and especially the executive branch. Indeed, by formulating his dictum, later to become so successful, he intended to champion the need for transparency of the bankers' fees charged for investments made by corporations.

[56] See entries "*Transparency*;" "*Transparent*;" "*Sunlight*;" "*Sunshine*," in J.A. Simoson–E.S.C. Weiner (eds.) *The Oxford English Dictionary*, 2nd ed. (1989) – respectively, XVIII, 419; vol. XVII, 198, 201 (as for the latter, "sunshine law" is considered separately within the list of meanings of the word). See, also, entries "*Transparency*" and "*Sunshine law*", in *Black's Law Dictionary*, 9th ed. (2009) – respectively, 1638 and 1574. On the equation between transparent activity and

Therefore, when it is applied to public authorities, transparency implies a need – *rectius*, a demand – for public scrutiny[57]. From an overview of literature, however, it may be inferred that there appears to be some slight differences in the way U.S. scholars and their European counterparts approach transparency. In the U.S., in particular, scholars tend to focus less frequently on the distinction between the concepts of transparency[58], openness[59], and publicity[60].

Thirdly, the FOIA favors accountability, a concept that is peculiar to the Anglo-Saxon culture – i.e., to the common law tradition – and not easy to implement elsewhere[61]. Especially in

visible activity on the basis of the etymology of the term "transparency", see G. Arena, *La trasparenza amministrativa ed il diritto di accesso ai documenti amministrativi*, in Id. (ed.), *L'accesso ai documenti amministrativi* (1991), 18-20, 85 nt. 12; R. Chieppa, *La trasparenza come regola della pubblica amministrazione*, Dir. econ. 615 (1994). It is interesting to note that Chieppa has stressed the ability of transparency – meant this way – to bring citizens closer to public institutions, i.e., the very underlying purpose of the U.S. FOIA.

[57] See C. Hood, *Transparency in Historical Perspective*, in C. Hood, D. Heald, *Transparency: The Key to Better Governance?* (2006), 4.

[58] One of the few American scholars who has proved to grasp the deep meaning of transparency is Fenster. Transparency – he argues – requires that information be not only made available, but also clear and "understandable to the public." M. Fenster, *The Opacity of Transparency*, cit. at 30, 942. For a recent collective work conducting a critical analysis of transparency, see D.E. Pozen, M. Schudson (eds.), *Troubling Transparency* (2018).

[59] As has been pointed out, "transparency" and "openness" are often used as synonyms. See D. Heald, *Varieties of Transparency*, in C. Hood, D. Heald, *Transparency: The Key to Better Governance?*, cit. at 57, 25-26.

[60] See, traditionally, F.E. Rourke, *Secrecy and Publicity* (1961).

[61] On accountability of the public sector in general, see M.J. Dubnick, H.G. Frederickson (eds.), *Accountable Governance: Problems and Promises* (2011); M. Bovens, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, 33 West Eur. Politics 946 (2010); E.C. Page, *Accountability as a Bureaucratic Minefield: Lessons from a Comparative Study*, *id*., 1010; M.D. Dowdle (ed.), *Public Accountability: Design, Dilemmas and Experiences* (2006); R. Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (2003); A. Schedler, L. Diamond, M.F. Plattner (eds.), *The Self-Restraining State* (1999), in particular the papers in Part I ("Conceptual and Normative Issues"). As for the United States in particular, I deem it proper – first of all – to refer to the works by Kitrosser, who mainly analyzed the functioning and implications of accountability and the relation between transparency and accountability itself within the executive branch. See H. Kitrosser, *Supremely Opaque?: Accountability, Transparency, and Presidential Supremacy*, 5 U. St. Thomas J.L. & Pub. Pol'y 62 (2010); Id., *The Accountable Executive*, 93 Minn. L. Rev. 1741 (2009); Id., *Kitrosser,*

continental Europe, the integration of this concept into national legal cultures has proved complicated. In Italy, for instance, accountability enters a legal system characterized by a very different way of addressing the responsibility[62] ascribable to public administrations and their personnel, as has been clearly explained[63]. The very adoption – with plenty of varieties, as noted

Accountability and Administrative Structure, 45 Willamette L. Rev. 607 (2009); Id., *Reclaiming Accountability: Transparency, Executive Power, and the U.S. Constitution* (2015). See also M. Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 Duke L.J. 1059 (2001), focusing on political accountability of agency rulemaking; B. Lipton, *Accountability, Deference, and the Skidmore Doctrine*, 119 Yale L.J. 2096, 2101-2120 (2010), arguing that agencies should be accorded a high level of deference by courts even when they make informal decisions, as such decisions, too, are subject to political accountability; D. Markell, "*Slack" in the Administrative State and its Implications for Governance: The Issue of Accountability*, 84 Or. L. Rev. 1 (2005), pinpointing some features of the administrative state – with special attention devoted to the Environmental Protection Agency (EPA) – that seem to hinder, instead of favoring, the increase in transparency and accountability. See, also, most recently, R. Beck, *Promoting Executive Accountability through* Qui Tam *Legislation*, 21 Chap. L. Rev. 41 (2018), taking into account the use of *qui tam* legislation to strengthen executive branch officials' accountability; Kevin Bohm, *The President's Role in the Administrative State: Rejecting the Illusion of Political Accountability*, 46 Hastings Const. L.Q. 191 (2018). Bohm's article is concerned with a specific aspect of accountability: the ability of the President to implement accountability and thus to conduct effective oversight of agencies. Scholars have often dealt with this topic especially since a 2001 article by Kagan: E. Kagan, *Presidential Authority*, 114 Harv. L. Rev. 2245 (2001). See F.R. Shapiro, M. Pearse, *The Most-Cited Law Review Articles of All Time*, 110 Mich. L. Rev. 1495 (2012), underlining that Kagan's article was cited 371 times just in the first year after its publication. Another much-cited article defined the theoretical framework of this issue: P.L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984).

[62] In Italy, "responsibility" has been traditionally conceived of as capable of including different meanings, which are expressed by different terms in the U.S. – responsibility; liability; accountability. See L. Torchia, *La responsabilità*, in S. Cassese (ed.), Trattato di diritto amministrativo. Diritto amministrativo generale, II (2003), 1649 nt. 1.

[63] Della Cananea has pointed out that not only is there no exact word equating to accountability in the Italian language, but – above all – it is different the way public administration's responsibility is meant. The core difference lies in the oversight of administration. While the oversight is conducted by people in the U.S. and other countries of similar tradition, it is entrusted to a public office acting instead of people in Italy. See G. della Cananea, *Legittimazione e* accountability *nell'Organizzazione mondiale del commercio*, 53 Riv. trim. dir. pubbl. 738 (2003).

above – of the FOIA model in most countries is gradually eroding such differences[64]. This phenomenon does not come as a surprise,

[64] As far as the Italian experience is concerned, for example, Legislative Decree No. 97 of May 25, 2016, by amending Legislative Decree No. 33 of March 14, 2013 (also known as transparency decree), resulted in increasing the degree of public administrations' accountability. See B.G. Mattarella, *The Ongoing Constitutional and Administrative Reforms in Italy*, 66 Riv. trim. dir. pubbl. 434 (2016). This reform doubtless went in the direction of FOI legislation. Nevertheless, it is better to be cautious in concluding that the current regulation of transparency and access to records in the Italian legal system equates to a FOI act, even though a good deal of Italian scholarship seems to be doing so. See B. Ponti, *La trasparenza ed i suoi strumenti: dalla pubblicità all'accesso generalizzato*, in Id. (ed.), *Nuova trasparenza amministrativa e libertà di accesso alle informazioni* (2016), 56-58; M. Savino, *Il FOIA italiano. La fine della trasparenza di Bertoldo*, 22 Giorn. dir. amm. 593 (2016); S. Villamena, *Il c.d. FOIA (o accesso civico 2016) ed il suo coordinamento con istituti consimili*, Federalismi.it (2016); D.U. Galetta, *La trasparenza, per un nuovo rapporto tra cittadino e amministrazione: un'analisi storico-evolutiva, in una prospettiva di diritto comparato ed europeo*, cit. at 26, 1047-1049, 1053-1054; Id., *Accesso (civico) generalizzato ed esigenze di tutela dei dati personali ad un anno dall'entrata in vigore del Decreto FOIA: la trasparenza de "le vite degli altri"?*, Federalismi.it (2018); A. Corrado, *La "trasparenza" nella legislazione italiana*, in M.A. Sandulli (ed.), *Codice dell'azione amministrativa*, 2nd ed. (2017), 1416-1418; S. Foà, *La nuova trasparenza amministrativa*, 25 Dir. amm. 72-73, 78-83 (2017); C. Deodato, *La difficile convivenza dell'accesso civico generalizzato (FOIA) con la tutela della privacy: un conflitto insanabile?*, www.giustizia-amministrativa.it (2017). However, at least a few scholars prove to be more skeptical, by pinpointing some critical issues, not solved by the new legislation. See G. Gardini, *Il paradosso della trasparenza in Italia: dell'arte di rendere oscure le cose semplici*, Federalismi.it 2-6 (2017), highlighting the confusion determined by the 2016 reform even as far as the wording of legislative provisions is concerned. Indeed, Legislative Decree No. 97/2016 provided for a new form of "civic access" (section 5, para. 2, transparency decree), which was added to the form of "civic access" already established by the original version of the transparency decree (currently, section 5, para. 1). As a result, the same section now contains two different types of civic access, to which are entrusted different functions. As for the former, it consists of a right of access to administrative records vested in any person, thus modeled upon the U.S. FOIA. The latter, which is the older one chronologically, is instead aimed at providing any person an instrument to demand that public administrations fulfill their obligations to publish administrative documents, data, or information. Therefore, this type of civic access may be employed in case of inaction by a certain administration. A general oversight power concerning compliance with obligations of publications is vested in the National Anticorruption Authority (ANAC), as transparency is regarded as strictly related to corruption prevention in the transparency decree. See S. Cassese, *Evoluzione della normativa sulla trasparenza*, 8 SINAPPSI 6 (2018). Furthermore, from the fact that the new

since transparency is closely related to accountability. This relation has been underlined not only by scholars[65] but also in presidential documents – namely, in two memoranda issued by President Obama on January 21, 2009[66]. Also because of this almost symbiotic relation with transparency, accountability is now considered as an essential feature to a democratic legal system[67].

Fourthly, despite the major role played, the FOIA is just a piece of ordinary legislation. In other words, access to agency records does not enjoy constitutional protection, and – in particular – it is not deemed to fall within the scope of the First Amendment of the Constitution. This issue was much discussed in the past[68], though in reality it is still open for debate[69]. Given the

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civic access was inserted into a set of obligations to publish already existing and still effective it may be inferred that they both should be recognized an equivalent role in the overall system. For such a stance, see E. Carloni, *Il nuovo diritto di accesso generalizzato e la persistente centralità degli obblighi di pubblicazione*, 24 Dir. amm. 615-621 (2016). Finally, there is a problem of legislative coordination, for the regulation of the right of access to administrative documents established by the Italian Administrative Procedure Act (Law No. 241 of August 7, 1990) was nor repealed. Its coexistence with the new civic access is troublesome, as the former provides for a restrictive type of access, i.e., an access assigned only to concerned persons (or parties). Such aspect is stressed, e.g., in A. Simonati, *L'accesso civico come strumento di trasparenza amministrativa: luci, ombre e prospettive future (anche per gli Enti locali)*, 37 Ist. fed. 737-738 (2016).

[65] Scholars have often observed that transparency is a pre-requisite for an effective implementation of accountability. See J. Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 Yale Law & Pol. Rev. 83 (2012); A.M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, cit. at 16, 917; M. Fenster, *The Opacity of Transparency*, cit. at 30, 949; S. Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 Yale L. & Pol'y Rev. 399 (2009).

[66] See *Memorandum from President Barack Obama on the Freedom of Information Act to the Heads of Executive Departments and Agencies* and *Memorandum from President Barack Obama on Transparency and Open Government to the Heads of Executive Departments and Agencies*, Jan. 21, 2009 – respectively, 74 Fed. Reg. 4683, 4683, and 4685, 4686, Jan. 26, 2009.

[67] See E. Chiti, *Le sfide della sicurezza e gli assetti nazionali ed europei delle forze di polizia e di difesa*, 24 Dir. amm. 539-540 (2016). See, also, *Memorandum from President Barack Obama on the Freedom of Information Act*, *ibid.*, arguing that both transparency and accountability constitute a requirement for the existence of democracy.

[68] The discussion among scholars, based on a series of Supreme Court and other federal courts decisions, was lively especially under the Burger Court, i.e., when

importance of the FOIA, it has even been advanced the theory that it may be included among "super-statutes", a class of statutes that would lie at an intermediate level between ordinary statutes and the Constitution[70]. What matters the most, however, is that the FOIA do not end up losing its pivotal features.

3. The FOIA Improvement Act of 2016

3.1. Some general considerations

In order to be able to formulate an overall assessment of the FOIA Improvement Act, it is necessary – beforehand – to provide an overview of the amendments it brought to the FOIA[71]. Seemingly, the methods of doing so should be just two: either to follow a textual order – i.e., to mention the amendments as they compare in the reform statute and thus in the FOIA – or to arrange them by relevance. Actually, there is a third option and this is the one that will be adopted: to follow the layout established in Senate Report No. 114-4 of February 23, 2015[72] [hereinafter – 2015 Report or Report], which sets forth the intent of the reform. The Report employs the first of the two methods just proposed, albeit not rigorously.

Warren E. Burger was Chief Justice of the Supreme Court (1969-1986). For a description of the academic debate and the courts standpoints, see B. Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know"*, 72 Md. L. Rev. 1 (2012).

[69] See R. Peled, Y. Rabin, *The Constitutional Right to Information*, 42 Colum. Hum. Rts. L. Rev. 360-369 (2011) (pinpointing four justifications for the constitutional foundations of the right to know).

[70] See B. Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know"*, cit. at 68, 64-66, referring to W.N. Eskridge Jr., J. Ferejohn, *Super-Statutes*, 50 Duke L. J. 1215 (2001). See also W.N. Eskridge Jr., J. Ferejohn, *A Republic of Statutes: The New American Constitution* (2010). Since the FOIA was conceived of as an amendment to the APA, this theory should also deem the latter to be a super-statute. Indeed, then-professor Scalia pointed out in 1978 that the Supreme Court tended to consider the APA as such, "or [as a] subconstitution, in the field of administrative process: a basic framework that was not lightly to be supplanted or embellished." A. Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 363 (1978). See also K.E. Kovaks, *Superstatute Theory and Administrative Common Law*, 90 Indiana L.J. 1223-1237 (2015), setting forth a series of reasons for encompassing the APA among super-statutes.

[71] Section 2 of the FOIA Improvement Act contains all the amendments.

[72] See, *supra*, nt. 4.

Before describing the different amendments, the 2015 Report lays down not only the purposes of the FOIA Improvement Act but also the key elements of the reform. The former and the latter are not equivalent. The purposes are rather simple: to make disclosure more suited for ITC – therefore, for the Internet – and ensure a higher level of compliance with FOIA provisions by agencies. Ultimately, as the name of the statute suggests, the reform is aimed at improving the implementation of the FOIA. Indeed, it is where all main issues are located, as recent statistical data demonstrate[73]. As far as the pivotal elements of the reform are concerned, the Report pinpoints the following[74]: the foreseeable harm standard as for the degree of disclosure in general; the exemptions, namely, exemption 5, which is the only one subject to amendment; the strengthened role of the Office of Government Information Services (OGIS); the availability of records in electronic format; proactive disclosure; the charging of fees for processing FOIA requests; the creation of a Chief FOIA Officers Council; the establishment of a consolidated online request portal for the submission of all requests; reporting requirements on implementation of the FOIA imposed upon agencies.

3.2. Amendments brought by the FOIA Improvement Act: An overview

The amendments – or set of amendments – just mentioned will now be analyzed, albeit quite concisely. Most of the considerations they are capable of triggering, however, will be left to the following paragraph, devoted to the upsides and downsides of the reform. The first amendment found in the text requires that records that may be freely inspected by the public be made

[73] According to the most recent data collected by the Office of Information Policy of the Department of Justice, fiscal year 2017 ended with an increase by 3.7% of FOIA requests from the previous year, and only five agencies have received over 70% of all requests. There was a significant growth in the number of requests processed and a positive trend in the reduction of the amount of backlogged requests. Backlog, however, is still quite massive, as it may be inferred by the average time agencies need to respond to simple FOIA requests. See U.S. Dep't of Justice, *Office Of Info. Policy (OIP), Summary of Annual FOIA Reports for FY 2017* (posted Jun. 8, 2018), 2-12, available at *https://www.justice.gov/oip/page/file/1069396/download*.

[74] S. Rept. No. 114-4, cit. at 4, 4-5.

available in an electronic format. Contrary to what might be expected, the electronic format is prescribed as requisite not only for records and information – *rectius*, categories of records and information – subject to publication in the Federal Register or on agencies' websites – respectively, under § 552(a)(1) and § 552(a)(2) – but also for further material[75]. An amendment is concerned specifically with proactive disclosure, instead, and vested with what may be described as a clarification function. Indeed, its purpose is to explain the meaning of the most important category of the proactive disclosure material – the "frequently requested" records[76]. In doing so, the amendment added some elements to the notion[77]. An amendment pertaining to the charging of fees by agencies for processing FOIA requests has a similar clarification function. It is aimed at clearly identifying the cases in which agencies are prohibited from charging those fees, especially search fees. Such cases refer to the situations in which the agency has failed to conclude a certain FOIA proceeding within the time limit prescribed[78]. Therefore, the prohibition acts as a sanction against

[75] In particular, the new requirement applies to a report that, under subsection (e)(1), each agency has to submit to the Attorney General of the United States annually by February 1. It is specified that the requirement also applies to the contents of the report, i.e., to "raw statistical data". 5 U.S.C. § 552(e)(3). Such data are concerned with access requests and FOIA implementation in general in the preceding fiscal year by the submitting agency. The 2016 reform provided that the Director of the OGIS, too, is to receive the report. The same requirement extends to the report that the Attorney General – in turn – has to submit to the Committee on Oversight and Government Reform of the House of Representatives, to the Committee on the Judiciary of the Senate, and to the President of the United States by March 1 of each calendar year. § 552(e)(6)(B)(i).

[76] The Department of Justice has long used this expression in its directives, instructions, and other documents to designate the category at issue. See, e.g., Dep't of Justice, *FOIA Post: OIP, Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements*, Jun. 27, 2008, available at *https://www.justice.gov/oip/blog/foia-post-2008-guidance-submitting-certification-agency-compliance-foias-reading-room*.

[77] Records now fall within the category when, in addition to having already been released upon an individual's request, they are deemed by the proceeding agency to have become or be likely to become the subject of subsequent requests or – alternatively – they have been requested three or more times. From this formulation, it may be inferred that the first option entrusts the agency involved with a margin of discretion. 5 U.S.C. § 552(a)(2)(D)(i)-(ii).

[78] 5 U.S.C. § 552(a)(4)(A)(viii)(I).

lack of effectiveness, since it indirectly punishes agencies that prove not quick enough in processing FOIA requests. Some exceptions to this sanction are established[79]. The 2015 Report[80] recalls that the OPEN Government Act of 2007[81] [hereinafter – OPEN Government Act] – i.e., the previous major FOIA reform – had already provided for the sanction[82], but agencies continued to charge fees regardless of duration of their proceedings. Other than acknowledging a failure to ensuring compliance with a legislative provision, the Report suggests that the amendment aspires to act as a true deterrent.

Then, the 2015 Report devotes special attention to the amendment consisting in the codification – i.e., the formal insertion into the statute –[83] of the so-called "presumption of openness", thereby demonstrating its significance. The presumption was established by President Obama in his 2009 memorandum on the FOIA already mentioned[84] and confirmed by Attorney General Holder in a memorandum issued a couple of months later[85] [hereinafter – Holder FOIA memo]. The latter, in particular, lays down the criteria on which agencies should base their decisions on disclosure of records and information. The release of them may be denied if the proceeding agency "reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or [if] disclosure is prohibited by law."[86] The Report clarifies that the foreseeable harm standard applies only to those FOIA exemptions that confer

[79] The exceptions relate to the concepts of "unusual" and "exceptional circumstances", expressly defined in the statute, and operate provided that certain notice requirements be met. § 552(a)(4)(A)(viii)(II).
[80] S. Rept. No. 114-4, cit. at 4, 7.
[81] Openness Promotes Effectiveness in Our National Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (Oct. 2, 2007).
[82] § 6(b)(1)(A), OPEN Government Act.
[83] 5 U.S.C. § 552(a)(8).
[84] *Memorandum from President Barack Obama on the Freedom of Information Act to the Heads of Executive Departments and Agencies*, cit. at 66, *ibid*.
[85] *Memorandum from Eric Holder, Attorney General, on the Freedom of Information Act to the Heads of Executive Departments and Agencies*, Mar. 19, 2009, 1, available at *http://www.usdoj.gov/ag/foia-memo-march2009.pdf*.
[86] *Id*., at 2.

some discretion upon the agency making the decision on disclosure[87].

While the amendment just mentioned affects all FOIA exemptions, or – at least – those implying an amount of discretion, another one is concerned with a specific exemption – exemption 5. The reform consists here in adding what the 2015 Report expressly defines as a "sunset provision."[88] As such, it affects one of the statutory components of the exemption – i.e., the period within which the exemption may operate. In particular, an agency is prohibited from applying this exemption if the sought records were created 25 years or more before the submission of the FOIA request[89].

The subsequent amendment the 2015 Report mentions is concerned with administrative organization. By that, I mean that it pertains to the structure of an agency charged with dealing with FOIA requests. In this regard, an authority to which the 2016 reform assigned a pivotal role is the OGIS, which was established by the OPEN Government Act[90]. The Report highlights that, from the outset, the OGIS was conceived of as "the FOIA ombudsman" [91]. As such, it was assigned the functions to provide FOIA requesters with assistance with all issues they may have and to help resolve disputes between them and federal agencies. Accordingly, agencies are now required to inform FOIA requesters of the right to turn to the OGIS in order for it to carry out the latter function[92]. The FOIA Improvement Act resulted in strengthening OGIS independent role. It determined this effect mainly by vesting the OGIS with the power to submit Congress and the U.S. President a report wherein the OGIS itself essentially sets forth the results of its multiple functions concerning implementation of the FOIA and proposals deriving from those results[93]. It is specified that the exercise of such power needs no

[87] S. Rept. No. 114-4, cit. at 4, 8.
[88] Id., at 10.
[89] 5 U.S.C. § 552(b)(5).
[90] The 2007 reform inserted into the FOIA subsection (h), devoted to the OGIS.
[91] S. Rept. No. 114-4, cit. at 4, 2.
[92] 5 U.S.C. § 552(a)(6)(A)(i)(III)(bb). This right exists in case of an adverse determination, i.e., when the agency responds to the FOIA request with a denial.
[93] § 552(h)(4)(A)(i).

prior approval whatsoever from agencies or other bodies[94]. Among OGIS functions is the issuance of advisory opinions at its own discretion or upon request[95].

Another amendment pertaining to organization is the one establishing the Chief FOIA Officers Council[96]. It is a body composed of all Chief FOIA Officers, who operate at each agency. Its main functions[97] are the following: to adopt recommendations aimed at improving implementation of the FOIA; to collect best practices and have them spread among agencies; to ensure the coordination of initiatives in the matter at issue.

Finally, apart from establishing some new reporting requirements on FOIA implementation that are incumbent on agencies and the Attorney General[98], the 2016 reform also provided for the creation of a consolidated online portal[99]. It is supposed to serve as a single platform – *rectius*, a single website – to use for the submission of FOIA requests directed to any federal agency. In other words, it may be the starting point – technically speaking – of all FOIA requests. However, it is specified that such portal may not replace analogous instruments made available by individual agencies. The former and the latter should rather coexist, and the Director of the Office of Management and Budget has to lay down standards for their "interoperability."[100]

4. Some major implications for the FOIA

4.1. Proactive disclosure and access upon request as institutions to be kept apart from a theoretical perspective

It is not possible here to conduct a detailed critical analysis of each amendment mentioned above. I will limit myself to some observations concerning the impact of the 2016 reform on the FOIA. In order to make them as clear as possible to the reader, they will be arranged into two groups, each of them corresponding to a different matter. The two general matters

94 § 552(h)(4)(C).
95 § 552(h)(3).
96 § 552(k)(1).
97 They are enumerated in § 552(k)(5)(A).
98 Respectively, § 552(e)(1)(P),(Q) and § 552(e)(6)(A),(B). See also, *supra*, nt. 75.
99 § 552(m)(1).
100 § 552(m)(2).

acting as the guide to such observations are the following: disclosure and agency organization.

Disclosure is meant here as a general category, the components of which have in common the release of information to the public. It has recently been argued that disclosure, in this sense, equates to transparency[101]. In fact, the latter concept has a broader scope, since it includes – for instance – the duty to give reasons[102], as noted above[103]. Still, the equation between disclosure and release of information is correct, on condition that the former be not deemed tantamount to access to records. Access is a legal institution that traditionally requires an individual's initiative, while publicity identifies an activity that consists in the publication of records or information[104]. Such activity is unsolicited and thus it takes either an act ascribable to a public office or a material – i.e., actual – operation to start the relevant

[101] D.E. Pozen, *Transparency's Ideological Drift*, cit. at 37, 102.

[102] For a recent analysis of such duty from a comparative administrative law perspective, see G. della Cananea, *Due Process of Law Beyond the State* (2016), 61-81. The duty to give reasons is so essential that it gradually acquired the status of a global standard of the administrative procedure. See G. della Cananea, *The Giving Reasons Requirement: A Global Standard for Administrative Decisions*, in G. della Cananea–A. Sandulli (eds.), *Global Standards for Public Authorities* (2011), 3.

[103] See, *supra*, para. 2.2.

[104] Even though the concept of publicity meant as dissemination of information is not very widespread among scholars, it is not unknown. See, for instance, E. Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 Harv. L. Rev. 1380 (1973). See, also, D.E. Pozen, *Transparency's Ideological Drift*, cit. at 37, 107-115, associating "publicity" – as a synonym to "transparency" – especially with the Progressive Era. However, such a concept, which implies a duty of affirmative action imposed upon public administrations, must not be confused with publicity in its purely commercial meaning. The latter forms the subject of an individual right of citizens, which has raised a certain interest among scholars in recent years. See, e.g., A. Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 Duke L.J. 383 (1999); S.L. Dogan, M. A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 Stan. L. Rev. 1161 (2006); J.E. Rothman, *The Inalienable Right of Publicity*, 101 Geo L.J. 185 (2012); A. J. Berger, *Righting the Wrong of Publicity: A Novel Proposal for a Uniform Federal Right of Publicity Statute*, 66 Hastings L.J. 845 (2015). Nevertheless, it was recently argued that the courts should interpret this right as falling within the scope of the First Amendment of the Constitution. See M.H. Redish, K.B. Shust, *The Right of Publicity and the First Amendment in the Modern Age of Commercial Speech*, 56 Wm. & Mary L. Rev. 1422 (2015). Therefore, this theory would lead to conclude that the right of publicity and the right of access to agency records share the same – albeit implicit – constitutional underpinning.

procedure. Disclosure, meant in a general way, is a neutral concept capable of including both access and publicity. Proactive disclosure, instead, has a narrower scope, as it encompasses only the latter. Indeed, "proactive" – or "affirmative," which constitutes a synonym in this context[105] – is an adjective denoting a public authority's initiative. Therefore, there is proactive disclosure whenever an agency – whether or not pursuant to a legislative obligation – disseminates records and information without awaiting a request by an individual or – anyway – regardless of it[106].

The wording of the FOIA is only partly clear in this regard. On the one hand, the distinction between publicity and access upon request is easy to detect, as a specific provision – subsection (a)(3) – is devoted to the latter. Subsection (a)(3), indeed, expressly rules out the provisions of subsection (a)(1) and (a)(2) from its scope of application. On the other hand, subsection (a)(3) seems to suggest that all three provisions – paragraphs (1), (2), and (3) – refer to the concept of availability of records. Yet, subsection (a)(1) regulates a different instrument of publicity: the publication in the Federal Register, i.e., in the executive branch official gazette. Therefore, by relying on FOIA statutory language, Davis distinguished between cases of mandatory publication (paragraph (1)) and cases in which records had to be made "available" (paragraphs (2) and (3))[107]. However, as explained above, access upon request is an autonomous institution, founded on a different

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[105] See D.E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, cit. at 2, 1108, 1117, and 1108 nt. 57. From such passages, it can be inferred that the Author ultimately gives the same meaning to the two adjectives. By contrast, Herz deems affirmative disclosure to be limited to publication imposed by law and proactive disclosure to mean, instead, purely spontaneous publication, i.e., publication made by an agency without it being imposed by a legislative provision. See M. Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, cit. at 19, 597.

[106] For an analysis – in general terms – of the features of proactive disclosure as a component of the right to know, see H. Darbishire, *Proactive Transparency: The future of the right to information?*, World bank Institute – Governance Working Paper Series (2010), available at *http://documents.worldbank.org/curated/en/100521468339595607/pdf/565980WP0Box351roactiveTransparency.pdf* and also at *https://www.right2info.org/resources/publications/publications/proactive-transparency-the-future-of-the-right-to-information-darbishire-wb/at_download/file*.

[107] *Davis Treatise*, cit. at 32, § 5:4, p. 314.

rationale. Furthermore, the distinction between paragraphs (1) and (2) has a formal significance by now. Indeed, today records and information subject to publication in the Federal Register may also be posted online[108], and paragraph (2) records, originally stored in physical places called "reading rooms", are now available in "electronic reading rooms."[109] Even though its official Guide to the FOIA suggests otherwise[110], the Department of Justice, too, seems to agree. Indeed, in a 2016 document containing the results of a pilot program aimed at assessing the viability for agencies to routinely post online their records already released, the OIP – a component of the department –[111] defined subsections (a)(1) and (a)(2) jointly as "proactive disclosure provisions."[112]

How did the FOIA Improvement Act step into the legal framework concerning proactive disclosure? As explained above, the reform focused on the pivotal category of subsection (a)(2) material – the frequently requested records, inserted into the statute by the Electronic Freedom of Information Act Amendments of 1996[113]. It is undeniable that, as the OIP argues, records labeled as "frequently requested" are records deemed to

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[108] On publication in the Federal Register and its evolution due to the Internet, see B. Schwartz, R.L. Corrada, J.R. Brown Jr., *Administrative Law*, 6th ed. (2006), 252-253.

[109] See Dep't of Justice, *FOIA Update: Congress Enacts FOIA Amendments*, Vol. XVII, No. 4, Autumn 1996, available at *https://www.justice.gov/oip/blog/foia-update-congress-enacts-foia-amendments*. As for scholarship, see M. Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, cit. at 19, 586-591.

[110] See *United States Department of Justice Guide to the Freedom of Information Act*, 2009 ed., *Proactive Disclosures* (posted Aug. 10, 2009), available at *https://www.justice.gov/oip/foia_guide09/proactive-disclosures-2009.pdf*, at 9.

[111] On the establishment of the OIP, see S.F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 Jour. Const. L. 1047-1048 (2008).

[112] Dep't of Justice, OIP, *Proactive Disclosure Pilot Assessment* (Jun. 30, 2016), 2, available at *https://www.justice.gov/oip/reports/proactive_disclosure_pilot_assessment/download*. The same consideration is found in OIP Guidance, *Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request* (Mar. 16, 2015), available at *https://www.justice.gov/oip/oip-guidance/proactive_disclosure_of_non-exempt_information*.

[113] Pub. L. No. 104-231, 110 Stat. 3048 (Oct. 2, 1996). The 1996 reform also added the next category, which imposes the publication of indexes of the frequently requested records posted online. The first three categories, codified at subparagraphs (A), (B), and (C) of paragraph (2), were instead already included in the original FOIA.

be concerned with "a matter of popular interest."[114] The rationale of this category may appear consistent with the fee waiver to apply to FOIA requests involving a public interest[115]. Furthermore, as – once again – the OIP points out, this category is based on a "pragmatic reason, [consisting in helping] agencies achieve greater efficiencies by reducing the need to respond to numerous requests for the same records."[116] In addition to that, the online posting of frequently requested records is without a doubt in accordance with former President Obama's policy of strengthening proactive disclosure[117]. However, the 2016 OIP document on the pilot program already mentioned before went further and envisioned the possibility of full coincidence between what has been requested by an individual and what has to be published online[118]. Apart from the technical and material difficulties in realizing that, such coincidence would affect the theoretical framework concisely described above. Indeed, what would happen to agencies' initiative in proactive disclosure if agencies themselves had just to certify the records requested and publish them online?

Therefore, it is important to keep access upon request and proactive disclosure distinct and thus consider them as mutually autonomous institutions. On the one hand, they have in common at least two features: the purpose to realize the right to know and

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[114] Dep't of Justice, OIP, *Proactive Disclosure Pilot Assessment*, cit. at 112, *ibid*.

[115] Under subsection (a)(4)(A)(iii), agencies may not charge fees or may charge just a fee of negligible amount if disclosure of the information contained in the records sought satisfies the public interest "because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."

[116] OIP Guidance, *Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request*, cit. at 112, *ibid.*

[117] See *Memorandum from President Barack Obama on the Freedom of Information Act to the Heads of Executive Departments and Agencies*, cit. at 66, *ibid*.; *Memorandum from Eric Holder, Attorney General, on the Freedom of Information Act to the Heads of Executive Departments and Agencies*, cit. at 85, 3, directing agencies to "readily and systematically post information online in advance of any public request."

[118] As the OIP clarified, the proposal was founded on the following motto: "Release to One is Release to All." Dep't of Justice, OIP, *Proactive Disclosure Pilot Assessment*, cit. at 112, 3.

thus the capacity of meeting the interest in disclosure[119]; the subjection to judicial enforcement. Indeed, the judicial remedy ensured by subsection (a)(4)(B) of the FOIA has to be meant so as to apply to both access upon request and proactive disclosure[120]. On the other hand, the two institutions – or set of institutions – (subsections (a)(1) and (a)(2) and subsection (a)(3)) determine different implications for the overall legal framework of disclosure. Such implications are not only theoretical – as observed above – but also practical. An example of the latter, often pointed out by scholars[121], is the predominant number of FOIA requests submitted by businesses.

4.2. Codification of the presumption of openness and amendment to Exemption 5

4.2.1. Codification of the presumption of openness: the foreseeable harm standard enters the FOIA

The amendment codifying the presumption of openness was much more important. Its significance can be fully grasped from a historical perspective. The Holder FOIA memo, in establishing the foreseeable harm standard already mentioned, also expressly abolished the "sound legal basis" standard provided for in the 2001 FOIA memo issued by former Attorney General Ashcroft[122]. The former standard resulted in conferring a

[119] See, recently, *CREW v. Dep't of Justice, 846 F.3d 1235*, 1240 (D.C. Cir. 2017), underscoring that the FOIA "imposes on federal agencies both reactive and affirmative obligations to make information available to the public."

[120] *Id.*, at 1240-1241, 1245. Davis already reached such a conclusion in the 1970s. See *Davis Treatise*, cit. at 32, § 5:23, pp. 374-376. But see, also, *Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior*, 88 F.3d 1191, 1203 (D.C. Cir. 1996), holding that the only judicial remedy provided for by subsection (a)(4)(B) of the FOIA consists of an order imposed upon a given agency to release the sought records. Therefore, according to this decision, by filing a suit, an individual may not demand the fulfillment of proactive disclosure obligations, namely the publication of information in the Federal Register.

[121] See D.E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, cit. at 2, 1103, 1111, 1113; P. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Playbacks of Legislating Democratic Values*, cit. at 25, 665-666; L. Tai, *Fast Fixes for FOIA*, cit. at 2, 470. For a recent detailed study, based on agency statistical data, aimed at analyzing the nature – and thus the types – of FOIA requesters, see M. Kwoka, *Foia, Inc.*, 65 Duke L. J. 1379-1414 (2016).

[122] Memorandum from John Ashcroft, Attorney General, on the Freedom of Information Act to the Heads of all Federal Departments and Agencies, Oct. 12,

broader amount of discretion upon agencies in granting or denying access to records. Therefore, it consisted in a prominent change from the Clinton administration[123], under which the 1993 Reno FOIA memo[124] had already established a foreseeable harm standard[125]. As it has been observed, this change consisted in a significant setback: The legal nature of the entitlement to accessing agency records essentially shifted from a right to know to a need to know[126]. The Holder FOIA memo reintroduced the degree of disclosure already effective in the 1990s[127]. Given that fluctuation occurred over time, the codification of the presumption of openness provided the matter with a sufficient degree of certainty. Indeed, it would now take not just a presidential memorandum[128], as was the case in the past, but a legislative provision – and thus the carrying out of a legislative procedure – to cause a further change thereof.

2001, available at *https://www.justice.gov/archive/oip/011012.htm*. However, it should also be recalled that this memorandum was issued in the aftermath of the September 11 terrorist attacks on U.S. soil. On the implications of this event for the separation of powers, especially in light of the exercise of emergency powers, see A. Fioritto, *L'amministrazione dell'emergenza tra autorità e garanzie* (2008), 79-85. On implementation of the FOIA under the George W. Bush administration, see generally B. Pack, *FOIA Frustration: Access to Government Records Under the Bush Administration*, 46 Ariz. L. Rev. 815 (2004).

123 See P.M. Schoenhard, *Disclosure of Government Information Online: A New Approach From an Existing Framework*, 15 Harv. J.L. & Tech. 503 (2002).

124 *Memorandum from Janet Reno, Attorney General, on the Freedom of Information Act to the Heads of Departments and Agencies*, Oct. 4, 1993, available at *http://www.justice.gov/oip/blog/foia-update-attorney-general-renos-foia-memorandum*.

125 See S.J. Piotrowski, *Governmental Transparency in the Path of Administrative Reform*, cit at 30, 98.

126 See K.E. Uhl, *The Freedom of Information Act Post-9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 Am. U. L. Rev. 285 (2003).

127 See D. Metcalfe, *Sunshine Not So Bright: FOIA Implementation Lags Behind*, 34 Admin & Reg. L. News 6 (2009).

128 For an analysis of presidential memoranda, chiefly aimed at distinguish them from executive orders issued by U.S. Presidents, see P.J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action, Lawrence* (2002), 81-116. See, in general terms, J.L. Mashaw, *Gli atti sub-legislativi di indirizzo della pubblica amministrazione nell'esperienza degli Usa*, in P. Caretti, U. De Siervo (eds.), *Potere regolamentare e strumenti di direzione dell'amministrazione. Profili comparatistici* (1991), 111.

4.2.2. The New Exemption 5: A Time Limit for Applying the Exemption

Only one of the amendments brought in by the 2016 reform directly affected the system of exemptions provided for in the FOIA, even though the analysis of the codification of the presumption of openness should have shown that it has had at least an indirect impact on that whole system. Was the reform insufficient in this respect? Should the lawmakers have intervened more intensely? A proper response to these questions would take a deep inspection of such system, which cannot be conducted here. However, it may be observed that the overall exemptions system stands, so limited revisions brought to it are better than massive alterations, which might end up distorting the system itself. This system is an essential element of the FOIA. Even though the primary purpose of the FOIA is to ensure the right of the people to know "what their Government is up to"[129], Congress also took into adequate account public and private interests opposing the interest in disclosure[130]. Therefore, the statutory provisions containing the nine exemptions[131] constitute the balance Congress had to strike between such diverging interests[132]. The courts are saddled with a burdensome task in

[129] This phrase is often used by federal courts in their decisions concerning the FOIA. See, e.g., *Mink*, 403 U.S., cit. at 11, 105 (1973) (Douglas, J., dissenting); *Reporters Committee*, 489 U.S., cit. at 19, 772-773; *National Archives And Records Administration v. Favish*, 541 U.S. 157, 171 (2004).

[130] See *FBI v. Abramson*, 456 U.S. 615, 621 (1982).

[131] The interests demanding the protection of agency records and information from public access are concerned with the following matters: national security and foreign affairs (exemption 1); agency personnel rules and practices (exemption 2); non-disclosure provisions contained in statutes other than the FOIA (exemption 3); trade secrets and commercial or financial information revealed by – or otherwise obtained from – private parties (exemption 4); privileges comprehensively related to agency decision-making process (exemption 5); personal privacy, seriously undermined by the release of personnel and medical files, as well as other similar files (exemption 6); law enforcement and the diverse issues that the carrying out of relevant procedures may imply (exemption 7); the oversight function on the banking and financial system (exemption 8); geological and geophysical information and data (exemption 9).

[132] See *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989), referring to *Mink*, 403 U.S., cit. at 11, 80.

implementing such balance[133], but it is inevitable. Indeed, as has been argued, subsection (b) of the FOIA is capable of encompassing "virtually every major dilemma, accommodation, and delicate balance that a modern democratic government faces."[134] For this reason, every alteration – albeit of apparently minor impact – introduced therein should be considered very carefully.

The FOIA Improvement Act amended exemption 5 by establishing a 25-year limitation of effectiveness. This exemption assigns agencies the power to refuse the release of memoranda or letters exchanged among agencies or within an agency whenever they could not be routinely obtained in court through discovery[135]. The exemption has diverse contents, as it is composed of multiple agency privileges, each of which are founded on their own rationale. The main ones are the following[136]: deliberative process privilege[137]; presidential communications privilege[138]; attorney work-product privilege; attorney-client privilege. The main issue here is whether the sunset provision added in 2016 applies to all those privileges or just to some of them. From the language of the 2015 Report[139], it should be inferred that the former is the right solution[140]. Especially as far as the deliberative process privilege is

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133 See K.C. Davis, *Administrative Law of the Seventies. Supplementing Administrative Law Treatise* (1976), § 3A.34, p. 113.

134 P. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Playbacks of Legislating Democratic Values*, cit. at 25, 656.

135 See *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1050 (1973). On this exemption, see, e.g., R.J. Pierce Jr., *Administrative Law Treatise*, I (2002), § 5.11, pp. 276-281.

136 The exemption also encompasses situations involving sensitive information, the release of which would cause harm to the proceeding agency. See R.J. Pierce Jr., S.A. Shapiro, P.R. Verkuil, *Administrative Law and Process* (2009), § 8.3.3e, pp. 471-473.

137 See R.L. Weaver, J.T.R. Jones, *The Deliberative Process Privilege*, 54 Mo. L. Rev. 279 (1989).

138 A 1997 decision by the Court of Appeals for the District of Columbia Circuit deeply inspected the respective scope of these two privileges: *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

139 S. Rept. No. 114-4, cit. at 4, 10.

140 See F.J. Sadler, *Testimony*, in *Ensuring Government Transparency Through FOIA Reform, Hearing Before the Subcomm. On Government Operations of the House Comm. Oversight and Government Reform*, 114th Cong., 1st Sess., Feb. 27, 2015, 17, maintaining that the 25-year time limit would fit quite well the deliberative process privilege, while it would cause problems with the attorney-work

concerned, a proposal combining the foreseeable harm standard and the sunset provision has been advanced[141].

5. Conclusion

Is the U.S. FOIA still a statute other countries may model upon their transparency legislation? The response to this question should be yes, provided that the theoretical framework emerging from the present Article be not overlooked. The theoretical approach followed has also led to pinpointing some paradoxes in the usage of the FOIA as a model. However, they are not strong enough to thwart this role of the statute. Why is it so? Because the FOIA, already in its original version, had the potential for ensuring the right to know. The foreword to the 1967 Attorney General memorandum mentioned above[142] grasped this potential, and that is why it is still so important.

Nevertheless, the FOIA reforms occurred over the years made some considerable adjustments. One of them was the strengthening of proactive disclosure in 1996. The category of frequently requested records has since played a pivotal role in this regard. The FOIA Improvement Act significantly contributed to clarifying what records fall within the category and this is definitely an upside produced by the reform. The risk to avoid is to get to a point, wherein access upon request and proactive disclosure are deemed interchangeable, as this would cause the entire theoretical framework to collapse. Since a 2016 OIP document has proved that the frequently requested records category possesses the potential for this risk to materialize, it is on

product and attorney-client privileges. See, also, K. Singhal, *Disclosure, Eventually: A Proposal to Limit the Indefinite Exemption of Federal Agency Memoranda from Release Under the Freedom of Information Act*, 84 Geo. Wash. L. Rev. 1404 (2016), critically reading the amendment as applying only to the deliberative process privilege, because it should cover the whole exemption 5.

[141] According to this view, the more the age of an agency record approaches the expiration date for the invocation of exemption 5, the stronger is the need for its release and – accordingly – the rarer are the chances that such release would cause harm to the agency. See Z.D. Reisch, *The FOIA Improvement Act: Using a Requested Record's Age to Restrict Exemption 5's Deliberative Process Privilege*, 97 Bost. U. L. Rev. 1928-1929 (2017).

[142] But see *Davis Treatise*, cit. at 32, § 5:1, p. 309, criticizing this memorandum for giving a restrictive interpretation of FOIA provisions.

scholars to prevent this from happen. Since proactive disclosure and access upon request turn out to be both essential to implementing an adequate degree of administrative transparency, scholars should also ensure that these two institutions remain balanced and thus that neither of them prevail over the other.

Finally, as far as the other two amendments considered in the Article are concerned, the codification of the presumption of openness seems to ensure a sufficient degree of legal certainty. The scope of the amendment brought to exemption 5 to the FOIA, instead, is not very clear. This is another issue scholars will have to explore and check up on, also relying on practice and court decisions.

THE LEGAL REGULATION OF SURROGACY IN RUSSIA

*Ekaterina Mouliarova**

Abstract

Reproductive technologies and surrogacy can be seen as a new legal knot for Russian law. Being at the intersection between constitutional, family, civil, administrative and tax law, surrogacy creates a real problem for the legislator. Moreover, surrogacy practices are strongly interrelated with moral issues and cultural patterns. This article deals with some aspects of the complex issue of surrogacy. It focuses on developments in Russia in particular, and discusses them from the perspective of public comparative law. The article examines how Russian law, Russian jurisprudence and Russian morals and ideology are dealing with the new legal phenomenon of surrogacy. It argues that legal principles should be harmonised and clear legal priorities should be set in order to ensure the appropriate level of protection of the best interests of the child, parties in national and international surrogacy contracts, and the interests of public order. The article starts by briefly introducing some essential aspects of new reproductive technologies and surrogacy and the notions involved together with a brief comparative review of the international legal regulation of assisted reproduction. It then turns to the current situation in Russia, discussing legal definitions and such issues as surrogacy contracts, the legal position of the child, parental rights, registration of the child and disputes over parental rights. The level of legal certainty and human rights standards in surrogacy arrangements are pressing issues in the legal regulation of surrogacy. To illustrate this, the article refers where possible to related case law. Finally, it touches on ethical issues and the 'morality' of surrogacy arrangements, discussing the ideological underpinning of public discourse on surrogacy in Russia.

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1. Introduction

1.1. Context and contribution

This article focuses on legal, cultural and moral responses to surrogacy in Russia and discusses divergent approaches to new reproductive technologies in a comparative perspective. The article examines how Russian law, Russian jurisprudence and Russian morals and ideology are dealing with the new legal phenomenon of surrogacy.

Being a destination for 'surrogacy tourism,' Russia is as a matter of course involved in the transnational regulation of surrogacy in Europe and worldwide. As a member of the Council of Europe, Russia has an obligation to ensure an effective application of the Council of Europe's legal instruments at the

national level and to harmonize national law with the principles developed by the European Court of Human Rights. The article studies how Russia has reflected on approaches taken by other European states and by the European Court of Human Rights, in particular providing some examples of how the *Paradiso & Campanelli* case has influenced national discussion on new reproductive technologies and surrogacy.

To provide the context for contemporary views on surrogacy in Russia, it is important to clarify some background information. The literature cited in this article represents the range of views on new reproductive technologies in Russia. The references made exemplify different positions and reflect the overall heterogeneous picture. Being relatively new fields, surrogacy and assisted reproduction are traditionally discussed by family law scholars, and more recently by scholars working in the area of bioethics and medical law.[1] However, the specifics of new

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I would like to thank all my colleagues for their comments on the draft version of this article. I appreciate the invaluable comments made by an unknown referee. I am grateful to all the institutions where I have been able to work on my comparative research. The usual declaimer applies.

[1] E. Grigorovitch, *Iskustvennoje oplodotvorenie I implantazija embriona* [Искусственное оплодотворение и имплантация эмбриона человека] Автореф. дис. ... канд. юрид. наук. М., 1999; V. Maslyakov, N. Portenko, *Zakonodatelnoje regulirovanie surrogatnogo materinstva* [Законодательное регулирование суррогатного материнства]//"Медицинское право", 2016, N 5; V. Momotov, *Bioetika v kontekste zakonodatelstva I pravoprimenenija .Surrogatnoe materinstvo*[Биоэтика в контексте законодательства и правоприменения (суррогатное материнство)] // Lex russica. 2019. N 1. C. 29 – 39; E. Burdo, I. Garanina, *Problemy vydelenija reproduktivnah prav cheloveka v rossijskom prave* [Проблемы выделения института репродуктивных прав человека в российском праве человека] // Пробелы в российском законодательстве. 2015. N 5. C. 61 – 68; O. Balashov, *Iskusstvennoje oplodotvorenije. Chto dumajt pravoslavnyje*. [Искусственное оплодотворение: что думают православные // Биоэтика: принципы, правила, проблемы.] М.: Прогресс Традиция, 1998. С. 147 – 153; A. Pestrikova, *Obyzatelstva surrogatnogo materinstva* [Обязательства суррогатного материнства]: Автореф. дис. ... канд. юрид. наук. Самара, 2007; N. Sedova, *Pravovoj status bioetiki v sovremennoj Rossii* [Правовой статус биоэтики в современной России] // Медицинское право. 2005. N 1. С. 11 – 15; J. Sergeev, J. Pavlova, *Problemy pravovogo regulirovanija* ART [Проблемы правового регулирования

reproductive technologies are often mentioned but not thoroughly critically assessed.[2] Only very few Russian scholars specialize in surrogacy law[3] and therefore have expertise in factual questions about surrogacy or surrogacy law. Moreover, the issue of surrogacy is somewhat insufficiently treated by legal scholars active in the field of European and international law.[4] Recently, more has been written on comparative approaches to surrogacy in the states of the former Soviet Union, like Belorussia and Kazakhstan.[5]

This situation can be primarily explained by the fragmented nature of legal regulation. The actual laws in force regulate some technical aspects of new reproductive technologies in detail like, for example, the medical procedure itself, the list of required tests and record keeping. However, legal regulation still features too many lacunae with regard to the legal relationship between the parties in a surrogacy arrangement, the legal position of the child and so on.

Due to insufficiently detailed regulation, many legal scholars apparently treat surrogacy arrangements as new area of

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применения методов вспомогательных репродуктивных технологий] // Медицинское право. 2006. N 3. С. 3 - 8.

[2] For example, the classics of family law, like, *Family Law* [Семейное право] / B.M. Gongalo, P. Krasheninnikov, L. Miheeva под ред. П.В. Крашенинникова. 3-е изд., перераб. и доп. М.: Статут, 2016; or A. Nechaeva, *Family Law* [Семейное право]. М.: Юристъ, 2008; O. Rusakova, *Family Law* [Семейное право]. Эксмо; Москва; 2010.

[3] For example, T. Borisova, *Surrogatnoe materinstvo v Rossijskoj Federazii* [Суррогатное материнство в Российской Федерации: проблемы теории и практики:] Монография. М.: Проспект, 2012; E. Mitryakova, *Pravovoje regulirovanie surrogatnogo materinstva v Rossii* [Правовое регулирование суррогатного материнства в России:] Автореф. дис. ... канд. юрид. наук. Тюмень, 2006; E. Ivaeva, *Problemy realizasii konstituzionnyh prav cheloveka v Rossijskoj Federazii na primere surrogatnogo materinstva* [Проблемы реализации конституционных прав человека в Российской Федерации на примере суррогатного материнства:] Дис. ... канд. юрид. наук. М., 2004.

[4] A. Soltsev, A. Koneva, *Mezhdunarodnye obyazatelstva Rossii v sfere zashity prav detej* [Международные обязательства Российской Федерации в сфере защиты прав детей в свете деятельности международных универсальных и региональных контрольных органов по правам человека] // Евразийский юридический журнал. — 2013. — № 10. — С. 38-42.

[5] K. Zhirikova, *Opyt stran SNG v pravovom regulirovanii surrogatnogo materinstva* [Опыт стран СНГ в правовом регулировании суррогатного материнства]// "Российская юстиция", 2018, N 11.

civil law, discussing surrogacy contracts in relation to service contracts.[6] Despite the deficiencies in regulation, ART clinics offer contracts with different levels of elaboration and so legal practice in the field is growing.

Contemporary views on surrogacy are being discussed by scientists from other disciplines, including ethics, religion, demography and anthropology.[7]

New case law emerging in the context of new reproductive technologies will be discussed where possible.

1.2. Main definitions

In vitro fertilization and embryo transplantation are defined by the World Medical Association[8] as a medical technique which is available for the treatment of infertility. It has the potential to benefit both individual parents and society generally, not only through the alleviation of infertility but also through a possible avoidance of genetic disorders and by enhancing fundamental studies on human reproduction and contraception. A surrogate mother, as defined by the World Medical Organization, is a woman who carries a pregnancy resulting from third-party oocytes and sperm with the intention or agreement that the offspring will be brought up by one or both of the individuals who produced the oocytes and sperm.[9] A surrogacy arrangement is

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[6] I. Shapiro, *Sravnitelno-pravovoj analiz uslovij dogovorov o pravovom materinstve I vozmezdnogo okazanija uslug* [Сравнительно-правовой анализ условий договоров суррогатного материнства и возмездного оказания услуг]//"Семейное и жилищное право", 2018, N 3.

[7] O. Savvina, *Vlijanije reproduktivnogo turisma na zakonodatelstvo* [Влияние "репродуктивного туризма" на законодательство, регулирующее суррогатное материнство] //"Lex russica", 2018, N 2; N. Sedova, *Vse zakona byli kogda-to normami morali* [Все законы когда-то были нормами морали, но не все моральные нормы становятся законами]// Биоэтика. 2009. N 1. С. 37 - 42.

[8] WMA Statement on In-Vitro Fertilization and Embryo Transplantation, adopted by the 39th World Medical Assembly Madrid, Spain, October 1987 and rescinded at the WMA General Assembly, Pilanesberg, South Africa, 2006. Available at: https://www.wma.net/policies-post/wma-statement-on-in-vitro-fertilization-and-embryo-transplantation/.

[9] The World Medical Organization. Assisted Reproduction in Developing Countries – Facing up to the Issues, in: Progress in Reproductive Health Research. № 63.2003. Available at: http://www.who.int/reproductivehealth/publications/infertility/progress63.pdf

defined by the European Court of Human Rights[10] as a situation in which a woman bears a child for a couple who take responsibility for the plans for conception, and to whom the child will be handed over after his or her birth. In a surrogacy arrangement, the gametes may either come from the couple seeking to have the child (the intended parents) or from one member of that couple – in which case the child has a genetic relationship with at least one of the intended parents – or from two donors, possibly including the surrogate mother. In the vast majority of cases, in vitro fertilization is used.

Clearly, the term surrogacy covers several possible situations. First, the intended parents of the child may also both be his genetic parents; second, the child's conception may result from IVF (in vitro fertilization) using sperm from the intended father, and the surrogate mother is both the 'carrier' and the genetic parent; third, sperm from the male partner in the couple and a donated oocyte may be used, or alternatively donor sperm and the intended mother's oocyte – in this situation the intended parents have only a partial genetic relationship with the child; and the final variation is when both gametes are donated and transferred to the surrogate mother – in this case the intended parents have no genetic relationship with the child.

1.3. Approaches to maternity

The issue of the type of surrogacy constellation is central in determining legal maternity. Consequently, different approaches to maternity are paramount in the legal regulation of rights and duties in surrogacy relations, including the priority of deciding upon the future of the child. Surrogacy practices cause serious legal problems in determining legal maternity.[11] Nowadays, there is no full certainty that a mother who gives birth to a child is the mother in every respect. From both legal and moral perspectives,

[10] Questions and answers on the *Paradiso and Campanelli v. Italy* Judgement (27 January 2015). Available at: http://www.echr.coe.int/Documents/Press_Q_A_Paradiso_and_Campanelli_ENG.pdf.

[11] Russian Yearbook of the European Convention on Human Rights, issue 1, Statute, 2015.

both parties in a surrogacy arrangement have claims to parentage.[12]

According to Antokolskaja, a well-known Russian expert in family law, a strong maternal-foetal bond and a biological relationship between a surrogate mother and a foetus may develop, leading to strong feelings and psychological ties.[13] Pregnancy stimulates maternal instincts and determines a mother-child relationship, argue Rybakov and Tihonova.[14]

The Russian Orthodox Church emphasizes the strong biological and physiological ties that connect a mother and a child.[15] Siluyanova and Siluyanov criticize the legal notion of 'potential parents' being a wide circle of people wishing to have a child, including a couple officially married or officially unmarried or a single woman or even a man.[16] In their opinion, such extension of parentage and maternity definitions signals that the traditional family is in crisis. According to these authors, surrogacy limits the natural right of a child to have a mother and a father.

By contrast, some other Russian authors, such as Flyagin, point out that maternity is not limited to a biological capability of reproduction, and neither can it be restricted to the relationship

[12]S.F. Afanasjev, *Grazhdanskaja prozessualjnaja storona del ob ispolnenii dogovora o predostavlenii uslug surrogatnogo materinstva* [Гражданская процессуальная сторона дел об исполнении договора о предоставлении услуг суррогатного материнства] // Arbitrazhnyj I grazhdanskij prozess [Арбитражный и гражданский процесс]. N 7.2014.

[13]M.V. Antokoljskaja, *Family Law* [Семейное право]. Textbook, 2d ed. Moscow, 2002.

[14]O.J. Rybakov, S.V. Tihonova, *Doktrina estestvennogo prava I filosofija transgumanisma: vozmozhnostj kommunikazii* [Доктрина естественного права и философия трансгуманизма: возможность коммуникации], Lex russica, N 2, 2014.

[15]Osnovy sozialjnoj konzepzii Russkoj pravpslavnoj zerkvi, Glava 12.4, Problemy bioetiki. [Основы Социальной концепции Русской православной церкви. Глава 12.4 "Проблемы биоэтики". [Электронный ресурс] URL: http://www.Patriarchia.ru/db.

[16] I. Silujanova, V., K.A. Silujanov, *Reprodukzija cheloveka: etiko-pravovyje problemy* [Репродукция человека: этико-правовые проблемы.] // Medizinskoje pravo [Медицинское право]. N 4, 2013. С. 35 - 38.

between a mother and a child during the first year of the child's life.[17]

One of the central issues in the legal definition of surrogacy is intention. Together with the genetic relationship between the parent(s) and the child, intention creates an essential feature of the parent-child relationship (upbringing, caring, living in a family with a common sense of family life). According to an intent-based approach to legal maternity, the woman who intends to raise a child is the mother.[18] The intent-based approach, however, sets different standards for surrogacy arrangements and for parents conceiving a child in a natural way, where intent is not always present. It is clear that this lack of consensus on fundamental issues such as the definition of maternity hinders the harmonization of legal norms.

The legal determination of maternity has deep roots in national normative tradition.[19] Nowadays, Russian discourse on the family is influenced by a transformation of the traditional family model and emerging alternative models of family, partner and parent-child relationships. One newly popularized topic is 'collective parenthood,' writes Tatarinzeva.[20] If the model of multi-paternity is introduced into Russian family law, it will be necessary to establish normative principles on the nature of the rights of every parent and limits to their interaction and capabilities of independently exercising their rights.[21]

These societal developments challenge Russian constitutional and family law.[22] Tensions between traditional

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[17]Flyagin A.A. Pravovoj status roditelej pri surrogatnom materinstve [Правовой статус родителей при суррогатном материнстве].// Grazhdanskoe pravo [Гражданское право], N 3, 2015.

[18] A.M. Larkey, *Redefining Motherhood: Determining Maternity in Gestational Surrogacy Agreements* 51(3) Drake Law Review, 605-631(2003).

[19] Irina P. Lotova, *A systematic approach to the study of family values in modern Russian society*. "Статистика и Экономика." №5, 2015.

[20] E. Tatarintseva, *Modeli pravootnoshenij po vospitaniju rebenka v semje* [Модели правоотношений по воспитанию ребенка в семье и тенденции их формирования в национальном семейном праве.] М.: Юстицинформ, 2017.

[21]https://ivan4.ru/news/semeynye_tsennosti/parliamentary_hearings_30_03_17_the_concept_of_the_parent_child_relationship_in_the_rf_ic/.

[22] For example, S. Narutto, *Semja kak konstituzionnaja tsennostj* [Семья как конституционная ценность]// "Актуальные проблемы российского

understanding of motherhood and the family in Russia, and even 'gender stereotypes'[23] and divergent approaches in Europe have been examined both by the Russian Constitutional Court[24] and by the European Court of Human Rights.[25]

The limits to the constitutional right to family are not so obvious and simple, argues prominent Russian family lawyer Svetlana Narutto.[26] Complexity and diversity are characteristic of parental relationships in present times. As an example, the parental rights of the persons who are engaged in a surrogacy arrangement are made dependent on the consent of the surrogate mother.

Commenting on Article 38, 1 of the Russian Constitution, Judge of the Constitutional Court Gadzhiev asks what kind of family is protected by the Constitution and if actual partner relationships should have the same protection as the traditional family. He suggests that constitutional values should not be treated as fixed facts but should take into account the development of social reality.[27]

The legal determination of maternity and its biological configurations are related but in tension. The legislation in force treats different kinds of social family relationships between a child

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права", 2017, N 5; A. Tolstaja, *Faktícheskij brak:perspektivy pravovogo razvitija* [Фактический брак: перспективы правового развития] // Закон. 2005. N 10. С. 21 - 29; N. Kostrova, *Kaka zashititj semju I prava detej* [Как защитить семью и права детей: проблемы совершенствования семейного законодательства] // Закон. 2010. N 8. С. 131 - 135.

[23] A. Timmer, *From inclusion to Transformation: Rewriting Konstantin Markin vs.Russia*, in Eva Brems (ed.), *Diversity and European Human Rights. Rewriting Judgements of the ECHR* (2013), 148-171.

[24] Resolution from the 6th of December 2013 N 27-П Постановление от 6 декабря 2013 г. N 27-П по делу о проверке конституционности положений статьи 11 и пунктов 3 и 4 части четвертой статьи 392 Гражданского процессуального кодекса Российской Федерации в связи с запросом Президиума Ленинградского окружного военного суда. available at: https://rg.ru/2013/12/18/ks-dok.html.

[25] The European Court of Human Rights, Grand Chamber, case of *Konstantin Markin v. Russia*, App.no. 30078/06. At: hudoc.echr.coe.int/app.

[26] S. Narutto, *Semja kak konstituzionnaja tsennostj* [Семья как конституционная ценность]// "Актуальные проблемы российского права", 2017, N 5

[27] G. Gadzhiev, *Ekonomicheskaja effektivnostj, pravovoja etika I doverije k gosudarstvu* [Экономическая эффективность, правовая этика и доверие к государству] // Журнал российского права. 2012. N 1. С. 10 - 21.

and other persons who are not his/her biological parents but who take care of him/her as not fully identical to parental relationships.

The tension between biological and legal parenthood is well illustrated by the legal relationship of adoption. Russian family law views adoption as a legal relationship very close to parenting. According to article 136, 1 of the Family Code, on the request of adoptive parents [приемные родители] the court can register them as legal parents [родители] in the register of births. However, the legal status of adoptive parents has a complex nature. According to article 15,1 of the federal law 'On Guardianship' some aspects of adoption are regulated by family law and some by civil law. Adoptive parents, guardians or other substituting parents cannot be deprived of their parental rights precisely because their rights are not equal to the rights of biological parents. A resolution of the Supreme Court of the Russian Federation has confirmed this position.[28]

From a sociological perspective, writes expert in family law Antokolskaja, adoption is a form of social fatherhood and motherhood. Although the rights and duties of adoptive parents are almost equal to those of parents, the real relationship of adoption depends substantially on the attitudes of a child and if he/she sees the adoptive parents as his/her relatives.[29] The jurisprudence of the Constitutional Court has confirmed the complex nature of the legal relationship of adoption.[30]

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[28] The Plenum of the Supreme Court of the Russian Federation 14.11.2017 N 44 Постановление Пленума Верховного Суда РФ от 14.11.2017 N 44 "О практике применения судами законодательства при разрешении споров, связанных с защитой прав и законных интересов ребенка при непосредственной угрозе его жизни или здоровью, а также при ограничении или лишении родительских прав"//"Российская газета", N 262, 20.11.2017.

[29] M. Antokolskaj, *Semejnoe pravo* [Семейное право]. 2-е изд., перераб. и доп. М., 2003. С. 196.

[30] Resolution of the Constitutional Court Федерации from the 20th of March 2014 N 633-О Определение Конституционного Суда Российской Федерации от 20 марта 2014 года N 633-О; Resolution from the 31st of January 2014 N 1-П, Постановление от 31 января 2014 года N 1-П.

1.4. Comparison of legal perspectives on assisted reproduction and surrogacy

The focus of this article is not the comparison of different legal approaches in itself, as it is almost impossible to embrace rich plentitude of views and studies in the field of assisted reproduction.[31] A brief comparative background should rather identify possible views and help to situate Russian responses to surrogacy in comparative perspective.

At the level of international law, the World Medical Association has adopted the Madrid Declaration, which contains main principles and recommendations.[32] It is generally recognized that as new reproduction technologies and surrogacy practices constitute a relatively new practical field they are linked with "ever-increasing dilemmas and controversies"[33] and often conflict with the moral principles or ethical restrictions of some people and societies. The United Nations Committee on Bioethics has recognized the transnational character of scientific practices and underlined the "necessity of setting universal ethical guidelines covering all issues raised in the field of bioethics and the need to promote the emergence of shared values."[34]

International organizations such as the Council of Europe tend to treat a wide set of issues related to surrogacy rather than surrogacy itself. The European Court of Human Rights has recognized "the wide margin of appreciation of individual states and a lack of consensus on these issues in Europe."[35] In European

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[31] B. Stark, *Transnational Surrogacy and International Human Rights Law*. 18(2) *ILSA Journal of International and Comparative Law* (2012), 369-386; P. Gerber and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights* (2015).

[32] WMA Statement on In-Vitro Fertilization and Embryo Transplantation, adopted by the 39th World Medical Assembly Madrid, Spain, October 1987 and rescinded at the WMA General Assembly, Pilanesberg, South Africa, 2006. Available at: https://www.wma.net/policies-post/wma-statement-on-in-vitro-fertilization-and-embryo-transplantation/.

[33] Universal Declaration on Bioethics and Human Rights, 32 C/Resolution 24, 2005. Available at: http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[34] Resolution adopted on the report of Commission II I at the 18th plenary meeting on 19 October 2005. The 32d Session of the UNESCO General Conference, 32 C/ Resolution 24.

[35] *Mennesson v. France* (application no. 65192/11); *Labassee v. France* (Application no. 65941/11). See also: C. Fenton-Glynn, *International Surrogacy Before the European Court of Human Rights*, 13(3) Journal of Private International Law

Union law, family law belongs to the competence of single Member States and the field has not yet been harmonized. Only a few relevant matters are covered by EU regulations, such as matrimonial matters, matters of parental responsibility and recognition, and enforcement of judgments.[36]

A comparative analysis of legal regulations reveals quite different approaches to these issues in different countries, ranging from full prohibition, as in Germany,[37] for example, to an absence of any explicit regulation, as for example in Poland[38]. Countries like Germany prohibit any surrogacy relations because it is not possible to separate social and biological maternity. Such a distinction would lead to various psychological problems and conflicts for the parties involved and for the identity of the child. German law acknowledges as a child's mother the woman who gave birth to it. Nevertheless, the German high courts recognize parentage by same-sex couples if at least one of the parents is biologically related to the child, finding in such cases no violation of public order.[39] According to the German Constitutional Court, life partners can be as beneficial for a child as parents as married partners. Thus, the Court gives preference to the integrity of

(2017), 546-567; Richard F. Storrow, *International Surrogacy in the European Court of Human Rights*, 43(4) North Carolina Journal of International Law (2018) 38.

[36] Regulation (EC) no. 1347/2000 on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses (Brussels II) as revised by Regulation (EC) no. 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) no. 1347/2000, *OJ* L 338/1, 23.12.2003, effective as of 1 March 2005. Green Papers on maintenance obligations (COM(2004) 254), on the applicable law and jurisdiction in divorce matters (COM (2005) 82) and on succession and wills (COM (2005) 65); C. Thomale, *State of play of cross-border surrogacy arrangements – is there a case for regulatory intervention by the EU?*, 13(2) Journal of Private International Law (2017) 463-473.

[37] K. Diedrich, S. Al-Hasani, T. Strowitzki, *Reproduktionsmedizin in Deutschland – vom Embryonenschutzgesetz bis zur Präimplantationsdiagnostik*, 51 Gynäkologe (2018) 713.

[38] Z.V. Chernova, *Semejnaja politika v Evrope i Rossii: gendernyj analiz* [Семейная политика в Европе и России: гендерный анализ]. СПб. Норма, 2008.

[39] Bundesgerichtshof Beschluss X I I Z B 4 6 3 / 1 3 vom 10. Dezember 2014. Available at: http://juris.bundesgerichtshof.de

family life over formal marriage registration.[40] In Poland, with an absence of any explicit regulation, interpretation of surrogacy arrangements is left to the judiciary. The mother of a child is the woman who gave birth to the child according to the Family and Guardianship Code. Therefore, according to the prevailing opinion of jurisprudence, surrogacy agreements are void as they are contrary to the law and public policy and are unenforceable. This also applies to agreements where a surrogate mother gives her consent to the future adoption of the child by the genetic parents, because consent to the adoption of a child cannot take place earlier than six weeks after birth.[41]

Between these positions, we find all possible mixtures of prohibition and tolerance in legal provisions concerning surrogacy. Using gestational surrogacy arrangements is prohibited in Italy. Danish law requires written donor consent and a genetic relationship of at least one of the intended parents in artificial fertilization and it prohibits surrogacy. Austria has introduced a number of restrictions on using assisted reproduction technologies.[42] Greek law restricts the number of foetuses produced from the sperm of one donor to ten and automatically recognizes the male member of the couple as the father in the case of written consent by the female member to artificial fertilization.[43] In the USA, some states prohibit and some, like California, recognize and practise surrogacy arrangements

[40] Judgment of 19 February 2013 – 1 BvL 1/11 – 1 BvR 3247/09 – Available at: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/02/ls20130219_1bvl000111en.html.

[41] J. Kosińska-Wiercińska, J. Wierciński, *Family Law in Poland: Overview* (2015) Available at: https://content.next.westlaw.com; M. Radkowska-Walkowicz, *Frozen Children and Despairing Embryos in the 'New' Post-Communist State: The Debate on IVF in the Context of Poland's Transition*, 21(4) European Journal of Women's Studies, 2014, 399–414.

[42] Stellungnahme der Bioethikkommission beim Bundeskanzleramt zum Entwurf eines Bundesgesetzes, mit dem das Fortpflanzungsmedizingesetz, das Allgemeine bürgerliche Gesetzbuch und das Gentechnikgesetz geändert werden (Fortpflanzungsmedizinrechts-Änderungsgesetz 2015 – FMedRÄG 2015). Available at: http://archiv.bundeskanzleramt.at/DocView.axd?CobId=57878.

[43] A.N. Hatzis, *The Regulation of Surrogate Motherhood in Greece*, available at: users.uoa.gr/~ahatzis/Surrogacy.pdf.

widely.[44] Israel prohibits commercial surrogacy.[45] Canada's Royal Commission on New Reproductive Technologies rejects commercial surrogacy but to some extent permits altruistic surrogacy arrangements as cases giving a benefit or service to another in a way that expresses benevolence.[46]

1.5. Opinion on surrogacy

Public opinion is not always surrogacy-friendly. As the World Medical Organization explains, attitudes to assisted reproduction are very much influenced by specific cultural and social contexts.[47] Legal opinions rank from "surrogacy being a legitimized sale of children"[48] to surrogacy being the last chance for infertile couples to have a fulfilling family life.[49]

At one pole, surrogacy is deemed an dehumanizing form of labour. At the opposite pole, addressing the question of whether surrogacy is categorically unethical, some authors challenge anti-surrogacy arguments by comparing surrogacy to other invaluable services such as health care.[50] Some discuss the tendency to commodify reproduction.[51] Others support surrogacy by drawing

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[44] Max-Planck-Datenbank zu den Rechtlichen Regelungen zur Fortpflanzungsmedizin in Europäischen Ländern. Avaliable at: https://meddb.mpicc.de/.

[45] D. Birenbaum-Carmeli, *Contested Surrogacy and the Gender Order: An Israeli Case Study*, 3(3) Journal of Middle East Women's Studies (2007) 21-24.

[46] D. Snow, *Criminalising commercial surrogacy in Canada and Australia: the political construction of 'national consensus'*, 51(1) Australian Journal of Political Science (2016) 1-16.

[47] The World Medical Organization. Assisted Reproduction in Developing Countries – Facing up to the Issues. In: Progress in Reproductive Health Research. №63.2003. Available at: http://www.who.int/reproductivehealth/publications/infertility/progress63.pdf.

[48] D.M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children*, 43 Pepp. L. Rev. (2016), 265.

[49] A.A. Pestrikova, *Obyazatelstva surrogatnogo materinstva* [Обязательства суррогатного материнства] (2007).

[50] M. Davies (ed.), *Babies for sale? Transnational Surrogacy, Human Rights and the Politics of Reproduction* (2017); P-H. Shuck, *The Social Utility of Surrogacy*, 13(1) Harvard Journal of Law and Public Policy (1990) 132-137.

[51] Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, Columbia Public Law & Legal Theory Working Papers (2008) 08153, http://lsr.nellco.org/columbia_pllt/08153.

on constitutional rights to privacy, which should include a right to hire a surrogate.[52] Ethical issues are often discussed with regard to global surrogacy arrangements.[53] Much concern has been raised about increasing surrogacy tourism to developing countries where low health care standards and poverty place women at risk of exploitation and harm.[54] Discussing the ethical arguments against international surrogacy, some authors notice that employment alternatives for potential surrogate mothers could be even more exploitative or more harmful than surrogacy itself, and call for Fair Trade Surrogacy regulations.[55] Ultimately, nowadays there is neither a single legal approach to reproduction and surrogacy in the world and nor is there a consensus on the moral issues related to surrogacy arrangements.

Against this brief comparative background, let me now turn to discussing the legal regulation of surrogacy arrangements in the Russian Federation.

2. Surrogacy arrangements in Russia

2.1. The main facts about surrogacy in Russia

New reproductive technologies and surrogacy have been practised in Russia since approximately 1996.[56] Statistics show that nowadays there are more than 3 million children in Russia born by means of new reproductive technologies and surrogacy arrangements.[57] Russia has around 150 clinics offering assisted

[52] A.M. Larkey, *Redefining Motherhood: Determining Maternity in Gestational Surrogacy Agreements*, 51(3) Drake Law Review (2003) 605-631.

[53] A. Banerjee, *Reorienting the Ethics of Transnational Surrogacy as a Feminist Pragmatist,* 5(3) The Pluralist (2010), 107-121.

[54] G.K.D. Crozier, D. Martin, *How to Address the Ethics of Reproductive Travel to Developing Countries: A Comparison of National Self-Sufficiency and Regulated Market Approaches*, 12(1) Developing World Bioethics (2012) 45-54.

[55] H. Cassey, *Fair Trade International Surrogacy*, 9(3) Developing World Bioethics (2009) 111-118 (2009).

[56] I. Krasnopoljskaja, *EKO-nevidalj*. [ЭКО невидаль. Первому российскому ребенку из пробирки исполнилось 30 лет.] Avaliable at: https://rg.ru/2016/02/08/gennadij-suhih-v-rf-est-programma-pomoshchi-besplodnym-param-v-ramkah-oms.html

[57] E. Novoselova, *Mama na devyatj mesyatsev* [Мама на девять месяцев] // Rossijskaja gaseta [Российская газета]. 2006. N 424. Available at: http://www.rg.ru.

reproduction, and with almost 69,000 IVF tests a year it occupies the third place for this practice globally.[58] There are data banks of potential surrogates which include information on their age, health and the number of their own children.[59]

Despite the reproductive boom, important aspects of the complex issue of surrogacy are not adequately regulated in Russian legislation. These include donor definition, the rights of genetic parents, the rights of the surrogate mother and finally the legal position of the child. This is the predominant opinion in Russian literature.[60] Currently, relations in assisted reproduction are regulated by family law, medical law and a number of administrative acts which are only able to reflect the latest technological developments in a limited way.

Public policy grounds in surrogacy arrangements are given no importance at the constitutional level and are only indirectly mentioned in administrative acts. The related protection of equality is left to judicial discretion.[61]

Moreover, the further issues of succession and property rights do not seem to preoccupy the mind of the legislator.[62] Judicial practices reveal an extremely mixed picture, ranging from very open-minded protection of equality to consideration of taxing donors.

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[58]Xth International Congress on reproduction, Russia, Moscow. 2016. At: www.reproductive-congress.ru.

[59]M. Brovkina, *Zhivot naprokat* [Живот напрокат]. Available at: https://rg.ru/2016/10/05/reg-ufo/na-iuge-rossii-sozdan-bank-dannyh-surrogatnyh-materej.html.

[60]A. Kristaforova, *V. Surrogatnoje materinstvo v Rossijskoj Federarzii: osnovnyje ponyatija, problemy pravovogo regulirovanja, rolj notariusa* [Суррогатное материнство в Российской Федерации: основные понятия, проблемы правового регулирования, роль нотариуса] // Semejnoe I zhilischnoe pravo [Семейное и жилищное право]. N 3, 2014. P. 24 - 28.

[61]A.N. Levushkin, I.S. Saveljev, *Trebovanja, predjavlyaemye zakonodatelem k buduschim roditelyam rebenka, rozhdennogo s primeneniem tehnologii surrogatnogo materinstva* [Требования, предъявляемые законодателем к будущим родителям ребенка, рожденного с применением технологии суррогатного материнства] // Sovremennoe pravo [Современное право], N 9, 2015.

[62]Z.A. Shukshina, *Pravo nasledovanija i sovremennye reproduktivnyje technologii* [Право наследования и современные репродуктивные технологии], // Medizinskoe pravo [Медицинское право], №6, 2011.

In order to assess the level of legal certainty in surrogacy arrangements in Russia, in this part of the article I will discuss the definition of surrogacy and new reproductive technologies in Russian law and will review the provisions on surrogacy contracts in Russia. Furthermore, to evaluate the human rights standards in surrogacy arrangements, I will examine the legal regulation of child registration, the child-parent relationship, disputes over fatherhood or motherhood in surrogacy arrangements and the central issue of the legal position of the child. Where possible, I will discuss the related case law. Finally, in order to analyse the current limitations in applying the principles of equality and non-discrimination, I will focus on references to public policy grounds in surrogacy arrangements.

2.2. The definition of surrogacy and donorship in Russian Law

Surrogacy and new reproductive technologies are legally recognized in the Russian Federation. Article 55 of the Russian Federation Citizens' Health Protection Act contains the main provision on surrogacy, defining surrogate motherhood as "bearing (вынашивание и рождение) a child (including premature birth) according to a contract entered into by a surrogate mother (a woman bearing a child after an embryo has been transferred (implanted) to her) and potential parents whose gametes have been used for the fertilization, or by a single woman who is not able to bear a child according to medical indications."[63] A woman can become a surrogate mother if she is aged between 20 and 35, has at least one healthy child of her own, has received positive medical certification, and has given her written informed free-will consent. If she is officially married according to the law of the Russian Federation, the written consent of her husband is obligatory.

An important part of surrogacy treatment is donation. The Federal Law on donation of blood and blood components regulates blood donation.[64] By contrast, a separate administrative

[63] Federal Law from November, 23, 2011 N 323-ФЗ "On the Basics of Protection of Health of Citizens in the Russian Federation". Available at: https://rg.ru/2011/11/23/zdorovie-dok.html.

[64]Federal Law of July 20, 2012 No. 125 "On Donorship of Blood and its Components". Available at: www.consultant.ru.

act by the Russian Ministry of Health regulates the donation of gametes. Ministry of Health decree No. 107n[65] defines donors and sets standard requirements for those wishing to become one. Donors are persons who donate their gametes to other people to treat infertility and do not have a parental commitment to the future child. The legislator thus gives priority to intention and the social component of parentage over the genetic relationship in the definition.

In 2017 the Plenum of the Russian Supreme Court confirmed that if donor gametes are used in a surrogacy arrangement, neither the donors of genetic material nor the legal parents of a child have a right to dispute the legal registration of a child on these grounds. Whether the donor was known or anonymous does not lead to any legal consequences regarding paternal rights and the parental relationship.[66]

Regardless of definitions, the complexity of surrogacy arrangements and the absence of comprehensive federal regulation open possibilities for abuse of contractual donor relationships in surrogacy. For instance, in 2004 a couple concluded a contract with a surrogate mother. This woman received donor sperm from the male member of the couple. After the child was born, the surrogate mother renounced her consent to give the child to the couple, identified the fatherhood of the sperm donor and successfully claimed alimony, which was allowed by the Russian court.[67]

There are standard requirements to become a donor in terms of age, health and absence of serious infections and diseases. In surrogacy arrangements, the woman or the intended parents

[65]Decree of the Ministry of Health of the Russian Federation of 30.08.2012 No. 107n "On regulations of use of assisted reproductive technologies, including counter-indications and restraints concerning its use", 11.06.2015. Available at: www.consultant.ru.

[66] The Plenum of the Supreme Court of the Russian Federation, Resolution 16 th of May, 2017 N 16 O [Пленум Верховного Суда Российской Федерации Постановление от 16 мая 2017 г. N 16 О Применении судами законодательства при рассмотрении дел, связанных с установлением происхождения детей.] Available at: http://www.vsrf.ru.

[67]A.A. Pestrikova, *Obyazatelstva surrogatnogo materinstva* [Обязательства суррогатного материнства] Samara, 2007.

have the right to know the nationality and physical constitution and features of the donor. The remaining information is secret.

In insufficiently regulated commercial surrogacy arrangements, the anonymity of donors can cause long-term legal, medical and moral problems. Romanovskij makes a serious argument against the principle of anonymity of donors. He notes a "kind of anarchic activity of the Russian ART clinics,"[68] which are created and closed spontaneously. A common database of donor gametes is inexistent. If a clinic is liquidated, in several years no information on donors will be available and will be possibly completely lost.

Citizens have the right to cryoconservation of their gametes and embryos. The industrial use of gametes and embryos is forbidden in the Russian Federation. The Federal Law on the Transplantation of Organs and Tissues of a Man[69] explicitly excludes embryo and gamete transplantation outside the legal scope of this law (Article 2). In line with international norms set out in the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, using techniques of medically assisted procreation to help choose the sex of a child is prohibited, except where it would help to avoid serious genetic disorders.[70]

According to Russian law, a surrogate mother cannot be a donor of an ovule (oocyte). In this way, the legislator prohibits a genetic relationship between the surrogate mother and the child. Thus, the Family Code of the Russian Federation adheres to the '*mater est quam gestatio demonstrate*' principle and gives priority to 'birth physiology' over 'genetic physiology.' At the same time, the Federal Law on the Basics of the Health Care Policy uses the notion of 'potential parents' in relation to people whose gametes

[68] G.B. Romanovskij, *Anonymity of donors of gender cells and contemporary family law*. [Анонимность доноров половых клеток и современное семейное право.] (Романовский Г.Б.//"Семейное и жилищное право", 2010, N 5.

[69] Federal Law from December 12,1992 N 4180-1 (in red. 29.11.2007) "On the transplantation of organs and tissues of a man". Available at: www.consultant.ru

[70] The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No 164). Available at: http://www.coe.int/en/web/bioethics/oviedo-convention.

are used in a surrogacy arrangement.[71] However, the law retains the prerogative right of the surrogate mother to decide on the parental relationship. She has to give her written consent for the intended parents of the child to be registered as such.[72]

2.3. Surrogacy Contracts

Assisted reproduction in Russia is offered by licensed clinics. A surrogacy arrangement is normally formalized in a complex contractual relationship between the intended parents, the surrogate mother and the clinic.

Here I will mention two issues which are crucial for the adequate protection of the interests of the parties in a surrogacy contract.

First, the very nature of a surrogacy contract has not yet been clarified.[73] Some authors treat surrogacy as a special type of family law contract.[74] Indeed, the Family Code incorporates one element involved in a surrogacy arrangement, namely the registration of children. However, the family law does not cover the other remaining elements. Most authors agree that surrogacy represents a special type of civil law contract[75] and should be

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[71] Article 55, 9 of the Federal Law on the Basics of Protection of Health of Citizens in the Russian Federation. Available at: www.consultant.ru.

[72] Article 52,3 of the Family Code of the Russian Federation. Available at: www.consultant.ru.

[73] M. Startchikov, *Dogovor okazanija medizinskih uslug* [Договор оказания медицинских услуг: правовая регламентация, рекомендации по составлению, судебная практика и типовые образцы.] М.: Инфотропик Медиа, 2017; S. Chashkova, *Svoboda* formirovanija uslovij dogovora o surrogatnom materinstve kak netipichnoj [Свобода формирования условий договора о суррогатном материнстве как нетипичной договорной конструкции] // Законы России: опыт, анализ, практика. 2016. N 2. С. 58 – 64; K. Kirichenko, *Opredelenie predmeta dogovora surorgatnogo matrinstva* [Определение предмета договора суррогатного материнства] // Семейное и жилищное право. 2016. N 1. С. 9 – 12; S. Losovskaja, M. Shodonova, *Subjektnyj sostav dogovora surrogatnogo materinstva* [Субъектный состав договора суррогатного материнства] // Семейное и жилищное право. 2016. N 3. С. 7 - 10.

[74] L.V. Kruzhalova, I.G. Morosova, *Spravochnik jurista po semejnomu pravu* [Справочник юриста по семейному праву], Sankt-Peterburg, 2007.

[75] J.A. Dronova, *Chto nuzhno znatj o surrogatnom materinstve* [Что нужно знать о суррогатном материнстве]. Moscow, 2007.

regulated by norms related to services,[76] in the sense that a surrogate mother provides certain services to a couple. She receives compensation for medical examinations, travel, absence from work, possible injuries and for her 'service.' Nevertheless, she is not fully protected from arbitrariness by a clinic or from unexpected actions by the intended parents. Only the financial obligations of the parties to the contract are enforceable.[77]

There has been an attempt to make a surrogacy contract a mandatory condition for the registration of a child born in a surrogacy arrangement.[78] The draft law, however, has not been ratified so far.

Since a special type of contract with a surrogate mother is not explicitly mentioned in Russian civil law, its enforcement was deemed fully invalid in Russian courts until recently. The priority is normally to be given to explicit provisions in the Family Code providing the right of a surrogate mother to decide upon the future of a child.

In 2017 the Plenum of the Supreme Court of the Russian Federation in Resolution No. 16 "On application of the law related to identification of a child"[79] noted that if a surrogate mother has not given her consent to register potential parents as legal parents of the child born in a surrogacy arrangement, this fact cannot be an absolute ground for rejecting the claim of potential parents to

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[76]A. Aslsmurzaeva, *Surrogatnoje materinstvo: probely zakonodateljstva* [Суррогатное материнство: пробелы законодательства]// EZ-Juristy [ЭЖ-Юрист]. 2011. N 30; A.V. Malutina, *Vserossijskij zhurnal nauchnyh publikazij* [Всероссийский журнал научных публикаций]. Juridicheskie nauki [Юридические науки]. №1 (11) 2012.

[77]S.S. Shevtchuk, *Nekotorye problemy pravovogo regulirovanja primenenija iskusstvennyh metodov reprodukzii* [Некоторые проблемы правового регулирования применения искусственных методов репродукции] // Jurist, 2002. N 9.

[78] Законопроект N 1177252-6 "О внесении изменений в Семейный кодекс РФ и статью 16 Федерального закона "Об актах гражданского состояния" в части применения вспомогательных репродуктивных технологий" (внесен в Государственную Думу 19.09.2016).

[79] The Plenum of the Supreme Court of the Russian Federation, Resolution from the 16th of May 2017, N 16 Пленум Верховного Суда Российской Федерации Постановление от 16 мая 2017 г. N 16 О применении судами законодательства при рассмотрении дел, связанных с установлением происхождения детей. Available at: http://www.vsrf.ru.

register them as legal parents of the child. The court should decide if a surrogacy contract has been concluded, examine its provisions and clarify why the surrogate mother has withdrawn her consent.

Obviously, there is a certain dynamic in the attitudes of the judiciary and we find more nuanced interpretations of the freedom of contract principle in conjunction with the principle of equality.

As the *Paradiso* case illustrates,[80] an important aspect of a surrogacy contract is the relationship between the clinic, the intended parents, the donor and the surrogate mother. In the IVF procedure carried out in Russia for Italian citizens Paradiso and Campanelli, unknown gametes were used. The Italian authorities decided to remove the child and place him under guardianship on the ground that he had no biological relationship with the Italian couple. Including a genetic test of the newly born child in the obligations of the clinic would save couples the trouble of giving evidence of their biological relationship. The current contractual scheme does not guarantee the adequate and effective protection of the interests and rights of any of the parties.

The Paradiso case has raised several important concerns with regard to surrogacy contracts.

First, the question of liability of a medical institution involved in a surrogacy arrangement is not specified in Russian law. Significantly, the clinic which was involved in the *Paradiso & Campanelli* case still exists providing "all-inclusive surrogacy packages to its clients." [81] The law firm cooperating with the clinic treats surrogacy contracts as a type of commercial service: "A contract between a surrogate mother and biological parents is a common contract of commercial services." Putting aside moral reasons, the law firm claims that any "good quality work deserves to be well-paid, including work of this kind."[82]

Some Russian legal scholars strongly reacted to the *Paradiso* case. Vershinina in an article refers to the *Paradiso* case explicitly[83]

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[80] Questions and Answers on the Paradiso and Campanelli v. Italy judgment. Available at: http://www.echr.coe.int/Documents/Press_Q_A_Paradiso_and_Campanelli_ENG.pdf.

[81] http://vitanovaclinic.ru/en/program/allinclusive/.

[82] www.jurconsult.ru.

[83] G. Vershinina, *O nekotoryh problemah primenenija zakonodatelstva pri rassmotrenii del svyazannyh s ustanovleniem proishozhdenija detej* [О некоторых проблемах

and argues that if a fraud has taken place or any kind of illegal agreement between the clinic and the couple exists, the issue should be regulated by criminal law.

Second, the clinic involved in the *Paradiso* case openly rejects the importance of the citizenship of the intended parents or their marital status.[84] However, among legal professionals *Paradiso* has induced broader debates precisely on the differences in legal approaches to surrogacy worldwide.

Without mentioning the *Paradiso* case directly, Tagaeva and Aminova[85] argue that a foreign fact element can restrict carrying out some kinds of reproductive technologies in transnational surrogacy contracts. Some countries fully prohibit surrogacy arrangements. Citizens of those countries can become parties to surrogacy contracts in other states. Therefore, *lex voluntatis* can be restricted on public policy grounds or imperative national laws.

Scholars recall the strong moral and ethical implications that surrogacy contracts often have and their impact on the legal position of a child. Therefore, the authors insist on particular state control in surrogacy contracts. "Breach of contractual obligations either by the immediate contractual parties (genetic parents and a surrogate mother), or by a medical organization should lead to liability. In this regard, it is necessary to take into account both the national law of the genetic parents but equally the law of the state where the surrogacy arrangement takes place."[86]

"Unfortunately, the authors conclude, the choice of law rules in relation to new reproductive technologies lag behind the actual development of medical techniques."[87]

From the international private law perspective, choice of law in surrogacy contracts is a difficult question. The authors

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применения законодательства при рассмотрении дел, связанных с установлением происхождения детей] // Законы России: опыт, анализ, практика. 2018. N 1. С. 11 - 15.

[84] http://vitanovaclinic.ru/en/services/surrogacy/.

[85] S. Tagaeva, F. Aminova, *Problemy primenenija provoporyadka k oslozhnennym inostrannym elementom otnoshenijam voznikaushim iz vspomogatelnyh reproduktivnyh technogolij* [Проблемы применения правопорядка к осложненным "иностранным элементом" отношениям, возникающим из вспомогательных репродуктивных технологий] "Вестник Пермского университета. Юридические науки", 2017, N 2. С. 192 - 202.

[86] S. Tagaeva, F. Aminova, cit. at 85, 199.

[87] S. Tagaeva, F. Aminova, cit. at 85, 194.

presume, that *lex personalis* can create problems in international surrogacy arrangements because many states prohibit surrogacy. The choice of the national law of the intended parents create unfavourable conditions for them. Tagaeva and Aminova argue that for transnational surrogacy contracts is it crucial to study national rules before entering a surrogacy contract. Neglect can create serious problems with regard to the rights and legal position of a child and even create limping parental relationships, which are recognized in the state where the surrogacy arrangement has taken place but not in the legal order of the intended parents. Finally, the authors plead for the harmonization of rules regulating parental relationships.

A second issue that is crucial for the adequate protection of the interests of the parties in a surrogacy contract, in our opinion, has to do with the regime of medical secrecy, which includes secrecy of donorship and secrecy of surrogacy treatment. A factor that creates a serious gap in the regulation of surrogacy and opens up the possibility of malpractice is the fact that although the commercial use of gametes is prohibited there are banks of gametes which can be used by cooperating clinics.[88] If such gametes are sent from Russia to the USA for use in surrogacy treatments, the regime of secrecy cannot be applied there according to US law, and *vice versa*. The absence of harmonized regulation causes serious legal collisions and conflicts.

International surrogacy and donor contracts represent a vast field for legal collisions between those legal orders which recognize the legality of surrogacy and new reproduction technologies as a basis for the acquisition of parental rights and those which do not. Due to differences in legal regulations and certain essential differences in the financial aspects of surrogacy, so-called surrogacy tourism is becoming more and more popular. Cases such as *Mennesson v. France*, *Labassee v. France* in 2014, and *Paradiso and Campanelli v. Italy* in 2015 call for standards to be set.

Regulatory divergences open doors for manipulation and exploitation. Assisted reproduction is a developing lucrative business in Russia. Absence of clear contractual rules, provisions

[88]http://reprod.ru/about/novosti/klinika-novaya-zhizn-nachala-sotrudnichestvo-s-odnim-iz-krupnejshih-mi/.

on liability all undermine the level of legal certainty and finally hinder the adequate judicial protection of all persons involved.

The need for harmonization has been expressed by the United Nations Committee on Bioethics: "A growing number of scientific practices have extended beyond national borders and the necessity of setting universal ethical guidelines covering all issues raised in the field of bioethics and the need to promote the emergence of shared values have increasingly been a feature of the international debate. The need for standard-setting action in the field of bioethics is felt throughout the world, often expressed by scientists and practitioners themselves and by lawmakers and citizens."[89] A UN General Conference considered that it was "opportune and desirable to set universal standards in the field of bioethics with due regard for human dignity and human rights and freedoms, in the spirit of cultural pluralism inherent in bioethics."[90] The lack of appropriate regulations and harmonized guidelines is a serious obstacle to ensuring non-discrimination and effective enforcement.

2.4. The legal position of the child

The absence of a properly structured enforceable surrogacy contract[91] in Russian law has a negative effect on the legal position of the child. Since the regulation is fragmented, there is no legal certainty about the legal position of the child in surrogacy arrangements. What happens if the newly born child is handicapped and the intended parents refuse to take him? What happens if they have their own children in the meantime, or in the worst case become ill themselves, incapable or die? All these questions receive no answer. Children's rights of inheritance are not mentioned in any way by the legislator. As already mentioned, from the legal perspective there are many kinds of surrogacy depending on the combination of donor material and the persons involved. Lebedeva mentions the diversity in the legal

[89] Resolution adopted on the Report of Commission II I at the 18th plenary meeting on 19 October 2005. The 32d Session of the UNESCO General Conference, 32 C/ Resolution 24.

[90] The UN General Conference on 32 C/Res. 24. 32 Session October 2003

[91] T.E. Borisova, *Surrogatnoje materinstvo v Rossijskoj Federazii; problemy teorii I praktiki* [Суррогатное материнство в Российской Федерации: проблемы теории и практики]. Moscow, 2012.

definitions of kinship. There is no agreement on the legal priority between genetic relationship and intention in cases of conflict. Criteria for a genetic relationship, legally expressed intention, the legitimacy of reproductive technologies and surrogacy treatments and the best interests of the child all need to be weighed and applied either separately or simultaneously by the court.[92] Emphasising the particular delicacy of surrogacy arrangements, the European Court of Justice called for a cautious and individual approach to the question of balancing the biological and factual rights of a father (parents) to examine what was really in the best interests of a child.[93] Thus, the complexity of surrogacy arrangements ends up becoming a complexity of recognition of parental rights and the legal position of the child. Notwithstanding the complexity of the issue, there is good news from Russian judicial practice.

On non-discrimination grounds and the principle of the child's best interests, the Russian courts recognize the possibility of changing the date and place of birth of a child born in a surrogacy arrangement when registering the birth.[94]

Two children born to a surrogate mother in the city of Rzhev, Tverj region, were, however, initially registered by their parents in Moscow, where they live. The State Registration Authority asked the court of the first instance to change the erroneously made entry. This claim of the State Registration Authority was satisfied. However, the Court of Appeal has finally reversed the initial decision.

The Court of Appeal applied the procedural rules on adoption according to article 1 of the Code of Civil Procedure by analogy. The Court noted that on the one hand the laws on reproductive technologies and surrogacy in particular do not explicitly regulate the registration procedure for children born in surrogacy arrangements. On the hand, the law contains no explicit

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[92]O.J. Lebedeva, *Juridicheskaja kategorija "rodstvo" v sovremennom semejnom prave* [Юридическая категория "родство" в современном семейном праве].// Semejnoje I zhilischnot pravo [Семейное и жилищное право], 2013, N 3.

[93] Decision of the ECHR of the 21st of December 2010 "Anayo v. Germany". Avilable at: NJW.2011. Bd. 3565.

[94] Appeal Ruling by the Moscow City Court of September 18th 2013 (Case №11-26919).

prohibition of changing the place and date of birth of a child born in a surrogacy arrangement if it is in the child's best interest.

According to the article 47 of the Civil Code and article 15 of Federal Law No. 143 "On acts of civil status" the parents of a child cannot choose the place of birth when registering a child. The Russian Constitution guarantees the right to privacy, to family and private life, and protects motherhood and childhood. It allows limiting these rights only to the extent necessary to protect competing public policy grounds.

The Court of Appeal found that changing the entry in the register would be against the child's best interest and would unnecessarily limit the constitutionally protected rights of citizens. To guarantee the secrecy of a surrogacy arrangement and to protect the best interests of the children the Court of Appeal recognized the possibility of changing the date and place of birth of a child born in a surrogacy arrangement when registering the birth.

With regard to the legal registration of a child, the Paradiso case received no official response in Russia. Both Italy and the Russian Federation are signatories to The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents. According to Russian law, foreign citizens can be registered as parents of a child born on the territory of the Russian Federation. In the situation with a surrogacy arrangement – as has been mentioned earlier – married persons are registered as parents of a child born in a surrogacy arrangement if they provide a document from a medical organization confirming the birth of a child and a document confirming the consent of the surrogate mother to register these same persons as the parents of a child. If one parent or both parents of a child are foreigners, the Federal Law "On Citizenship"[95] of the Russian Federation recognizes the foreign citizenship of a child. However, according to Article 12, g of the Federal Law "On Citizenship," if a child is born in the territory of the Russian Federation, both or one of his parents are foreigners and the nationality of the parents does not provide for a citizenship for the child, the child receives Russian nationality.

[95] ст. 12 Федерального Закона № 62 от 31.05.2002 «О гражданстве».

Since the child has not been denied Italian citizenship, the issue has not received any further official reaction.

In Russian legal discourse, the *Paradiso* case has been mostly discussed as an ECHR case.[96] Nevertheless, it has inspired more dynamic and nuanced reflection on surrogacy within the national judiciary in Russia.

On 27 September 2018 the Russian Constitutional Court issued Resolution N 2318-O on surrogacy and the registration of parent-child relationships.[97] The claimants challenged the absolute right of a surrogate mother to give consent to the registration of the intended parents of a new born child as his legal parents. The application was rejected on formal grounds. The Court confirmed its legal position expressed in Resolution N 880-O of 15 May 2012. In conformity with the legal position of the European Court of Human Rights and the wide margin of appreciation, the existing national model of surrogacy, in the opinion of the Court, is not the only possibly model for protecting motherhood, family and children's rights.

In his dissenting opinion, Judge Kokotov directly refers to the opinions expressed by De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov on *Paradiso and Campanelli* in 2017 and critically assesses important deficits of the current surrogacy regulation in Russia.[98] He argues that a birth of a child having two

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[96]I. Garanina, T. Lysenko, *Osnovnye voprosy realizasii prava na surrogatnoe materinstvo v mezhdunarodnom prave I sudebnoj praktike Rossijskoj Federazii* [Основные вопросы реализации права на суррогатное материнство в международном праве и судебной практике Российской Федерации] "Российский судья", 2017, N 7.

[97] The Constitutional Court of the Russian Federation, Ruling from the 27th of September 2018 N 2318-O Конституционный Суд Российской Федерации. Определение от 27 сентября 2018 г. N 2318-О "Об отказе в принятии к рассмотрению жалобы граждан С.Д. и С.Т. на нарушение их конституционных прав пунктом 4 статьи 51, пунктом 3 статьи 52 Семейного Кодекса Российской Федерации, пунктом 5 статьи 16 Федерального Закона "Об актах гражданского состояния", частью 9 статьи 55 Федерального Закона "Об основах охраны здоровья граждан в Российской Федерации".

[98] Descending Opinion Judge Kokotov: "Совпадающее мнение судей Винсента А. де Гаэтано, Паулу Пинту де Альбукерке, Кшиштофа Войтычека и Дмитрия Дедова к постановлению Европейского Суда по правам человека от 24 января 2017 года по делу "Парадизо и Кампанелли против Италии (жалоба N 25358/12)".

mothers causes serious moral, ethical and legal problems related to the rights of the child and his parents. From the legal perspective, it is essential to avoid legal uncertainty in a short period after the birth of a child and to resolve potential conflicts about parental rights promptly excluding lengthy proceedings. Countries permitting surrogacy implement different solutions that all have certain natural justifications. The Judge stresses that within the wide margin of appreciation, different national models of surrogacy should guarantee a due balance of constitutional rights of the child, genetic parents and surrogate mother.

Russia realizes a gestational surrogacy model including commercial surrogacy. The law allows a surrogate mother to revoke her obligation to give a child born in a surrogacy arrangement to the potential parents. This model imparts an essential element of risk to surrogacy contract. However, such an element of risk is in the nature of the contract, and parties can take it into consideration before entering into contractual relationships. Furthermore, the surrogacy contract can provide for rules minimizing risk, like, for example, the obligation of a surrogate mother to fully compensate the intended parents for all expenses in the surrogacy arrangement.

The aim of constitutional jurisprudence, as Judge Kokotov points out, would be to assess the constitutionality of lacking differentiated regulation with regard to different surrogacy models (commercial and non-commercial surrogacy) in Russia. He questions the constitutionality of the single model of gestational surrogacy in general, suggesting that commercial surrogacy might incorporate stronger protection of the rights of genetic parents.

Another important aspect that is missing in the current legal regulation of surrogacy contracts is the availability of clear criteria for malpractice by a surrogate mother.

2.5. Legal aspects of the child-parent relationship in surrogacy arrangements. Registration of the child and parental status of the intended parents

There are different theories on the foundation of parental status.[99] In the Russian Federation, recognition of parents' rights is generally based on genetic relationship and official registration. In its Article 51, 4, the Family Code of the Russian Federation states that the names of married persons who have given their consent in written form to the artificial fertilization or implantation of the embryo are to be recorded as the child's parents in the Register of Births if the child is born as a result of the application of these methods. Married persons who have given their consent in written form to the implantation of an embryo in another woman for her to bear it may only be registered as the child's parents with the consent of the woman who has given birth to the child (the surrogate mother). Accordingly, as previously mentioned, the legal parent-child relationship can only be established with the consent of the surrogate mother. According to Article 16 of Federal Law No. 143 "On acts of civil status,"[100] married persons who have given their consent to the implantation of an embryo in another woman should concurrently provide a document from a medical organization confirming the birth of the child and a document confirming the consent of the surrogate mother to register these same persons as the parents of the child.

The law protects surrogate mothers, which has raised much discussion. Many lawyers see it as a possibility for the couple to be blackmailed. Even though the intended parents have a contract with the surrogate mother, they cannot enforce it in the case of her refusing to give them the child. As an example, in 2012 the Russian Constitutional Court recognized the right of a surrogate mother to decide on the future of a child, claiming a wide margin of appreciation in surrogacy cases and conformity with European and international case law.[101]

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[99]A.A. Kirichenko, *Vopros opredelenija osnovanij roditeljskogo statusa* [Вопрос определения оснований родительского статуса]. // Semejnoje I zhillischnoje pravo [Семейное и жилищное право]. N 6, 2008.

[100]Federal Law №143 "On acts of civil status" 1997-2014. Available at: www.consultant.ru.

[101]Ruling of the Constitutional Court of the Russian Federation of May 15th 2012 N 880-O "On the non-admissibility of a petition by citizens T.P and T.J

There has been an attempt to modify this provision: in 2016 a draft law was proposed to amend the Family Code eliminating the mandatory consent of a surrogate mother.[102] It has not so far been reviewed by the Parliament.

The high courts in Russia in their turn begin to differentiate between commercial and non-commercial surrogacy, stressing the importance of contractual provisions. On 16 May 2017 the Supreme Court of the Russian Federation issued a resolution "On implementation of laws in cases establishing the origin of a child."[103] In paragraph 31 it states that in disputes arising from surrogacy arrangements, the refusal of a surrogate mother to register the potential parents as legal parents cannot be an absolute ground for rejection of their claim. In this case, the court should examine if a surrogacy contract has been concluded, what its provisions are, if the intended parents are the child's genetic parents and what the reasons are for the surrogate mother's refusal to give her consent. In every case the priority should be given to the best interests of the child."

Vershinina criticizes the insufficient elaboration of the above-mentioned Resolution. "In the situation of insufficient regulation of surrogacy, it would be very helpful if the Supreme Court would specify the grounds for rejection or satisfaction of a claim." Moreover, the court should study the legality of a surrogacy contract itself, since surrogacy is construed in Russian law as a medical technique treating infertility and not allowed on other grounds."[104]

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regarding article 51, 4 of the Family Code of the Russian Federation and Article 16, 5 of the Federal Law "On acts of civil status," including a dissenting opinion by Judge S.D.Knyazev [Определение Конституционного Суда Российской Федерации от 15 мая 2012 г. N 880-О "Об отказе в принятии к рассмотрению жалобы граждан Ч.П. и Ч.Ю. на нарушение их конституционных прав положениями п. 4 ст. 51 СК РФ и п. 5 ст. 16 Федерального закона "Об актах гражданского состояния", а также Особое мнение судьи Конституционного Суда Российской Федерации С.Д. Князева касательно Определения от 15 мая 2012 г. N 880-О]. Available at: www.consultant.ru.

[102] Draft Law N 1177252-6 "О внесении изменений в Семейный кодекс РФ и статью 16 Федерального закона "Об актах гражданского состояния" в части применения вспомогательных репродуктивных технологий" (внесен в Государственную Думу 19.09.2016.

[103] Российская газета. 24 мая 2017 г.

[104] G. Vershinina, cit. at 83, 13.

2.6. The possibility of disputing fatherhood or motherhood in surrogacy arrangements is an important indicator of the level of legal certainty for the parties and of the legal position of the child

Article 52, 2 of the Family Code states that a claim disputing fatherhood by a person registered as a child's father on the ground of Article 51, 2 of the Code may not be satisfied if at the moment of making the entry the person was aware that he was not actually the child's father. According to Article 52, 3 of the Family Code, a spouse who gave his consent in written form, in conformity with the legally established procedure, to applying the method of artificial fertilization or implantation of an embryo, does not have the right to refer to these circumstances when disputing the fatherhood. Spouses who have given their consent to the implantation of an embryo in another woman, and also the surrogate mother (the second part of Item 4, Article 51 of the same code), do not have the right to refer to these circumstances when disputing the motherhood and fatherhood after the entry in the register of births has been made.

In the modern context of pluralistic family relationships, the high courts in Russia have started revising interpretations of complex constellations related to biological and social parenthood. In particular, in 2017 the Plenum of the Supreme Court issued a resolution on the application of the law related to establishing the origin of a child.[105] There is a certain shift in balancing conflicting rights in favour of intention.

The Supreme Court says the following. If the court finds out, that the person who is registered as a child's father (or mother) is not his or her biological father (or mother), then the claim disputing the entry made in the state register of births can be satisfied. If the mother of a child or his or her guardian do not demand identification of the child's biological father, or if the biological father himself does not claim his fatherhood and simultaneously the person initially registered as the child's father objects to modification of the registration, then in exceptional

[105] The Plenum of the Supreme Court of the Russian Federation from the 16th of May 2017 N 16 О Пленум Верховного Суда Российской Федерации Постановление от 16 мая 2017 г. N 16 О Применении судами законодательства при рассмотрении дел, связанных с установлением происхождения детей. Available at: http://www.vsrf.ru.

cases the court can reject the claim disputing the entry in the state register of births. The court should examine if a child has developed long-term emotional ties with the person, if the person has an intention to raise and bring up the child as his own and to decide on the best interest of the child.

2.7. Public policy grounds in surrogacy arrangements

The core principles of the dignity of the person and the integrity of his/her personality, life and body are the foundations of the human rights to reproduction, health protection and care, as well as to the rights to privacy and family life.[106] The main purpose of new reproduction technologies and surrogacy is the treatment of infertility.[107] The law stipulates that every adult woman of a fertile age has a right to artificial fertilization and implantation of an embryo. A woman has the right to information about the procedure for artificial fertilization and implantation of an embryo, and about the medical and legal aspects of the treatment.

The Constitution of the Russian Federation and other organic laws are silent on possible public policy grounds related to surrogacy treatment and new reproduction technologies. There is an indirect mention of public policy reasoning in Decree No. 107n of the Ministry of Health, which states that new reproduction technologies and surrogacy treatments are basically permitted in the Russian Federation in the case of medically acknowledged infertility, which means that hypothetically the legislator restricts surrogacy technology to those who are not able to have children themselves. In practice, however, clinics advertise new reproduction technologies and surrogacy for everybody.[108]

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[106]E.V. Perevozchikova, *Konstituzionnoe pravo na zhisnj I reproduktivnye prava cheloveka* [Конституционное право на жизнь и репродуктивные права человека], Kazanj, 2006.

[107]M.L. Chernyshova, A.BV. Chernyshov, E.M. Osmano, G.J. Klimenko, V.V. Lebedev, A.I. Korzhavina, *Bioeticheskie i pravovye problemy besplodija I vspomogateljnyh reproduktivnyh technologij* [Биоэтические и правовые проблемы бесплодия и вспомогательных репродуктивных технологий]. Tambov. 2010.

[108] For example, http://www.spbivf.com/ru/surrogatnoe-materinstvo-i-donorskie-programmi/

2.8. Equality and Non-Discrimination principles

Equality and non-discrimination principles in surrogacy arrangements can be interpreted from different perspectives.

From the gender perspective, the reproductive rights of a person are considered most sensitive, as Hasova points out.[109] Article 55, 3 of the Russian Federation Citizens' Health Protection Act recognizes the right of married or unmarried couples to apply reproduction technologies provided they give their mutual informed free consent. A single woman has an equal right.

In protecting the equality of single women, the Russian judiciary is quite progressive and traditionally sympathetic. Russia's selective compliance with universally recognized international standards has long been a topic in academic discussion.[110] Despite the established criticisms of the Russian judicial system, courts in Russia are very forward in protecting equality rights in family matters. Two decisions by the Sankt Petersburg District Court recognizing the equal right of a single are examples the right of a woman to maternity and registration of her child,[111] as is a similar verdict by the Moscow District Court.[112]

However, the legislator denies single men an equal right to parentage, thus infringing the international principle of gender equality. Some authors criticize the regulations for being discriminatory against single men.[113] Their limited access to assisted reproduction contradicts the provisions of article 19, 3 of

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[109]O.A. Hasova, *Reproduktivnyje prava v Rossii: predely zakonodateljnogo regulirovanija* [Репродуктивные права в России: пределы законодательного регулирования] // Konstituzionnoe pravo: vostochnoevropejskoe obozrenije [Конституционное право: восточноевропейское обозрение]. N 4, 2000. P. 16.

[110] See, for example, Rule of Law in Russia. Issues of Implementation, Enforcement and Practice. International Collective Monograph. Moscow. Statute. 2010.

[111]Ruling of Kalininskij District Court of Sankt-Petersburg from August 5, 2009 in civil matter N 2-4104 [Калининский районный суд г. С.-Петербурга, решение от 5 августа 2009 г. по гражданскому делу N 2-4104, судья Корчагина А.Ю.].

[112]Ruling of Kuntzevskij District Court of Moscow from November 3, 2009 in civil matter N 2-3853/09 [Кунцевский районный суд г. Москвы, решение от 3 ноября 2009 г. по гражданскому делу N 2-3853/09, судья Макарова М.Э.].

[113] J.V. Belyaninova, T.S. Guseva, N.A. Zakharova, L.V. Savina, N.A. Sokolova, J.V. Hlistun, *Commentary to the Federal Law 323 "On the Basics of Protection of health of citizens in the Russian Federation"* (2016) available at: www.consultant.ru

the Russian Constitution securing equality for men and women.[114] Here again, Russian jurisprudence seems to be more open-minded than the legislator. In 2010-2011, in several cases Russian district courts upheld the equal right of a single man to parentage, indicating that Russian law contains no normative limitations on a single woman or a single man realizing her or his right to parentage through the use of new reproduction technologies.[115] It is interesting that the first known verdict of this kind was given by a male judge. However, according to the law, surrogacy is open to officially married couples and single women.

In May 2018 a draft law changing the provisions of the Family Code with regard to unregistered couples was brought before the Russian Parliament. It initiates the recognition of the right of unregistered couples to enter into surrogacy arrangements.[116]

Presumably, by analogy with adoption it is only open to heterosexual couples. Article 127, 1 of the Family Code of the Russian Federation provides a right to adoption for everyone except – in paragraph 13 – persons of the same sex in a union acknowledged and registered as a marriage according to the law of a foreign country which authorizes such unions, and citizens of such a country not officially married.[117] In this vein the law does not recognize the right of LGBT couples to enter into surrogacy arrangements. In conjunction with the legal positions expressed by the Constitutional Court of the Russian Federation on adoption, it is not realistic to assume that homosexual couples can

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[114] Article 19, 3 of the Constitution of the Russian Federation. Available at: www.consultant.ru

[115]Ruling of Babushkinskij District Court of Moscow of August 4, 2010 in civil matter No. 2-2745/10. [Бабушкинский районный суд г. Москвы, решение от 4 августа 2010 г. по гражданскому делу N 2-2745/10, судья Мартыненко A.A.]; Ruling of Smoljninskij District Court of Sankt-Petersburg in civil matter N 2-1601/11 [Решение Смольнинского районного суда г. Санкт-Петербурга от 4 марта 2011 г. по гражданскому делу N 2-1601/11].

[116] Проект Федерального закона N 473140-7 "О внесении изменений в отдельные законодательные акты Российской Федерации в части государственной регистрации рождения ребенка, в результате применения вспомогательных репродуктивных технологий" (ред., внесенная в ГД ФС РФ, текст по состоянию на 24.05.2018).

[117] The Family Code of the Russian Federation. The Federal Law №223 of 29.12.1995 with changes of 20.04.2015. Available at: www.consultant.ru.

be granted a right to legally adopt a child or to openly enter into surrogacy arrangements.

However, some agencies propose for lesbian couples to act in a single woman capacity and homosexuals to use the model of 'traditional surrogacy,' which is not mentioned in the law. Here, a biological father and – ideally – a single woman (a surrogate mother) are registered as parents of the child and the woman legally terminates her parental rights after the delivery, so the biological father become the only parent of the child.[118]

General attitudes to LGBT unions in Russia are either negative or cool. 72% of the Russian population find homosexuals morally unacceptable.[119] Many Russian authors rigidly hold, moreover, that access to surrogacy should be forbidden for homosexual couples. Romanovskij,[120] for example, calls for "reproduction prevention of people with unconventional sexual orientation." However, there is also an opposite opinion. Discussing the issue of adoption of children in homosexual families, Vorozhejkina, a leading expert of the "Levada-Center," for example, claims that in choosing between an orphanage and adoption by a homosexual couple, adoption provides in any case better conditions for a child.

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[118] See, for example, www.jurconsult.ru
Иван, 25 лет, Москва. Я гей. Планирую завести ребенка. Как это сделать?
— При реализации гражданами своих репродуктивных прав никакая дискриминация недопустима. Ваша сексуальная ориентация не имеет в данном случае никакого значения. Это излишняя информация, которая к тому же представляет собой охраняемую законом тайну Вашей личной жизни и, следовательно, не может никого касаться.
Вам нужно будет пройти установленное медицинское обследование, после чего выбрать в специализированном агентстве будущую генетическую мать своего ребенка (донора ооцитов) и гестационную суррогатную мать, которая и будет вынашивать Вашего малыша.

[119] V. Sakevitch, Отношение к разводам, внебрачным отношениям, гомосексуализму,
абортам, контрацепции в 40 странах мира. Demoscope Weekly. № 595 – 596/21 April - 4 May 2014.
Available at:http://www.demoscope.ru/weekly/2014/0595/reprod01.php.

[120] G.N. Romanovskij, *Pravovoje regulirovanije vspomogateljnyh reproduktivnyh technologij* [Правовое регулирование вспомогательных репродуктивных технологий] in// Biomedizinskoje pravo v Rossiii I za rubezhom [Биомедицинское право в России и за рубежом]. Prospekt. 2015.P.129.

Some Russian scholars suggest using reproductive technologies according to so-called 'social indications,' like sexual abstinence, psychological phobia related to pregnancy and persons having serious anatomic or aesthetic defects.[121]

Another important aspect in interpretation of the principle of equality is the age of persons entering into surrogacy arrangements. Mitryakova express doubts on the reasonableness of surrogacy arrangements for genetic parents who are 60-70 years old. The law should contain a limitation on the age of genetic parents, the author points out.[122]

From the other side's perspective, so to say, the law does not clearly regulate the question if a surrogate mother is a legal subject of a parental relationship and is entitled to social benefits. The problem of the legal position of a surrogate mother is well illustrated by the situation regarding a medical certificate allowing her to be on leave from work. The law provides for a medical certificate of disability for pregnant women and mothers after the birth of a child. Decree N 624n of 29.06.2011 "On the approval of the procedure of issuing medical disability certificates"[123] provides for medical certificates for women adopting a child under 3 months old. A woman who has had infertility treatment has a right to a medical certificate and to leave, but a surrogate mother is not explicitly mentioned.

So much has been said about the principle of equality on the one side of the contract, that of the intended parents. The other side – the surrogate mother – deserves attention as a discriminated subject too.

There are some further legal issues that this paper does not deal with. The life of a person starts with conception, notes former

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[121] A. Levushkin, I. Saveljev, *Trebovanija predjavlyaemye zakonodatelem k budushim roditelym rebenka, rozhdennogo s primeneniem technologii surrogatnogo materinastva* [Требования, предъявляемые законодателем к будущим родителям ребенка, рожденного с применением технологии суррогатного материнства] // Современное право. 2015. N 9. С. 92 - 96.

[122] E. Mitryakova, *Trebovanija k potenzialnym roditelym pri ispolzovanii methoda surrogatnogo materinastva* Требования к потенциальным родителям при использовании метода суррогатного материнства (Митрякова Е.С.) ("Семейное и жилищное право", 2018, N 6).

[123] Decree of the Ministry of Social Development N 624н On the issue of medical certificates of disability [Приказ Минздравсоцразвития России] от 29.06.2011 N 624н "Об утверждении Порядка выдачи листков нетрудоспособности".

Russian Judge at the European Court of Human Rights Anatolij Kovler, so the legal regulation of the position of an embryo is another pressing issue.[124] A legal framework for possible decisions about the future of cryoconservated embryos in cases of potential conflict between the genetic parents is another gap in Russian law.[125] There is much potential for conflict here, as, for example, the decision of the European Court of Human Rights in *Evans v. the United Kingdom* shows.[126] Further areas which are not effectively regulated in Russian law are the inheritance rights of a child born with assisted reproduction, the inheritance rights of those born from cryoconservated embryos, donor rights in relation to children, and the collision between the regime of secrecy in relation to surrogacy and assisted reproduction and the right of a child to his own identity, which includes a right to know one's parents.

3. Ethical issues and the 'morality' of surrogacy

Finally, I would like to touch upon the issue of the morality of surrogacy and new reproduction technologies and their clash with traditional values.

At the policy-making level in Russia, a lot of attention is being traditionally paid to motherhood, childhood and family-support measures.[127]

For many women, entering into surrogacy contracts surely offers the possibility of resolving financial and social problems. Resolution of the Constitutional Court of the Russian Federation

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[124] A.I. Kovler, *Antologija prava* [Антропология права]. Moscow, 2002. P. 428.

[125] Gendernaja perspektiva rossijskogo zakonodateljstva [Гендерная экспертиза российского законодательства]. Moscow, 2001.

[126] The European Court of Human Rights, case of Evans v. the United Kingdom, App. No(s).6339/05. 10/04/2007. Available at: http://hudoc.echr.coe.int/eng#{%22dmdocnumber%22:[%22815166%22],%22itemid%22:[%22001-80046%22]}.

[127] The National Strategy in the Interests of Children2012-2017 [Национальная стратегия действий в интересах детей на 2012-2017 гг].; Десятилетие детства. Available at: http://government.ru/news/33171/; The National Strategy of Children Education and Training till 2025 [Стратегия развития воспитания в Российской Федерации на период до 2025 года] (утв. распоряжением Правительства Российской Федерации от 29.05.2015 N 996-р) // СЗ РФ. 2015. N 23.

N 2318-O,[128] which has been discussed earlier, uncovers to a certain extent a realistic underpinning of surrogacy practice in Russia. Possible manipulations in surrogacy arrangements are linked to the right to social benefits, especially with regard to housing that families with many children have in Russia. Thus, one of the main motives for entering into surrogacy contracts is surely material benefit.

Some authors speak about a non-altruistic motivation of surrogates and an immorality of surrogacy in general.[129] In March 2017, a draft law prohibiting surrogacy was brought before the Russian State Duma.[130] Some of the motives for the draft were the developing surrogacy tourism to Russia, the transfer of children born through surrogacy arrangements abroad, and the regulation of surrogacy by a civil law contract. The draft received negative responses from the Russian Government and the Committees and in October 2018 was finally rejected. The Government in particular stated that prohibition of surrogacy would limit the right of Russian citizens to medical assistance in the case of infertility, would lead to a development of the black market and would force Russian citizens to travel abroad for infertility treatment.

However, discourse on moral values very often appears in Russia where there is a lack of long-term social policies and social responsibility also related to social and health policies, access to quality health care and medicine, especially for the health of women and children, the improvement of living conditions, the reduction of poverty and a proper balance between justice and

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[128] The Constitutional Court of the Russian Federation Ruling from the 27th of September 2018 N 2318-O Конституционный Суд Российской Федерации. Определение от 27 сентября 2018 г. N 2318-О "Об отказе в принятии к рассмотрению жалобы граждан С.Д. и С.Т. на нарушение их конституционных прав пунктом 4 статьи 51, пунктом 3 статьи 52 Семейного Кодекса Российской Федерации, пунктом 5 статьи 16 Федерального Закона "Об актах гражданского состояния", частью 9 статьи 55 Федерального Закона "Об основах охраны здоровья граждан в Российской Федерации".

[129] E.V. Isakova, V.S. Korsak, J.A. Gromyko, *Opyt realizatsii programmy "Surrogatnoje materinstvo"* [Опыт реализации программы "Суррогатное материнство"] // Problemy reprodukzii [Проблемы репродукции]. 2001. N 3. C. 27.

[130] All the materials on the draft law to be found in the official archive of the State Duma at: http://sozd.duma.gov.ru.

equity principles. Thus, emphasis on the traditional family seeks – intentionally or not – to shift discussion from real problems. As in many similar cases in Russia, moral values are brought into the discourse where there is a lack of legal certainty and the freedom and dignity of people are not effectively protected. Very often, traditional values are used to compensate for deficits of regulation and to divert attention from real issues of social responsibility.

Divergent approaches to surrogacy in Europe and worldwide along with the position of Russia within a global reproductive market urge us to pay more attention to the relationship between national practices and supranational regulation.[131]

Surrogacy is legally recognized and widely practiced in Russia. In this regard, there is a clear contradiction between the existing legal framework and medical practices to assist reproduction in Russia. No matter what the reasons are for surrogate mothers to enter into surrogacy arrangements, if Russian law permits assisted reproduction and surrogacy, the solid protection of all the parties and an adequate level of legal certainty should be guaranteed.

There is a second point I would like to make concerning the 'unnaturalness of surrogacy.' I believe the best argument in the moral discussion about surrogacy is the existence of non-commercial surrogacy: family surrogacy when a mother bears a child for her daughter, or when a woman preserves donor material (sperm) from male members of the family before or shortly after their death to have her own child. As blood donation is being promoted to become a non-commercial activity only rewarded with social benefits and recognition, the same should happen with surrogacy.

When considering the discussion on the 'unnaturalness of surrogacy' and its contradiction with the moral values of society

[131] According to ex-senator Belyakov, in a year more than 70.000 foreigners travel to Russia for medical purposes, 80% of those become services in reproductive technologies. "За этот год в Россию приехало за оказанием медицинских услуг 70 тысяч иностранцев. Из них 80% приехало за оказанием услуг в области репродуктивных технологий. Мы очень дешевые по сравнению с Европой." Торговля детьми или спасение от бесплодия: запрещать ли в России платное суррогатное материнство. Available at: https://www.irk.kp.ru/daily/26930/3980714/.

and the traditional family, it is interesting to recall quite a widespread tradition in Russia of fostering a child from a poor family or caring for a child whose parents have died. This happened at quite a different level of technological development, but the motivation and social roles of foster parents were – in my opinion – the same.

4. Conclusion

In summary, surrogacy treatment in the Russian Federation is bound up with several legal problems. First of all, there is no legal certainty for a couple that they will receive the child after he is born since the law protects the interests of the surrogate mother, who after the birth has to consent to the couple being registered as the parents of the child. Second, there is no legal certainty for a surrogate mother that the couple will take the child, if, for example, the child is handicapped or the couple have their own children in the meantime, or if the couple die or become incapable. Third, there is no certainty about financial and damage issues related to surrogacy treatment, as the law does not provide a standard contractual form for surrogacy treatments. Many problems relate to the rights of the child. The law protects the secrecy of surrogacy and donorship. However, a child has the right to know his parents. Russian law does not properly regulate these essential issues.

Surrogacy practices lead to several human rights issues. They affect some sensitive bioethical and moral issues too. However, surrogacy is nowadays the reality in Russia. Adequate and detailed legal regulation of new reproduction technologies will allow human rights violations to be avoided. This is the appropriate way consistent with international norms to overcome legal uncertainty, and it will protect the rights and interests of all the parties involved.

COMMENTS

THE GRAND CHAMBER ON CONFISCATION WITHOUT CONVICTION: 'BEYOND CONFISCATION OF PROPERTY, THE WAR OF THE COURTS', THE INTERPRETATION OF JUDGMENTS, AND THE RIGHTS OF LEGAL PERSONS

Tomaso Emilio Epidendio[*]

Abstract

The ruling of the European Court of Human Rights (ECtHR) of 28 June 2018 addresses once again the issue of the compatibility with the ECHR of the confiscation of property without conviction under the Italian law. Drawing from the specific issues concerning the confiscation of property of legal persons, this paper aims to highlight the need to look more closely at the interpretation of judgments of the ECtHR and their relationship with the Italian Constitutional Court. In this regard, the analysis examines in a comparative perspective the ECtHR's theory of "interpretative authority" and that of "settled case law" developed by the Italian Constitutional Court. These two approaches both address the problem of relations between national and supranational jurisdictions in terms of "interpretative monopolies", by attributing an "axiological superiority" to the normative corpora derived from their respective interpretative powers. Instead, the paper concludes that the ECtHR and the Italian Constitutional Court should find a "new direction" in their relations and, more specifically, rediscover and cultivate a culture of self-restraint.

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1. Introduction

With its judgment of 28 June 2018, the European Court of Human Rights has once again addressed the issue of the compatibility with the ECHR of the confiscation of property for unlawful site development under Italian law.

It regards a case of confiscation of property, already contemplated under article 19 of Law no. 47 of 1985, now disciplined by Article 44 of Presidential Decree no. 44 of 2001, regulating areas of land that have been divided illegally. Not only may offenders be sanctioned for their crime by having their property confiscated, but under certain circumstances even defendants who have been acquitted, and third parties – whether natural persons or entities with legal personality – may also have their property confiscated.

According to the prevailing Italian case law[1], this confiscation measure is an administrative sanction ordered by a criminal court in lieu of the public administration, linked to the illegitimacy of the division of areas of land, and has the purpose of returning them to the municipal estates regardless of any conviction once it has been established that a site has been unlawfully divided.

The Court of Strasbourg had examined this particular form of confiscation on two previous occasions: first with a judgment

[1] E.g. Cass. III no. 331/97; Cass. III, no. 1880/99; Cass. III, no. 38728/04; Cass. III, no. 10916/05; Cass., no. 20243/09; Cass. III, no. 36844/09; Cass. III, no. 5857/10; this approach was also endorsed by the Constitutional Court with its judgment no. 187 of 1998.

handed down by the Grand Chamber, in *Sud Fondi v. Italy*,[2] in which it established that, according to the Convention, it is necessary to establish a moral link between those who suffer forced deprivation of title and the offence that incurred the sanction, and secondly, with the judgment handed down by an ordinary division, in *Varvara v. Italy*,[3] interpreted by some as requiring a formal conviction to order the confiscation of the illegally divided site legitimately.

Precisely on the basis of this interpretation, the Italian Constitutional Court (with its judgment no. 49 of 2015) did not consider the judgment handed down in *Varvara* (by an ordinary division of the ECtHR) to constitute "settled case law" from Strasbourg. It also deemed it at odds with the judgment of the Grand Chamber handed down in *Sud Fondi*, whose principles were to be deemed respected under Italian law, insofar as it had come to embody in Italian case law the "living law", stating the requirement to ascertain the existence of substantive unlawful conduct, at least in terms of negligence, on the part of a defendant who, while not being found guilty, has nevertheless had their property confiscated.

The question that arose in the wake of these judgments was therefore whether, and to what extent, "confiscation without conviction" such as that relating to Italian urban planning was compatible with the Convention.

In addressing this specific issue, the new ruling of the Grand Chamber (*GIEM Srl and others v. Italy* of 28 June 2018) examines some important issues of a more general nature relating to the interpretation of the judgments of the European Court of Human Rights, their value and relationship with domestic proceedings, and in particular with the Italian Constitutional Court: from this point of view, the judgment is noted for the opinions – concurring or partially dissenting – expressed by some judges of the Strasbourg Court, which are of such range and complexity as to be considered to almost form a sort of "parallel judgment" to the "main" one representing the majority opinion of the judges of the European Court.

[2] ECtHR, 10 May 2012, *Sud Fondi and others v. Italy*.
[3] ECtHR, 29 October 2013, *Varvara v. Italy*.

The steps making up the long reasoning may be very briefly outlined in the following points:

1) Confiscation of property in Italy is essentially a penalty ("*peine*" in the French version) affecting title to property and, as such, must comply with the conventional safeguards on the matter, as specified in the case law of the Court of Justice of the European Communities, in particular Article 7 ECHR,

2) as a penalty, and in order to comply with Article 7, confiscation of property therefore requires a "mental element" or "*élément moral*" on the part of the person upon whom it is imposed (as established in the *Sud Fondi* judgment) and, from this point of view, the development of national case law satisfies the requirements of the Convention insofar as it requires evidence of some unlawful conduct, at the very least in terms of negligence,

3) formal conviction ("*condamnation formelle*") is not an indispensable element under the Convention, as long as the confiscation is imposed in compliance with the guarantees within the meaning of Article 7 of the ECHR and is the result of a procedure that respects the guarantees provided for under Article 6, especially the presumption of innocence and the right to a fair hearing, such that formal conviction is a necessity only if the act of confiscation is ordered in the light of appearance of presumed guilt,

4) from this point of view, there is no contradiction between the *Sud Fondi* and the *Varvara* judgments, the latter going no further than to maintain that confiscation can be imposed only after conviction in the light of appearance of guilt, and that the value of Strasbourg judgments may not be said to depend on the composition of the body that hands them down, considering that all the judgments of the European Court (whether by an ordinary division or the Grand Chamber) have equal binding force,

5) from the point of view of respecting the safeguards enshrined in the Convention, it is therefore not permissible to confiscate the property of legal persons that have not taken part in the proceedings, notwithstanding persons representing a company took part in them, albeit only as natural persons,

6) moreover, automatic confiscation of unlawfully allocated sites from persons who have not participated in the relative proceedings cannot be regarded as compliant with the principle of proportionality, which must be protected from measures that

affect individual property, so Article 1 of Protocol no 1 to the ECHR must also be deemed to have been violated,

7) on the other hand, the presumption of innocence referred to in Article 6, § 2, ECHR cannot be considered to have been violated when a person is declared "substantially" guilty, as happens in the case of those who, although formally acquitted due to the offence becoming statute-barred, are found to have acted in a subjectively unlawful way.

Beyond the important clarifications and the Strasbourg Court's effort to rationalise and systematise in this case, the impression remains that the Court has a twin-track approach, one national and the other European, that seems to prevent effective communication between the various judicial (or better, para-jurisdictional) authorities. The reasons for this dual vision deserve examination in order to understand the causes of a past conflict that might re-surface at any time: only when the underlying reasons for this distance (between national courts and the European Court of Human Rights) have been understood will it be possible, perhaps, to recreate the conditions for mutual understanding and for the rediscovery of how useful it may be to be able to call upon a plurality of institutional points of view on the same phenomenon to ensure the proper functioning of the Convention and the guarantees that must necessarily come with it.

2. Confiscation of property from the national perspective

As already mentioned, confiscation of property is envisaged in Italian law under Article 44 of the Construction Code (Presidential Decree no. 380 of 2001), which reproduces Article 19 of the previous Construction Code (Law no. 47 of 1985) verbatim. It is referred to as a "special confiscation" contained in regulations governing further cases of deprivation of property under the general provision of Article 240 of the Italian Criminal Code. Even though it has the same legal designation – "confiscation" – the various kinds of deprivation of property can be so specific as to often constitute distant "operations" of a different juridical

nature.[4] Thus, while the confiscation referred to in the above-mentioned Article 240 of the Italian Penal Code is largely considered a "safety measure" aimed at acquiring a thing due to its intrinsic dangerousness or the link it has with whoever owns it or with the offender, other "confiscations" provided for in special provisions are considered "sanctions", and still others are deemed "hybrid" measures.[5] This is reflected in the applicable regulations and formal guarantees that differ profoundly in terms of inter-temporal regulation, degrees of mandatory application, the possibility of confiscation without conviction, or applicability also to third parties in good faith.

The urban confiscation[6] in question here provides for the compulsory confiscation of areas where "unauthorised development" has occurred. "Unauthorised development" is defined in Article 30 of the above-mentioned Construction Code (which quotes the analogous text of the previous Article 18 of the Construction Code referred to above): it may be "*materiale*" – when the unlawful act takes the form of intervention or construction altering the territory in such a way as to give it a different appearance from what was envisaged – or "*negoziale*" – when it occurs through the unlawful division of land into lots used for building after subsequent sale. It is "mixed", when both situations occur together.

According to the prevailing case law and in the opinion of some scholars, this kind of confiscation is an "administrative sanction" exceptionally imposed by a criminal court acting in the stead of the public administration when the latter has taken no action despite having similar power. This faculty is grounded in the following circumstances: the historical origin of the law that

[4] For a masterly analysis of the multifaceted nature of the penalty known as "*confisca*" seen through the lens of Italian case law, see Supreme Court, Joint Sections, no. 26654/08, *Impregilo and others*.

[5] See, especially for the bibliographical references, T. Epidendio, *La confisca nel diritto penale e nel sistema delle responsabilità degli enti* (2011).

[6] For an overview of the matter. see S. Vinciguerra, *Appunti in tema di lottizzazione abusiva e confisca*, 4 Giur. it. 1913 (2005); R. Martuscelli, *La lottizzazione abusiva* (2012); M. Pelissero, *Reati contro l'ambiente e il territorio* (2013); P. Tanda, *I reati urbanistico-edilizi* (2016); A: Esposito, *La confisca nei reati urbanistici e ambientali,* in M. Montagna (ed.), *Sequestro e confisca* (2017); V. Aranci-Gargiulo, *Lottizzazione,* in T. Epidendio, G. Varraso (eds.), *Codice delle confische* (2018).

originally only granted this power to the public administration, which continues to hold it under Article 30, paragraphs 7 and 8, of the Construction Code, the fact that the penalty appears in a different place from the criminal sanctions envisaged for the offence, the acquisition of the confiscated assets as municipal property rather than State property (as happens in the case of criminal confiscations), its mandatory nature, revocable in the event of amnesty regarding the offence in administrative law, the need to allow the measure to protect the landscape and the environment despite the frequent expiry of the limitation period for "minor" offences, as a contravention for which shorter times are envisaged.

In the opinion of the majority of scholars[7] and in previous case law[8] however, confiscation constitutes a "safety measure" in criminal law, which courts must apply due to the danger posed by the *res*, in connection with ascertainment of the unlawful character of the development. In support of this thesis, the following were invoked: the title/name of provision, the systematic necessity to differentiate it from the analogous power of the public administration to deprive persons of their property in order to avoid the total overlapping of the two provisions, and justification for applying it to extraneous third parties by virtue of the intrinsic danger posed by the thing which, as such, is outside the ascertainment of subjective responsibility.

Although, due to the intrinsic dangerousness of the thing, the interpretative conclusion of confiscation without conviction can be buttressed also (and perhaps better) by construing it in terms of a security measure, classification as an administrative sanction has prevailed in the case law, fully endorsed by Constitutional Court judgment no. 187 of 1998 (ruling on the analogous Art. 19 previously in force).

On the other hand, the prevalent inference that it is a penalty, albeit administrative, should have led the Italian courts to realise that imposing a sanction on a third party in relation to the crime is a constitutionally dubious act. On the contrary, the case

[7] A. Esposito, *La confisca nei reati urbanistici e ambientali*, cit. at 6; M. Panzarasa, *Confisca senza condanna*?, 3 Riv. it. dir. proc. pen. 1672 (2010); C. Angelillis, *Lottizzazione abusiva: la confisca nei confronti del terzo alla resa dei conti*, 5 Cass. pen. 2566 (2009).

[8] Cass. III, 4292/96; Cass. III, no. 12999/00.

law on legitimacy actually found that there was no conflict with the principle that criminal liability is personal under Article 27 of the Italian Criminal Code inasmuch as the "regulatory" rather than "criminal" nature of the sanction freed it from application of the said constitutional principle of responsibility for one's own actions. It is therefore not surprising that this way of reasoning has come to the attention of Strasbourg, for which (as is well known) formal classification is not decisive, as it looks to the substance in order to avoid fundamental human rights being infringed thanks to "fraudulent labelling".

It was therefore not until Strasbourg's first decision, *Sud Fondi v. Italy*, that the Constitutional Court (with judgment no. 239 of 2009) and then the Supreme Court, affirmed that an interpretation should be adopted that would favour a meaning compatible with both the Constitution and the ECHR, one where confiscation of property must still be subject to the ascertainment of the wilful and personal involvement of the one whose property is confiscated in the offence.

Nevertheless, some inconsistencies remained, and the way (in terms of procedure and related guarantees) this ascertainment had to be carried out remained completely unexplored.

From the Italian perspective, it was considered a sufficient guarantee of the rights of the person to have requested a ruling, albeit incidental, relating to an offence, even if only for negligence regarding the person whose property is confiscated.

3. ... and from the perspective of the ECtHR

The ECtHR perspective on confiscation, on the other hand, adopts a view that focuses on the nature of the provision and the human rights to be safeguarded in relation to it.

In relation to the first aspect (the nature of the provision), it should be stressed that the discussion mainly focuses on the "criminal" nature of confiscation and is argued according to the classic model of the so-called *Engel criteria*.[9] The fact that the

[9] As we know, the "Engel criteria" (as they are called in the parts of the judgment in which they were first used: (ECtHR, GC, 8 June 1976, *Engel and others v. the Netherlands*, consistently taken up by the successive judgments on the subject and, in particular, by the commonly cited ECtHR, GC, 1 February 1984, *Öztürk v. Turkey*) are three criteria identified by the settled case law of the

measure affects private property, bringing into play the guarantees referred to in art. 1 of Protocol no. 1 supplementing the ECHR, is usually addressed later and after recognising the criminal application of the measure, so that the conclusions on the violation of the protocol, despite being autonomous in the abstract, seem in fact to bear the influence of the conclusions reached on the nature of the measure, following a "dual", rather than a "parallel" violations approach.

These criteria seem to have little selective-orientative weight, as shown by the gradual increase in the measures considered "criminal matters", according to the treaty – often acting as an *a posteriori* justification for a decision to apply certain ECHR guarantees to the case before the Strasbourg Court, when the criteria actually used are unclear. In particular, it seems that the "Engel criteria" can justify considering almost all the confiscations contemplated by the Italian legal system (with the possible exception of that of instruments used to commit the offence, or else of intrinsically unlawful things) as punitive measures, with the consequent application of the guarantees provided for them under the Convention, especially those referred to in Article 7 ECHR.

From the second point of view (the extent of the safeguards), two specificities in the approach adopted by the Strasbourg court are of particular relevance: the first proposes a "comprehensive reading" of the substantive and procedural guarantees insofar as the (substantive) need to ascertain the "mental element" cannot disregard the right to take part in a fair hearing by the person against whom proceedings are to be brought; the second concerns the autonomy of legal persons and the limits within which they may be considered represented by natural persons in criminal proceedings.

Court of Strasbourg in determining whether or not there is a "criminal charge": The first criterion is its classification as such in national law; the second is the nature of the measure (which, for example, must not consist merely of forms of financial compensation for damage suffered, but must have a punitive purpose in order to act as a deterrent); the third is the seriousness of the possible consequences on the defendant.

The unitary (substantive-procedural) interpretation of the guarantees highlights an aspect which, as we have seen in the previous section, had been underestimated in Italian case law but which appears to be a fundamental human rights issue, i.e., the way (and the safeguards available to) those subject to confiscation can discuss the ascertainment of the presuppositions of the confiscation against them. This is over simplified in terms of the national specificities of hearings – and the various guarantees available during them – in which the necessary assessments leading to confiscation are carried out. In this regard, the Strasbourg Court, inevitably reflecting the specificities of the cases for which it must ascertain whether the Convention has been violated, limits itself to verifying whether or not the person whose property has been confiscated participated in the proceedings, adding nothing about the way any such participation took place, and, especially, without specifying anything regarding compliance with Article 6 ECHR, the *a posteriori* hearing (i.e. the possibility of speaking before the court only after the measure has been adopted in order to contest it in a separate court case), the possibility of appealing against an unfavourable decision, the possibility of expressly contesting a charge of subjective wrongdoing (wilful misconduct or negligence) other than that sufficient to constitute an offence, or what means of defence are to be considered necessary and what methods of obtaining evidence must be safeguarded.[10]

4. The harmonisation of ECtHR precedents and constraints on national courts: "interpretative authority" vs "settled case law"

From another point of view, it must be observed that the unitary (substantive-procedural) interpretation of the Convention is precisely what allows the European Court to harmonise its precedents (*Sud Fondi* and *Varvara*), criticising and overriding the

[10] These points were examined by the ECtHR in the significantly different case of sanctions imposed by so-called "independent" authorities, giving rise to a case law not without uncertainty on the "compensability" of guarantees through a "full jurisdiction" when impugning a sanction (see, for example, most recently, E. Bindi, A. Pisaneschi, *Sanzioni Consob e Banca d'Italia. Procedimenti e doppio binario al vaglio della Corte europea dei diritti dell'uomo* (2018).

interpretation given by the Italian Constitutional Court also with regard to its statements on the reconstruction of the relationships between national courts and the entire Strasbourg case law.

The ECtHR, in fact, radically rejects the approach adopted by the Italian Constitutional Court in its judgment 49 of 2015, whereby only the "settled case law" of the ECtHR – to be considered such on the basis of a series of "parameters", including Grand Chamber rulings rather than those handed down by ordinary divisions – are binding on Italian courts, clearly stating that all Strasbourg judgments are equally binding.

On this point, the concurring opinions seem, in fact, much more explicit than the Strasbourg Court in explaining the source of the national court's limitations in terms of the theory of the "authority of the *res interpretata*".[11] However, this approach seems to lead to an inextricable conflict and a reciprocal invasion of the spheres of competence of the individual jurisdictions without taking into account the specificities of the cases that take place in them and the limits of the powers of each jurisdiction: claiming interpretative monopolies over the respective "law" (conventional, constitutional, and national) inevitably leads to contrasts that tend to be resolved on the basis of the alleged axiological superiority of the various systems.

Strasbourg case law, in fact, has jurisdiction over the adjudicating violations of the Convention in the cases brought before it, even though ruling on a violation means concretising and specifying the meaning of the Convention through its interpretation (often in the light of the application of domestic law in the national legal system): it is not, therefore, institutionally called upon to declare the illegality of national rules or to interpret them, formulating "principles of law" that a "referring court" has to apply, but only in order to ascertain breaches of the Convention, and it is thus that the monopoly of interpretation attributed to it must be understood insofar as it prevents the organs of the Member States from mitigating the obligation they have assumed to respect fundamental human rights by relying on margins of interpretation of the Convention.

The case law of the Constitutional Court, on the other hand, is that of a body institutionally called upon to declare the possible

[11] Especially the separate opinion of Judge Pinto de Albuquerque.

illegality of rules that an ordinary court must apply in order to decide a case submitted to it and that, because of the principle of the separation of powers (in particular the legislative and judicial powers) and the judge's subjection to the law, he or she may not directly disapply. In so doing, the Constitutional Court interprets and implements the constitutional provisions (functioning as a parameter for the legitimacy hearing) in the light of the interpretation that falls within the jurisdiction of ordinary courts, which, for enforcement purposes, must refer to the national law whose constitutionality has to be ascertained.[12] In so doing, the Constitutional Court may consider the question referred to it to be unfounded, establishing a possible meaning (interpretation) of the provision that is different from the one attributed to it by the ordinary court: however, where the meaning attributed to the provision by the ordinary court is uniformly established by the national courts, constituting an exemplar of the so-called "living law" or "settled case law", the Constitutional Court declares the law illegitimate. It does so in order to avoid hard-to-resolve conflicts between jurisdictions (constitutional and common), precisely because of the different institutional interpretative powers of the ordinary courts (interpreting provisions in order to apply them to the case at hand) and the Constitutional Court (interpreting constitutional provisions in order to decide on the legitimacy of the provisions that ordinary courts must apply).

In its judgment no. 49 of 2015, and faced with an increasingly unstable and frankly ambiguous Strasbourg Court case law, the Constitutional Court decided to adopt the same approach used at national level in order to avoid conflicts with the ordinary courts; it therefore considered only its "settled case law" binding.

In relation to the previous tried and tested relationship between the ECtHR system and the national system established by previous Italian constitutional case law, this approach is much more revolutionary and innovative than some have considered it.

[12] For reasons of brevity and clarity of presentation, I take for granted that it is possible to distinguish between "interpretation" (attribution of a meaning/norm to a text) and "application" (the ability to refer a norm and its effects to a concrete historical fact), which is indeed a much-discussed issue.

Starting with the so-called "twin judgments" of the Constitutional Court[13] – and prior to sentence 49 of 2015, inter-institutional relations were construed in the terms summarised as follows. The norms set out in the ECHR, as international norms subject to ratification and execution by ordinary law in Italy, are "interposed norms" that supplement the criteria set forth in Article 117 of the Italian Constitution. As they are called upon to supplement the constitutional provision of Article 117 of the Constitution, the rules of the Convention have, in the event of conflict with national rules, the usual effects as far as ordinary courts are concerned, consisting in the obligation to interpret them coherently or, should this prove impossible, in the obligation to raise a question of constitutional legitimacy. With respect to the ECtHR, the Italian State has not formalised the ceding of sovereignty as it has in the case of Community law, so the provisions of the Convention cannot give rise to the direct non-application of national law.[14] On the other hand, the ECHR system does not envisage organs empowered to produce legislation in certain areas, as in the case of the European Union, but "only" an *ad hoc* court with specific jurisdiction over the interpretation of the conventional rules in order to establish whether or not Member States have violated them. In compliance with this interpretative monopoly – decisive in giving concrete form to necessarily general norms of principle regarding specific cases and preventing States from evading their contractual obligations by means of captious national interpretations – the Constitutional Court has therefore specified that it has no power to attribute meanings to Conventional provisions other than those attributed to them by the ECtHR. The conventional rules thus supplement the internal constitutional apparatus with content that may not differ from that attributed to it by the Strasbourg Court and which the Constitutional Court cannot review. However, supplementing the constitutional apparatus with the conventional norms according to the meaning attributed to them by Strasbourg may be possible on the basis of two possible variations expressed (respectively) in two judgments which should be thought of as "cousins" rather than

[13] Judgment nos 348 and 349 of 2007.

[14] The complex issue of conventional rules overlapping with those of the Charter of Fundamental Rights of the European Union is not discussed here.

"twins". According to the first, the supplementing is automatic, but the content of the interposed provision, conveyed by Article 117 of the Constitution, should perhaps be weighed against other constitutional provisions on the basis of an assessment by the Constitutional Court itself, so as to be reconciled, albeit possibly losing out, to higher constitutional values (first variation). According to the second view, an interposed norm may be considered incapable of supplementing Article 117 of the Constitution, being prevented from doing so by stronger constitutional values expressed by other provisions of the Constitution (second variation).[15]

Sooner or later, this view had to take into account the instability of the decisions of the Strasbourg Court and the varied nature of the problems of interpretation that may arise in the hermeneutics of a text of a law or a judgment: both problems can be considered physiological in terms of the role of the Strasbourg Court, namely to ascertain individual violations, and it is no coincidence that an attempt has been made to respond to these problems within the system of the Convention through Additional Protocol XVI,[16] recognising that the Court has a further consultative function regarding the clarification of the contents of its own rulings.

With judgment 49 of 2015, the Constitutional Court, seeking a national solution to the problem of the ambiguity of the Strasbourg judgments and their apparently contradictory nature (leading to individual courts arbitrarily cherry picking from the judgments they consider most appropriate to their needs, arrogates to the Constitutional Court itself or, as some believe, also to every ordinary court) the competence to establish which part of the European Court's case law to apply, thus effectively depriving the formal respect of the Strasbourg Court's monopoly over interpreting the rules of the Convention of meaning. Considering that these rules live and take on concrete meaning only insofar as they are applied by the Court of Justice of the European Union, choosing which judgment expresses the Court's

[15] Although often confused with the subject of the "counterlimits" that operate with regard to European Union law, the reserve mechanism of constitutional screening is clearly different in the case of the ECHR.

[16] In force from 1 August 2018 following the expiry of the deadline of France's depositing the tenth instrument of ratification.

"true" interpretation inevitably results in an invasion of the field, and so the protests expressed in the judgment discussed here are understandable, and even more so in some separate opinions, especially if accompanied by the clarification of the axiological superiority of national constitutional values.

It would have been much simpler – and compliant with a principle of self restraint all the more important in a situation involving non-hierarchically organised court systems – to recognise the true basis of the broad scope of Strasbourg rulings, and this would have led to the recognition that this broad scope could not be attributed to the Varvara judgment, which was applicable and binding with respect to the case the Court itself had decided. In fact, while the *Sud Fondi* judgment had established a breach of contract linked to the interpretation established in national case law whereby it was not necessary to establish that those subjected to confiscation had committed an unlawful act, in such a way as to have an impact beyond the case that has been ruled upon and lead to a *revirement* of internal case law to comply with the Convention, the same could not be said of the *Varvara* judgment. This decision did not take into account the new development in the case law, because in the case submitted to it, the Court had made a "pathological" application regarding the living law itself and the norms governing confiscation. Consequently, the statements issued regarding the Varvara judgment had no effect on national cases in which an unlawful act had been (physiologically) ascertained.

In this way, it would appear, the role of each jurisdiction would have been respected, and the jurisdictional conflicts that then occurred would have been avoided. In the writer's view, this point should be considered in the future organisation of relations.

5. Legal "entities" and confiscation

The issue of the autonomy of legal persons – in relation to investigations carried out for the purpose of confiscation in (criminal) proceedings in which natural persons have participated – is a further reason for the interest in – and inspiration to be taken from – the Strasbourg Court's *GIEM* judgment. However, further elaboration and more precise inferences are necessary.

The reasoning of the Strasbourg Court in contemplating confiscation from entities other than natural persons appears, in

fact, to be extremely simple: first of all, it is necessary to verify whether, on the basis of domestic legislation, an entity has a legal personality of its own and whether or not it is a mere smoke screen drawing an unacceptable "veil" over the recovery of assets. Secondly, it must be ascertained whether a legal person can be punished for a crime, given that only in this case can the natural person (administrator or shareholder) be considered as a representative of the company. On the basis of these premises, the Court of Strasbourg, considering that Italy holds to the principle of *societas delinquere non potest*, does not concede that in this case the firm that has had its property confiscated can be considered to have taken part in the proceedings in the person of its director, a natural person. It thus concludes that companies that have had their property confiscated without appropriate participation in the proceedings are victims of a violation of the Convention.

As in other cases (e.g. *Contrada v. Italy*),[17] this simplistic representation of the national legal system in the Strasbourg judgment risks completely undermining the scope of a decision that, on the other hand, touches on a real problem and provides useful indications, which, nevertheless need to be re-examined in the light of legal peculiarities and (national) dogmatic categories neglected by the European Court.

First of all, individual liability and the possibility of answering for crimes within the national legal system are not only connected to legal personality[18] but to the consideration of the entity as a repository of interests in itself, with an organisation in which it is possible to identify a natural person who does not act in the exclusive interest (or to the advantage) of a person or of a third party (natural persons) but of the entity itself. In this connection, no consideration whatsoever is given to the systemic effect of the innovations introduced into Italian law by Legislative Decree no. 231 of 2001 on the liability of entities for offences

[17] ECtHR, 14 April 2015, *Contrada vs. Italy*, on the subject of the so-called "external involvement" in mafia association.

[18] On the subject of individual responsibility with regard to natural persons as well as firms even if they do not have legal personality, see the vast framework outlined by F. Galgano, *Persone giuridiche (art.11-35)*, in A. Scialoja, G. Branca (eds.), *Commentario al Codice Civile* (2006). With reference to Legislative Decree no. 231 of 2001 on the liability of entities for offences arising from criminal acts, the point is already clearly outlined in the report on the draft decree.

arising from criminal acts, which does not provide for liability in the event of contraventions for which confiscation of property is contemplated. Moreover, the formalities provided for by Italian law concerning the way a company may be represented in criminal proceedings are disregarded: either in terms of being a person responsible for an offence arising from a criminal act in the "parallel" proceedings that must be held against it, as a party liable in civil law, as an injured party or claimant, as a party in incidental proceedings against measures regarding it, or as a party in incidental enforcement proceedings.

Even considering these shortcomings – due to the institutional "distance" of the Strasbourg Court from the national laws it adjudicates, and the consequent distortions of perspective (which also underlie the actions of the parties in the proceedings and how their procedural contributions are heard by the courts) – the fact remains that, in the case of confiscation measures, the entity itself is not liable for punishment and, therefore, the administrator accused of the crime cannot be considered its representative. It cannot therefore be said that the firm participated in the proceedings through him or her.

The indications of the Court of Strasbourg thus appear very useful in strengthening safeguards: let us not forget, in fact, that behind the entity (as long as it is not a mere "smoke screen" or "empty box") there are shareholders, employees, creditors, and, in general, a variety of actors who rely not only on the assets of the company but also on its business activities, thanks to which they in turn perform their activities in what is now an increasingly complex and tightknit interconnected market system. This signal must, however, be seen from the perspective of greater compliance with national law, i.e., as a starting point for strengthening the "systemic effect" of the law on the liability of companies in the Italian legal system, insofar as it is possible to proceed with the confiscation of company assets as a sanction for a criminal offence only when the company (if it is not a mere screen) can be considered liable for an offence connected with that crime (and has participated in proceedings relating to this liability). The important systemic repercussions of this conclusion should, however, lead to a serious rethinking of the nature of confiscated assets, which, only in the case of illegal artefacts, should be

considered as the confiscation of intrinsically illicit assets, and this requires a revision of the law on the subject.

6. Conclusions

In conclusion, the issues surrounding "confiscation of property" seem to be very instructive from the point of view of a number of more general aspects relating to the specific theme.

First of all because they highlight the need to look more closely at the theme of the "interpretation of judgments" as an "art" in itself, whose characteristics differ from those of the "interpretation of the law".

Secondly, as they are a stimulus to finding a "new direction" in relations between national and supranational jurisdictions, if only so that there may be a real wish for inter-institutional collaboration and to avoid gradual entrenchment vis-à-vis previous positions, agreeing to abandon them once they are understood to be a source of unsolvable conflict. In particular, it seems that the theory of "interpretative authority", of which the Strasbourg Court is so fond, and that of the "settled case law" so dear to the Italian Constitutional Court have both proved unable to provide a valid understanding of inter-institutional relations or to resolve possible conflicts. Moreover, these two approaches share two related defects: they address the problem of inter-institutional relations in terms of "interpretative monopolies", which ultimately leads to attributing – more explicitly by the Italian Constitutional Court and more indirectly, but equally strongly by Strasbourg – a status of "axiological superiority" to the normative *corpora* derived from their respective interpretative powers. This means either upholding the supremacy of the values of the Italian Constitution or those of the ECHR in the event of conflict. In order to break free from this "dead end", all the jurisdictions involved would do well to rediscover and cultivate a culture of "self restraint" and rigorous respect for differing institutional characteristics. Only strict regard for the specifics of the legitimacy of their interventions can allow the coexistence of jurisdictions that are not organised hierarchically and, at the same time, ensure a pluralistic view of rights tantamount to progress for everyone and that, as such, will be able to come to bear with "natural authority" so to speak, namely authority resulting from

the "congruence" between the "power exercised" and the "institutional form" by which it has been attributed to the individual body. From this point of view, the problem of the binding nature of Strasbourg case law appears easy to solve, thanks to the theory (furthermore a traditional one), of the "serial ascertainment" of violations of the convention, inasmuch as they are connected to the interpretation and application of the national norms present in the system of a given Party State.

Lastly, the confiscation of the property of legal persons appears to be a good starting point for a new and less ideologically conditioned examination of the liability of legal persons for offences connected with a crime in order to give new impetus to a necessary reform of the now outdated Legislative Decree no. 231 of 2001.

BOOK REVIEW

MARTA SIMONCINI, ADMINISTRATIVE REGULATION BEYOND THE NON-DELEGATION DOCTRINE: A STUDY ON EU AGENCIES, HART PUBLISHING, 2018, (213 PP.).

*Claudia Figliolia**

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1. Introduction

Marta Simoncini's Book aims to contribute to the constitutional conceptualization of the administrative powers at European level. Her innovative reading and interpretation of the *Meroni* Doctrine constitutes the space in which the Author has the opportunity to question the foundation of administrative powers, opening a discussion on the EU administrative identity itself.

The incoherence of the dominant interpretation of the *Meroni* Doctrine[1] is analysed through the study of two different

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[1] On this topic, P. Van Cleynenbreugel, *Meroni circumvented? Article 114 TFEU and EU regulatory agencies*, Maastricht J. Eur. E Comp. L. 70 (2014); V. Randazzo, *Comment to Case C-217/04*, Common Mkt. L. Rev., 155 (2007); M. Chamon, *The empowerment of agencies under the Meroni doctrine and article 114 TFEU: comment on United Kingdom v Parliament and Council (Short-selling) and the proposed Single*

patterns: on the one side the reinforcement of EU agencies' quasi-regulatory power; on the other, the emergence of hybrid administrations that are located in between agencies and independent administrations[2]. The last wave of agencification has amplified the divergence between theory and reality: powerful agencies such as the European Aviation Safety Agency (EASA) and the European Supervisory Authorities (ESAs), "in fact, cover a range of administrative powers that clearly reverse the idea of purely advisory bodies and show the as yet legally hidden regulatory content of their competence".

The real understanding of the juridical nature of the agencies' powers represents – in the Author's view – "a conceptual premise" (88) in order to understand their conformity to the non-delegation principle and the functional division of powers in EU legal framework. A reconsideration of substantive role of agencies in the EU policy requires an analysis of the actual legal nature and scope of these new public powers. The volume is part of the study on discretionary power at European level[3],

Resolution Mechanism, Eur. L. Rev. 380 (2014); Id, *EU Agencies: Does the Meroni Doctrine Make Sense?*,17 Maastricht J. Eur. E Comp. L. 280-305 (2010) C.F. Bergström, *Shaping the new system for delegation of powers to EU agencies: United Kingdom v. European Parliament and Council (Short selling)*, Common Mkt. L. Rev. (2014).

[2] Other books and articles on EU Agenecification: E. Chiti, *Le agenzie europee. Unità e decentramento nelle amministrazioni comunitarie* (2002); M. Busuioc, *European agencies and their boards: promises and pitsfalls of accountability beyond design*, in Journal of European Public Policy (2012); M. Thatcher, *The creation of European regulatory agencies and its limits: a comparative analysis of European delegation*, in Journal of European Public Policy (2011); R. Schütze, *Principles of European Union Law* (2016); E. Chiti, *European Agencies' Rulemaking: Powers, Procedures and Assessment*, in European Law Journal (2013); E. Chiti, *Le trasformazioni delle agenzie europee*, 1 Riv. trim. dir. pubbl. 57 (2010); Id, *L'accountability delle reti di autorità amministrative dell'unione europea,* 01 Riv. it. dir. pubbl. comunit., 29 (2012).

[3] On this topic see: J. Mendes, *Law and Administrative Discretion in the EU: Value for Comparative Perspectives*, in S. Rose-Ackerman and P. Lindseth (eds.), *Comparative Administrative Law* (2017); Id, *Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU,* Mod. L. Rev. (2017); R. Caranta, *On Discretion*, in S. Prechal and V. Van Roermund (eds.), *The Coherence of EU Law. The Search for Unity in Divergent Concepts*, 185 (2008); H.C.H. Hofmann, C.G. Rowe, A.H. Turk, *Administrative Law and Policy of the European Union,* 499 (2011); P. Craig, *EU administrative Law,* 404 (2012); J-P. Schneider, *A Common Framework*

giving space to a theme – that of administrative discretion – which has remained underdeveloped and not conceptualized in the current scientific panorama. This was due to the fact that the doctrinal and jurisprudential analysis of administrative power was either traced back to the concept of political discretion within the competence of the legislator or hidden behind the technicality of the evaluations.

In the first Chapter the Author critically evaluates the non-delegation doctrine as interpreted by the Court of Justice in *Meroni* and *Romano*[4] Judgements, proposing an innovative reading of this jurisprudence that fills that gap represented by the failure to identify the nature of the public powers exercised by agencies. The second Chapter focuses on the legal taxonomy of agencies' power, questioning the quasi-regulatory competence that they actually exercise and how they contribute to sector-specific regulations. Finally, the third and fourth Chapters, instead, analyse the "nature" and the "sustainability" (12-13) of the power exercised by EU agencies going beyond the dichotomy between technical and political discretion developed by the European Jurisprudence. This analysis is part of the more general issue of the development of European administrative law and the recognition of a supranational public authority. In this sense, the Author considers procedural guarantees and the system of judicial protection as instruments aimed at guaranteeing control over administrative discretion.

2. Legality and reality: case studies

The *evolution* of the agencification process has to be compared with the *staticity* of that legitimacy parameter represented by the non-delegation principle, intended "as a constitutional principle that positions agencies in the EU institutional framework" (p. 49)

The progressive empowerment of European agencies with new and more incisive tasks has increased the gap between theory and reality. The *Meroni* doctrine has become a too short blanket

for Decentralized EU Agencies and the Meroni Doctrine, 61 Admin. L. Rev. 29, 38 (2009).

[4] CJEU, 4 May 1981, Case 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité*.

unsuitable to constitutionally justify the evolution of the institutional reality.

Although the *Meroni* jurisprudence referred to a case of delegation of powers by the High Authority to private law agencies under the European Coal and Steal Community, it still represents a principle aimed at preserving the constitutional and democratic legitimacy of the exercise of administrative powers by European agencies and has continued to govern the legislative conferral of administrative powers to agencies under EU law. However, in the sixty years of validity of this doctrine, the reality of the agencification phenomenon has changed: in a system of multilevel governance, agencies have become the centre of connection between national and supranational interests, gaining ever greater and more incisive powers of intervention in the internal market.

From the last wave of agencification process[5], the intensity of agencies' regulatory powers has increased, questioning the very traditional collocation of these organisations in the European institutional scenario. The attribution of new powers to EU agencies and the increase of their autonomy, challenge the traditional role played by these bodies within the framework of European powers. The cases of the EASA and ESAs' competences are the privileged scenario where the Author ascertains these trends. Their role in the rule-making process, the stronger standardisation practices and the selected regulatory powers attributed to those agencies reveals how the 'agency model' goes beyond the traditional advisory and assistance functions, providing a new face to the participation of agencies in the regulation of specific sectors.

The qualification of this model as a tool for technical cooperation with the Member States and the European institutions is being exceeded: the EASA has substituted the Joint Aviation Authorities cooperation (JAAs), and the ESAs have replaced the system of committees operating in the regulation of the financial system, creating an innovative system of governance and proactively participating in the regulation of the relevant area of

[5] For an in-depth analysis on the agencification process see C. Tovo, *Le agenzie decentrate dell'Unione Europea,* (2016).

their expertise[6]. These agencies have been granted increasingly strong powers: the drafting of opinions, recommendations and reports that assist the European Commission in formulating supranational policies, the adoption of soft-law acts with a significant regulatory impact and the adoption of binding decisions vis-à-vis national authorities or directly vis-à-vis economic operators.

From the first point of view, EASA contributes to the definition of safety rules in the air transport sector through the preparation of opinions assisting the Commission in the exercise of its power of legislative initiative and the adoption of delegated acts. As the Author points out, the exercise of this power is more than just an advisory support and has a substantial impact on the content of the acts. Even more penetrating from this point of view are the participatory powers of the ESAs in the formal rule-making: They provide the set of rules by drafting the binding technical standard formally adopted by the EU Commission in the form of regulatory technical standard (pursuant to Art 291 TFEU) and of implementing technical standards (pursuant to Art. 290 TFEU).

From the second point of view, also the standardisation practices have increased the relevance of the agency contribution to the regulatory function. In both institutional experiences, agencies exercise soft law powers having a relevant regulatory impact through – for instance in the case of ESAs – the "comply or explain" formula. Finally, for what concerns the adjudication powers, these agencies can issue measures directly affecting market operators: the conferral of certification competences on the EASA by centralising in an agency the supervisory powers over market access requirements and the (mainly) subsidiary powers of intervention of the ESAs to ensure the implementation of European law by the competent national authorities.

These attributions demonstrate that agencies have, to date, genuine administrative powers through which they actively

[6] The three ESAs – European Banking Authority (EBA), European Insurance and Occupational Pensions Authority (EIOPA), European Securities and Markets Authority (ESMA) – together with the European Systemic Risk Board (ESRB) constitute the European System of Financial Supervision (ESFS).

contribute to the regulation of the areas of their competence and to the achievement of European objectives, making them the authentic "centre of regulation" (74). This has led to a fracture with the principle of non-delegation enshrined in case law. In fact, according to the *Meroni* Judgement only "clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority"[7] can be delegated by institutions to EU agencies. These powers should be exercised only if accompanied by accountability formulas; i.e. supervision by the delegating institution and judicial review.

The concept of "non-discretionary powers" included in the above-mentioned judgment has been interpreted restrictively by the legal doctrine, significantly reducing the scope of application of the delegation. As a result, any delegation of regulatory powers to agencies would contradict the principle of institutional balance. Therefore, according to the traditional interpretation of the *Meroni* doctrine, while discretion in the European legal order is relegated to institutional policy making, administration was considered as a mere technical competence, "neutral to the balance of interests"; it follows that delegation theories are "developed as a methodology aimed at responding to complex technical issues with specialised skills" (15).

In the light of this interpretation «the emerging methods of administrative quasi-regulation by EU agencies question the constitutional foundation of EU agencies' competences» (178). The Author shows how the absence of a specific legal basis at constitutional level has made a progressive development of the agencification phenomenon in terms of 'compromise': their organizational autonomy, the attribution of highly specialised technical competences, the political contingencies and functional needs have allowed the development of this model beyond the letter of the law.

The Author identifies the *Meroni* doctrine as the dominant Kuhnian paradigm for verifying the compatibility of the agencies' powers with European law. However, as has been illustrated, the reality of the current agencification phenomenon makes this

[7] CJEU, 13 June 1958, Case 10/56, *Meroni & Co., Industrie Metallurgiche, S.A.S., v High Authority of the European Coal and Steel Community*, 173.

paradigm – as traditionally interpreted – no longer suitable to explain the anomalies and strains derived from the new face of agencies. In the absence of alternative paradigms, the non-binding nature of the agencies' powers and the avoidance of direct conflict of competence with the Commission have represented the "theoretical justifications" for the exercise of these penetrating competences.

3. An innovative reading of *Meroni* Doctrine: Administrative discretion beyond technical and political powers.

Assessment of the sustainability of the agencies' powers in relation to the *Meroni* doctrine calls for a twofold reflection: the first relates to the abstract possibility of agencies being able to participate actively in the exercise of regulatory functions within the European institutional framework; the second concerns the way in which such participation can be achieved. Thus, it is necessary to ascertain, on the one hand, the legal qualification of the administrative powers of agencies ("if-condition") and, on the other, those balancing and accountability mechanisms which limit their exercise ("how-condition"). The first one will be analysed in this paragraph, while the next paragraph will be devoted to the second.

The traditional reading of the *Meroni* doctrine has held back doctrine and jurisprudence from questioning administrative discretion at European level, contributing to the creation of a gap that today – in the face of evolution of the agencification phenomenon – can no longer be hidden behind the abstract distinction between technical and political power. If, on the one hand, the *Meroni* doctrine has not prevented the attribution of quasi-regulatory powers to agencies, on the other hand, it "has nonetheless trapped agencification in an unfortunate compromise between legality and reality" (178). In this context, the Author, not denying the role of the *Meroni* doctrine as the dominant paradigm, proposes an innovative interpretation of the non-delegation principle that represents a significant contribution towards the shift of the paradigm for the exercise of agencies' powers.

The "dark side" (29) of the *Meroni* doctrine is revealed by the Author through a careful interpretation of the aforementioned sentence: through the reference to the prohibition of delegation of

"discretionary powers", the Court of Justice has intended that type of discretion "directly related to priority-settings and policy choices" (31) which, implying margins of political evaluation, could not be validly transferred to bodies that do not find their legal basis in the Treaties. Consequently, all those administrative powers that do not provide for priority-settings and do not involve political choices are excluded from the prohibition of delegation.

It follows that reference can no longer be made to the technical nature of the agencies' powers in order to bring them in line with the "*Meroni* Doctrine"; the constitutional foundation of the powers (also discretionary) of the agencies must be sought elsewhere. Once the powers of agencies can no longer be covered by the «false myth» (106) of their neutrality with respect to public and private interests, the Author wonders whether and under what conditions the revealed discretionary nature of these powers is consistent with the constitutional framework and the principle of non-delegation. On the basis of the *Meroni* doctrine, it is the shifting of political choices and related responsibilities from the institutions in favour of other bodies that is contrary to the principle of "non-delegation"; but administrative discretion no longer confuses itself with political discretion. Thanks to the analysis contained in this volume, it finds autonomous theoretical dignity and autonomous practical recognition in the European legal order. In that respect the concept of "clearly defined executive powers" does not necessarily cover the content of the exercised powers but only outlines its boundaries; so administrative discretion may fit into it.

In the subsequent ESMA judgment[8], the Court of Justice, in establishing the legitimacy of ESMA's exercise of its short-selling powers in relation to the principle of non-delegation, did not take the opportunity to clarify the legal nature of the administrative powers within the European legal order, emphasising the technical qualification of the powers subject to review. Indeed, in this case, the Court avoids considering the argument used by the Parliament that short-selling measures are not "determined by political considerations, but by complex professional analyses",

[8] CJEU, 22 January 2014, Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*.

but states that the number of substantive and procedural conditions limiting the adoption of ESMA's decisions are such as to rule out the possibility that they may be highly discretionary in nature.

However, since the ESMA judgment [9], the Court of Justice has – by widening the scope of the *Meroni* doctrine – introduced new legitimation mechanisms for the exercise of public authority by European agencies [10]: among others, the quantity and quality of the procedural limits and conditions governing the agencies' administrative decision-making. [11]. On the basis of this ruling, the legitimacy of the powers of agencies must also be assessed in the light of the substantive and procedural conditions underlying the exercise of public authority. It follows that «as a result, two paradigms of legitimation for EU agencies seem to co-exist: the delegation paradigm, based on the long-standing *Meroni* doctrine, and an emerging procedural paradigm of legitimation. Within the conditions that can potentially limit the agencies' powers, procedural regulations shaping their rule-making activity, enacting fundamental values such as participation, transparency and openness, can be particularly effective in strengthening the legitimacy of the financial agencies»[12].

Conclusively, the volume enters into the scientific panorama introducing the administrative discretionary power of the executive apparatus through a reinterpretation of the *Meroni* Doctrine that goes beyond the traditional opposition between technical powers (falling within the agencies' sphere of competence) and political powers (reserved for the competent EU institutions). Through a deep analysis of the legislation and of the applicative reality, the Author goes beyond this dichotomy by

[9] See *ex multis*: A. Dariusz, *The ESMA Doctrine: A Constitutional Revolution and the Economics of Delegation*, European Law Review, XXXIX(6): 812-834 (2014); C. Merijn, *The Empowerment of Agencies under the Meroni Doctrine and Article 114 TFEU: Comment on United Kingdom v Parliament and Council (Short-selling) and the Proposed Single Resolution Mechanism*, European L. Rev., XXXIX(3): 380-403 (2014).

[10] E. Vos and M. Everson, *European Agencies: What About the Institutional Balance?* Maastricht Faculty of Law, Working Paper No. 4 (2014).

[11] On that topic see: M. De Bellis, *Procedural rule-making of European Supervisory Agencies (ESAs). An effective tool for legitimacy?* TARN Working Paper 12 (2017).

[12] M. De Bellis, *Procedural rule-making of European Supervisory Agencies (ESAs). An effective tool for legitimacy?* cit at 11.

identifying autonomous spaces of discretionary evaluation in the exercise of administrative powers by agencies. The exercise of adjudication and standardisation powers implies a balancing of interests and opportunity judgements that is carried out within the limits of the priorities and values established by the framework legislation. Technical judgements are often accompanied by administrative choices. Therefore, from a functional and organisational point of view, agencies present themselves in the EU constitutional order as autonomous administrative entities with particular technical expertise that complete the framework of European executive powers, supplementing the executive activity of the Commission and assisting the national authorities in achieving European policy objectives.

Once the agencies' exercise of discretionary powers is recognised as being in conformity with the *Meroni* doctrine, the analysis shifts to the instruments of accountability and institutional control aimed at ensuring the sustainability of the agency model in the EU legal order. (p. 107)

4. The control over the discretionary

The recognition of autonomous administrative powers on EU agencies implies the identification of the correspondent boundaries of such powers. In fact, only checks and balances structure the accountability of administrative bodies reconnecting the administrative powers to the unitary exercise of executive function. Only in a system inspired by legality and the rule of law, where there are adequate guarantees of accountability, could European agencies legitimately exercise discretionary powers in line with the democratic principle that inspires the EU legal order.

As part of the European administrative system, agencies must comply with the principles of independence, transparency, efficiency, participation and judicial control that inspire the European legal order; that is, guaranteeing the close relationship of interdependence between the administrative apparatus and the rights of individuals that characterises the democratic legal systems.

For these reasons, in the fourth part of the volume, the Author dwells on the concrete ways in which agencies exercise their powers, highlighting the limits of the current mechanisms of "discretion control". The analysis consists of three levels of investigation: first, the Author focuses on the organisational aspects and "political accountability", secondly, on the functional aspects related to the "proceduralisation" of the agencies' powers and the related procedural guarantees, and finally, on the judicial review of the agencies' decisions.

The analysis reveals a fragmented and uncertain implementation of legal guarantees applicable to European agencies, which makes controlling of the exercise of administrative powers by European agencies uncertain.

As far as organisational aspects[13] are concerned, the principle of autonomy is not structured in such a way as to improve "coherence in administrative decision-making and the pursuit of the identified European public interest" (174). "Insofar as autonomy is required as a condition for the operation of EU administration, the political accountability framework should be strengthened accordingly. Conversely the current regime demonstrates little awareness of the political relevance of the technical tasks exercised by EU agencies". In this context, the reinterpretation of the *Meroni* doctrine in a key that does not hide but enhances the discretionary aspects of the EU agencies' power could open the way to deepening the instruments of connection between the objectives (the result of political discretion) and their implementation (also through margins of discretion).

On the other hand, with regard to functional aspects, the Author points out that the absence of uniform rules at legislative level and the fact that procedural rules are often left to the decision-making power of individual agencies, distances administrative action from the democratic principle. In fact, by giving the power to agencies to decide how to reach decisions, it means giving them the priority of interests, compromising both the impartiality of decisions and the fundamental principle that limits the exercise of administrative discretion within the

[13] C. Franchini, *Le fasi e i caratteri del processo evolutivo dell'organizzazione amministrativa europea*, Riv. it. dir. pubbl. com., fasc.2, 375 (2017).

framework of the criteria and values established at the legislative level (151).

The introduction of a general law on administrative procedure[14] implementing those key principles laid down in the Treaties and in the Charter of Fundamental Rights would certainly make it possible to convey the exercise of administrative discretion while ensuring the legality of administrative action. Therefore, also from a functional point of view, the recognition and theorisation of an autonomous concept of administrative power at European level makes it necessary to adapt the existing legislative instruments to the dimension assumed by the discretionary activity of administrations at European level.

Lastly, with reference to the judicial protection the Authors noted that constitutional recognition of the judicial review of the acts of bodies, offices and agencies intended to produce legal effects vis-à-vis third parties does not ensure the full justiciability of all EU agencies' action. In that respect, the quasi-regulatory nature of the most EU agencies' powers makes judicial review particularly problematic, because the attribution of legal force does not causally follow the adoption of the act. When agencies acts are just a part of a broader procedure, their "preparatory nature" limits the justiciability of such decisions. A further problematic profile is represented by the justiciability of the acts of

[14] On the contribution of doctrine towards the codification of a European administrative procedure see: G. della Cananea, D.U. Galetta e a. (eds), *Codice ReNEUAL del procedimento amministrativo dell'Unione Europea*, (2016); G. della Cananea, *From Judges to Legislators? The Codification of EC Administrative procedures in the Field of State Aid*, RIDPC, 967 ss. (1995); C. Harlow, *At risk: National Administrative Procedure within the European Union*, IJPL, 1, 56 ss. (2015); D.U. Galetta, *Attività e procedimento nel diritto amministrativo europeo, anche alla luce della Risoluzione del Parlamento europeo sulla disciplina del procedimento per istituzioni, organi e organismi dell'Unione europea*, Riv. it. dir. pubbl. com., 395 ss., (2017); J. Ziller, *Risoluzione del Parlamento europeo per un'amministrazione europea aperta, efficace e indipendente*, RIDPC, 5, 947 ss (2016); Id, *Is a law of administrative procedure for the Union institutions necessary?,* in RIDPC, 3, pp. 699 ss., (2011); Id., *European Added Value of a Law of Administrative Procedure* cit.; B. Mattarella, *The concrete options for a law on administrative procedure bearing on direct EU administration?*, RIDPC, 3, 537 ss. (2012); D.U. Galetta - H.C.H. Hofmann - O. Mir Puigpelat - 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*, RIDPC, 1, 313 ss. (2016).

standardisation, the non-binding nature of which can make direct legal action more difficult.

Legislation is the most appropriate source to guarantee and ensure a system of procedural rights and remedies that support the conferral of incisive powers on European agencies; «from a cooperation role, they would be able to acquire stronger regulatory tasks and may ultimately come close to the status of independent regulators in the internal market» (187).

Generally speaking, the agencies' action must be governed by a composite administrative regime including organisational, procedural and judicial guarantees aimed at strengthening the bottom-up legitimacy of EU agencies. The control mechanisms of agency governance are characterised by a high degree of uncertainty, fragmentation and inconsistency; there is no crystal-clear accountability framework (186). This undermines the conformity of the agencies' action with the *Meroni* Doctrine in that it subordinates the constitutional compatibility of the delegation of powers with the principle of legality and democracy to the existence of a broad structure of accountability and control.

Therefore, even though – in the reinterpretation given by the Author – the abstract compatibility of the conferral of discretionary administrative powers on agencies has been recognised with the principle of non-delegation; nevertheless, to date, the general system of accountability that supports the agencification phenomenon does not seem suitable and adequate to circumscribe and convey the exercise of significant regulatory powers attributed to them.

5. The implication on the constitutional side: the autonomous dignity of administrative power in EU constitutionalism

The reinterpretation of the *Meroni* Doctrine suggested by the Author contributes to the debate on the modern EU administrative constitutionalism. In fact, once the existence of autonomous centres of discretionary power within agencies has been uncovered, it becomes possible to question the traditional re-conduction of the agencification phenomenon to the 'rational-

instrumental' paradigm according to Fisher's well-known distinction[15].

In fact, case law and doctrine have constantly minimised the discretionary nature of the agencies' powers by enhancing the technical-specialist nature of their competences, as well as by enhancing the formulas for monitoring the agencies' activities by the Commission and the non-binding nature of their powers. The traditional interpretation of the *Meroni* doctrine, limiting the recognition of spaces of discretion on the part of agencies, has prevented the above-mentioned paradigm from being questioned, determining an uncertain system of agencies' governance which is difficult to justify on a constitutional level.

On the contrary, the deepening of the powers of agencies in terms of authentic and substantial discretionary powers, even if characterised by elements of high technical expertise, offers the possibility of elaborating the application of a model of "deliberative constitutionalism" more pragmatically concerned with effective problem-solving.

Moreover, the recognition of agencies as an autonomous model of administration in the governance of internal market has important constitutional implications, helping to redefine the interpretation of the principle of institutional balance[16]. In fact, upon implementation of the traditional interpretation of the *Meroni* doctrine, this principle was referred to the enumeration of

[15] The Author dwells on E. Fisher, *Risk Regulation and Administrative Constitutionalism* (2007).

[16] E. Chiti, *Le trasformazioni delle agenzie europee*, Riv. trim. dir. Pubbl., 57 (2010): "la ragion d'essere della limitazione operata dalla Corte di giustizia (sentenza Meroni) alla possibilità di delega, individuata nel principio dell'equilibrio istituzionale, ha subìto, nella stessa giurisprudenza del giudice europeo, una profonda ridefinizione: da principio, per così dire, statico, volto a delimitare ed a tutelare la posizione di ciascuna istituzione politica europea, a criterio di relazione, che consente l'inventiva istituzionale di un'autorità comunitaria a condizione che quest'ultima tenga nel giusto conto il ruolo delle altre, valutando gli effetti della propria azione sulla sfera dei poteri pubblici contitolari delle funzioni comunitarie. Una ridefinizione che induce a chiedersi se il rigido confinamento dei compiti attribuibili ad un'agenzia europea entro i limiti dei poteri strettamente esecutivi, privi di alcuna discrezionalità, corrisponda ancora al principio di equilibrio istituzionale o non richieda piuttosto un aggiornamento".

powers of attribution [17] . However, agencies are given administrative powers, which, since they are genuinely executive in nature, cannot innovate existing legislation. It follows that the principle of institutional balance "can be effectively construed on the recognition of the hierarchy in EU legal sources"[18].

In conclusion, Simoncini's book represents a fundamental landmark in the study of administrative power at European level[19]. Through analysis of the evolutionary agencies' powers this text marks a decisive step in the study and deepening of the constitutional balance of European powers by finally giving a role and an autonomous place of prominence (autonomous dignity) to administrative power in this delicate balance.

[17] In jurisprudence: case law described the principles as a "structural normative" principle regulating the horizontal relations between the institutions of the Union (Conclusion AG Trstenjak, 30 giugno 2009, case C-101/08, *Audiolux e alt.*, 105). As interpreted in the *Chernobyl* judgment first and in the *Verugdenhil* judgment afterwards, the institutional balance has become a principle that introduces elements of flexibility within the Union's competences on the basis of the achievement of "European" ends (respectively: CJEU, 22 May 1990, C-70/88, *European Parliament v Council of the European Communities*; CJEU, 13 March 1992, C-282/90, *Industrie en Handelsonderneming Vreugdenhil BV v Commission of the European Communities*.)

[18] On this topic, *ex multis*, E. Chiti, *Decentralized implementation: European Agencies*, in T. Tridimas – R. Schutze (eds), *Oxford Principles of European Union Law*, (2016); compare also to H.C.H Hofmann, *European administration: nature and development of a legal and political space*, in C. Harlow – P. Leino – G. della Cananea (eds), *Research Handbook on EU Administrative Law*, 27 ss. (2017); The Author recognised that the creation of European agencies allows "shifting regulatory approaches from traditional hierarchic administrative organisations and unilateral forms of act towards more fluid and less transparent governance structures".

[19] On this topic see also G. della Cananea, *The European Administration: imperium and dominium*, in C. Harlow – P. Leino – G. della Cananea (eds), cit. at 18, 52-63.