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EL CRITERIO DE LA EFICIENCIA

EN EL DERECHO ADMINISTRATIVO[1]

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INDÍCE

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RESUMEN

La eficiencia ha tenido una amplia pero desigual recepción en el Derecho público español durante las últimas décadas y su estudio tiene que abrirse a las aportaciones de la ciencia económica. En este artículo se trata de teorizar la noción jurídica de la eficiencia y su alcance para nuestro Derecho administrativo, tanto desde una perspectiva general como también desde la más particular de la regulación económica, que permite aplicar y contrastar este marco teórico en algunas reformas recientes, como la de la regulación de los servicios.

PALABRAS CLAVE: eficiencia; economía; regulación; servicios.

ABSTRACT

In recent decades, Spanish public law has widely yet unevenly come to accept the conceptof efficiency, and to explain this it is necessary to acknowledge the contributions of economics. This article theorizes the legal notion of efficiency and its incidence in Spanish public law from an overall perspective and, specifically, from the viewpoint of economic regulation, by applying and checking the theoretical framework in the light of new reforms, such as the regulation of services.

KEY WORDS: efficiency; economy; regulation; services.

1. INTRODUCCIÓN[3]

[3] Este trabajo forma parte del proyecto de investigación «De los servicios públicos a los servicios de interés general: el futuro de la intervención publica en un contexto de crisis económica» (DER2009-09819), financiado por el Ministerio de Ciencia e Innovación. Agradezco a los profesores Luciano PAREJO, Álvaro ESCRIBANO y Antonio DESCALZO las observaciones que han tenido la amabilidad de hacer al borrador.

La ciencia del Derecho administrativo español ha vivido dos «edades de oro». Una fundadora, a mediados del siglo XIX, de la mano de los liberales moderados como Posada Herrera, Colmeiro, De Burgos, Gómez de la Serna, Oliván u Ortiz de Zúñiga. Y otra de madurez, durante la segunda mitad del siglo XX, gracias a la que conocemos como la «generación de la RAP». Durante estos periodos —sobre todo el segundo—, nuestro Derecho administrativo se ha abierto a las corrientes dogmáticas europeas más relevantes y se ha hecho acreedor también de su respeto, se ha expandido a materias antes no exploradas y se ha armado de un aparato conceptual sistemático que ha contribuido a su formidable progreso como rama del ordenamiento y de la ciencia jurídica (GARCÍA DE ENTERRÍA, 1983a, 1999).

El primer periodo mencionado tiene lugar durante el Estado liberal del Derecho, pero entonces el Derecho administrativo responde todavía al paradigma del poder administrativo como poder ejecutivo y persigue su eficacia[4]. Entre él y la segunda etapa aludida media, sin embargo, la poderosa influencia del liberalismo decimonónico alemán, que elabora la doctrina del Estado de Derecho, desarrolla el método jurídico y propicia una cierta «hipóstasis de la legalidad, elevando a la categoría de esencia del sistema lo que no es más que un elemento del mismo» (NIETO, 1986: 162)[5]. Su influencia sobre el Derecho público europeo se extiende durante la primera mitad del siglo XX y llega también a España de la mano de Royo Villanueva, Gascón y Marín o Fernández deVelasco (GALLEGO ANABITARTE, 1999: 88-89) y a través de la doctrina francesa e italiana

[4] En esta etapa temprana de la ciencia jurídico-administrativa española late con fuerza la preocupación por la eficacia de la Administración: «Poder es querer con eficacia: donde nohay voluntad para concebir y fuerza para ejecutar, allí no existe poder de ninguna especie» (COLMEIRO, 1850: 5)

[5] Según Alejandro NIETO, «la ideología liberal ha encontrado en el Derecho administrativo uno de sus últimos reductos y han sido los administrativistas quienes mejor han sabido afinar las técnicas de paralización del Estado, por muy paradójico que parezca. (…) Para remediar esta situación, el Derecho administrativo tiene que empezar por reconsiderar el estrecho ámbito en donde él mismo se ha encerrado al cabo de siglo y medio de individualismo jurídico» (NIETO, 1975: 22, 25).

(cuyos «padres fundadores», como Orlando o Santi Romano, están caracterizados por su «germanofilia», según CASSESE, 2010: 289).

La segunda etapa aludida es heredera directa de esta poderosa influencia y se forma, además, bajo un Estado autoritario carente de Constitución formal, durante la cual la doctrina española centró su atención en la necesaria «lucha contra las inmunidades del poder»[6], esto es, en la plena sujeción del poder al Derecho. Su éxito ha sido proporcional a su mérito y, por ello mismo, sigue gozando de gran actualidad. Si bien este mismo éxito ha venido lastrando su necesaria adaptación y puesta al día de las importantes novedades que le han sido sobrevenidas (PAREJO ALFONSO, 2010: 958). Entre estas novedades tienen una especial significación dogmática dos: la Constitución de 1978 y nuestra integración en la Unión Europea a partir de 1986.

La Constitución española, en primer lugar, ha ratificado la plena sujeción de los poderes públicos al Derecho en general (art. 9.1 CE) y en particular la de las Administraciones públicas (art. 103.1 CE), bajo control judicial (art. 106.1 CE). Pero también ha dotado a la Administración de una legitimidad democrática indirecta a través de la función directiva que sobre ella ejerce el Gobierno (art. 97 CE) y le ha asignado una función proactiva (arts. 9.2 y 103.1 CE) de acuerdo con principios constitucionales que van más allá del sometimiento pleno a la ley y el Derecho: principios organizativos y funcionales como los de eficacia, jerarquía, descentralización, desconcentración y coordinación. Y la integración en la Unión Europea está generando, asimismo, una verdadera mutación del Derecho constitucional y administrativo español (MUÑOZ MACHADO, 1993 y 2004: 312-325), como de los restantes Estados miembros, de la que

[6] En las páginas iniciales de su libro así titulado, el profesor GARCÍA DE ENTERRÍA (1983b: 11-12) escribe: «todo el suculento tema del Estado de Derecho se convierte para los administrativistas en un conjunto de técnicas concretas y particulares. Esta conversión de la metafísica en técnica es, justamente, nuestro papel en el gran concierto de las ciencias sociales».

veremos más adelante alguna manifestación a propósito de la regulación de los servicios económicos.

Sobre estas o similares bases, en varios países europeos, incluido España, se discute desde hace décadas la necesidad de una renovación del Derecho administrativo como ciencia. En la concreta formulación de Eberhard SCHMIDT-ASSMANN (2003: 26-27) —que ha ganado bastante notoriedad entre nosotros gracias a su capacidad de síntesis y a su traducción al español—, la ciencia del Derecho administrativo debe concebirse como una «ciencia de dirección» porque cumple una doble finalidad: la limitación del poder, sin duda, pero también la eficacia de la acción administrativa, lo que debería llevarnos a entender prohibido no sólo el exceso, sino también el defecto incurrido en esa acción. Como ya advirtiera prontamente entre nosotros Manuel COLMEIRO (1850: 11), «el gobierno no es sólo un escudo; es también una palanca». Entre las principales características de esa ciencia del Derecho administrativo como ciencia de dirección destaca, a los efectos que interesan para estas páginas, su concepción como un *sistema dinámico y abierto* que debe integrar, dentro del dogma clásico de la vinculación al Derecho, otros parámetros de dirección y control como los criterios de *eficiencia* (SCHMIDT-ASSMANN, 2003: 4-5, 35; las cursivas son mías). En consecuencia, cobra protagonismo la preocupación por la organización y el funcionamiento de la Administración, junto al que tradicionalmente han desempeñado sus relaciones jurídicas con terceros.

2. LA APERTURA DEL DERECHO ADMINISTRATIVO A LA ECONOMÍA

Como se acaba de recordar, una de las características más destacadas de nuestra tradición científica ha sido su empeño por ceñir el Derecho administrativo a las pautas y los cánones metodológicos de la ciencia jurídica. La emancipación de la ciencia jurídica ha favorecido su progreso y madurez, como también ha propiciado una cierta incomunicación respecto de las restantes ciencias sociales, con las que todavía dialogaba de forma natural y fluida el Derecho administrativo fundado por nuestros liberales moderados a mediados del

siglo XIX. Hoy, alcanzado este objetivo emancipador y sin renunciar a él en absoluto, se oyen voces renovadoras que reclaman la apertura del sistema a otras ciencias sociales que lo enriquezcan, como la economía, la sociología o las ciencias políticas y de la Administración (NIETO, 1975: 30; PAREJO ALFONSO, 2010: 971).

El Derecho es un sistema en sí mismo, pero un sistema dinámico y abierto. El ordenamiento jurídico no sólo goza de validez y eficacia formal, sino que persigue tener eficacia material, efectividad y eficiencia (CALSAMIGLIA, en VV.AA., 1989: 142-146). Se reivindica como un orden de las relaciones sociales que procura su transformación y progreso[7]. Como tal orden, es esencialmente dinámico: muta y se autointegra permanentemente (VAQUER CABALLERÍA, 2010a: 15-16, 55-65). Por la misma razón, la dogmática jurídica no puede cerrarse a las restantes ciencias sociales, que investigan y explican el comportamiento de los sujetos y las relaciones que el Derecho ordena. Pues no cabe ordenar sin aprehender primero el objeto de ordenación.

Según las sugerentes palabras de HOFFMANN-RIEM, sin conocer ni tratar el área de la realidad de la norma (*Realbereich*) en la dogmática y la práctica jurídicas, el Derecho queda en una construcción teorética, un «juego de bolas de cristal en una torre de marfil» (en RUFFERT, 2007: 203). Y permanecer a salvo en la «ciudadela del Derecho», según una feliz metáfora de Andreas HELLDRICH (cit. *ibidem*: 206), protegidos por los fuertes muros trabajosamente construidos a lo largo de todo un siglo, ya no es una opción, porque hace décadas que el «caballo de Tro ya» de otras ciencias sociales los ha traspasado. Así las cosas, parece que la opción metodológica del Derecho y su fortuna como ciencia social en

[7] El preámbulo de la Constitución española de 1978 es elocuente de esta voluntad tanto de «consolidar un Estado de Derecho que asegure el imperio de la ley como expresión de la voluntad popular» como también de «promover el progreso de la cultura y de la economía para asegurar a todos una digna calidad de vida». Esta dualidad encuentra su síntesis en la constitucionalización del Estado social y democrático de Derecho en el artículo 1.º, un Estado que no sólo sujeta a todo poder al Derecho (art. 9.1), sino que también le atribuye la misión de promover la efectividad de la libertad y la igualdad de las personas y remover los obstáculos que impidan o dificulten su plenitud (art. 9.2).

el futuro dependen más bien de saber dar «una respuesta competitiva» (COASE, 1978: 209).

Si esto es así con carácter general, cuánto más no lo es para el Derecho público en general y el administrativo en particular, que rige la «función ejecutiva» de las leyes y cuya historicidad o dinamismo es particularmente agudo. No existen muchos ejemplos de la apertura del Derecho administrativo contemporáneo español a las otras ciencias sociales, pero sí algunos notorios, como son el influjo desplegado desde la ciencia política a través de la noción de *gobernanza*, el que la doctrina sociológica de la *sociedad del riesgo* ha tenido sobre la elaboración del principio de precaución o el ejercido por la teoría económica de la *regulación* sobre nuestro Derecho público de la economía.

De entre las diversas ciencias sociales cuyo concurso cabe invocar interesa aquí en particular la ciencia económica. Porque la misión de la Administración pública es administrar, es decir, gestionar recursos escasos (personal, patrimonio, financiación) para la consecución de fines de interés general. Y la economía es justamente eso: la ciencia de administrar recursos escasos[8]. Luego la Administración es una organización económica de primer orden: porque administra los recursos del Estado y porque proyecta su actividad en todas sus formas (regulación, intervención, fomento, servicio público, iniciativa empresarial, planificación, información) sobre el mercado.

[8] «Economía es el estudio de la manera en que las sociedades utilizan recursos escasos para producir mercancías valiosas y distribuirlas entre los distintos individuos» (SAMUELSON y NORDHAUS, 2010: 4). «El problema económico central es la asignación de recursos para satisfacer deseos o necesidades humanas», y es un problema porque las necesidades son, a efectos prácticos, ilimitadas, mientras que los recursos disponibles son limitados (LIPSEY y HARBURY, 1993: 7). «La economía es la ciencia de la elección racional en un mundo —nuestro mundo— donde los recursos son limitados en relación con las necesidades humanas» (POSNER, 2007: 25).

Esta confluencia entre economía y Administración pública[9] y, en consecuencia, entre las ciencias económica y jurídica en el campo del Derecho administrativo se ha acrecentado en el Estado social, que añade a su legitimidad de origen la búsqueda de una legitimidad de ejercicio a través de su desempeño o *performance*, y en el que la actividad de las Administraciones públicas de garantía de las libertades de los ciudadanos cede protagonismo en favor de la prestación de bienes y servicios, así como de la dotación de las necesarias infraestructuras que constituyen el entorno para los bienes y servicios que debe prestar la sociedad, sea de forma mercantil o solidaria. Tareas todas ellas atributivas y distributivas a las que es esencial optimizar el empleo de recursos (*input*) en la actividad de la Administración y la asignación de sus resultados o rendimientos (*output*), esto es, la economía.

Como ya se ha apuntado, la Administración del Estado social tiene atribuidos unos fines de transformación social de rango constitucional, al servicio de la efectividad de la libertad e igualdad de las personas y grupos (art. 9.2), y el mandato de ser eficaz en su servicio objetivo (art. 103.1). Muchos de esos fines se traducen desde la Constitución misma en mandatos de prestaciones públicas potencialmente universales y muy intensivas en el empleo de recursos (por ejemplo, en educación: art. 27, o seguridad social: art. 41). Así pues, el Derecho administrativo del Estado social de Derecho instaurado por nuestra Constitución está presidido por un amplio conjunto de derechos de prestación y principios rectores (todos los del capítulo III del Título I, pero no sólo ellos) que constituyen verdaderos «mandatos de optimización», según la conocida expresión de Robert ALEXY (2008: 67), y cuya consecución nunca es plena, sino secuencial e idealmente progresiva. La efectividad de esos principios y derechos consiste en realizar un bien o valor jurídico en la mayor medida posible, habida cuenta de las posibilidades fácticas y jurídicas existentes, por

[9] Ya afirmada por Manuel COLMEIRO, uno de los primeros cultivadores en España tanto del Derecho administrativo como de la economía política: «la economía política … es la ciencia de la administración pura» (1850: 13); «la economía política es la ciencia que demuestra, y la administración el arte que aplica» (1870: 17).

lo que constituye un problema económico (DOMÉNECH, en ORTEGA y SIERRA, 2009: 159-161).

La gestión eficaz de una matriz tan abierta de mandatos jurídicos de optimización demanda asimismo criterios jurídicos de optimización. Como veremos de seguido, el concepto de la eficiencia nos ofrece precisamente eso: criterios de optimización para la consecución de fines diversos con medios determinados o limitados. Esta correlación entre fines potencialmente ilimitados y recursos estrictamente limitados, ambos predeterminados por la ley, hace que la eficacia global de la Administración dependa de su eficiencia[10] y provoca que la economía del sector público emerja como un problema esencial del Estado social.

En el Estado social, lo social y lo económico se funden en un magma inescindible (VAQUER CABALLERÍA, 2005). Y la continua crisis en que vive la cláusula social del Estado a partir de la década de los setenta del siglo pasado tiene un componente ideológico[11], sin duda, pero su prin cipal explicación es económica: las sucesivas crisis económicas (primero del petróleo, después de las empresas tecnológicas, hoy la inducida desde los sectores inmobiliario y financiero) han puesto en evidencia la fragilidad de su sostenibilidad, sobre todo financiera. Cómo supere el Estado social las crisis dependerá, en definitiva, de su eficiencia. Porque siendo un Estado *finalmente social*, se ha convertido en un Estado *modalmente económico*.

[10] La Administración puede lograr uno o más de sus fines de modo ineficiente. Pero para ser globalmente eficaz debe ser eficiente, de manera que los ahorros logrados en cada una de sus actividades le permita dedicar más medios y alcanzar más objetivos en ella o en las restantes (eficiencia productiva) y que pueda maximizar los efectos sociales positivos y minimizar los negativos de dichas actividades (eficiencia asignativa).

[11] No es la ideología la que ha provocado la crisis del Estado social en Europa, pero sí que condiciona su diagnóstico (mientras para unos se trata de una crisis de crecimiento, para otros es terminal) y su tratamiento (para los primeros, hay que redimensionar y ganar en eficiencia; para los segundos, «dar un entierro digno» a sus principales instituciones). La discusión sobre la vigencia de la doctrina de los servicios públicos en España es un paradigma de este debate.

3. LA ACEPCIÓN JURÍDICA DE LA EFICIENCIA Y SU RELEVANCIA PARA EL DERECHO PÚBLICO

Los dos grandes criterios que utiliza la economía política o pública para valorar la racionalidad en la asignación de recursos e ingresos son la *eficiencia* y la *equidad* (STIGLITZ, 2000: 111; ALBI, GONZÁLEZ-PÁRAMO y ZUBIRI, 2009: 5). Y ambos han sido asumidos de forma cartesiana en el artículo 31.2 de la Constitución española, según el cual «el gasto público realizará una asignación *equitativa* de los recursos públicos, y su programación y ejecución responderán a los criterios de *eficiencia* y economía» (las cursivas son mías).

«Una economía es eficiente si no es posible hacer que nadie esté mejor sin hacer que otros estén peor». Así pues, la eficiencia de la economía es la maximización de los resultados deseados con los medios disponibles[12]. Ahora bien, «la eficiencia tiene que ver con *cómo lograr objetivos*; no dice nada al respecto de cuáles deben ser esos objetivos. Decir que el resultado del mercado es eficiente no significa que dicho resultado sea necesariamente deseable. (…) ¿Cuándo puede un resultado eficiente no ser deseable? Cuando no sea justo». Por ello, «le pedimos algo más que eficiencia a una economía. También le pedimos *equidad*: exigimos que la distribución de la utilidad entre los individuos sea razonablemente justa» (KRUGMAN y WELLS, 2006: 317, 325-326; las cursivas en el original).

[12] Aunque habitualmente, en economía, cuando se habla de eficiencia sin más se suele identificar con la *eficiencia asignativa*, y más en particular con el óptimo de Pareto (como ocurre con la definición transcrita en el cuerpo de este texto), también se maneja el concepto de *eficiencia productiva* para referirse a la «situación en que una economía no puede producir más de un bien sin producir menos de otro bien; esto significa que la economía se halla en su frontera de posibilidades de producción» (SAMUELSON y NORDHAUS, 2010: 13, 687). Ambas pueden trasladarse a la Administración pública como organización económica y al Derecho administrativo como orden que rige tanto su producción como la asignación por ella de bienes y servicios, de manera que ambas son pertinentes al objeto de este trabajo.

La noción económica de equidad difiere de la jurídica utilizada, por ejemplo, en el artículo 3.2 del Código civil. En economía, la equidad se entiende como «distribución justa del ingreso» (SAMUELSON y NORDHAUS, 2010: 38). Más concretamente, alude a la justicia distributiva necesaria para favorecer la igualdad material (vid. STIGLITZ, 2000: 111-112)[13]. En consecuencia, la equidad de la economía apunta a los valores superiores de la igualdad y la justicia proclamados en el artículo 1.1 de la Constitución, por lo que su asunción es consustancial al Derecho y no plantea problemas dogmáticos en nuestro Estado social y democrático de Derecho. Por la misma razón, los poderes públicos, y en particular la Administración, objetivamente dirigida al cumplimiento de los fines marcados por el Derecho del Estado social (arts. 9.2 y 103.1 CE), son, por su misma esencia, organizaciones al servicio de los valores superiores de la justicia y la igualdad, esto es, de la equidad tal y como la concibe la economía.

Con lo afirmado en el párrafo anterior no quiere devaluarse el problema de la equidad, sino todo lo contrario. En los Estados sociales de Derecho de tradición continental, la equidad forma parte del «código genético» axiológico y finalista del ordenamiento. Su Derecho público lo configura jerárquicamente a través del trinomio constitución + ley + reglamento, lo determina lógicamente por el trinomio valor + principio + regla, y lo realiza funcionalmente mediante el trinomio legislación + ejecución + aplicación, por lo que su certidumbre es menos problemática que en los países situados en la tradición del common law.

Pero con la eficiencia no ocurre lo mismo. Ese «código genético» de nuestro Derecho público no la incorpora del mismo modo: la igualdad y la justicia son valores superiores del ordenamiento jurídico español; la eficiencia, no. Eso no quiere decir, sin embargo, que no quepa rastrear fundamentos o elementos de la eficiencia en nuestro orden

[13] Y que ésta es la acepción del término empleada en el artículo 31 de la Constitución lo confirma su posterior utilización en el artículo 40 de la misma, según el cual «los poderes públicos promoverán las condiciones favorables (…) para una *distribución de la renta* regional y personal más *equitativa*, (…)».

constitucional más allá de su proclamación expresa a propósito del gasto público en el artículo 31. Por ejemplo, los siguientes:

En primer lugar, es cierto que la cláusula de Estado democrático y el valor superior correspondiente del pluralismo político introducen criterios de eficiencia en la configuración del poder público. Porque los representantes públicos que dirigen los procesos políticos y administrativos de toma de decisiones se eligen en pública competencia, de acuerdo con la famosa concepción schumpeteriana de la democracia como método. Y los empleados públicos también se seleccionan me diante concurrencia pública regida por los criterios de mérito y capacidad[14]. Pero estos criterios de eficiencia ya no rigen en el momento posterior del funcionamiento del poder público, es decir, en su actividad o desempeño.

Los defensores del federalismo competitivo[15] argumentan, en segundo lugar, que la cláusula de Estado autonómico ha introducido asimismo elementos competitivos en la actividad de los distintos entes territoriales del Estado. Y no les falta razón, pero su alcance es mucho más limitado por el grado de predeterminación constitucional del ámbito material, territorial y personal de sus competencias y su financiación (*mutatis mutandis*, del «producto» y del «precio» con que se «compite»).

En tercer lugar y para superar esta limitación, puede suscitarse una cuestión previa que suele —pero no debe— ser obviada: si la competencia es el único o principal canon de eficiencia en el sector público como en el mercado y si no puede serlo también, alternativa o complementariamente, la *cooperación*. Solemos contraponer Estado a mercado e

[14] Como ha recordado Ramón PARADA (2010: 355-357), esta competencia selectiva del modelo burocrático es distinta pero complementaria de la competencia electiva de los representantes políticos, participa de su misma legitimidad democrática y acabó siendo apoyada hasta por «los más conspicuos liberales», como John Stuart Mill.

[15] Esta corriente de pensamiento, arraigada en Estados Unidos, fue introducida en el Derecho público español por la estimulante monografía de BALLBÉ y PADRÓS (1997).

identificar a este último con la sociedad civil, pero lo cierto es que la sociedad civil se organiza cada día más en torno a dos grandes tipos de organizaciones: las empresas y las organizaciones sin ánimo de lucro. La competencia es el principal paradigma de organización y relación de las primeras en el mercado[16], pero la cooperación lo es de la organización y relación de las segundas en el tercer sector. Competencia y cooperación son, en suma, dos formas posibles de relación entre organizaciones económicas[17]. Y la cooperación (o la lealtad institucional) sí es un principio vertebral del Estado autonómico.

En cuarto y último lugar, como se ha anticipado más atrás y se desarrollará seguidamente, la eficiencia puede ser asumida como un corolario general y complemento necesario del principio de la eficacia en el Estado social.

En todo caso, estas elaboraciones no niegan, sino que más bien confirman que no ocurre lo mismo con la eficiencia como criterio operativo general de los poderes públicos que con la equidad o con la propia eficiencia en el momento constitutivo de los poderes públicos: la dogmática del Derecho público no puede *presumirla*, sino que tiene que *asumirla* y elaborarla a partir de diversos fundamentos. Y por ello, así como para la

[16] Según el preámbulo de la Ley 15/2007, de 3 de julio, de Defensa de la Competencia, «la existencia de una competencia efectiva entre las empresas constituye uno de los elementos definitorios de la economía de mercado, disciplina la actuación de las empresas y reasigna los recursos productivos en favor de los operadores o las técnicas más eficientes».

[17] Según el padre de la economía neoclásica, «si la competencia se opone a una enérgica cooperación en un trabajo desinteresado, que se encamina al bien público, entonces incluso las mejores formas de competencia son relativamente perniciosas, y sus formas más egoístas y deplorables llegan a hacerse odiosas» (Alfred MARSHALL, 2005: 12). En la teoría de juegos, la racionalidad de la cooperación suele explicarse con el famoso *dilema del prisionero*, formulado por Albert TUCKER.

economía política el reto dogmático más difícil lo ofrece actualmente la equidad[18], para el Derecho público lo plantea simétricamente la noción de eficiencia.

En efecto, la traslación del criterio de la eficiencia al ordenamiento jurídico español es más novedosa y difícil. Eso no significa, como se ha comprobado, que la eficiencia sea un concepto ajeno al ordenamiento jurídico, porque éste ya lo tiene hoy incorporado a la propia Constitución. En sede de los principios que rigen el funcionamiento de los poderes públicos en general (eficiencia: art. 31.2 CE) y de las Administraciones públicas en particular (eficacia: art. 103.1 CE), la Constitución española resuelve uno de los clásicos problemas de conciliación entre las cláusulas de Estado social y Estado de Derecho, ya que integra criterios de desempeño o de *performance* entre los principios constitucionales del ordenamiento jurídico o, en otros términos, integra parámetros de oportunidad dentro del canon de la legalidad al que están sometidos todos los poderes públicos en un Estado de Derecho (PAREJO ALFONSO, 1995: 108, 137).

Y si la Constitución menciona la eficiencia en su artículo 31.2 como criterio de programación y ejecución del gasto público, la Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y Procedimiento Administrativo Común (en adelante, LRJPAC), lo convierte en un criterio general de actuación de las Administraciones públicas en su artículo 3.2, según el cual «las Administraciones públicas … se rigen … en su actuación por los criterios de eficiencia y servicio a los ciudadanos».

[18] Los desarrollos iniciales del *law and economics* los impulsó en Estados Unidos la escuela de Chicago y estuvieron vinculados a la ideología liberal o conservadora y orientados al valor de la eficiencia. Posteriormente, la Universidad de Yale ha protagonizado una cierta «reacción progresista» caracterizada por una mayor sensibilidad hacia los problemas de la equidad (vid. ROSE-ACKERMAN, 1988-1989, y NAPOLITANO y ABRESCIA, 2009: 21-30). Paralelamente, es bien conocida la denuncia de Amartya SEN (1987), según la cual la economía moderna ha evolucionado hacia la caracterización de la motivación humana en términos «extraordinariamente estrechos» y hacia un carácter autoconscientemente «no ético» que la ha empobrecido.

Ambos preceptos introducen la eficiencia en nuestro Derecho público, pero tienen distinto alcance: conforme a la óptica estatutaria que le es propia, la LRJPAC, por un lado, restringe el ámbito subjetivo a las Administraciones públicas pero, de otro lado, amplía su ámbito funcional, del gasto público a la actuación administrativa en general. Al desvincularla del gasto público y vincularla al funcionamiento general de la Administración, podemos interpretar que la eficiencia querida por la ley es la optimización del consumo y asignación de cualesquiera recursos públicos, ya sean económicos (financieros, materiales o personales) o jurídicos (reglas, actos, plazos)[19].

Más adelante observaremos cómo la noción de eficiencia ha sido recibida también en otros cuerpos legales como la Ley General Presupuestaria, la Ley de Patrimonio de las Administraciones Públicas, el Estatuto Básico del Empleado Público o la Ley de Economía Sostenible, por ejemplo, además de una pléyade de leyes sectoriales. Así pues, la eficiencia es hoy norma positiva en el Derecho administrativo español. Sobre esta base, las páginas que le dedicamos aquí no quieren ser un ejercicio de análisis económico del Derecho, sino más bien un análisis jurídico, basado en la interpretación finalista y sistemática del concepto de eficiencia tal y como lo ha recibido nuestro ordenamiento y dirigido a proponer algunas conclusiones sobre su alcance.

En otros términos, no se trata aquí de la noción económica de eficiencia, sino de la jurídica. Esta juridificación de la noción económica de eficiencia plantea, sin duda, un reto para el Derecho público en general y en particular para el Derecho administrativo (HOFFMANN-RIEM y SCHMIDT-ASSMANN, 1998). Por ello nos centraremos en adelante en las difíciles relaciones entre la eficiencia y el Derecho administrativo.

[19] En este sentido apunta la letra j) del artículo 4 de la Ley 11/2007, de 22 de junio, de Acceso Electrónico de los Ciudadanos a los Servicios Públicos (en adelante, LAECSP), que confía el logro de una mayor eficacia y eficiencia en la Administración pública a la reducción sustancial de los tiempos y plazos de los procedimientos administrativos.

Pues bien, podemos concluir de lo hasta aquí expuesto que la eficiencia, para el Derecho público, es un criterio complementario del principio de eficacia, que significa empleo y asignación racionales de los recursos en general y que es susceptible de aplicarse a problemas tan diversos como la minimización del gasto público[20], la explotación óptima del patrimonio del Estado, la productividad de los empleados públicos, la proporcionalidad de la regulación o la simplicidad y la celeridad del procedimiento administrativo.

Más aún, podemos concebir la eficiencia como un concepto integrador de la eficacia, que la presupone o concurre con ella, según se con sidere. Porque siendo la eficiencia una noción relativa, que evalúa la idoneidad de la combinación de recursos empleados para alcanzar la finalidad perseguida, enriquece la noción absoluta de eficacia[21].

Ahora bien, la eficacia de una organización puede juzgarse de forma particular respecto de cada uno de los fines perseguidos por ella (evitar o erradicar una epidemia, alcanzar un nivel de alfabetización de la población, extender una red de infraestructuras o de servicios a equis núcleos de población) o globalmente, cuando se refiere al conjunto de fines perseguidos por organizaciones tan complejas como la Administración pública. La eficacia global de la Administración aumenta según lo hace su eficiencia porque, siendo para ella indisponibles los recursos disponibles, los ahorros conseguidos en la gestión de un fin no sólo podrán, sino que deberán necesariamente destinarse al mismo o a otros de los que tiene atribuidos, mejorando sus resultados. Pero se puede lograr un fin u objetivo

[20] Esta complementariedad se expresa claramente en el artículo 69.1 de la Ley General Presupuestaria, según el cual «los sujetos que integran el sector público estatal adecuarán su gestión económico-financiera al cumplimiento de la *eficacia en la consecución de los objetivos fijados* y de la *eficiencia en la asignación y utilización de recursos públicos*, en un marco de objetividad y transparencia en su actividad administrativa» (la cursiva es mía).

[21] La eficacia como principio constitucional del artículo 103.1 CE es una noción material que equivale a efectividad o surtimiento de los fines o efectos deseados. Como tal, se diferencia de la eficacia formal, entendida como aptitud o potencia de surtir efectos. Esta acepción material la sitúa en línea con la noción de eficiencia, de la que sin embargo se distingue por ser la primera una noción absoluta y la segunda relativa, pues relaciona medios con fines (PAREJO ALFONSO, 1995: 92-94).

(eficacia particular) de muchos modos, de los que sólo uno constituye el óptimo de eficiencia. Y, del otro lado, el discurso sobre la idoneidad de medios no puede prescindir de los fines.

Una actuación no puede ser eficientemente ineficaz: si existiera algún óptimo de eficiencia para la ineficacia, sería precisamente la inactividad. Luego la eficiencia presupone la eficacia cuando se mide de modo particular y concurre con ella en un juicio global.

Se comprende, pues, que la economía política suela prescindir de la noción de la eficacia y centrarse en la de eficiencia[22]. Pero la Constitución española enuncia ambas separada y diversamente, lo que obliga a los especialistas en Derecho público a investigar sus relaciones y diferencias.

Ciertamente que la eficacia es un concepto final y la eficiencia una noción modal, por lo que no cabe confundirlas. Más aún, a diferencia de quienes las afirman como dos principios jurídicos autónomos, referido el primero a fines y el segundo a recursos[23], concebimos aquí más bien a la eficacia como un *principio* jurídico y a la eficiencia como

[22] Y es que «para que la eficacia sea una medida adecuada de la bondad de la gestión de los recursos públicos, es necesario que los objetivos establecidos sean los máximos alcanzables con los recursos asignados y que estos objetivos tengan en cuenta todos los beneficios y los costes de la actuación pública. Pero esto es exactamente lo que hacen los análisis de eficiencia. Por ello la eficiencia, y no la eficacia, es el concepto que se debe utilizar a la hora de valorar la actuación pública» (ALBI, GONZÁLEZ-PÁRAMO y ZUBIRI, 2009: 234-235).

[23] En la doctrina alemana, que se ha ocupado profusamente del asunto, esta aproximación está bastante generalizada, como atestiguan los trabajos de Walter LEISNER (1971), HOFFMANN-RIEM (en HOFFMANN-RIEM y SCHMIDT-ASSMANN, 1998: 16-25) o EIDENMÜLLER (2005). SCHMIDT-ASSMANN (2003: 347) parece apuntar en la línea que se va a defender aquí cuando califica a la eficiencia como parámetro, baremo o escala, al utilizar el término *Maßstab*, que Alejandro HUERGO traduce oportunamente como «criterio», pero el autor alemán no lo diferencia claramente del concepto de principio. En su opinión —que no comparto en este punto—, «en el momento en que un criterio orientador de la acción administrativa es utilizado por unTribunal como canon de control, se convierte automáticamente, en última instancia, en un principio jurídico» (*ibidem*: 351).

un *criterio* de optimización de la eficacia global de la Administración y, para ello, de ponderación en la decisión entre opciones diversas de asignación de los recursos con los que cuenta la Administración. No en vano, tanto la Constitución como la LRJPAC califican a la eficacia como un «principio» y a la eficiencia como un «criterio».

Como principio jurídico, la eficacia es un mandato de optimización. Mientras que la eficiencia es un criterio —más bien un conjunto complejo y tecnificado de criterios— para dicha optimización. En consecuencia, la relación que guardan es similar a la que media, por ejemplo, en el sistema de fuentes entre el principio de legalidad del artículo 9 CE y los criterios de interpretación de las normas del artículo 3.1 Cc. O la que existe en el Derecho de la función pública entre el propio principio de eficacia de la Administración, el de igualdad y el derecho de participación en los asuntos públicos (arts. 14, 23 y 103.1 CE) y los criterios —aunque la Constitución los denomine también «principios»— de mérito y capacidad del artículo 103.3 CE[24].

Puede concluirse que las nociones de eficacia y eficiencia de la Administración son diferentes pero inescindibles: la eficiencia en la ineficacia carece de sentido y la

[24] Dado que convencionalmente se clasifica a las normas en valores, principios y reglas, ¿a qué clase pertenecerían estos «criterios»? Cuando trata del principio de proporcionalidad, ALEXY afirma que los tres «subprincipios» en que se articula (idoneidad, necesidad y ponderación) tienen que catalogarse como reglas (ALEXY, 2008: 92, nota 84). Similarmente, podemos entender que la eficiencia y los demás criterios de optimización mencionados pertenecen al género de las reglas. Pues los principios son *razones prima facie* y las reglas *razones definitivas*, y «el camino que conduce desde el principio, es decir, desde el derecho *prima facie*, hasta el derecho definitivo, transcurre por la determinación de una relación de preferencia. Sin embargo, la determinación de una relación de preferencia es, de acuerdo con la ley de la colisión, el establecimiento de una regla» (*ibidem*: 83). Los que aquí llamamos criterios de optimización son, en la terminología de ALEXY, «relaciones de preferencia» que sirven de puente entre el principio y la regla y determinan «razones definitivas» para la decisión en los casos concretos.

eficacia global pasa necesariamente por la eficiencia[25]. Por eso no cabe contraponerlas ni ponderar entre ambas, como entre principios diversos.

Y por lo que hace a la relación entre la equidad y la eficiencia, la economía suele aceptar que «hay una relación de intercambio entre equidad y eficiencia: las políticas que promueven la equidad a menudo tienen un coste en términos de eficiencia, y viceversa» (KRUGMAN y WELLS, 2006: 15). Eso no significa que la economía no se ocupe de lo socialmente deseable, pero sí que su marco analítico sitúa a la eficiencia y la equidad como valores autónomos y potencialmente rivales.

La economía del bienestar es «la rama de la teoría económica que se ocupa de la deseabilidad social de los estados económicos alternativos». Y su primer teorema fundamental afirma que «siempre y cuando los productores y consumidores actúen completamente como precio aceptantes, y exista un mercado para cada mercancía, surgirá una asignación de recursos Pareto eficiente[26]. Es decir, la economía operará en un punto de

[25] Esta interdependencia recíproca entre fines y medios rige tanto en el momento de la actuación de la Administración como en el de su control, como evidencia el siguiente razonamiento de la STSJ de Madrid 1063/2001, de 26 de noviembre (RJCA 2002\480): «Podríamos afirmar que *nos encontramos, al hablar del principio de eficacia, ante una "obligación de simple actividad", "de diligencia" o "de medios"*. Con ello venimos a afirmar que la eventual disconformidad del actuar administrativo con el principio constitucional de eficacia no será predicable por la mera constatación de que con él no se obtuvo el resultado al que debió en caminarse. La vulneración nacerá en aquel instante en que dicho actuar no vaya dirigido a la obtención del resultado querido por el ordenamiento, o que sea conforme a éste; *o cuando los medios, instrumentos o etapas se presenten objetivamente como inidóneos para tal obtención*; o cuando el resultado buscado, estando en línea con el querido por el ordenamiento, no alcance en su misma previsión los niveles que en ese momento pudieran objetivamente ser exigibles» (la cursiva es mía).

[26] El de Pareto es el modelo más conocido y extendido de eficiencia, según el cual se alcanza el óptimo en el punto en el que no se puede aumentar la utilidad de un individuo o grupo sin reducir la de otro. Esta restricción hace que muchas situaciones diversas puedan ser óptimos de Pareto. Para tratar de superar sus limitaciones, KALDOR y HICKS propusieron otro alternativo según el cual el óptimo se situará allí donde la ganancia de utilidad de un sujeto o grupo pueda compensar a la pérdida que experimente el otro.

la frontera de posibilidades de utilidad». «Pero el teorema fundamental no dice nada acerca de la justicia». Como ya hemos advertido más atrás, un óptimo de Pareto puede ser eficiente pero injusto. Las exigencias de la justicia pueden desviar el equilibrio o resultado deseable de ese óptimo de eficiencia y «entonces se puede utilizar la economía del bienestar para determinar cuán costosa (en términos de eficiencia) será esa interferencia» (KATZ y ROSEN, 1995: 422, 434, 437).

Los iuspublicistas no nos planteamos el problema de la justicia como una «interferencia» en el análisis de la eficiencia de los poderes públicos ni concebimos que éste pueda contraponerse a aquél. En el Derecho público podemos asumir la idea esgrimida por Ronald DWORKIN en su polémica con CALABRESI y POSNER, según la cual no se trata de una relación de compensación o de compromiso entre dos valores autónomos, pues «carece de sentido hablar de intercambiar medios por fines» (DWORKIN, 1980a: 204), sino más bien de una distribución entre ingredientes o elementos de la justicia igualitaria según su teoría «de la igualdad profunda» (*deep-equality theory*), de manera que la solución justa o el equilibrio entre ambos en cada caso no debe ser conce bido como un compromiso (*trade-off*), sino como una receta o fórmula combinatoria (*recipe*) (DWORKIN, 1980b: 569). Entre nosotros, Albert CALSAMIGLIA (en VV.AA., 1989: 114) ha defendido, asimismo, que la eficiencia es uno de los «componentes esenciales» de la idea de justicia en el Estado social, ya que «una sociedad no sólo es justa si respeta una concepción determinada de igualdad, sino que también debe asignar correctamente los recursos. Una sociedad que despilfarre recursos que cubren necesidades básicas no es una sociedad justa».

Del mismo modo que hemos sostenido que los poderes públicos del Estado social no pueden ser eficientemente ineficaces, podemos afirmar ahora análogamente que la eficiencia de un Estado de Derecho no puede ser injusta ni discriminatoria, sino vicaria de la idea de justicia. «No se puede enfrentar la eficiencia administrativa al Derecho» (SCHMIDT-ASSMANN, 2003: 353). Esta concepción es plenamente consistente con la configuración de la justicia y la igualdad como valores superiores del ordenamiento, prevalentes sobre la eficiencia en la Constitución española, que hemos recordado más atrás. En el Derecho público español, no cabe la antinomia entre los valores superiores de la justicia y la igualdad del artículo 1 CE y el criterio de la eficiencia de su artículo 31. En

primer lugar, porque éste sólo juega en el marco de aquéllos y está subordinado a ellos. En segundo lugar, porque aquéllos identifican fines o mandatos de optimización y éste sólo un criterio modal para su consecución y su ponderación con otros.

La perspectiva del jurista es, en este punto, distinta de la del economista. Y nos permite tecnificar la noción de eficiencia en el Derecho público, desactivando su carga ideológica, axiológica o teleológica. Mientras los economistas se plantean como problema los fines de la eficiencia (¿qué es lo que debe maximizarse: la riqueza, la libertad, la utilidad o el bienestar?[27]; y ¿a qué nivel: individual, grupal o social?) y su relación con la equidad o justicia distributiva (¿son valores rivales?; ¿cabe compensación —*trade off*— entre ellos?), en nuestro Derecho público, cuyas organizaciones no se rigen por la autonomía de la voluntad, sino por la heteronomía legal[28], los fines los fijan las normas, empezando por los valores superiores del ordenamiento, continuando por los principios y derechos constitucionales y así sucesivamente. Y la eficiencia, como ha quedado ampliamente expuesto, no constituye ni un valor ni un principio jurídico, sino un criterio para su optimización.

4. LA EFICIENCIA EN EL DERECHO ADMINISTRATIVO

La ciencia del Derecho administrativo español parece todavía inconsciente de su economicidad. No me refiero aquí al Derecho administrativo económico como ramo o sector especial del Derecho administrativo, que ha merecido numerosas y valiosas aportaciones en las últimas décadas, sino a la consideración cabal del Derecho

[27] Un ejemplo sintético pero elocuente de la discusión entre estos cuatro conceptos (*welfare, wealth, freedom o liberty y utility*) en términos económicos se encuentra en STIGLER (1978).

[28] De acuerdo con el artículo 3.3 LRJPAC, «la actuación de la Administración pública (…) se desarrolla para alcanzar los objetivos que establecen las leyes y el resto del ordenamiento jurídico».

administrativo desde una perspectiva económica, desde la que valorar su eficiencia en el empleo y en la asignación de recursos y su eficacia al servicio de los intereses generales. Expresado más sencillamente, no se trata aquí del Derecho administrativo de la economía, sino de *la economía del Derecho administrativo*.

Goza ya de cierta tradición científica entre nosotros el análisis económico del Derecho (*law & economics*), que evalúa las normas con criterios económicos. Y, sin embargo, apenas hemos desarrollado instituciones jurídicas dirigidas a optimizar la eficiencia en el ejercicio de las potestades reglamentaria u organizativa, por ejemplo, o en la gestión de los medios de la Administración.

Los avances normativos dados en los últimos años parecen insuficientes y caen frecuentemente en el descrédito y en la pura formalidad, porque responden a meros impulsos del legislador que no se inscriben ni proyectan en una política sistemática y estable. Falta, como decimos, una *política de economía administrativa* que optimice y evalúe la organización, el funcionamiento y la actividad de las Administraciones públicas con criterios objetivos, adecuados, contrastables y transparentes de eficiencia. Repasemos los principales pasos dados en este sentido y su desigual alcance.

4.1 La potestad reglamentaria y la iniciativa legislativa

Existe la opinión, generalizada en determinados círculos aunque difícil de verificar empíricamente de forma general, de que nuestro ordenamiento conforma hoy «una maraña legislativa y reguladora que amenaza la unidad de mercado dentro del territorio español, sofocando la actividad empresarial y económica bajo unos costes de transacción muy elevados e injustificables» (Círculo de Empresarios, 2011: 9). En los últimos años, el legislador parece haber asumido este diagnóstico y ha emprendido la senda de la llamada

«mejora regulatoria»[29]. Lo ha hecho volcándose en la regulación económica[30] y sus efectos sobre los mercados, dejando para mejor ocasión un planteamiento más general sobre la eficiencia del ordenamiento desde la perspectiva del derecho a una buena Administración, de los principios de legalidad y de seguridad jurídica y de los fines del Derecho.

Tampoco la ciencia del Derecho ha estado muy concernida por los problemas de la eficacia material y la eficiencia de las normas, sino más bien entretenida con las cuestiones de su validez y de la vigencia o la eficacia formal. Pero ya Rudolf VON IHERING destacó hace más de un siglo que el Derecho es acción movida por un fin práctico (asegurar las condiciones de vida de la sociedad) y nos recordó que la etimología del Derecho evoca precisamente la idea de la recta dirección hacia ese fin, es decir, su función directiva (IHERING, 2000: LX y 300-304), a lo que podríamos añadir nosotros que la línea recta es el camino más corto entre dos puntos: el más eficiente. Para IHERING, el fin del Derecho es necesario, pero los medios son disponibles y «el método puede equivocarse en la elección de los medios» (*ibidem*: 308). Y, como ya sabemos, el criterio de adecuación de medios a fin nos lo ofrece la noción de eficiencia.

[29] La Comunicación de la Comisión *Plan de Acción «Simplificar y mejorar el marco regulador»*, de 5 de junio de 2002 [COM (2002) 278 final], asumió esta corriente y la instauró en la Unión Europea. Tuvo continuación en la estrategia de simplificación (2005) y el programa de acción para la reducción de cargas (2007), a los que me referiré en notas posteriores.

[30] Como es notorio, el término «regulación» puede referirse al uso del poder legislativo y reglamentario, pero también tiene una acepción materialmente más reducida pero funcionalmente más amplia y también más indeterminada, por influencia de otras ciencias sociales y otras regiones que lo identifican con la actividad de las «agencias reguladoras». Esta acepción incluye a todas las potestades y técnicas de actividad administrativa ejercitables sobre las empresas y los sectores económicos, haciéndolo equivaler a lo que en países como Alemania, Francia y España se ha llamado más tradicionalmente «Derecho público de la economía» (OGUS, 2004: 2; MUÑOZ MACHADO, en MUÑOZ MACHADO y ESTEVE PARDO, 2009: 16, 111; BETANCOR, 2010: 31-37).

La eficiencia del ordenamiento jurídico puede ser evaluada de forma prospectiva o retrospectiva, para lo que existen diversas técnicas (PONCE SOLÉ, 2009). La evaluación *ex ante* o prospectiva trata de prever el impacto de la norma proyectada, los efectos (positivos o negativos) que se seguirán de su aprobación y los costes que acarreará su ejecución y cumplimiento, mientras que la evaluación *ex post* o retrospectiva valora la eficacia material efectivamente desplegada por una disposición vigente durante un periodo de tiempo, lo que permite mejorarla (corregir las desviaciones observadas respecto de los fines perseguidos y los medios previstos, integrar sus lagunas, aclarar los aspectos cuya interpretación y aplicación ha planteado más dificultades, codificarla o refundirla con otras conexas, etc.) y derogar las normas obsoletas o en desuso[31].

La Ley 2/2011, de 4 de marzo, de Economía Sostenible, dedica un capítulo a la «mejora de la calidad de la regulación», para la que exige en su artículo 5 a las Administraciones públicas tanto «instrumentos de análisis previo de iniciativas normativas» como también «procedimientos de evaluación a posteriori de su actuación normativa», que, según el artículo 6, pasa por la revisión periódica de la normativa vigente y la promoción del análisis económico de la regulación.

En España, la evaluación retrospectiva se ha hecho hasta ahora de forma informal y asistemática, salvo en algún ejemplo sectorial —aunque sin duda relevante— como la reciente revisión de la regulación de los servicios económicos provocada por la Directiva Bolkestein, de la que nos ocuparemos más adelante. Pero sí se ha intentado establecer un cauce general y eficaz para la evaluación prospectiva de las iniciativas legales y reglamentarias, siempre más sencilla y menos comprometida.

[31] La simplificación legislativa es objeto de un amplio programa de la Unión Europea, que incluye tanto la evaluación del impacto de nuevas iniciativas como la revisión del acervo en vigor, y dentro del que se enmarca a su vez el programa de reducción de cargas administrativas, del que daré cuenta unas notas más adelante. Véase la Comunicación de la Comisión al Parlamento Europeo, al Consejo, al Comité Económico y Social Europeo y al Comité de las Regiones, de 25 de octubre de 2005, «Aplicación del programa comunitario sobre la estrategia de Lisboa: Una estrategia para la simplificación del marco regulador» [COM (2005) 535 final].

Así y por lo que toca a la Administración General del Estado[32], el Real Decreto 1083/2009, de 2 de julio, por el que se regula la Memoria del Análisis de Impacto Normativo, destaca en su preámbulo el «papel que los ordenamientos jurídicos juegan como motor del desarrollo sostenible, la competitividad y la creación de empleo» como justificación primaria de su aportación a la mejora de la calidad de las normas. En consecuencia, el Decreto presta «especial atención a la valoración del impacto económico de las propuestas, entendida como un concepto más amplio que la estimación del coste presupuestario y haciendo hincapié en el impacto sobre la competencia, así como a la adecuación del proyecto al orden constitucional de distribución de competencias».

Este protagonismo se plasma en un contenido preceptivo de la memoria del análisis de impacto normativo de las iniciativas legales y reglamentarias, que deberá pronunciarse sobre el «impacto económico y presupuestario, que comprenderá el impacto sobre los sectores, colectivos o agentes afectados por la norma, incluido el efecto sobre la competencia, así como la detección y medición de las cargas administrativas», según reza el

[32] Los ordenamientos autonómicos también han introducido parámetros similares de motivación de las iniciativas normativas de la Administración. La Ley 6/2002, de 10 de diciembre, de Régimen Jurídico del Gobierno y de la Administración de Cantabria, exige que los anteproyectos de ley y proyectos de reglamento se acompañen de un «informe sobre mejora de la regulación», que «tendrá por objeto analizar el impacto normativo, así como justificar qué trámites se han reducido, qué procedimientos se han simplificado o, en aquellos casos en que la norma se dirija a la regulación de cualquier actividad económica, qué cargas administrativas se han reducido». Y la Ley 26/2010, de 3 de agosto, de Régimen Jurídico y Procedimiento de las Administraciones Públicas de Cataluña, exige que los proyectos de reglamentos se acompañen de una «memoria de impacto normativo» que, entre otros documentos, incluya «un informe de impacto económico y social, en que se evalúan los costes y los beneficios que implica el proyecto de disposición reglamentaria para sus destinatarios y para la realidad social y económica». En su Sentencia 45/2005, de 20 de enero, el TSJ de Cataluña nos recuerda que estos parámetros de motivación pueden serlo también de control de la discrecionalidad, pues anuló un reglamento de suministro eléctrico por carecer del estudio económico en términos de coste-beneficio exigido por la ley entonces vigente.

artículo 2.1.d). Un sesgo económico, pues, dentro del cual se otorga especial relieve a la competencia[33] y la reducción de cargas administrativas.

Sin embargo, ¿qué son «cargas administrativas» a los efectos de esta norma? Jurídicamente, «carga» es una situación jurídica pasiva o negativa que es preciso levantar para poder ejercer un derecho (así, por ejemplo, la carga de la prueba de quien ejerce una pretensión procesal en ejercicio del derecho a la tutela judicial efectiva). Pero no parece ser ésta la acepción utilizada en el precepto, sino otra según la cual «carga administrativa» sería cualquier carga, obligación o deber legal que se imponga desde o ante la Administración pública y no para el ejercicio de cualesquiera derechos, sino justamente de la libertad de empresa. En efecto, en sus recomendaciones para una regulación eficiente, la Comisión Nacional de la Competencia (2008: 15) nos propone esta definición: «Las cargas administrativas son aquellos costes que soportan las empresas como consecuencia de una obligación contenida en la norma, tales que, si las normas desaparecieran, las empresas dejarían de incurrir en ellos»[34]. Una noción no sólo reduccionista, sino también preñada de

[33] Las normas que afecten a la competencia, además, deben ser objeto de dictamen preceptivo de la Comisión Nacional de la Competencia, de conformidad con lo prescrito en el artículo 25.a) de la Ley 15/2007, de 3 de julio, de Defensa de la Competencia.

[34] En la Unión Europea, la Comunicación de la Comisión al Consejo, al Parlamento Europeo, al Comité Económico y Social Europeo y al Comité de las Regiones, de 24 de enero de 2007, «Programa de Acción para la Reducción de las Cargas Administrativas en la Unión Europea» [COM (2007) 23 final] plantea «un ambicioso programa de acción destinado a reducir la carga administrativa que impone la reglamentación en vigor en la UE», que deberían reducir las instituciones y los Estados miembros conjuntamente en un 25% hasta 2012 (porcentaje que justifica por los objetivos «políticos» establecidos por algunos Estados miembros y que estima que puede aumentar el PIB de la UE un 1,4%, es decir, 150.000 millones de euros). La Comunicación define las cargas administrativas conforme a estándares internacionales y a partir del concepto más amplio de costes administrativos, como los costes para las empresas de gestionar la información que no recogerían de no obligarles a ello la legislación. También deja clara su finalidad específica, que tiene más que ver con el mercado interior que con la buena administración: puesto que «uno de los objetivos constantes del Programa de Acción será la obtención de resultados concretos que hagan la vida más fácil a las empresas», la Comisión propone limitar el ámbito de aplicación del programa a las obligaciones impuestas a las empresas. Por último, también cabe destacar que la Comisión anuncia que contratará la medición de los costes con consultores externos. Confiemos, pues, en

una evidente carga valorativa negativa, ya que pone el foco en los costes de la regulación y deja en la sombra sus beneficios. Más adelante tendremos ocasión de desarrollar esta suerte de «presunción general de onerosidad» imputada en los últimos tiempos al Derecho administrativo, hasta el punto de haber abierto una causa general contra sus instituciones clásicas.

4.2 La potestad organizativa

Por lo que hace a la eficiencia en el ejercicio de la potestad organizativa, podemos traer aquí a colación brevemente el ejemplo paradigmático de las agencias.

La Ley 28/2006, de 18 de julio, de Agencias Estatales para la Mejora de los Servicios Públicos, pretendió dar un impulso notable a una nueva cultura de gestión, sobre la base del desarrollo de la administración por objetivos y de la evaluación de resultados en un marco de mayor flexibilidad y responsabilidad gestora. Y la Agencia Estatal de Evaluación de las Políticas Públicas y la Calidad de los Servicios fue concebida como «una pieza clave de un nuevo modelo de gestión pública orientada al servicio de los intereses generales, en un entorno de estabilidad presupuestaria, y de búsqueda de la mejora continua de la productividad y competitividad de la economía española», según el preámbulo del Real Decreto 1418/2006, de 1 de diciembre, por el que se aprueba su Estatuto.

Pero tampoco este modelo parece haber cuajado. Son pocas las agencias creadas al amparo de la Ley de 2006[35] y pocos los organismos públicos convertidos en agencias desde

que el interés directo de éstos en el negocio de la reducción de cargas administrativas abierto con este proceso no afectará a la objetividad de sus mediciones, informes y propuestas.

[35] Dejando de lado, claro está, las «agencias independientes» o «agencias reguladoras» que fueron creadas antes y con otro fin (BdE, CNMV, CNE, CMT, CNC, etc.). Como he advertido más atrás, el análisis propuesto en este apartado trata de la economía del Derecho administrativo, no del Derecho administrativo de la economía.

entonces, pese a que nacieron al Derecho español con la vocación de constituir en adelante la forma de personalidad jurídica central o de referencia para la descentralización funcional de los servicios públicos de la competencia de la Administración General del Estado. Y la propia Agencia Estatal de Evaluación se ha visto después despojada de una de sus principales actividades de evaluación, la del impacto regulatorio o normativo, por el Real Decreto antes citado por el que se regula la Memoria de Análisis de Impacto Normativo.

Pero nada de esto puede sorprendernos. Se trata más bien de otro episodio en la larga lista de frustraciones cosechada por el legislador en sus sucesivos intentos por ordenar con criterios racionales la «jungla organizativa» del sector público.

4.3 La ordenación de los recursos financieros, materiales y humanos

La gestión de recursos tampoco ha sido orientada de forma decidida hacia la eficiencia.

La legislación presupuestaria es la que más ha avanzado por este camino, aunque sea con resultados desiguales. La Ley 47/2003, de 26 de noviembre, General Presupuestaria, sienta como principios de funcionamiento de la gestión económico-financiera los «de la eficacia en la consecución de los objetivos fijados y de la eficiencia en la asignación y utilización de recursos públicos» (art. 69.1), a cuyo servicio propone la gestión por objetivos del sector público administrativo estatal (arts. 70-72) y —lo que es más operativo— extiende el alcance de los controles a la valoración de la racionalidad económico-financiera y su adecuación a los principios de buena gestión, ya se trate del control financiero permanente [art. 159.1.f)] o de la auditoría pública [art. 164.1.c)], a los que habría que añadir el control *ex post* ejercido por el Tribunal de Cuentas conforme a su legislación reguladora.

El criterio de la eficiencia en el gasto público es asimismo enunciado en las leyes reguladoras de las principales formas de gestión del gasto, como son la Ley de Contratos del Sector Público (art. 1 de la Ley 30/2007, de 30 de octubre) y la Ley de Subvenciones

[art. 8.c) de la Ley 38/2003, de 17 de noviembre], que confían de forma general su consecución al procedimiento de adjudicación y, en particular, a su sujeción a los principios de publicidad y competencia.

La legislación patrimonial, en segundo lugar, sigue generalmente concebida con una vocación «defensiva» o garantista antes que «creativa» o directiva, como hemos visto más atrás que ocurre en general con nuestro Derecho administrativo. Dentro de este contexto, la Ley 33/2003, de 3 de noviembre, del Patrimonio de las Administraciones Públicas, dio un paso al frente al enunciar el principio de eficiencia y economía en la gestión de los bienes y derechos patrimoniales por las Administraciones públicas en general [art. 8.1.a)] y en particular de los edificios administrativos [art. 156.b)], crear órganos específicos de coordinación al efecto (arts. 10.2 y 158) y mandar al Consejo de Ministros aprobar programas anuales de actuación. Sin embargo, la Ley no arbitra mecanismos de seguimiento y control del cumplimiento de estos principios, ni nos consta que en los últimos años se haya aprobado programa de actuación alguno ni se haya reunido la Comisión de Coordinación Financiera de Actuaciones Inmobiliarias y Patrimoniales.

Otro de los campos en los que la Administración pública encuentra dificultades para introducir el principio de eficiencia es el empleo público. Es lo que Joseph STIGLITZ denomina *employment constraints*: una de las peculiaridades del Estado como organización económica es el carácter compulsivo de sus ingresos, por lo que tiene una particular responsabilidad fiduciaria que se refleja en sus políticas de empleo público, mediante la contención de los salarios y el estatuto de función pública, lo que a su vez limita, respectivamente, los incentivos positivos y negativos que cabe utilizar para orientar a los empleados hacia el servicio eficiente a los intereses generales (STIGLITZ, 1989: 26-28, 32).

Las peculiaridades del empleo público constriñen ciertamente las vías para optimizar su productividad, aunque sabemos que también ofrecen algunas ventajas que no deben despreciarse ni descuidarse, como son las potestades organizativas, directivas y disciplinarias de la Administración, la limitación legal de la actualización salarial y la consecuente limitación de la negociación colectiva. Ciertamente que la heteronomía de la

ley prima en el régimen estatutario de la función pública, como en todo el Derecho público, mientras que en el régimen laboral común tiene mayor peso la autonomía de la voluntad, aunque no tanto como en otras ramas del Derecho privado, por su naturaleza tuitiva. Pero la asociación que comúnmente se hace entre función pública y rigidez, de un lado, y entre flexibilidad laboral y productividad, de otro lado, pasa por alto que ciertas restricciones regulatorias (por ejemplo, la limitación de algunos derechos de los trabajadores para garantizar la continuidad del servicio público o la limitación a sus retribuciones por razones de estabilidad presupuestaria) pueden ofrecer resultados eficientes en determinadas circunstancias.

La Ley 7/2007, de 12 de abril, del Estatuto Básico del Empleado Público, introduce el principio de la eficiencia, pero sólo para la planificación de recursos humanos (art. 69.1). Sigue además siendo muy restrictiva con la movilidad forzosa por necesidades de servicio, por ejemplo (art. 81.2), y no tipifica ninguna falta disciplinaria muy grave directamente conectada con la gestión económica (art. 95). Sí prevé «sistemas de evaluación del desempeño» que deben surtir efectos sobre la carrera horizontal, la formación, la provisión de puestos de trabajo y las retribuciones complementarias de los funcionarios (art. 20) y manda, consecuentemente, que dichas retribuciones atiendan, entre otros factores, al «grado de interés, iniciativa o esfuerzo con que el funcionario desempeña su trabajo y el rendimiento o resultados obtenidos» [art. 24.c)], si bien no precisa la forma de evaluar dicho desempeño, lo que hace posible que los sistemas se desnaturalicen o no articulen las necesarias garantías contra la arbitrariedad y que el complemento de productividad siga degenerando en una mayor retribución al puesto o a los méritos del funcionario, y no a su desempeño[36].

[36] Sobre esta tradicional «desnaturalización» del complemento de productividad y sus razones puede verse Federico CASTILLO BLANCO (2002: 224-226), quien llama la atención de forma más general sobre las inercias históricas del sistema retributivo de la función pública en España, que no son sólo legislativas, sino sobre todo aplicativas, derivan de la ausencia de una definición clara y global de objetivos y han impedido que cumpla su función de motivación y eficiencia en la prestación de los servicios públicos (*ibidem*: 14, 18).

Implantar y aplicar sistemas eficaces y objetivos de evaluación no es fácil, «pero, pese a las resistencias que sin duda se van a encontrar, será necesario avanzar en la implantación de sistemas eficaces de evaluación, pues no cabe conformarse ya con un sistema burocrático que dispensa a todos sus empleados el mismo trato con independencia de su actitud ante el servicio» (SÁNCHEZ MORÓN, 2007: 20).

4.4 El procedimiento administrativo y las técnicas de intervención

El procedimiento administrativo también ha estado sometido en las últimas décadas a varios impulsos de simplificación y aceleración dirigidos a aumentar la eficiencia en el funcionamiento de la Administración pública. El ejemplo más notorio y reciente lo encontramos en la «mejora regulatoria» de los servicios en Europa.

La Directiva 2006/123/CE del Parlamento Europeo y del Consejo, de 12 de diciembre de 2006, relativa a los servicios en el mercado interior, basa su regulación, entre otros considerandos, en la hipótesis de que las barreras opuestas por los Estados miembros a la libre prestación de servicios en el seno de la Unión tienen un origen común «en un exceso de trámites administrativos, en la inseguridad jurídica que rodea a las actividades transfronterizas y en la falta de confianza recíproca entre los Estados miembros». Por lo que hace a lo primero, sostiene que «una de las principales dificultades a que se enfrentan en especial las PYME en el acceso a las actividades de servicios y su ejercicio reside en la *complejidad, la extensión y la inseguridad jurídica de los procedimientos administrativos*» (las cursivas son mías). Es decir, según este diagnóstico[37], el Derecho administrativo de los

[37] La Directiva forma parte de la segunda fase de la estrategia de la Comisión para el mercado interior de servicios. La primera fase tuvo por objeto un amplio proceso de consultas y concluyó con el Informe de la Comisión al Consejo y el Parlamento Europeo *Estado del mercado interior de servicios*, de 30 de julio de 2002 [COM (2002) 441 final], que destacaba estos obstáculos para el establecimiento del prestador de servicios en otro Estado miembro: «Las contribuciones han venido a destacar de manera especial las dificultades relativas al número de autorizaciones requeridas, a la duración y a la burocracia de los procedimientos, al poder discrecional de las

Estados miembros es uno de los principales problemas para implantar el mercado interior en materia de servicios.

Ahora bien, salvo que asumamos que el legislador ha incurrido en un vicio de arbitrariedad masiva, tendremos que convenir en que los trámites de un procedimiento y las resoluciones que le ponen término garantizan derechos de los ciudadanos en algunos casos y en todos sirven al interés general, ya se llamen informes preceptivos, información pública o audiencia a los interesados en el primer caso, o autorizaciones, prohibiciones o sanciones en el segundo. En efecto, «conviene recordar que los requisitos formales de la actuación jurídico-administrativa suelen responder a unos fines garantistas, de intereses particulares o generales, que no pueden desconocerse», y que «los intereses más fuertes, los vinculados al ejercicio de la iniciativa económica, que reclaman celeridad en un entorno competitivo, no deben ser los únicos a tener en cuenta» (TORNOS MAS, 2000: 75).

Luego el criterio de decisión entre la prolongación de los procedimientos administrativos o su abreviación, y entre el mantenimiento, la supresión o la sustitución de los actos administrativos de intervención en el mercado, debe basarse en un juicio de ponderación entre principios jurídicos diversos entre sí, entre los que es preciso hallar un equilibrio razonable: de un lado, el servicio objetivo al interés general (orden y salud públicos, protección de los consumidores y del medio ambiente, etc.) con la debida precaución y, de otro lado, la proporcionalidad y la celeridad.

Este mismo dilema se puede formular con el auxilio de la teoría de decisiones recurriendo al análisis coste-beneficio: los procedimientos administrativos conducentes a

autoridades locales y a la duplicación de condiciones ya satisfechas por el prestador de servicios en su Estado miembro de origen». Sin embargo, en el momento posterior de la prestación del servicio (gestión de recursos, promoción, distribución, venta y postventa) los obstáculos detectados eran muy variados, implicaban a otras ramas del Derecho, como el laboral, el fiscal, el mercantil, el procesal civil o el de consumo, y también a factores no jurídicos, como los culturales o lingüísticos. Mucho más variados, desde luego, de lo que resulta de la lectura de los rotundos considerandos de la Directiva.

una autorización operativa de servicios, por ejemplo, tienen sin duda un coste para la Administración y para los interesados. Para la Administración, por la adscripción y el consumo de medios que debe dedicar a la instrucción y resolución del procedimiento; para los interesados, por la preparación y documentación de la solicitud, las tasas que debe abonar y el tiempo de espera hasta su resolución favorable, incluidos en su caso los gastos de los recursos. Pero también aportan una utilidad o beneficio esperado para las partes: para la Administración, la realización de su misión constitucional de servicio objetivo al interés general; para los interesados directos, la seguridad jurídica del prestador, la prevención de riesgos de daños y perjuicios a sus competidores y usuarios, y la consecuente limitación de la responsabilidad civil del primero; y para los ciudadanos en general, la protección de su medio ambiente, su salud o su seguridad, por ejemplo[38].

La difícil síntesis en esta tensión dialéctica la ofrece el criterio de la eficiencia, que reclama en unos casos la derogación de normas reguladoras, la simplificación de procedimientos y la supresión de actos de intervención previa, sin duda, pero en otros contrariamente la complicación administrativa y el mantenimiento o la instauración de dichos actos y normas. Habrá que establecer y sustanciar sólo los actos y trámites

[38] Todos los documentos españoles y europeos situados bajo la égida de la *better regulation* (simplificación, análisis de impacto normativo, reducción de cargas administrativas) que he podido consultar aluden a estos beneficios, pero no los analizan ni los cuantifican, como sí hacen con los costes (los distintos programas estatales y europeos hacen estimaciones multimillonarias de ellos). Es decir, no realizan un verdadero análisis coste-beneficio, sino un análisis parcial de costes o, todo lo más, un análisis coste-eficacia. Sobre estas limitaciones metodológicas, vid. PONCE SOLÉ (2009: 212-215) y NOGUEIRA LÓPEZ (2011: 37-44). Para la Comisión Nacional de la Competencia (2008: 16), no obstante, la satisfacción sentida por los resultados sana cualquier defecto metodológico: «si bien las metodologías de cálculo de costes y beneficio de estos estudios tienen sus limitaciones y las magnitudes concretas pueden ser cuestionables, estos ejercicios son interesantes en cuanto que reflejan muy sustanciales ganancias derivadas de las mejoras regulatorias introducidas».

necesarios y proporcionados al fin perseguido, sin duda[39], pero también los suficientes e idóneos para tener garantías razonables de alcanzarlo (eficacia).

El propio Derecho europeo medioambiental o de la contratación pública nos aporta ejemplos de esto último. ¿Acaso no son las Directivas europeas quienes han introducido mayor complejidad en nuestro Derecho ambiental en las últimas décadas, con sus altos estándares procedimentales para la evaluación de impacto de proyectos y la evaluación estratégica de planes y programas? ¿No son también ellas las que han introducido un recurso especial suspensivo previo a la perfección de los contratos del sector público? En el primer caso está en juego la protección del medio ambiente, en el segundo es la propia competencia en los mercados la que demanda complicar el procedimiento administrativo.

Allí donde la ponderación de los intereses afectados —generales y particulares— es compleja, el procedimiento administrativo será de suyo complejo por imperativo del principio constitucional de eficacia de la Administración y en garantía de los derechos subjetivos e intereses legítimos afectados de los ciudadanos. Expresado de forma más sencilla y elegante: «No obstante que la Administración debe ser pronta, negocios hay arduos o cuestiones importantes cuya solución requiere maduro examen y una deliberación previa como garantías del acierto» (Manuel COLMEIRO, 1850: 17).

Los considerandos de la propia Directiva Bolkestein expresan en otros términos este mismo equilibrio aquí defendido: «Es importante, por consiguiente, realizar el mercado

[39] El criterio de la necesidad de los trámites que se sustancien en el procedimiento no es ni mucho menos novedoso entre nosotros, sino que aparece enunciado en los artículos 78.1, 81.1, 85.3 y 86.1 de la LRJPAC. Y el de la proporcionalidad de la intervención administrativa ya está enunciado de forma preclara en el artículo 6 del Reglamento de Servicios de las Corporaciones Locales (en adelante, RSCL), de 17 de junio de 1955: «1. El contenido de los actos de intervención será congruente con los motivos y fines que los justifiquen. 2. Si fueren varios los admisibles, se elegirá el menos restrictivo de la libertad individual», de donde ha saltado a la legislación básica de régimen administrativo en los artículos 84.2 de la Ley 7/1985, de 2 de abril, reguladora de Bases del Régimen Local (LBRL), y 53.2 LRJPAC. Así pues, *nihil novum sub sole*.

interior de los servicios con el debido equilibrio entre la apertura de los mercados y la preservación de los servicios públicos, los derechos sociales y los derechos de los consumidores». Ahora bien, la Directiva no encauza en principio este equilibrio por la vía de la ponderación, sino por la vía mucho más sencilla de la exclusión. En efecto, la Directiva opta por excluir de su ámbito de aplicación, de forma preliminar y completa, a los sectores en los que más necesaria es la actividad administrativa de intervención (por ejemplo, servicios financieros, juego o seguridad privada) o de servicio público (seguridad social, sanidad, vivienda y otros servicios sociales, etc.).

Una vez hecho esto, la Directiva opta de forma inequívoca y apriorística por la simplificación administrativa, como atestiguan sus considerandos 43 y ss. Y su expresión normativa en el artículo 4.1 alcanza el clímax de la tautología: «Los Estados miembros verificarán los procedimientos y trámites aplicables al acceso a una actividad de servicios y a su ejercicio. *Cuando los procedimientos y formalidades* estudiados de conformidad con este apartado *no sean lo suficientemente simples, los Estados miembros los simplificarán*» (la cursiva es mía)[40]. La sentencia es casi tan tajante como las que gustaba pronunciar a la Reina de Corazones en el país de las maravillas: «*¡Que les corten la cabeza!*».

No se discute el mandato según el cual la Administración pública debe sustanciar sólo los trámites necesarios para alcanzar el fin de interés general perseguido en cada procedimiento, ni tampoco la oportunidad de revisar la eficiencia del ordenamiento vigente, ni que dicha revisión arroje como resultado la supresión de los trámites, formalidades y controles que sean o hayan devenido innecesarios. En este sentido, la «simplicidad» del procedimiento puede y debe ser afirmada como un factor o componente de la eficiencia, pero no la «simplificación», del mismo modo que las leyes exigen la «celeridad» y no la

[40] No sólo plantea problemas la construcción técnica del precepto, sino que además su construcción sintáctica es deficiente. Verificar es comprobar la verdad de una cosa. Quizá quiso decirse «los Estados miembros *revisarán* los procedimientos y trámites…». Además, los trámites son actos de los procedimientos, por lo que es innecesario mencionarlos a continuación de ellos, pues el todo engloba a la parte. Por lo demás, los «trámites» del primer inciso se transforman en «formalidades» en el segundo, cuando está claro que no son lo mismo.

«aceleración», o la «transparencia y publicidad» y no la «transparentación y publificación» de los procedimientos[41]. El objetivo general de la «simplificación» expresado en la Directiva presupone, lógicamente, una complejidad innecesaria o desproporcionada, es decir, delata un juicio de valor global resultante o sustitutivo del juicio de ponderación que defendemos aquí.

Mejor parece enunciar la simplicidad junto a la celeridad como criterios de economía procedimental, en el bien entendido de que se trata de la simplicidad y celeridad adecuadas para alcanzar el fin perseguido, esto es, que se sustancian los trámites y los plazos sólo necesarios pero también suficientes. Porque el riesgo de enfatizar el criterio de la necesidad y obviar el de la suficiencia o idoneidad es abocar a la ineficacia[42]. La eficiencia, como se ha expuesto anteriormente, es una noción complementaria, no sustitutiva de la eficacia. Y una Administración eficientemente ineficaz es un ser perfectamente inútil, además de inconstitucional, por las razones expuestas más atrás.

Los instrumentos puestos por la Directiva al servicio de la simplificación administrativa son los formularios armonizados, la vía electrónica, la supresión de

[41] Véanse, respectivamente, los artículos 75 LRJPAC y 4 y 36 LAECSP. Esta última transpone, sin embargo, literalmente el principio de la «simplificación administrativa». Por el contrario, la Ley de Economía Sostenible enuncia entre los «principios de buena regulación» el de «simplicidad» en su artículo 4.7.

[42] Este riesgo puede tomar cuerpo, por ejemplo, en la regla de la «ley ómnibus» con la que hemos transpuesto la Directiva en España, según la cual la declaración responsable y la comunicación previa habilitan para ejercer el derecho o iniciar la actividad de que se trate *desde el mismo día de su presentación* (art. 71 bis.3 LRJPAC), de manera que las potestades administrativas de comprobación, control e inspección a que se refiere de inmediato la norma no podrán ejercerse ya sino de forma simultánea o sucesiva a la actividad del privado. De esta forma, no es que se someta a las actividades potencialmente peligrosas para el interés general o los intereses de terceros a una intervención previa menos dilatoria o menos gravosa, sino que se sustituye por una intervención simultánea o sucesiva, lo que puede resentir la seguridad jurídica de los operadores (MUÑOZ MACHADO, 2010: 75-77) y aumentar el coste de practicarla y de ejecutar la resolución: pensemos en la clausura de una actividad ya iniciada, el restablecimiento de la situación física y jurídica alterada, la indemnización a terceros perjudicados o la imposición de sanciones. ¿Dónde está entonces la economía?

requisitos formales y documentales o las ventanillas únicas. Todos ellos son buenas prácticas de modernización administrativa —o, si se prefiere, instrumentos de *buena administración*— que ya venían poniéndose en práctica por los Estados miembros, si bien a distinto ritmo, de manera que la Directiva, más que introducir con ellos una reforma administrativa, la impulsa.

Más importantes son los aspectos no ya formales, sino sustantivos de la nueva regulación: los que definen el ámbito de la libertad económica de los prestadores y prestatarios de servicios. Son fundamentalmente tres: la sustitución de autorizaciones por controles no dilatorios o ejercidos a posteriori, la generalización del silencio administrativo positivo, y la extensión del ámbito territorial y temporal de las autorizaciones de acceso a la actividad a todo el territorio nacional y a una duración ilimitada, respectivamente.

Respecto de ellos, la Directiva no puede ya evitar el juicio de ponderación a que me refería más atrás, ya que el acceso a una actividad de servicios podrá seguir supeditándose a una autorización cuando ésta cumpla los «criterios de no discriminación, necesidad y proporcionalidad», y el sentido positivo del silencio y la extensión de los efectos territoriales y temporales de las autorizaciones podrán seguir limitándose por «razones imperiosas de interés general». La Directiva toma esta última noción de la jurisprudencia del Tribunal de Justicia, pese a que no es sólo un concepto jurídico indeterminado, sino también impreciso en su versión española. La perplejidad aumenta si se compara con otras versiones oficiales de la Directiva y de la jurisprudencia de que trae causa: las que en español se traducen como «razones imperiosas» y en francés *raisons imperieuses*, en italiano pasan a ser *motivi imperativi* y en alemán *zwingende Gründe*, mientras que en inglés son overriding reasons, expresión que parece aludir al carácter prevalente del interés general afectado[43].

[43] El adjetivo «imperiosas» es otra licencia sintáctica, como las apuntadas tres notas más atrás, ya que no encaja en ninguna de las acepciones de este término según el Diccionario de la RAE. Con este adjetivo parece quererse significar en realidad «imponderables» o, mejor aún, «prevalentes», como sugiere la versión inglesa. En materia

Ahora bien, como ya se ha expuesto, los principios de interdicción de la arbitrariedad (art. 9.2 CE), no discriminación (art. 14 CE) o *favor libertatis* (aquí en relación con las libertades de profesión —art. 35 CE— y de empresa —art. 38 CE—) y los criterios de eficiencia y servicio al ciudadano (art. 3.2 LRJPAC), así como los de necesidad y proporcionalidad, que son sus corolarios lógicos (arts. 41.1 y 53.2 LRJPAC, 84.2 LBRL y 6 RSCL), ya regían en nuestro ordenamiento de forma general. Tampoco la comunicación previa ni la declaración responsable nos eran desconocidas. En España y en los países de nuestro entorno europeo llevamos más de una década acometiendo reformas y adoptando medidas para simplificar los procedimientos administrativos, suprimir autorizaciones previas innecesarias y generalizar el silencio administrativo positivo[44].

Así pues, en mi opinión, el mayor impacto dogmático de la reforma administrativa emprendida por la Directiva Bolkestein[45] no está tanto en su innovación material[46] cuanto

ambiental, la *Directiva sobre los Hábitats* también utiliza en su artículo 6.4 la expresión «razones imperiosas de interés público de primer orden» (transpuesta literalmente en el artículo 45.5 de nuestra Ley del Patrimonio Natural y la Biodiversidad) para referirse a las que pueden justificar un plan o proyecto pese a sus repercusiones negativas, y el Tribunal de Justicia afirmó en su Sentencia de 11 de julio de 1996, *Regina*, as. C-44/95, par. 38, que abarcan en todo caso «las razones de interés general superior». De otro lado, ése es también el criterio de proporcionalidad utilizado por el Tribunal Constitucional Federal alemán en su doctrina de los tres escalones, según la cual la libertad de elección de profesión, por ejemplo, sólo puede ser objetivamente limitada en la medida en que lo exija necesariamente la protección de un bien de interés general especialmente importante y, por ello, prevalente: «Die Freiheit der Berufswahl darf dagegen nur eingeschränkt werden, soweit der Schutz *besonders wichtiger ("überragender") Gemeinschaftsgüter* es zwingend erfordert» (la cursiva es mía; Sentencia de 11 de junio de 1958, par. 76, *BVerf*GE 7, 377).

[44] Puede encontrarse amplia razón y una ponderada valoración de ellos en TORNOS MAS (2000).

[45] Que ha dado pie a la doctrina a calificarla como fundadora de «un nuevo Derecho administrativo» (Tomás-Ramón FERNÁNDEZ, 2007), de «cataclismo en el núcleo central del Derecho administrativo» (Enrique LINDE, en VV.AA., 2008a: 87), de «radical reconversión del sistema administrativo de control de las actividades de servicios» con una repercusión «enorme y de porte constitucional» (Luciano PAREJO, 2009: 34-35) o causante de «un enorme impacto en los Estados miembros (…) en razón de los profundos cambios que va a determinar en la cultura jurídico-económica y en los hábitos de las Administraciones de los Estados miembros» (Tomás de la

en su distorsión axiológica y sistemática. Porque pone bajo sospecha de restricción ilícita cualquier regulación e intervención sobre el acceso a la actividad y su ejercicio (PAREJO ALFONSO, 2009: 34) y, sobre esta base, sienta un régimen específico para dichas actividades administrativas en materia de servicios. La distorsión axiológica no es privativa de la Directiva, sino más bien común en la literatura de la *better regulation*, y radica en confundir fines con medios, como ocurre cuando se eleva a la categoría de objetivos axiomáticos la simplificación y la reducción de cargas administrativas. A su vez, la distorsión sistemática consiste en generar un Derecho administrativo general propio sólo para los servicios de interés económico. ¿Qué hay entonces, por ejemplo, de las autorizaciones de obras o de las operativas para cualquier otra actividad económica, de las concesiones demaniales o de servicio público o del silencio en cualesquiera otros procedimientos iniciados a instancia de parte? Su trascendencia para la economía y el mercado interior no tiene por qué ser menor, como tampoco lo es su relevancia política para la efectividad del derecho a una buena administración, consagrado por el artículo 41 de la Carta de Derechos Fundamentales de la Unión Europea.

QUADRA-SALCEDO, 2009a: 46). Por el contrario, para Santiago MUÑOZ MACHADO (2010: 71), «los cambios que introduce la Directiva 2006/123 son una manifestación más de la nueva regulación económica, y no necesariamente la más relevante».

[46] Cuestión distinta es que la transposición realizada en España haya adoptado un «enfoque expansivo» tanto de su ámbito objetivo de aplicación como de su alcance material, yendo mucho más allá que la propia Directiva, como ha advertido tanto la doctrina científica (NOGUEIRA LÓPEZ, 2011: 8 y ss.) como el Consejo de Estado en su Dictamen 779/2009, de 21 de mayo, sobre la «ley ómnibus», quien critica además «que el anteproyecto atiende de manera desigual a los distintos objetivos o pilares de la norma comunitaria. Ello se debe a que el centro de gravedad de la regulación proyectada lo constituyen la eliminación de trabas o cargas administrativas y la supresión de numerosos regímenes de autorización (…). Sin embargo, estas medidas no siempre van acompañadas del correspondiente aumento de los mecanismos de control a posteriori de la actividad, ni de un correlativo refuerzo de la protección de los derechos de los consumidores y usuarios o del fomento de la calidad de los servicios».

Conviene, además, recordar que mientras la Directiva Bolkestein se ha ocupado de reducir y depurar la actividad administrativa de intervención sobre los servicios privados, la jurisprudencia del Tribunal de Luxemburgo sobre los servicios de interés general y las ayudas de Estado lleva décadas empleada en reducir y depurar el campo de los servicios públicos y el de las subvenciones públicas, respectivamente[47]. En suma, el Derecho unitario europeo está produciendo importantes mutaciones en las tres formas más canónicas o clásicas de actividad de la Administración, según la dogmática española del Derecho administrativo: la de policía o intervención, la de prestación y la de fomento. Mutaciones que afectan de manera parcial —en lo que toca al mercado interior, esto es, la actividad empresarial o económica— pero sustancial a sus instituciones más representativas: la autorización, el servicio público y la subvención, respectivamente.

Los expuestos son buenos ejemplos de la tensión hacia la huida de nuestro sistema de Derecho administrativo que produce el Derecho unitario europeo. Este Derecho no configura el estatuto subjetivo de un Estado, sino el régimen objetivo de un mercado, pero desde él produce una mutación en el Derecho público (tanto constitucional como administrativo) de los Estados miembros que, por las razones expuestas y más allá de su impacto sustantivo, tiene en todo caso un impacto sobre su sistema ordinamental y dogmático.

Y la perspectiva adoptada (la apertura del mercado interior), unida a una determinada concepción sobre la misma (según la cual el buen funcionamiento del mercado demanda menos intervención administrativa), arriesgan con desviar los resultados alcanzados respecto de los fines marcados en los Tratados, que ya no se ciñen a la instauración del mercado interior, sino que se han enriquecido en las últimas décadas y promueven también la cohesión social y territorial y el derecho a una buena administración, por ejemplo. Pero estos principios y derechos no han merecido todavía el despliegue de una política y una doctrina general de las instituciones europeas, al menos al nivel de la

[47] Sobre estos otros casos, me permito aquí remitir *in toto* a Marcos VAQUER (2005 y 2010b).

desplegada al servicio del mercado interior[48], lo que puede sesgar la ponderación que se haga entre ellos.

Al legislador, la doctrina científica y los tribunales de los Estados afectados les toca recomponer su sistema jurídico propio una vez mutado de forma asistemática. Y, al hacerlo, les cabe una alternativa: o minimizar el impacto de las nuevas orientaciones ciñéndolas al ámbito objetivo del Derecho europeo de que se trate en cada caso, a costa de mantener en el Derecho interno la distorsión sistemática expuesta, o extenderlas más allá de dicho ámbito hasta generalizarlas como bases del nuevo régimen administrativo en su país[49].

4.5 Otras aplicaciones de la eficiencia

Como puede observarse, todas las disposiciones citadas en este apartado han sido promulgadas ya entrado este siglo. Podemos recapitular, pues, afirmando que durante la última década el legislador ha incorporado ampliamente los criterios de la eficiencia y la economía a nuestro ordenamiento jurídico-administrativo general[50]. Sin embargo, lo ha

[48] Por eso ha podido afirmarse que este Derecho derivado excluye «de plano ciertas opciones normativas que cabrían tanto en los Tratados europeos como en la Constitución española» y «somete a un enfoque reduccionista las previsiones del Derecho originario comunitario contenidas en los Tratados» (NOGUEIRA, 2011: 28, 29).

[49] Siguiendo con el ejemplo Bolkestein, en España el legislador ha tratado de reconstruir la coherencia sistemática de nuestro Derecho administrativo dando alcance estatutario al principio de proporcionalidad y a los nuevos criterios sobre actos de intervención y silencio administrativo en la Ley 25/2009, de 22 de diciembre («ley ómnibus»), que los generaliza mediante su incorporación a la LRJPAC.

[50] La parte especial los utilizaba ya anteriomente, sobre todo en el Derecho administrativo económico. Baste citar, por ejemplo, la Ley 54/1997, de 27 de noviembre, del Sector Eléctrico, cuyo artículo 1.2 sujeta la regulación de las actividades destinadas al suministro de energía eléctrica que tiene por objeto a la finalidad de su «racionalización, eficiencia y optimización», su artículo 3.3 atribuye competencias a las CC.AA. en materia de eficiencia energética, establece la eficiencia como criterio de la planificación eléctrica general en su artículo 4, como objeto de

hecho de forma asistemática y desigual, enunciando principios o reglas aisladas y carentes de instrumentos de seguimiento y control efectivos, por lo que han caído en buena parte en el olvido o el acatamiento meramente formal.

En todo caso y sea cual sea la valoración que hagamos de su desarrollo normativo, no cabe duda de que no sólo la eficacia, sino también la eficiencia es hoy norma de nuestro Derecho administrativo, que rige como criterio general directivo y evaluador de su actuación. Lo hemos constatado en los campos en los que se hacen más evidentes (las potestades normativa y de organización, la planificación y gestión de los medios de la Administración, el procedimiento administrativo), pero puede y debe generalizarse su uso.

Así, por ejemplo, la eficiencia puede servir también de criterio directivo para la ordenación sustantiva de los sectores sociales o económicos, en la búsqueda del equilibrio entre dos o más derechos subjetivos en conflicto (de forma que la norma o el acto de que se trate maximice la tutela del derecho que tiene por objeto, sin violar el derecho con el que entra en conflicto[51]) o entre un principio y un derecho subjetivo[52].

planificación especial en el artículo 47 y como criterio retributivo de las actividades en su artículo 14, exige información sobre eficiencia energética en las cuentas anuales de las empresas en su artículo 20.5, etc.

[51] Frente a una norma legal que plantea un conflicto entre dos derechos constitucionales, el Tribunal Constitucional tiene establecido que la aplicación del principio de proporcionalidad «no debe limitarse a la ponderación genérica acerca de si el tipo de diferenciación introducida resulta adecuada o razonable para alcanzar el fin perseguido, si resulta o no arbitraria; sino que, al tratarse de una regla que, al tiempo que protege a un determinado grupo afecta a otros derechos sustantivos dignos de tutela, la proporcionalidad debe ponderarse con respecto al grado de constricción de esos derechos y teniendo como límite infranqueable el respeto de su contenido constitucional» (STC 158/1993, de 6 de mayo, FJ 2.º). En términos económicos, este singular juicio de ponderación puede reconducirse al modelo de eficiencia de Pareto, ya que se trata de maximizar un derecho sin producir merma en el contenido constitucional de otro.

[52] Así, por ejemplo, el principio de desarrollo territorial y urbano sostenible (y el correlativo derecho a disfrutar de un medio ambiente adecuado en tanto que inspirado por dicho principio) exige «un medio urbano en el que la ocupación del suelo sea eficiente» y delimita el contenido estatutario de la propiedad del suelo, según los artículos

O en la evaluación ambiental, para establecer el equilibrio óptimo entre la transformación del medio ambiente que requiere el interés general perseguido por el plan, programa o proyecto, de un lado, y, de otro, la protección del medio y la utilización racional de los recursos naturales (de modo que se evalúen las distintas opciones de consecución de dicho fin con vistas a preferir la que produzca un menor impacto y a integrar la prevención, atenuación o corrección de éste en el propio instrumento evaluado)[53].

También puede tener aplicación en las relaciones entre poderes públicos, para sentar el equilibrio entre activismo y deferencia en el control judicial de la actividad de la Administración[54]. O en las relaciones interadministrativas, para establecer el óptimo entre descentralización y coordinación en el ejercicio de una competencia administrativa (tanta descentralización como aconsejen las ganancias en eficiencia asociadas a la competencia entre Administraciones y a la proximidad al ciudadano, pero tanta coordinación como requiera la eficacia del sistema).

2.2.c) y 7.1 del Texto Refundido de la Ley de Suelo (Real Decreto Legislativo 2/2008, de 20 de junio). Aquí el óptimo puede asimismo describirse en términos paretianos: el propietario de suelo puede incrementar su utilidad en el disfrute de su derecho mientras no reduzca la de los demás en su derecho a un medio ambiente adecuado, que se objetiva mediante la determinación del uso e intensidades máximas (y mínimas, en su caso) de la ocupación del suelo («eficiente») por la ordenación urbanística.

[53] En este caso, a diferencia de los expuestos en las dos últimas notas, estamos más cerca de la noción de eficiencia basada en el modelo de compensación de utilidades de Kaldor-Hicks.

[54] Como ha observado Gaspar ARIÑO (2010: 29), uno de los fundamentos de la doctrina anglosajona de la «deferencia» del juez frente a la discrecionalidad del regulador económico es precisamente el de la eficiencia, que parece aquí modelada, como en el caso anterior, según el criterio de Kaldor-Hicks (el riesgo de tolerar una solución injusta a causa de la de ferencia puede ser compensado —incluso en términos de responsabilidad patrimonial, si fuera el caso— por las ganancias que se presumen de la eficacia de la administración económica).

Todos estos problemas nos revelan, en suma, que los modelos analíticos de eficiencia pueden servir como criterios jurídicos de ponderación[55]. La ciencia económica, con el concurso de la matemática y otras, ha dado un amplio desarrollo a estos modelos: análisis costebeneficio, programación lineal, ley de la utilidad marginal decreciente, curvas de indiferencia, óptimos de Pareto y de Kaldor-Hicks, etc. Por su formalidad[56], constituyen un acervo útil no sólo para la gestión de los medios y recursos de la Administración (eficiencia productiva), sino también para la motivación y el control de los juicios de ponderación que la Administración u otros poderes públicos deben realizar para resolver entre estos principios o derechos en conflicto[57] (eficiencia asignativa).

[55] La ponderación ha sido definida como «la forma de decidir de un órgano público prestando atención simultánea a dos o más principios, bienes, intereses, derechos o valores contrapuestos» (RODRÍGUEZ DE SANTIAGO, 2000: 9) o «el discurso jurídico a través del cual se resuelven las colisiones entre principios» estableciendo «una relación de precedencia condicionada » (ARROYO, en ORTEGA y SIERRA, 2009: 24).

[56] La ciencia económica contemporánea ha extendido el campo de su estudio al de todas las demás ciencias sociales (además de la economía política y el análisis económico del Derecho, existen teorías económicas de la educación, del lenguaje, del matrimonio e incluso del suicidio), pero, paradójicamente, también ha estrechado su interés al análisis de cuestiones técnicas muy formales y a su tratamiento matemático. En realidad, esta formalidad metodológica ha podido favorecer la extensión temática de que hablamos: «Es esta generalidad de sus sistemas analíticos, según creo, la que ha facilitado el desplazamientos de los economistas hacia las demás ciencias sociales, donde presumiblemente repetirán los éxitos (y fracasos) que han tenido en la economía» (COASE, 1978: 207). Esta formalidad que favorece su objetivación abstracta puede haberse debido a que la economía dispone de «la vara de medir del dinero» (*ibidem*: 209), una unidad de medida de amplio espectro (si no universal: los administrativistas estamos habituados a ver tasar en dinero hasta los afectos, las expectativas, el dolor o la vida en materia de expropiación forzosa y responsabilidad patrimonial) que le permite convertir y comparar las más diversas variables. Según Alfred MARSHALL (2005: 19-20), «esta posibilidad de medir de una manera exacta en dinero los móviles de la vida de los negocios ha permitido que la economía haya superado a todas las demás ramas de las ciencias sociales».

[57] La clásica objeción de la inconmensurabilidad de los valores y bienes en juego puede superarse, como propone DOMÉNECH (en ORTEGA y SIERRA, 2009: 174-176) siguiendo a DÍEZ y MOULINES, si se responde desde una perspectiva no ontológica, sino epistemológica o meramente instrumental, es decir, afirmando que lo

Suponiendo que la eficiencia de la Administración integra y modaliza su eficacia y que la eficacia de la Administración está al servicio de la «equidad» o justicia (porque los fines por ella perseguidos constituyen el canon de justicia igualitaria predeterminado por el ordenamiento jurídico en el Estado social y democrático de Derecho), como se ha sostenido en un apartado anterior, alcanzaremos la conclusión de que la eficiencia es el criterio general que rige la economía del Derecho administrativo.

5. LA CAUSA GENERAL ABIERTA CONTRA ALGUNAS INSTITUCIONES PROPIAS DEL DERECHO ADMINISTRATIVO. SUS FUNDAMENTOS CIENTÍFICOS E IDEOLÓGICOS

El estudio llevado a cabo en el apartado anterior de las diversas iniciativas europeas y españolas tendentes a la mejora regulatoria y la reducción de cargas, tanto en general como en materia de servicios, induce a una reflexión general: hoy parece haberse devaluado el valor económico de las instituciones canónicas de nuestro Derecho administrativo, muchas de las cuales son despachadas de forma apodíctica como «barreras», «cargas», «distorsiones» o «costes de transacción» para el mercado, que conviene eliminar o, cuando menos, reducir a su mínima expresión[58]. Esta «acusación de

cuantitativo no es la realidad misma, sino una forma de describirla o aprehenderla. Esta instrumentalidad permite proponerlo como método posible, pero no necesario ni exclusivo, de motivación y control de las decisiones.

[58] Véase, por ejemplo, la elocuente formulación que de la proporcionalidad como principio de buena regulación hace el artículo 4.3 de la Ley de Economía Sostenible respecto de las iniciativas normativas de las Administraciones públicas: «En virtud del principio de proporcionalidad, la iniciativa normativa que se proponga deberá ser el instrumento más adecuado para garantizar la consecución del objetivo que se persigue, tras constatar que no existen *otras medidas menos restrictivas y menos distorsionadoras* que permitan obtener el mismo resultado» (la cursiva es mía). El legislador parece presuponer que todas las iniciativas normativas de las AA.PP. son, en mayor o menor medida, restrictivas (¿de derechos?) y distorsionadoras (¿del mercado?).

contra-productividad» (Jacques CAILLOSSE, en RUFFERT, 2007: 180-182) dio lugar primero al conocido fenómeno de la «huida» del Derecho administrativo y después ha provocado también una cierta tendencia a su «jibarización», que lo constriñe compulsivamente a reducir los tiempos, las formas y los efectos de su intervención sobre el orden socioeconómico. Si en la primera fase aludida los paradigmas fueron la liberalización y la privatización, ahora se propone la mejora regulatoria (*better regulation*)[59] o, directamente, la desregulación (*deregulation*)[60].

Esta percepción sesgada del Derecho administrativo como problema o amenaza que parece proyectar la economía en nuestros días lo ha sumido en una «crisis de capacidad de control social» (PAREJO ALFONSO, 2010: 970). Contrasta, por cierto, con el prestigio económico de que goza el Derecho administrativo que rige sin complejos la actividad sectorial de *imperium* de los reguladores económicos, muy destacadamente de las autoridades financiera y monetaria y de la competencia[61]. Por estas materias siguen campando pacíficamente las autorizaciones previas, los plazos contados por meses y los

[59] En notas anteriores ya he dado razón de la Comunicación de la Comisión *Plan de Acción «Simplificar y mejorar el marco regulador»*, de 5 de junio de 2002 [COM (2002) 278 final], que asumió esta corriente y tuvo continuación en la estrategia de simplificación (2005) y el programa de acción para la reducción de cargas (2007). En las tres comunicaciones, la Comisión insiste en que no son iniciativas de desregulación. También se ha visto que, en España, la mejora regulatoria concebida como parte de la mejora del entorno económico constituye el objeto del capítulo I del Título I de la Ley de Economía Sostenible.

[60] Es «en el contexto internacional de liberalización y desregulación de mercados en el que surgen el movimiento de evaluación de las políticas públicas y las propuestas de mejora regulatoria (*better regulation*)». En este contexto pueden distinguirse dos fases: «las reformas de liberalización y privatización de primera generación» y «las reformas subsiguientes, aquellas denominadas de segunda generación», que «es lo que se ha venido denominando procesos de mejora o reforma regulatoria, en inglés *better regulation* o, de manera más amplia, *regulatory reform*» (Comisión Nacional de la Competencia, 2008: 6, 15).

[61] La crisis económica ha provocado incluso un nuevo auge de la actividad reguladora e intervencionista de la autoridad financiera y un reforzamiento del Derecho público económico frente a la autorregulación fomentada en el pasado reciente (EMBID IRUJO, 2009: 80).

silencios negativos. Y las potestades administrativas ampliamente discrecionales de regulación, intervención o sanción, lejos de ser cuestionadas desde la perspectiva de la seguridad jurídica y del tráfico mercantil, son generalmente percibidas como regalía imponderable y garantía del correcto funcionamiento de la economía[62]. Alejandro NIETO (1986: 148) ya apuntó hace tiempo que este singular canon de legalidad aplicado a la regulación económica «puede ser conveniente, y aun necesario; pero que deja muy mal parado al sistema».

El descrédito de las técnicas clásicas del Derecho administrativo —del que sólo escapan, como vemos, algunas instituciones propias del monetarismo (autoridad financiera) y del liberalismo (autoridad de la competencia)— es tributario de la doctrina neoliberal del Estado mínimo, que alcanzó un gran predicamento en la segunda mitad del siglo pasado de la mano de la conocida como Escuela de Chicago. Entre sus más notorios exponentes se encuentran Milton y Rose FRIEDMAN, que concluían el capítulo de su *Libertad de elegir* expresivamente titulado «La tiranía de los controles» con una afirmación terminante: «La libertad no puede ser absoluta. Vivimos en una sociedad interdependiente. Algunas limitaciones a nuestra libertad son necesarias para evitar otras restricciones todavía peores. Sin embargo, hemos ido mucho más lejos de ese punto. *Hoy la necesidad urgente estriba en eliminar barreras*, no en aumentarlas» (FRIEDMAN, 1980: 104; la cursiva es mía).

De forma científicamente más depurada, Friedrich HAYEK distinguió varias acepciones del concepto «Derecho administrativo». Las dos primeras, referidas

[62] En la jurisprudencia puede verse la STS de 14 de marzo de 2006 (RJ 2006\1637), sobre la sustitución del Consejo de Administración de Banesto por el Banco de España. En la doctrina, Gaspar ARIÑO (2010: 15) cita a Kenneth DAVIS: «Las reglas son esenciales, pero el poder discrecional es también esencial en la regulación económica». A lo que añade después el autor español: «Y es que los actos de regulación económica, que afectan a un sector industrial o financiero, (…) son difíciles de enjuiciar con los moldes del Derecho administrativo clásico. (…) De esa discrecionalidad no hay que abominar (…). Su juicio no debe ser sustituido por la apreciación (discrecional también) del Juez», sino más bien respetado conforme al «principio de deferencia» del Derecho británico (ARIÑO, 2010: 19, 22, 23, 29).

respectivamente a la regulación de la actividad de las agencias del gobierno y de sus relaciones con los ciudadanos, no le ofrecían mayores problemas de legitimación. La cuestión surge en relación con su tercera acepción, la referida a «los poderes administrativos sobre las personas y la propiedad», que no consisten en reglas universales de conducta, sino en medidas que persiguen resultados particulares, para lo que necesariamente implican discriminación y discrecionalidad. Y este sentido del Derecho administrativo implica, en opinión del autor, «un conflicto con el concepto de libertad bajo la ley» porque entiende, siguiendo a Carl SCHMITT, que no puede haber igualdad ante una medida como hay igualdad ante la ley (F. A. HAYEK, 1973-1982: 137-139).

Paralelamente a esta construcción filosófica se alzaba un edificio de teoría económica que ha sido utilizado durante décadas como muro de contención contra la actividad económica del Estado. Entre sus piedras basales, el teorema de COASE, la teoría de la regulación de STIGLER y la de la elección pública (*public choice*) de BUCHANAN.

En 1960, COASE formulaba su famoso teorema[63], según el cual, en ausencia de costes de transacción, el mercado asigna los recursos y resuelve las externalidades de forma eficiente sin necesidad de regulación. Para COASE, la producción puede organizarse de tres formas: a través de las transacciones del mercado, por la empresa individual o mediante la regulación del Estado. Su opinión parece primero equidistante, cuando afirma que «una regulación gubernamental directa no permitirá obtener mejores resultados que si se permite que los problemas los resuelva el mercado o la empresa. Pero tampoco existe una razón para pensar que, en ocasiones, dichas regulaciones administrativas gubernamentales no puedan producir una mejora de la eficiencia económica». Sin embargo, esta apariencia de

[63] La influencia desplegada por esta contribución de COASE ha llevado a George J. STIGLER (1992: 456) a ironizar que «*in the field of law and/or economics, B.C. means Before Coase*». Y sigue: «B.C., los economistas prestaban poca atención a la mayoría de ramas del Derecho. "El problema del coste social" se convirtió en el artículo más citado en la literatura en la materia, quizás en toda la literatura económica. El Derecho, como otras instituciones sociales, pasó a ser visto por los economistas como un instrumento para la organización de la vida social».

neutralidad se rompe poco después en el texto: «En mi opinión, los economistas y los que definen las políticas, en general, han tendido a sobreestimar las ventajas que se derivan de la regulación gubernamental. Pero esta creencia, aun cuando estuviera justificada, no hace más que sugerir que la regulación gubernamental debe ser recortada» (COASE, 1994: 137-138)[64].

George STIGLER teorizaba una década después los riesgos de captura del regulador por los grupos de presión. Para ello situó esta afirmación como tesis central de su teoría: «por regla general, la regulación es conseguida por la industria y es diseñada y ejecutada en su beneficio», lo que es tanto como afirmar que el servicio objetivo al interés general del regulador es una excepción, quizá incluso un mito, mientras que la regla es la dejación de funciones públicas, cuando no la prevaricación o el cohecho[65]; y propuso como hipótesis general de trabajo que cualquier industria o profesión que tenga suficiente poder político para utilizar al Estado perseguirá el control de entrada (STIGLER, 1971: 3, 5).

[64] En todo caso, COASE está lejos de la carga ideológica liberal que muchos de sus divulgadores han atribuido a su teorema (STIGLITZ, 1989: 30; NAPOLITANO y ABRESCIA, 2009: 25). Él mismo trató de aclarar y matizar su tesis años después, en el sentido de que un mundo sin costes de transacción está alejado del mundo real y es una mera hipótesis de trabajo, lo que hace muy necesaria la regulación al servicio de la eficiencia económica (COASE, 1994: 15-20).

[65] La prevención general de STIGLER contra la regulación combina agudas reflexiones sustentadas en análisis estadísticos (como el que hace de las variables que influyen en la sujeción de las profesiones a autorización administrativa) con algún prejuicio chocante y por completo acientífico, como ilustra este elocuente pasaje: «Conjeturo que buena parte de la compensación a los líderes legislativos toma la forma de pagos extrapolíticos. ¿Por qué tantos políticos son abogados? Porque todo el mundo emplea a abogados, de manera que la firma del congresista es una vía adecuada de compensación, mientras que un médico tendría que recibir sobornos en lugar de patrocinio» (STIGLER, 1971: 13). El autor parece desconocer las múltiples vías, tanto directas como indirectas, por las que puede retribuirse a cualquier profesional o pequeño empresario, así como que la principal función del Parlamento es legislar, que consiste en crear Derecho, por lo que alguna lógica tiene que emplee a más juristas que médicos.

En fin, la teoría de la *public choice*, cuyo máximo exponente ha sido BUCHANAN, propone que la economía deje de preocuparse tanto acerca de la asignación de recursos y de la eficiencia para concentrarse en los orígenes, las propiedades y las instituciones del intercambio, esto es, en lo que algunos precursores decimonónicos y HAYEK denominaron con el término griego «catalaxis», la ciencia de los intercambios. BUCHANAN defiende abrir esta ciencia a los intercambios complejos para así poder «contemplar la política, y el proceso político, en términos del paradigma del intercambio».

Y esta proyección de la «catalaxia» sobre la política no sólo tiene un ánimo descriptivo, sino también importantes implicaciones normativas: «En la medida en que el intercambio voluntario entre personas se valora positivamente mientras que la coerción se valora en términos negativos, surge la implicación de que *es deseable la sustitución de lo último por lo primero*, suponiendo, claro está, que dicha sustitución sea tecnológicamente factible y no sea prohibitiva en el coste de recursos. Esta implicación nos ofrece el apoyo normativo a *la proclividad del economista de la elección pública a favorecer los acuerdos de tipo mercado* donde sean factibles, y a favorecer la descentralización de la autoridad política en las situaciones apropiadas» (BUCHANAN, 1986: 19-22; las cursivas son mías)[66]. Dicho más brevemente: el mercado (intercambio voluntario) es preferible al Estado (intercambio basado en el poder o la coerción).

Pero si HAYEK recibe el Premio Nobel en 1974, FRIEDMAN en 1976, STIGLER en 1982, BUCHANAN en 1986 y COASE en 1991, STIGLITZ —que encarna una cierta reacción keynesiana finisecular frente al liberalismo precedente— lo recibiría en 2001.

[66] Por lo demás, la valoración que hace BUCHANAN de los representantes políticos no es mucho mejor que la de STIGLER reseñada en la nota anterior. En su opinión, como *homo economicus* que es, el representante persigue la reelección y, por tanto, «busca cualquier excusa para crear déficits presupuestarios» (BUCHANAN, 1986: 25). Asimismo, para los defensores de la *public choice*, el burócrata persigue naturalmente maximizar el gasto en los programas de su competencia, porque así aumenta su poder económico.

Joseph E. STIGLITZ rechaza la preeminencia apriorística sea de la empresa privada, sea del Estado como organización económica, porque ambos tienen ventajas e inconvenientes y ambos presentan ejemplos de ineficiencia. En su opinión, de un lado, es una falacia que lo público sea siempre y en todo lugar ineficiente y, de otro lado, el funcionamiento del mercado con información imperfecta y mercados de riesgo incompletos conduce con frecuencia a resultados que cuestionan su eficiencia.

Según su *Fundamental Non-decentrability Theorem*, en general, el mercado no logra hacer asignaciones eficientes sin la intervención estatal. De hecho, en su opinión, sólo bajo circunstancias excepcionales los mercados son eficientes, lo que abre el campo del rol potencial del gobierno. Luego el Estado no sólo tiene un papel redistribuidor al servicio de la equidad, sino que también cumple un rol al servicio de la propia eficiencia, que por otro lado ya no cabe separar netamente de aquélla, porque una distribución muy desigual de los ingresos o de la propiedad plantea, por ejemplo, graves problemas de incentivos (Joseph E. STIGLITZ, 1989: 32-33, 36-40).

El mismo COASE (1994: 15) quiso apostillar su famoso teorema, años después y a la vista de las interpretaciones a que había dado lugar, afirmando que «para que exista algo similar a la competencia perfecta se necesita un intrincado sistema de normas y regulaciones», como ocurre con las bolsas y mercados de valores, cuya regulación los economistas interpretan como «un intento de ejercer un poder monopólico que trata de restringir la competencia. Ignoran o no alcanzan a comprender una explicación alternativa: que existen para reducir los costes de transacción y para permitir el crecimiento del volumen comercializado».

En todo caso y más allá de la posición ideológico-científica que se adopte en este apasionante debate, lo cierto es, como ya apuntaba más atrás, que las instituciones jurídicas en general, y las jurídico-administrativas en particular, cumplen una función esencial para el correcto funcionamiento de los sistemas económicos. Sin embargo, las lecturas hasta aquí manejadas sobre economía política y teoría de la regulación económica utilizan instituciones jurídicas (tales como derechos subjetivos, propiedad, obligaciones, responsabilidad por daños, jurisprudencia, poder público, potestades administrativas,

normas, competencias, etc.) con tanta fluidez como superficialidad y apenas citan referencias de la literatura científica jurídica[67]. Y, sin embargo, el Derecho importa.

Sin duda, este último aserto gana en autoridad y prestancia puesto en boca de otro Premio Nobel de Economía: «Las instituciones son las reglas del juego en una sociedad o, expresado más formalmente, son las constricciones concebidas por la humanidad que dan forma a la interacción humana. (…) Que las instituciones afectan al funcionamiento de las economías apenas es controvertido. Que el funcionamiento diferencial de las economías en el tiempo es influenciado fundamentalmente por la forma en que evolucionan las instituciones tampoco es controvertido. Y, sin embargo, ni la teoría económica actual ni la historia cliométrica[68] muestran muchos signos de apreciar el papel de las instituciones en el funcionamiento económico porque todavía no hay un marco analítico para integrar el análisis institucional en la economía y la historia económica», marco que el autor se propone construir con el propósito declarado de tender puentes entre la investigación de las ciencias sociales (Douglass C. NORTH, 1990: 3, 5).

6. RECAPITULACIÓN FINAL

El mayor riesgo de la apertura de la ciencia del Derecho a las ciencias sociales en una cultura jurídica globalizada es el de caer de forma acrítica en un sincretismo que

[67] En opinión de José Eugenio SORIANO (2010: 56), «los economistas tienen, por así decir, una "superioridad epistemológica" basada en la pertinaz creencia de que lo suyo es "ciencia" y lo nuestro "arte", lo que les lleva a interesarse muy poco por lo que los jurisperitos suelen decir». Entre los citados en el cuerpo del texto, el caso de HAYEK (que maneja con soltura a BECCARÍA, SCHMITT, KELSEN o HART, entre otros) es singular pues era Doctor en Derecho.

[68] La cliométrica designa una corriente renovadora de la historia económica que propone la aplicación sistemática de la teoría económica, la econometría y otros métodos formales o matemáticos para estudiar la historia, en particular la económica (voz «new economic history», en *http://en.wikipedia.org*).

acumule en aluvión tal cantidad de sedimentos de los diferentes afluentes abiertos (la economía, la sociología, la ciencia política; la doctrina francesa, alemana, italiana, norteamericana) que enturbie las aguas, complique el cauce con meandros sin fin o incluso lo ciegue por saturación. Es necesario abrirse a las ciencias y doctrinas vecinas, sin duda, pero también es preciso hacer una importante labor de depuración metodológica de los aportes recibidos para poder integrarlos sin violencia en el sistema.

Los conceptos empleados a lo largo de este artículo son un buen ejemplo: la noción anglosajona de *regulation* no basta con traducirla literalmente, hay que transponerla adecuadamente a nuestro régimen administrativo. Y los conceptos de eficiencia, eficacia, proporcionalidad, ponderación, necesidad, simplicidad y celeridad conforman un grupo léxico ideológico dentro del lenguaje jurídico de nuestro Derecho administrativo, cuyas relaciones no es fácil desentrañar pero sí necesario.

El criterio (originalmente económico, hoy también jurídico) de la eficiencia persigue la relación óptima entre medios y fines. Y hemos comprobado que la eficiencia puede servir como criterio de ponderación entre principios o derechos contrapuestos en ámbitos muy diversos del Derecho público.

Así, por ejemplo, en las relaciones jurídicas arquetípicas entre Administración y ciudadanos que plantean un conflicto entre la potestad de la primera y la libertad de los segundos, la eficiencia consiste en una ponderación entre los principios constitucionales de proporcionalidad (tributario de la cláusula de Estado de Derecho: BARNÉS, 1994)[69] y de eficacia (que lo es de la cláusula de Estado social: PAREJO, 1995). Este criterio, expresado en positivo como mandato a los poderes públicos, sujeta la acción de las Administraciones públicas a un examen de necesidad y proporcionalidad, como afirma la Directiva de Servicios, pero también a un examen de suficiencia o idoneidad. Y expresado en los

[69] Del que los criterios de simplicidad y de celeridad, a su vez, son corolarios o especificaciones de carácter procedimental.

términos negativos o prohibitivos acuñados por la doctrina alemana, es tanto una «prohibición de exceso» (Übermassverbot, locución que designa en Derecho alemán al principio de proporcionalidad) como también una «prohibición de defecto» (SCHMIDT-ASSMANN, 2003: 26).

Pero si hablamos de relaciones interadministrativas, la eficiencia puede servir de criterio de ponderación entre el principio de descentralización del Estado autonómico, el de subsidiariedad de la Unión Europea o el de proximidad al ciudadano del Derecho local, de un lado, y, de otro, el de eficacia del Estado social, que en un Estado compuesto demanda vínculos de cooperación y coordinación.

En fin, más atrás se han puesto otros ejemplos diversos en los que los modelos analíticos de la eficiencia podían servir para ponderar entre principios objetivos o derechos públicos subjetivos.

Por último, de forma general y con independencia del campo de actuación de la Administración, la eficiencia es siempre una ponderación entre la economía de recursos, la simplicidad y la celeridad demandadas por el derecho a una buena Administración, y la eficacia de ésta, capitales ambas para la realización del Estado social.

Aunque esta última sea la noción de la eficiencia que más familiar le resulta a un jurista, un economista no tendría problema alguno en plantear también los anteriores como problemas de eficiencia. Dada la recepción general que el criterio de eficiencia ha tenido en nuestro ordenamiento jurídico-administrativo positivo, su consideración como criterio jurídico de actuación no sólo no distorsiona el sistema, sino que, por el contrario, es muy clarificador, simplificador y enriquecedor de los juicios de ponderación entre principios objetivos o derechos subjetivos en el Derecho público, a los que dota de un aparato analítico muy útil para la motivación y el control de las correspondientes decisiones discrecionales de los poderes públicos, pero que ha sido hasta ahora poco desarrollado y utilizado entre nosotros. La plena asunción del criterio de eficiencia por el Derecho administrativo no sólo puede contribuir a mejorar la regulación y aumentar la eficacia de la Administración, sino también a dar «una respuesta competitiva» a los retos que aquél afronta hoy dentro del concierto de las ciencias sociales.

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LA JURISPRUDENCE *SIMMENTHAL* DANS LA FORCE DE L'AGE. VERS UNE COMPLETUDE DES COMPETENCES DU JUGE NATIONAL?[1]

Brunessen BERTRAND[2]

INDEX

Depuis plus de trente ans, la jurisprudence *Simmenthal*[3] s'est imposée avec la force de l'évidence, sans que la Cour de justice ait réellement eu à la réaffirmer. Le « contentieux de deuxième génération » a clairement mis en relief « les conséquences qu'il appartient aux juridictions nationales de tirer de cette exigence existentielle du droit communautaire »[4]

[1] Reproduction de l'Etude paru sur la *Revue Française de Droit Administratif*, n. 2/2011, p. 367 - 376 - Rubrique *Droit Administratif de L'union Européenne* sous la direction de Louis DUBOUIS .

[2] Docteur en droit à l'Université Panthéon-Assas (Paris II).

[3] CJCE 9 mars 1978, *Simmenthal*, aff. C-106/77, Rec. CJCE p. 629.

[4] D. Simon, « Les exigences de la primauté du droit communautaire : continuité ou métamorphoses? », in *L'Europe et le droit, Mélanges en hommage à J. Boulouis*, Dalloz, p. 481.

qu'est la primauté. Aussi, la « plénitude de compétence »[5] du juge national en sa qualité de juge de droit commun de l'Union européenne semble parfaitement intégrée par les juridictions nationales, qui ont toutes développé le réflexe européen nécessaire au bon fonctionnement du système juridictionnel décentralisé de l'Union[6]. Dans ces conditions, pourquoi revenir sur une jurisprudence trentenaire dont les prémisses n'ont jamais été remises en cause? Peut-être parce qu'un mouvement de contestation de la primauté[7] pourrait faire douter de sa pérennité. L'appel à l'identité constitutionnelle nationale par certaines juridictions suprêmes a pu donner le sentiment que des exceptions à cette plénitude de compétence étaient à terme inévitables. Mais, à rebours de ce mouvement de reflux du principe de primauté[8], un certain nombre d'arrêts récents, d'ailleurs pour la plupart rendus en Grande chambre, se réclament de la solution *Simmenthal* pour imposer des solutions souvent assez audacieuses pour la compétence du juge national. Dans un intervalle de temps très réduit, des arrêts importants tels que *Cartesio*[9], *Filipiak*[10], *Kücükdeveci*[11], *Melki et Abdeli*[12], *Purrucker*[13], *Winner Wetten*[14] et *Elchinov*[15], sont ainsi

[5] A. Barav, « La plénitude de compétence du juge national en sa qualité de juge communautaire », in *L'Europe et le droit, Mélanges en l'honneur de J. Boulouis*, Dalloz, 1992, p. 1, spéc. p. 15.

[6] V. par ex., CE, ass., 30 oct. 2009, *Mme Perreux*, Lebon p. 407.

[7] D. Ritleng, De l'utilité du principe de primauté du droit de l'Union, RTD Eur. 2009. 677.

[8] H. Gaudin, « Primauté, la fin d'un mythe ? Autour de la jurisprudence de la Cour de Justice », in *Mélanges en l'honneur de P. Manin*, Pédone, 2010, p. 639, spéc. p. 641. A. Levade, « Identité constitutionnelle et exigence existentielle. Comment concilier l'inconciliable », in *Mélanges en l'honneur de P. Marin*, op. cit., p. 109.

[9] CJCE 16 déc. 2008, *Cartesio*, aff. C-210/06, Rec. CJCE p. I-9641.

[10] CJCE 19 nov. 2009, *Filipiak*, aff. C-314/08, Rec. CJCE p. I-11049.

[11] CJUE 19 janv. 2010, *Kücükdeveci*, aff. C-555/07.

[12] CJUE 22 juin 2010, *Melki et Abdeli*, aff. jtes C-188/10 et C-189/10.

venus préciser ou approfondir l'office européen du juge national sur le fondement de l'arrêt *Simmenthal*. Cet atavisme affiché mérite une explication.

La reprise, souvent *in extenso*, des considérants *Simmenthal* dans cette série d'arrêts récents est-elle un aveu d'échec, la preuve de l'inconséquence d'une jurisprudence qui n'a pas su, en l'espace de trente ans, imposer ses solutions[16] ou faut-il y voir au contraire le signe d'une vitalité jamais démentie? Si la pédagogie commence par la répétition, la réitération de la solution *Simmenthal* témoigne-t-elle d'une méconnaissance, par certaines juridictions nationales, de ses prémisses ou n'est-ce là que le rappel solennel d'une jurisprudence qui fait autorité depuis plus de trois décennies et fait partie de ces rares jurisprudences qui n'ont jamais été modifiées? C'est qu'en effet, et contrairement à beaucoup d'autres, la solution *Simmenthal* n'a pas varié d'une syllabe[17] : pas d'exception à

[13] CJUE 15 juill. 2010, *Purrucker*, aff. C-256/09, non encore publiée (nep).

[14] CJUE 8 sept. 2010, *Winner Wetten*, aff. C-409/06, nep.

[15] CJUE 5 oct. 2010, *Elchinov*, aff. C-173/09, nep.

[16] Au regard de la clarté de l'arrêt *Simmenthal*, « il peut surprendre que, trente ans plus tard, des États membres et des cours nationales s'efforcent encore de combattre cette jurisprudence » (D. Sarmiento, La question prioritaire de constitutionnalité et le droit européen. L'arrêt *Melki* : esquisse d'un dialogue des juges constitutionnels et européens sur toile de fond française RTD Eur. 2010. 588).

[17] V., par ex., CJCE 19 juin 1990, *Factortame*, aff. C-213/89, Rec. CJCE p. I- 2433, pts 18 et 20 ; CJCE 4 juin 1992, *Debus*, aff. jtes C-13/91 et C-113/91, Rec. CJCE p. I-3617, pt 32 ; CJCE 22 oct. 1998, IN. CO. GE'90, aff. jtes C-10/97 à C-22/97, Rec. CJCE p. I-6307, pt 20 ; CJCE 28 juin 2001, Larsy, aff. C-118/00, Rec. CJCE p. I-5063, pt 51 ; CJCE 20 sept. 2001, *Courage et Crehan*, aff. C-453/99, Rec. CJCE p. I-6297, pt 25 ; CJCE 17 sept. 2002, Muñoz et Superior Fruiticola, aff. C-253/00, Rec. CJCE p. I-7289, pt 28 ; CJCE 20 mars 2003, *Kutz- Bauer*, aff. C-187/00, Rec. CJCE p. I-2741, pt 73 ; CJCE 3 mai 2005, *Berlusconi*, aff. C-387/02, C-391/02 et C-403/02, Rec. CJCE p. I-3565, pt 72.

ses principes, pas de solution emportant un subtil *distinguishing*[18], la solution de 1978 est restée intacte au fil du temps. Pourtant, il semble qu'elle ait évolué, en s'élargissant souvent, en se limitant peut-être aussi, mais en s'imposant toujours en définitive quand un juge national se laissait tenter par les arguments de certaines parties.

La revitalisation de la solution *Simmenthal* opérée par cette série d'arrêts paraît alors résulter de la force des choses et ne semble pas être liée à un possible affaiblissement du principe de primauté.

L'arrêt *Winner Wetten*[19] le réaffirme trop solennellement pour que cela puisse être le cas, d'autant que la solution *Simmenthal* n'a pas seulement été rappelée, elle a été renforcée aussi bien directement qu'indirectement. Elle s'est ainsi trouvée consolidée par le principe de protection juridictionnelle effective, principe général du droit de l'Union qui découle des traditions constitutionnelles communes aux États membres, et consacré par les articles 6 et 13 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales. Ce principe résulte désormais aussi de l'article 47 de la Charte des droits fondamentaux de l'Union européenne. En vertu de ce principe, il incombe aux juridictions des États membres, par application du principe de coopération loyale, d'assurer la protection juridictionnelle des droits que les justiciables tirent du droit de l'Union[20]. Le traité de Lisbonne va dans le même sens, puisque l'article 19, § 1, alinéa 2, du Traité sur l'Union européenne (TUE) dispose que « les États membres établissent les voies de recours

[18] En dépit de la fréquence du recours à cette technique. V. L. Coutron, Style des arrêts de la Cour de justice et normativité de la jurisprudence communautaire, RTD Eur. 2009. 643.

[19] « Il ne saurait en effet être admis que des règles de droit national, fussent-elles d'ordre constitutionnel, portent atteinte à l'unité et à l'efficacité du droit de l'Union » (CJUE 8 sept. 2010, *Winner Wetten*, aff. C-409/06, nep, pt 61).

[20] CJCE 13 mars 2007, Unibet, aff. C-432/05, Rec. CJCE p. I-2271, pts 37 et 38.

nécessaires pour assurer une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union ».

Par ricochet, ce mouvement renforce la solution *Simmenthal*[21], dès lors que la protection juridictionnelle des particuliers est « le pendant barométrique de l'effectivité du droit communautaire »[22] ; les justiciables « ont un droit au juge investi de la plénitude de compétence pour apprécier librement la conformité au droit communautaire de la mesure nationale contestée devant lui, sans qu'une règle ou un principe de droit interne ne puisse l'entraver dans une telle appréciation »[23]. Depuis toujours, la Cour de justice fait confiance à la « vigilance des particuliers » pour assurer l'effectivité du droit communautaire[24]. Dans ces conditions, la consolidation dont la solution *Simmenthal* fait l'objet prend une dimension particulière. Le courant jurisprudentiel actuel tend à réaffirmer autant qu'à renforcer la jurisprudence trentenaire quant à la plénitude de compétence du juge national. Cet affermissement des conséquences de la primauté sur l'office du juge national permet de penser que l'on aurait peut-être atteint une complétude de la définition des compétences du juge national en sa qualité de juge de droit commun du droit de l'Union européenne. Dans l'arrêt *Simmenthal*, le juge avait « fait preuve d'un très grand pragmatisme » en se limitant

[21] V., en ce sens, P. Manin, La question prioritaire de constitutionnalité et le droit de l'Union européenne, AJDA 2010. 1023.

[22] A. Barav, « Le juge et le justiciable », *Scritti in onore di G. F. Mancini*, Milan, Giuffrè, 1998, vol. II, p. 1, spéc. p. 4.

[23] A. Barav, « La plénitude de compétence du juge national en sa qualité de juge communautaire », in *L'Europe et le droit. Mélanges en l'honneur de J. Boulouis*, Dalloz, 1992, p. 1, spéc., p. 15.

[24] Pour la Cour en effet, « la vigilance des particuliers intéressés à la sauvegarde de leurs droits entraîne un contrôle efficace qui s'ajoute à celui que les articles ex-169 et 170 confient à la diligence de la Commission et des États membres » (CJCE 5 févr. 1963, *Van Gend en Loos*, aff C-26/62, Rec. CJCE p. 3). Il existe « un lien fort entre les idées d'unité du droit communautaire et de protection juridictionnelle des particuliers » de sorte que ces deux objectifs sont « interdépendants » pour la Cour de Justice (O. Dubos, Les juridictions nationales, juge communautaire, Dalloz, 2001, p. 119).

« à considérer que le juge ne doit pas appliquer la norme nationale contraire, sans développer les conséquences pour l'ordonnancement juridique interne de cette "inapplicabilité" »[25]. La jurisprudence *Simmenthal* serait aujourd'hui dans la force de l'âge en ce qu'elle aurait enfin déployé la totalité de ses effets, dont certains seraient restés en germe pendant toutes ces années. L'enracinement des compétences du juge national est en effet passé par certaines adaptations qui rendent nécessaire de prendre la mesure des incidences de la primauté sur l'applicabilité immédiate du droit de l'Union. Plus encore, il ne fait guère de doute que le juge est allé au-delà de cette simple réaffirmation et s'est attaché à en tirer de nouvelles conséquences.

Aussi bien l'« émancipation du juge interne au regard du droit national, par l'auto-appropriation de sa part de certains pouvoirs »[26] qui résulte de l'arrêt *Simmenthal*, est poussée plus avant. On note ainsi un nombre significatif de solutions qui ont en définitive pour effet d'affaiblir l'autorité des juridictions supérieures, de sorte qu'il semble important d'évaluer les conséquences nouvelles de la primauté sur la hiérarchie juridictionnelle interne.

1. LES INCIDENCES DE LA PRIMAUTE SUR L'APPLICABILITE IMMEDIATE DU DROIT DE L'UNION

La Cour de justice affirmait en 1978 que l'applicabilité directe « signifie que les règles du droit communautaire doivent déployer la plénitude de leurs effets d'une manière uniforme dans tous les États membres »[27]. L'idée était que les dispositions du droit

[25] O. Dubos, *Les juridictions nationales, juge communautaire*, op. cit., p. 61.

[26] E. Dubout, Le « contentieux de la troisième génération » ou l'incomplétude du système juridictionnel communautaire, RTD Eur. 2007. 427.

[27] CJCE 9 mars 1978, *Simmenthal*, aff. C-106/77, Rec. CJCE p. 629, pt 14.

communautaire devaient être « une source immédiate de droits et d'obligations pour tous ceux qu'elle concerne », à savoir aussi bien le juge que les particuliers[28]. La Cour de justice souligne donc avec constance l'incompatibilité avec les exigences inhérentes à la nature même du droit de l'Union de toute disposition d'un ordre juridique national ou de toute pratique, législative, administrative ou judiciaire, qui aurait pour effet de diminuer l'efficacité du droit de l'Union[29]. L'application dans le temps de la solution *Simmenthal* s'est stabilisée autour d'un certain équilibre. D'un côté, l'atténuation de l'exigence d'immédiateté paraît possible; d'un autre côté, l'effet d'éviction, qui résulte de la primauté, pourrait être élargi dans des situations particulières.

1.1. L'atténuation possible de l'exigence d'immédiateté

L'arrêt *Simmenthal* est itérativement réaffirmé avec force. Le juge national chargé d'appliquer, dans le cadre de sa compétence, les dispositions du droit de l'Union a l'obligation d'assurer le plein effet de ces normes en laissant au besoin inappliquée, de sa propre autorité, toute disposition contraire de la législation nationale, même postérieure, sans qu'il ait à demander ou à attendre l'élimination préalable de celle-ci par voie législative ou par tout autre procédé constitutionnel[30]. Dans le même temps, la Cour de justice admet que des assouplissements sont possibles. Si la question du maintien provisoire d'une loi inconventionnelle n'est pas encore résolue, celle de l'articulation des contrôles de constitutionnalité et de conventionnalité montre bien que les exigences posées par l'arrêt *Simmenthal* peuvent occasionnellement être adoucies.

La question du maintien provisoire d'une loi inconventionnelle

[28] *Ibid*., pts 14 à 16

[29] *Ibid*., pt 22

[30] *Ibid*., pts 21 et 24.

L'arrêt *Winner Wetten*[31] soulevait la question de savoir si l'effet d'éviction de la réglementation nationale jugée contraire au droit de l'Union, découlant du principe de primauté, pouvait être suspendu le temps nécessaire à la mise en conformité de cette réglementation avec le traité. En d'autres termes, le juge national peut-il continuer à appliquer à titre exceptionnel et transitoire sa réglementation nationale et donc déroger à l'obligation imposée par la jurisprudence *Simmenthal* pour éviter un vide juridique? Pour y répondre, la Cour commence par reprendre point par point l'arrêt *Simmenthal*. Ce rappel « particulièrement pédagogique » était d'ailleurs « assorti d'une leçon de coopération juridictionnelle destinée à préciser les modalités selon lesquelles doit être assurée la protection juridictionnelle effective des droits des justiciables »[32].

Il est assez remarquable que tous les États membres ayant présenté des observations se soient ralliés à l'idée d'un principe qui autoriserait, dans des circonstances exceptionnelles, le maintien provisoire des effets d'une norme nationale jugée contraire à une norme du droit de l'Union directement applicable. Cette idée reposait sur un argument tiré de l'analogie avec la jurisprudence développée par la Cour sur le fondement de l'article 264, alinéa 2, du Traité sur le fonctionnement de l'Union européenne (TFUE), qui permet de maintenir provisoirement les effets d'actes de droit dérivé dont elle a prononcé l'annulation en vertu de l'article 263 du TFUE ou constaté l'invalidité en vertu de l'article 267 du TFUE. En vertu de l'article 264, alinéa 2, du TFUE, la Cour bénéficie d'un pouvoir d'appréciation pour indiquer, dans chaque cas particulier, ceux des effets d'un acte de l'Union qu'elle annule ou déclare invalide qui doivent être considérés comme définitifs[33]. La Cour peut ainsi suspendre les effets de l'annulation ou du constat d'invalidité d'un tel

[31] CJUE 8 sept. 2010, *Winner Wetten*, aff. C-409/06, nep

[32] D. Simon, Effet d'exclusion du droit national, Europe n° 12, déc. 2010, comm. 397.

[33] CJCE 22 déc. 2008, *Régie Networks*, aff. C-333/07, Rec. CJCE p. I-10807, pt 121.

acte jusqu'à l'adoption d'un nouvel acte remédiant à l'illégalité constatée[34]. La justification de cette prérogative est d'éviter un vide juridique[35] en cas de considérations impérieuses de sécurité juridique tenant à l'ensemble des intérêts, tant publics que privés, en jeu. Dans ses conclusions, l'avocat général Bot refusait d'admettre une telle analogie. Il excluait donc la possibilité d'une dérogation à l'obligation posée par la jurisprudence *Simmenthal*, au motif que le maintien en vigueur d'une telle réglementation, fût-ce à titre transitoire, porterait atteinte à la primauté du droit communautaire et au droit à un recours juridictionnel effectif[36]. Aussi, « la transposition de la possibilité » prévue à l'article 264, alinéa 2, du TFUE « à des règles de droit interne contraires à une norme de droit communautaire directement applicable se heurte à des obstacles de principe difficilement franchissables »[37]. Il faisait valoir en particulier que la possibilité d'aménager dans le temps les effets du droit de l'Union sur le droit national n'avait été envisagée que *ex tunc*[38].

Si l'existence d'une telle dérogation à *Simmenthal* n'a pas été clairement admise par la Cour dans l'affaire *Winner Wetten*, elle n'est pas non plus totalement écartée. Reprenant une formulation qui évoque celles qui ont prévalu pour l'hypothèse d'une

[34] CJCE 3 sept. 2008, Kadi et Al Barakaat International Foundation c. Conseil et Commission, aff. jtes C-402/05 P et C-415/05 P, Rec. CJCE p. I-6351, pts 373 à 376.

[35] CJCE 5 févr. 2004, Rieser Internationale Transporte, aff. C-157/02, Rec. CJCE p. I-1477, pt 60.

[36] Conclusions de l'avocat général Bot présentées le 26 janvier 2010 sur Winner Wetten, pt 84. « D'autre part, à supposer même qu'une dérogation à l'obligation imposée par la jurisprudence *Simmenthal*, puisse être envisagée dans des circonstances exceptionnelles, elle ne saurait être appliquée lorsque, comme dans la présente affaire, d'une part, la réglementation litigieuse est inapte à atteindre ses objectifs et, d'autre part, les motifs pour lesquels elle est contraire au droit communautaire découlent d'un arrêt préjudiciel rendu plus de 18 mois avant l'adoption des actes contestés dans le recours au principal » (*Ibid*.).

[37] Conclusions de l'avocat général Bot, présentées le 26 janvier 2010 sur *Winner Wetten*, pt 94.

[38] *Ibid*., pt 85.

responsabilité sans faute avant l'arrêt *FIAMM*[39], la Cour a affirmé que « à supposer même que des considérations similaires à celles sous-jacentes à ladite jurisprudence, développée en ce qui concerne les actes de l'Union, soient de nature à conduire, par analogie et à titre exceptionnel, à une suspension provisoire de l'effet d'éviction exercé par une règle de droit de l'Union directement applicable à l'égard du droit national contraire à celle-ci, une telle suspension, dont les conditions ne pourraient être déterminées que par la seule Cour, est à exclure d'emblée, en l'occurrence, eu égard à l'absence de considérations impérieuses de sécurité juridique propres à justifier celle-ci »[40].

La formule est à tout le moins équivoque; si la Cour refuse toute application transitoire de la loi nationale en l'espèce, elle n'écarte pas la possibilité d'admettre à l'avenir une telle hypothèse. L'expérience en matière de responsabilité sans faute montre que cette hypothèse pourrait très bien ne jamais voir le jour[41]. Si celle-ci devait néanmoins être reconnue, on pressent que cela ne pourrait être qu'à des conditions drastiques, puisqu'il s'agirait là d'une exception à l'exigence d'immédiateté posée par l'arrêt *Simmenthal*. Une telle solution pourrait porter atteinte à l'impératif d'application uniforme du droit de l'Union, de sorte que la Cour se réserve l'appréciation « exclusive »[42] d'une telle modulation. Ainsi, elle paraît avoir dénié aux juges nationaux la possibilité d'opérer un tel maintien transitoire du droit national contraire, à l'image de la compétence qu'elle s'est

[39] CJCE 9 sept. 2008, *FIAMM*, aff. jtes C-120/06 P et C-121/06 P, Rec. CJCE p. I-6513.

[40] CJUE 8 sept. 2010, Winner Wetten, aff. C-409/06, pt 67.

[41] CJCE 25 mars 2010, Sviluppo Italia, aff. C-414/08P, pt 141.

[42] « Embarrassée par ce type de raisonnement par analogie qu'elle a ellemême développé dans le passé, la Cour n'a pas exclu purement et simplement le principe d'une telle suspension provisoire qui devrait être exceptionnel et relever de l'appréciation exclusive de la Cour » (F. Picod, Pas de maintien provisoire d'une réglementation contraire au droit de l'Union, JCP 2010, n° 39, p. 1792).

réservée dans l'arrêt *Foto- Frost*[43] s'agissant de l'appréciation de validité des actes de l'Union européenne[44], alors même qu'est ici en cause un acte national. Si une telle lecture devait se confirmer, la situation serait des plus délicates. Si l'on peut comprendre que des impératifs d'application uniforme du droit de l'Union permettent de refuser aux juges nationaux de décider seuls du maintien des effets d'une loi inconventionnelle, il est particulièrement difficile de concevoir que l'application d'une loi nationale ne dépende que de la Cour de Justice. Si la répartition des compétences juridictionnelles a encore un sens, l'application de la loi nationale ne relève pas de l'appréciation de la Cour de justice. Et si l'objet du renvoi en interprétation relève largement de la fiction juridique en ce sens que l'arrêt de la Cour conditionne souvent totalement la validité de la loi nationale, cette fiction juridique doit être maintenue; c'est au juge national qu'il revient de tirer les conséquences d'un arrêt rendu à titre préjudiciel sur la validité de la loi nationale, même si, ce faisant, sa compétence est en réalité fortement liée. Il faut alors souhaiter que l'arrêt *Winner Wetten* soit à interpréter de telle sorte que la Cour de justice se contenterait de poser les conditions, même strictes, pour que le juge national puisse décider un tel maintien temporaire des effets d'une loi inconventionnelle, comme elle l'a fait dans l'arrêt *Factortame*[45].

L'instauration d'une obligation de renvoi préjudiciel, pour permettre à la Cour de décider de la possibilité de maintenir provisoirement la loi nationale contraire, ne devrait cependant avoir que de faibles conséquences pratiques; en plus de trente ans d'application de la jurisprudence *Simmenthal*, la question ne s'est guère posée qu'une fois. Ceci est d'autant plus vrai que, à supposer qu'elle soit admise, la possibilité de maintenir les effets d'une loi nationale contraire ne serait possible qu'en présence de considérations impérieuses de sécurité juridique.

[43] M. Aubert, E. Broussy, F. Donnat, Chronique de jurisprudence de la CJUE, AJDA 2010. 2305. (42) CJCE 22 oct. 1987, aff. C-314/85, Rec. CJCE p. 4199.

[44] CJCE 22 oct. 1987, aff. C-314/85, Rec. CJCE p. 4199.

[45] CJCE 19 juin 1990, *Factortame*, aff. C-213/89, Rec. CJCE p. I-2433.

L'articulation des contrôles de constitutionnalité et de conventionnalité

En dépit de son absence d'ambiguïté, la jurisprudence *Simmenthal* a parfois dû être rappelée, signe que les juridictions nationales peuvent encore éprouver des difficultés à appliquer une solution si radicale[46]. Il peut ainsi être étonnant de constater que des juges posent encore à la Cour de justice la question de savoir s'ils doivent laisser inappliquée une législation contraire au droit communautaire, d'autant que ces questions ne proviennent pas que des juridictions des nouveaux États membres[47]. On peut cependant voir dans ce type de question un moyen pour le juge national de légitimer l'arrêt à venir en confortant sa solution par un rappel solennel de *Simmenthal* par la Cour de justice. On peut peut-être aussi interpréter ces demandes comme des tentatives pour introduire des exceptions à cet arrêt au nom d'impératifs de sécurité juridique ou de confiance légitime. Si elle l'exprime avec constance, la Cour n'applique pas toujours la solution *Simmenthal* avec une grande rigidité, comme le montre l'admission conditionnée du caractère prioritaire de la question de constitutionnalité en France.

La solution *Simmenthal* permettait légitimement de douter de la compatibilité du mécanisme français de la question de constitutionnalité, notamment du fait de son caractère prioritaire[48]. La validation apportée par l'arrêt *Melki*[49] apparaît donc implicitement mais

[46] « Un étudiant de licence sait que cette question est déjà tranchée depuis longue date, mais le fait qu'elle soit encore posée à la Cour de justice montre la gêne que continuent d'éprouver les juridictions nationales sur ce point » (E. Dubout, L'invocabilité d'éviction des directives dans les litiges horizontaux, Le « bateau ivre » a-t-il sombré ?, RTD Eur. 2010. 277).

[47] V. par ex., CJUE 19 janv. 2010, Kücükdeveci, aff. C-555/07.

[48] « Les formulations utilisées par la Cour en 1978 paraissent s'opposer à tout mécanisme qui, à l'instar de la priorité constitutionnelle, entraverait l'immédiateté d'application du droit de l'Union européenne » (P. Cassia, Question sur le caractère prioritaire de la question de constitutionnalité, AJDA 2009. 2193). « Même si l'on peut avoir des doutes sur la pertinence d'une vision maximaliste de la jurisprudence *Simmenthal*, force est de constater que la décision commentée laisse ouverte la possibilité d'une contestation de la conformité au droit communautaire de la loi organique en tant qu'elle ferait obstacle, non à la primauté de ce droit, mais à son

nécessairement comme une inflexion de cette jurisprudence[50]. La lettre du considérant de principe ne change pas mais sa lecture semble adoucie et l'impératif d'immédiateté relativisé.

Classiquement, est incompatible avec les exigences inhérentes à la nature même du droit de l'Union « toute disposition d'un ordre juridique national ou toute pratique, législative, administrative ou judiciaire, qui aurait pour effet de diminuer l'efficacité du droit de l'Union par le fait de refuser au juge compétent pour appliquer ce droit le pouvoir de faire, au moment même de cette application, tout ce qui est nécessaire pour écarter les dispositions législatives nationales formant éventuellement obstacle à la pleine efficacité des normes de l'Union »[51]. L'expression « au moment de son application » paraissait

applicabilité directe » (B. Genevois, Le contrôle a priori de constitutionnalité au service du contrôle *a posteriori*. À propos de la décision n° 2009-595-DC du 3 décembre 2009, RFDA 2010. 1). « En cas de concurrence entre l'obligation de renvoi préjudiciel en matière constitutionnelle et celle de renvoi préjudiciel communautaire, le juge national doit privilégier la seconde : le point 22 de l'arrêt *Simmenthal* est dépourvu d'ambiguïtés à cet égard. L'idée de cette préséance réside dans le fait qu'il faut coûte que coûte assurer l'effectivité du droit communautaire, même de façon temporaire » (L. Burgorgue-Larsen, Question préjudicielle de constitutionnalité et contrôle de conventionnalité. État des lieux de leurs liaisons (éventuellement dangereuses) dans le projet de loi organique relatif à l'application de l'article 61, § 1, de la Constitution, RFDA 2009. 787). « En retardant l'examen de la communautarité de la loi, le caractère prioritaire de la QPC pourrait bien être contraire à la jurisprudence *Simmenthal* » (M. Gautier, La question de constitutionnalité peut-elle rester prioritaire ? À propos de l'arrêt de la Cour de cassation du 16 avril 2010, RFDA 2010. 449). V. aussi, D. Simon, Le projet de loi organique relatif à l'application de l'article 61- 1 de la Constitution : un risque d'incompatibilité avec le droit communautaire ?, Europe, 2009, repère 5.

[49] CJUE 22 juin 2010, *Melki et Abdeli*, aff. jtes C-188/10 et C-189/10, pts 52 et 53.

[50] V. aussi, en ce sens, F. Donnat, La Cour de justice et la QPC : chronique d'un arrêt prévisible et imprévu, D. 2010. 1640; M. Gautier, QPC et droit communautaire. Retour sur une tragédie en cinq actes, Dr. adm., n° 10, oct. 2010, étude 19.

[51] CJCE 9 mars 1978, *Simmenthal*, aff. C-106/77, Rec. CJCE p. 629, pt 22 ; CJCE 19 juin 1990, Factortame, aff. C-213/89, Rec. CJCE p. I-2433, pt 20 (nous soulignons).

signifier « à ce moment précis de l'instance » puisque la Cour de justice considérait, dans l'arrêt *Simmenthal*, comme incompatible une procédure de droit interne qui ne formerait qu'un obstacle temporaire à la pleine efficacité au droit de l'Union[52]. Dans ces conditions, il est très significatif que la Cour de justice ait admis que la question préjudicielle ou l'inapplication de la loi nationale en raison de son inconventionnalité puissent n'avoir lieu qu'après la procédure de la question prioritaire de constitutionnalité[53]. Aussi a-t-elle précisé dans l'arrêt *Melki* que le juge national est « libre de saisir, à tout moment de la procédure qu'il juge approprié, et même à l'issue d'une procédure incidente de contrôle de constitutionnalité », la Cour de justice de toute question préjudicielle. L'expression « au moment de son application » de la jurisprudence *Simmenthal* ne signifierait donc plus à ce moment précis de l'instance mais au cours de cette même instance. La pérennité de la jurisprudence *Simmenthal* passe par des adaptations nécessaires. Si elle peut à l'occasion voir ses exigences assouplies, elle peut aussi à l'inverse se trouver renforcée.

1.2. L'élargissement potentiel de l'effet d'éviction

L'effet d'éviction caractéristique de la formule *Simmenthal* trouve classiquement certaines limites, dans les litiges horizontaux qui mettent en jeu les dispositions d'une directive ou dans les litiges qui ne relèvent pas du droit de l'Union européenne. Pourtant, ces situations évoluent sous l'effet du développement de la jurisprudence *Simmenthal*. On constate ainsi une extension de l'effet d'éviction dans les litiges de droit international privé.

[52] CJCE 9 mars 1978, *Simmenthal*, aff. C-106/77, pt 23.

[53] La Cour « se contente d'une situation dans laquelle le juge national ne pourra, le plus souvent… ne donner qu'une solution provisoire du point de vue du droit de l'Union. De façon raisonnable, la Cour semble ainsi accepter que l'effectivité du droit de l'Union soit suspendue ou retardée de façon raisonnable par l'enclenchement de la procédure constitutionnelle » (F. Donnat, La Cour de justice et la QPC : chronique d'un arrêt prévisible et imprévu, art. préc., p. 1640). Aussi est-il « surprenant que la Cour de justice accepte qu'un ordre juridique national conditionne le renvoi préjudiciel à une question de constitutionnalité préalable » (D. Sarmiento, La question prioritaire de constitutionnalité et le droit européen. L'arrêt *Melki* : esquisse d'un dialogue des juges constitutionnels et européens sur toile de fond française RTD Eur. 2010. 588).

Par ailleurs, si le refus de l'effet d'éviction des directives dans les litiges horizontaux n'est pas remis en cause, il semble parfois contourné.

L'extension de l'effet d'éviction des règlements dans les litiges de droit international privé

Les incidences de la solution *Simmenthal* dans les litiges de droit international privé doivent être envisagées dans une double perspective; d'abord l'extension de la formule *Simmenthal* au cas particulier des « situations transfrontalières » a été un moyen pour la Cour de justice de contrôler les règles procédurales nationales et, par là même, de tenter de les écarter indirectement. Ensuite, la jurisprudence *Simmenthal* lui a permis de résoudre la question des conflits de conventions au bénéfice du droit de l'Union européenne et donc d'écarter l'application d'autres conventions lorsque les règlements n'en disposent pas autrement.

Dans la première optique, la jurisprudence *Simmenthal* a permis à la Cour de justice de pallier l'absence d'effets extraterritoriaux de certaines dispositions du règlement relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale dit « Bruxelles II bis ».

Dans l'arrêt *Purrucker*[54], le juge avait dû se résoudre à constater que les articles 21 et suivants du règlement n° 2201/2003[55] ne s'appliquaient pas aux mesures provisoires en matière de droit de garde de l'article 20 du règlement; autrement dit, ces mesures provisoires ne pouvaient bénéficier du système de reconnaissance et d'exécution prévu par le règlement et leurs effets étaient donc cantonnés au territoire de la juridiction nationale.

[54] CJUE 15 juill. 2010, *Purrucker*, aff. C-256/09, nep.

[55] Règlement n° 2201/2003 du 27 novembre 2003, JOUE n° L 338, 23 déc. 2003, p. 1.

Mais la Cour de justice a souhaité aller plus avant et préciser le régime de ces mesures provisoires. Elle a voulu imposer l'idée que « compte tenu de l'importance et des enjeux des mesures provisoires en matière de responsabilité parentale, il semble indispensable que toute personne concernée, même si elle a été entendue, puisse exercer un recours »[56]. L'appel à la jurisprudence *Simmenthal* lui a ainsi permis d'émettre « des réserves sur ce dispositif procédural national »[57], en particulier sur le fait que le droit national ne prévoyait aucun recours contre ces mesures provisoires. Aussi s'empresse-t-elle d'affirmer qu'il « appartient au juge national d'appliquer, en principe, son droit national tout en veillant à assurer la pleine efficacité du droit de l'Union, ce qui peut le conduire à écarter, si besoin est, une règle nationale y faisant obstacle ou à interpréter une règle nationale qui a été élaborée en ayant uniquement en vue une situation purement interne afin de l'appliquer à la situation transfrontalière en cause » [58].

Le recours à la jurisprudence *Simmenthal* a aussi été le vecteur d'une extension des effets de certaines dispositions d'autres règlements du droit international privé européen. Dans l'arrêt *Leffler*, la Cour était confrontée au fait que l'article 8 du règlement n° 1348/2000[59] ne prévoyait pas les conséquences juridiques qui découlent du refus de réception d'un acte par son destinataire, au motif que cet acte n'est pas rédigé dans une langue officielle de l'État membre requis ou dans une langue de l'État membre d'origine que ce destinataire comprend. Pour pallier cette carence, la Cour de justice fait appel à l'arrêt *Simmenthal* pour affirmer que « lorsque le règlement ne prévoit pas les conséquences

[56] L. Idot, Déplacement illicite d'enfant et reconnaissance d'une décision de mesures provisoires, Europe, n° 10, oct. 2010, comm. 350.

[57] C. Nourissat, Régime des mesures provisoires dans le règlement « Bruxelles II bis » Procédures, n° 10, oct. 2010, comm. 343.

[58] CJUE 15 juill. 2010, Purrucker, aff. C-256/09, pt 99.

[59] Règlement n° 1348/2000 du Conseil du 29 mai 2000 sur la signification et la notification des actes judiciaires et extrajudiciaires en matière civile et commerciale, JOCE n° L 160, 30 juin 2000, p. 37.

de certains faits, il appartient au juge national d'appliquer, en principe, son droit national tout en veillant à assurer la pleine efficacité du droit communautaire, ce qui peut le conduire à écarter, si besoin est, une règle nationale y faisant obstacle ou à interpréter une règle nationale qui a été élaborée en ayant uniquement en vue une situation purement interne afin de l'appliquer à la situation transfrontalière en cause »[60]. À nouveau, la solution *Simmenthal* lui permet d'écarter le principe d'autonomie procédurale dans une situation de droit international privé[61].

Dans une seconde perspective, la Cour de justice a recouru à la solution *Simmenthal* pour empêcher l'application concurrente d'autres conventions de droit international privé. Dans l'affaire C, la juridiction de renvoi posait la question de l'articulation entre le règlement nº 2201/2003 précité et les dispositions nationales adoptées en application de la coopération entre les États nordiques.

La Cour de justice rappelle que le juge national a l'obligation d'assurer le plein effet de ces normes en laissant au besoin inappliquée, de sa propre autorité, toute disposition contraire de la législation nationale[62] de sorte que la loi en cause ne saurait être appliquée à une décision de prise en charge et de placement d'un enfant relevant du champ d'application du règlement nº 2201/2003.

[60] CJCE 8 nov. 2005, *Leffler*, aff. C-443/03, Rec. CJCE p. I-9611, pt 51.

[61] L. Idot, Coopération judiciaire en matière civile – Premier arrêt en matière de notification et signification des actes, Europe, janv. 2006, Comm. n° 28, p. 24.

[62] CJCE 27 nov. 2007, C, aff. C-435/06, Rec. CJCE p. I-10141, pts 56 et 57. V. L. Idot, Champ d'application du règlement et mesures de protection de l'enfance, Europe, janv. 2008, Comm. n° 28, p. 27.

La problématique de l'effet d'éviction des directives dans les litiges horizontaux

L'application de la jurisprudence *Simmenthal* dans les litiges verticaux mettant en jeu une directive précise et inconditionnelle, non transposée dans les délais ou mal transposée, ne pose pas de difficultés. Dès lors qu'une directive engendre des droits dont les particuliers peuvent se prévaloir devant le juge national, ce dernier sera alors tenu de laisser inappliquées les dispositions contraires de la loi nationale[63]. C'est dans le cadre des litiges horizontaux que l'application de la solution *Simmenthal* est plus difficile puisque la reconnaissance d'un effet d'éviction lié à une directive reste encore problématique.

Ainsi, dans l'affaire *Mangold*[64], la réglementation nationale autorisant la conclusion de contrats de travail à durée déterminée lorsque le travailleur atteint l'âge de 52 ans était incompatible avec la directive 2000/78 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail. Le problème était que le litige au principal opposait deux particuliers et que le délai de transposition de la directive n'était pas encore expiré. C'est alors par le biais d'un principe général du droit, le principe de non-discrimination en fonction de l'âge, que la Cour est parvenue à appliquer *Simmenthal* et donc à dire au juge national d'écarter le droit national contraire; ce détour par un principe général du droit permet au juge d'appliquer directement le droit de l'Union dans le cadre d'un litige entre particuliers. Ainsi, la Cour de justice a contourné le problème en considérant que le juge national devait assurer le plein effet du principe général de non-discrimination en fonction de l'âge en laissant inappliquée toute disposition contraire de la loi nationale.

Dans l'arrêt *Kücükdeveci*, la Cour de justice a confirmé que le juge national, saisi d'un litige entre particuliers, devait assurer le respect du principe de non-discrimination en

[63] CJCE 5 mars 1998, *Solred*, aff. C-347/96, Rec. p. I-937, pt 30.

[64] CJCE 22 nov. 2005, *Werner Mangold*, aff. C-144/04, Rec. CJCE p. I-9981, pt 77.

fonction de l'âge, tel que concrétisé par la directive 2000/78, en laissant au besoin inappliquée toute disposition contraire de la réglementation nationale[65]. Par là, la Cour tâchait de trouver une troisième voie de compensation à l'absence d'effet direct horizontal des directives, en se fondant sur les compétences du juge national en sa qualité de juge de droit commun du droit de l'Union européenne[66].

Au-delà de l'interprétation conforme et de l'invocabilité de réparation, l'avocat général Bot proposait un « palliatif […] dans le découplage entre l'effet direct horizontal des directives et l'invocabilité de celles-ci en vue d'exclure le droit national contraire, y compris dans le cadre d'un litige entre particuliers »[67]. Cette solution permettait de faire en sorte que, en l'absence d'effet de substitution des directives au droit national, ces dernières puissent néanmoins être invoquées pour écarter le droit national contraire. Mais cette dissociation entre l'effet de substitution et l'invocabilité d'exclusion des directives n'a été admise que dans des cas très spécifiques[68] et ne semble donc pas avoir été réellement admise par la Cour. Cela est singulier si l'on considère que l'effet de substitution est une conséquence de l'effet direct et que l'invocabilité d'exclusion n'est liée qu'à la primauté[69].

[65] CJUE 19 janv. 2010, *Kücükdeveci*, aff. C-555/07, pt 56.

[66] Elle souhaitait ainsi « concilier sa jurisprudence constante écartant l'effet horizontal des directives avec la mission impartie au juge national, appelé à trancher un litige entre particuliers dans une situation où le droit interne est contraire au droit de l'Union » (D. Simon, L'invocabilité des directives dans les litiges horizontaux : confirmation ou infléchissement ?, Europe, n° 3, mars 2010, Étude 3).

[67] Conclusions de l'avocat général Bot présentées le 7 juillet 2009 sur CJUE 19 janv. 2010, *Kücükdeveci*, pt 63.

[68] Cas particulier d'un vice de procédure : CJCE 30 avr. 1996, *CIA Security International*, aff. C-194/94, Rec. CJCE p. I-2201 ; CJCE 26 sept. 2000, *Unilever*, aff. -443/98, Rec. CJCE p. I-7535.

[69] V. en ce sens, D. Simon, *Le système juridique communautaire*, 3e éd., PUF, 2001, p. 441; G. Isaac, M. Blanquet, *Droit général de l'Union européenne*, 9e éd., Sirey Université, 2006, p. 290.

Cette question divise la doctrine puisque d'autres éminents auteurs estiment que l'effet d'éviction est lié à l'effet direct d'un acte[70]. Tel semble bien être le cœur du problème[71] et cette « hésitation illustre la difficulté qu'ont les juges à situer précisément cette forme de justiciabilité intermédiaire qui impose l'inapplication du droit de l'État sans pour autant entraîner l'application du droit de l'Union »[72]. L'arrêt ne se positionne pas clairement. D'un côté, il continue de refuser un effet d'éviction propre à la directive dans les litiges horizontaux. Cela tendrait à associer effet direct et effet d'éviction. Mais, d'un autre côté, s'il n'est pas question d'effet direct, la primauté semble au cœur du raisonnement; le juge affirme que, « en vertu du principe de primauté du droit de l'Union, dont bénéficie également le principe de non-discrimination en fonction de l'âge, une réglementation nationale contraire qui entre dans le champ d'application du droit de l'Union doit être laissée inappliquée »[73]. Il semble alors que l'arrêt *Simmenthal* offre une solution commode au juge pour contourner la question centrale qui est de savoir si l'invocabilité d'exclusion est une conséquence de l'effet direct ou de la primauté.

[70] C. Blumann, L. Dubouis, *Droit institutionnel de l'Union européenne*, 4e éd., Litec, 2010, p. 569. V. aussi, D. Ritleng, De l'utilité du principe de primauté du droit de l'Union, RTD Eur. 2009. 677. V. aussi D. Ritleng, Le principe de primauté du droit de l'Union, RTD Eur. 2005. 285.

[71] « Le fond du problème consiste à admettre que l'invocabilité d'un acte communautaire en vue de demander au juge national d'écarter la règle nationale contraire est moins une question d'effet direct que de primauté. C'est la prévalence du droit de l'Union, telle qu'elle a été posée dans la jurisprudence *Costa c. ENEL* et *Simmenthal*, qui implique nécessairement l'obligation pour les juridictions nationales, de laisser inappliquées les règles nationales contraires » (D. Simon, L'invocabilité des directives dans les litiges horizontaux : confirmation ou infléchissement ?, Europe, n° 3, mars 2010, étude 3).

[72] E. Dubout, L'invocabilité d'éviction des directives dans les litiges horizontaux, Le « bateau ivre » a-t-il sombré ?, RTD Eur. 2010. 277.

[73] CJUE 19 janv. 2010, *Kücükdeveci*, aff. C-555/07, pt 54. On a d'ailleurs pu noter que « la référence au principe de primauté du droit de l'Union dans le cadre de l'invocabilité des directives est plus innovante » (E. Dubout, L'invocabilité d'éviction des directives dans les litiges horizontaux, Le « bateau ivre » a-t-il sombré ?, RTD Eur. 2010. 277).

L'application de la solution *Simmenthal* lui permet de sortir de cette impasse conceptuelle sans pour autant la résoudre.

2. LES CONSEQUENCES DE LA PRIMAUTE SUR LA HIERARCHIE JURIDICTIONNELLE INTERNE

La plénitude de compétence du juge national a toujours eu pour conséquence une forte autonomie du juge national à l'égard des règles procédurales nationales; il semble que la complétude soit aujourd'hui atteinte avec l'idée d'une autonomie envers les juridictions suprêmes de l'ordre juridique interne. L'arrêt Lucchini avait montré que la solution *Simmenthal* pouvait conduire le juge national à écarter l'autorité chose jugée[74], même si l'équilibre avec la primauté ne se fait pas toujours en faveur de celle-ci[75].

Allant plus loin, la Cour de justice a, dans des arrêts récents, tiré toutes les conséquences de *Simmenthal* et montré qu'elle était « prête à s'immiscer dans l'autonomie procédurale des États membres et même, si cela s'avère nécessaire, à remettre en question la hiérarchie juridictionnelle interne »[76]. Pour n'être qu'un prolongement logique de *Simmenthal*, ce « décentrement »[77] du juge national n'en paraît pas moins nouveau. L'autonomisation de la compétence du juge national à l'égard des juridictions supérieures s'opère sur deux plans même si, dans tous les cas, c'est toujours l'interprétation uniforme et l'application effective du droit qui sont en cause. D'une part, le juge national est incité

[74] CJCE 18 juill. 2007, *Lucchini*, aff. C-119/05, Rec. CJCE I-6199, pt 62.

[75] CJUE 22 déc. 2010, *Commission* c. *République slovaque*, aff. C-507/08, pt 60; CJCE 3 sept. 2009, *Fallimento Olimpiclub*, aff. C-2/08, Rec. CJCE I-7501, pt 22.

[76] D. Sarmiento, La question prioritaire de constitutionnalité et le droit européen. L'arrêt *Melki* : esquisse d'un dialogue des juges constitutionnels et européens sur toile de fond française RTD Eur. 2010. 588.

[77] J.-C. Barbato, Le droit communautaire et les recours internes exercés contre les ordonnances de renvoi, RTD Eur. 2009. 267.

(parfois tenu) à avoir une appréciation au fond indépendante des autres juridictions. D'autre part, le juge national doit être pleinement libre d'exercer sa compétence préjudicielle comme il l'entend, sans être entravé par l'appréciation divergente de juridictions supérieures.

2.1. L'insubordination du pouvoir d'appréciation du juge national

Sous l'effet de la jurisprudence *Simmenthal*, la Cour de justice a développé des solutions qui visent explicitement à affranchir le juge national de l'autorité des juridictions supérieures. C'est le cas en particulier de l'obligation d'écarter la solution au fond apportée par le juge suprême ou de celle d'écarter les modulations temporelles décidées par le juge constitutionnel.

L'obligation d'écarter la solution au fond apportée par le juge suprême

La jurisprudence de la Cour de justice a eu pour effet d'amoindrir l'autorité que le juge national doit accorder aux arrêts rendus par des juridictions supérieures. En particulier, l'arrêt *Elchinov*[78] a très clairement confirmé la possibilité pour le juge national d'écarter les décisions rendues par le juge suprême. À la question de savoir si le juge national pouvait valablement être lié par des appréciations portées en droit par la juridiction supérieure, s'il estimait que ces appréciations n'étaient pas conformes au droit de l'Union, la Cour de justice a réaffirmé avec force la jurisprudence *Simmenthal*. Il en résulte que le juge national ayant exercé un renvoi préjudiciel est lié par l'interprétation donnée par la Cour et doit donc écarter les appréciations de la juridiction supérieure s'il estime qu'elles ne lui sont pas conformes[79]. Dans cette affaire, la Cour rappelait d'ailleurs que, en vertu d'une « jurisprudence bien établie », le juge national chargé d'appliquer, dans le cadre de sa compétence, les dispositions du droit de l'Union a l'obligation d'assurer le plein effet de

[78] CJUE 5 oct. 2010, *Elchinov*, aff. C-173/09, nep.

[79] *Ibid*., pt 30.

ces dispositions en laissant au besoin inappliquée, de sa propre autorité, toute disposition nationale contraire, à savoir, en l'occurrence, l'article 224 du code de procédure administrative bulgare qui dispose que les instructions de la Cour suprême administrative relatives à l'interprétation et à l'application de la loi ont, lors de l'examen ultérieur de l'affaire par le tribunal administratif, un caractère contraignant à l'égard de ce dernier[80].

En jugeant ainsi, la Cour de justice n'a pas suivi son avocat général, qui préconisait une solution plus respectueuse de l'autonomie procédurale et de « la structure judiciaire interne de chaque État membre, dont le schéma et l'équilibre ne doivent pas être modifiés sans raison »[81]. Les conclusions de l'avocat général Cruz Villalón faisaient en effet valoir que l'évolution de la jurisprudence permettait de confier de nouvelles responsabilités au juges nationaux. Elles soulignaient ainsi que « contrairement à la situation des années 1970 », le droit de l'Union a « atteint un degré de maturité qui lui permet de garantir son effectivité pratique à l'égard des juridictions nationales, avec une incidence pour l'autonomie des juridictions nationales »[82]. Pourtant, l'avocat général commençait ses conclusions en précisant que toutes les questions posées par le juge national étaient déjà tranchées par la jurisprudence mais que « l'adhésion à l'Union de nouveaux États membres… soulève des questions quant à l'applicabilité d'une jurisprudence conçue et développée à une époque antérieure à l'élargissement »[83]. Il ne faut toutefois pas s'y tromper. Cette réaffirmation n'est pas qu'un simple rappel à l'égard d'un juge moins familier de la jurisprudence traditionnelle de la Cour de justice; la solution

[80] *Ibid*., pt 31.

[81] Conclusions de l'avocat général P. Cruz Villalón présentées le 10 juin 2010 sur *Elchinov*, aff. C-173/09, pt 32.

[82] *Ibid*., pt 31.

[83] *Ibid*., pt 2.

pourrait aussi apparaître comme un avertissement à l'égard des juges d'États fondateurs tentés d'accorder plus de poids à d'autres juridictions qu'à la Cour de justice[84].

Si la Cour de justice n'a pas suivi l'idée d'un assouplissement de sa jurisprudence, il apparaît qu'elle a sans doute eu conscience de la radicalité de sa solution et cherché à en atténuer quelque peu la portée. Cela transparaît dans la reformulation de la question du juge national qui, à l'origine, était de savoir si le juge du fond était lié par les appréciations portées en droit par la juridiction supérieure, lorsqu'il a des raisons de supposer que ces appréciations ne sont pas conformes au droit de l'Union. Constatant que la question posée par le juge national n'excluait pas l'hypothèse où il envisagerait de statuer sans renvoi préjudiciel en s'écartant des appréciations en droit portées dans la même affaire par la juridiction nationale supérieure, qu'il jugerait non conformes au droit de l'Union, la Cour de justice affirme que, puisque tel n'est pas le cas en l'espèce, la question doit être reformulée de façon plus restrictive. De la sorte, la solution exigeante de la Cour de justice ne vaut que pour l'hypothèse où une juridiction nationale serait liée par des appréciations portées en droit par la juridiction supérieure contraires à l'interprétation qu'elle a sollicitée de la Cour[85].

La Cour de justice tempère la portée de sa solution en déplaçant le débat; il s'agirait moins d'annihiler l'autorité des juridictions supérieures que de d'assurer l'autorité des arrêts rendus à titre préjudiciel pour la solution du litige au principal. Mais, s'il ne s'agit peut-être là que d'un rappel « des principes essentiels à la structuration de l'ordre juridique

[84] En effet, « prononcé trois mois après l'arrêt *Melki* et *Abdeli* cité à plusieurs reprises, cet arrêt pourrait être transposé à la question prioritaire de constitutionnalité en France, en ce sens que le juge national ne devrait pas être lié par une décision du Conseil constitutionnel s'il apparaît, au vu de l'interprétation donnée par la Cour de justice, qu'une telle décision est contraire au droit de l'Union » (F. Picod, Le juge national doit suivre la Cour de justice plutôt qu'un juge national supérieur, JCP n° 43, 25 oct. 2010, p. 1061).

[85] CJUE 5 oct. 2010, *Elchinov*, aff. C-173/09, pts 23 à 25..

de l'Union »[86], il n'en induit pas moins une forme de « déhiérarchisation » des juges nationaux à l'égard de leur système juridictionnel. Et si cette solution ne fait que tirer les conséquences de l'arrêt *Simmenthal*, il faut bien en mesurer l'impact. La Cour de justice s'appuie sur les juridictions inférieures pour atténuer l'autorité des juridictions suprêmes et, par là même, asseoir l'autorité de sa propre jurisprudence. Or, écarter une règle procédurale est une chose, passer outre l'autorité de chose jugée d'une juridiction supérieure en est une autre. Aussi, le juge national pourrait se retrouver dans des situations délicates, d'autant que cet arrêt n'est pas le seul à préconiser d'écarter des solutions de juridictions supérieures.

La nécessité d'écarter les modulations temporelles décidées par le juge constitutionnel.

Le juge national doit écarter la loi inconventionnelle, en dépit du maintien temporaire de ses effets décidé par le juge constitutionnel. S'il ne s'agit là encore que d'une conséquence naturelle de la solution *Simmenthal*, la jurisprudence de la Cour de justice n'est explicite que depuis les affaires *Winner Wetten*[87] et *Filipiak*[88]. C'est l'arrêt *Filipiak* qui a le premier imposé l'idée que « la primauté du droit communautaire impose au juge national d'appliquer le droit communautaire et de laisser inappliquées les dispositions nationales contraires, indépendamment de l'arrêt de la juridiction constitutionnelle nationale qui a décidé l'ajournement de la perte de force obligatoire des mêmes dispositions, jugées inconstitutionnelles »[89]. De la même façon, l'affaire *Winner Wetten* nuance l'autorité sur le juge national de la décision de la Cour constitutionnelle fédérale

[86] V. Michel, Les règles procédurales nationales ne peuvent pas priver les juridictions internes de leur faculté de renvoi, Europe n° 12, déc. 2010, comm. 402.

[87] CJUE 8 sept. 2010, *Winner Wetten*, aff. C-409/06, nep, pts 61 et 62. V. F. Picod, Pas de maintien provisoire d'une réglementation contraire au droit de l'Union, JCP 2010, n° 39, p. 1792.

[88] CJCE 19 nov. 2009, *Filipiak*, aff. C-314/08, Rec. CJCE p. I-11049.

[89] CJCE 19 nov. 2009, *Filipiak*, aff. C-314/08, Rec. CJCE p. I-11049, pt 85.

allemande de maintenir à titre transitoire les effets de la réglementation interne. Cette décision du juge constitutionnel ne saurait faire obstacle à ce qu'une juridiction nationale qui constaterait que cette même réglementation méconnaît des dispositions du droit de l'Union décide, conformément au principe de primauté du droit de l'Union, de ne pas appliquer ladite réglementation dans le cadre du litige dont elle est saisie[90]. En France, l'application de cette jurisprudence pourrait se révéler problématique[91]. La portée d'une modulation des effets dans le temps de sa décision par le Conseil constitutionnel sur le juge ordinaire est en effet réglée par l'article 62 de la Constitution[92]. Même si la Cour de justice a pris soin de rappeler qu'« il ne saurait en effet être admis que des règles de droit national, fussentelles d'ordre constitutionnel, portent atteinte à l'unité et à l'efficacité du droit de l'Union », il n'est pas sûr qu'un tel conflit puisse se résoudre si facilement. Pourtant, l'inconventionnalité du maintien d'une loi contraire au droit de l'Union ne fait aucun doute[93]: une telle décision a les mêmes effets qu'une « validation temporaire »[94] qui

[90] CJUE 8 sept. 2010, Winner Wetten, aff. C-409/06, nep, pts 61 et 62.

[91] « Étant donné que les décisions du Conseil constitutionnel s'imposent à toutes les juridictions administratives et judiciaires, celles-ci, dans l'une ou l'autre des deux hypothèses, pourraient s'estimer contraintes de continuer d'appliquer la loi aussi longtemps que la date fixée pour son abrogation n'est pas arrivée ou d'appliquer certains effets de la loi déterminés par le Conseil constitutionnel. Elles pourraient donc s'estimer empêchées, dans le cas où la loi serait également incompatible avec le droit de l'Union, de la déclarer inapplicable au litige » (P. Manin, La question prioritaire de constitutionnalité et le droit de l'Union européenne, op. cit., p. 1023).

[92] « Les décisions du Conseil Constitutionnel ne sont susceptibles d'aucun recours. Elles s'imposent aux pouvoirs publics et à toutes les autorités administratives et juridictionnelles ».

[93] La même remarque vaut pour la modulation des effets de l'annulation d'un acte administratif. Le juge semble toutefois en tenir compte. V., D. Casas, L'annulation de certaines dispositions du code des marchés publics et ses conséquences ; conclusions sur Conseil d'État, 23 février 2005, Association pour la transparence et la moralité des marchés publics e. a, RFDA, 2005, p. 483. Le rapporteur public soulignait ainsi, pour cantonner la jurisprudence AC! au droit interne, « qu'en faisant application de la jurisprudence *Association AC*! à l'occasion de la violation d'une règle de droit communautaire », le Conseil d'État se mettrait « dans la situation d'être accusé d'avoir… manqué au respect du droit communautaire. Cette objection ne repose pas sur une hypothèse d'école ».

s'accommode mal avec la jurisprudence de la Cour de justice[95]. L'hypothèse pourrait rapidement se produire, comme l'illustre le droit français. Le Conseil constitutionnel utilise en effet fréquemment cette technique dans le cadre des décisions « questions prioritaires de constitutionnalité (QPC) »[96]. Plus encore, la Cour de cassation accepte d'appliquer une loi inconventionnelle pour tenir compte de la jurisprudence constitutionnelle[97], ce qui ne va pas dans le sens de l'autonomie souhaitée par la Cour de justice. L'affranchissement a toutefois pour conséquence une autonomie ambivalente du juge national, puisqu'il a pour contrepartie des obligations renforcées en matière préjudicielle et donc une plus forte allégeance du juge national à l'égard de la Cour de justice.

[94] B. Mathieu, Jurisprudence relative à la question prioritaire de constitutionnalité, JCP n° 47, 22 nov. 2010, chron. 1163.

[95] D. Simon, Effet d'exclusion du droit national, Europe, n° 12, déc. 2010, comm. 397.

[96] Le Conseil constitutionnel recourt assez largement aux dispositions de l'alinéa 2 de l'article 62 de la Constitution aux termes desquelles « une disposition déclarée inconstitutionnelle sur le fondement de l'article 61-1 est abrogée à compter de la publication de la décision du Conseil constitutionnel ou d'une date ultérieure fixée par cette décision. Le Conseil constitutionnel détermine les conditions et limites dans lesquelles les effets que la disposition a produits sont susceptibles d'être remis en cause ». V. par exemple, Cons. const., n° 2010-1- QPC, 28 mai 2010, Consorts L. (Cristallisation des pensions), JO 29 mai 2010, p. 9728; Cons. const., 11 juin 2010, n° 2010-2-QPC, *Mme Vivianne* L. (Loi dite « anti-Perruche »), JO 12 juin 2010, p. 10847; Cons. const., n° 2010-10-QPC, 2 juill. 2010, Consorts C. (Tribunaux maritimes commerciaux), JO 3 juill. 2010, p. 12120; Cons. const., 30 juill. 2010, n° 2010-14/22-QPC, M. Daniel W. (Garde à vue), JO 31 juill. 2010, p. 14198; Cons. const., 6 oct. 2010, n° 2010-45-QPC, M. Mathieu P. (Noms de domaines Internet) ; V. P. Puig, Le Conseil constitutionnel et la modulation dans le temps des décisions QPC, RTD civ. 2010. 517.

[97] Par référence à la décision du Conseil constitutionnel du 30 juillet 2010 (Cons. const., n° 2010-14/22-QPC, 30 juill. 2010, M. Daniel W. (Garde à vue), préc.), la Cour de cassation a admis l'application d'une loi inconventionnelle, en l'occurrence contraire aux dispositions de la CEDH, en se fondant sur le principe de sécurité juridique et de la bonne administration de la justice (Crim. 19 oct. 2010, n° 10-82.902, D. 2010. 2809). V. E. Dreyer, La Cour de cassation suspend l'application de l'article 6, § 3, de la Convention européenne jusqu'au 1er juillet 2011, D. 2010. 2809.

2.2. L'autonomisation de la compétence préjudicielle du juge national

L'autonomisation de la compétence du juge national passe par la mise à l'écart de l'obligation faite aux juridictions inférieures, lorsque leur décision de renvoi a fait l'objet d'un appel, de suspendre, voire de rapporter leur demande de décision préjudicielle. La volonté de rendre les juges nationaux plus indépendants des juridictions supérieures s'incarne aussi dans l'élargissement, certes modéré, de l'obligation qui leur est faite de poser une question préjudicielle.

L'indépendance du juge national pour poser une question préjudicielle

Un autre aspect de la jurisprudence *Simmenthal* a été réexaminé. L'arrêt de 1978 avait affirmé que la Cour se considère comme saisie d'une demande à titre préjudiciel « aussi longtemps que cette demande n'a pas été retirée par la juridiction dont elle émane, ou mise à néant, sur recours, par une juridiction supérieure »[98]. Dans l'affaire *Cartesio*[99], la Cour de justice s'est penchée sur la procédure de l'appel prévu par le droit national hongrois, qui pouvait être formé contre une décision ordonnant un renvoi préjudiciel devant la Cour. Selon le droit national, la juridiction d'appel ainsi saisie avait le pouvoir de réformer cette décision, d'écarter le renvoi préjudiciel et d'enjoindre au premier juge de poursuivre la procédure de droit interne suspendue. Classiquement, la Cour de justice ne s'oppose pas à ce que les décisions des juges nationaux restent soumises aux voies de recours normales prévues par le droit national mais l'issue d'un tel recours ne saurait restreindre leur compétence de la saisir s'ils considèrent qu'une affaire soulève des questions relatives à l'interprétation de dispositions de droit de l'Union[100]. La Cour ajoute

[98] CJCE 9 mars 1978, aff. 106/77, Rec. CJCE p. 629, pt 10.

[99] CJCE16 déc. 2008, *Cartesio*, aff. C-210/06, Rec. CJCE p. I-9641.

[100] CJCE 16 janv. 1974, *Rheinmühlen-Düsseldorf*, aff. 166/73, Rec. CJCE p. 33; CJCE 12 févr. 1974, *Rheinmühlen-Düsseldorf*, aff. C-146/73, Rec. CJCE p. 139.

dans l'arrêt *Cartesio* que l'application de règles nationales relatives au droit d'appel contre une décision ordonnant un renvoi préjudiciel, dès lors que seule la décision de renvoi fait l'objet de l'appel, peut affaiblir « la compétence autonome de saisir la Cour que l'article 234 CE confère au premier juge»[101] ; l'autonomie de la compétence du juge national serait remise en cause si, en réformant la décision ordonnant le renvoi préjudiciel, en l'écartant et en enjoignant à la juridiction ayant rendu cette décision de poursuivre la procédure suspendue, la juridiction d'appel pouvait empêcher la juridiction de renvoi d'exercer la faculté de saisir la Cour qui lui est conférée par le Traité[102]. En effet, l'appréciation de la pertinence et de la nécessité de la question préjudicielle relève de la seule responsabilité de la juridiction qui ordonne le renvoi préjudiciel. Ainsi, il incombe à ce seul juge de tirer les conséquences d'un jugement rendu dans le cadre d'un appel contre la décision ordonnant le renvoi préjudiciel et, en particulier, de conclure qu'il convient soit de maintenir sa demande de décision préjudicielle, soit de la modifier, soit de la retirer. L'autonomisation de la compétence du juge national est ici liée à l'idée que, lorsqu'elle pose une question préjudicielle, la juridiction nationale « devient une partie à un débat sur le droit communautaire sans dépendre d'autres autorités ou instances juridictionnelles nationales. Il n'a pas été dans l'intention des rédacteurs du traité qu'un tel dialogue soit filtré par une quelconque autre juridiction nationale, quelle que puisse être la hiérarchie des tribunaux dans l'État membre concerné »[103]. De la même façon, l'avocat général Maduro défendait la thèse selon laquelle la relation nécessairement bilatérale entre la Cour et le juge national auteur d'une question ne pouvait s'accommoder de l'intervention d'une juridiction

[101] CJCE 16 déc. 2008, *Cartesio*, aff. C-210/06, Rec. p. I-9641, pt 95.

[102] CJCE 16 déc. 2008, *Cartesio*, aff. C-210/06, Rec. p. I-9641, pt 95.

[103] Conclusions de l'avocat général Poiares Maduro présentées le 22 mai 2008 sur l'arrêt *Cartesio*, pt 19

supérieure[104]. Le résultat est que l'arrêt *Cartesio* « est de nature à inciter le juge du premier degré à user des prérogatives – discrétionnaires, serait-on tenté d'écrire – qui lui sont accordées par le droit communautaire »[105]. Cependant, il n'est pas sûr que le juge national assumera pleinement les potentialités de cette autonomie[106].

L'affirmation de l'autonomie du juge national peut donner le sentiment que la jurisprudence *Simmenthal* « a été écornée »[107] par l'arrêt *Cartesio* au sujet de la prise en compte des recours internes contre un renvoi préjudiciel. Mais, si l'attendu 10 de l'arrêt *Simmenthal* a en effet été fortement nuancé, c'est peut-être pour appliquer avec plus de force son attendu 21, avec toujours cette idée de plénitude de compétence du juge national. Poussée au maximum, la complétude semble se muer en autonomie de la compétence du juge national.

[104] « Il incombe à la Cour de décider de la recevabilité d'une demande de décision préjudicielle et non à une juridiction nationale qui, dans le contexte procédural interne, occuperait un degré supérieur à celui de la juridiction de renvoi » (Conclusions Poiares Maduro présentées le 22 mai 2008 sur l'arrêt *Cartesio*, pt 20).

[105] C. Nourissat, De quelques précisions sur les relations entre la procédure d'appel et le renvoi préjudiciel en interprétation, Procédures, n° 3, mars 2009, comm. 83.

[106] « Il semble incertain que des juridictions nationales arguant des compétences que leur offre le droit communautaire aillent braver l'obéissance hiérarchique qu'elles doivent aux juridictions nationales d'un degré supérieur. Cela implique d'heurter de front les dispositions procédurales d'un ordre juridique au sein duquel elles sont insérées et qui constitue, pour ainsi dire, leur milieu naturel. C'est d'autant plus improbable que l'absence de hiérarchie organique dans les relations entretenues entre le juge national et le juge communautaire, dans le cadre de l'article 234 TCE, ne permet pas de contrebalancer cette exigence » (J.-C. Barbato, Le droit communautaire et les recours internes exercés contre les ordonnances de renvoi, RTD Eur. 2009. 267).

[107] F. Donnat, Chronique annuelle 2008 de jurisprudence communautaire, RJEP n° 666, juill. 2009, chron. 3.

L'élargissement de l'obligation pour le juge national de poser une question préjudicielle

Dans l'arrêt *Kükücdeveci*, la Cour de justice a refusé de déduire de la jurisprudence *Simmenthal* une obligation de poser la question préjudicielle avant de procéder à l'inapplication d'une loi inconventionnelle, estimant « probablement qu'une telle obligation constituerait un obstacle qui finirait par faire perdre de son attrait à l'application de la jurisprudence *Simmenthal* »[108]. *L'obiter dictum* de l'arrêt *Melki* a néanmoins offert à la Cour de justice une nouvelle occasion d'imposer une obligation spécifique de renvoi préjudiciel. Sa justification est que le caractère prioritaire d'une procédure incidente de contrôle de constitutionnalité d'une loi nationale dont le contenu se limite à transposer les dispositions impératives d'une directive de l'Union pourrait porter atteinte à la compétence qui est la sienne de constater l'invalidité d'un acte de l'Union[109]. En effet, si le caractère prioritaire de l'exception d'inconstitutionnalité aboutit à l'abrogation d'une loi de transposition d'une directive « impérative » en raison de sa contrariété à la Constitution[110], la Cour de justice ne pourrait plus contrôler la validité de la directive par voie préjudicielle[111]. C'est la raison pour laquelle la Cour de justice a écarté la priorité accordée à l'exception d'inconstitutionnalité à la faveur d'une question préjudicielle en appréciation de validité dans ce cas précis. Elle impose ainsi une nouvelle obligation de renvoi ; avant le contrôle incident de constitutionnalité d'une loi dont le contenu se limite à transposer les dispositions impératives d'une directive, les « juridictions

[108] D. Sarmiento, La question prioritaire de constitutionnalité et le droit européen. L'arrêt Melki : esquisse d'un dialogue des juges constitutionnels et européens sur toile de fond française RTD Eur. 2010. 588.

[109] CJUE 22 juin 2010, *Melki et Abdeli*, aff. jtes C-188/10 et C-189/10, pt 54.

[110] Même si le Conseil constitutionnel a entendu prévenir une telle situation : Cons. const., 17 déc. 2010, n° 2010-79-QPC, Kamel D. ; Cons. const., 12 mai 2010, n° 2010-605-DC, Loi relative à l'ouverture à la concurrence et à la régulation des jeux d'argent et de hasard en ligne.

[111] *Ibid*., pt 55.

suprêmes sont tenues d'interroger la Cour de justice sur la validité de cette directive, à moins que la juridiction déclenchant le contrôle incident de constitutionnalité n'ait elle-même choisi de saisir la Cour de justice de cette question »[112].

L'invitation adressée au Conseil constitutionnel de s'engager dans la coopération préjudicielle paraît assez évidente[113], et le refus du Conseil constitutionnel de saisir la Cour de justice pourrait à terme se révéler problématique. L'arrêt *Simmenthal* nous enseigne que l'effet utile du traité « serait amoindri si le juge était empêché de donner, immédiatement, au droit communautaire, une application conforme à la décision ou à la jurisprudence de la Cour »[114]. Il est d'ailleurs assez remarquable que la Cour invalide le principal argument qui avait été soulevé par le Conseil constitutionnel en 2006[115] en précisant que « l'encadrement dans un délai strict de la durée d'examen par les juridictions nationales ne saurait faire

[112] *Ibid*., pt 56.

[113] V. H. Labayle, Question prioritaire de constitutionnalité et question préjudicielle : ordonner le dialogue des juges ?, art. préc.

[114] CJCE 9 mars 1978, aff. C-106/77, Rec. CJCE p. 629, pt 20.

[115] Cons. const., n° 2006-540-DC, 27 juill. 2006, Loi relative au droit d'auteur et aux droits voisins dans la société de l'information, Rec. Cons. const. p. 88, consid. 20 : « devant statuer avant la promulgation de la loi dans le délai prévu par l'article 61 de la Constitution, le Conseil constitutionnel ne peut saisir la Cour de justice des Communautés européennes de la question préjudicielle prévue par l'article 234 du traité instituant la Communauté européenne ; qu'il ne saurait en conséquence déclarer non conforme à l'article 88-1 de la Constitution qu'une disposition législative manifestement incompatible avec la directive qu'elle a pour objet de transposer ; qu'en tout état de cause, il revient aux autorités juridictionnelles nationales, le cas échéant, de saisir la Cour de justice des Communautés européennes à titre préjudiciel ». Cette impossibilité concernait le contrôle a priori qui conditionne l'entrée en vigueur de la loi ; si l'on peut comprendre la nécessité de ne pas ralentir l'intervention du Conseil constitutionnel dans ce cadre, le refus de saisir la Cour de Justice dans le cadre de l'article 61-1 paraît plus difficile à justifier.

échec au renvoi préjudiciel relatif à la validité de la directive » [116]. La Cour souhaite sans doute éluder la concurrence potentielle qui pourrait résulter des décisions du Conseil constitutionnel.

Cette invitation montre aussi que l'indépendance du juge national à l'égard d'autres juges internes ne suffit pas et que c'est en réalité une allégeance plus forte à sa propre jurisprudence qui est recherchée. Ainsi, l'autonomisation du juge national s'accompagne d'une extension de ses compétences, quelle que soit sa place dans la hiérarchie juridictionnelle. Surtout, la valorisation des juges ordinaires a peut-être pour contrepartie une certaine banalisation des juridictions supérieures.

Dès 1978, la Cour de justice a vu dans le juge national la pierre angulaire de l'effectivité et de l'application uniforme du droit communautaire. Points de rencontre entre le droit et le fait, les juridictions nationales sont appelées à l'orthodoxie juridique autant qu'à la créativité intellectuelle, à l'allégeance autant qu'à l'audace. Outil d'émancipation du juge national à l'égard des règles procédurales nationales, la jurisprudence *Simmenthal* devient aujourd'hui l'argument de son autonomie envers les juridictions suprêmes et d'une subordination à la Cour de justice. Pas de révolution donc, juste quelques prolongements. La solution *Simmenthal* s'affirme avec la sérénité des arrêts qui ont fait leurs preuves. Fruit de cette immuable cohérence, les questions nouvelles d'aujourd'hui sont résolues par un retour aux fondamentaux. C'est peut-être là la force du destin.

[116] CJUE 22 juin 2010, *Melki et Abdeli*, aff. jtes C-188/10 et C-189/10, pt 56 ; V. sur ce point, D. Sarmiento, La question prioritaire de constitutionnalité et le droit européen…, art. préc., p. 588.

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L'APPLICATION DU DROIT DE LA CONSOMMATION AUX SERVICES PUBLICS[1]

Guillaume LAZZARIN[2]

INDEX

Depuis l'arrêt Société des eaux du Nord, les juridictions administratives appliquent aux services publics l'article L. 132- 1 du code de la consommation, relatif aux clauses abusives dans les contrats passés entre professionnels et consommateurs. Peu critiquée jusqu'alors, cette jurisprudence revêt pourtant de nombreux défauts, qui mettent en doute son bien-fondé et son opportunité.

[1] Reproduction de l'étude paru sur la *Revue Française de Droit Administratif*, n. 3/2011, p. 591- 599 - Rubrique Services Publics sous la direction de: Jean-François LACHAUME e Bertrand SEILLER .

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Le 11 juillet 2001, la section du contentieux du Conseil d'État opérait, dans une décision *Société des eaux du Nord*, l'intégration du droit des clauses abusives à la légalité administrative[3].

Cette révolution juridique était attendue car les relations qu'entretiennent les usagers avec les services publics industriels et commerciaux ne sont pas uniquement régies par le contrat de droit privé qui les unit. Les modalités de tarification ou de responsabilité du service sont souvent incluses dans un « règlement de service », établi unilatéralement par la collectivité publique, ou dans les clauses réglementaires du contrat de concession[4]. Les usagers des services publics industriels et commerciaux sont donc dans un statut mixte, à la fois contractuel et réglementaire.

Les juridictions judiciaires appliquaient déjà le droit de la consommation aux stipulations du contrat de droit privé[5] passé entre l'usager et le service public industriel et commercial[6]. Dans un souci de réalisme du droit économique, « qui commande que les pratiques d'entreprises soient assujetties de plein droit à toutes les règles applicables aux

[3] CE, sect., 11 juill. 2001, Société des eaux du Nord, Lebon p. 348, concl. C. Bergeal ; AJDA 2001. 853, chron. Guyomar et Collin ; ibid. 893, note G. J. Guglielmi ; D. 2001. 2810, note J. Amar; CJEG 2001. 496, concl. C. Bergeal ; BJCP 2001. 519, concl., note P. Terneyre ; RD publ. 2001. 1495, note G. Eckert ; JCP 2001. I. n° 368, p. 2249, obs. C. Boiteau.

[4] Pour une illustration récente : CAA Paris, 17 mars 2009, Commune de Puteaux, n° 07PA01173: « Considérant que [...] la juridiction administrative est compétente, quelle que soit la nature du service délégué et des liens qui l'unissent aux tiers et usagers, pour se prononcer sur la légalité des clauses réglementaires d'un contrat de concession ou du règlement de service de ladite concession ».

[5] CE 13 oct. 1961, Établissements Campanon-Rey, Lebon p. 567; AJDA 1962. 98, concl. Heumann, note A. de Laubadère ; CJEG 1963. 17, note A.C., D. 1962. 506, note Vergnaud.

[6] Angers, 16 déc. 1987, EDF c. Briant, CJEG 1988. 178, note P. Sablière ; TGI Mâcon, 25 févr. 1991, CJEG 1991. 404, note L. Richer ; Gaz. Pal. 1991. 2. Somm. 515; Civ. 1re, 13 nov. 1996, Bull. civ. I, n° 399.

entreprises, quels que puissent être le procédé ou la forme utilisés »[7], la jurisprudence *Société des eaux du Nord* a étendu ce contrôle au règlement de service. En l'espèce, l'usager d'un service des eaux avait engagé une instance devant le juge civil pour obtenir la condamnation du gestionnaire du service des eaux à réparer le dommage causé par la rupture de son branchement particulier. Cependant, cette responsabilité était exclue par l'article 12 du règlement du service de distribution d'eau, selon lequel « le client abonné aura à sa charge toutes les conséquences dommageables pouvant résulter de l'existence de ces parties du branchement, sauf s'il apparaissait une faute du service des eaux ». Le Conseil d'État était saisi d'une question préjudicielle relative à la légalité de cette disposition. En visant « le code de la consommation et notamment son article L. 132-1 » et en reproduisant cet article dans les motifs de sa décision, il s'est prononcé sans ambiguïté pour l'application directe des dispositions consuméristes relatives aux clauses abusives. Un arrêt *Cainaud* du 29 juin 1994[8] avait pu être interprété comme consacrant l'autonomisation du droit des clauses abusives[9] mais il était difficile d'y voir un arrêt de principe[10].

Contrairement à l'intégration du droit de la concurrence à la légalité administrative, la jurisprudence *Société des eaux du Nord* n'a pas soulevé d'importantes controverses. Certes, elle implique que l'usager de service public soit qualifié de

7 M. Bazex, note sous TA Nice, 28 avr. 2006, Jean-Marc Buti, CCC juill. 2006, p. 34.

8 CE 29 juin 1994, Cainaud, n° 128313, BJCP 1994, n° 19, p. 519, concl. C. Bergeal.

9 J. Huet, La détermination des clauses abusives dans les contrats de service public et les moyens de leur élimination : quel droit ? quels juges ? LPA 6 févr. 1998, n° 16, p. 7.

10 Certes, l'arrêt se réfère dans ses motifs, sans avoir visé le code de la consommation, au critère de l'« avantage excessif », consacré par la loi n° 78-23 du 10 janvier 1978 sur la protection et l'information des consommateurs de produits et de services. Toutefois, l'absence de publication au recueil, et la rédaction de l'arrêt, délicate d'interprétation, font que la question de l'application du droit des clauses abusives par la jurisprudence administrative n'était pas réglée.

consommateur[11], car le champ d'application du droit des clauses abusives est circonscrit aux relations entre professionnels et consommateurs[12]. Si les bénéficiaires des services publics étaient plus perçus comme des usagers que comme de simple consommateurs[13], les deux notions n'ont jamais été perçues comme totalement antagonistes[14]. Dans la mesure où la qualification de l'usager de service public en consommateur permet l'application de règles qui lui sont favorables, l'application du droit des clauses abusives s'est imposée sans heurts, même si certains commentateurs ont regretté le partage de compétence juridictionnelle[15] ou le choix, par l'application directe, de ne pas autonomiser la matière[16]. L'intégration du droit des clauses abusives à la légalité administrative apparaissait comme « inéluctable » car s'inscrivant dans « la droite ligne de la jurisprudence administrative sur l'applicabilité du droit de la concurrence à l'organisation des services publics »[17].

[11] V. J. Amar, De l'usager au consommateur de service public, PUAM, 2001, préf. A. Ghozi ; H. Pauliat, « Usager, client, consommateur du service public industriel et commercial », in Services publics industriels et commerciaux, questions actuelles, LGDJ 2003, p. 81.

[12] Art. L. 132-1, al. 1er, C. consomm.: « Dans les contrats conclus entre professionnels et non-professionnels ou consommateurs, sont abusives les clauses qui ont pour objet ou pour effet de créer, au détriment du non-professionnel ou du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat ».

[13] V. P. Delvolvé, La question de l'application du droit de la consommation aux services publics, Dr. adm. oct. 1993, p. 3.

[14] J. Chevallier, Les droits du consommateur usager des services publics, Dr. soc. 1975, p. 75.

[15] V. J. Amar, De l'application de la règlementation des clauses abusives aux services publics : à propos de l'arrêt Société des eaux du Nord rendu par le Conseil d'État le 11 juillet 2001, D. 2001. 2810.

[16] V. A. Van Lang, Réflexions sur l'application du droit de la consommation par le juge administratif, RD publ. 2004. 1015.

[17] Concl. Bergeal, préc., p. 501

Intervenant dans un contexte de concurrence entre les deux ordres de juridiction, « le Conseil d'État [pouvait] difficilement abandonner le rôle de juge protecteur des usagers du service public »[18].

L'intégration du droit des clauses abusives à la légalité administrative semble désormais fermement établie. Elle ne concerne que peu d'affaires, les exemples se limitant quasiment exclusivement au service public de distribution d'eau, mais permet l'annulation de certaines dispositions de règlement de service, relatives notamment à l'exonération[19] ou la limitation[20] de la responsabilité du gestionnaire du service. Par ailleurs, la jurisprudence *Société des eaux du Nord*, initialement circonscrite à l'examen d'une question préjudicielle, est désormais étendue au recours pour excès de pouvoir, les juridictions administratives inférieures admettant le caractère opérant du moyen tiré de la violation des dispositions de l'article L. 132-1[21].

Alors que la jurisprudence *Société des eaux du Nord* fêtera bientôt ses dix ans, nous voulons pourtant montrer qu'elle n'est pas opportune. D'un côté, le réalisme dont elle se prévaut cause une atteinte certaine à l'intelligibilité des actes administratifs, car elle repose sur une assimilation partielle du règlement de service au contrat. De l'autre côté, au

[18] A. Van Lang, op. cit., p. 1027.

[19] TA Orléans, 20 déc. 2002, Vitteau c. Commune de Beaugency, n° R.G. 99- 1674; TA Nice, 28 avr. 2006, Jean-Marc Buti, BJCP n° 49, p. 438, concl. F. Dieu ; CCC juill. 2006, p. 34, note M. Bazex ; TA Amiens, 13 oct. 2008, Société d'assurances « GAN Assurances », n° 0802015.

[20] CE, sect., 11 juill. 2001, Société des eaux du Nord, préc. ; TA Orléans, 20 déc. 2002, Vitteau c. Commune de Beaugency, préc.

[21] TA Orléans, 20 déc. 2002, Vitteau c. Commune de Beaugency, préc. ; CAA Nantes, 29 déc. 2005, Vitteau c. Commune de Beaugency, AJDA 2006. 1286, note J. Filiaire ; TA Nice, 28 avr. 2006, Jean-Marc Buti, préc. ; TA Nîmes, 30 juin 2010, Association des usagers de l'eau du Grand Avignon gardois, n° 0801875.

regard des modalités d'application du droit des clauses abusives par le juge administratif, le gain de protection pour l'usager-consommateur apparaît très contestable.

1. LES FONDEMENTS DE LA JURISPRUDENCE SOCIETE DES EAUX DU NORD

Contrairement à l'article L. 410-1 du code de commerce, concernant le droit de la concurrence[22], l'article L. 132-1 du code de la consommation ne précise pas explicitement qu'il s'applique aux personnes publiques. De plus, cet article énonce qu'il s'applique à des « contrats », ce qui exclut les règlements, qui sont des actes administratifs unilatéraux. La jurisprudence *Société des eaux du Nord* ne s'explique donc que par une assimilation du règlement au contrat, permettant l'applicabilité du droit des clauses abusives, mais une assimilation incomplète, la conservation du caractère réglementaire justifiant la compétence administrative.

1.1 La nature réglementaire de l'acte, fondement de la compétence administrative

Avant l'intervention de la jurisprudence *Société des eaux du Nord*, nombreuses étaient les décisions de juridictions judiciaires du fond qui ne déclinaient pas leur compétence et appréciaient la légalité des règlements de service au regard du droit des clauses abusives[23].

[22] « Les règles définies au présent livre s'appliquent à toutes les activités de production, de distribution et de services, y compris celles qui sont le fait de personnes publiques, notamment dans le cadre de conventions de délégation de service public ».

[23] La requalification du règlement de service en contrat, bien qu'opérée par la plupart des juridictions civiles inférieures dans les années 1990, n'a pas été suivie systématiquement (v. par ex, Dijon, 2 juill. 1992, Société de distribution d'eau intercommunale c. UFC, RJDA 1993, n° 970: retient le caractère réglementaire du règlement de service).

Le plus souvent, le problème de compétence juridictionnelle n'était pas même envisagé par les juges civils. Ils appréciaient la légalité des dispositions litigieuses sans s'interroger au préalable sur leur nature éventuelle d'acte administratif unilatéral[24]. Parfois, les tribunaux civils opéraient une véritable requalification du règlement de service en contrat, suivant une argumentation explicite visant à intégrer les dispositions réglementaires aux relations contractuelles. Les motifs d'une décision du tribunal d'instance de Grenoble sont à ce titre particulièrement explicites : « Attendu [...] que [la défenderesse] fait valoir dans ses conclusions qu'il est remis au client, lors de l'ouverture de son branchement, le règlement du Service des eaux approuvé par la délibération du Conseil municipal du 30 octobre 1989; qu'il y a donc lieu de considérer ce document comme matérialisant le contrat d'adhésion proposé au nouvel abonné »[25].

Cette conception correspondait à la doctrine exprimée alors par la Commission des clauses abusives dans sa recommandation 85-01 du 17 janvier 1985 relative aux contrats de distribution de l'eau[26] : « quel que soit le mode juridique de distribution, les relations entre l'usager et le service chargé de la distribution d'eau, communément appelé "service des eaux", résultent d'un contrat d'abonnement appelé "règlement du service d'eau"; [...] ce contrat se trouve, du fait de sa nature même, soumis, en ce qui concerne l'ensemble de ses stipulations, au régime du droit privé ». De même, cette requalification du règlement de service en contrat pourrait s'appuyer sur une lecture extensive de l'article L. 132-1, alinéa

[24] Paris, 23 nov. 1993, SNCF c. M. X, n° R.G. 92/21697: appréciation par le juge civil de la légalité d'une clause du tarif général des voyageurs SNCF, lequel constitue pourtant un acte administratif réglementaire (CE 26 juin 1989, Association « Etudes et consommation CFDT ») ; Pau, 20 mai 2000, Régie municipale des eaux de Bayonne c. SAADEG, n° R.G. 98/00187, Juris-Data n° 113322: règlement du service des eaux ; Paris (8e ch.), 29 juin 2000, n° R.G. 1998/09533: règlement de service d'une piscine municipale ; TGI Narbonne, 8 oct. 1998, X. c. régie du Port de Leucate, n° R.G. 97-180: règlement de police d'un port de plaisance.

[25] TI Grenoble, 2 mars 1999, Société des eaux de Grenoble, n° R.G. 11-98-000049.

[26] BOCC, 17 janv. 1985.

4, du code de la consommation, selon lequel les dispositions du présent article « sont applicables quels que soient la forme ou le support du contrat. Il en est ainsi notamment des bons de commande, factures, bons de garantie, bordereaux ou bons de livraison, billets ou tickets, contenant des stipulations négociées librement ou non ou des références à des conditions générales préétablies ». Le règlement du service public apparaît, quant à son contenu, très proche des « conditions générales préétablies » d'un service privé.

Le raisonnement suivi par ces juridictions civiles revenait à considérer que des actes administratifs unilatéraux sont matériellement, en raison de leur contenu, des contrats de droit privé. Il constituait en quelque sorte le contrepied de la jurisprudence du Conseil d'État en matière de clauses réglementaires, d'après laquelle les clauses du contrat d'exploitation du service public relatives à l'organisation même du service public ont un effet réglementaire à l'égard des usagers du service[27]. Chaque ordre de juridiction invoquait une « attractivité » du contrat ou du règlement pour étendre sa propre compétence juridictionnelle.

La requalification judiciaire du règlement en contrat n'en restait pas moins totalement contraire à la jurisprudence du Conseil d'État et du Tribunal des conflits, selon laquelle le cahier des charges liant la personne publique au gestionnaire du service public transmet son caractère réglementaire aux clauses du contrat passé entre l'usager et le service qui le reproduisent en partie XXVI. Les tentatives judiciaires de requalification du règlement de service en contrat ont été censurées par la Cour de cassation.

[27] En conséquence, les usagers, bien qu'étant tiers à ce contrat, peuvent invoquer l'illégalité des clauses réglementaires par voie d'exception (CE 21 déc. 1906, Syndicat des propriétaires et contribuables du quartier Croix-de-Seguey-Tivoli, Lebon p. 962, concl. Romieu ; S. 1907. 3. 33, note Hauriou ; CE, sect., 18 mars 1977, CCI de La Rochelle, Lebon p. 153, concl. Massot) et par voie d'action (CE, ass., 10 juill. 1996, Cayzeele, Lebon p. 274, AJDA 1996. 372, chron. Chauvaux et Girardot, CJEG 1996, p. 382, note Terneyre, RFDA 1997. 89, note Delvolvé, JCP 1997. I. 4019, chron. J. Petit, Mélanges Guibal, p. 545, comm. J.-L. Mestre).

Dans un arrêt du 31 mai 1988, la première chambre civile a jugé que les tribunaux judiciaires ne peuvent, sans méconnaître le principe de la séparation des pouvoirs, déclarer abusives les clauses réglementaires d'un cahier des charges type approuvé par décret et reprises dans un règlement du service des eaux[28]. Cependant, la Cour de cassation, en affirmant qu'elle ne peut apprécier la légalité des dispositions du cahier des charges reprises dans le règlement de service d'eau, n'a pas délimité clairement le champ de son incompétence. En effet, certaines juridictions judiciaires ont interprété cette jurisprudence comme limitant leur incompétence à l'hypothèse dans laquelle les dispositions du règlement de service sont issues d'un décret[29]. Cette question est tranchée dans un arrêt du 22 novembre 1994[30] : le caractère réglementaire d'un règlement de service n'est pas conditionné par le fait qu'il reprenne des dispositions décrétales. Visant la loi des 16 au 16 août 1790 et le principe de séparation des pouvoirs, la Cour de cassation annule le jugement du tribunal d'instance qui a apprécié la légalité d'un règlement du service de distribution d'eau au regard du droit de la consommation sans rechercher si cette disposition avait une nature réglementaire. Malgré cette mise au point, la position de la Cour de cassation reste, à la fin des années 1990, très difficilement suivie par les juridictions inférieures[31]. Elle est

[28] Civ. 1re, 31 mai 1988, Bull. civ. I, n° 161, p. 111, D. 1988. Somm. 406, obs. Aubert.

[29] TGI Mâcon, 25 févr. 1991, UFC de Saône et Loire c. Syndicat intercommunal des eaux de Mâcon, préc. : « seul l'examen des clauses insérées en vertu d'un cahier des charges type approuvé par décret relève des juridictions administratives. Par contre, l'examen des clauses figurant dans le règlement du service des eaux, liant les usagers et le gestionnaire du service, relève de la compétence des juridictions de l'ordre judiciaire ».

[30] Civ. 1re, 22 nov. 1994, Bull. civ., I, n° 343, p. 247.

[31] V. par ex., TI Juvisy-sur-Orge, 6 mars 1997, SA Compagnie générale des eaux, n° R.G. 11-96-01222 ; Pau, 20 mai 2000, préc.

contournée par la théorie de l'acte clair, par laquelle les juridictions du fond rejettent le « caractère sérieux » de la question préjudicielle[32].

Finalement, c'est l'intervention du Conseil d'État, assurant que la compétence administrative ne signifierait plus l'inapplicabilité du droit des clauses abusives aux règlements, qui incite les juridictions civiles à respecter le principe de séparation, ce que montrent leurs décisions les plus récentes[33]. Il faut noter toutefois que la juridiction civile n'est tenue de surseoir à statuer que si la réponse à la question préjudicielle est nécessaire à l'issue du procès[34]. De manière tout à fait classique, la compétence juridictionnelle est donc administrative lorsqu'il faut procéder à l'appréciation de la légalité d'un acte administratif, dans le cadre d'une exception d'illégalité soulevée lors de l'instance civile ou dans le cadre d'un recours pour excès de pouvoir. La jurisprudence *Société des eaux du Nord* n'apporte aucune innovation quant aux critères de partage des compétences entre les deux ordres juridictionnels.

[32] Montpellier, 15 mai 2001, M. X c. SA SAUR, Juris-Data n° 154157: à propos d'un règlement du service de l'assainissement renvoyant aux dispositions réglementaires issues des articles R. 326s. du code des communes dont le requérant soulève l'exception d'illégalité au regard de la directive 93/13 du 5 avril 1993 concernant les clauses abusives dans les contrats conclus avec les consommateurs.

[33] Paris, 26 janv. 2007, SAS Dalkia France c. HLM Résidence le logement des fonctionnaires, n° R. G. 05/01781, Lamyline.fr : règlement du service du réseau de chauffage urbain ; Paris, 8 avr. 2009, SA Conseil et financement en informatique et autres c. SCS Compagnie des eaux de Paris, n° R.G. 04/47462, Lexbase : règlement du service des eaux.

[34] Montpellier, 4 sept. 2001, Commune de Leucate, Juris-Data n° 170748: la cour d'appel ne renvoie pas la question préjudicielle tirée de l'illégalité d'un règlement de police prévoyant l'irresponsabilité d'une commune dans la mesure où elle relève l'absence de faute de cette commune ; Civ. 1re, 20 nov. 2001, n° 99- 13.731, inédit : le défaut d'information à l'usager du système d'indexation des prix, prévu dans le contrat d'exploitation et le règlement du service des eaux, constitue une faute dans l'exécution contractuelle de bonne foi, sans qu'il soit besoin d'apprécier la légalité de ce règlement de service.

Les tentatives judiciaires de requalification du règlement de service en contrat étaient bien sûr contraires au principe de séparation des autorités administrative et judiciaire. Elles avaient néanmoins l'avantage de la cohérence, en ne faisant pas varier la nature de l'acte contrôlé selon qu'il s'agit de l'applicabilité du droit des clauses abusives ou de la compétence juridictionnelle. La jurisprudence du Conseil d'État n'a pas ce mérite. D'acte administratif unilatéral concernant la compétence juridictionnelle, le règlement de service devient contrat lorsque se pose la question de l'applicabilité du droit des clauses abusives.

1.2 La relation contractuelle, fondement de l'applicabilité

L'apport de la jurisprudence Société des eaux du Nord pourrait se résumer ainsi: le caractère réglementaire d'un acte justifie la compétence du juge, non l'inapplicabilité du droit de la consommation. Cependant, ce critère de compétence juridictionnelle ne permet pas de justifier l'applicabilité du droit des clauses abusives devant le juge administratif, dans la mesure où l'article L. 132-1 du code de la consommation s'applique uniquement aux contrats.

Paradoxalement, le juge administratif ne soumet pas les contrats administratifs, qui contiennent pourtant des « clauses », au droit des clauses abusives[35]. La raison de l'inapplicabilité aux contrats administratifs ne résulte pas, bien entendu, de l'absence de relation contractuelle. Elle tient au champ d'application personnel du droit des clauses abusives, plus précisément au statut de professionnel des contractants de l'administration[36].

[35] V. J. Huet, La détermination des clauses abusives dans les contrats de service public et les moyens de leur élimination : quel droit ? quels juges ? art. préc. ; E. Delacour, « Délégation de service public et droit de la consommation. La question de l'applicabilité du régime des clauses abusives », Contrats Marchés publ., sept. 2001, p. 4; B. Dumeril, Délégations de service public et usagers: clauses abusives, une notion irrésistible, Le Moniteur, 2001, n° 5108, p. 120.

[36] Au-delà des règles propres au champ d'application du droit des clauses abusives, cette exclusion est sans doute souhaitable en raison de la contradiction latente entre clause abusive et clause exorbitante du droit commun. V. J.

D'après la jurisprudence du Conseil d'État, les titulaires d'un marché public sont des professionnels, qui ne peuvent se prévaloir de la protection offerte par le droit des clauses abusives[37]. S'il est envisageable que la personne publique soit considérée comme consommateur ou non-professionnel, et bénéficie à ce titre de la protection consumériste[38], seule la jurisprudence judiciaire l'a pour l'instant reconnu, dans le cadre d'un litige portant sur un contrat de droit privé[39]. Dans le cas du règlement de service, la difficulté ne provient pas tant de l'existence d'un rapport entre consommateur et professionnel que de la recherche de « clauses » dans un règlement administratif. L'application du droit des clauses abusives repose nécessairement sur l'assimilation du règlement au contrat. Aucune des décisions par lesquelles le juge administratif applique le droit des clauses abusives à un règlement n'explique pourquoi elle dépasse cette apparente contradiction. La lecture des conclusions de Catherine Bergeal montre la confusion sur laquelle repose l'intégration du droit des clauses abusives à la légalité administrative: « la question nouvelle que pose la requête de la Société des Eaux du Nord est celle de savoir si sont applicables aux contrats

Huet, art. préc.; M. Bazex, Clauses abusives et contrats de l'administration, note sous TA Nice, 28 avr. 2006, Jean-Marc Buti, CCC 2006. Comm. 145; G. Clamour, Personnes publiques et droit de la consommation, J.-Cl. adm., fasc. 150-10, spéc. n° 90 s.; contra, F. Linditch, « La protection en droit public », in C. Jamin et D. Mazeaud [dir.], Les clauses abusives entre professionnels, Economica, 1998, p. 78.

[37] CE 23 févr. 2005, Association pour la transparence et la moralité des marchés publics, n° 264712, Lebon p. 71; JCP adm. 2005. I. 190, note F. Linditch ; Contrats Marchés publ. 2005. Comm. 107, note G. Eckert ; AJDA 2005. 669, chron. F. Donnat et D. Casas, RLC 2005/4, n° 294, note G. Clamour : « Considérant [...] que les dispositions du code des marchés publics régissent la passation et l'exécution des marchés passés par les personnes publiques mentionnées à son article 2 avec des professionnels pour répondre à leurs besoins en matière de travaux, de fournitures ou de services ; que, par suite, les organismes requérants ne peuvent utilement invoquer les dispositions précitées de l'article L. 132-1 du code de la consommation qui ne s'appliquent qu'aux relations entre un professionnel et un non-professionnel ou consommateur ».

[38] V. S. Perdu, Le juge administratif et la protection des consommateurs, AJDA 2004. 481, spéc. p. 488s.

[39] Versailles, 17 nov. 2006, Commune d'Attainville, R.G. n° 05/04455: litige à propos du contrat d'assurance passé par une commune. La cour d'appel juge que la commune peut se prévaloir de la qualité de consommateur.

conclus entre les services publics industriels et commerciaux et leurs usagers, les dispositions du code de la consommation, qui prohibent "dans les contrats conclus entre professionnels et non-professionnels ou consommateurs, les clauses abusives" »[40]. Or, dans cette affaire, le Conseil d'État n'est pas saisi du contrat passé entre l'usager et le service public industriel et commercial, qui relève du droit privé. Au contraire, la raison même de sa compétence repose sur la nature réglementaire de l'acte dont il doit apprécier la légalité. Le commissaire du gouvernement Frédéric Dieu relève cette contradiction: « les dispositions de l'article L. 132-1 du code de la consommation prévoient expressément, afin de pouvoir l'appliquer, l'existence d'un contrat et de parties à celui-ci [...]. L'application de ces dispositions au recours de M. Buti est donc loin d'être évidente, d'autant que le caractère abusif d'une clause s'apprécie au regard de l'économie générale du contrat qui la contient, appréciation en l'espèce impossible puisque vous êtes saisis, en excès de pouvoir, de la question de la légalité de dispositions réglementaires »[41]. L'assimilation du règlement au contrat comme justification de l'applicabilité du droit des clauses abusives est démontrée implicitement par les décisions refusant l'application du droit des clauses abusives. Lorsque les relations entre les administrés et l'administration naissent non d'un contrat mais d'un acte administratif individuel, le droit des clauses abusives est inapplicable, y compris à l'acte réglementaire. Ainsi, la Cour administrative d'appel de Bordeaux refuse d'appliquer le droit des clauses abusives à la délibération d'une collectivité établissant les conditions d'attribution d'une subvention[42]. De même, la Cour administrative d'appel de Marseille rejette l'applicabilité de l'art. L. 132-1 du code de la consommation à un règlement de police, dans le cadre d'une action intentée par le titulaire d'une autorisation unilatérale d'occupation du domaine public[43] : « Considérant, en premier lieu, que les autorisations

[40] Concl. préc., p. 496.

[41] F. Dieu, concl. sur TA 28 avr. 2006, Jean-Marc Buti, BJCP n° 49, p. 438, spéc. p. 439.

[42] CAA Bordeaux, 16 avr. 2008, Frédéric Viprey, n° 06BX01014.

[43] CAA Marseille, 28 juin 2004, SA CGU Courtage c. Commune de Cannes, n° 02MA00349: article de l'arrêté du maire de Cannes réglementant la foire de Noël, par lequel la ville décline toute responsabilité, notamment pour les

d'occupation du domaine public dont bénéficient les forains à l'occasion de la Foire de Noël à Cannes constituent des permis de stationnement accordés par décisions unilatérales du maire de Cannes, en vertu de ses pouvoirs de police du domaine public ; que, par suite et en tout état de cause, la société requérante ne peut utilement soutenir que l'article 12 de l'arrêté du 14 décembre 1992 par lequel le maire de Cannes a réglementé la Foire de Noël de 1992-1993, qui est de nature réglementaire et non contractuelle, serait contraire aux dispositions de l'article L.132-1 du code de la consommation ». Finalement, « une disposition réglementaire telle qu'un règlement de service d'eau ne peut être confrontée aux dispositions de l'article L. 132-1 du code de la consommation que si elle a vocation à devenir une clause contractuelle. Dans le cas contraire, le moyen tiré de la violation des dispositions de l'article L. 132-1 du code de la consommation ne peut qu'être inopérant »[44]. Quitte à se prévaloir d'un certain réalisme, transgressant les catégories d'actes juridiques pour donner leur pleine application à des règles protégeant les consommateurs, il paraît regrettable que la jurisprudence Société des eaux du Nord se limite aux seuls règlements « contractuels ». Il est souvent écrit que seuls les services publics industriels et commerciaux, à l'exclusion des services publics administratifs, sont soumis au respect du droit des clauses abusives[45]. Plus exactement, l'applicabilité ne dépend pas de la nature du service mais de l'existence de relations contractuelles entre l'usager et le service. C'est dans la mesure où les usagers des services publics administratifs sont considérés comme étant dans une situation légale et règlementaire qu'ils ne bénéficient pas de la protection du droit des clauses abusives[46]. Il en résulte que l'applicabilité du droit des clauses abusives à un service

dégâts que les installations foraines pourraient subir du fait d'événements extérieurs (attentats, intempéries, coups de mer, coups de vent, etc.), sauf en cas de faute lourde du maire dans l'exercice de ses pouvoirs de police.

[44] F. Dieu, concl. préc., p. 440.

[45] V. J. Amar, Plaidoyer en faveur de la soumission des services publics administratifs au droit de la consommation, CCC janv. 2002, p. 13.

[46] Le statut de professionnel du service public administratif pourrait également être discuté, mais il faut noter que la jurisprudence administrative a reconnu qu'un service public administratif pouvait constituer une activité

public peut dépendre, non de la nature du service public lui-même, mais du mode de gestion de ce service public. En effet, des prestations équivalentes seront ou non soumises au droit des clauses abusives selon qu'elles sont gérées en régie par l'État ou par des personnes privées. Tel est le cas du service public de l'enseignement. Les élèves de l'enseignement public n'étant pas liés par un contrat à l'Éducation nationale[47], ils ne bénéficient pas de l'application du droit des clauses abusives. Au contraire, les élèves de l'enseignement privé sont liés par contrat à leur établissement d'enseignement, ce qui permet aux tribunaux civils de vérifier que ces contrats ne contiennent pas de clauses abusives[48]. Il y a donc une différence de traitement entre des usagers d'un même service public selon qu'il est géré par une personne privée ou en régie par l'État. La jurisprudence Société des eaux du Nord est ambivalente: le règlement de service est assimilé au contrat quant à l'applicabilité de l'article L. 132-1 du code de la consommation, mais conserve sa qualification de règlement pour déterminer l'ordre de juridiction compétent. Dans un souci de cohérence, il faudrait, soit que la nature réglementaire du règlement de service conduise à l'inapplicabilité du droit des clauses abusives, soit reconnaître sa nature contractuelle, ce qui commanderait la compétence juridictionnelle de l'ordre judiciaire. L'application du droit des clauses abusives par la jurisprudence administrative est d'ailleurs plus problématique que l'application du droit de la concurrence. En effet, le droit de la concurrence appréhende des pratiques (entente, abus de position dominante), dont la définition peut transcender les catégories d'actes juridiques : la qualification d'acte

économique (CE, ass., 31 mai 2006, Ordre des avocats au barreau de Paris, Lebon p. 272; BJCP 2006, p. 295, concl. Casas ; CJEG 2006. 430, concl. ; RFDA 2006. 1048, concl. ; AJDA 2006. 1592, chron. C. Landais et F. Lenica ; JCP adm. 2006, n° 1133, note F. Linditch ; RLC 2006, p. 44, note G. Clamour ; Dr. adm. juill.-août 2006, n° 129, note M. Bazex).

[47] Cependant, les prestations moyennant une contrepartie financière, comme la demi-pension ou l'internat, donnent lieu à des contrats.

[48] Bordeaux, 4 nov. 1993, Boucharel, Lamyline.fr ; Civ. 1re, 2 avr. 2009, X. c. société École privée bilingue, n° 08-11.596, inédit.

administratif n'est pas exclusive de celle d'entente ou d'abus de position dominante. Au contraire, le droit des clauses abusives s'applique à une catégorie déterminée d'actes juridiques, les contrats. L'extension de son application aux règlements entre donc directement en contradiction avec son champ d'application. L'objectif poursuivi par l'intégration du droit des clauses abusives à la légalité administrative, c'est-à-dire la protection de l'usager, pourrait justifier cette atteinte à l'intelligibilité des actes administratifs. Malheureusement, dans son application, la jurisprudence Société des eaux du Nord ne tient pas cette promesse.

2. L'APPLICATION DE LA JURISPRUDENCE *SOCIETE DES EAUX DU NORD*

L'application du droit des clauses abusives apparaît généreuse, dans la mesure où elle semble offrir « une nouvelle garantie »[49] à l'usager de services publics. En dépit de cette apparence, le gain de protection est illusoire. Les décisions des juridictions administratives, peu nombreuses, n'ont pas réussi à convaincre que le juge administratif était un spécialiste du droit des clauses abusives. Elles n'échappent pas à un certain laconisme, et les recours objectifs dont est saisi le juge administratif s'adaptent mal à l'analyse *in concreto* que commande le droit des clauses abusives[50]. Les contradictions inhérentes à l'application directe du droit des clauses abusives par le juge administratif vont à l'encontre de l'objectif poursuivi par cette législation. Ainsi, l'applicabilité du droit des clauses abusives se base sur l'existence d'une relation contractuelle, mais au stade de l'application de ces règles, le juge administratif relève le contexte particulier de service public dans lequel cette relation contractuelle se noue. Le service public vient alors limiter

[49] G. J. Guglielmi, note préc., p. 1500.

[50] En effet, le « déséquilibre significatif » s'apprécie au regard de la situation concrète du consommateur. La méthode de contrôle du juge administratif manque de souplesse. Sous l'apparence d'effectuer cette analyse concrète, le juge administratif s'en tient à un certain degré de généralité : il examine si le consommateur, en général, peut exercer les obligations qui lui sont demandées. Au contraire, les juridictions civiles ne s'attachent pas à la situation de tout consommateur mais à la position précise du requérant.

l'effet protecteur du droit des clauses abusives. Surtout, l'application directe du droit des clauses abusives ne permet pas d'approfondir le contrôle déjà opéré par le juge administratif sur les actes réglementaires.

2.1. Le service public, limite à l'application du droit des clauses abusives

Le raisonnement par lequel le commissaire du gouvernement Catherine Bergeal a convaincu la section du contentieux du Conseil d'État d'appliquer le droit des clauses abusives apparaît assez contradictoire.

Dans un premier temps, ses conclusions justifient l'application du droit des clauses abusives par l'identité de situation entre l'usager et le consommateur: « il est des services publics qui assurent des prestations dans des conditions exactement similaires à celles d'une entreprise privée et dont l'usager qui paie une somme équivalente au service se trouve bien dans la situation d'un consommateur. Il s'agit en particulier des services assurant la fourniture de biens comme l'électricité, le gaz et l'eau »[51]. Cependant, le Conseil d'État est invité dans un second temps à développer sa propre interprétation de la notion de clause abusive: « vous pourrez être amené dans ce contrôle à avoir de la notion de clause abusive une interprétation différente de celle du juge judiciaire, parce qu'il vous faudra concilier et combiner les exigences du code de la consommation avec celles du service public qui peuvent justifier pour les usagers certaines contraintes »[52].

Les relations qui existent entre un service public et son usager ne correspondent pas à la relation type entre le professionnel et le consommateur idéalisée par le droit de la consommation. Il en résulte que le juge administratif prend en compte les besoins du service public dans l'appréciation du « déséquilibre significatif entre les droits et les obligations des parties ». Le fondement juridique de la prise en compte du service public

[51] Concl. préc., CJEG 2001. 501.

[52] Ibid.

repose sur une interprétation de l'article L. 132-1, alinéa 5, du code de la consommation, selon lequel « le caractère abusif d'une clause s'apprécie en se référant, au moment de la conclusion du contrat, à toutes les circonstances qui entourent sa conclusion, de même qu'à toutes les autres clauses du contrat [...] ». Un considérant de principe de l'arrêt Société des eaux du Nord effectue une véritable réécriture de l'alinéa 5: « le caractère abusif d'une clause s'apprécie non seulement au regard de cette clause elle-même mais aussi compte tenu de l'ensemble des stipulations du contrat et, lorsque celui-ci a pour objet l'exécution d'un service public, des caractéristiques particulières de ce service »[53]. Le fondement de la prise en compte du service public est ici différent de celui prévalant pour le droit de la concurrence[54] ou les autres dispositions consuméristes[55], parce qu'il repose sur l'application directe de la matière, non sur son autonomisation. Cette interprétation extensive de l'alinéa 5 est propre au juge administratif. Aucune décision émanant de juridictions civiles, qui connaissent pourtant de litiges impliquant des services publics industriels et commerciaux,

[53] CE, sect., 11 juill. 2001, Société des eaux du Nord, préc.

[54] CE, sect. 26 mars 1999, Société Eda, Lebon p. 96, concl. J.-H. Stahl ; AJDA 1999. 427, concl., note M. Bazex ; RFDA 1999. 977, note Pouyaud; D. 2000. 204, note Markus ; RD publ. 2000. 353, obs. Guettier : « Considérant que s'il appartient à l'autorité administrative affectataire de dépendances du domaine public de gérer celles-ci tant dans l'intérêt du domaine et de son affectation que dans l'intérêt général, il lui incombe en outre lorsque, conformément à l'affectation de ces dépendances, celles-ci sont le siège d'activités de production, de distribution ou de services, de prendre en considération les diverses règles, telles que le principe de la liberté du commerce et de l'industrie ou l'ordonnance du 1er décembre 1986 dans le cadre desquelles s'exercent ces activités ; qu'il appartient alors au juge de l'excès de pouvoir, à qui il revient d'apprécier la légalité des actes juridiques de gestion du domaine public, de s'assurer que ces actes ont été pris compte tenu de l'ensemble de ces principes et de ces règles et qu'ils en ont fait, en les combinant, une exacte application ».

[55] CE 13 mars 2002, Union Fédérale des Consommateurs, Lebon p. 94; BJCP 2002 n° 22, p. 230, concl. R. Schwartz ; AJDA 2002. 978, note Guglielmi et Koubi ; RFDA 2003. 772, étude C. Deffigier : dans l'application de l'article L. 122-1du code de la consommation sur la vente liée, le Conseil d'État reprend la formulation du considérant de principe de la jurisprudence Société Eda : « il appartient au juge de l'excès de pouvoir [...] de s'assurer que ces tarifs ont été pris compte tenu de l'ensemble des règles applicables et qu'il en a été fait, en les combinant, une exacte application ».

ne fait apparaître cette prise en compte du contexte de service public dans l'appréciation du caractère abusif d'une clause. À première vue, l'originalité de la méthode du juge administratif, bien qu'elle modifie la situation de l'usager par rapport à celle du consommateur, ne semble pas le désavantager. Les caractéristiques du service public « pourront, dans certains cas, justifier le caractère déséquilibré d'un contrat, mais à l'inverse, dans certains autres, elles conduiront le juge administratif à se montrer plus sévère que le juge judiciaire dans l'appréciation du caractère abusif d'une clause, compte tenu de la nature du cocontractant de l'usager, prestataire d'un service essentiel en situation de monopole »[56]. Dans l'arrêt Société des eaux du Nord, le Conseil d'État relève que les dispositions litigieuses s'insèrent « pour un service assuré en monopole, dans un contrat d'adhésion », sans être « justifiées par les caractéristiques de ce service public ». Le service public paraît donc aggraver le déséquilibre entre les parties par ses conditions d'organisation (monopole, contrat d'adhésion), qui empêchent la négociation entre l'usager et le service. En réalité, les hypothèses dans lesquelles le service public aggrave le caractère abusif ne sont pas propres aux services publics. De nombreuses activités privées proposent des contrats d'adhésion et bénéficient d'un monopole. Le juge civil prend en compte ces paramètres dans des litiges purement privés, dans la mesure où ils font partie de l'économie générale du contrat. En revanche, seul le juge administratif considère que les nécessités du service public peuvent couvrir le déséquilibre significatif. Le contexte de service public justifie la présence de clauses abusives, car la relation de service public est déséquilibrée par nature. La prééminence de la défense de l'intérêt général justifie qu'il y ait parfois déséquilibre entre les droits et les obligations respectifs du service public et de l'usager. Il en résulte que l'usager est moins bien protégé que le consommateur. La disposition d'un règlement de service, bien qu'elle introduise un déséquilibre significatif, peut donc ne pas

[56] G. J. Guglielmi, note préc., p. 853.

être jugée abusive[57]. Premièrement, le déséquilibre significatif peut être justifié par l'exigence d'adaptation du service. Ainsi, le tribunal administratif d'Orléans refuse d'annuler l'article du règlement du service des eaux renvoyant à la faculté de modification unilatérale du règlement du service d'eau par le conseil municipal. Le tribunal administratif considère qu'« eu égard à la nature du service public de distribution de l'eau, il n'est pas en soi abusif de prévoir que l'abonné soit soumis à des clauses réglementaires susceptibles de garantir la continuité et l'adaptation du service »[58]. En effet, la modification unilatérale des conditions d'organisation du service public est une prérogative traditionnelle de la collectivité publique en charge d'un service public[59]. Deuxièmement, le caractère abusif peut également être couvert par la continuité du service, la bonne marche du service. N'a pas été jugé abusif l'article d'un règlement de service permettant au service des eaux d'exiger le paiement intégral de l'abonnement lorsque l'abonné, dans une période de moins d'une année, sollicite la cessation de son abonnement puis la réouverture du branchement et la réinstallation du compteur, car il « vise à garantir le service de demandes répétitives et abusives »[60]. De la même manière, l'article permettant au service des eaux de refuser l'ouverture d'un branchement si les installations intérieures sont susceptibles de nuire au fonctionnement normal de la distribution publique a « pour objet de garantir la qualité et la continuité du service »[61] et ne présente donc pas un caractère abusif. Enfin, une décision récente du tribunal administratif de Nîmes étend cette logique à l'équilibre financier du

[57] Les décisions du juge administratif relèvent explicitement l'existence du déséquilibre significatif lorsque la disposition est jugée abusive. A l'inverse, elles n'énoncent pas qu'il n'y a pas déséquilibre significatif, lorsque le service public couvre le caractère abusif.

[58] TA Orléans, 20 déc. 2002, Vitteau c. Commune de Beaugency, préc.

[59] CE 2 févr. 1983, Union des transports publics urbains et régionaux, Lebon p. 33, RD publ. 1984. 212, note J.-M. Auby ; RFDA 1984. 45, note Llorens.

[60] TA Orléans, 20 déc. 2002, Vitteau c. Commune de Beaugency, préc.

[61] CAA Nantes, 29 déc. 2005, Vitteau c. Commune de Beaugency, préc.

service public en jugeant que les sanctions prévues par le règlement de service en cas d'impayés (fermeture du branchement et paiement de frais de fermeture) « ne présentent, par elles-mêmes, un caractère abusif, dès lors qu'elles sont justifiées par la nécessité de sauvegarder l'équilibre financier du service public de distribution de l'eau »[62]. La prise en compte des particularités du service public, si ce n'est quant à son fondement juridique, n'est pas critiquable en soi, mais elle réduit la protection de l'usager et l'intérêt même d'appliquer le droit des clauses abusives. L'application du droit des clauses abusives aux services publics, censée rapprocher l'usager du consommateur, constitue finalement un révélateur de leurs différences. La faiblesse de la jurisprudence Société des eaux du Nord est encore renforcée au regard des autres moyens de droit qui permettraient de protéger l'usager.

2.2 L'inutilité de l'application directe du droit des clauses abusives

Toute utilisation du droit des clauses abusives n'est pas inutile. L'opposabilité de ces règles, consacrée par la jurisprudence *Société Dodin*[63], permet de résoudre certaines difficultés, sans avoir les défauts de l'application directe. Il ne s'agit pas de contrôler si l'acte administratif constitue directement une clause abusive, mais de vérifier que cet acte n'a pas pour effet nécessaire de placer ses destinataires en situation de violer le droit de la consommation[64]. Or, pour la Cour de cassation, conformément à la directive communautaire du 5 avril 1993 relative aux clauses abusives dans les contrats conclus avec

[62] TA Nîmes, 30 juin 2010, Association des usagers de l'eau du Grand Avignon gardois, préc.

[63] CE 6 juill. 2005, Société Dodin et société Demathieu et Bard, Lebon p. 309, JCP 2005. II. 2065, concl. F. Donnat : contrôle du décret approuvant le contrat type relatif aux transports publics routiers de marchandises.

[64] Une démarche identique est suivie pour le droit de la concurrence : CE, sect., 3 nov. 1997, Société Million et Marais, Lebon p. 406, concl. J.-H. Stahl ; RD publ. 1998. 256, note Y. Gaudemet ; AJDA 1998. 247, note O. Guezou.

les consommateurs[65], les clauses types issues d'un règlement sont exclues du contrôle des clauses abusives[66]. La jurisprudence *Société Dodin* est donc opportune, car elle permet de contrôler des décrets instaurant des clauses types, qui sont normalement soustrait au droit des clauses abusives[67]. L'application directe du droit des clauses abusives par le juge administratif ne revêt pas la même utilité que son opposabilité. Le commissaire du gouvernement Frédéric Dieu estime que « considérer le moyen [tiré de la violation de l'article L. 132-1 du code de la consommation] comme inopérant reviendrait à placer le justiciable devant un quasi-déni de justice puisque le juge judiciaire est incompétent pour se prononcer sur la légalité de dispositions de nature réglementaire »[68]. Cet argument n'emporte pas la conviction, car l'application du droit des clauses abusives n'est pas forcément nécessaire pour annuler les dispositions réglementaires en cause. La recherche du déséquilibre significatif entre dans une logique contractuelle. Cependant, dans le cadre de la jurisprudence *Société des eaux du Nord*, le juge administratif n'intervient pas en tant que juge d'un contrat, mais comme juge de la légalité d'un acte administratif réglementaire.

[65] Art. 1-2 : « Les clauses contractuelles qui reflètent des dispositions législatives ou réglementaires impératives ainsi que des dispositions ou principes des conventions internationales, dont les États membres ou la communauté sont partis, notamment dans le domaine des transports, ne sont pas soumises aux dispositions de la présente directive ».

[66] Civ. 2e, 21 oct. 2004, n° 03-15.478, inédit : « Ne peut constituer une clause abusive ou illicite la clause figurant dans un contrat d'assurance conforme à une clause type dont l'usage était expressément autorisé par un arrêté en vigueur au moment où ledit contrat a été conclu et a produit ses effets ».

[67] Toutefois, l'annulation ainsi effectuée par le juge administratif peut s'avérer insuffisante à protéger l'usager. La Cour de cassation juge que « la déclaration d'illégalité par la juridiction administrative d'une clause type réglementaire [issue de l'arrêté interministériel du 27 juin 1980, pris en application de l'art. L. 667 CSP [...] ne saurait, sans porter atteinte aux principes de respect des droits acquis et de sécurité juridique, priver rétroactivement d'efficacité la clause qui en est la reproduction, figurant dans un contrat passé et exécuter avant que le juge administratif ne déclare illégal l'arrêté sur la base duquel elle avait été stipulée » (Civ. 2e, 21 oct. 2004, préc.).

[68] F. Dieu, concl. préc., p. 439.

Or le contrôle de l'unilatéralisme permet d'aboutir à l'annulation des dispositions litigieuses des règlements de service. D'un côté, le contrat, en tant qu'accord de volonté, constitue la loi des parties. Il donne une grande liberté dans la détermination des engagements contractuels. De l'autre côté, l'administration ne saurait se soustraire de ses obligations légales par un règlement, car cet acte constitue un procédé unilatéral. Dans sa thèse, François Béroujon a présenté l'application du droit des clauses abusives aux services publics comme étant « un complément relatif à la protection contre le détournement de pouvoir »[69]. En effet, le détournement de pouvoir concrétise l'utilisation par l'autorité administrative du pouvoir d'organisation du service public dans un but autre que celui pour lequel il lui a été conféré. Il se rapproche donc du concept de clause abusive, laquelle est stipulée dans l'intérêt exclusif du professionnel. Plus que le contrôle du but de l'acte, toujours délicat à mettre en œuvre, nous pensons que le contrôle de la violation de la loi, sans faire application directe de l'article L. 132-1 du code de la consommation, suffit à protéger les usagers. Certaines dispositions des règlements de service aujourd'hui annulées sur le fondement du code de la consommation pourraient l'être sur le fondement de législations particulières. L'usager doit se soumettre à des normes édictées unilatéralement par l'organisme qui assure le fonctionnement du service, mais ces normes réglementaires doivent elles-mêmes respecter les normes supérieures, notamment législatives. L'article L. 210-1, alinéa 2, du code de l'environnement consacre un « droit d'accéder à l'eau potable dans des conditions économiquement acceptables par tous ». L'interprétation de cette norme de valeur législative pourrait permettre de fonder l'annulation des dispositions réglementaires relatives aux conditions d'accès au service d'eau potable. Le service public de distribution d'eau potable est également régi par les articles L. 2224-12 et suivants du code général des collectivités territoriales. Ces textes permettent de fonder des annulations. Par exemple, l'article d'un règlement de service des eaux imposant la garantie du locataire par le propriétaire, annulé par le tribunal administratif d'Orléans comme revêtant un

[69] F. Béroujon, L'application du droit de la consommation aux gestionnaires des services publics. Éléments de réflexion sur l'évolution du droit des services publics, thèse Grenoble II, 2005, p. 374.

caractère abusif[70], est contraire à l'article L. 2224-12-3, alinéa 2, du code général des collectivités territoriales, selon lequel « pour les abonnés domestiques, les demandes de caution ou de versement d'un dépôt de garantie sont interdites ». De manière plus générale, les principes traditionnels dégagés par la jurisprudence du Conseil d'État sont aussi efficaces que l'application du droit des clauses abusives. Le contrôle des règlements de service gagnerait à s'inspirer du contrôle des règlements de police plutôt que de celui des clauses abusives. Le règlement de service peut prévoir des sanctions à l'encontre de l'usager lorsque ce dernier a méconnu ses obligations. Dans le cadre d'un service public industriel et commercial, la contestation de la décision individuelle de sanction relève du contrôle du juge judiciaire. Cependant, lorsque le requérant conteste la base juridique de cette sanction, c'est-à-dire le règlement de service, il soulève une exception d'illégalité qui doit être portée devant le juge administratif. Le tribunal administratif de Nîmes annule ainsi l'article du règlement de service des eaux relatif aux sanctions prévues en cas d'impayé par l'usager: « Considérant [...] qu'un tel cumul de mesures pécuniaires, qui a le caractère d'une sanction disproportionnée aux conséquences, pour l'équilibre financier du service affermé, de l'absence de paiement reproché à l'usager, a pour effet de créer un déséquilibre entre les droits et les obligations des parties »[71]. La rédaction de ce considérant montre que la recherche du déséquilibre significatif se surajoute au contrôle de la proportionnalité des sanctions prononcées par le service public. La jurisprudence administrative effectue depuis longtemps un contrôle de proportionnalité des règlements de police[72], il n'était pas nécessaire d'appliquer le code de la consommation pour contrôler la proportionnalité de la sanction prévue par un règlement de service. La majeure partie des annulations prononcées sur le fondement du droit des clauses abusives est relative aux dispositions du règlement de service limitatrices ou exonératoires de responsabilité. Or il n'y a pas besoin d'appliquer le

[70] TA Orléans, 20 déc. 2002, Vitteau c. Commune de Beaugency, préc.

[71] TA Nîmes, 30 juin 2010, Association des usagers de l'eau du Grand Avignon gardois, préc.

[72] CE 19 mai 1933, Benjamin, Lebon p. 541, S. 1934. 3. 1, concl. Michel, note Mestre, D. 1933. 354, concl.

code de la consommation pour annuler ces dispositions. Sous couvert d'organiser le service public, la personne publique ne peut ménager sa propre responsabilité ou celle de son cocontractant qui exploite le service public. Ainsi, le Conseil d'État annule la délibération d'Aéroports de Paris fixant les conditions d'utilisation des installations des aéroports par les entreprises en ce qu'elle contient une disposition qui exclut l'engagement de la responsabilité de l'établissement public[73] : « Considérant que [...] s'il appartient au conseil d'administration d'Aéroports de Paris, sur le fondement de ces dispositions, de fixer les conditions d'utilisation des installations des aéroports par les entreprises autorisées à exploiter des services d'assistance en escale, il ne saurait légalement décider de façon unilatérale que la responsabilité d'Aéroports de Paris ne pourra jamais être recherchée en cas de dommages causés à des tiers par ou à l'occasion de l'exercice desdites activités en escale »[74]. Le Conseil d'État censure ici l'exonération de responsabilité insérée dans un règlement de police administrative, pour lequel le droit des clauses abusives n'est de toute façon pas applicable mais cette solution est transposable aux règlements du service public. Même si, comme le rappelle la décision Société des eaux du Nord, l'usager du service public industriel et commercial « ne peut, en cas de dommage subi par lui à l'occasion de la fourniture [...], exercer d'autre action contre son cocontractant que celle qui procède du contrat », l'administration ne saurait limiter sa responsabilité contractuelle par acte unilatéral. La solution proposée s'avère même plus protectrice que l'application du droit des clauses abusives. Ce dernier ne s'oppose pas aux clauses limitatives de responsabilité, si elles ne créent pas de déséquilibre significatif entre les droits et les obligations des parties. A l'inverse, toute soustraction unilatérale à ses obligations de responsabilité par l'administration constitue une violation de la loi. L'utilisation des techniques classiques de contrôle des règlements de police suffisait donc à protéger les administrés, en permettant l'annulation des dispositions litigieuses des règlements de service. Le Conseil d'État a

[73] CE 5 juin 2002, Compagnie Air France et autres, n° 218390, Lebon T. p. 945, Lexbase hebdo, éd. Affaires, 2002, n° 32, note V. Corneloup.

[74] C'est nous qui soulignons.

choisi une autre voie, mais l'application directe du droit des clauses abusives présente de nombreux inconvénients. En conclusion, nous pensons que la jurisprudence Société des eaux du Nord répond plus à une mode – la prééminence supposée du droit du marché[75] – qu'à une véritable nécessité juridique. Sans véritablement améliorer la protection de l'usager, l'application directe du droit des clauses abusives présente les désavantages du réalisme économique: elle néglige les catégories d'actes juridiques – en confondant acte unilatéral et contrat – tout en imposant une nouvelle distinction, au sein des actes réglementaires, entre les règlements de service (ainsi que les clauses réglementaires des contrats de concession) et les autres règlements. Par surcroît, le réalisme économique dont se prévaut cette jurisprudence est inachevé. L'application directe du droit des clauses abusives ne concerne, en raison de son champ d'application limité à l'existence de relations contractuelles, que les services publics industriels et commerciaux. Cette différence de traitement entre les usagers des services publics industriels et commerciaux et ceux des services publics administratifs ne se justifie pas du point de vue de l'analyse économique, qui préfère la distinction entre les services marchands et les services non marchands. La jurisprudence du Conseil d'État reconnaît d'ailleurs qu'un service public administratif peut constituer une activité économique[76]. De plus, la jurisprudence Société des eaux du Nord, parce qu'elle vise à protéger la compétence juridictionnelle de l'ordre administratif, conserve les désavantages du dualisme juridictionnel. Outre la complexité de la procédure liée au mécanisme de la question préjudicielle, des divergences sont possibles dans l'interprétation du code de la consommation. Ainsi, la Cour de cassation a restreint le champ du droit des clauses abusives aux seuls actes qui, par leur finalité, sont extérieurs à l'activité professionnelle du requérant[77]. Le Conseil d'État a retenu une conception plus

[75] V. B. Quiriny, Les droits de l'usager face aux droits du marché, RFDA 2008. 20.

[76] CE, ass., 31 mai 2006, Ordre des avocats au barreau de Paris, préc.

[77] Civ. 1re, 24 janv. 1995, n° 92-18.227, Bull. inf. C. cass. 15 mars 1995, D. 1995, I.R., p. 47, D. 1995, jur., p. 327, note G. Paisant.

extensive de la notion de consommateur, appréciée en fonction de la compétence et de l'expérience du contractant[78]. Les solutions propres au droit administratif permettent de protéger l'usager du service public. Même lorsque les besoins pratiques nécessitent l'utilisation de règles issues du droit privé, la technique de l'autonomisation devrait toujours être privilégiée, sauf à renoncer à toute justification du dualisme juridictionnel tirée de la spécificité des règles du droit public.

[78] Le commissaire du gouvernement Catherine Bergeal estime « qu'il importe peu que la société Damart soit une entreprise commerciale et non un particulier, dès lors qu'elle contracte pour les besoins de ses fournitures en eau, contrat qui ne correspond en rien à son activité professionnelle ». Cependant, un jugement du tribunal administratif de Lyon adopte la définition stricte du consommateur prônée par la Cour de cassation (TA Lyon, 3 nov. 2005, M. et Mme Paul Verriere, n° 0401842: la société requérante, qui loue un immeuble appartenant au domaine privé de la communauté urbaine de Lyon pour les besoins de son entreprise de plomberie, ne peut être qualifiée de consommateur « dès lors que la location de l'immeuble sis rue Henri Maréchal à Saint-Priest pour usage professionnel a un rapport direct avec l'activité professionnelle qu'elle exerce »).

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SOME REFLECTIONS ON THE STATE OF URBAN PLANNING LAW AND PRACTICE IN SPAIN: ANOMALIES AND EXCEPTIONS

Abstract: Urban planning law has been put under great pressure over the last years. The reason for this can be found in the complex interests involved in urban planning, which are especially intense during phases of economic expansion. It is therefore not surprising that the legislator has carried out a process of legislative reform and that the European Institutions have paid attention to the practice of urban planning in Spain. Against this background, urban planning seems to be undergoing a deconstruction process and a deep revision that affects some of its most essential institutions, such as the land property regime, the classification and valuation of land, the legal regime of urban planning agreements or the legal regime of infrastructure-development works. This revision does not only affect the instruments of urban planning; it aims at changing its content, placing in a central position environmental considerations and the requirements stemming from the principle of sustainable development.

Keywords: Urban planning; land valuation; public procurement law; land property

I. THE COMPLEX SET OF INTERESTS AND PERCEPTIONS RELATED WITH URBAN PLANNING LAW AND PRACTICE

We are at a critical juncture in the evolution of urban planning law in Spain. The bursting of the housing market bubble[1], which is to a great extent at the origin of the current

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financial crisis, has shown that the traditional patterns of Spain's urban planning law – which were reinforced by the legislation adopted by the State between 1996 and 2003[2] – are unsustainable from an economic, environmental and urban point of view. Furthermore, the European institutions have dealt with this issue in several resolutions, amongst which two stand out: the position adopted by the European Commission and by the European Court of Justice with regard to the need to subject the urban-development process to public procurement rules, and the position adopted by the European Parliament with regard to the harmful effects that the bad urban design practices followed – specially, although not exclusively – along the Spanish east coast has had. However, the path towards a new urban planning policy and, especially, towards a new urban planning practice, is not going to be an easy one. Resistance from many actors will have to be met, and it may not always be possible to overcome it.

Not in vain, urban planning is one of these fields of human activity where very different interests are at stake, so that conflict is unavoidable. Urban planning law and practice are shaped by the pressure put upon them by the confluence of social, media,

[1] CAMPOS ECHEVARRÍA, J.L. (2008) *La burbuja inmobiliaria española*, Marcial Pons, Madrid, pp. 107-143. On the same issue, from an international perspective and arguing in favour of introducing new financial products to prevent future housing bubbles SCHILLER, R.J. (2008) *El estallido de la burbuja. Cómo se llegó a la crisis y cómo salir de ella*, Gestión 2000, pp. 43-62 and 132.

[2] This was probably not the efficient cause of the current situation, which is the result of the combination of several, more complex factors – all of which are analysed in the two books mentioned in the previous note –. However, this legislation seems to have acted as a catalyser of a situation which now receives harsh criticism from very different scientific backgrounds. FERNÁNDEZ DURÁN, R. (2006) *El tsunami urbanizador español y mundial. Sobre sus causas y repercusiones devastadoras y la necesidad de prepararse para el previsible estallido de la burbuja inmobiliaria*, Virus editorial, Barcelona, pp. 63-70 (also available under a Creative Commons Licence in http://www.nodo50.org/ramonfd/tsunami_urbanizador.pdf), speaks of 'mafiosi capitalism' (p. 44-51), considers that Spain has been hit by a 'cement spill' (p. 23) and refers to the 'large projects made with public funds' as a 'city-show' (p. 32). Irony is also present in the title of MARTÍN MATEO, R. (2007) *La gallina de los huevos de cemento*, Civitas, Madrid – i.e., 'The goose that laid eggs made of concrete' –, where the pathology of the said bird is analysed (pp. 220-223), where examples of an 'ethically inadmissible urban planning' are put forward (pp. 112-116) and where mention is made of a 'pathological building fever' (p. 119).

technical, political, legal, economic and environmental considerations. The relevant actors and, in particular, the Administration, are forced to manage the tensions arising from such a wide range of interests and to find the right balance between them. In this sense, urban planning law, first, and urban planning instruments, then, incorporate several legal institutions and techniques aimed at reducing the tensions generated by the adoption of land-use decisions[3]. Our current urban planning is the result of all these tensions, and it is clearly undergoing an important transformation. The way in which cities and towns are actually designed is also the result of this conflict. It is therefore worth devoting some attention to these forces, which act sometimes in the opposite and sometimes in the same direction, and which are, ultimately, the fundamental object of urban planning law and practice.

The social implications of urban planning are very clear. Urban planning decisions have a very important social impact, because they are concerned with the way in which cities are designed and built and, more generally, with the way in which the territory is organised; they are therefore concerned with the human habitat, that is to say, with the environment in which all human activities are performed. The social dimension of urban planning is illustrated by the permanent difficulties which affect access to housing, by the conflicts generated in small towns by the redistribution of wealth through urban planning, the reversion of the agrarian reform as a result of the reconstruction of large estates– which are now urban rather than agrarian –, and by the activism of social and ecological groups. It

[3] FERNÁNDEZ RODRÍGUEZ, T.R. (1973) *El urbanismo concertado y la Ley del Suelo, IEA, Madrid*, p. 49, said it with the following words: 'The law in force may not have reached its objectives, but I think it is legitimate to doubt whether a new Law will be able to reach them. In my opinion, a change in the formal, legal techniques is far from being the solution for the current situation. The ultimate causes of this situation are undoubtedly much deeper, and they can be found in the unhealthy atmosphere in which urban planning problems evolve, an atmosphere to which the public entities with responsibilities in this field are not alien either; in the abundant organisational defects; in the lack of management capacity of the urban planning Administration, etc. They are all structural causes, upon which no action has been taken; should they continue to operate, they will lead to the failure of any reform or innovation undertaken in the future. Without a capable and well-equipped Administration, with better support and better social controls, little will be achieved'. Almost forty years have elapsed and four State laws have been passed, and the structural causes continue to exist.

is also illustrated by the surprising position adopted by certain groups with regard to the Land Use Act of 2007 (*Ley 8/2007, de 28 de mayo, de Suelo*), arguing that it harmed the interests of the farmers in possession of land which could be reclassified, and by the position adopted by the agricultural associations, which were almost the only ones which opposed the reform at the Economic and Social Council (*Consejo Económico y Social*)[4].

The social debate over urban planning tends to focus on the problem of speculation and, as corollary, on the problem of housing. While some argue that the high prices of housing are due to the high prices of land, others argue that land is expensive because the prices of housing are abusive. For the former, the solution is simple: less regulation, less administrative interventionism and more land on sale are needed. The prevention of speculation is also simple for the latter: first, it is necessary to regulate urban planning in such a way that classified land is urbanised as it becomes necessary, thereby avoiding the retention of land; secondly, it is necessary to foster the construction of protected housing (i.e., housing with limited prices). It is against this framework that a process of reforms and contra-reforms has taken place in Spain; the process has been pendular, going from the maximum possible degree of regulation and administrative intervention to the opposite extreme. This process has alternatively blamed the public sphere – as a result of its restrictive character –and the private sphere – as a result of its tendency to keep land away from the market –. Yet the truth in Spain is that everybody who has something to speculate with, be it land, be it a building product, speculates with it. Individuals can thus make benefits; these benefits being privy to them, they logically escape any form of control. The Administration obtains additional resources which, in principle, it applies to its own public goals, in order to serve the citizen. But it cannot be denied that in both cases urban development channels speculation, in the sense that it is used to generate a capital gain that will be applied to achieve goals which have nothing to do with it. And the problem is that, to date, the only limit has been the economic capacity of buyers, that is to say, their immediate or deferred – by means of a mortgage– paying capacity.

[4] Dictamen 10/2006, de 26 de Junio, dissenting opinion. The Popular Group in the Spanish Parliament (*Congreso de los Diputados*) also used this argument, claiming that the farmers constituted the worst affected group (*Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente*, VIII Legislatura, No 255, p. 12741).

This mentality and this speculation culture impregnated the whole society, and not only in relation to land but also in relation to housing. Housing became for many an investment asset, and a very secure one, for its returns were considerably higher than those offered by other markets and could be more easily realised. This was so much so, that the main residence became the springboard to acquire a better house.

The public sphere strengthened this culture, offering considerable tax deductions, in particular when the amount obtained for the sale of the permanent residence was reinvested in the purchase of a new one. Housing thus acquired a speculative purpose, a financial dimension that is at the origin of some of the current problems – because, as every financial investor knows, financial markets rise but they also fall –. Housing and land became over the last years a sort of futures market in which all the society was involved, with the only exception of those who could not afford buying a first house. In the end, the futures market and the bubble have exploded, after being fuelled by the public sphere, by the banks, by developers, by real estate intermediaries and by the regulation authorities, while getting funds from other countries to which ours is now heavily indebted[5]. Investment became a gamble and, unfortunately, the majority lost, as always. Before anything else, housing is a commodity and the essential foundation of human life. From an urban perspective, however, housing and dwellers are the cells that make up the city. It is debatable whether these dimensions are compatible with its consideration as an investment asset, and the question is not ideologically neutral. It is certainly not compatible with the correct functioning of the market and of the real estate sector, especially in the rental market, although it is compatible with this sort of discount which has taken place lately, through the concession of mortgage loans for the purchase of land and houses on the basis of the expected value.

[5] FERNÁNDEZ DURÁN, R. (2006: 63-70), lucidly foresaw the situation we are now going through. In any event, it should be noted that financial entities, real estate businessmen and intermediate agents, all of whom fed the inflationary spiral and benefited from it, tended to deny its existence and to advocate in favour of an 'orderly deflation' [FERNÁNDEZ DURÁN, R. (2006: 63-64), from whom I take the expression quoted; and SHILLER, R.J. (2008: 136-137)].

In view of the strong social implications of urban planning, it is not surprising that it has such an important media impact. Over the last years, urban planning has been one of the topics that has attracted more attention from the media, which have not always been able to escape from the pressure of some of the sectors involved. Urban planning used to sell. The media disclosed a lot of small and big corruption cases, some of which had been concealed by bad administrative practices[6]. Although they were not always linked, urban planning was thus associated to obscure interests and to obscure political transactions. The resulting social discredit that affects urban planning is, together with the problem of access to housing, one of the most important problems that needs to be tackled. Because designing an urban operation, combining the public and private interests at stake and ensuring the economical and social viability of the project is far from being a vicious activity; it is on the contrary an exercise of realism. Only those projects whose economical viability is ensured, with sufficient public or private funding, will be carried out, because planning something which is not economically sound is of no use, beyond that of generating artificial capital gains.

Another complex issue is that of defining the role that has to be assigned to technical experts in the field of urban planning. The weakness of the technical advisory structures which assist the political management is very surprising; they have in fact been supplanted by private technical teams which are becoming increasingly interdisciplinary, and this has happened in a field characterized by the extremely high profits generated by public decisions. These technical decisions, adopted on the basis of the arguably obscure 'urban planning science', often overwhelm the decision-making organs, which thus end up being controlled – *de facto* – by their technical cabinets. The absence of any sort of control and supervision over external technical teams, the weakness of the Administration – which is often composed of a single civil servant in charge of several municipalities – and the occasionally deficient training of the urban planning officers form an explosive cocktail. The fact that all the external technical teams advising the Administration provide the same service to private actors is the source of frequent and difficult problems.

[6] IGLESIAS, F., AGUDO, J., SARTORIUS, N. y ZAPATERO, P., *et al.* (2007) *Urbanismo y democracia. Alternativas para evitar la corrupción*, Fundación Alternativas, pp. 42-91.

Nevertheless, it is nowadays the political management which attracts a higher degree of attention and criticism. The media attach immense importance to the adoption of the final land-use decision and to the will of the public Administration expressed in the urban administrative agreements it subscribes, thereby magnifying their relevance, to the extent that the Administration seems to be the only responsible actor. The responsibilities, whether legal or not, bore by all the other actors disappear. Furthermore, the decentralization of the system of urban-planning took place during Spain's democratic transition, and it therefore benefitted from the absence of criticism over that period. It is only recently, as a result of the numerous corruption cases disclosed by the media, that the allocation of competences in this field has been called into question, in particular with regard to the adequacy of the local level of government to be the main decision-making centre. In my opinion, this position is totally opportunistic. The local level of government is the most adequate to take urban-planning decisions; the problem is that many decisions formally taken within a local council are in fact materially taken outside from it, and this is what makes no sense. The principle of local autonomy requires that local entities be assigned with competences, human and material resources and financing. Should any of these elements be absent, excessively weak or deprived of any legal guarantee, it is the general interest which will be harmed. Consequently, it is not the level to which decision-making power is assigned that should be disputed, but rather the scant public resources with which the decision-making organs must form their opinions. Political decisions on urban matters are not so complex; what is complex is their justification and implementation.

Those are not the only problems that arise from the desirable and unavoidable relationship between politics and urban-planning. At least two further problems need to be mentioned. The first one has to do with the perception felt by the political managers who integrate the decision-making organs that the effects of their decisions will only be felt in the long run, so that it will not be for themselves to face them. It is thus easy to give in to the temptation of not questioning something for which others will probably respond. It takes at least one political mandate to adopt a general urban plan, and at least half a mandate more to approve its necessary implementing program, so that there seems to be no reason to worry too much. The second problem is structural or systemic: it arises from the very structure of the political parties and it links the municipal map with the tremendous difficulties involved in making effective the legal and opportunity controls. In Spain, the

structure of the political parties is based on municipalities. Logically, the provenance of most party leaders reflects this fact, both at the local, provincial and regional level. I do not intend to challenge from an abstract perspective this situation, which goes far beyond the scope of this article, but I want to point out that it affects urban-planning. The endemic weakness of the local Administration in many areas of Spain and the locally-based structure of the political parties make it extremely difficult to design policies capable of transcending an exclusively local vision of the territory, a vision that seeks support in the autonomy argument[7]. The Municipality thus becomes, with the more or less explicit consent of all the political groups, the basic and allegedly sovereign entity for the organisation and management of the territory. Everything which limits or constraints its decision-making capacity is perceived and opposed as a dubious encroachment on local autonomy. There is no territory beyond the limits of the municipality and local authorities are deemed to be the only government ruling over it. Finally, this political perception pretends to be converted into law, and local autonomy is thus advocated on the basis of arguments which, if correct, would reduce to nothing the competences that correspond to the State and to the Autonomous Communities[8]. The general plan pretends to pass for the sovereign instrument

[7] MARTÍN MATEO, R. (2007: 248) considers, within the framework of his proposal to 'subject local urban management to further controls', that the starting point for these controls must be the fact that 'the Municipality is an institution which serves the citizens and not the political parties, although political parties can be the channel through which a democratic system of elections focused exclusively on the approval of the basic urban plans may take place'.

[8] Against this idea, PARADA VÁZQUEZ, R. (2007) 'La segunda descentralización: Del Estado autonómico al municipal', *Revista de Administración Pública*, No 172, pp. 9-77. The author argues in a vehement but well-founded way against the need to revise the artificial consensus that leads to destroy what he names 'extreme mini-municipalism' and to destroy the structures of the State and of the nascent Autonomous Communities. He harshly criticises a certain conception of the decentralization process, which transforms the State and the Autonomous Communities into quasi-confederate entities, based on the Municipalities and almost ungovernable. He questions the *Carta de Vitoria*, accepted by all the political parties, because it is the expression of the 'municipal extremism' represented by the *Federación Española de Municipios y Provincias*. He also questions the virtues of the principle of proximity between the municipalities and the citizenry, on the basis of the municipal map, because 'the application of the principle of proximity to the municipal Spanish reality is complete non-sense'. And he adds that 'the European, national or regional authorities may come down from time to time to get in touch with the citizens and with the territory they govern, but it is simply ridiculous to claim that the local governments should do the

in the organisation and management of the municipal territory. Outside from the municipality, no territory and no urban-planning competences seem to exist.

This account is sufficient to explain the extreme tension to which the system of competences and the system of inter-administrative relations are subject in the field of urban-planning. However, the situation is worsened by the demographic factor. The scarce population of many municipalities and the absence of any reform directed at adjusting the municipal map make the adoption of certain decisions in this field even more difficult. In those circumstances – small municipalities with dynamic real estate markets–, the adoption or revision of the general plan typically gives rise to struggles between families or 'houses'. These struggles do not reflect any political cleavage, but they always result in political alignments aimed at securing the re-classification of each faction's own lands. This often brings about division within the major political parties, which in turn results in the creation of independent local parties. The judgment of the Supreme Court of 23 September 2008 will certainly not contribute to alleviate these problems, since it declares lawful the claim made by a municipality to celebrate a referendum on the content of a general plan, prior to its initial adoption.

The economy cannot ignore urban planning; conversely, urban planning cannot ignore the constraints and the criteria stemming from the economy. In fact, the economic repercussions that a very specific type of urban-planning has had are today very well-known amongst us: it has generated a development model totally dependant on the real estate sector and a socio-economically irresponsible dynamic that has impaired the solvency and the liquidity of the financial system. It was believed that the housing market and hence the land market would never be saturated. There was a tacit conviction that the

same, because they govern over thousands of municipalities with less than 500 or 2000 inhabitants and they are facing an unstoppable process of desertification', and he adds that 'in these municipalities and in those with more population and with a larger territory, it is necessary to avoid an excessive degree of familiarity between the authorities and the citizens in the management of public affairs. Only a certain distance between the decision making organ, which is surrounded and full of neighbouring interests, will prevent the use of subjectivity and of arbitrariness in the management of the territory and in the protection of the environment'. In the same direction, see MARTÍN MATEO, R. (2007: 240-248).

housing demand was inexhaustible and that the credit capacity of Spanish and foreign families had no limits, in a context were financial costs were being cut, which made money lose its value as a result of the combination of rates and inflation. It was believed that the credit institutions would continue financing anything and anyone. And these beliefs eventually proved to be wrong. Everything has stopped, and after the bursting of the housing bubble it seems as if the field of urban planning had become a piece of wasteland with a huge mortgage and as if nobody knew when it is going to be redeemed. 'Financial urban-planning' – the use of urban planning as a source of financing for public policies or for private business – has ceased to be workable, and it is not foreseeable that the situation will change soon.

The environmental implications of urban-planning and the tensions they generate have also been apparent over the last years. Rather than a standard to take into account, environmental considerations have become an enemy for urban-planners. The assessment and balancing of environmental considerations seem to be the enemy to beat; they seem to be an obstacle which hinders urban development and which has to be overcome for the sake of a growth rate which is unsustainable and, therefore, unreal. The need to protect the environment has been surrendered to the power of money. It has been seen, alternatively, as an emergency and as a temporary fad, and it has only recovered its importance when the power of money has been momentarily weakened by the crisis, when the urban-management model has died, after draining all its resources. Urban planning is not anymore a financial tool, and it will not be again for a long time. However, the current crisis also jeopardizes the protection of the environment, since environmental constraints risk to be seen as an obstacle that hinders longed-for economic initiatives, which means that it may once again be sacrificed with the aim of fostering the economy and of overcoming the current situation.

The trend to integrate urban-planning and environmental policies may be revitalised by the expanding competence of the EU in environmental matters, and by its emerging policy on urban planning, which is embodied in the *European Spatial*

Development Perspective[9]. The exclusive role played by Member States in the field of urban planning is being eroded by several European actions, which seem to be based on the need to manage in an environmentally sustainable way the use of the territory and, in particular, of urban land. Sustainability is the most important axis along which the European actions are designed in the field of urban planning. Urban planning calls for an integrated treatment of towns in order to achieve an adequate and sustainable urban environment[10]; at the same time, the urban space has to be recognised as a central element in the socioeconomic dynamism of the European Union and in its cohesion policies[11]. As I explain below, the urban space and its design are considered as essential elements for the balanced and sustainable development of the European territory as a whole.

As far as the urban environment is concerned, the approach of the Commission to cities, as already exposed in the Green Paper, has tended to be expansive and to go beyond the boundaries of the urban planning sector[12]. Although the concerns for urban planning expressed by the Commission in the Green Paper were prompted by its environmental implications (air, water and soil pollution, transports, waste management, etc.), the integrated approach advocated in that document was welcome as the announcement of a more ambitious policy, which could eventually result in the development of a global urban

[9] *European Spatial Development Perspective: Towards a balanced and sustainable development of the territory of the European Union*, agreed at the Informal Council of Ministers responsible for Spatial Planning in Potsdam, May 1999.

[10] *Green Paper on the urban environment*, COM (1990) 218 final, 26 June 1990; *Towards an urban agenda in the European Union*, COM (1997) 197 final, 6 May 1997; *Towards a thematic strategy on the urban environment*, COM (2004) 60 final, 11 February 2004; *Thematic Strategy on the Urban Environment*, COM (2005) 718 final, 11 January 2006.

[11] *Cohesion Policy and Cities: the urban contribution to growth and jobs in the regions*, COM (2006) 385 final, 13 July 2006, which responds to the *European Parliament resolution on the urban dimension in the context of enlargement*, A6 (2005) 272, 21 September 2005.

[12] LÓPEZ RAMÓN, F. (2004) 'Fundamentos y tendencias del urbanismo supranacional europeo', *Revista de Urbanismo y Edificación*, No 9, pp. 72-74.

regime. A fair amount of the urban-related policies developed by the European Institutions over the last years respond to the ambitious approach set out in the Green Paper. This is the case of the environmental impact assessment of the instruments of urban planning, the development of urban regeneration policies with the URBAN and INTEGRA programs, the programs for sustainable building such as CONCERTO, the development of a thematic strategy for soil protection[13], the enhancement of citizen participation and information or the design of policies for the conservation of the cultural heritage.

The *Thematic Strategy on the Urban Environment* is certainly one of the essential instruments – although not the only one[14] – to meet the objectives of the European Union's strategy on sustainable development[15]. From this perspective, it seems that Community action has focused on environmental issues in order to avoid doubts being raised about its competence to intervene in such a sensitive sector. However, in spite of the key role recognised to the local Administration in this area, the *Thematic Strategy on the Urban Environment* stresses the need 'to act at all levels of government', because national and regional, as well as EU authorities, have their own role to play. The main goal of the Strategy is to improve the quality of the urban environment, to make cities a healthier and more attractive place to live in, to work and to invest, and to mitigate the negative environmental effects that cities can produce, especially as regards climate change. The measures put forward by the Commission are consistent with other European initiatives, such as the Aalborg Charter adopted at the European Conference on Sustainable Cities held on 27 May 1994 and the Local Agenda 21. The development and implementation of the latter has been the object of many conferences, which have focused on the design of

[13] See COM (2006) 231 final, 22 September 2006.

[14] The actions of the Commission related with the urban contribution to growth and jobs, i.e., with the function played by the urban phenomenon in the economic structure and in the cohesion policies of the European Union, is a clear complement of the *Thematic Strategy on the Urban Environment* [see COM (2006) 385 final, 13 July 2006, which is clearly linked to the ideas of the document COM (1997) 197 final, 6 May 1997 and with the European aspiration to a common urban policy].

[15] COM (2005) 718 final, 11 January 2006, on the *Thematic Strategy on the Urban Environment*.

sustainable urban transport plans, the exchange of information on good practices and the reinforcement of the synergies with other Community policies such as waste management, air quality, energy saving, the recovery of polluted soil, sustainable building and the integrated strategies for urban regeneration. In any event, the Strategy pins high hopes on sustainable urban design. In order to be sustainable, urban design must stop cities from expanding out of control and thus reduce the loss of green space and of biodiversity, and it must comprise policies directed at promoting sustainable land reuse so as to stop urban sprawl and to reduce soil sealing, to promote urban biodiversity and to increase environmental awareness amongst citizens[16].

Despite the fact that some efforts haven been made, it would be delusive to say that the foregoing circumstances have generated no victims. There are indeed many victims. The most conspicuous ones are the territory, the cities, many youths – unable to have access to their own house until they are in a position to buy it –, and an important percentage of homeless people, left aside by the system. But, in addition to those, mention should be made of the hundreds of thousands of families who bought their house on the verge of their payment capacity, and who are now enduring great difficulties to keep paying it. Month by month, these families contribute to the enrichment a minority made up of original land owners, intermediaries and developers, all of whom calculate the value of land as the value they expect to obtain from the real estate product. It is also these families who ultimately bear the cost of the development and building process, for such a cost is incorporated into the price they pay, together with the purely speculative price. Although some of these costs are legally allocated to the buyers, others should be bore in principle by the landowners and the urban development actors; instead of bearing these costs themselves, they charge them to the buyers. The legislation adopted by the Autonomous

[16] The intensity of these policies is coherent with the *European Parliament resolution on the alleged abuse of the Valencian Land Law or Ley Reguladora de la Actividad Urbanistica (LRAU - law on development activities) and its effect on European citizens*, A6(2005) 382, 13 December 2005, and with the *European Parliament resolution on the results of the fact-finding mission to the regions of Andalucía, Valencia and Madrid conducted on behalf of the Committee on Petitions*, B6 (2007) 251, 21 June 2007, and especially with the harsh *Report of the European Parliament on the impact of extensive urbanisation in Spain on individual rights of European citizens, on the environment and on the application of EU law, based upon petitions received*, A6 (2009) 82, 20 February 2009.

Region of Valencia in 1994 was harshly criticised, on the ground that it allowed the development agent to better its offer at the landowners' expense. The same happens when urban agreements are used to charge urban development projects managed according to the compensation model with costs which do not legally correspond to them, and which end up being added to the price of the end product – and yet this does not usually attract the same sort of criticism –. The principle of equality in the contribution to the public expenses is thus ignored, and the costs which should be satisfied by the public budget, and financed by the ordinary mechanisms with which the public budget is funded, are thus charged to the families. It should be noted that this conduct – inflating the urban development costs and using the revenues thus obtained to finance urban infrastructures and facilities which go beyond what urban development requires –, directly benefits a minority: the public managers, who can thus sponsor urban projects that go beyond the financial capacity of the public Administration they are in charge of, and who can then exploit them as an achievement of their own or of their political party.

II. A BODY OF PUBLIC LAW OF AN EXCEPTIONAL CHARACTER

If it is not easy to grasp all the interests at stake in urban planning, it is not easy either to understand its strictly legal dimension. Urban planning law has become, in the course of the last decades, a body of public law of an exceptional character. It is worth reflecting upon the effects produced by some of the legal institutions that are usually considered to be central to urban planning law and, in particular, the extent to which they have contributed to the current situation – to the bursting of the housing bubble and of other previous bubbles –. It would not be reasonable to think, *a priori*, that they are not related to what has happened, be it as a tool, be it as a mere channel. It is obvious, in the light of the results, that the system of weights and counterweights that should have balanced the different forces acting in the field of urban planning did not work particularly well. Regulatory problems can certainly be identified in the credit sector, where irresponsible risk assessment was allowed; but problems can also be identified in the administrative regulation of urban planning, many of which have incidentally been pointed out by the doctrine, the courts and the European institutions.

Overall, however, the regulation of urban planning has been assessed in rather positive terms by the specialized lawyers. This can be explained by the fact that it is these

very lawyers who are often in charge of managing the urban process, in the framework of the compensation model; were this public activity really in the hands of the public Administration, this would not have been possible. In any event, there have also been critical voices with regard to the model established in 1956, which is the one at the origin of the anomalies that are analysed below and that the last reform seems to address. Although formally justified by many authors, by the case law and sometimes even by legislation itself, these anomalies can be found in many different aspects of urban planning law and practice. There are many issues in which urban planning does not seem to follow the general patterns of our legal system: public procurement, organisation, competence, economic assessments, special rules on the derogation of norms (*inderogabilidad singular de los reglamentos*), not to mention the apparent ineffectiveness of some criminal offences when applied in this field.

1. Public procurement and urban planning

One of the problems that has attracted more attention is the absolute or partial lack of compliance with public procurement rules in certain areas of urban planning, and in particular in those cases in which the urban development process is indirectly managed – especially by compensation boards (*Juntas de compensación*) –. Pursuant to the controversy provoked by the urban planning policy of the Autonomous Community of Valencia and by the intervention of the European Commission and of the European Court of Justice, an intense debate has arisen as to the nature and legal regime of development or infrastructure works[17]. Traditionally, infrastructure works have been considered subject to

[17] PARADA VÁZQUEZ, R. (1998-1999) 'La privatización del urbanismo español (Reflexión de urgencia ante la Ley 6/1998 de régimen del suelo y valoraciones', *Documentación administrativa*, No 252-253, pp. 75-93; FERNÁNDEZ RODRÍGUEZ, T. R. (2001) 'La Sentencia del Tribunal de Justicia de 12 de julio de 2001 (asunto Proyecto Scala 2001) y su impacto en el ordenamiento urbanístico español', *Actualidad Jurídica Aranzadi*, No 505/2001, also in *Revista de Urbanismo y Edificación*, No 4, 2002, and in *Documentación administrativa*, No 261–262 (2001–2002), which is the one I quote, pp. 11-26; VAQUER CABALLERÍA, M. (2001–2002), 'La fuente convencional, pero no contractual, de la relación jurídica entre el urbanizador y la Administración urbanística', *Documentación administrativa*, No 261–262, pp. 231-255; PAREJO ALFONSO, L. (2001–2002) 'La cuestión de la constitucionalidad de la figura urbanística del «urbanizador» en su concreta versión, la de la legislación valenciana', *Documentación Administrativa*, No 261–262, pp. 69-108; TEJEDOR BIELSA, J. C. (2001a) 'Contratación de la obra pública

public procurement rules and hence to the public works contract, since they clearly fall within the definition laid down by Article 1(2)(b) of Directive 2004/18/EC of the European Parliament and of the Council, of 31 March 2004, on the on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and by Article 6 of Law 30/2007, on public procurement (*Ley de Contratos del Sector Público*).

On the contrary, the same infrastructure works are considered to be private when the execution corresponds to a compensation board – an administrative entity, the most important decisions of which need to be approved by the responsible public Administration, and Administration before which those acts can furthermore be challenged –. In that case, the works are considered to fall outside the scope of the public procurement rules, despite the fact that they have to satisfy the needs defined by the public Administration that approves the urban development project[18].

urbanizadora y sistema de compensación. La Sentencia del Tribunal de Justicia de 12 de julio de 2001', *REDA*, No 112, pp. 597-611, and (2001c) 'Los sistemas de actuación entre la tradición y la modernidad. Su configuración como esquemas típicos de relación en la ejecución de la obra pública urbanizadora', *Revista de Urbanismo y Edificación*, No 6, pp. 77-85; GONZÁLEZ-VARAS IBÁÑEZ, S. (2002) 'Los convenios urbanísticos y el derecho comunitario europeo: La STJCE de 12 de julio de 2001, asunto C-399/98', *Revista de Derecho Urbanístico*, No 197, pp. 97-103; PARDO ÁLVAREZ, M. (2002) 'El derecho a urbanizar: ¿Sumisión a la Ley de Contratos?', *Revista de Derecho Urbanístico*, No 198, pp. 11-36; BUSTILLO BOLADO, R. (2002) 'Derecho urbanístico y concurrencia en la adjudicación de los contratos públicos de obras: La Sentencia del Tribunal de Justicia de las Comunidades Europeas de 12 de julio de 2001', *Revista de Urbanismo y Edificación*, No 5, pp. 117-134; GIMENO FELIÚ, J. M. (2006) *La nueva contratación pública europea y su incidencia en la legislación española*, Civitas, Madrid, pp. 121-125, y (2007b) 'Actividad urbanística y contratos públicos: La lógica de la publicidad y concurrencia en las infraestructuras públicas', *Revista aragonesa de Administración pública*, monographic volume on *El nuevo régimen del suelo*, Zaragoza, pp. 78-97; GÓMEZ–FERRER MORANT, R. (2001–2002) 'Gestión del planeamiento y contratos administrativos', *Documentación Administrativa*, No 261–262, pp. 48-54 y 64-67; TARDÍO PATO, J. A. (2007) *La gestión urbanística en el derecho de la Unión Europea, del Estado español y de la Comunidad Valenciana*, Aranzadi, Pamplona, pp. 361-397 y MENÉNDEZ REXACH, A. (2009) 'Contratación y urbanismo. Contratación y sistema de obra urbanizadora. Otras modalidades de ejecución de las obras de urbanización', in *Estudios sobre la Ley de Contratos del Sector Público*, Institución Fernando El Católico, Zaragoza, pp. 535-584.

[18] For all, see LÓPEZ RAMÓN, F. (2007) *Introducción al Derecho urbanístico*, Marcial Pons, Madrid, p. 147.

After so many years of private management, after so many years leaving aside competition, transparency and the most basic principles of public procurement, practice has turned into law and fiction into reality. It is necessary to consider whether the defining element of public works is the body in charge of their material execution or whether some weight should be given to the needs they are bound to satisfy, to whom has imposed them and to their end – especially when the result is going to join the public domain, for the use or service of the citizens –. In brief, it is necessary to determine whether the criterion to consider that a works contract is public is functionally subjective or whether it can also be functionally objective, as argued by some authors[19].

In my opinion, it is not the mere presence of a contracting authority which requires competition, as proved by the Judgment of 12 July 2001 of the European Court of Justice in the *Scala* case. Competition is the result of the public needs and decisions, which in this case take the form of a development plan and project that require the execution and provide a detailed account of the works. As far as the development agent is concerned, it is settled

[19] GIMENO FELIÚ, J. M. (2007a) 'El urbanismo como actividad económica y mercado público: la aplicación de las normas de contratación pública', *Revista de administración pública,* No 173, pp. 78-97, and pp. 95-96 for an analysis of the concept of works in the *Auroux* judgment; and 2007b: 158-162. FERNÁNDEZ RODRÍGUEZ, T. R. (2001-2002: p. 20), analysing the Judgment of the Court of Justice of 12 July 2001, had argued that the development works are always public, even if it is the owner wishing to build who executes them; however, he had questioned whether this implied that urban planning had to be subject to the competence of the European Union, 'the risk being to transform a system of liberties such as that of the European Union into a totalitarian monster, in the name of the very liberties the system proclaims'. The uncertainty of the author as to the scope of the *Scala* judgment is revealed by the fact that he tries to limit its impact on urban management: 'unless the Court of Justice does it in the future, it would be necessary to modify Directive 93/37, adding a new exception to the list laid down by Article 7' [FERNÁNDEZ RODRÍGUEZ, T. R. (2001-2002: p. 19)]. The Judgments of 18 January 2007 (*Auroux* case) and 21 February 2008 (*Ley de Obras Públicas* case) do not modify anything. Neither does the Commission, when it sues Spain for certain alleged irregularities of the Valencian legislation. The definitive answer may come from the future ruling of the Court in this case.

case law of the Supreme Court that the infrastructure works contract is public even if the contracting authority – normally, the Municipality – does not bear its cost[20].

However, there are also strong arguments in favour of the contractual freedom of the compensation boards, and against the possibility that a contractual relationship may arise between the compensation boards and the responsible Administration[21]. Departing from a model that links the right to promote the development of land to the ownership of a piece of land which satisfies the conditions established by the urban plan, FERNÁNDEZ

[20] Judgments of the Spanish Supreme Court of 22 November 2006 (rec. 3961/2003); 28 December 2006 (rec. 4245/2003), 27 March 2007 (rec. 6007/2003), 6 June 2007 (rec. 7376/2003), 27 December 2007 (rec. 10/2004), 22 January 2008 (rec. 687/2004), 5 February 2008 (rec. 714/2004), 27 February 2008 (rec. 6745/2005), 2, 8, 28 and 29 April 2008 (rec. 361/2005, 1231/2004, 6641/2005 and 2282/2005), and 27 January 2009 (rec. 8540/2004, the first judgment on the legislation of the Autonomous Community of Castilla-La Mancha, since all the others are concerned with the Autonomous Community of Valencia). On the case law of the Supreme Court and of the lower Courts, TARDÍO PATO, J. A. (2007: 361-367); and CORCHERO, M. (2008) 'El agente urbanizador valenciano y la legislación de contratos de las administraciones públicas: referencia a la reciente jurisprudencia del Tribunal Supremo', *Revista de Urbanismo y Edificación*, No 16, pp. 220-234.

[21] In this sense, FERNÁNDEZ RODRÍGUEZ, T. R. (2001-2002: 21); GIMENO FELIÚ, J. M. (2007: 92) y VAQUER CAVALLERÍA, M. (2001-2002) 'La fuente convencional, pero no contractual, de la relación jurídica entre el agente urbanizador y la Administración urbanística', *Documentación administrativa*, No. 161´-262, pp. 244-247. GÓMEZ–FERRER MORANT, R. (2001–2002: 49) shows more doubts when he states that 'strictly speaking, it is not possible to say that a contract is celebrated, even if the acts performed by the parties prove that there is a coincident will (the very agreement on the use of a system, when it is reached at the request of the owners, the approval of the basis, the approval of the development project, the acceptance of the development works once finished, etc.)'; similar arguments can be found in TEJEDOR BIELSA, J. C. (2001a: 608-611). LÓPEZ RAMÓN, F. (2007: 147) expresses his doubts on the relationship between the board and the Administration, which he does not consider to be contractual, and on the effect of the *Scala* Judgment on the compensation system, which is based on the entrustment made by the law of the works to the owners (although he omits that is not a direct entrustment, but one conditioned by many factor, as GÓMEZ-FERRER points out. SORIANO, J. E. and ROMERO REY, C. (2004) *El agente urbanizador*, Iustel, Madrid, pp. 195-202, also find the question doubtful. On the contrary, ASÍS ROIG , A. (2001-2002) 'Caracterización de la función de urbanización', *Documentación administrativa*, No 261-262, pp. 226-228, considers that the relationship between the Administration and the actor who assumes the performance of the development works is always be a public contract, especially 'in the case of the compensation system, given the public character of the Compensation Board, the nature of the activity that is performed in the general interest, and the control and supervision assured by the urban planning Administration over the board'.

RODRÍGUEZ argues that the public works and free competition dogma, if taken to its ultimate consequences, can lead to totally unsatisfying results[22]. The landowner who gets a building licence with the right and the obligation to carry out the development process, the real-state company which can carry out with its own means the development process of the lands it owns, the development projects which affect a single owner or the development company which has a seat in a compensation board, they all have the right and the obligation to finance and to carry out the infrastructure building process. In those cases, the urban planning regulations seem to define the content of the right of property over land, which would exclude the need to introduce competition in the exercise of the different faculties which form that right in the terms of the *Scala* judgment[23]. In this sense, the European debate does not look very different from the debate that has taken place in Spain during the last years. The right to promote the development of land can either be part of the right of property – which would take the infrastructure works out of the scope of the European competition rules –, either be alien to it – in which case it is based on a power granted by the Administration and therefore subject to competition requirements –.

Leaving aside the strictly legal arguments, the resistance met by the position of the European Commission amongst many urban managers of the compensation model is understandable. The infrastructure works create the urban space and generate infrastructures, nets, services and public facilities. The reason why the most basic principles of competition, transparency and objectivity have been ignored in their award is the interposition of an association of landowners – of an administrative nature and under the control of the Administration, which approves its more important decisions and which rules on the actions brought against them, but which surprisingly has no influence on its contractual decisions –. This is the reason why the award and the whole development

[22] FERNÁNDEZ RODRÍGUEZ, T. R. (2001-2002: 21).

[23] FERNÁNDEZ RODRÍGUEZ, T. R. (2001-2002: 20-24). His main argument is the 'logic line of property', to which he refers when he analyses the hypothesis of the landowner who has to complete the infrastructure works in order to start building. TARDÍO PATO, J. A. (2007: 483-487) expresses a similar opinion, criticising the position of the European Commission.

process has been controlled by the legal and technical bodies which now claim that the public works are private because of the fact that they are commissioned by a board of landowners and not by the Administration itself[24]. But the foregoing is not sufficient to turn something public into private: it cannot alter the nature of an infrastructure which creates the urban space and which ultimately has to be delivered to the Administration that manages the city[25]. In any event, the debate is open and, as it is alas too often the case, it is unlikely that the Spanish legislation will solve the problem by its own means. The solution will come from Europe, and in particular from the Court of Justice of the European Union[26]. As it is so often the case, the solution may not lie on the extremes. It may be convenient to set up formulas that recognise a certain priority to landowners for the execution of the infrastructure building process, while at the same time providing for the

[24] TARDÍO PATO, J. A. (2007: 539).

[25] The Judgment of the Spanish Supreme Court of 24 May 1994 (rec. 4739/1990), mentioned by FERNÁNDEZ RODRÍGUEZ, T. R. (2001-2002: 22), clearly states that the contract celebrated by a Compensation Board 'is a contract for the performance of infrastructure works and hence a public works contract, which binds the concerned Administration'. This Judgment quotes as authoritative the previous Judgment of 26 February 1985 (Ar. 1233/1985), which in no way questions the competence of the contentious-administrative order to resolve the issues that may arise with regard to a contract for the performance of infrastructure works between an administrative association of owners and the building company. Since then, many Judgments have declared the public character of infrastructure works in cases related with the legislation from Valencia and Castilla-La Mancha (see previous note).

This argument could be questioned with regard to private development projects. In my opinion, however, this type of projects are also the result of the public competence over urban planning, and inasmuch as they fall within the model designed by the public power, they are not completely alien to it, despite the fact that some of the resulting infrastructures, if this is allowed by the regional legislation.

[26] And there are some interesting precedents: Judgments of 12 July 2001, *Scala* case; 20 October 2005, *Mandato de obras* case; 18 December 2007, *Auroux* case; and 21 February 2008, *Ley de obras públicas* case.

intervention of the Administration, or of other interested third parties, in order to implement the approved urban plan if the landowners do not take the initiative[27].

The Court of Justice has already analysed the different conditions that trigger the application of the European rules on public procurement. While some of them are unquestionable – the presence of a contracting authority[28], the execution of works within the meaning of the Directive[29], and the written form of the contract[30] –, the rest of them are more problematic – i.e., the very existence of a contract, its pecuniary interest and the presence of a contractor –. As explained above, those are precisely the issues that have given rise to doubts from the standpoint of Spain's internal law. It should be recalled, however, that the Court took the view, with regard to the existence of a contract, that the fact that the object, the goal, and the characteristics of urban planning law are different from those of the Directive does not imply that the latter should not be applied when a situation falls within its scope, as defined by its own provisions. The Court also confirmed the synalagmatic and onerous character of the contract because the 'the total or partial set-off against the amount payable in respect of the infrastructure contribution', the payment of which is linked to the permission to carry out the works, 'suggests that, in consenting to the direct execution of infrastructure works, the municipal authorities waive recovery of the amount due in respect of the contribution' established to finance the works when they are

[27] TEJEDOR BIELSA, J. C. (1998) *Propiedad, equidistribución y urbanismo. Hacia un nuevo modelo urbanístico*, Aranzadi, Pamplona, pp. 349-353, and (2008) *"Urbanismo"*, Capítulo II, Parte IV, Volume *Derecho Administrativo. Parte Especial*, Civitas, 7th ed., Madrid, pp. 640-642; TARDÍO PATO, J. A. (2007: 539). Article 6(a) of the *Texto Refundidido de la Ley del Suelo de 2008* seems to endorse this solution, since it authorises the regional legislator to establish some 'peculiarities or exceptions' for the award of the infrastructure works made with publicity and competition 'in favour of the initiative of the landowners'. It is the initiative which is therefore relevant, and not the mere fact of being the landowner. The owner decides, directly or indirectly, to become a development agent.

[28] Judgment of 12 July 2001, para. 57.

[29] Judgment of 12 July 2001, para. 58-61.

[30] Judgment of 12 July 2001, para. 87.

not directly executed[31]. Finally, the Court has made it clear that the presence of a contractor cannot be denied when the Administration signs the development agreement with the landowners and not with a construction businessman or developer, because there is always a party which assumes the responsibility for the performance of the works, even if the party in question will not carry them out directly[32].

The Court of Justice therefore concluded that the domain of urban planning is not exempted from applying the rules on public procurement and, particularly, the public works regime, no matter how specific its object, its goal and its characteristics are. However, the Court is probably aware of the significant impact that this stance may have on the urban development practice of several Member States; it has thus foreseen certain mechanisms to avoid the liquidation of the legal regimes that entrust certain urban management tasks to the landowners, guaranteeing their compatibility with the public procurement rules. The Court has clarified that the fact that the Municipality is obliged to respect the public procurement rules does not mean that these rules must be directly applied by it whenever it is responsible for a given project; the application can be ensured indirectly, by whomever is in charge of the execution of the project, for example the landowner[33]. As a result of this construction,

[31] Judgment of 12 July 2001, para. 81.

[32] Judgment of 12 July 2001, para. 93-94, which confirms the ruling of the Court in the Judgment of 14 April 1994, *Ballast Nedam Groeg NV v Belgium*, where the Court held that a company which does not execute works by itself, but which has them executed by its agencies or branches or having recourse to external technical teams or to other companies, can be a works contractor for the purpose of the Directive. Incidentally, this could be the case of compensation boards when a development works company sits in them (see in that connection PERNAS GARCÍA, J. J. (2008) *Las operaciones in house y el derecho comunitario de contratos públicos*, Iustel, Madrid).

[33] The Court states that 'the Directive would still be given full effect if the national legislation allowed the municipal authorities to require the developer holding the building permit, under the agreements concluded with them, to carry out the work contracted for in accordance with the procedures laid down in the Directive so as to discharge their own obligations under the Directive. In such a case, the developer must be regarded, by virtue of the agreements concluded with the municipality exempting him from the infrastructure contribution in return for the execution of public infrastructure works, as the holder of an express mandate granted by the municipality for the construction of that work. Article 3(4) of the Directive expressly allows for the possibility of the rules

the door remains seemingly open for the landowners to be involved in the management of urban development.

The debate on the application of the European rules on public procurement to infrastructure works is thus open. The case law of the Court of Justice is abundant – to name but a few, see the Judgment of 18 January 2007, in the *Auroux* case, and the Judgment of 21 February 2008, in the *Ley de obras públicas* case –. The Commission has also partaken in this ongoing debate: it has taken a clear and strong position in relation to the urban development model of the Valencian Autonomous Community, issuing several letters of formal notice and reasoned opinions that have not prevented the matter from being brought before the Court[34]. The Commission has taken the view, on the basis of the *Scala* case, that 'infrastructure works (…) constitute building and civil engineering works, hence activities of the kind referred to in Annex II to the Directive 93/37/EEC, and are sufficient of itself to fulfil an economic and technical function'[35]. On these grounds, the Commission asserts the contractual and onerous character of the relationship between the Administration and the development agent, also in relation to the draft of the technical documents needed to carry out the urban development process, so that the public

concerning publicity to be applied by persons other than the contracting authority in cases where public works are contracted out' (Judgment of 12 July 2001, para. 100).

[34] Letter of Formal Notice SG (2005) D/201/201301, of 21 March, which was followed by Reasoned Opinion C (2005) 5320, of 13 December 2005, addressed to the Kingdom of Spain pursuant to Article 226 of the Treaty establishing the European Community, concerning the breach of Directives 93/37/EEC and 92/50/EEC with regard to the *Programas de Actuación Integrada* of Law 6/1994, of 15 November (*Ley reguladora de la Actividad Urbanísticas de la Comunidad Valenciana*); and Letter of Formal Notice C (2006) 1117, of 4 April 2006, which was followed by Reasoned Opinion C (2006) 4738, of 12 October 2006, addressed to the Kingdom of Spain pursuant to Article 226 of the Treaty establishing the European Community, concerning the incompatibility of Law 16/2005 (*Ley Urbanística Valenciana*) and the Decree 67/2006, of 12 May (*Reglamento de Ordenación y Gestión Territorial y Urbanística*), with Directive 2004/18/EC, of the European Parliament and of the Council, of 31 March 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and with certain general principles of Community law derived from the EC Treaty, and the public contracts awarded on the basis of Law 6/1994 between 21 March 2005 and 31 January 2006.

[35] Reasoned Opinion C (2005) 5320, 9 (my translation).

procurement rules must be applied. In that connection, the fact that the development agent may simultaneously be the landowner is irrelevant, even if its right stems from a statutory conception of property[36]. Furthermore, the contractual nature of the relationship between the Administration and the development agent is so clear, in the view of the Commission, that the latter has even called into question the use of land ownership as a criterion to choose the development agent, on the ground that it amounts to a breach of the principle of equality between tenderers[37]. According the Commission, land ownership cannot be a relevant criterion for the selection of the agent that is going to draw up and execute the urban instruments required by the infrastructure works.

The Spanish legislation on urban planning has not devoted much attention to competition between economic agents, despite its being one of the core elements of the European integration process. Urban planning regulation has ignored competition issues by focusing on the right of property and on the different rights and obligations that arise from the property of land. Leaving aside the direct management hypothesis, the access to the development activity and to the private management of the development process – of the process whereby natural, green space is transformed into urban space – is only possible on the condition that the property of the land is acquired or that an agreement is reached with its owners. Together with the Administration, the landowner is traditionally the only actor who can manage the urban development process, to the exclusion of any other actor,

[36] The Commission states that everything which has been said before is equally applicable to the special award cases of Articles 50 (priority award) and 51 (connected or conditioned award) of the LRUA [Reasoned Opinion C (2005) 5320, 10]. The first provision used to regulate the priority award, which disappeared in the new Valencian legislation.

[37] When analysing the criteria for the selection of tenderers laid down by the Valencian legislation, the Commission states that 'the first part of this criterion, the proportion of the land which belongs to the tenderer, is contrary to the principle of equal treatment and non-discrimination and/or to Article 49 of the EC Treaty. According to the LUV, any natural or legal person fulfilling the selection criteria can act as development agent, irrespectively of whether it is the owner of the land affected by the project. This criterion runs counter to this objective, since it favours the tenderers that own all or part of the land over those who do not. This different treatment is not justified in the light of that objective and is therefore contrary to the principle of equal treatment and non-discrimination' [Reasoned Opinion C (2006) 4738, 42].

sometimes on the basis of the legal consideration of compensation boards as the beneficiaries of the expropriation. As a result, the notion of free competition as promoted by Europe has not reached urban planning law, although the case law of the European Court of Justice is steadily advancing in that direction. The European regime considers that the infrastructure works are public and as such subject to public procurement rules, and that they cannot be deprived of that condition by any agreement, even if it involves a transfer of the ownership of land. Nothing more – for the time being –, and nothing less. In the *Scala* case, the Court of Justice made it clear that the agreements reached with the landowners cannot be used to entrust them with the execution of the infrastructure works without tender: 'infrastructure works of the kind listed in Article 4 of Law No 847/64 constitute either building or civil engineering works, hence activities of the kind referred to in Annex II to the Directive, or works sufficient in themselves to fulfil an economic and technical function' (para. 59). It is only a matter of time before the Court rules on the public works regime in Spain, irrespective of whether its execution corresponds to an urbanizing agent selected following a competitive procedure, to a board of landowners, or to other bodies set up without competition.

2. Urban planning agreements

From the perspective of public procurement law, the legal regime of the public works contract is not the only surprising element that can be found in the field of urban planning. The traditional case law on urban planning agreements (*convenios urbanísticos*) is equally staggering, both from the standpoint of public procurement law and of the principle according to which public powers cannot be disposed of. There are many municipalities in which no project can be conducted nowadays without such an agreement. In the field of urban planning, the agreement seems to be a minor god, the lever that can move anything, the key that can open anything and the law that can decide anything. Nothing without an agreement and everything beneath it. Within this framework, the urban plan is nothing else than the administrative instrument where the agreements previously reached by the Administration are captured; these agreements are thus the maximum symbol of the process of commercialization that affects today's public power, and of the loosening of the principle of non-disposal of public powers. According to PARADA, 'the urban planning agreements are very close to the criminal offence of bribery («I offer urban use to you, local government, provided you allow me to build on this land») and are

therefore absolutely incompatible with the philosophy that should underlie urban planning: consideration should only be given to the general interests, for it is on account of them that the Law laid down aseptic and exquisite procedures for the adoption of decisions and for their modification, and it is because of the agreements that those procedures are becoming a fake rite which only serves to legitimise what has been previously agreed'[38].

The urban planning agreement is, in my view, the result of a certain line of case law, which can be termed as hypocrite and contradictory[39]. In light of the fact that the legislator has expressly declared that the public competence over planning cannot be disposed of (Article 3 of the *Texto Refundido de la Ley del Suelo de 2008*), no other adjective can be used to describe the case law which states that the agreements are compatible with the principle of non-disposal, that there is no disposal because the Administration is under no obligation to conduct the procedure leading to the adoption of the plan (although some laws adopted by the Autonomous Communities qualify the absence of such an obligation) and that the Administration is under no obligation, but simply under the responsibility to do so[40]. The contractual nature of the agreements always entails reciprocal obligations, which in turn give rise to contractual liabilities. The existence of liabilities implies that some rights and some expectations have arisen in the other party, and that they can be assessed and – eventually – indemnified. It is therefore not surprising that many agreements contain a clause whereby the Administration is exempted from any responsibility in some situations – and therefore not in others –. Although the power is therefore theoretically non-disposable, what happens in practice is that the agreements have as their object a certain form of exercise of that power, a specific content of the planning decisions or even the exercise of the exclusive power of the Municipality to initiate the procedure or to revise the general plan. And everything happens ignoring the most

[38] PARADA VÁZQUEZ, R. (1998-1999: 137).

[39] PARADA VÁZQUEZ, R. (1998-1999: 137).

[40] BUSTILLO BOLADO, R. O. y CUERNO LLATA, J. R. (1996) *Los convenios urbanísticos entre las Administraciones locales y los particulares*, Aranzadi, Pamplona, p. 183 or, *in extenso* with regard to the issue of misuse of power, pp. 102-110; HUERGO LORA, A. (1998) *Los convenios urbanísticos*, Civitas, Madrid, pp. 97, 110-115.

elementary procedures for the control of the contractual activity of the Administration. The urban planning agreements have a contractual nature and they generate contractual liability, but they are subject to procedural rules which are almost symbolical and which do not guarantee any sort of prior control, nor their financial viability.

Although originally designed as an instrument to encourage compliance with the law and not to facilitate its transgression, the agreements have in practice been perverted and they are nowadays used as a mechanism to put pressure on the authorities of the Autonomous Communities. How else could we assess the agreements whereby the Municipality receives in advance economic benefits in cash or in kind that it will be unable to give back should it fail to meet the agreement? How else could we assess the agreements which treat as an advance payment the execution of public works, thereby ignoring the rules on public procurement? Finally, bearing in mind the prohibition to dispose of the public power to supervise territorial and urban design, how else could we assess the agreements which describe and predetermine, almost to its last detail, the content of a new general plan or of its modifications? The settled case law according to which the agreements involve no waiver of the public planning competence only serves to hide the reality: the commercialisation of the planning competence and its sale by its only possible holder, in exchange for a number of benefits obtained in advance. The commercialisation of the public planning competence is certainly coherent with the transformation of the public works contract into a private one and, more generally, with the philosophy underlying a system which relies primarily on compensation boards. There are, however, some limits. The two most important ones are the misuse of power prohibition and the arbitrariness prohibition, as noted by the doctrine and by the courts. But it seems convenient to go further, following the path initiated by the most recent State legislation. It should be recalled, for example, that it is not possible to include in the agreements any clause excluding the application of the rules on public procurement to infrastructure works, for example awarding separate contracts to the individuals who subscribe the agreement with the Administration[41]. This prohibition is of particular importance when one party assumes,

[41] For all, see Judgments of the Spanish Supreme Court of 27 December 2005 (rec. 4875/2002) and 28 March 2006 (rec. 6047/2002).

by virtue of the agreement, certain obligations with regard to the development process that go beyond the duties imposed upon it by the urban planning legislation. In those cases, it will be possible to agree on the private funding of the public works, but their tender will have to respect the public procurement rules.

3. The flight from Administrative law. The urban-planning companies.

Urban planning also displays some peculiarities from the organisational point of view. Many Autonomous Communities have regulated the 'mixed urban-planning companies' (*sociedades urbanísticas mixtas*), formed by the Administration and by the landowners affected by a certain development project. These societies have been entrusted with very different functions: while some of them are clearly public, others are private, but still performed with no respect for the most basic rules of competition between economic actors. The obscurity surrounding the contractual practice of the private managers in charge of the compensation model of urban planning has thus been transferred to the public realm, trying to elude the rules on public procurement. At best, the surplus generated by those mixed societies, which would normally be treated as a profit by private companies, is used to finance public services and infrastructures; but in most cases those are alien to urban planning and should be directly financed by the public budget.

Some confusion also arises from the fact that those societies sometimes assume the task of managing the whole urban development process, and even the property of the Municipality, and from the fact that they respect only formally the competence of the local government, whose organs merely approve the planning and managerial decisions taken within the society. Furthermore, it is often the case that the establishment of these societies conceals the total privatisation of the urban planning activity of the Municipality, since the management of the society is entrusted to private third parties which are selected without even observing the rules on public procurement. The society thus becomes an empty carcass, a screen, a veil that hides managerial and decision-making structures which are totally alien to the municipal organisation, which are immune to public participation and which act in confrontation with the local authorities. The same happens, incidentally, with regard to publicly owned land, when the societies act as mere screens to mitigate the rigour of the regulation.

The urban planning companies (*sociedades urbanísticas*) established between several Administrations also present some peculiarities. Normally, the aim behind this joint venture is to foster certain urban actions which are of common interest to all the public shareholders and which can be of an industrial or residential character. In any event, the execution of the tasks entrusted to those societies used to be very problematic, in the light of the public procurement rules and as a result of the fact that their capital is hold by different entities; however, those problems can be considered overcome, after the Judgment of 19 April 2007 in the *TRAGSA* case, where the European Court of Justice held that those societies could be regarded as an in-house service of the different Administrations that participate in its capital share, even if they have a minority stake.

4. Land valuation and the expectations generated by urban-planning

The principle according to which the value of the goods that are expropriated should be assessed without taking into the account the project that is going to be executed blew up in relation to land. Both the legislator and the Supreme Court established the principle according to which account should be taken, not only of the project, but also of the mere expectations that could eventually come into being. Thus, when the value of a piece of land is assessed, the assessment looks at the market value that the land could acquire, in the long term, should certain public decisions be taken, i.e., to the value the land will have depending on the use it will be assigned in the future by the planning instruments. Not only are expectations considered: it is the most profitable expectation which counts, even if such a possibility depends on the adoption of several administrative decisions which are subject, as the Administration itself, to the general interest. CERDÁ declared as early as in 1860 that 'when the lands and the buildings where a street is going to be built are paid with public funds belonging to the State, the province, or the municipality, the administration buys to the owners of the adjacent pieces of land and buildings the right to become richer, at least doubling the value of the buildings and lands located on both sides of the new street, in an area equal in width to the normal length of the buildings'[42]. We

[42] I take the quote from BASSOLS COMA, M. (1973) *Génesis y evolución del Derecho urbanístico español*, Madrid, p. 257.

discuss today whether the Administration must pay to the expropriated owners the expected profit, assessed on a subjective and hypothetical basis, in order to avoid breaking the principle of equality recognised in the Constitution when exercising its expropriation powers. This is the debate underlying the Supreme Court's case law on the valuation of general systems (*sistemas generales*), which is based on the recognition of a universal profit which is equally shared by the all the owners directly affected by the urban development project designed by the plan. This leads to a universal land subdivision which seems to inspire certain of the provisions of the legislation of the Valencian Autonomous Community, inasmuch as it requires the delivery to the administration of certain protected pieces of land, depending on the dimension of the land reclassified as developable[43].

The new regime for the assessment of the value of land pretends to change the evolutionary pattern that urban planning law has followed in Spain during the last sixty years. The new regulation is based on the central position assigned to land, which is simultaneously considered as the object of rights and as a limited and contingent resource which can be transformed into a business asset. The underlying philosophy of the old regulation is thus left behind, inasmuch as it was basically concerned with the regulation of the property regime applied to land. A shift has occurred in the way urban planning law is conceived: it is no longer the framework within which the property of land is defined, but rather the regulation of the use and conservation of land, which is the object upon which the non-disposable, public competence of territorial and urban organisation falls, and alongside which takes place the interaction between the rights and powers assigned to different actors, such as owners, undertakings and, in general, citizens.

From this ample perspective, the principle of sustainable development permeates all the new regulation. In effect, the public policies for the regulation, organisation, occupation, transformation and use of land have as their common goal the use of this

[43] Criticised in the last editorial he wrote before his death by GARCÍA-BELLIDO, J. (2005) 'Por una liberalización del paradigma urbanístico español (III): el tsunami urbanístico que arrasará el territorio', *Ciudad y Territorio*, No 144, pp. 273-284; and propounded as a model in the dissenting opinion of the *Dictamen del Consejo de Estado* of 26 June 2006 on the project of the *Ley del Suelo*.

resource in accordance with the general interest and with the principle of sustainable development (Article 2(1) of the *Texto Refundido de la Ley del Suelo de 2008*). These policies will therefore have to foster the rational use of natural resources, balancing the requirements stemming from factors such as the economy, employment, social cohesion, equal treatment and equal opportunities between men and women, health and security, and the protection of the environment; in particular, they will have to contribute to the prevention and reduction of pollution, trying to set up effective measures for the preservation and improvement of the nature, the flora and fauna and the protection of the cultural and landscape heritage, the protection of the rural and urban space, ensuring – with respect to the latter – that the occupation of land is efficient, that the necessary infrastructures and services are available, and that the different uses assigned to land are functionally and effectively combined when they perform a social function (Article 3(1) of the *Texto Refundido de la Ley del Suelo de 2008*). Urban and territorial organisation are, within this context, public functions which are not open to transaction and which organise and define the use of the territory and of land according to the general interest, determining the rights and obligations associated with the ownership of land, depending on its final use (Article 3(1) of the *Texto Refundido de la Ley del Suelo de 2008*).

Those are the premises upon which state legislation puts forward new principles and key ideas that are meant to inspire the regulation of urban planning as one of the fundamental matters related to the regulation of land. I cannot go any further. After the Judgment 164/2001 of the Supreme Court, the State is bound to exercise a competence which is almost impossible to exercise[44], unless it decides to harmonize the regulation of urban planning, which is unlikely[45]. The competence for the development of the principles laid down by the state legislation corresponds to the Autonomous Communities' legislator, which is bound by its mandatory provisions, such as the new requirements concerning the

[44]TEJEDOR BIELSA, J. C. (2001b) 'Propiedad urbana y urbanismo como competencias estatales de imposible ejercicio en la STC 164/2001, de 11 de julio', *Revista Aragonesa de Administración Pública*, No 19, pp. 259-260 and (2001d) *Gobierno del territorio y Estado autonómico*, Tirant lo blanch, Valencia, p. 186.

[45] TEJEDOR BIELSA, J. C. (2001c: 80-84).

authorisation regime for the urbanisation of rural land – which impose a balancing assessment to ensure respect for the principle of sustainable development – and the legal regime of the urbanization activity – which must be carried out within the framework defined by Article 6(a) of the *Texto Refundido de la Ley del Suelo de 2008*[46].

However thin it may be, the competence of the State in this field currently covers a crucial question: land valuation. This competence is actually claimed by the Charters of Autonomy of some Autonomous Communities. The regulation currently in force is faithful to the non-speculative conception of the new urban planning legislation, which is based on the separation of the issues of land classification and land valuation. The criteria defined by the state legislator take into account the value of land at the moment when it is assessed, and they disregard any future expectation or any possible use which goes beyond the one objectively established by the regulation in force, so that it is not possible anymore to say that the adoption of the very plan which classifies land unreasonably multiplies its value, as it used to happen under Law 6/1998, of 13 April (*Ley sobre régimen del suelo y valoraciones*). It will not be possible for valuation agencies and for the financial entities to keep on acting carelessness – as they have been doing for the past years, with the dreadful results that are now apparent –, because the value derived from the use assigned to land will only be realised once the development process has effectively taken place, so that building is actually possible. Value will only be created by investment; the value of all the uses foreseen by the plan will only increase the value of a piece of land once it has been incorporated into the productive process[47].

Very concrete effects will stem from the combination of the new system of land valuation with an urban-development model which is subject to the principle of sustainable development, and which has to justify the classification of land in accordance with the

[46] PAREJO ALFONSO, L. (2007: 324-331).

[47] ROCA CLADERA, J. (2007) '¿Ser o devenir? La valoración del suelo en la Ley 8/2007', *Ciudad y Territorio,* No 152-153, pp. 431-439; FERNÁNDEZ FERNÁNDEZ, G. R. (2007) 'El régimen de valoraciones en la nueva Ley de Suelo. La valoración del suelo rural y urbanizado. La tasación de las actuaciones de transformación', *Ciudad y Territorio,* No 152-153, pp. 402 and 411-416.

requirements laid down by Article 47 of the Constitution. Furthermore, these effects will be amplified by the recent changes undergone by the legislation on equity capital and risks affecting financial entities[48].

The transformation of the effects that the plan has on the value of land would not have been possible if the legislator had not dispensed with the classification of land as the basis for the determination of its legal status, defining instead two 'basic land situations' (*situaciones básicas del suelo*) – in other words, the two factual situations in which a piece of land can find itself, depending on whether it is urbanised or not –. Thus, rural land (*suelo rural*) is considered as not urbanised, irrespective of whether it is considered as fit to be transformed – although this has to be nuanced, as it depends on its situation and classification at the time of the entry into force of the 2007 *Ley del Suelo* –. The consideration of urban land (*suelo urbanizado*) is reserved to the land which has been legally transformed, and incorporated to the urban space in the way described by the legislation. Neither the regional legislation, nor the municipal plans specify what part of the territory is urban and what part is rural, because we are dealing with facts, with a factual situation that depends on the concurrence of certain objective factors. The classification of land therefore overlaps with its factual state without conditioning its valuation, thus strengthening the capacity of urban planning to organise the urban space, without being constrained by the effects that it used to have on the value of land under the Law of 1998 (*Ley sobre régimen del suelo y valoraciones*).

Nevertheless, as far as the valuation of land is concerned, the truth remains that urban planning law and, in particular, the treatment of land, present some peculiarities[49].

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[48] Law 36/2007, of 16 November (Ley por la que se modifica la Ley 13/1985, de 25 de mayo, de coeficiente de inversión, recursos propios y obligaciones de información de los intermediarios financieros y otras normas del sistema financiero); Royal Decree 216/2008, of 15 February (Ley de recursos propios de las entidades financieras); and Circular 3/2008, of 22 May, of the Spanish Central Bank (*Circular del Banco de España a entidades de crédito, sobre determinación y control de recursos propios mínimos*).

[49] GARCÍA BELLIDO, J. (1998-1999) 'La excepcional estructura del urbanismo español en el contexto europeo', *Documentación administrativa,* No 252-253, pp. 68-76; ROCA CLADERA, J. (2007: 431-437).

Traditionally, urban planning law has established specific rules for the assessment of the value of land when it is expropriated in order to carry out a certain development plan. In general, those rules have sought to establish objective criteria and the case law has been reluctant to accept them. Only in 1990 were the valuation criteria unified, so that they ceased to depend on the goal of the expropriation. Logic prevailed. From then on, the objective of the expropriation would not determine anymore the regime according to which the value of land would be assessed. The unification of the assessment procedures and criteria in 1990 confirmed the tendency inaugurated by the urban planning legislation of 1956; the objective criteria of urban planning law thus prevailed over the criteria traditionally used by the general legislation on expropriation. Although the latter departed from the principle of free valuation, Article 36.1 of the Expropriation Law stated that 'the value will be determined according to the value that the expropriated goods or rights have at the time when the procedure to determine the expropriation price is initiated, without taking into account the surpluses directly generated by the works plan or project that is at the origin of the expropriation or those which are foreseeable in the future'. Urban valuations departed from the opposite principle, because it was possible since 1956, under certain circumstances, to take into account totally or partially the surpluses generated by the very plan which was at the origin of the assessment and which execution was at stake[50]. Precisely the opposite. Until 1998, once the urban plan had been approved, the value of urban and priority developable land (*suelo urbano* and *suelo urbanizable prioritario*) was assessed according to the scrap value of the use assigned by the plan, in other words, according to the use that would be possible if the plan was executed, and provided the market conditions would not change substantially. The value of land was therefore assessed according to an estimation of the future evolution of the real estate market. Not only was the value of land assessed taking into account the plan that justified the expropriation and that was to be executed; the assessment used to take into account the expected and estimative surplus, since the most important reference to determine the expropriation price was the scrap value of land. This was nothing else than an estimate of its market value and

[50] PARADA VÁZQUEZ, R. (1998-1999: 123-124); ROCA CLADERA, J. (2007: 435); LORA-TAMAYO VALLVÉ, M. (2001) *Urbanismo de obra pública y derecho a urbanizar*, Madrid, Marcial Pons, pp. 372-374.

hence a subjective assessment which went beyond what the Constitution required[51]. The value of the other types of land – i.e., non-priority developable land and non-developable land (*suelo urbanizable no prioritario* and *suelo no urbanizable*) – was assessed with the real or potential income capitalization model, therefore excluding any surplus generated by the development process, insofar as this had not been recognised by the plan, although the case law mitigated the rigour of the law[52].

The 1998 Law (*Ley sobre régimen del suelo y valoraciones*) went even further; it fuelled the use of land to speculate and the inflation of the housing bubble, since it changed the method of valuation of non-priority developable land and of non-developable land, adopting the method of comparison, which used as a reference the actual sale price of similar pieces of land. The application of this method implied that the surpluses generated by the development activities themselves were taken into account, even if they had not been authorised yet by the planning regulation, and this led to the manipulation of some development and accounting concepts. The notion of pre-developable land (*suelo preurbanizable*) is a clear example thereof; it referred to land classified as non-developable but which had been acquired and valued, for accounting and mortgage purposes, taking into account the value it would have after being classified as developable, the future classification being sometimes previously agreed in an urban planning agreement. The value of this type of land has been drastically reduced, although the accounting of this reduction is being slow. Accounting negligence has a cost[53]. The same legislator that carried out the 1998 reform was compelled, only five years later, to limit the extent to which expectations could be taken into account and to do so without altering the method of

[51] BAÑO LEÓN, J. M. (2008) 'Las valoraciones del suelo', in the collective work *El nuevo régimen jurídico del suelo*, Iustel, Madrid, pp. 156-159; for the opposite view, SERRANO ALBERCA, J. M. (2008) 'Las valoraciones en la Ley del Suelo 8/2007, de 28 de mayo. Una inducción a la arbitrariedad', *Revista de Urbanismo y Edificación*, Aranzadi, No 16, pp. 100-102.

[52] SERRANO ALBERCA, J. M. (2008: 98-99).

[53] BAÑO LEÓN, J. M. (2008: 157).

assessment; the method of comparison was kept, but no account would be taken of the development expectations that could have influenced the prices used as a reference[54].

The *Texto Refundido de la Ley del Suelo de 2008* has deeply transformed the legal regime on the valuation of land[55]. Undoubtedly, the main novelty does not lie so much on the new assessment methods – which are again the ones in force prior to the adoption of the 1998 Law (*Ley sobre régimen del suelo y valoraciones*) –, as in the criteria laid down for their application. Thus, the scrap value of the use authorised by the plan only becomes relevant when the land is actually urbanised, in other words, when the factual situation of a given piece of land is urban, irrespectively of what the plan states. The urban character of land therefore depends on its actual state, and not on what the planning instruments say. Irrespectively of their classification, the other types of land will be valued according to the real or potential income capitalization model, despite the fact that they can be recognised an income linked to their location, which can double their value, and even an additional compensation when their owner is deprived of the possibility to participate in the development process through an equitable distribution of the benefits and costs of the process – the compensation being additional and therefore independent from the value of the piece of land itself –.

Finally, the new system is also substantially different from the old one inasmuch as it does not use the classification of land as the basis upon which the method of valuation is determined – thus altering the value of an important part of urban land and of all the developable land, which is today considered rustic land (*suelo rústico*) – and as it puts an end to the consideration as sacred of the development surpluses and expectations – incorporated into property rights by the 1998 Law (*Ley sobre régimen del suelo y valoraciones)*, which equated the legal value of land with its estimative future market value

[54] In fact, the Popular Group in the Spanish Parliament used the 2003 reform – which attempted to limit the use of urban planning expectations in the valuation of land – as one of its main arguments to oppose the 2007 Law. See, in that connection, *Diario de Sesiones del Congreso de los Diputados. Pleno y Diputación Permanente*, VIII Legislatura, No 216, p. 10986.

[55] FERNÁNDEZ FERNÁNDEZ, G. R. (2007: 401-418).

–. There is no consensus, however, on whether the Constitution requires that the legal value assigned to expropriated land should be the estimative market value[56]. In any event, the importance of another change should also be noted: the use of the method traditionally used to value non-developable and non-programmed developable land (*suelo urbanizable no programado*) – i.e., the income capitalization method – to value any other type of developable land which has not undergone yet the development process. This is the chore of the legislative reform, as proved by its transitory regime, which mitigates the impact of the new system by making it dependant on the deadlines for the execution of the development plans, and by allowing the application of the rates linked to the location income. The change may have been too big, even for the 2007 legislator.

5. Speculation and the price of land and housing

What can finally be said about the so much despised speculation? After establishing as one of the guiding principles of the social and economic policies of the State 'the right (of all Spaniards) to enjoy decent and adequate housing'[57], Article 47 of the

[56] BAÑO LEÓN, J. M. (2008: 159); FERNÁNDEZ RODRÍGUEZ, T. R. (2007) 'Valoración de la nueva Ley del Suelo', in *Observatorio joven de vivienda en España. Anuario 2006*, Consejo de la Juventud, Madrid. Also in the collective work (2008) *El nuevo régimen jurídico del suelo*, Iustel, Madrid, which is the one I quote, and Ander the title 'La nueva Ley 8/2007, de 28 de mayo, de suelo: valoración general', in *Revista de Administración pública*, No 174 (2007), pp. 24-31; VAQUER CABALLERÍA, M. (2007a) 'Estudio preliminar', in PAREJO ALFONSO, L. y FERNÁNDEZ G. R. (2007) *Comentarios a la Ley de Suelo (Ley 8/2007, de 28 de mayo)*, Iustel, Madrid, 2007, p. 40; SERRANO ALBERCA, 2008: 100-102; CHINCHILLA PEINADO, J. A. (2009) 'Título III. Valoraciones', in the collective work *Ley del Suelo. Comentario sistemático del Texto Refundido de 2008*, La Ley-El Consultor, Madrid, pp. 712-714.

[57] This right may also be at a critical juncture, given the reformulation of the concept of protected housing, the generalisation of the reserves of protected houses as an ordinary tool of the urban plans, the use of this right to justify the classification of residential land, the acknowledgment that this classification is a right of the citizenry which is protected by public action and the judicial protection of this right, although with important limitations. See the recent *Proyecto de Ley reguladora del derecho a la vivienda en Andalucía* (*http://www.juntadeandalucia.es/viviendayordenaciondelterritorio/www/layouts/banners/ProyectoLeyDerechoVivienda.pdf*) or the already abandoned *Proyecto de Ley de garantía del derecho ciudadano a una vivienda digna* of the VIII Basque Legislature. The perception of housing policies as a service of general economic interest also fosters the evolution of the right proclaimed in Article 47 of our

Spanish Constitution states that 'the public authorities shall promote the necessary conditions and establish appropriate standards in order to make this right effective, regulating land use in accordance with the general interest in order to prevent speculation'. Obviously, the concept of speculation used by the Spanish constituent power is far from the Anglo-Saxon concept, and it leads to the prohibition of all norms and practices which artificially inflate the value of land or of the buildings erected thereon. Land speculation is therefore constitutionally prohibited, which is not the case of other economic goods, and the justification for this seems to lie on the peculiarities and on the exceptional importance that land has as a public and private resource[58]. This constitutional provision must be understood as a restriction to the free market; not in vain, competition tends to be imperfect or altogether inexistent in the land and housing market, and this is the reason why dominant abuses are so common, as a result of the concentration of land property rights in very few owners, all of which condemns the administration to a passive role. The concentration of property provokes a strong territorial partitioning of the land market, the limits of which do not usually go beyond cities or metropolitan areas. Each of these markets has its own oligopolists; these oligopolists tend to avoid competing in other neighbouring cities and areas, and only occasionally they compete with other oligopolistis within their own area.

It cannot be concealed that it is urban planning regulation and the compensation model of urban planning which make those practices possible: the abuse of dominant position, the fragmentation of the market and the manifest manipulation of the urban process to alter the price of the final product. Were it not for the protection granted upon these practices by the regulation in force, which goes against the spirit and probably also the letter of the Constitution, it would be possible to subsume some of them under rarely applied criminal provisions such as Articles 281 and 284 of the Criminal Code. The former punishes 'he who detracts from the market raw materials or staples with the aim of depriving of any supply a part of it, of forcing a change in the prices or of seriously

Constitution *(La Comunidad Europea y la vivienda social*, Boletín informativo No 94 (2009), AVS, Valencia, esp. pp. 18-24).

[58] VAQUER CABALLERÍA, M. (2007a: 19-21).

harming consumers'. The latter punishes 'those who attempt to alter the prices that would result from a process of free competition between products, goods, securities, services or any other movable or immovable good capable of forming the object of a contract, using violence, threat or deception, or using insider information'.

I do not believe that the application of those criminal offences to the urban development practice should be encouraged, but it is certainly surprising that the evident manipulation of the price of a product like housing, which is essential for society, is left aside from some of the most important criminal provisions protecting the market and consumers. This anomaly – the manipulation of prices beyond any reasonable limit –, seems to be assumed as normal in the field of urban development.

Thus, one of the most fundamental acts of consumption for any family or citizen – the one that gives access to a house and which gives rise to commitments which remain in force, for the greatest part, until the end of one's life – seems to be immune to the normal guarantees and controls established by Consumer protection law. The complexity of the regulation and the slowness of the judicature discourage house buyers and tenants from asserting their rights.

III. COMPETITION BETWEEN ADMINISTRATIONS TO THE DETRIMENT OF THE PUBLIC SPHERE

Urban planning seems to demand a deep regeneration. It is necessary, today more than ever during the last thirty years, to recover moderation and the general interest as guiding principles and as a pattern for the exercise of the public competences over the territory and, as far as urban planning is concerned, over the city. The use of economic theories purportedly based on the protection of competition – such as the ones advocated in 1994 by the Spanish Competition Authority (*Tribunal de Defensa de la Competencia*)[59], which inspired the *1998 Ley del Suelo* –, has lead to results which lack solidarity. The huge

[59] FONSECA FERRANDIS, F. E. (1999) *La liberalización del suelo en España. Presupuestos y marco jurídico-constitucional*, Madrid, pp. 169-172.

benefits of the real estate sector, reinvested in the very same sector with the help of financial tricks and of abusive real estate valuations, seem to have faded away. However, their generation was possible thanks to the debts and mortgages subscribed by many citizens and families. These debts remain, and so does the debt of our financial system with foreign creditors. The housing bubble has exploded and the only thing that remains are frequently over-valued buildings, debts which are over-priced if compared to the actual value of the goods acquired with them, and an over-indebted financial sector. The economy appears today as the pre-condition to reach certain solutions, but not as the solution to the problems related to urban planning and to the problem of access to housing.

It is surprising that during the flourishing of the real estate sector, when the economic cycle was at its peak, the most intense public debates did not turn on the issue of sustainability and on the abuses brought to the fore by the well-known *Malaya* case and by other corruption cases. The most intense debates turned on the issue of the allocation of competences. Firstly, this issue gave rise to a conflict between the State and the Autonomous Communities, which resulted in three important and well-known judgments of the Constitutional Court[60]. The doctrine was staggered by the upheaval brought about by the Judgment 61/1997 and by the obligation it imposed upon the Autonomous Communities to exercise their urban planning competences, in order to tackle the grave problem of legal uncertainty. The Autonomous Communities, closer than the State to the reality of urban planning, were entitled to assume the full competence in this matter pursuant to Article 148(1)(3) of the Constitution; they therefore claimed and exercised their competence. It looked as if this conflict had been overcome, but the 2007 *Ley del Suelo* has prompted a similar dispute and has been challenged before the Constitutional Court on grounds of both substance and competence.

However, this was not the end of the debate related with the allocation of competences in this field. Strong tensions also arose between the Municipalities and the

[60] Judgment 61/1997 of the Spanish Constitutional Court, on the *Texto Refundido de la Ley sobre régimen del suelo y ordenación urbana de 1992;* Judgment 164/2001, on the *Ley del Suelo de 1998*; and 54/2002, where the scope of the *Ley del Suelo de 1998* and of the State competence were defined.

Autonomous Communities, the latter being aware of their strength and of their growing economic and management capacity. The tension was handled in very different ways by the different Autonomous Communities, so that we find very heterogeneous solutions in the norms that each of them adopted. Some norms reproduced the State model and assigned to the Autonomous Community the competences of the State, sometimes even extending them – the example of the Community of Madrid is paradigmatic –; others extended the competences of the Municipalities to the extent that they deprived of any content the competences of the Autonomous Community itself, making their exercise impossible. The central role claimed by the Municipalities, and theoretically recognised by the case law, was only partially recognised by the laws. The conflict between the Autonomous Communities and the Municipalities was further aggravated by the rare implementation of policies for the organisation of the territory, by the willingness of the Autonomous Communities to promote large, strategic actions within their territory without being constrained by the Municipalities, and also by the economic interests at stake and by the conflict over the power to decide on the re-classification of land.

With almost no exceptions, all the actors involved in the urban planning process backed the empowerment of the Autonomous Communities and the widening of the competences of the Municipalities. This factor, together with a radical swift in urban planning culture and, more precisely, with the adoption of classification decisions, has prompted a rapid change in the previous *status quo*, as intended by the legislator. There is today much more classified land susceptible of being transformed and the classification of land is less strict than in the past. The reason is that, in the areas where the pressure was stronger and where there was more dynamism, the old general plans and the subsidiary municipal norms were immediately revised in order to ensure that the offer of developable land increased in accordance with the pro-development ideology of the new legislation, irrespective of the political views of the future managers. The criteria that must determine the final use of this new developable land are often not defined in the legislation. This is the result of the so-called 'land liberalisation' of 1998[61]: plans which re-classify urban land

[61] PARADA VÁZQUEZ, R. (1998-1999: 134-135); VAQUER CABALLERÍA, M. (2007a: 30-32); FONSECA FERRANDIS, F. E. (1999: 188).

through norms which only affect specific areas, plans which classify as non-consolidated developable land (*suelo urbanizable no consolidado*) the maximum extension of land allowed by the legislation, plans which omit the category of demarcated developable land (*suelo urbanizable delimitado*) and which include a large stretch of non-demarcated developable land, despite the absence of all the elements which determine the traditional, general and organic structure of the territory, thus leaving its entire definition to future partial plans. After the general plans had been definitively approved, the Autonomous Communities were bound to issue their opinion against this very complex legal background; but their reports, which were not even binding in some Autonomous Communities, had little relevance and a limited impact on the urban, legal and commercial process leading to the organisation and transformation of land. This was an idyllic scenario for land traders.

The foregoing account shows that the defence of the Municipality as the exclusive decision-maker in the urban planning process was manifestly interested, and that it was to a great extent unrelated to the own interests and needs of the local entities, being the interest factor and not the material one the determining criterion[62]. The concentration of the urban planning competence in the municipalities presents very relevant advantages for its most important advocates. First, for the land owners and managers, because the Municipality is more accessible and more easily influenceable, especially when they have a small population and a large territory. The need to protect municipal autonomy – understood as the need to prevent other administrations from encroaching on the forum in which an agreement has been reached – is strongly advocated by these actors, who actually invoke it very often in their pleas when they bring a judicial action. Secondly, for the private technical experts, because the extent and the complexity of the competences assigned to the Municipalities widens the sphere in which they can intervene, performing functions that would otherwise be carried out by public organs and in accordance with the administrative

[62] It used to be common, amongst the advocates of a 'sovereigntist regionalism', to try to limit the competences of the Autonomous Communities, declaring them unconnected to urban planning, despite the content of the law and of the case law. On this issue, MENÉNDEZ REXACH, A. (2006) 'Autonomía municipal urbanística: Contenido y límites', *Revista española de la función consultiva*, No 5, pp. 25-27.

legislation. I must insist, coming back to ideas that have already been expressed in this article, that it is not possible to consider that an administration exists, in the functional sense of the term, when the economic and material resources are scarce and when the only available civil servant is in charge of several municipalities and works under an interim contract. And this is so irrespective of the disposition, the determination and the good will that the civil servant may have in the performance of its fundamental functions. Third and lastly, the advantages for the mayors and town council members are also obvious, because the debate over competences is linked to the financial debate, in the sense that Municipalities can obtain via urban development financial resources that are not available to them via the ordinary financing mechanisms.

Nevertheless, the limitation of the competences of the regional Administration has had a boomerang effect, as has happened with other state and regional norms. Surprisingly, the policies and the legal instruments for the organisation of the territory have not been reinforced so as impose a comprehensive and binding legal framework on the Municipalities. The general plan represented a global, integrated and comprehensive assessment of all the decisions, impacts and needs related to the territory; this global assessment has been recovered on a sector by sector basis, imposing a whole set of partial reports that approach the process from the perspective of different sectors, and implementing the environmental impact assessment introduced by the European legislation. Today, these sectorial reports have a greater weight and a greater impact on the design of a general plan than the global assessment of the plan made by the regional Administration: the reports on the water cycle (water supply, drainage, sewage, flooding), risks, defence, heritage, cattle trails, civil protection, provincial, regional or state roads, airports and ports, to name but a few. What is the point of the global assessment if concrete reports on every sectorial aspect have already been issued? What is the point of the assessment carried out by the regional Administration if the design of the urban development model corresponds exclusively to the Municipality? The dominant case law on the scope of the regional competences only worsens this situation, which is the basis upon which those who claim that the scope of the municipal decision on the general plan should be widened even more – to the point of making it exclusive and exclusionary – build their case. The answer to these questions may come from an adequate construction of the new regulation of land as a

scarce resource, from the tradition regional competence and from the environmental impact assessment imposed by the European Union.

In any event, the absence of a set of effective and resolute policies for the organisation of the territory has generated competition between the Municipalities. The problem is that the competition between Municipalities for the leadership of urban development project, together with the legal framework and with the dominant practices, have not always benefitted the general interest, and this has not necessarily happened as a result of the lack of willingness to impose, but as result of the impossibility to do so. Each Municipality legitimately sought to grow as much as possible within a deregulated context. And within such a context, it is difficult to understand and explain why they should have waived their aspirations voluntarily. Since it was possible, and since other Municipalities decided to reclassify land to carry out development projects that went far beyond their needs, why should other Municipalities avoid the same route? The problem is that competition between Municipalities can deprive of any value the decisions concerning the organisation and classification of land, and at the same time cause important territorial imbalances if the powers of the regional urban- planning organs are legally limited. The pressure bore by certain rural areas generates important environmental risks, which are described in the European Spatial Development Perspective, which concludes that 'these negative impacts can only be countered through suitable regional planning and corresponding environmental and agricultural policies for the re-establishment of biodiversity; reduction of soil contamination; and extension and diversification of agricultural use' (*European Spatial Development Perspective*, 1999, para. 94). According to the European Union, 'it will only be possible to stem the expansion of towns and cities within a regional context. For this purpose co-operation between the city and the surrounding countryside must be intensified and new forms of reconciling interests on a partnership basis must be found' (*European Spatial Development Perspective*, 1999, para. 84).

The regional administrations that renounced to implement effective policies on the organisation of the territory – whereas in Andalucía, for example, these policies were only decisively implemented after the *Malaya* corruption case, in the Basque Country the same policies had been implemented for a long time, despite the absence of corruption cases –, were bound to play an almost impossible role: the role of arbiter between Municipalities,

with no other tools than, on the one hand, the strict application of the law and, on the other, the use of reason. During these years, deregulation prevailed in a field where the rational use of the territory and the protection of the public sphere should be the axis of the regional policies and competences; it prevailed in a field where these principles should constitute the framework which conditions *a priori* the actions of all the other actors, in the form of instructions for the organisation of the territory that make room for effective competition between the economic actors with no negative territorial costs. Within this context, instead of fostering competition between private actors for the management of the development process, with the aim of lowering the price of the final product – developed land –, the competitive process took place between the public actors and this allowed the private actors to take advantage of their position as actual or potential landowners and to maximise their purely speculative benefits, in spite of the constitutional prohibition.

Urban planning is perhaps one of the fields in which the interests of the local community are more intense and where the participation of the local authorities in the decision-making process is more justified. However, this cannot result in the supra-municipal dimension of the territory and of its government being ignored, because the involvement of other authorities clearly results from the competences over large infrastructures, over economic planning and over services, which correspond to the other Administrations, be the Autonomous Community or the State. But it should not be forgotten either that the guarantee of municipal autonomy has suffered from a serious deficit in the past, which has hindered the exercise of the competences enshrined by that principle. And I do not refer only to the financing deficit, which has been the object of many studies, which is often the object of political debate, which has forced municipalities to use urban-development as an *extra-budgetary* source of financing and which, by the way, nobody seems ready or able to solve. I refer to another deficit, one which has attracted less media attention but which is also important: the insufficient availability and the insufficient training of technical staff, a problem which is aggravated by the high fragmentation of the municipal map and by the low population density. Since municipalities are bound to compete amongst themselves for the coveted development, since the private sector puts upon them great pressure and since their financial resources – and hence their material and human resources – are very limited, the result seems logical and unavoidable. Only nominally do they exercise the decision-making power stemming from their autonomy,

because substantially it only benefits those who can profit from a decision that they pretend to shield from the interference of any other Administration, going beyond the constitutional and legal requirements. This is the origin of many criticisms made to the state and regional intervention in the field of urban planning by private actors, who are especially eager to invoke municipal autonomy to attack any state or regional decision that limits the benefits they have made within the Municipality. It is therefore absolutely necessary to ensure that the municipal competences on urban planning are always exercised in the public interest and that the local interest is the principle which presides over their exercise, within a framework previously defined in the most detailed possible way by the other levels of government. The solution to the problems that have arisen in the last years cannot and must not consist in depriving Municipalities of their natural competences. Furthermore, these competences must be adequately financed to prevent unnecessary expenses. The reform of urban planning must go hand in hand with a far-reaching reform of the system of local financing and with a mandate of financial restraint, in the form of a limiting and unequivocal definition of the municipal competences. Otherwise, if the poor economic situation of Municipalities is maintained, urban planning will again be used as source of financing as soon as it recovers its past profitability.

The general urban plan – together with the preceding urban planning agreements on the reclassification of land or on the revision of a previous plan – has become a financial instrument which responds to concerns that are alien to the design of urban development. Instead of designing the city, the general plan is primarily seen as source of money. But the blame is not to put exclusively – not even especially – on the Municipalities. This is the result of the economic conception that prevailed over the years and that broke some essential consensus. It is the result of the economic conception underlying the Royal Decree 4/2000 (*Real Decreto-ley 4/2000, de 23 de junio, de medidas liberalizadoras del sector inmobiliario y de transportes, cuya exposición de motivos resultaba bien expresiva*):

> 'With respect to the real estate sector, these measures are intended to correct the rigidities which have become apparent in the market as a result of the strong growth of demand and of the impact of real estate products in the price of land, which in turn has been conditioned by the scarcity of developable land. Consequently, the reform will increase the supply of land, eliminating the legal

provisions in force which lack flexibility and which therefore limit the supply of land, shifting this positive effect to the final price of property'.

The idea was quite simple: it was necessary to avoid the classification of land as non-developable on the basis of purely urban planning reasons and to ensure that the most important planning decisions – the design of the city model and the classification of land in accordance with it – would respond to market considerations. The facts have proven, however, that the market did not work as it had been foreseen, but rather in the opposite way. The so-called 'land liberalisation' was in reality a process of deregulation which abandoned to the market the most important urban development decisions. The current situation is the result of the relaxation of the risk assessment made by credit entities, coupled with valuations that seemed to be based on the mistaken idea that the increase of the prices and the payment capacity of buyers had no roof[63].

IV. THE EVOLUTION OF URBAN PLANNING FROM OWNERSHIP TO BUSINESS. THE SUBORDINATION OF PLANNING TO FINANCIAL CONSIDERATIONS

Although based on other precedents, the Spanish urban planning model embodied in the state regulation of 1996-1998 dated back to 1956. It was the final phase of the late XIX century model of urban planning, which aimed at enlarging cities (*urbanismo de ensanche*), updated and transformed by the modern financial products and business practices, which have turned the land market into a speculative futures market, depending on the type of land-use foreseen, expected or negotiated in each part of the territory. This is not the place to examine in detail the evolution of urban planning in Spain – an issue which has been perfectly analysed elsewhere[64] –, but it should be noted that the evolution of the model resulted in the almost complete abandonment of the consolidated city, in the deterioration of full neighbourhoods – in the absence of any renovation and of any

[63] CAMPOS ECHEVERRÍA, J. L. (2008: 85-105).

[64] For an excellent synthesis, see LÓPEZ RAMÓN, F. (2007: 19-37).

generational substitution of the population fleeing to new suburban and metropolitan areas –, in the economic and environmental unsustainability of the city and in the destruction of the rural legacy. The problem has been pointed out by the European Union, as shown by the following:

> 'Member States and regional authorities should pursue the concept of the "compact city" (the city of short distances) in order to have better control over further expansion of the cities. This includes, for example, minimisation of expansion within the framework of a careful locational and settlement policy, as in the suburbs and in many coastal regions.'[65]

But another type of unsustainability has also become too common: the imposition of new norms to consolidated areas, which alter their traditional structure by replacing the single-family building model – where houses are semi-detached and have one or two floors on top of the ground-floor – with a multi-family building model – where buildings have up to four floors on top of the ground-floor –. Such a deep transformation of some urban areas has often been carried out without adapting the public services and infrastructures to serve the new population living within these renovated and crowded areas. Urban development plans do not take into account the new population densities generated by these urban tricks: they are not counted as growth because they affect areas which were already urban, despite the fact that six families may be living on the same piece of land where only one family used to live. The problem of the lack of adequate facilities and services to meet the needs of the increased population is thus aggravated, and the built heritage is sacrificed in order to increase its use.

Despite the complacency of many urban planners, the virtues of the 1956 model cannot conceal its drawbacks and the pernicious effects it has produced, in combination

[65] *European Spatial Development Perspective: Towards a balanced and sustainable development of the territory of the European Union*, May 1999, para. 84. On this issue, see PAREJO NAVAJAS, T. (2004) *La estrategia territorial europea. La percepción comunitaria del uso del territorio*, Marcial Pons, Madrid, pp. 366-376.

with other factors[66]. A thorough and critical revision of the traditional Spanish model of urban planning is necessary in order to recoup the value of the public sphere. It is generally acknowledged that the 1956 model, in conjunction with housing policies which fostered access to property rather than renting, was a useful tool for the socialization of the middle class which was emerging at that time, that it helped to reach social peace through to the generalization of housing property with external financing and hence to build the real estate and financial sectors. But the legal recognition that the public sphere was unable to assume on its own the management of urban planning and the involvement of private land owners also generated a new oligarchy of land owners, which was no longer characterized by the agricultural use of their lands but by their potential urban use.

The most important moment in the evolution of urban planning in Spain may have been the reform undertaken in 1975-1978, which resulted in a regulation that is still the model in which all the regional urban norms are inspired, without exception. In 1975, the redistribution philosophy (*filosofía reparcelatoria*) underlying the nineteenth century model changes, and it goes one step further in the de-materialisation of property thanks to the technique of the 'average use' (*técnica del aprovechamiento medio*). It is at that time when certain systems were fostered, for example the cooperative system, which – in its concession version – forms the basis of urban planning and which recalls the late concession of the nineteenth century reform. It is also the state legislation of the mid-seventies which introduced in our country the agreed urban planning model of the 'programs of urban action' (*programas de actuación urbanística*), thus fostering competition, an element which is nowadays demanded by part of the doctrine and by the European Institutions themselves. It may be the case that a more reasonable and less traumatic evolution of the seventies' regulation could have avoided the excesses of the last years.

The 1990-1992 reform resulted in the demise of the state urban legislation as the legal reference peacefully used in almost all the country. The Judgment 61/1997 of the Constitutional Court certified the end of a normative era, despite the fact that it declared

[66] GARCÍA BELLIDO, J. (2005: 273-284).

that the derogation of the seventies' regulation had been unconstitutional since it was not possible within the competences allocated to the State at that time. The ensuing developments – the 1996-2003 reform, as interpreted by the Constitutional Court in its Judgments 61/1997 and 164/2001, and the 2007-2008 reform – reveal that the State has been relegated to a secondary role in the definition of the urban development model, with the only important exception of the land valuation model[67]. In order to fit within its meagre competences in the field of urban planning, the regulation issued by the State has to be so open and so flexible that the State is bound to adopt norms which will rarely meet their objectives without the collaboration of the regional legislators.

The truth is that the 1956 model drove us here: to a place were the public task in the field of urban planning seems to be subordinated to private ownership and to private undertakings, and where the public management of urban planning is constrained by the right to promote the urban transformation of land, as defined in the 1996-2003 legislation. The model reached a point where, according to the 1998 state legislator, the Administration in charge of urban planning and its decisions could only create obstacles and rigidify the functioning of the land market. This model gave birth to what could be termed as 'cadastral urban planning' (*urbanismo catastral*), a design which gives priority to the cadastral division of land and to the property of each piece of land over the orderly organisation of the city and of its growth. Logically, the ownership of land is a factor which must be taken into account when adopting urban planning decisions, but it makes no sense that the most important ones are conditioned by the concrete ownership of certain pieces of land.

The last and tumultuous years of urban planning show that the 'cadastral urban-planning model' tends to disregard the territorial model, because property and acquisition rights in general prevail over urban and territorial considerations. It is a model that consumes land massively, because it uses property to conceal densities and uses which

[67] TEJEDOR BIELSA, J. C. (2001b: 259-260); BARNÉS VÁZQUEZ, J. (2002) *Distribución de competencias en materia de urbanismo. Estados, Comunidades Autónomas, Entes locales. Análisis de la jurisprudencia constitucional*, Bosch, Barcelona, pp. 149-154; y BAÑO LEÓN, J. M. (2007) 'El objeto de la Ley y el orden de las competencias legislativas: La depuración del ordenamiento en la materia', *Ciudad y Territorio*, No 152-153, pp. 302-303.

would be very controversial if they were rationally applied to other lands. In short, this model distorts the practice of urban-planning and it conditions the normal functioning of the Administration, because its decisions are precisely the efficient cause of the execution of purchase options over those lands which are expected to be urbanized. The agreement with the owner or with the holder of the purchase option is followed by pressure being put on the Administration; this in turn is followed by the decision of the Administration on the classification of land and, finally, after the classification and, eventually, the development plan, the execution of the purchase option or the sale of the land is carried out, on the basis of a plan which can already be implemented and which could be used – until a few months ago – to borrow money from Spain's financial entities[68]. It is in the light of these practices that some of the urban planning agreements reached over the last years should be assessed, in particular those which imposed or conditioned the adoption of the decision or the content or reform of the general plan, even though they did not imply the waiver of the public power of urban planning according to the case law.

This type of urban planning has generated very important malfunctions in local governance in Spain and even clashes between the inhabitants of local communities, who are logically the owners of a great deal of the land which is affected by the urban plans. Although the practice of urban planning should be inspired by the general interest, the latter was subordinated to the private interest in selling family land at prices which were much higher than what its late owners could have expected. Consequently, the owners put pressure on the Municipalities so that they would adopt the classification required to make the purchase option effective. Important governance problems also arise at the level of the Autonomous Communities. Their relationship with the Municipalities is bound to be under strain, especially when the actions of the Municipalities are conditioned by the agreements

[68] SÁNCHEZ DE MADARIAGA, I. (1999) *Introducción al urbanismo. Conceptos y métodos de planificación urbana*, Alianza editorial, Madrid, p. 99, explains how the English system works; its starting point is that the right to land development is alien to the content of property rights, since the plan does not assign building rights to the owner. These rights can only derive from a specific licence that the promoters can obtain from the Administration, which enjoys discretionary power to grant it. On top of that, and precisely because of the discretionary character of this power, the Administration enjoys disciplinary powers that are exercised by the local authorities.

reached with private actors and when these agreements foresee the provision of services in exchange for the future urban plan – should the plan not be approved as a result of the opposition of the Autonomous Community, the Municipality would be obliged but unable to return the services provided –.

Obviously, the content of the general plan and the planning culture which arose with so many difficulties in the seventies and the eighties of the last century have also undergone important transformations as a result of the foregoing. It is possible to perceive in today's urban planning that economic considerations and the value of land carry greater weight than the concern for the city itself. The general plan has been considered, above all, as the way to generate mortgage value and, from this perspective, urban decisions were perceived as an instrument to generate value and not as the tool to reach purely urban objectives. There are very effective tools to increase the price of non developed land: higher buildings, more building capacity, more profitable land-uses, more classified land with less structural urban planning – the traditional general and organic structure of the territory –, more housing density or the elimination of this limitative criterion altogether – allegedly, as a way of adapting the regulation to the market, although it represents in fact a manipulation of the market –, or more flexible and permissive local rules. Urban considerations are overshadowed and technical reports are not determining anymore; their only use is to justify *ex post*.

Surprisingly, although the new '*soft plan*' model has led to the possibility of urbanizing unlimited portions of land and hence to the possibility of multiplying the population or the residential capacity of the Municipality, the lack of land and of developable land has continued to be seen as a problem. The first of the recommendations made in the well-known and yet forgotten *Informe sobre suelo y urbanismo en España*[69] began by stating that 'the problem of the price and the availability of developable land is fundamentally a management problem'. The third recommendation stated that 'the forecast of the offer of classified and developable land and the planning of the needs of urban land,

[69] COMISIÓN DE EXPERTOS SOBRE URBANISMO (1996) *Informe sobre Suelo y Urbanismo en España*, MOPTMA, p. 191.

foreseeing the necessary steps well in advance, are indispensable in order to avoid the tensions generated by the peaks in the demand of land (such as the ones that will arise in the next period of economic reactivation) and the insufficient offer of land'. The proposal did not consist in filling Spain with developable land, but in managing the land which had already been classified, making it apt to initiate the building process as it becomes necessary. In order to do this, it is necessary to carry out determined public actions, to anticipate the needs and to prevent the withholding of land for speculative purposes as well as the incorporation of value to land as a result of the approval of the urban plan. The classification of land increases its value and the wealth of the owner without any investment on its part, simply as a result of an administrative decision. The withholding of land reduces its impact on the final product, but its price is not reduced. As is well known, the premises of the above mentioned *Informe* did not inspire the 1996-2003 legislation, which sought, as the preamble of the 1998 Law stated, 'to facilitate the raise of the offer of land, making it possible for any piece of land, which has not *yet* been incorporated to the development process, to be considered as apt to be urbanised, provided there are not specific reasons to preserve it'. This idea came from another well-known document of the mid-nineties – *Remedios políticos que pueden favorecer la libre competencia en los servicios y atajar el daño causado por los monopolios*[70] – in which it was stated that it was necessary to 'change the current views, defining the areas of the national territory which are apt to be developed in accordance with a plan that fixes public priorities taking into account environmental, landscape and ecological values'. And the document added: 'the rest of the territory must be, in principle, developable'. According to the Spanish Competition Authority, the design of the city should be the result of the application of general norms, with no discretion whatsoever on the part of the Administration, which was seen as an entity completely separated from, and even opposed to, the citizen; it was clearly established that 'the authorities cannot go so far as to decide what must be done in each space and when it must be done'.

[70] TRIBUNAL DE DEFENSA DE LA COMPETENCIA (1994), *Remedios políticos que pueden favorecer la libre competencia en los servicios y atajar el daño causado por los monopolios*, pp. 247-259; for an academic work sharing the ideas of the Report, see for SORIANO GARCÍA, J. (1995) *Hacia la tercera desamortización (Por la reforma de la Ley del Suelo)*, Marcial Pons–IDELCO, Madrid, pp. 97-110.

From the perspective of the historically complex relationship between property and urban planning[71], the 2007-2008 reform implies a clear breach with the prevailing model in Spain since 1956 and a vigorous rectification of the premises of the 1996-2003 legislation[72]. The very conception of urban planning seems to change, since greater importance is attached to the reduction of land consumption that results from its legal treatment as a contingent and scarce resource, and which is inspired by the principle of sustainable development[73]. From this perspective, it is necessary to balance the needs of land and its preservation in a natural state or, at least, as it currently stands. The last reform of the state legislation incorporates into our legal system the ideas of the European Spatial Development Perspective, inasmuch as it assumes the five aspects which are considered decisive for the sustainable development of cities: the control of urban sprawl, the mix of social functions and groups, the intelligent and resource-saving management of the urban ecosystem (in particular, water, energy and waste), better accessibility through more efficient and environmentally-friendly means of transport, and the protection and development of the natural and cultural heritage[74]. It is the regional legislators' responsibility to ensure that the incorporation of those aspects into the state legislation does not come down to a purely rhetorical statement[75].

However, the changes are even more relevant from the perspective of the status of property and of undertakings. The state regulation breaks with the equi-distributive model

[71] TEJEDOR BIELSA, J. C. (1998: 39-187).

[72] BAÑO LEÓN, J. M. (2007: 304-309); VAQUER CABALLERÍA, M. (2007b) 'Los principios y derechos constitucionales inspiradores de la Ley de Suelo', *Ciudad y Territorio*, No 152-153, pp. 247-256; TEJEDOR BIELSA, J. C. (2008: 626-659).

[73] FARIÑA TOJO, J. (2007) 'Las nuevas bases ambientales de la sostenibilidad en la ordenación y utilización del suelo', *Ciudad y Territorio*, No 152-153, pp. 300.

[74] *European Spatial Development Perspective (1999: 24).*

[75] LÓPEZ RAMÓN, F. (2008) 'Principios generales y urbanismo sostenible en la Ley de Suelo 8/2007, de 28 de mayo', *Revista de Urbanismo y Edificación*, No 16, pp. 15-22.

of property. This model necessarily leads to self-financed urban development, that is to say, to a city development model in which the profits arising from the classification of land can fund the cost involved in making that use effective. However, while it pays attention to the consolidated city trough the so-called 'provisioning actions' (*actuaciones de dotación*) and the compulsory building regime, this model eliminates the link between development and property. In today's state legislation, land ownership does not imply anymore the right to carry out the development of land and the approval of the urban plan does not create such a right either. The right to develop land derives from an administrative decision adopted for that specific purpose, either as a result of a competitive procedure, either as a result of the 'specificities or exceptions (…) in favour of the land-owners initiative' [Article 6(a) *in fine* of the *Texto Refundido de la Ley del Suelo de 2008*][76]. Incidentally, some have criticised what they consider a 'random nationalisation' of the right to develop land: some Autonomous Communities have used the competence to establish those specificities and exceptions in favour of the ownership[77] to eliminate every reference to the development agent.

It is striking that the successive legal reforms have all faced the same criticism with regard to their effect: the price of land has varied in accordance with the economic cycles, irrespectively of the legal reforms and of the price of housing and has been constantly rising; it has only been stable or slightly fallen during the downturn of the economic cycles. From this perspective, legislation seems to be totally ineffective and this is the reason why the housing problem remains. The truth is that this problem has been worsened during the last cycle, which has been presided by the 1996-2003 legislation:

[76] PAREJO ALFONSO, L. (2007) 'Condiciones básicas de igualdad de los ciudadanos y régimen básico del suelo', *Ciudad y Territorio*, No 152-153, pp. 329-331; TEJEDOR BIELSA, J. C. (2008: 640-642).

[77] PERALES MADUEÑO, F. (2008) 'Ejecución del planeamiento. Especial atención a la figura del agente urbanizador', *Revista de Urbanismo y Edificación*, No 5, p. 62. In a similar and very critical way, MARTÍNEZ LÓPEZ-MUÑIZ, J. L. (2007) 'El derecho de propiedad sobre el suelo en su nueva ley estatal de 2007', in the collective work *El derecho urbanístico del siglo XXI. Libro homenaje al profesor Martín Bassols Coma*, Tomo I (Urbanismo y Vivienda), Editorial Reus, Madrid, pp. 509-539.

whereas in 1998 families needed to invest the total income of four years and a half in order to buy a house, in 2008 they needed to invest the income of nine years[78].

In any event, the dimension of the problem varies very much depending on the municipality. Thus, in many small municipalities with no exogenous real-estate pressure, houses are an accessible good; however, this raises another problem: the lack of professional promotion. In these municipalities, the housing problem is tackled through the self-consumption of land and in most cases trough self-promotion. In contrast, in many equally small municipalities where the housing market is subject to strong pressures for a number of reasons – tourism, or the fact that it is located in the surroundings of big cities or in economic corridors –, access to housing is problematic for the native population and, in many cases, especially in touristic locations, the type of buildings which are built are not adequate to be used as permanent housing. Lastly, the inhabitants of large municipalities must face an expensive market that is hardly accessible for youths and for the citizens with lower incomes, who can neither buy nor rent a house.

Lastly, the deep 2007-2008 reform tries to change the pro-development stance that has characterised Spanish urban planning legislation during the last fifty years. The state legislator tries to focus again on the existing city and on policies aimed at regenerating and revitalising it. These policies go beyond the boundaries of urban planning, because they also imply social actions, facilities, new economic activities and the relocation of administrative uses. The current legislation sees as a pending problem the urban design of internal cities. In order to reduce the consumption of land, it is necessary to optimise and to clean up the land that has already been incorporated to the city. There is still a long road ahead.

[78] RODRÍGUEZ LÓPEZ, J. (2008) '2008. El mercado de la vivienda sufre el ajuste', *Ciudad y Territorio*, No 156, p. 388. If we look at the effort made by families, the result is not good either: they spent 25% of their total income in 1998 and 50% in 2008. The peak took place in 2007, according to the author, who analyses data from 1985 to 2008.

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ORDENACIÓN DEL TERRITORIO Y URBANISMO

INFORME ANUAL - 2011 - ESPAÑA

(Diciembre 2011)

Prof. Tomás-Ramón FERNÁNDEZ

1. Muy poco hay que reseñar en este año 2011 en lo que respecta a este sector, que a consecuencia de la crisis económica está prácticamente paralizado.

La principal y casi única novedad en el plano legislativo es el cambio del sentido del silencio de la Administración en materia de autorizaciones y licencias urbanísticas, que ha pasado a tener carácter negativo con el Real Decreto-Ley 8/2011, de 1 Julio (artículo 23).

En rigor, la citada norma no ha hecho otra cosa que convertir en prosa legal la categórica doctrina establecida por el Tribunal Supremo en sus Sentencias de 28 de Enero, 28 de Abril y 7 de Julio de 2009, la primera de las cuales advirtió con un énfasis rigurosamente inusual que "a partir de la publicación de la parte dispositiva de esta sentencia nuestra en el Boletín Oficial del Estado, vinculará a todos los jueces y Tribunales por ser la Sala Tercera del Tribunal Supremo, conforme a lo establecido en el artículo 123.1 de la Constitución, el órgano jurisdiccional superior en el orden contencioso-administrativo en toda España".

Este nada habitual recordatorio se explica por el empeño del Tribunal Supremo de poner fin definitivamente a una muy vieja polémica que le ha tenido a él mismo dividido durante muchos años en torno a los efectos del silencio en materia de otorgamiento de

licencias en aquellos casos en los que el proyecto técnico presentado por los solicitantes no fuese conforme con el plan o norma urbanística aplicable.

La respuesta inicial a este problema fue la de considerar que el silencio de la Administración suponía en todo caso el otorgamiento de la licencia incluso en los supuestos en que el proyecto técnico fuese disconforme con el plan de ordenación. A esa primera respuesta que hacía primar la seguridad jurídica sobre la legalidad se unió pronto otra de signo opuesto que negó en consecuencia que pudiera entenderse otorgada la licencia por silencio positivo si existía disconformidad entre el proyecto y la norma. Esta segunda línea de respuesta fue acogida por el legislador que incluyó en el apartado tercero del artículo 178 del Texto Refundido de la Ley del Suelo de 9 de Abril de 1976 un inciso según el cual "en ningún caso se entenderán adquiridas por silencio administrativo facultades en contra de las prescripciones de esta Ley, de los Planes, Proyectos, Programas y, en su caso, de las Normas Complementarias y Subsidiarias del Planeamiento".

La norma pasó como artículo 242.6 al Texto Refundido de la Ley del Suelo de 1992 y, más tarde, a la legislación urbanística de las Comunidades Autónomas. No consiguió, sin embargo, pacificar el asunto, porque, como es obvio, por muy categórica que la Ley se muestre el silencio de la Administración genera siempre una incertidumbre irreductible en torno a si el proyecto presentado se ajusta o no al planeamiento, cuestión ésta que, en último término, termina remitiendo a la decisión de los Tribunales y a su actitud, más o menos favorable, al principio de legalidad o al de seguridad jurídica.

Esta polémica inacabable es la que quiso zanjar el Tribunal Supremo en las Sentencias más atrás citadas afirmando la imposibilidad de obtener por silencio una licencia para realizar un a obra o una actividad contraria al plan. Y esta es, en fin, la solución que el artículo 23 del Real Decreto Ley 8/2011 ha terminado por establecer. A partir de ahora, por lo tanto, "los actos de transformación, construcción, edificación y uso del suelo y el subsuelo…requerirán del acto expreso de conformidad, aprobación o autorización administrativa que sea preceptivo según la legislación de ordenación territorial y urbanística", por lo que "el vencimiento del plazo máximo sin haberse notificado la

resolución expresa legitimará al interesado que hubiere deducido la solicitud para entenderla desestimada por silencio administrativo".

2. Uno de los problemas más preocupantes en el Derecho Urbanístico español es el de la ejecución de las Sentencias firmes que anulan planes o licencias a cuyo amparo se han construido viviendas que cuando dichas Sentencias se producen han sido ya vendidas por sus promotores a terceros de buena fé, que, como es lógico, se resisten por todos los medios posibles, a que dichas viviendas sean demolidas.

La posición de la Sala 3ª (de lo Contencioso-Administrativo) del Tribunal Supremo al respecto se ha hecho progresivamente más y más rigurosa en el sentido de rechazar las pretensiones de que se declare la imposibilidad legal de ejecutar estas Sentencias cuando con posterioridad a las mismas se produce un cambio del planeamiento (propiciado muchas veces para convertir en legal *a posteriori* lo que con anterioridad no lo era).

Del rigor de esta posición adoptada por el Tribunal Supremo en este asunto da fé la Sentencia de 12 de Mayo de 2006, según la cual "los terceros adquirentes del edificio cuyo derribo se ordena ni están protegidos por el artículo 34 de la Ley Hipotecaria, ni están exentos de soportar las actuaciones materiales que lícitamente sean necesarias para ejecutar una sentencia; su protección jurídica se mueve por otros cauces, cuales pueden ser los conducentes a dejar sin efecto, si aún fuera posible, la sentencia de cuya ejecución se trata, o a resolver los contratos por los que los que los adquirieron, o a obtener del responsable o responsables de la infracción urbanística o del incumplidor de los deberes que son propios de dichos contratos el resarcimiento de los perjuicios irrogados por la ejecución". En esa misma línea de rigor se sitúa la Sentencia de 26 de Septiembre de 2006, que afirma sin vacilación que "la fé pública registral y el acceso de los derechos dominicales al Registro de la Propiedad no subsana el incumplimiento del ordenamiento urbanístico, ya que los sucesivos adquirentes del inmueble se subrogan en los deberes urbanísticos del constructor o del propietario inicial, de manera que cualquier prueba tendente a demostrar la condición de terceros adquirentes de buena fé con su derecho inscrito en el Registro de la Propiedad carece de relevancia en el incidente sustanciado".

Como puede suponerse, este planteamiento dista mucho de ser pacífico y cuenta con la oposición de la doctrina privatista (vid. el reciente libro de V. GUILARTE, *Legalidad urbanística, demolición y terceros adquirentes de buena fe*, Lex Nova, Valladolid, Octubre 2011). Tampoco sirve, como es natural, para resolver los problemas que plantea la ejecución de este tipo de sentencias porque no basta decir a quien se queda sin la casa en que vivía que tiene acción para reclamar a quien se la vendió o a la Administración que otorgó en su día la licencia declarada nula.

La presión de las "víctimas" es muy fuerte en algunas Comunidades Autónomas, tanto como para haber conseguido en el caso concreto de Cantabria que el Parlamento regional haya aprobado dos Leyes con la finalidad de encontrar una solución razonablemente satisfactoria para quienes a sí mismos se consideran "maltratados por la Administración" y se han constituido en una asociación así bautizada.

Una de esas Leyes, la 6/2010, de 30 de Julio, ha introducido en la Ordenación del Territorio y Urbanismo de Cantabria de 25 de Junio de 2001 un precepto que autoriza a los Ayuntamientos a dejar sin efecto la orden de derribo en aquellos casos en los que a las edificaciones a derribar se hubieren unido otras "legalmente construidas con posterioridad" que hubieren contribuido a transformar el paisaje de la zona privando a ésta "de los valores que determinaron la necesidad de demoler" aquellas edificaciones iniciales.

Otra Ley de 4 de Abril de 2011 ha establecido que en caso de que sea precisa la demolición habrá de fijarse con carácter previo y hacerse efectiva por la o las Administraciones responsables la correspondiente indemnización.

Sobre ambas normas se ha elaborado por el Gobierno de Cantabria un plan de acción sobre cuya viabilidad habrá de pronunciarse el Tribunal Superior de Justicia de la Comunidad Autónoma.

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ACCORDI TRA AMMINISTRAZIONI E TRA AMMINISTRAZIONI E PRIVATI NEL GOVERNO DEL TERRITORIO

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INDICE

1. INQUADRAMENTO DEGLI ACCORDI URBANISTICI

La funzione urbanistica reca in sé, nella maggior parte dei casi, la necessità di perfezionare accordi con i privati interessati per ragioni proprietarie e/o per interessi imprenditoriali. La complessa articolazione degli interessi e la necessità di acquisire opere e dotazioni pubbliche sono le principali ragioni che hanno elevato gli accordi a strumento di "governo del territorio"[1].

Di norma per accordi urbanistici si intendono:

a) le "*convenzioni urbanistiche*", accessive a piani attuativi, che specificano scelte pianificatorie definendo le relative modalità attuative e gli impegni delle parti; il modello di riferimento è la "*convenzione di lottizzazione*" di cui all'art. 28 della legge n. 1150 del 1942[2], il cui perfezionamento condiziona perfezionamento ed efficacia del piano attuativo[3];

[1] **GOVERNO DEL TERRITORIO:** P. STELLA RICHTER, *Profili funzionali dell'urbanistica*, Milano 1984; *L'evoluzione della dottrina in materia urbanistica ed edilizia*, in *Riv. Giur. Ed*, 2009, *I rapporti tra la legislazione statale e regionale*, in *Riv. Giur. Urb*, 2008; G. MORBIDELLI, *Pianificazione territoriale ed urbanistica, ad vocem,* in *Enc. Giur.*, vol. XXIII, Roma 1990; V. MAZZARELLI, *L'urbanistica e la pianificazione territoriale* in *La disciplina dell'economia*, in S. CASSESE (a cura di), *Trattato di diritto amministrativo*, Milano 2003; A. CROSETTI, A. POLICE, M. R. SPASIANO, *Diritto urbanistico e dei lavori pubblici*, Torino 2007; V. CERULLI IRELLI, *Il governo del territorio nel nuovo assetto costituzionale*, in S. CIVITARESE MATTEUCCI – E. FERRARI – P. URBANI (a cura di), *Il governo del territorio,* Atti del VI Convegno AIDU, Milano, 2003, 499 ss..

[2] Il modello della legge urbanistica del 1942 è stato poi ripreso da norme speciali e settoriali successive, quali ad esempio: la "legge-ponte" n. 765 del 1967, la legge n. 162 del 1967 e la legge n. 865 del 1971 in tema di edilizia residenziale ed insediamenti produttivi, la legge n. 10 del 1977, la legge n. 457 del 1978 e la legge n. 493 del 1993 sui piani di recupero urbano, la legge n. 122 del 1989 in materia di parcheggi pubblici e privati pertinenziali su aree pubbliche, la legge n. 179 del 1992 sui programmi di riqualificazione urbana. Si veda ora anche l'art. 5 del D.L. 112/2008 conv. con L. 133/2008 cd. "decreto sviluppo".

b) gli *accordi* tra amministrazione e privati nell'ambito di *procedimenti pianificatori* ed in quanto tali concorrenti alla definizione delle scelte urbanistiche (comprensivi quindi anche degli *accordi perequativi*) e gli *accordi plurifunzionali* attuativi di piani e programmi speciali[4];

c) gli *accordi tra amministrazioni* strumentali alla pianificazione o finalizzati alla realizzazione di interventi pubblici con riflessi sulla pianificazione[5].

La difficoltà di prospettare una ricostruzione unitaria di tali accordi risente delle differenze funzionali degli stessi, del diverso atteggiarsi degli interessi pubblici (urbanistici in senso stretto e "differenziati"[6]), della caratterizzazione imprenditoriale della proprietà (da

[3] **CONVENZIONI URBANISTICHE:** V. MAZZARELLI, *Le convenzioni urbanistiche*, Bologna, 1979; A. CROSETTI, *Piano di lottizzazione*, in *Nov. Dig. It.. Appendice*, vol. V, Torino, 1984; P. URBANI - S. CIVITARESE MATTEUCCI, *Diritto Urbanistico. Organizzazione e rapporti*, Torino, 2004.

[4] Relativamente agli accordi nella pianificazione, funzionali anche ad accordi perequativi, i riferimenti più significativi sono rappresentati dall'art. 18 della L.R. Emilia Romagna, n.20/2000 e dall'art. 6 della L.R. Veneto n. 11/2004. Caratteri più complessi, non solo urbanistici, presentano invece gli accordi per la realizzazione di piani e programmi settoriali quali *piani di recupero* di cui alla *legge n. 457/1978* (artt. 28 e 30); *programmi integrati di intervento* e *programmi di riqualificazione urbana* introdotti dalla *legge n. 179/1992 (art. 16); contratti di quartiere* (1998); *programmi innovativi in ambito urbano (2002); programmi di riabilitazione urbana* di cui alla *legge n. 166 del 2002*. Più recentemente si vedano - anche per le disposizioni riguardanti i "programmi di riqualificazione e recupero urbano" - il cd. "Piano Casa" (D.L. 112/2008 conv. con L. 133/2008 e D.L 70/2011 conv. con L. 106/2011), nonché le leggi regionali: VENETO: L.R. 14/2009 e L.R. 13/2011; TOSCANA: L.R. 24/2009; L.R. 65/2010; EMILIA ROMAGNA: L.R. 6/2009; LOMBARDIA: L.R. 27/2009; CAMPANIA: L.R. 19/2009 e L.R. 1/2011; PIEMONTE:: L.R. 20/2009 e L.R. 1/2011; UMBRIA: L.R. 13/2009 e L.R. 27/2010.

[5] Il riferimento principale è rappresentato dall'art. 34 della legge 267/2000, ripreso poi dalla legislazione regionale urbanistica (*sub nota 12*)

[6] **INTERESSI DIFFERENZIATI:** V. CERULLI IRELLI, *Pianificazione urbanistica e interessi differenziati*, in *Riv. Trim. Dir. Pubbl.*, 1985, 386 ss..

"proprietà fondiaria" a "proprietà - impresa")[7], delle nuove regole perequative (perequazione premiale, perequazione compensativa; negoziazione di diritti edificatori)[8], della debolezza strutturale delle amministrazioni. A ciò si aggiunga poi, la mancata riforma urbanistica nazionale e il non chiaro assetto delle funzioni statali e regionali negli ambiti materiali riconducibili, anche indirettamente, al "governo del territorio"(si veda ad esempio, Corte Cost. 121/2010 sul cd. "Piano casa"; come pure Corte Cost. 303/2003, 401/2007 e 411/2008 in tema di lavori pubblici).

2. QUALIFICAZIONE E PROFILI DI REGIME GIURIDICO DELLE CONVENZIONI E DEGLI ACCORDI URBANISTICI (TRA AMMINISTRAZIONE E PRIVATI)

La qualificazione giuridica degli accordi urbanistici in senso lato propone, da sempre, profili di incertezza riflesse nelle diverse posizioni dottrinali; rispetto alle prospettazioni contrattual-civilistiche, appare tuttavia prevalente la loro riconduzione - per elementi essenziali e funzione - alla categoria delle *convenzioni e accordi pubblicistici*, ed in particolare agli *accordi procedimentali* di cui all'art. 11 della legge 241 del 1990[9]; così

[7] **RAPPORTO PIANIFICAZIONE - PROPRIETA'**: S. AMOROSINO, *Il governo dei sistemi territoriali. Il nuovo diritto urbanistico*, Padova, 2008.

[8] **PEREQUAZIONE**: si rinvia A. BARTOLINI, *Area vasta e perequazione*, R*eport 2011, in www.ius-publicum.com*

[9] **ACCORDI TRA AMMINISTRAZIONI E PRIVATI:** tra i tanti rilevanti contributi su una tematica classica, si può rinviare, per una ricostruzione pubblicistico-procedimentale, A. AMORTH, *Osservazioni sui limiti dell'attività amministrativa di diritto privato*, in *Arch. Dir. Pubbl.*, 1938, 465; G. FALCON, *Le convenzioni pubblicistiche. Ammissibilità e caratteri*, Milano 1984; G. GRECO, *Accordi amministrativi tra provvedimento e contratto*, Torino, 2003; F.G. SCOCA, *Gli accordi*, in F.G. SCOCA (a cura di), *Diritto Amministrativo*, Torino, 2008; E. BRUTI LIBERATI, *Accordi amministrativi*, in *Enc. Dir., Aggiornamento*, V, Milano, 2001, 2; A. MASUCCI (a cura di), *L'accordo nell'azione amministrativa*, Roma, 1988. E. STICCHI DAMIANI *Attività amministrativa consensuale e accordi di programma*, Milano, 1992; G. PERICU, *L'attività consensuale della pubblica amministrazione*, in L.

ravvisando in tale disciplina la sintesi tra potere amministrativo e discrezionalità da un lato, autonomia ed assetto convenzionale-pattizio dall'altro.

Eccezion fatta per le regolamentazioni pattizie aventi contenuto meramente esecutivo di scelte pianificatorie, nella maggior parte di detti accordi è infatti presente una "quota" di funzione pianificatoria (e quindi di potere amministrativo) definita in forma consensuale anziché autoritativa, con il concorso delle volontà della parte privata che tuttavia non condiziona l'efficacia della volontà pubblica ma ne costituisce componente costitutiva, essenziale.

L'ambientazione procedimentale degli accordi urbanistici è stata a più riprese precisata dalla giurisprudenza della Corte di Cassazione e dei giudici amministrativi, assumendo la portata generale della categoria degli accordi ex art. 11 della legge 241/1990 e del relativo regime giuridico. Quest'ultimo risulta infatti idoneo sia a comporre la natura pubblica e discrezionale del potere con una definizione parzialmente consensuale dell'assetto degli interessi, sia ad assegnare cognizione piena al giudice amministrativo, quale riflesso dell'esplicazione di funzioni amministrative anche se tramite moduli convenzionali (Corte Cass. S.U., 16 luglio 2008, n. 19494; indirettamente Corte Cass. S.U., 22 dicembre 2009, n. 26972; Consiglio Stato, IV, 2 marzo 2011, n. 1339; Corte Cass., S.U., 5 maggio 2011, n. 9843; Consiglio Stato, sez. V, 26 ottobre 2011, n. 5711; T.A.R. Liguria Genova, 5 luglio 2011, n. 1054; T.A.R. Emilia Romagna Parma, I, 22 febbraio 2011, n. 45;

MAZZAROLLI, G. PERICU, A. ROMANO, F.A. ROVERSI MONACO, F.G. SCOCA (a cura di), *Diritto Amministrativo*, Vol. II, Bologna, 2004, 1635 ss.; M. RENNA, *Il regime delle obbligazioni nascenti dall'accordo amministrativo*, in *Dir. Amm*. 2010, 1 ss.; F. MERUSI, *Il codice del giusto processo amministrativo*, in *Dir. proc. amm*. 2011, 1, 1; A. MALTONI, *Considerazioni in tema di attività procedimentali a regime privatistico delle amministrazioni pubbliche*, in *Dir. amm*. 2011, 1, 97. F. PELLIZZER, *Gli accordi pubblico-privato nel governo del territorio*, in F. MASTRAGOSTINO (a cura di), *La collaborazione pubblico privato e l'ordinamento amministrativo*, Torino, 2011.
Per una ricostruzione contrattual-civilistica: COMPORTI, *Il coordinamento infrastrutturale*, Milano 1996, 317 ss.; G. MANFREDI, *Accordi e azione amministrativa*, Milano, 2002; S. CIVITARESE MATTEUCCI, *Contributo allo studio del principio contrattuale nell'attività amministrativa*, Torino, 1997; G.MONTEDORO, *La nuova disciplina degli accordi*, in *www.giustizia-amministrativa.it*.

nonché su convenzioni in generale T.A.R. Veneto, II, 31 maggio 2011 n. 920; T.A.R. Lombardia Brescia, I, 27 maggio 2011 n. 770; T.A.R. Lombardia Milano, II, 18 maggio 2011, n. 1281).

Dalla variegata tipologia di accordi discendono ovviamente differenziazioni sia sotto il profilo qualificatorio, sia in punto di disciplina, ma pur sempre tenendo conto della tendenziale unicità dei principi generali della categoria.

2.1 Le convenzioni urbanistiche

Relativamente al modello convenzionale classico, la ricostruzione dottrinale prevalente, confortata da una giurisprudenza consolidata, ha qualificato dette convenzioni come accordi sostitutivi necessari (nel senso di non facoltativi e quindi non alternativi all'agire unilaterale) in quanto imposti ex lege a far tempo dalla legge urbanistica del 1942, da ricondurre anch'essi allo schema procedimentale dell'art. 11 della legge 241 del 1990 anziché a fattispecie meramente contrattuali, ovvero ad "atti-fonte" di una disciplina esclusivamente consensuale.

In particolare, secondo la giurisprudenza, l'assetto convenzionale si inserisce sempre in uno specifico procedimento amministrativo (di approvazione del piano di lottizzazione e di rilascio dei titoli edilizi), volto all'adozione di un provvedimento individuabile mediante accordo o sostituibile per accordo, ma comunque differenziato da altri moduli consensuali per l'inerenza all'esercizio di una potestà pubblicistica alla quale i soggetti privati concorrono per determinarne il modo e l'esito dell'esercizio (Cass., Sez. Un., 30 marzo 2009 n. 7573).

Di qui alcune conseguenze anche in termini di giurisdizione. Mentre potranno essere devolute al giudice ordinario unicamente le richieste risarcitorie derivanti da una condotta colpevole dell'amministrazione che ometta di approvare un piano particolareggiato che ha superato positivamente tutte le fasi del procedimento, spetta alla giurisdizione esclusiva del giudice amministrativo ogni altra ipotesi di mancato perfezionamento di una

convenzione ove residui in capo all'amministrazione un sia pur limitato margine di apprezzamento discrezionale (Corte Cass., S.U., 1 luglio 2009, n. 1538).

La finalità dell'attribuzione di giurisdizione esclusiva su questa materia sarebbe infatti quella di riservare al giudice amministrativo una cognizione piena dell'esercizio della funzione amministrativa anche quando venga esercitata in termini convenzionali, ritenendo indifferente lo schema giuridico formale di esercizio del potere autoritativo (Cons. Stato, V, 8 ottobre 2008, n.4952; Cons. Stato, IV, 12 novembre 2009, n. 7057; Corte Cass., S.U., 29 aprile 2009, n.9952).

Alcune incertezze permangono in merito alla frequente dilatazione dell'oggetto delle convenzioni urbanistiche rispetto al modello classico tipizzato, ponendo l'attenzione sull'estensibilità del regime giuridico ex art. 11 della legge 241/1990 ad eventuali obblighi aggiuntivi posti a carico del soggetto attuatore. Il che, uscendo dallo scema tipico delle convenzioni, si collega all'interrogativo più generale se negli accordi urbanistici procedimentali sia consentito all'amministrazione negoziare anche aspetti che esulano dalla posizione di titolare di potere amministrativo espressivo di una determinata funzione e che presupporrebbero una posizione di autonomia privata correlata a situazioni di diritto soggettivo.

Al di fuori di specifici divieti legislativi, non sembrano sussistere elementi ostativi in tal senso, anche se è indubbio che il modello tipizzato e lo stesso contesto procedimentale costituiscono parametro per valutare la rispondenza - nel senso di ragionevolezza, adeguatezza, proporzionalità e in una proiezione civilistica la "meritevolezza" ex art. 1322 c.c. - all'interesse pubblico specifico.

Va poi ricordato come in merito al "recesso unilaterale" ex art. 11, comma 4, della legge 241/1990, distinto dal recesso contrattuale - la giurisprudenza prevalente, pur ancorando lo stesso potere alla logica impossibilità di cristallizzare le scelte urbanistiche (T.A.R. Liguria Genova, I, 11 luglio 2007 n. 1377), ha ritenuto che la preesistenza di una regolamentazione convenzionale e bilaterale correlata a precedente atto pianificatorio renda particolarmente aggravato - quanto a presupposti, condizioni e termini - un nuovo esercizio

dello stesso potere amministrativo incidente su situazione soggettive sorte proprio in virtù dell'affidamento generato dalla iniziale scelta urbanistica "convenzionata" (Cons. Stato, IV, 12 novembre 2009, n. 7057; Cons. Stato, IV, 27 giugno 2008, n. 3255; Cons. Stato, IV, 29 luglio 2008, n. 3766; Cons. Stato, IV, 19 febbraio 2008, n. 534; Cons. Stato, IV, 12 marzo 2009, n. 1477; TAR Piemonte, Torino, I, 20 novembre 2008, n. 2900; TAR Lazio Roma, III, 1 febbraio 2010, n. 1275; T.A.R. Liguria Genova, I, 17 novembre 2011, n. 1575; T.A.R. Emilia Romagna Parma, I, 11 maggio 2011, n. 141).

2.2 Gli accordi nella pianificazione urbanistica e gli accordi per l'attuazione di piani e programmi settoriali

Relativamente alle altre tipologie di *accordi urbanistici* - funzionali alla pianificazione o strumentali all'attuazione di interventi di interesse collettivo (piani di edilizia sociale, piani integrati di recupero e di riqualificazione, accordi perequativi-compensativi) - si sono registrate minori incertezze nella qualificazione pubblicistico-procedimentale e quindi nel riferimento al quadro delineato dall'art. 11 della legge 241/1990.

Per i primi la collocazione endoprocedimentale nel pieno rispetto dei limiti di garanzia pubblicistica precisati dall'art. 13 della stessa legge 241/1990 (TAR Toscana Firenze, I, 3 marzo2009, n. 303), per i secondi l'oggetto a contenuto complesso (non solo pianificatorio), evidenziano infatti come la disciplina consensuale possa anche non esaurire il potere amministrativo, residuando margini di discrezionalità che non consentono l'integrale applicazione degli istituti civilistici.

Si può quindi affermare che negli *accordi urbanistici endoprocedimentali* funzionali all'approvazione di uno strumento urbanistico generale[10], l'elemento consensuale esprime l'interesse delle parti ad una possibile soluzione urbanistica che comunque deve essere apprezzata dall'amministrazione con autonoma valutazione di sintesi al momento dell'approvazione del piano.

Di qui la preferenza, accordata anche dalla giurisprudenza, alla tesi della non piena disponibilità negoziale delle funzioni urbanistiche, in luogo dell'adesione alla tesi della cd. "urbanistica consensuale o contrattata" fondata sulla de-tipizzazione della categoria generale ex art. 11 della legge 241 e sulla loro assimilazione agli strumenti contrattuali dell'attività di diritto privato dell'amministrazione. In tal senso è significativa la posizione assunta nel 2010 dal *Consiglio di Stato* (Cons. Stato, IV, 13 luglio 2010, n. 4545, in riforma di T.A.R. Lazio Roma, II, 4 febbraio 2010, n. 1524) in merito alla ammissibilità di talune previsioni del *PRG del Comune di Roma* comportanti per il privato, interessato a sfruttare le capacità edificatorie assegnate in via condizionata ad aree di proprietà, l'obbligo di aderire ad un predefinito strumento attuativo (nella specie, "piano integrato") con accettazione, tramite accordo, anche di misure perequative/compensative predeterminate (nella specie cessione di aree e contributo straordinario per opere di urbanizzazione).

Secondo il giudice amministrativo il potere pianificatorio non può prescindere dalla "riserva" riconosciuta alle amministrazioni in tema di funzioni urbanistiche e dal "numero chiuso" degli strumenti di pianificazione, di guisa che, allorquando siano introdotte varianti alla disciplina urbanistica di dettaglio, non sono comunque ammesse deviazioni di essi dal modello legale rispetto alla "causa" e al "contenuto" prefissati dalla legge. Di qui anche la possibilità che le fasi attuative siano disciplinate tramite strumenti

[10] **ACCORDI NELLA PIANIFICAZIONE:** G .PAGLIARI, *Gli accordi urbanistici tra P.A. e Privati*, in *Riv. giur. Urb.* 2008; M. MAGRI, *Gli accordi con i privati nella formazione dei piani urbanistici strutturali*, in *Riv. Giur. Ed.*, 2004, 539 ss.; oltre a P. URBANI, *Pianificare per accordi*, in *Riv. Giur. Ed.*, 2005, 177 ss. e P .URBANI - S. CIVITARESE M., *Amministrazione e privati nella pianificazione urbanistica*, Torino, 1995.

consensuali flessibili, polifunzionali, ad iniziativa pubblica o privata, legislativamente previsti, ma sempre rimettendo la responsabilità pianificatoria alla sola amministrazione, anche in linea con l'obbligo imposto dall'art. 11, comma 4 bis, della legge 241/1990, di previa determinazione amministrativa che anticipi e legittimi il ricorso allo strumento dell'accordo.

Si tratta quindi di accordi "non necessari", ma in molti casi essenziali per creare le condizioni minime di fattibilità delle scelte pianificatorie generali; anche per questo è bene rilevare come le posizioni soggettive delle parti private non possano reputarsi particolarmente garantite a fronte dell'eventuale mancato o difforme recepimento dell'assetto concordato nello strumento pianificatorio di cui l'accordo deve costituire parte integrante (si veda l'art. 18 della L.R. Emilia Romagna, 24 marzo 2000, n. 20; sulla necessarietà di accordi per attuare forme perequative T.A.R. Basilicata, I, 21 ottobre 2011, n. 530; T.A.R. Veneto, 10 gennaio 2011, n. 11; T.A.R. Toscana Firenze, 1 marzo 2011, n. 367).

Infine va ricordato che la complessità degli accordi urbanistici endoprocedimentali e la sempre più marcata caratterizzazione imprenditoriale derivante dalla loro funzione perequativa ha reso poi quasi inevitabile l'integrazione della relativa disciplina con i principi concorrenziali tipici dei contratti pubblici (anche se permangono indubbie differenziazioni funzionali tra "urbanistica" e "appalti" come evidenziato da Corte di Giustizia, Sezione III, 25 marzo 2010, in causa C-451/08, *Helmut Muller*)[11], in linea con quanto si registra negli *accordi complessi attuativi di piani e programmi settoriali;* in questi ultimi la funzione urbanistica in senso stretto assume rilievo indiretto, quasi servente rispetto ad interessi pubblici settoriali e differenziati implicanti l'attivazione di forme di collaborazione operativa pubblico privato (secondo Corte Cass. S.U. 23 marzo 2009, n. 6960, comunque riconducibili alla categoria ex art. 11 della legge 241/1990).

[11] **GOVERNO DEL TERRITORIO E CONCORRENZA**: F. PELLIZZER, *Le opere di urbanizzazione tra concorrenza e organizzazione del territorio,* in *www.giustamm.it.*

Di qui la possibilità di accordi tra amministrazioni e privati, non riconducibili esclusivamente agli accordi urbanistici endoprocedimentali (ad eccezione di quelli incentrati sulla remunerazione delle prestazioni private attraverso forme di perequazione urbanistica), bensì mutuanti anche caratteri e regime giuridico ("misto") proprio di diversi modelli di partenariato contrattuale (in particolare concessioni di lavori pubblici perfezionate ad esito di una procedura di *project finance*). In questi casi, peraltro di attualità, il contesto disciplinare "misto" si riflette in particolare sulle modalità di esecuzione delle opere pubbliche o di interesse pubblico per le quali dovranno valere i principi affermatisi in materia di realizzazione di opere di urbanizzazione con doveroso esperimento di procedure ad evidenza pubblica (Corte di Giustizia, VI, 12 luglio 2001, in causa C-399/98 e 21 febbraio 2008, in causa C-412/04; nonché Corte Cost., 28 marzo 2006, n° 129 sulla L.R. Lombardia n. 12/2005 e 13 luglio 2007, n. 269 sulla Legge della Provincia Autonoma di Trento n. 16/2005; con riferimento ad opere pubbliche contemplate in accordi urbanistici si veda TAR Emilia Romagna, Parma, 12 marzo 2010, n. 82 e TAR Lombardia Brescia, 15 gennaio 2008, n. 7).

Quanto osservato dà atto di un quadro articolato e in divenire; altrettanto evidente è la linea evolutiva seguita dalla giurisprudenza per garantire che sia nei casi in cui all'"amministrazione - parte di un accordo" non residui alcun margine di discrezionalità, sia nella fase dell'esecuzione degli stessi accordi, la pienezza della tutela giurisdizionale sia garantita attraverso l'applicazione dei "principi in materia di obbligazioni e contratti in quanto compatibili" (riprendendo l'apertura di Cons. Stato, IV, 15 maggio 2002, 2363; Cons. Stato, V, 19 ottobre 2011, n. 5627; T.A.R. Piemonte Torino, I, 16 giugno 2011, n. 630; T.A.R. Sardegna, I, 12 maggio 2011, n. 478).

In questa prospettiva si collocano alcune pronunce con cui, ad esempio, non è stato escluso che il regime pubblicistico degli accordi ben possa essere integrato da altre ipotesi di nullità contrattuale e comunque da tutte le ipotesi di nullità per inesistenza o illiceità della causa o dell'oggetto (TAR Lombardia Brescia, I, 12 ottobre 2010, n. 4026 in tema di art. 1341 c.c. e clausole vessatorie, con applicazione degli artt. 1338 e 1339 c.c.). In termini si vedano anche quelle pronunce che hanno posto l'attenzione sull'ammissibilità di azioni di mero accertamento dell'inadempimento a fini risarcitori, o che hanno affrontato i temi della

responsabilità precontrattuale (ex art. 1337 c.c) e dell'inadempimento dell'amministrazione per mancata adozione di atto previsto o per adozione di atto difforme dall'accordo.

Nel primo caso è stata rilevata l'essenzialità, per l'ammissibilità di una condanna ad un *facere*, di un apprezzamento circa l'esaurimento di qualsivoglia margine di discrezionalità in capo all'amministrazione (TAR Lazio Roma, II, 14 gennaio 2010, n. 268).

Apprezzamento decisivo anche nel secondo caso per consentire quindi, attraverso l'applicazione delle norme generali sull'interpretazione dei contratti, l'accertamento dell'effettiva volontà delle parti, pronunce ex art. 2932 c.c. (TAR Lombardia Brescia, II,.16 luglio 2009, n. 1504).

Nel terzo caso, invece, è stata prospettata l'esperibilità di un'azione di annullamento per violazione dell'accordo con conseguente tutela risarcitoria per inadempimento contrattuale (TAR Lombardia Brescia, I, 12 ottobre 2010, n. 4026).

3. ACCORDI TRA AMMINISTRAZIONI

Agli accordi urbanistici tra amministrazioni possono essere ricondotti sia quelli perfezionabili tra diversi livelli di governo locale nell'ambito di procedimenti di pianificazione (con funzione di raccordo e semplificazione procedimentale oppure con esiti di co-pianificazione), sia gli accordi di co-pianificazione, sia quelli finalizzati alla realizzazione di opere pubbliche comportanti varianti agli strumenti urbanistici e che trovano il modello paradigmatico nella figura dell'accordo di programma ex art. 34 del D.Lgs. 267 del 2000 poi replicata nella legislazione regionale sul governo del territorio[12].

[12] A livello regionale, tenendo conto dei più recenti aggiornamenti, possono essere segnalate: EMILIA ROMAGNA: L.R. 20/2000 "*Disciplina generale sulla tutela ed uso del territorio*"; L.R. 24/2001 "*Disciplina generale dell'intervento pubblico nel settore abitativo*"; L.R 19/1998 "*Norme in materia di riqualificazione*

I primi presentano un carattere prettamente organizzativo, solo parzialmente evidente nei secondi in cui ad una funzione programmatica si accompagna la definizione e la disciplina di dettaglio di interventi di interesse pubblico per lo più coinvolgenti soggetti attuatori privati (Cons. Stato, IV, 4 aprile 2011, n. 2104; Cons. Stato, VI, 10 marzo 2011, n. 1534; Cons. Stato, IV, 16 settembre 2011, n. 5220; Cons. Stato, IV, 7 settembre 2011, n. 5029; Cons. Stato, VI, 31 ottobre 2011, n. 5816; T.A.R. Lazio Roma, I, 21 luglio 2011, n. 6559; T.A.R. Lazio Roma, I, 13 ottobre 2011, n. 7916)[13].

Le principali problematiche che hanno interessato gli accordi del secondo tipo hanno riguardato, da un lato, la loro qualificazione come accordi procedimentali ex artt. 15 e 11 della legge 241/1990 (Cons. Stato, IV, 12 novembre 2009, n. 7057 e TAR Toscana Firenze, I., 3 marzo 2009, n. 303; T.A.R. Campania Napoli, I, 17 giugno 2011, n. 3241), dall'altro, la posizione dei soggetti privati a vario titolo interessati agli esiti del perfezionamento degli accordi di programma comportanti varianti agli strumenti urbanistici: sia per ragioni direttamente connesse agli effetti di queste ultime, sia più in generale relativamente alla loro diretta partecipazione all'accordo, quali ideatori/realizzatori

urbana"; CAMPANIA: L.R. 16/2004 "*Norme sul governo del territorio*"; FRIULI VENEZIA GIULIA, L.R. 5/2007 "*Riforma dell'urbanistica e disciplina dell'attività edilizia e del paesaggio*"; LIGURIA: L.R. 36/1997 "*Legge urbanistica regionale*"; LOMBARDIA: L.R. 12/2005 *"Legge per il governo del territorio*"; MARCHE: L.R. 34/1992; PIEMONTE: L.R. 56/1977 "*Tutela e uso del territorio*"; PUGLIA: L.R. 20/2001 "*Norme generali di governo e uso del territorio*"; TOSCANA: L.R. 1/2005 "*Norme per il governo del territorio*"; VENETO: L.R. 11/2004 "*Norme per il governo del territorio*"; UMBRIA: L.R. 13/2009 "*Norme per il governo del territorio*".

[13] **ACCORDI DI PROGRAMMA**: tra i tanti E. STICCHI DAMIANI, *Attività amministrativa consensuale e accordi di programma*, Milano, 1992; R. FERRARA, *Gli accordi di programma*, Padova, 1993; R. FERRARA, *Intese, convenzioni e accordi amministrativi*, in *Digesto disc. pubbl.*, VIII, Torino, 1993, 543 ss.; GRECO, *Accordi di programma e procedimento amministrativo*, in AA.VV., *I rapporti tra cittadini e istituzioni nelle recenti leggi di riforma delle autonomie locali e del procedimento amministrativo*, Milano, 1992; G. MANFREDI, *Accordi e azione amministrativa*, Torino, 2001; S. VALAGUZZA, *L'accordo di programma: peculiarità del modello, impiego dei principi del codice civile e applicazione del metodo tipologico*, in *Dir. Amm.*, 2010, 395 ss..

materiali degli interventi (T.A.R. Veneto, 7 ottobre 2011, n. 1502; T.A.R. Piemonte Torino, II, 15 aprile 2011, n. 378; T.A.R. Puglia Bari, I, 10 febbraio 2011, n. 250).

In particolare oggetto di disamina da parte dei giudici amministrativi sono stati i presupposti e i limiti degli accordi di programma in tutte le ipotesi in cui oltre alla realizzazione di un'opera pubblica gli stessi abbiano ad oggetto anche interventi privati ovvero determinino variante agli strumenti urbanistici anche a tale fine. Al riguardo, richiamando la duttilità dello strumento, preordinato alla rapida conclusione di procedimenti connessi e quindi all'efficienza dell'azione pubblica, la giurisprudenza amministrativa ha ritenuto che la norma generale legittimante gli accordi di programma - l'art. 34 del TUEL 267/2000, al pari delle corrispondenti disposizioni introdotte nella legislazione regionale di "governo del territorio" - legittimi il perfezionamento di accordi anche su iniziativa di privati riguardante interventi di rilevante interesse pubblico (quale, ad esempio, la localizzazione di un impianto produttivo in variante agli strumenti urbanistici, come nel caso affrontato da Cons. Stato, IV, 29 luglio 2008, n.3757 in riforma di TAR Emilia Romagna Parma, 29 novembre 2007, n.11; su accordi di programma e piani settoriali si veda Cons. Stato, IV, 27 giugno 2011, n. 3833; T.A.R. Lazio Roma,II, 14 settembre 2011, n. 7273; T.A.R. Lombardia Milano, IV, 19 luglio 2011, n. 1937).

Per completezza va tuttavia rilevato come le amministrazioni, per attivare la realizzazione di opere pubbliche possibili/fattibili/sostenibili solo tramite interventi privati connessi, prudenzialmente procedano al perfezionamento di accordi di programma aventi ad oggetto solo l'opera pubblica "doppiati" da accordi urbanistici nell'ambito di specifici procedimenti di variante urbanistica riferita agli interventi di interesse privato (Corte Cass., S.U., 20 luglio 2011, n. 15871).

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AGREEMENTS BETWEEN LOCAL AUTHORITIES AND BETWEEN LOCAL AUTHORITIES AND PRIVATE INDIVIDUALS WITH REFERENCE TO TERRITORIAL GOVERNMENT

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Prof. Franco PELLIZZER

INDEX

1. REGULATORY FRAMEWORK FOR TOWN PLANNING AGREEMENTS

The role of town planning creates, in the majority of cases, the need to finalise agreements with private individuals either for property or for business reasons. The complex framework of interests plus the need to purchase public works or facilities are the main reasons why basic agreements have become part of "territorial government"[1]

Town planning agreements usually cover:

a) "*town planning conventions*", followed by implementation plans which state planning decisions defining how they should be implemented and the commitments on both sides; the reference model is the "*parcelling out agreement*" according to art. 28 law N. 1150/1942 [2] whose completion influences the completion and the effectiveness of the implementation plan[3].

[1] **TERRITORIAL GOVERNMENT:** P. STELLA RICHTER, Functional profiles of town planning (*Profili funzionali dell'urbanistica)*, Milan 1984; The evolution of town planning and construction doctrine (*L'evoluzione della dottrina in materia urbanistica ed edilizia)*, in *Riv. Giur. Ed*, 2009, The relationship between national and regional legislation (*I rapporti tra la legislazione statale e regionale)*, in *Riv. Giur. Urb*, 2008; G. MORBIDELLI, Town and land management (*Pianificazione territoriale ed urbanistica, ad vocem)*, in *Enc. Giur.*, vol. XXIII, Roma 1990; V. MAZZARELLI, Town and land management in an economic sense (*L'urbanistica e la pianificazione territoriale* in *La disciplina dell'economia)*, (edited by) S. CASSESE, Treaty of administrative law (*Trattato di diritto amministrativo)*, Milan 2003; A. CROSETTI, A. POLICE, M.R. SPASIANO, Town planning and public works laws and regulations (*Diritto urbanistico e dei lavori pubblici)*, Turin 2007; V. CERULLI IRELLI, Territorial government in the new constitutional organization (*Il governo del territorio nel nuovo assetto costituzionale)*, in S. CIVITARESE MATTEUCCI – E. FERRARI – P. URBANI (edited by), Territorial government (*Il governo del territorio)*, Conference Notes -Atti del VI Convegno AIDU, Milan, 2003, 499.

[2] **The 1942 town planning law** has been modified by special and sectional laws such as: the "interim law" n. 765/1967, and law n. 865 /1971 dealing with house building and business units, law n. 10 /1977, law n. 457 del 1978 and law n. 493 /1993 inner city development plans, law n. 122/1989 on public and private car parks

b) *Agreements* in the field of planning procedures between authorities and private individuals who compete to define urban decisions (also including *equalizing agreements*) and *multifunctional agreements* of plans and special programmes[4].

c) Agreements between authorities aimed at planning or oriented in favour of public interventions which have repercussions on town-planning[5].

The difficulty of outlining an equal reconstruction of such agreements suffers due to their functional differences, different attitudes of public interest (strictly urban and

appurtenant to public land, law n. 179/1992 dealing with inner city development plans. See also art. 5 decree-law n 112/2008 converted into L. 133/2008 "development decree".

[3] **TOWN PLANNING CONVENTIONS:** V. MAZZARELLI, Town planning conventions (*Le convenzioni urbanistiche)*, Bologna, 1979; A. CROSETTI, Parcelling-out plan (*Piano di lottizzazione)*, in *Nov. Dig. It.. Appendice*, vol. V, Turin, 1984; P. URBANI - S. CIVITARESE MATTEUCCI., Town planning law. Organization and relationships *(Diritto Urbanistico. Organizzazione e rapporti)*, Turin, 2004.

[4] In reference to **planning agreements**, functional also to equalizing agreements, the most significant references are represented in art. 18 Regional Law Emilia Romagna, n.20/2000 and by art. 6 of the Regional Law Veneto n. 11/2001. More complex definitions, not only town-planning ones, are present in agreements to realize integrated intervention programmes and regeneration programmes see law n. *457/1978* (articles. 28 and 30);*integrated programmes of intervention and urban regeneration programmes introduced in law n. 179/1992 (art. 16); district agreements (1998); innovative programmes in urban spheres (2002); programmes of urban regeneration – see law n. 166/2001*. More recently for dispositions regarding urban regeneration see "*Housing Schemes*" (Decree law 112/2008 converted into L. 133/2008 and Decree law 70/2011 converted into law 106/2011) also the following regional laws: VENETO: L.R. 14/2009 and L.R. 13/2011; TUSCANY: L.R. 24/2009; L.R. 65/2010; EMILIA ROMAGNA: L.R. 6/2009; LOMBARDY: L.R. 27/2009; CAMPANIA: L.R. 19/2009 e L.R. 1/2011; PIEDMONT: L.R. 20/2009 and L.R. 1/2011; UMBRIA: L.R. 13/2009 and L.R. 27/2010.

[5] The main reference is represented by art. 34 law n. 267/2009 then adopted by regional town planning legislation (sub note 12).

"alternative"[6]), by the business imprint on the property (from "demesne" to "business-owned")[7], new equal distribution rules (equalizing by reward, equalizing by compensation, negotiation of building rights)[8] and by the weak framework of authorities. One must also add, the lack of a national reform on town planning plus the ambiguous distribution of national and regional functions in this field even indirectly to "local government" (see for example, Constitutional Court Sent. 121/2010 "Housing scheme"; and also Constitutional Court Sent. 303/2003, 401/2007 and 411/2008 in the subject of public works).

2. LEGAL DEFINITIONS AND PROFILES OF CONVENTIONS AND TOWN PLANNING AGREEMENTS (BETWEEN AUTHORITIES AND PRIVATE INDIVIDUALS)

Legal definitions of town planning agreements on the one hand offer, as always, forms of uncertainty regarding different doctrinal views; in comparison with civil-contract proposals, which seem however to be predominant to their renewal – for essential elements and function – to the category of *conventions* and *public law* agreements, and in particular to the *procedural agreements* according to art.11 law n.241/1990[9] thus recognizing in this

[6] **DIFFERENTIATED INTERESTS:** V. CERULLI IRELLI, *Town planning and differentiated interests*, in *Riv. Trim. Dir. Pubbl.*, 1985, 386.

[7] **RELATIONSHIP PLANNING-PROPERTY**: S. AMOROSINO, *The government of local land management – the new town planning legislation* Padua, 2008.

[8] **EQUALISATION** read A. BARTOLINI, *Large land areas and equalization,* R*eport 2011, on website www.ius-publicum.com.*

[9] AGREEMENTS BETWEEN LOCAL AUTHORITIES AND PRIVATE INDIVIDUALS. Among the numerous important contributions on a classic theme, a reconstruction of public law and procedures may be found in A. AMORTH, Observations on the limits of local authority's activities and legislation (*Osservazioni sui limiti dell'attività amministrativa di diritto privato*), in *Arch. Dir. Pubbl*., 1938, 465; G. FALCON, Public law

field the synthesis between administrative power on one hand, autonomy and a conventional-pactional structure on the other.

With the exception of those pactional regulations with a mere conceptual content of planning decisions, a "quota" of planning functions (and thus administrative power) in the majority of such agreements, defined in a consensual way rather than enforced, with the contribution of the will of the private party that however, does not influence the efficacy of public will but instead becomes an essential cornerstone.

The procedural environment of town planning agreements has been revised on several occasions by case law of the Supreme Court and by administrative judges, assuming

conventions – acceptability and definitions (*Le convenzioni pubblicistiche. Ammissibilità e caratteri*), Milan 1984; G. GRECO, Administrative agreements regulations and contracts (*Accordi amministrativi tra provvedimento e contratto*), Turin, 2003; F.G. SCOCA, Agreements (*Gli accordi*), in F.G. SCOCA (edited by), Administrative law (*Diritto Amministrativo*), Turin, 2008; E. BRUTI LIBERATI, Administrative agreements (*Accordi amministrativi*), in *Enc. Dir., Aggiornamento*, V, Milan, 2001, 2; A. MASUCCI (edited by),The agreement of administrative action (*L'accordo nell'azione amministrativa*), Rome, 1988. E. STICCHI DAMIANI Consensual administrative activity and programmed agreements (*Attività amministrativa consensuale e accordi di programma*), Milan, 1992; G. PERICU, The consensual activity of the civil service (L'attivi*tà consensuale della pubblica amministrazione*), in L. MAZZAROLLI, G. PERICU, A. ROMANO, F.A. ROVERSI MONACO, F.G. SCOCA (edited by), Administrative Law (*Diritto Amministrativo*), Vol. II, Bologna, 2004, 1635 ss.; M. RENNA, The regime of obligations borne from administative agreements (*Il regime delle obbligazioni nascenti dall'accordo amministrativo*), in *Dir. Amm.* 2010, 1.; F. MERUSI, The correct administrative proceedings code (*Il codice del giusto processo amministrativo*), in *Dir. proc. amm.* 2011, 1, 1; A. MALTONI, Reflections on procedures and activity in private law regarding the civil service (*Considerazioni in tema di attività procedimentali a regime privatistico delle amministrazioni pubbliche*), in *Dir. amm.* 2011, 1, 97. F. PELLIZZER, Public-private agreements in territorial government (*Gli accordi pubblico-privato nel governo del territorio*), in F. MASTRAGOSTINO (edited by), Public-private collaboration and administrative regulations (*La collaborazione pubblico privato e l'ordinamento amministrativo*), Turin, 2011.
A contract-civil law explanation can be found here: COMPORTI, Infrastructural coordination (*Il coordinamento infrastrutturale*), Milan 1996, 317; G. MANFREDI, Agreements and administrative action (*Accordi e azione amministrativa*), Milan, 2002; S. CIVITARESE MATTEUCCI, Contribution to the study of the contract principle in administrative activity (*Contributo allo studio del principio contrattuale nell'attività amministrativa*), Turin, 1997; G. MONTEDORO, The new agreement discipline (*La nuova disciplina degli accordi*), webiste www.giustizia-amministrativa.it.

the general scope of the whole category of agreements ex art. 11 law n. 241/1990 and its relative legal regime. The latter is actually appropriate to constitute a public and discretional nature of authority with a partially consensual definition of the structure of interests; and also to allocate full awareness to an administrative judge, which has repercussions on the execution of administrative functions, although via conventional forms (Supreme Court 16/7/2008 indirectly Supreme Court. S.U., 22 December 2009, n. 26972; Council of State, IV, 2 March 2011, n. 1339; Supreme Court., S.U., 5 May 2011, n. 9843; Council of State, Section. V, 26 October 2011, n. 5711; Regional Administrative Court (subsequently written as R.A.C) Liguria Genoa, 5 July 2011, n. 1054; R.A.C. Emilia Romagna Parma, I, 22 February 2011, n. 45; also on conventions in general R.A.C. Veneto, II, 31 May 2011 n. 920; R.A.C. Lombardy Brescia, I, 27 May 2011 n. 770; R.A.C. Lombardy Milan, II, 18 May 2011, n. 1281).

Obviously differentiations descend from a wide variety of agreements regarding both the qualifying angle and from a disciplinary position, but always allowing for the tendential uniqueness of the general principles in this sector.

2.1 Town planning conventions

In comparison to the classic conventional model, the predominant doctrinal reconstruction, supported by consolidated laws, has qualified such agreements as necessary substitute agreements (in the sense that they are not facultative and therefore not alternative to unilateral action) in that they were formulated ex lege dating back to the 1942 Town Planning law, which also ties in with the procedural pattern art. 11 of law n. 241/1990 rather than merely contractual typologies, or "government laws" of an exclusively consensual discipline.

In particular, according to the legal system, the conventional structure is always embedded within a specific administrative procedure (parcelling-out approval and issue of planning permission), aimed at adopting a measure specified by means of an agreement or a substitute, although different to other consensual models due to its inherence to the

application of a public authority to which individuals may contribute towards the manner and the outcome of the venture (Supreme court sentence n. 7573 30/3/2009).

As a result, there are several legal consequences. While trial judges can only deal with compensation claims if a local authority is found guilty of overlooking an approval of a detailed plan which had in fact passed all the necessary stages, all other legal issues are addressed by an "administrative" judge who oversees all other non-compliances of agreements by authorities, although with limited, discretional judgement (Supreme court sentence n. 1538 01/7/2009).

The aim of conferring "exclusive jurisprudence" in this subject matter is in fact aimed at attributing full administrative legal powers to an "administrative" judge, even when they are carried out in conventional terms, deemed indifferent to the formal legal draft of authoritarian power (Council of State, V, 8 October 2008, n.4952; Council of State, IV, 12 November 2009, n. 7057; Supreme Court, sent. 29 April 2009, n.9952).

Some uncertainties remain due to the frequent expansion of the field of town planning agreements in comparison to the standard classic model, emphasizing the extensibility of the legal system ex art. 11 law n. 241/1990 and further obligations borne by the executor. If we leave behind standard agreements, then a more general question is raised if in procedural town planning agreements authorities are able to negotiate further aspects which lie outside the jurisdiction of administrative power expressed by a given function and which would assume a position of private autonomy in line with situations of subjective law.

Beyond specific legal prohibitions, there is no evidence of any impediment in this sense, although it is undeniable that the standard model and the same procedural context constitutes a parameter to assess the compliance – in the sense of reason, adequacy, proportion and in a civil view the "worthiness" ex art. 132 Civil code, in the interests of the general public.

One must remember regarding "unilateral termination" ex art. 11, comma 4 law n. 241/1990, different from "contractual termination" – how the prevailing jurisprudence,

even though it links its authority to the logic of impossibility to crystallize town planning strategies (R.A.C. Genoa, I, 11 July 2007 n. 1377), considers that the pre-existence of a conventional and bilateral legislation linked to the previous planning act worsens– in reference to assumptions, terms and conditions – a new use of the same administrative power employed in those situations which arise in virtue of the assurance generated by the initial "approved" town-planning choice (Council of State, IV, 12 November 2009, Council of State n. 7057; IV, 27 June 2008, n. 3255; Council of State, IV, 29 July 2008, n. 3766; Council of State, IV, 19 February 2008, n. 534; Council of State, IV, 12 March 2009, n. 1477; R.A.C. Piedmont, Turin, I, 20 November 2008, n. 2900; R.A.C. Lazio Rome, III, 1 February 2010, n. 1275; R.A.C. Liguria Genoa, I, 17 November 2011, n. 1575; R.A.C. Emilia Romagna Parma, I, 11 May 2011, n. 141).

2.2 Town planning agreements and agreements regarding the implementation of sectional plans and programmes

In relation to other types of *town planning agreements* – used in planning or instrumental to the implementation of interventions in the public interest (social construction plans, urban regeneration plans, equalization-compensatory agreements) – minor uncertainties have been registered in the public-procedural definition and therefore in reference to the framework outlined in art. 11 law n. 241/1990.

For the first ones, the procedural collocation in full respect of the limits of the guarantee of public law specified in art. 13 of the same law n. 241/1990 (R.A.C Tuscany Florence, 13 March 2009, n. 303) while in reference to the latter which boasts complex contents (not only in terms of planning), highlights, indeed as how a consensual discipline cannot deplete administrative power, leaving margins of discretion which do not permit the integral application of civil law institutions.

Therefore we can confirm that in endo-procedural town planning agreements which are used to approve across-the-board urban planning[10], the consensual element expresses the interest of both parties in favour of a possible town-planning solution of which the local authority must appraise via a written approval document during the final planning stages.

From here stems the preference, in line with jurisprudence, to the theory of incomplete availability towards the negotiation of town-planning functions, instead of adhering to the theory of the "consensual or contracted town planning" founded on the de-standardization of the general category ex art.11 law n. 241 and its assimilation of instruments used in the authority's legal activity. At this point, the stance adopted in 2010 by The Council of State (Council of State, IV, 13 July 2010 n. 4545) following (R.A.C. Lazio Rome, 4 February 2010, n. 1524) relating to the acceptance of several estimates by the planning department of Rome Council required for private individuals, interested in exploiting building capacities assigned conditionally to privately-owned land, the obligation to join a predefined instrument (more specifically, "integrated plan") also accepting, by means of agreement, predetermined equalization/compensatory measures (in particular the relinquishment of certain areas and extraordinary contributions for works of urbanization).

According to the administrative judge, a planning authority cannot disregard the "reserve" officially recognized to local authorities in terms of town planning and by the limited amount of planning instruments, in such a way that when detailed variations on

[10] **PLANNING AGREEMENTS:** G .PAGLIARI,Town planning agreements between local authorities and private individuals *(Gli accordi urbanistici tra P.A. e Privati)*, in *Riv. giur. Urb.* 2008; M. MAGRI, Agreements with private parties in the creation of structural urban plans, *(Gli accordi con i privati nella formazione dei piani urbanistici strutturali*) in *Riv. Giur. Ed*., 2004, 539 also P. URBANI, Planning for agreements (*Pianificare per accordi)*, in *Riv. Giur. Ed*., 2005, 177 ss. and P .URBANI - S. CIVITARESE M., Local authorities and private individuals together for town planning *(Amministrazione e privati nella pianificazione urbanistica)*, Turin, 1995.

town planning discipline are introduced, these deviations however are not accepted from the legal model in observance of "cause" and "content" as defined by law. Hence the possibility that the implementation phases are disciplined by the usage of flexible consensual instruments which are also multi-functional, public or private venture, legally provided for, but always referring the planning responsibility to the local authority, even in line with the obligation imposed by art.11 comma 4 bis, law n. 241/1990, subject to an administrative determination which anticipates and legitimates the recourse of the agreement as an instrument.

Therefore "unnecessary" agreements are being dealt with, although in many cases they are essential in order to create minimum feasibility conditions of general planning decisions; for this reason it is also important to notice how subjective positions of private parties who cannot consider themselves particularly protected against the dissimilar or non-adoption of the lay-out agreed upon in the planning instrument of which the agreement constitutes an integral part (see art. 18 Regional law Emilia Romagna 24 March 2000, n. 20; regarding the necessity of agreements in order to implement equalizing forms R.A.C. Basilicata, I, 21 October 2011, n. 530; R.A.C. Veneto, 10 January 2011, n. 11; R.A.C. Veneto, 10 January 2011, n. 11; R.A.C. Tuscany Florence, 1 March 2011, n.367).

Finally, it must be remembered that the complexity of endo-procedural town planning agreements and their increasing entrepreneurial definition deriving from their equalizing function which has almost inevitably allowed for the integration of relative disciplines with competitive principles typical of public contracts (although undoubted functional differences remain between "town planning" and "calls for tender" as revealed by the Court of Justice, Section III, 25 March 2010, in case C-451/08, Helmut Muller)[11], in line with what is registered in complex implementation agreements of sectional plans and

[11] **LAND MANAGEMENT AND COMPETITION**: F. PELLIZZER, Urbanisation works among competition and terriorial management (*Le opere di urbanizzazione tra concorrenza e organizzazione del territorio), website www.giustamm.it.*

programmes; in the latter the town planning function in a narrower sense assumes an indirect importance, almost servient in comparison with sectional public interest and differential implicating the implementation of forms of effective public private assistance (according to the Supreme Court Sent. 23 March 2009, n. 6960, however ascribable to the schedule ex art. 11 law n. 241/1990).

At this point the possibility of an agreement between a local authority and private parties does exist, but is not ascribable exclusively to endo-procedural town planning agreements (with the exception of those revolving around the remuneration of private services through forms of urban equalization), Indeed also lending definitions and a (mixed) legal system which is actually formed of various models of contractual partnership (in particular concessions of public works finalized following the outcome of a project finance procedure). In these cases, which are in fact very topical, the "mixed" disciplinary context is reflected in particular in the methods of realization of public works or in the public interest for which the principles affirmed in the field of realization of town planning must stand by, following the necessary legal steps in a call for tender. (Court of Justice, VI, 12 July 2001, case C-399/98 and 28 February 2008 in case C-412/04; as well as Constitutional Court 28 March 2006, n. 129 Regional law Lombardy n. 12/2005 and 13 July 2007, n. 269 law of the self-governing province of Trento n. 16/2005; with reference to public works contemplated in town planning agreements, see R.A.C. Emilia Romagna, Parma, 12 March 2010, n. 82 and R.A.C. Lombardy Brescia, 15 January 2008, n. 7).

One may observe that an articulated and evolving framework can be acknowledged; it is equally clear to see that the evolutionary line, closely followed by jurisprudence in order to guarantee that in those cases where "the public authority – part of an agreement" does not have any residual margin of discretion, both in the execution phase of the agreement, complete legal protection must be guaranteed through the application of "compatible principles in the subject matter of obligations and contracts" (in reference to the opening of the Council of State, IV, 15 May 2002, 2363; Council of State, V, 19 October 2011, n.5627; R.A.C Piedmont Turin, I, 16 June 2011, n.630; R.A.C. Sardinia, I, 12 May 2011, n. 478).

Several sentences are collocated within this prospective with which, for example, it has not been excluded that the public law regime of agreements could be integrated by other hypothesis of contractual invalidity and however by all those invalidity hypotheses regarding the inexistence or unlawfulness of the case or subject matter (R.A.C Lombardy Brescia, I, 12 October 2010, n. 4026 on the same theme as Civil code art. 1341 and oppressive clauses, with application of Civil code articles n. 1338 and 1339). Strictly speaking one must also take into account those rulings which have put the spotlight onto the acceptability of actions of mere judgment of non-fulfilment with regards to a compensation claim, or that have faced the topic of pre-contract responsibility (ex art. 1337 Civil code) and of non-fulfilment by the authority in terms of non-adoption of an act provided for or for the adoption of an act which is dissimilar to the original agreement.

In the first instance we find essentiality, in order to acknowledge a sentence of *facere*, of a judgment regarding the exhaustion of any margin of discretion which lies with the public authority (R.A.C. Lazio Rome, II, 14 January 2010, n. 268.

A decisive judgment even in the second instance to enable, therefore, through the application of general rules regarding the interpretation of contracts, the investigation of the effective wishes of all parties, sentences ex art. 2932 Civil code (R.A.C. Lombardy Brescia, II, 16 July 2009, n. 1504).

In the third instance, on the contrary, an attempt has been advanced in favour of an action of annulment for violation of the agreement with consequent compensatory protection for breach of contract. (R.A.C. Lombardy Brescia, I, 12 October 2010, n. 4026).

3. AGREEMENTS BETWEEN PUBLIC AUTHORITIES

Town planning agreements between public authorities may include those perfectible among different levels of local government within the scope of planning procedures (with the function of unification and procedural simplification or with the outcome of co-planning), co-planning agreements and those with the aim of accomplishing

public works entailing variants to town planning instruments and that find a paradigmatic model in the outline of the programme agreement ex art. 34 Legislative decree n. 267/2000 and repeated in regional legislation for local governments[12].

The first agreements display a strictly organizational nature, only partially clear in the following ones in which a programmatic function is accompanied by the definition and detailed discipline of interventions in the public interest mostly involving private implementation parties (Council of State, IV, 4 April 2011, n. 2104; Council of State, Vi, 10 March 2011, n. 1534; Council of State, IV, 16 September 2011, n. 5220; Council of State, IV, 7 September 2011, n. 5029; Council of State, VI, 31 October 2011, n. 5816; R.A.C. Lazio Rome, I, 21 July 2011, n. 6559; R.A.C. Lazio Rome, I, 13 October 2011, n. 7916)[13].

[12] At a regional level, taking into account the most up-to-date literature we can recommend: EMILIA ROMAGNA: Regional Law 20/2000 General legislation on land protection and use. "*Disciplina generale sulla tutela ed uso del territorio*"; Regional Law 24/2001 General legislation of public intervention in the housing sector "*Disciplina generale dell'intervento pubblico nel settore abitativo*"; Regional Law 19/1998 Rules regarding urban regeneration "*Norme in materia di riqualificazione urbana*"; CAMPANIA: Regional Law. 16/2004 Rules for territorial administration "*Norme sul governo del territorio*"; FRIULI VENEZIA GIULIA, Regional Law. 5/2007 Reform of town-planning and legislation on construction and landscapes "*Riforma dell'urbanistica e disciplina dell'attività edilizia e del paesaggio*"; LIGURIA: Regional Law. 36/1997 Regional town-planning legislation "*Legge urbanistica regionale*"; LOMBARDY: Regional Law. 12/2005 laws for territorial administration *"Legge per il governo del territorio*"; MARCHE: Regional Law. 34/1992; PIEDMONT: Regional law. 56/1977 Land Protection and use "*Tutela e uso del territorio*"; PUGLIA: Regional Law. 20/2001 General rules of territorial administration and use "*Norme generali di governo e uso del territorio*"; TUSCANY: Regional Law 1/2005 Rules for territorial administration "*Norme per il governo del territorio*"; VENETO: Regional Law. 11/2004 Rules for territorial administration "*Norme per il governo del territorio*"; UMBRIA: Regional law 13/2009 Rules for territorial administration "*Norme per il governo del territorio*".

[13] **AREA AGREEMENTS AND PROGRAMMES**: there is a vast choice on this topic, this is just a selection E. STICCHI DAMIANI, Consensual administrative activity and area programmes (*Attività amministrativa consensuale e accordi di programma)*, Milan, 1992; R. FERRARA, Area agreements (*Gli accordi di programma)*, Padua, 1993; R. FERRARA, Cooperation, conventions and administrative agreements (*Intese, convenzioni e accordi amministrativi)*, in *Digesto disc. pubbl.*, VIII, Turin, 1993, 543; GRECO, Aree programmes and administrative

The main problems that concern the second type of agreement have in fact dealt with, on one hand, their qualification as procedural agreements ex articles 15 and 11 law n. 241/990 (Council of State, IV, 12 November 2009, n. 7057 and R.A.C. Tuscany Florence, I, 3 March 2009, n. 303, R.A.C. Campania Naples, I, 17 June 2011, n. 3241), yet on the other, the position of private parties in various capacities in reference to the outcome of the completion of the agreements of the programme entailing variations to town planning instruments: both for reasons directly linked to effects of the latter but also more generally in relation to their direct participation in the agreement, as creators or material accomplishers of their involvement (R.A.C. Veneto, 7 October 2011, n. 1502; R.A.C. Piedmont Turin, II, 15 April 2011, n. 378; R.A.C. Puglia Bari, I, 10 February 2011, n. 250).

In particular a subject of close scrutiny by administrative judges has been the preconditions and limits of programmed agreements in every hypothesis in which, apart from the realization of public works, were also subject to private interventions or rather a determinist alternative to town planning instruments even for this purpose. In this respect referring to the ductility of the instrument, pre-arranged to rapidly conclude relevant proceedings and therefore becoming an efficient public action, administrative law maintains that the general rule legitimizing local area plans – art. 24 Local Authorities Act n. 267/2000, together with corresponding dispositions introduced in regional legislation of "local government" – legitimates the completion of agreements even by private initiative regarding interventions of important public interest (which, for example, the localization of a business unit which modifies town planning instruments, as in the case examined by Council of State, IV, 29 July 2008, n. 3757 reforming R.A.C. Emilia Romagna Parma 29

procedure (*Accordi di programma e procedimento amministrativo)*, in AA.VV., The relationship between citizens and institutions after the recent reform of local authorities and administrative procedures (*I rapporti tra cittadini e istituzioni nelle recenti leggi di riforma delle autonomie locali e del procedimento amministrativo)*, Milan, 1992; G. MANFREDI, Agreements and administrative actions (*Accordi e azione amministrativa)*, Turin, 2001; S. VALAGUZZA, Area programme, the distinctiveness of the model, the use of the principles of civil code and its application (*L'accordo di programma: peculiarità del modello, impiego dei principi del codice civile e applicazione del metodo tipologico)*, in *Dir. Amm.*, 2010, 395

November 2007, n. 11; see Council of State, IV; 27 June 2011, n. 3833 regarding programmes and sectional plans; R.A.C. Lazio Rome, II, 14 September 2011, n. 7273; R.A.C. Lombardy Milan, IV, 19 July 2011, n. 1937).

For the sake of completeness, it must be underlined however how public authorities, in order to bring to fruition any possible/feasible/sustainable public works only via private interventions, complete with prudence those planned agreements that only deal with those public works "repeated" in town planning agreements within specific procedures of town planning variations in reference to those interventions of private interest (Supreme Court of Sent. 20 July 2011 n. 15871).

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PEREQUAZIONE URBANISTICA

REPORT ANNUALE - 2011 – ITALIA

(*Novembre 2011*)

Prof. Antonio BARTOLINI

INDICE

1. PREMESSA

La perequazione urbanistica è oggi il tema centrale del diritto urbanistico in Italia. Per perequazione urbanistica si intende quella tecnica di conformazione del territorio e delle proprietà immobiliare per cui il piano regolatore deve ripartire in maniera equa i vantaggi e gli svantaggi derivanti dalla pianificazione urbanistica. In altre parole, con la perequazione urbanistica si persegue lo scopo di distribuire equamente, tra i proprietari di immobili interessati dalla trasformazione oggetto della pianificazione urbanistica, diritti edificatori e obblighi nei confronti del Comune o di altri enti pubblici aventi titolo. Il

principio di perequazione consente all'amministrazione pubblica (in Italia: per l'appunto i Comuni e, nel prossimo, futuro, le loro forme associative) di acquisire gratuitamente dai privati, in cambio dei vantaggi loro riconosciuti, aree da destinare ad opere di pubblica utilità.

Il principio perequativo non è stabilito dalla legge dello Stato, ma si è attuato negli ultimi venti anni, in via di prassi, con la redazione di alcuni piani regolatori e, poi, con le leggi regionali.

Manca, tuttavia, una legge statale che riconosca e sancisca il principio perequativo.

La mancanza di una legge statale ha determinato grave incertezza, poiché, in Italia, il diritto urbanistico è materia rientrante nel "governo del territorio", dove la legge statale ha il compito di prescrivere i principi della materia, mentre le leggi regionali possono entrare solo nel dettaglio (art. 117, Cost.).

Con il presente report si indicherà:

a) come i piani regolatori (prg) e le leggi regionali abbiano attuato il principio perequativo in assenza di una legge statale;

b) la posizione della dottrina e della giurisprudenza sull'ammissibilità o meno (dal punto di vista costituzionale) del principio perequativo in assenza di una legge statale di principi;

c) l'atteggiamento del legislatore nazionale, anche alla luce delle novità introdotte nel 2011.

2. **PEREQUAZIONE NELLA PIANIFICAZIONE URBANISTICA E NELLE LEGGI REGIONALI**

In assenza di una legislazione nazionale, la prima esperienza di piano regolatore perequativo più nota in Italia è quella di Casalecchio di Reno (vicino a Bologna). A questo è seguito, tra i più noti, quello di Reggio Emilia nonché quello di Ravenna e, da ultimo, quelli di Roma e Milano.

Esistono vari modelli di perequazione previsti dai piani regolatori. I più noti sono quelli della perequazione per comparto e quella generalizzata. La *perequazione urbanistica di comparto* permette ai proprietari di immobili riuniti in un *comparto edificatorio* (cioè un ambito territoriale minimo entro cui l'intervento edilizio deve essere realizzato in modo unitario da più aventi titolo) di accordarsi tra di loro riguardo alla concentrazione di volumetrie all'interno di una determinata area, in modo tale da ripartire tra di loro in misura proporzionale i reciproci vantaggi e svantaggi. La *perequazione urbanistica generalizzata* si fonda sulla previsione di un indice di edificabilità uniforme su tutto il territorio comunale.

Il principio di perequazione è, oggi, recepito da numerose legge regionali: Basilicata (art. 33, l.r. 11 agosto 1999, n. 23), Calabria (art. 54, l.r. 16 aprile 2002, n. 19), Friuli-Venezia Giulia (art. 31, l.r. 23 febbraio 2007, n. 5), Emilia Romagna (art. 7, l.r. 24 marzo 2000, n. 20), Lombardia (art. 11, l.r. 11 marzo 2005, n. 12), Puglia (art. 7, l.r. 13 dicembre 2004, n. 24), Toscana (art. 60, l.r. 3 gennaio 2005, n. 1), Umbria (art. 29, l.r. 22 febbraio 2005, n. 11), Veneto (art- 35, l.r. 21 ottobre 2004, n. 20). Non va, poi, dimenticata la legge 4 marzo 2008, n. 1 della Provincia autonoma di Trento (art. 53).

Le invarianti che emergono dalla predetta legislazione regionale sono essenzialmente tre. In primo luogo la perequazione deve avvenire tenendo conto dello stato di fatto e di diritto in cui i terreni si trovano. In secondo luogo, la dinamica della perequazione è lasciata alla negoziazione dei proprietari interessati con il Comune mediante la predisposizione e conclusione di convenzioni. Infine, viene data libertà di scelta, ai

comuni, nella scelta della tecnica di perequazione da seguire (per comparto, generalizzata, mista, etc.).

Diversi sono stati i tentativi da parte del legislatore nazionale di introdurre il principio di perequazione, tentativi che, peraltro, ancora ad oggi, non sono sfociati in una legge statale di principi.

3. LA PEREQUAZIONE URBANISTICA IN DOTTRINA E IN GIURISPRUDENZA

In dottrina esistono posizione differenziate circa la legittimità dal punto di vista costituzionale della perequazione urbanistica.

Per una prima corrente di pensiero, sia le leggi regionali che i piani regolatori perequativi si pongono in radicale contrato con la Costituzione atteso, che tanto la disciplina della proprietà privata, quanto l'urbanistica, è riservata alla potestà legislativa statale. Mancando una disciplina statale di riferimento sulla perequazione urbanistica ne deriverebbe l'incostituzionalità della medesima.

Altra posizione dottrinale, ritiene, invece, che la perequazione urbanistica sia una tecnica di conformazione della proprietà privata diversa dallo *zooning*, ma pur sempre una tecnica di conformazione della proprietà privata. Sicchè la perequazione appare essere costituzionalmente giustificata, in quanto il potere di conformazione della proprietà privata è sicuramente attribuito dalla legge statale ai piani regolatori (legge 17 agosto 1942, n. 1150).

La giurisprudenza è ampiamente favorevole a riconoscere la legittimità del principio perequativo. Fondamentale in tal senso è una recente decisione del Consiglio di Stato sul piano regolatore di Roma, ove si è affermato che " *i ... meccanismi perequativi*

connessi all'attribuzione de futuro ai suoli di una cubatura aggiuntiva rientr(ano) a pieno titolo nel legittimo esercizio della potestà pianificatoria e conformativa del territorio" (Cons. Stato, sez. V, 13 luglio 2010, n. 4545).

La prima pronuncia fondamentale in materia ha riguardato il piano perequativo di Reggio Emilia, ove si è affermato che la perequazione si colloca in sintonia con "*gli sviluppi, culturali e giuridici, più recenti in materia urbanistica*" (Tar Emilia-Romagna, Bologna, sez. I, 14 gennaio 1999, n. 22; in senso conforme Tar Campania, Salerno, sez. I, 5 luglio 2002, n. 670). Ed ancora: si è ritenuto che il metodo perequativo sia conforme "*ai principi costituzionali in materia di tutela della proprietà privata di modo che, in applicazione del principio della perequazione, i benefici e gli oneri derivanti dalla pianificazione vengano distribuiti in modo rigidamente proporzionale alla consistenza ed all'estensione delle singole proprietà*" (Tar Lombardia, Brescia, 20 ottobre 2005, n. 1043).

Più di recente si è avuto modo di osservare che la perequazione urbanistica "*consente…di procedere all'acquisizione di aree aventi destinazione pubblica evitando il procedimento espropriativo, mediante la loro cessione al Comune, ovviando in tal modo al contenzioso derivante dalla reiterazione dei vincoli di destinazione pubblica, ma soprattutto di poter contare sulla collaborazione e la partecipazione degli stessi privati proprietari attraverso la proposizione di progetti e piani urbani di riqualificazione, in grado di migliorare il tessuto urbano. In buona sostanza, attraverso la perequazione urbanistica si persegue l'obiettivo di eliminare le disuguaglianze create dalla funzione pianificatoria, in particolare dalla zonizzazione e dalla localizzazione diretta degli standards, quanto meno all'interno di ambiti di trasformazione, creando le condizioni necessarie per agevolare l'accordo fra i privati proprietari delle aree incluse in essi e promuovere l'iniziativa privata*" (Tar Veneto, sez. I, 19 maggio 2009 , n. 1504).

Altre importanti pronunce sono quelle del Consiglio di Stato sul prg di Padova (Cons. St., IV, 22 gennaio 2010, n. 216) e quella del Tribunale amministrativo della Lombardia sul prg di Buccinasco (Tar Lombardia, Milano, 17 settembre 2009, n. 4671).

4. LE NOVITA' DEL 2011

La problematica relativa alla legittimità costituzionale o meno della perequazione urbanistica dovrebbe essere stata definitivamente risolta da un recente intervento legislativo del 2011. Difatti l'art. 5, comma 3, del d.l. 13 maggio 2011, n. 70 conv. in legge 12 luglio 2011, n. 106, ha introdotto una novella al codice civile, prevedendo l'obbligo di trascrizione per *" i contratti che trasferiscono, costituiscono o modificano i diritti edificatori comunque denominati, previsti da normative statali o regionali, ovvero da strumenti di pianificazione territoriale*" (art. 2643, comma 1, 2-bis), Codice civile).

In sostanza, con questa disposizione il legislatore nazionale intende dare una disciplina che crei certezza nei rapporti di scambio dei diritti edificatori generati in base al principio perequativo. La norma statale in questo modo dà una definitiva copertura costituzionale al sistema perequativo, riconoscendo la trascrivibilità dei diritti edificatori generati dagli strumenti di pianificazione territoriale e comunque riconosciuti dalle leggi regionali.

La disposizione in esame, pur avendo il merito, di aver risolto due problemi fondamentali posti dall'urbanistica perequativa, ovvero di trovare un fondamento costituzionale alla perequazione e l'esigenza di assicurare certezza nello scambio dei titoli volumetrici, porta con sé nuovi interrrogativi.

Innanzitutto, con il nuovo intervento legislativo non risulta chiaro quale sia la natura giuridica dei diritti edificatori: sono beni oggetto di diritti o diritti reali di godimento? sono interessi legittimi ?

In secondo luogo, viene da chiedersi se la trascrizione del diritto reale viene a costituire un limite invalicabile alla possibilità del prg di modificare e conformare la proprietà privata, derogando al principio generale per cui lo *ius aedificandi* è degradabile dal potere di piano.

Si tratta di domande che forse troveranno una risposta nel prossimo report annuale.

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Per le novità introdotte dal d.l 70/2010 in materia di trascrizione: E. BOSCOLO, *Le novità in materia urbanistico-edilizia introdotte dall'art. 5 del decreto sviluppo*, in *Urb. e appalti*, 2011, 1059 ss.

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EQUALIZATION IN URBAN DEVELOPMENT

ANNUAL REPORT - 2011 - ITALY

(November 2011)

Prof. Antonio BARTOLINI

INDEX

1. INTRODUCTION

Equalization is the central theme of urban development legislation in Italy today. The term equalization, in the context of town planning, refers to the technique of conformation of the territory and real estate under development, for which the regulatory plan must equally distribute the advantages and disadvantages of urban planning. In other words, the aim of equalization is to fairly distribute development rights and obligations towards the municipality, or other qualified public entities, between those property owners affected by the transformation brought about by urban development. The principle of equalization allows the public administration (in Italy, the municipalities, and in the near

future, their associated forms) to acquire free of charge from private individuals, in exchange for benefits granted to them, areas to be allocated to works of public interest.

The equalization principle is not established by state law, but has been implemented in practice over the past twenty years with the drafting of some regulatory plans and regional laws.

What is lacking, however, is a state law that recognizes and upholds the equalization principle.

The lack of a state law has led to great uncertainty, as urban development legislation in Italy is a matter dealt with by the "territorial government", as the state law has the task of setting out the principles of the matter, while regional laws can only enter into detail (Art. 117, Constitution).

This report will indicate:

a) how regulatory plans and regional laws have implemented the equalization principle in the absence of state legislation;

b) the position of the doctrine and jurisprudence on the admissibility or otherwise (from a constitutional perspective) of the equalization principle in the absence of a state law of principles;

c) the approach of the national legislature, also in light of changes introduced in 2011.

2. EQUALIZATION IN URBAN DEVELOPMENT AND REGIONAL LAW

In the absence of national legislation, the first notable example of a regulatory equalization plan in Italy was that of Casalecchio di Reno (near Bologna). Among those that followed, the most studied cases include Reggio Emilia, as well as Ravenna, and finally, Rome and Milan.

There are various models of equalization provided for by regulatory plans. The best known are equalization by sector and generalized equalization. Urban development equalization by sector allows those property owners gathered in a sector where construction can take place (the definition of this sector being the minimal territorial context within which construction activity must be carried out in a unified manner by title holders) to agree among themselves as to the concentration of volume within a determined area, so as to allow for distribution among themselves in proportion to their mutual advantages and disadvantages. Generalized equalization in urban development is based on an estimate of an index of what can be built that is uniform throughout the entire municipal area.

The principle of equalization is by now acknowledged by numerous regional laws: Basilicata (Art. 33, LR 11 August 1999, No 23), Calabria (Art. 54 LR 16 April 2002, No 19), Friuli-Venezia Giulia (Art. 31, LR 23 February 2007, No 5), Emilia Romagna (Article 7, LR 24 March 2000, No 20), Lombardy (Art. 11 LR 11 March 2005, No 12), Apulia (Art. 7, LR 13 December 2004, No 24), Tuscany (Art. 60, LR 3 January 2005, No. 1), Umbria (Art. 29, LR 22 February 2005, No 11), Ontario (Art. 35, LR 21 October 2004, No 20). A more recent example is the law of 4th March 2008, No 1 of the autonomous province of Trento (Art. 53).

There are essentially three invariants that arise from this regional legislation. In the first place, equalization must occur taking into account the state of affairs and the applicable law where the land is situated. Secondly, the dynamics of equalization are left to the negotiations between the owners concerned and the municipality, through the preparation and conclusion of agreements. Finally, freedom of choice is given to the

municipalities, in the choice of equalization technique to follow (by sector, generalized, mixed, etc.).

Several attempts have been made by the national legislature to introduce the equalization principle, attempts that, however, have still not resulted in a state law of principles.

3. EQUALIZATION IN URBAN DEVELOPMENT IN DOCTRINE AND IN LAW

In doctrine there exist different positions on the legality, from a constitutional perspective, of equalization in urban development.

In one train of thought, both regional laws and regulatory equalization plans contrast radically with the Constitution, as the discipline of private property, as with town planning, is the responsibility of the legislative power of the state. The absence of a state discipline of reference on equalization in urban development would therefore result in the unconstitutionality of the same.

Another doctrinal position holds that equalization, while different from zoning, for example, is still a private property conformation technique. Equalization appears to be constitutionally justified, from this point of view, in so far as the power of conformation of private property is clearly attributed under state law to regulatory plans (law 17 August 1942, No 1150).

The jurisprudence is largely in favour of recognizing the legality of the equalization principle. A recent decision of the State Council on the regulatory plan for Rome is crucial in this regard, as it was stated that " *the ... equalization mechanisms related to the allocation of future land use of additional cubage are an integral part of the*

legitimate exercise of the power of planning and conformation of the territory" (State Council, section V, 13 July 2010, No 4545).

The first fundamental judgment on the subject regarded the Reggio Emilia equalization plan, where it was stated that equalization is in harmony with "*the most recent cultural and legal developments in the urban development field*" (Regional Administrative Court of Emilia-Romagna, Bologna, section I, 14 January 1999, No 22; in keeping with the Regional Administrative Court of the Campania region, Salerno, section I, 5 July 2002, No 670). And furthermore, it was held that the equalization method complies with "*the constitutional principles regarding the protection of private property, so that, in applying the equalization principle, the benefits and expenses arising from planning are distributed strictly in proportion to the size and extent of the individual properties*" (Regional Administrative Court of Lombardy, Brescia, 20 October 2005, No 1043).

More recently it has been possible to observe that equalization in town planning "*allows… for the acquisition of areas destined for public use, while avoiding expropriation proceedings through their sale to the City, thereby obviating litigation arising from the reiteration of constraints involving land targeted for public use, and above all makes it possible to be able to count on the cooperation and participation of the private owners themselves, through the proposition of projects and urban redevelopment plans that have the capacity to improve the urban fabric. In essence, the objective of eliminating the inequalities created by the planning process, in particular those caused by zoning and the direct localization of standards, can be achieved through the use of equalization in urban development, at the very least within the areas under transformation, thereby creating the conditions necessary to facilitate agreement among the private owners of the areas in question, and to encourage private initiative*" (Regional Administrative Court of Veneto, section I, 19 May 2009 , No 1504).

Other decisions of note include that of the State Council on the regulatory plans of Padua (State Council, IV, 22 January 2010, No 216) and that of the Administrative Court of Lombardy on the regulatory plans for Buccinasco (Regional Administrative Court of Lombardy, Milan, 17 September 2009, No 4671).

4. DEVELOPMENTS IN 2011

The issues concerning the constitutionality or otherwise of equalization in urban development should have been resolved definitively by recent legislative action in 2011. In fact, art. 5, paragraph 3, of legislative decree May 13, 2011, No 70, which came into law July 12, 2011, No 106, introduced an innovation to the Civil Code, making it obligatory for the transcription of *"contracts that transfer, constitute or modify development rights, however they are denominated, as provided for by state or regional regulations, or by instruments of territorial planning"* (Article 2643, paragraph 1, 2-bis, Civil Code).

In substance, with this provision, the national legislature intends to create a discipline that creates certainty in relationships involving the exchange of development rights that come into effect according to the equalization principle. The provision of the state in this way gives a definitive constitutional cover to the equalization system, recognizing the transcribable nature of development rights, as generated by the instruments of territorial planning, and in any case recognized by regional laws.

The provision in question, while having the merit of having solved two fundamental problems involving equalization in urban development, or better, to have found a constitutional basis for equalization, and the need to ensure certainty in the exchange of volumetric titles, also brings with it new questions.

Firstly, with the new legislation the legal nature of development rights is not completely clear: are they assets subject to rights, or rights to be enjoyed in themselves? Are they legitimate interests?

Secondly, the question arises as to whether the transcription of the rights in rem could constitute an insurmountable barrier to the ability of regulatory plans to modify and conform private property, derogating from the general principle by which *ius aedificandi* can be degraded by the power of the regulatory plan.

These are questions that will perhaps be answered in the next annual report.

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SANZIONI AMMINISTRATIVE NEL CREDITO E NEL RISPARMIO

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Prof. Paolo LAZZARA

INDICE

1. INTRODUZIONE

Quella delle sanzioni amministrative è materia particolarmente importante nell'ordinamento italiano ed europeo, ed alla quale dottrina e giurisprudenza hanno sempre prestato notevole attenzione. Importante e dibattuta è la finalità della potestà sanzionatoria amministrativa, anche in relazione alla differenza con l'ambito del diritto penale; entrambe le misure sono considerate di carattere afflittivo e con finalità dissuasiva, di talché, sul piano sostanziale, non è facile coglierne la differenza. Anche il legislatore italiano, d'altra parte, più volte ha "spostato" alcuni precetti dall'ambito di rilevanza penale a quello amministrativo, con la conseguenza che, in queste ipotesi, la sanzione veniva inflitta non più dal giudice ma dalla stessa amministrazione titolare dei poteri di vigilanza e controllo sul relativo settore.

L'interesse per la materia si è nuovamente acceso in collegamento allo studio della legislazione sulle autorità amministrative indipendenti, enti pubblici completamente slegati dall'apparato amministrativo governativo, sia sul piano organizzativo che su quello funzionale ed alle quali sono affidati compiti di regolazione, vigilanza e sanzione in settori particolarmente "sensibili" (soprattutto per il rilievo costituzionale dei beni coinvolti: concorrenza, credito, risparmio, ecc.). Si richiede una vigilanza prudenziale che involge valutazioni di particolare complessità e che perciò è preferibilmente affidata ad organismi non collegati alla struttura ed alla funzione governativa, nonché particolarmente qualificati sul piano tecnico. Ciò spiega i criteri di nomina, la composizione e posizione istituzionale delle autorità indipendenti, legata all'esigenza di "neutralità" rispetto agli interessi coinvolti, scevra dalla funzione di soddisfazione primaria di interessi pubblici amministrativi.

Tra i poteri delle autorità indipendenti, rilievo centrale ha appunto la potestà sanzionatoria in collegamento ai generali compiti di vigilanza e regolazione settoriale.

Proprio per le autorità indipendenti il legislatore ha preferito affidare al giudice amministrativo la tutela avverso le relative sanzioni; in questo senso, a partire dal 1990, si è invertito l'orientamento che affidava principalmente al giudice civile la competenza sulle

opposizioni alle sanzioni amministrative pecuniarie. Inversione di tendenza che – dopo numerosi e significativi passaggi nella stessa direzione - il codice del processo amministrativo (2010) ha completato, omologando, in questo senso, il settore del credito e del risparmio e, dunque, con riferimento alle sanzioni irrogate dalla Banca d'Italia e dalla Commissione nazionale società e borsa (Consob). Aspetti che costituiscono il fronte più avanzato della discussione e del dibattito dottrinale e giurisprudenziale in materia.

2. SANZIONI AMMINISTRATIVE E CODICE DEL PROCESSO AMMINISTRATIVO. IL NODO DELLA GIURISDIZIONE

La discussione più recente in tema di sanzioni amministrative attiene dunque alle previsioni del codice del processo amministrativo che fissano un particolare regime di tutela derogatorio, per certi versi, rispetto alla disciplina della legge generale 689/1981. La questione, come già riferito, riguarda la potestà sanzionatoria delle autorità indipendenti il cui sindacato è stato affidato alla giurisdizione amministrativa esclusiva ed alla competenza funzionale del Tar del Lazio.

Per un verso, dunque, il codice riporta ad unità un quadro normativo relativamente disordinato e spezzettato nelle leggi speciali riguardanti le singole materie; riunione formale e trasversale delle disposizioni che contiene, tuttavia, una definitiva inversione di tendenza in materia; negli ambiti di azione delle autorità indipendenti, come in alcuni altri importanti settori (come ad es. l'edilizia e l'urbanistica), le sanzioni amministrative sono del tutto sottratte alla giurisdizione civile e riportate nell'alveo del sindacato giurisdizionale amministrativo.

Il quadro di riferimento ruota attorno a tre disposizioni: a) l'art. 133, comma 1, lett. l) che stabilisce: «*sono devolute alla giurisdizione esclusiva del giudice amministrativo […] le controversie aventi ad oggetto tutti i provvedimenti, compresi quelli sanzionatori […] adottati dalla Banca d'Italia, dalla Commissione nazionale per le società e la borsa, dall'Autorità garante della concorrenza e del mercato, dall'Autorità per le garanzie nelle*

comunicazioni, dall'Autorità per l'energia elettrica e il gas e dalle altre Autorità istituite ai sensi della legge 14 novembre 1995, n. 481, dall'Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture, dalla Commissione vigilanza fondi pensione, dalla Commissione per la valutazione, la trasparenza e l'integrità della pubblica amministrazione, dall'Istituto per la vigilanza sulle assicurazioni private […] ».

L'art. 134, comma 1, lett. c) prevede che «*il giudice amministrativo esercita giurisdizione con cognizione estesa al merito nelle controversie aventi ad oggetto […] le sanzioni pecuniarie la cui contestazione è devoluta alla giurisdizione del giudice amministrativo, comprese quelle applicate dalle Autorità amministrative indipendenti…*».

Chiude il quadro l'art. 135, comma 1, lett. c), che devolve alla competenza inderogabile del Tar del Lazio, sede di Roma, le controversie sugli atti, comprese le sanzioni, delle autorità amministrative indipendenti[1].

Il sistema può essere perciò così ricomposto: per i ricorsi avverso le sanzioni, nelle materia di giurisdizione amministrativa esclusiva, è prevista una cognizione piena ed estesa al merito; per le sanzioni irrogate dalle autorità amministrative indipendenti, in particolare, si stabilisce anche la competenza territoriale funzionale del Tar del Lazio.

[1] Si aggiunga altresì che in tutti i ricorso avverso atti delle autorità indipendenti, si segue il rito accelerato di cui all'art. 119, c.p.a.; sul punto, M. FRATINI, *L'opposizione alle sanzioni dinanzi al giudice amministrativo*, in M. FRATINI (a cura di) *Le sanzioni delle autorità amministrative indipendenti*, Padova, 2011, 1322.

3. LE SANZIONI AMMINISTRATIVE IN MATERIA DI CREDITO E RISPARMIO

Le principali questioni che emergono in materia[2] riguardano dunque le sanzioni irrogate dalle autorità amministrative indipendenti, secondo la nuova disciplina codicistica, gli orientamenti giurisprudenziali in atto e la normativa dell'Unione europea. La novella – invero – per un verso generalizza alcune regole già previste in materia di tutela del mercato e della concorrenza, mentre per altro verso innova significativamente il precedente assetto.

Va sottolineato anzitutto il riconoscimento al giudice amministrativo degli stessi poteri che l'art. 23, l. 689/81[3] attribuisce al giudice civile, compresa la possibilità del sindacato sostitutivo sulla valutazione della gravità dei fatti ed in relazione all'ammontare della sanzione. Soluzione già affermata in via giurisprudenziale[4], nonché prevista dalla disciplina comunitaria in materia di infrazioni alle regole della concorrenza.

Più articolato, complesso ed innovativo è stato il percorso che, nel settore del credito e risparmio, ha portato all'attribuzione al giudice amministrativo della competenza sulle sanzioni delle autorità indipendenti competenti. In queste materie, invero, vi era stata una apertura solo relativa della legge sul risparmio (art. n. 262/2005) che, pur avendo uniformato le regole procedimentali, aveva lasciato alla Corte d'Appello la competenza a decidere sulle principali ipotesi di sanzioni amministrative di Consob e Banca d'Italia.

[2] Tra le materie di giurisdizione esclusiva sono incluse anche altre importanti materie come ad esempio quella dell'edilizia e dell'urbanistica.

[3] Può essere utile ricordare che l'art. 23, comma quinto, l. 689/1981, è stato modificato dall'art. 26 del d.lgs. n. 40/2006, nel senso che contro le sentenze del giudice di pace si può proporre appello ordinario anziché, come precedentemente stabilito, ricorso *per saltum* avanti la Corte di Cassazione; cfr. sul punto C. cost., n. 90/2008.

[4] Cass. sez. un., 29 aprile 2005, n. 8882, in Giorn. dir. amm., 2006, 179, con commento di P. LAZZARA, *Le competenze comunitarie*; Cass. sez. un., 5 gennaio 1994, n. 52; Cons. Stato, 2 marzo 2004, n. 926; ancora in questo senso, cfr. Cons. Stato, VI, 8 febbraio 2008, n. 424

L'art. 4 dell'allegato 4 al codice del processo amministrativo ha invece definitivamente eliminato la competenza della Corte d'Appello portando ad unità la competenza esclusiva del giudice amministrativo sulle sanzioni delle autorità indipendenti e concentrando sul Tar del Lazio la competenza funzionale in primo grado. E' proprio questa una delle principali innovazioni del codice del processo amministrativo che attribuisce al giudice amministrativo i ricorsi avverso le sanzioni di Consob e Banca d'Italia, precedentemente affidate alla giurisdizione ordinaria ed alla competenza della Corte d'Appello (Cass., SS.UU., 20 settembre 2006, n. 20315; 12 novembre 2002 n. 15885; 25 maggio 2001, n. 225; in dottrina, M. Fratini, G. Gasparri, A. Giallongo, *Le sanzioni della Commissione nazionale per le società e la borsa*, in M. Fratini (a cura di) *Le sanzioni delle autorità amministrative indipendenti*, Padova, 2011, 464).

4. **IL PROBLEMA DELLA COMPETENZA GIURISDIZIONALE. LA PROSPETTIVA DEL GIUDICE CIVILE**

Su quest'ultimo punto è in atto un contrasto giurisprudenziale iniziato con l'ordinanza del 25 marzo 2011 con cui la Corte d'Appello di Torino ha considerato rilevante e non manifestamente infondata la questione di legittimità costituzionale delle richiamate disposizioni, puntando particolare attenzione all'abrogazione dell'art. 187 *septies*, comma 4, d. lg. n. 58/1998, con conseguente sottrazione al giudice civile della competenza funzionale in tema di sanzioni amministrative della Consob e della Banca d'Italia.

L'ordinanza solleva numerosi profili di illegittimità della novella codicistica; si ipotizza – anzitutto - la violazione dell'art. 76, Cost., per avere il decreto delegato oltrepassato i confini della delega di cui all'art. 44, L. 69/2009. Si ritiene, da questo punto di vista, che la disposizione delegante avesse richiesto il semplice riordino delle «*norme sulla giurisdizione del giudice amministrativo, anche rispetto alle altre giurisdizioni*» nonché di «*adeguare le norme vigenti alla giurisprudenza della Corte costituzionale*»; senza possibilità – ritiene la C. d'Appello – di mutare l'attuale riparto tra giudice ordinario

ed amministrativo. Sarebbe perciò illegittimo l'aver spostato una serie di controversie (art. 187 *septies*, d. lg. 58/1998, dalla competenza civile della Corte d'Appello a quella amministrativa del Tar del Lazio. Innovazione legislativa che esula, secondo la valutazione del giudice *a quo*, dal semplice «riordino» consentito dalla delega.

Più incisiva appare la critica avanzata in relazione agli artt. 103, 113, Cost., sulla base della sentenza n. 204/2004 della Corte. In materia di sanzioni amministrative, non sarebbe in considerazione alcun aspetto di discrezionalità amministrativa essendo la relativa potestà caratterizzata dal canone della doverosità e della piena tutela delle situazioni giuridico-soggettive incisa, che assurgerebbero, per l'appunto, al rango di diritto soggettivo. La competenza civile, in altri termini, avrebbe doppio ancoraggio nel carattere vincolato della funzione sanzionatoria ed alla natura di diritto soggettivo delle situazioni giuridiche soggettive oppositive.

Passaggio argomentativo poggiato sulle solide basi della giurisprudenza delle sezioni unite che, anche dopo l'entrata in vigore dell'art. 7, l. 21 luglio 2000 n. 205, hanno ribadito la devoluzione alla giurisdizione civile dei ricorsi avverso le sanzioni amministrative irrogate per la violazione delle regole in materia di intermediazione finanziaria[5].

Sul punto, la Corte non si sottrae ad un ulteriore ipotetica obiezione quando sottolinea che la funzione sanzionatoria può considerarsi solo occasionalmente, e non inscindibilmente, connessa alla complessiva attività di vigilanza «*atteso che il profilo della vigilanza ben può concludersi senza intervento sanzionatorio e, viceversa, il profilo sanzionatorio dev'essere attuato anche su segnalazione di terzi, in assenza di un'attività di vigilanza*». La vigilanza, insiste la Corte d'Appello, sarebbe espressione di un potere amministrativo mentre la funzione sanzionatoria sarebbe esercizio di un dovere "vincolato", in presenza dei presupposti. Anche in questo caso, il riferimento implicito è

[5] Cass. sez. un., 24 gennaio 2005, n. 1362; Cass. sez. un., 18 marzo 2004, 5535.

all'orientamento delle sezioni unite che hanno escluso l'assimilazione tra potestà sanzionatoria ed attività di vigilanza, per le modalità di esercizio non rigidamente predeterminate della seconda[6].

Anche il riferimento alla tutela del mercato, si aggiunge, non costituisce elemento unificante e sufficientemente specifico («*speciale materia*») per fondare la riunione in capo al giudice amministrativo di questi diversi aspetti dell'attività della Consob.

In disparte le considerazioni sull'eccesso di delega, la motivazione dell'ordinanza solleva alcune perplessità, soprattutto riguardo alla supposta autonomia tra attività di vigilanza e funzione sanzionatoria; come se quest'ultima potesse essere concepita, formalmente e sostanzialmente, al di fuori di compiti di amministrazione attiva, di vigilanza, controllo, etc. in capo alla stessa Consob. Al contrario, la potestà sanzionatoria amministrativa (a differenza di quella penale) si caratterizza proprio per la stretta connessione con la funzione ed i compiti di amministrazione della quale costituisce comunque espressione. Non è possibile infatti comprendere a pieno la vigilanza senza la prospettiva, centrale sul piano sistematico-giuridico, della potestà sanzionatoria e di tutti gli altri poteri interdittivi attribuiti all'autorità competente nell'ambito della complessiva funzione.

In nessun caso, nemmeno nella materia dell'abuso di mercato, si può perciò affermare la competenza «*unicamente sanzionatoria*» della Consob, che non sia direttamente e strettamente collegata ai compiti di vigilanza ed informazione complessivamente considerati.

Né si può condividere la proposta articolazione dei poteri-doversi della pubblica amministrazione e delle situazioni giuridico-soggettive degli interessati rispetto ai diversi momenti dell'attività di vigilanza, controllo e sanzione. Anche da questo punto di vista va

[6] Cass. sez. un.,23 gennaio 2004, n. 1235. Cass. sez. un., 22 luglio 2004, n. 13709, in materia di sanzioni della Banca d'Italia.

rilevato, piuttosto, che gli operatori coinvolti nel sistema dell'intermediazione finanziaria (o del credito, per quanto riguarda la Banca d'Italia) sono soggetti alle funzioni di controllo e vigilanza, così come alla potestà sanzionatoria dell'autorità, risultando oltremodo difficile immaginare, almeno formalmente, situazioni pienamente tutelate in un contesto così fortemente autoritativo.

A suo favore, d'altra parte, l'ordinanza può richiamare la tradizionale configurazione in termini di diritto soggettivo delle situazioni giuridico-soggettive del sanzionato. Sul punto non è il caso di addentrarci, essendo tale orientamento del tutto consolidato in dottrina ed in giurisprudenza.

Non si può però ritenere che la situazione giuridico-soggettiva (di pieno diritto) non sia, nemmeno indirettamente, connessa alla funzione di vigilanza e controllo, al punto che la relativa tutela rimarrebbe fuori dalla clausola di giurisdizione esclusiva.

Ulteriori dubbi sono avanzati nell'ordinanza con riferimento alla concentrazione di tutti i ricorsi sulle sanzioni amministrative delle autorità indipendenti, avanti ad un unico ufficio giudiziario (Tar del Lazio). Soluzione che appare al giudice *a quo* confliggere con il canone costituzionale della ragionevole durata del processo (art. 111, comma 2, Cost.) «*atteso che la distribuzione delle controversie medesime tra più Corti territoriali assicura una trattazione parallela dei processi, quindi con una minor durata di ciascuno, mentre la concentrazione in un unico ufficio comporta, necessariamente, una trattazione in sequenza, che finisce per incidere sulla ragionevole durata di tutti*».

La censura, di sicuro interesse, sembra prospettata in termini riduttivi essendo principalmente centrata su aspetti organizzativi, forse, non direttamente incidenti sul piano della legittimità costituzionale; né rilevanti nel giudizio *a quo* avanti alla Corte d'Appello.

Vero è, piuttosto, che la concentrazione avanti ad un unico giudice di primo grado irrigidisce notevolmente il processo interpretativo ed il naturale percorso di applicazione della legge, anticipando il momento di applicazione unificante, ordinariamente affidato al Consiglio di Stato. L'articolazione della tutela in primo grado, in altri termini, garantisce il

fondamentale valore del pluralismo nell'applicazione della legge, salva la funzione nomofilattica del giudice di palazzo Spada[7].

5. LA POSIZIONE DEL TAR DEL LAZIO SULLA GIURISDIZIONE IN TEMA DI SANZIONI AMMINISTRATIVE IN MATERIA DI CREDITO E RISPARMIO

In senso diametralmente opposto si è pronunciato il Tar del Lazio su analoga questione (sent. 9 maggio 2011, n. 3934). Il giudice amministrativo ripercorre analiticamente le questioni sollevate in giudizio dalla Consob respingendole punto per punto.

Si considera anzitutto manifestamente infondata l'asserita violazione dell'art.76 Cost., per eccesso di delega. Ciò in quanto il legislatore, tra i principi della delega, ha espresso l'esigenza di concentrazione della tutela, anche al fine della ragionevole durata del processo[8]; in questa prospettiva si è delegato il riordino delle norme vigenti sulla giurisdizione amministrativa, anche rispetto ad altre giurisdizioni.

Il decreto delegato avrebbe perciò correttamente esteso la giurisdizione amministrativa a tutte le sanzioni della Consob – precedentemente devolute al giudice civile – in base alla «*stretta connessione tra potere di vigilanza, costituente già servizio pubblico nei settori di cui all'art. 33 d. lgs. 80/1998 e potere sanzionatorio*». Siamo

[7] Sul punto, cfr. C. cost., n. 237/2007, che si è espressa sulla possibilità di concentrare in capo al Tar del Lazio tutte le controversie in materia di emergenza rifiuti. Sulla questione è stata nuovamente sollevata questione di legittimità costituzionale da Tar Campania, Napoli, ord. 18 nov. 2010, n. 800, in *Corr. merito*, 2011, 657, con commento di V. Neri.

[8] In questo senso, da ultimo, A. MALTONI, *Considerazioni in tema di attività prcedimentali a regime privatistico delle amministrazioni pubbiche*, in *dir. amm*. 2011, p. 161.

nell'ambito della "concentrazione" della tutela nei confronti di tutti i provvedimenti Consob, compresi quelli sanzionatori, prima affidati ad altra giurisdizione.

Il passaggio più convincente della motivazione attiene proprio la rilevata connessione tra la funzione amministrativa di vigilanza e la potestà sanzionatoria. Tale legame pone sicuramente la seconda funzione nell'alveo dei generali poteri di controllo come già ritenuto con riferimento alle altre Autorità amministrative indipendenti. Il compito di vigilanza riassume infatti tutta la serie di poteri di ispezione, richiesta di informazioni e documenti che caratterizzano il controllo del mercato dell'intermediazione finanziaria.

Tale argomento, si lega ad uno dei principali assunti del codice del processo amministrativo che consiste appunto nella saldatura tra potestà sanzionatoria e funzione di amministrazione attiva, con la conseguenza che anche gli atti sanzionatori sono configurati come provvedimenti naturalmente affidati alla giurisdizione del giudice amministrativo.

Sotto l'ulteriore profilo attinente alle situazioni giuridiche soggettive il Tar ritiene che sussistano i presupposti per la devoluzione della tutela avverso le sanzioni Consob alla giurisdizione amministrativa; in particolare, la situazione del destinatario della sanzione amministrativa è configurata in termini (non di diritto soggettivo ma) di interesse legittimo essendo il destinatario comunque contrapposto al potere amministrativo espressione di discrezionalità tecnica. Spetta infatti all'amministrazione l'apprezzamento dei fatti complessi che integrano la violazione nonché nella quantificazione della sanzione rispetto alla gravità dei comportamenti. Anzi, la potestà sanzionatoria richiederebbe «*una ponderazione di interessi pubblici e privati, finalizzata alla scelta della sanzione quantitativamente più proporzionata, che costituisce esercizio di discrezionalità amministrativa*».

Quest'ultima argomentazione appare per molti versi problematica; invero, non sembra che l'ammontare della sanzione possa essere determinato in base ad una valutazione di discrezionalità amministrativa in senso stretto e perciò dipendere dalla ponderazione comparativa tra interesse pubblico e privato; ciò in quanto la potestà punitiva deve

sottostare ad una condizione più rigorosa di legalità e prevedibilità. Solo la gravità dei comportamenti accertati ed la necessaria funzione dissuasiva della sanzione debbono guidare l'amministrazione nella valutazione delle azioni da colpire. Più pertinente è il riferimento alla "discrezionalità tecnica" (e non amministrativa) proprio per indicare che la valutazione della Consob assume carattere complesso rimanendo comunque legata a parametri tecnici oggettivi e predeterminati.

La questione di giurisdizione poteva perciò adeguatamente risolversi secondo la riferita connessione tra potestà sanzionatoria e compiti di amministrazione attiva senza involgere il terreno insidioso delle situazioni giuridiche soggettive.

Se è vero infatti che anche l'irrogazione di una sanzione costituisce espressione di un "potere", altrettanto vero è che in questa materia sussiste un vincolo più stringente del principio di legalità di talché il sindacato giurisdizionale è stato sempre esteso sino alla possibilità di modificare l'entità delle sanzioni irrogate. Ciò significa che, al di là della qualificazione formale della situazione giuridico-soggettiva fatta valere, il giudice (ordinario o amministrativo) può sostituirsi all'amministrazione nella valutazione della gravità dei comportamenti e nella conseguente determinazione dell'ammenda.

6. ULTERIORI SVOLGIMENTI

Va segnalata infine la decisione con la quale il Consiglio di Stato ha ritenuto la propria giurisdizione su una controversia intentata prima dell'entrata in vigore del nuovo codice e, dunque, a suo tempo, di competenza del giudice ordinario (C. St., sez. VI, 18 aprile 2011, n. 2359). In particolare, il Collegio ha ritenuto che la regola dell'art. 5, c.p.c., secondo cui la giurisdizione si determina "con riguardo alla legge vigente e allo stato di fatto esistente al momento della proposizione della domanda", essendo diretta a favorire, e non già ad impedire, la perpetuatio iurisdictionis, possa essere invocata soltanto nel caso di sopravvenuta carenza di giurisdizione del giudice adito e non nel caso inverso in cui si abbia l'attribuzione della giurisdizione al giudice che ne risultava privo al momento della proposizione della domanda.

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ADMINISTRATIVE SANCTIONS IN CREDIT AND SAVINGS

ANNUAL REPORT - 2011 - ITALY

(November 2011)

Prof. Paolo LAZZARA

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1. INTRODUCTION

Administrative sanctions are a particularly important subject in the Italian and European legal order, and doctrine and jurisprudence have always paid much attention to it. Important and controversial is also the purpose of the administrative sanctioning authority, in relation to the difference with the scope of criminal law; both measures are considered afflictive and with a deterrent effect, and the result is that, on substantive issues, it is not easy to grasp the difference. Even the Italian legislature, on the other hand, has repeatedly "moved" some precepts from criminal law to administrative law, with the result that, in these cases, the penalty was not imposed by the judge but by the same contracting owner of supervisory powers and control over the relative sector .

The interest in the matter has been turned on again in connection to the study of the regulation on independent administrative authorities, public administration completely independent from the apparatus of government, both from an organizational and functional point of view and to which are given tasks of regulation, supervision and sanction in particularly "sensitive" sectors (especially for the constitutional significance of the goods involved: competition, credit, savings, etc.). A prudential supervision is required, which involves assessments of particular complexity and therefore is preferably entrusted to bodies not connected to the governmental structure and function, and particularly skilled at the technical level. This explains the criteria for appointment, the composition and institutional position of independent authorities, linked to the need for "neutrality" with respect to the interests concerned, free from the function of primary satisfaction of public administration interests.

Among the powers of the independent authorities the sanctioning authority has a central role in connection with the general tasks of sectorial supervisory and regulation.

Just for the independent authorities the legislature has chosen to entrust the administrative judge with the protection against sanctions; in this sense, since 1990, the orientation that entrusted the civil courts with the competence on the opposition to administrative fines, has been reversed. A reversal that - after a number of significant steps

in the same direction - the administrative procedure code (2010) has completed, homogenizing, in this sense, the field of credit and savings and, therefore, with reference to the sanctions imposed by the Bank of Italy and the Italian Securities and Exchange Commission (CONSOB). Aspects that constitute the cutting edge of the doctrinal and jurisprudential discussion and debate on the subject.

2. ADMINISTRATIVE SANCTIONS AND ADMINISTRATIVE PROCEDURE CODE. THE MAIN POINT OF JURISDICTION

The most recent discussion on the subject of administrative sanctions regards therefore, the provisions of the administrative procedure code that establishes a special regime of protection of derogation, in some ways, compared to the discipline of General Law 689/1981. The question, as already mentioned, concerns the sanctioning power of the independent authorities, whose union has been entrusted to the exclusive administrative jurisdiction and the functional competence of the TAR of Lazio.

On the one hand, therefore, the code makes uniform a legal framework that is relatively disorganized and fragmented in the special laws relating to individual subjects; a formal and transversal union which contains, however, a definitive reversal on the subject; in the area of action of the independent authorities, as in some other important areas (such as. construction and urban planning), administrative sanctions are entirely excluded from the civil jurisdiction and brought back in the channel of judicial administration.

The framework revolves around three provisions: a) art. 133, paragraph 1, lett. I) which states: "*The administrative court has exclusive jurisdiction [...] on all disputes relating to any action, including sanctions [...] adopted by the Bank of Italy, by the Italian Securities and Exchange Commission, by the garantor Authority for competition and market, the Authority for Communications Guarantees, by the Regulatory Authority for Electricity and Gas and by other bodies established under the Law of 14 November 1995 481, the Authority for the Supervision of public works contracts, services and supplies, by*

the Commission of supervision of pension funds, by the Commission for assessment, transparency and integrity of public administration, the Institute for the supervision of private insurance [...]."

The Art. 134, paragraph 1, lett. c) provides that "*the administrative judge shall exercise jurisdiction with respect to the extended cognition in cases relating to [...] fines whose objection shall be referred to the jurisdiction of administrative courts, including those applied by the independent administrative authorities* .... ".

To close the framework the article 135, paragraph 1, lett. c), which entrusts the mandatory jurisdiction of the TAR of Lazio, Rome office, with disputes on acts, including sanctions, of the independent administrative authorities[1].

The system can therefore be reconstructed as follows: for appealing against the sanctions, in the exclusive administrative jurisdiction, there will be a full and extensive knowledge of the matter; for fines imposed by the independent administrative authorities, in particular, the functional jurisdiction of the TAR of Lazio is also established.

3. ADMINISTRATIVE SANCTIONS IN CREDIT AND SAVINGS

The main issues that arise[2] on the subject concern, therefore, the sanctions imposed by the independent administrative authorities, according to the new legal codes,

[1] Please not also that that all appeals against the acts of independent authorities, follow the accelerated proceedings under article 119 of the administrative procedure code; on this point M. FRATINI, *L'opposizione alle sanzioni dinanzi al giudice amministrativo,* in M. FRATINI (ed.) *Le sanzioni delle autorità amministrative indipendenti*, Padova, 2011, 1322.

[2] Among the subjects of exclusive jurisdiction there also are other important subjects such as the construction and planning.

the legal guidelines in place and the legislation of the European Union. The change - indeed - on the one hand generalizes some rules already laid down concerning protection of the market and competition, while on the other hand significantly innovates the previous structure.

It should be stressed, first, the attribution to the administrative judge of the same powers that Article. 23, l. 689/81[3] gives the civil courts, including the possible replacement of the union on the assessment of the seriousness of the facts and in relation to the amount of the fine. Solution already established by the courts[4], and provided for by Community rules on infringements of competition rules.

More structured, complex and innovative was the iter that, in the field of credit and savings, led to the attribution to the administrative judge of the competence on sanctions of the independent competent authorities. In these subjects, indeed, there had been an openness only on the law on savings (art. No. 262/2005) that, although it had uniformed rules of procedure, had left the Court of Appeals the power to decide on key assumptions of administrative sanctions of Consob and the Bank of Italy.

The Art. 4 of Annex 4 to the administrative procedure code, instead, has permanently eliminated the jurisdiction of the Court of Appeals, leading to a unity the exclusive jurisdiction of the administrative court on sanctions of independent authorities and focusing on the functional competence of the Regional Administrative Court of Lazio on the First trial. This is just one of the main innovations of the administrative procedure

[3] It may be useful to recall that Article. 23, fifth paragraph, l. 689/1981, was amended by section 26 of Legislative Decree no. 40/2006, in the sense that against the judgments of the peace officer we cn use the ordinary appeal rather than, as previously established, appeal per saltum before the Court of Cassation, cf. the point C. cost., n. 90/2008.

[4] Cass. Un. Ses. April 29 2005, No,. 8882, in *Giorn. Dir. Amm.* 2006, 179 commented by P. LAZZARA, *Le competenze comunitarie*; Cass. Un. Ses. January 5 1994, No. 52; Cons. State, March 2, 2004, No 926, even in this sense, cf. Cons. State, VI, Feb. 8, 2008, No 424.

code which gives the administrative judge the appeals against the sanctions of Consob and the Bank of Italy, previously entrusted to the ordinary jurisdiction and the jurisdiction of the Court of Appeals (Court of Cassation, SS.UU., September 20 2006, no. 20315; November 12 2002 no. 15885; May 25 2001, no. 225; in doctrine, M. Fratini, G. Gasparri, A. Giallongo, *Le sanzioni della Commissione nazionale per le società e la b*orsa, in M. Fratini (cured by) *Le sanzioni delle autorità amministrative indipendenti*, Padova, 2011, 464).

4. THE QUESTION OF JURISDICTION. THE PERSPECTIVE OF THE CIVIL COURTS

On this last point there is an ongoing conflict which began with the judicial order of March 25, 2011 in which the Court of Appeals considered significant and not manifestly unfounded the question of the constitutionality of these provisions, focusing particular attention to 'deletion of Art. F 187, paragraph 4, of Legislative Decree No 58/1998, resulting in removal of functional competence in the civil courts regarding administrative sanctions of Consob and the Bank of Italy.

The order raises many profiles of illegality of the new code, it is assumed - first of all - the violation of art. 76 of the Constitution, because the executive order would exceed the boundaries of the delegation of Article 44, L. 69/2009.

It is believed, from this point of view, that the delegation provision had requested the simple rearrangement of the “rules of the jurisdiction of administrative courts, even compared to other jurisdictions "and to" bring the rules in force at the jurisprudence of the Constitutional Court”; with no chance - believes the Court of Appeals- to change the current division between administrative and ordinary courts. It would therefore be unlawful to have moved a series of disputes (Article 187 f, d lg. 58/1998), from the civil jurisdiction of the Court of Appeal to the administrative Tar of Lazio. Legislative innovation that falls outside, according to the evaluation of the court, the simple "rearrangement" allowed by the delegation.

More incisive seems the criticism advanced in relation to Articles. 103, 113 of the Constitution, on the basis of the decision No. 204/2004 of the Court. With regard to administrative sanctions, no matter of administrative discretion would be considered, since the relative power is characterized by the canon of dutifulness and full protection of subjective legal situations, which soar, in fact, to the rank of individual right. The civil jurisdiction, in other words, would have a double anchorage in the duty-bound character of the sanctioning function and to the nature of subjective right of oppositional subjective legal situations.

Argumentative passage resting on the solid foundations of the case law of the united sections that, even after the entry into force of Article. 7, l. July 21, 2000 No 205, have confirmed the assignment to the civil jurisdiction of appeals against administrative sanctions imposed for violation of the rules on financial intermediation[5].

On this point, the Court does not escape from another hypothetical objection when it states that the sanctioning function can be considered only occasionally, and not inextricably, linked to the overall supervisory activities "*Given that the profile of supervision may well be concluded without the sanction and, conversely, the profile of sanctions must be implemented also on report by third parties, in the absence of supervisory activity.*" Supervision, insists the Court of Appeals, would be an expression of an administrative power while the sanctioning function would be exercise of a duty "bound" in the presence of the conditions. Again, the implicit reference is to the orientation of the united sections that excluded the assimilation of sanctioning authority and supervisory activities, for not rigidly predetermined mode of operation of the second[6].

[5] Cass. Un. Ses., January 24, 2005, No 1362; Cass. Un. Ses. March 18, 2004, 5535.

[6] Cass. Un. Ses. January 23, 2004, No 1235; Cass. Un. Ses. July 22, 2004, No 13709, relating to sanctions by the Bank of Italy.

Also the reference to the protection of the market, they add, is not a unifying and enough specific element ("special subject") to set up the union by the administrative judge of these different aspects of Consob.

Aside the considerations on excessive delegation, the grounds of the order raise some concerns, particularly about the supposed autonomy of the supervisory activities and sanctioning role; as if it could be conceived, formally and substantially, outside the duties of active administration, supervisory, control, etc.. by the Consob itself. In contrast, the administrative sanctioning authority (unlike the criminal authority) is characterized precisely by the close connection with the function and duties of administration of which is still expression. It is impossible to fully understand the supervision without the prospect, which is central on a systematic-legal level, of the sanctioning authority and all other powers of interdiction, attributed to the competent authority within the overall function.

In any case, even in the matter of abuse of the market, we can not assert the "entirely sanctioning" competence of Consob, which is not directly and closely related to the tasks of supervision and information considered as a whole.

Nor we can share the proposed articulation of the powers-duties of public administration and of subjective-legal situations of the parties concerned with respect to the different moments of supervision, control and sanction. Also from this point of view it should be noted, rather, that the operators involved in the system of financial intermediation (or of credit, with reference to the Bank of Italy) are subject to the supervision and control functions, as well as the sanctioning power of authorities, making it extremely difficult to imagine, at least formally, fully protected situations in such an authoritative context. In its favour, on the other hand, the order may draw the traditional configuration in terms of subjective right of the subjective-legal situations of the sanctioned. There is no need to investigate this point, this orientation being entirely consolidated in doctrine and in jurisprudence.

We can not believe that the subjective-legal situation (right), is not, even indirectly, related to the function of supervision and control, so that its protection would remain outside the exclusive jurisdiction clause.

Further doubts are entered in the order with respect to the concentration of all appeals of administrative sanctions of independent authorities, before a single judicial office (TAR of Lazio). A solution that appears to the national court conflicting with the canon of constitutional reasonable length of proceedings (Article 111, paragraph 2 of the Constitution) "*given that the distribution of the disputes themselves between more territorial courts provides a parallel treatment of processes, therefore with a shorter duration of each while the concentration in a single office necessarily entails a treatment in sequence, which ends up affecting the reasonable length of all of them.*"

Censorship, of great interest, seems reductive in terms proposed being primarily focused on organizational aspects, perhaps not directly affecting the level of constitutional legitimacy, nor relevant in the main proceedings before the Court of Appeals.

It is true, rather, that the concentration before a single judge of First Instance greatly stiffens the interpretation process and the natural course of law enforcement, anticipating the time of the unifying application, ordinarily entrusted to the State Council.

The structure of protection in the first trial, in other words, guarantees the fundamental value of diversity in law enforcement, except for the nomophylactic function of the court of the Palazzo Spada[7].

[7] On this point, cf. C. cost., n. 237/2007, which has expressed its opinion about the possibility of concentrating in the TAR of Lazio all disputes relating to waste emergency. The question of the constitutionality of was raised again on this point by Tar Campania, Naples, ord. November 18 2010, No 800, *Corr. merito*, 2011, 657, commented by V. Neri.

5. THE POSITION OF THE REGIONAL ADMINISTRATIVE COURT OF LAW (TAR) OF LAZIO IN TERMS OF ADMINISTRATIVE SANCTIONS ON CREDIT AND SAVINGS

In the opposite direction the Tar of Lazio ruled on a similar issue (sentence 9 May 2011, No 3934). The administrative judge analytically traces the issues raised in court by Consob dismissing them point by point.

First is considered the alleged violation of Article 76 of Constitution, manifestly unfounded, for excessive delegation. This is because the legislature, among the principles of the delegation, expressed the need for concentration of protection, also for a reasonable duration of the process[8]; from this perspective the reorganization of the existing rules on the administrative jurisdiction has been delegated, even compared to other jurisdictions.

The delegated decree would therefore properly extend the administrative jurisdiction to the sanctions of Consob - formerly attributed to the civil courts - according to the "*close connection between supervisory power, already constituting a public service in the areas referred to in Article 33 d. lgs. 80/1998 and sanctioning power*."

We are in the area of "concentration" of protection against all Consob measures, including sanctions, first assigned to another jurisdiction.

The most convincing passage of the grounds for the decision concerns precisely the observed connection between the administrative function of supervision and sanctioning powers.

[8] In this sense, most recently, A. MALTONI, *Considerazioni in tema di attività prcedimentali a regime privatistico delle amministrazioni pubbiche*, in *dir. amm*. 2011, p. 161.

This link poses probably the second function at the bottom of the general powers of supervision as already considered in relation to other independent administrative authorities.

The task of supervision sums up the whole series of powers of inspection, request for information and documents that characterize the control of financial intermediation markets.

That argument, binds to one of the main assumptions of the administrative procedure code which consists in welding between sanctioning authority and function of active administration, with the result that the acts are configured as sanctioning measures naturally assigned to the jurisdiction of administrative courts.

From the additional point of view concerning subjective lagal situations, the Tar believes that there are the conditions for the attribution to the administrative jurisdiction of the protection against the sanctions of Consob; in particular, the situation of the recipient of the administrative sanction is configured in terms (not of individual right but) of a legitimate interest, since the recipient is however opposed to the administrative power expression of technical discretion.

It is up to the administration, indeed, the appreciation of complex facts that integrate the violation, as well as in the quantification of the sanction according to the seriousness of the behaviour. Indeed, the sanctioning authority would require "*a balancing of public and private interests, aimed at the choice of the most proportionate sanction, which constitutes the exercise of administrative discretion*."

This argument is problematic in many ways; indeed, it seems that the amount of the fine can not be determined on the basis of an assessment of administrative discretion in the strict sense and therefore it does not depend on the comparative ponderation between public and private interests; this is because the punitive power must be subject to a condition more stringent than legality and predictability. Only the severity of behaviour established and the necessary deterrent effect of the sanction must guide the administration in the evaluation of actions to be punished. More relevant is the reference to "technical

discretion" (not administrative) just to indicate that the evaluation of Consob takes complex character while remaining linked to objective and predetermined technical parameters.

The question of jurisdiction could therefore be solved according to the reported link between sanctioning powers and duties of active administration without involving the treacherous terrain of subjective legal situations.

If it is true that the imposition of a sanction reflects a "power", it is equally true that in this matter there is a more stringent constraint than the rule of law so that the judicial review has always been extended up to the ability to change the amount of the sanctions imposed. This means that, beyond the formal classification of the legal-subjective situation asserted, the judge (ordinary or administrative) may replace the administration in assessing the gravity of the conduct and the consequent determination of the fine.

6. SUBSEQUENT COURSE

We must report then the decision by which the Council of State has considered its jurisdiction on a dispute brought before the entry into force of the new code and, therefore, at the time, a matter of ordinary courts (C. St., Section . VI, April 18, 2011, No 2359). In particular, the Board held that the rule in Article. 5, Code of Civil Procedure, according to which the jurisdiction is determined "with respect to the applicable law and the state of facts existing at the time of submitting the application," being directed to promote and not prevent, the perpetuatio iurisdictionis, may be invoked only in case of supervening lack of jurisdiction of the court and not in the reverse case in which there is the allocation of jurisdiction to the court that did not have it at the time of submitting the application.

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Prof. Dr. Matthias RUFFERT

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1. EUROPEAN ADMINISTRATIVE LAW IN GERMANY

Research on the influence of European administrative law on national administrative law has a great tradition in Germany. Following some pioneers in the 1960s and 1970s, it is *Jürgen Schwarze's* seminal work on the subject that creates attention not only at the domestic level. The establishment of the subject is followed by a phase of conflict in the early 1990s around several judgements of the ECJ such as *Francovich, Zuckerfabrik Süderdithmarschen* and *TA Luft* which are seen by many as an illegitimate intrusion into the scope of national administrative law. Fortunately, this phase has ended a few years later as many scholars concentrate on what is commonly called "Europeanisation" (*Europäisierung*) of administrative law. It is today generally accepted that European law containing principles and rules that are relevant for public government are part of German administrative law. In some areas, this is particularly visible, as e.g. in environmental law or the law of public procurement.

2. CONCEPTUAL ISSUES: INTEGRATED EUROPEAN ADMINISTRATION (*EUROPÄISCHER VERWALTUNGSVERBUND*)

If administrative law in Germany is generally "Europeanised", new conceptual approaches have to be found to achieve a more precise picture of the process and its results. In German public legal scholarship, the links and ties between the central administration at the Commission and agencies' levels on the one hand and national institutions on the other hand are particularly underlined, as is the interrelationship between supranational and national legal principles and rules. The dominant term for describing these conjunctions is *Europäischer Verwaltungsverbund*, which, regrettably, is scarcely translatable (not only into English). Some scholars strive for translation choosing the term "European composite administration", while it is preferred here to underline the integrated character of the *Verwaltungsverbund,* so that "European integrated administration" would be the right concept. Other terminological approaches are submitted to be less precise such as the "European administrative space" (*Europäischer Verwaltungsraum*).

At any rate, the concept of European integrated administration differentiates and combines the different levels of administrative law interacting within it: (1) administrative law to be implemented by the EU-institutions, (2) administrative law originating from EU sources (regulations and directives) implemented at national level and (3) national administrative law under European influence.

3. CORE DEVELOPMENTS IN 2011

1.1 Jurisprudence

The most important jurisprudential development is related to category (3) listed above. In Case C-115/09 (*Bund für Umwelt und Naturschutz Deutschland* v. *Bezirksregierung Arnsberg, Trianel Kohlekraftwerk intervening*), the *Trianel* case of 12 May 2011, the ECJ declared that German legislation precluding access to administrative courts of non-governmental organisations in the environmental sector was incompatible with the relevant legislation at EU level. The background to the case is the restrictive approach of German administrative procedural law concerning access to justice. As German administrative courts have a broad scope of review with only limited margins of decision left to the government bodies controlled, standing is limited to plaintiffs bearing an individual right (*subjektiv-öffentliches Recht*). In environmental matters, such individual rights are normally linked to individual health or property and not bestowed upon institutions acting in an altruistic way. There have certainly been some modifications in recent years and standing for environmentalist NGOs has been somehow extended. There was also some extension to individual standing following the jurisprudence of the ECJ (Case C-237/07, *Dieter Janecek* v. *Freistaat Bayern,* ECR 2008, I-6221). In *Trianel*, however, an obvious lacuna in German environmental law was brought before the Court:

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, known as 'the Ărhus Convention' of 1998, aims at the reinforcement of the activity of environment groups in administrative matters. It was transposed into EU law by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect

of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17). German implementing legislation continued making standing for environmental organisations conditional upon the impairment of individual rights. The ECJ – not astonishingly – did not accept this: "If, …, those organisations must be able to rely on the same rights as individuals, it would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness if such organisations were not also allowed to rely on the impairment of rules of EU environment law solely on the ground that those rules protect the public interest. … that very largely deprives those organisations of the possibility of verifying compliance with the rules of that branch of law, which, for the most part, address the public interest and not merely the protection of the interests of individuals as such." The decision was met with incomprehensive criticism in some parts of scholarship, but it is completely within the logics of ECJ jurisprudence, and it shows the need for modification in domestic administrative law.

1.2. Scholarship

It is impossible to list all publications in the field that have been published in Germany in 2011, but two of them shall be particularly underlined (details to be found in the bibliography). First, there is a new seminal work covering all areas of European Administrative Law edited by *Terhechte.* Second, the annual meeting of the University assistants in public law was devoted to the *Verwaltungsrechtsraum Europa.*

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EQUO PROCESSO E DIRITTO AD UN RICORSO EFFETTIVO NELLA RECENTE GIURISPRUDENZA DELLA CORTE DI STRASBURGO

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1. PREMESSA

La giurisprudenza della Corte dei diritti sull'art. 6 è comunemente nota soprattutto per le condanne inflitte agli Stati nazionali in ordine alla ragionevole durata del processo, ma invero le decisioni degli ultimi anni, ed in particolare quelle che qui esaminiamo, analizzano in maniera ben più ampia alcuni profili assai rilevanti dell'equo processo.

L'art. 6, infatti, prescrive che il processo sia pubblico e svolto innanzi ad un tribunale imparziale, previamente costituito per legge. Le decisioni della Corte su questi ultimi profili dell'equo processo si intrecciano spesso con la necessità, stabilita dall'art. 13, che, per la tutela dei diritti, si possa proporre un ricorso effettivo ad un'autorità nazionale.

Innanzi alla Corte dei diritti è, perciò, prassi consolidata che vengano dedotti motivi inerenti alla violazione congiunta degli artt. 6 e 13, ma non sempre le sentenze riconoscono la violazione di entrambe le disposizioni.

Per un mero ordine espositivo, si analizzano prima le sentenze che ammettono la violazione dell'art. 6, poi quelle relative all'art. 13 ed infine quelle che rilevano entrambe le violazioni.

2. ART. 6 CEDU: LA DURATA DEL PROCESSO

Seguendo una consolidata giurisprudenza, la Corte condanna gli Stati nazionali per l'eccessiva durata dei processi.

La Corte continua a ritenere che il tempo ragionevole di un processo non sia determinabile a priori, ma che spetti ad essa valutarne la congruità tenendo conto degli elementi di fatto dei singoli casi processuali: l'oggetto della contesa, il numero dei soggetti processuali, il grado di difficoltà degli accertamenti probatori.

In un caso innovativo avente ad oggetto un processo svolto davanti alla Corte dei conti (*Capriati c. Italia*, sentenza 26 luglio 2011), la Corte ritiene eccessivo un procedimento durato cinque anni per un solo grado di giurisdizione[1].

La Corte ribadisce che la ragionevole durata del processo deve essere valutata alla luce delle circostanze specifiche e con riferimento ai seguenti criteri: la complessità del caso, la condotta dei ricorrenti e delle autorità competenti, la natura degli interessi in gioco nella controversia (*Hoffer e Annen c. Germania*, sentenze 13 gennaio 2011)[2]. Non è perciò irragionevole che un'indagine preliminare duri un anno e due gradi di giudizio si protraggano per tre anni e due mesi, quando si giudichi su gravi reati con più imputati e molte prove da esaminare (*Buldakov c. Russia*, sent. 19 luglio 2011).

Nel caso *Berü c. Turchia* (sent. 11 gennaio 2011) la Corte ravvisa la violazione dell'articolo 6, c. 1 della Convenzione (nel caso in specie: cinque anni per due gradi di giudizio), ricordando come il carattere della ragionevole durata del processo deve essere determinato tenuto conto delle circostanze della causa, della complessità del caso, del comportamento delle parti e delle autorità competenti e sulla base della rilevanza per gli interessati (in tal senso *Daneshpayeh c. Turchia*, 16 luglio 2009).

[1] «20. La Cour a traité à maintes reprises d'affaires soulevant des questions semblables à celle du cas d'espèce et a constaté une méconnaissance de l'exigence du « délai raisonnable », compte tenu des critères dégagés par sa jurisprudence bien établie en la matière (voir, parmi beaucoup d'autres, *Cocchiarella* précité et *Frydlender c. France* [GC], n° 30979/96, § 43, CEDH 2000-VII). La Cour rappelle, notamment, qu'une diligence particulière s'impose pour le contentieux du travail (*Ruotolo c. Italie*, arrêt du 27 février 1992, série A n° 230-D, p. 39, § 17). N'apercevant rien qui puisse mener à une conclusion différente dans la présente affaire, la Cour estime qu'il y a également lieu de constater une violation de l'article 6 § 1 de la Convention, pour le même motif».

[2] In questo caso, la Corte ha tenuto conto della particolare situazione del Paese in cui l'evento è avvenuto, ritenendo che non violasse la libertà di espressione la condanna penale per diffamazione di due attivisti contro l'aborto che, in un volantino, avevano paragonato l'interruzione volontaria della gravidanza all'olocausto e avevano quindi dato del nazista al medico che aveva praticato gli interventi abortivi.

Nel caso in specie, la Corte riconosce la violazione dell'art. 6 per l'eccessiva durata del processo, ma nega il risarcimento del danno per la morte di una bambina attaccata da cani randagi, che i ricorrenti affermano essere curati dalla locale gendarmeria. Si tratta di un'ipotesi tipica in cui la Corte nega il risarcimento al ricorrente per la questione principale oggetto del giudizio, ma riconosce un risarcimento – in genere di lieve entità – per l'eccessiva durata del processo. In termini conformi quanto al termine ragionevole: *Chuykina c. Ucraina*, sent. 13 gennaio 2011; *Stebnitskiy e Komfort c. Ucraina*, sent. 3 febbraio 2011.

Si afferma altresì (*Ekdal e altri c. Turchia*, sent. 25 gennaio 2011) che anche nei sistemi giuridici basati sull'iniziativa delle parti, l'atteggiamento delle stesse non esenta i giudici dall'assicurare i principi di ragionevolezza di cui all'art. 6 della Convenzione (vedi anche: *Varipati c. Grecia*, sent. 26 ottobre 1999).

Quanto all'effettivo ristoro per l'eccessiva durata del processo, va segnalata la sentenza del 21 dicembre 2010 nel caso *Gaglione e altri c. Italia*, ove la Corte rileva come il rimedio previsto dalla legge "Pinto" non è sufficiente a garantire i ricorrenti che pure ottengono una sentenza favorevole della stessa Corte, in quanto le autorità italiane non riescono a garantire l'effettività della tutela con pagamenti in tempi brevi (i ritardi accertati dalla CEDU sono di 19 mesi per il 65% dei 475 ricorsi). Tali ritardi rischiano di rendere inutili le misure adottate dalla Corte e così si chiede alle autorità italiane di adottare misure idonee per rendere effettivo il diritto conseguito dai ricorrenti.

3. ART. 6 CEDU: PROFILI SOSTANZIALI DELL'EQUO PROCESSO

La giurisprudenza più interessante e, per qualche verso, innovativa, si prospetta in relazione ai profili sostanziali dell'equo processo.

L'art. 6, infatti, stabilisce che un processo si considera equo quando vi sia un giudice imparziale precostituito per legge e quando il processo si svolga – tranne casi eccezionali – in udienza pubblica.

Su questi due profili si pronunciano numerose sentenze della Corte che, al di là del tempo del processo e del suo contenuto sostanziale, considerano non equo un processo che non si sia stato svolto secondo precise regole formali.

Confermando un orientamento da poco enunciato, la Corte ritiene che vi sia violazione dell'art. 6 nel caso in cui la procedura per l'applicazione della misura di prevenzione della confisca non preveda il dibattimento in pubblica udienza (*Pozzi c. Italia* e *Paleari c. Italia*, sentt. 26 luglio 2011). Pur riconoscendo la gravità e la rilevanza della misura di prevenzione, la Corte ritiene iniqua l'applicazione di una sanzione senza che il destinatario di essa possa chiedere un'udienza pubblica[3].

Nella fondamentale sentenza *Krivoshapkin c. Rus*sia (sent. 27 gennaio 2011), la Corte fornisce un quadro completo circa la sua concezione di imparzialità. Secondo la Corte, perché venga rispettata la disciplina dell'art. 6, il tribunale deve essere imparziale

[3] «20. La Cour observe que la présente espèce est similaire à plusieurs affaires dans lesquelles elle a examiné la compatibilité des procédures d'application des mesures de prévention avec les exigences du procès équitable prévues par l'article 6 de la Convention (*Bocellari et Rizza c. Italie*, n° 399/02, 13 novembre 2007; *Perre et autres c. Italie*, n° 1905/05, 8 juillet 2008; *Leone c. Italie*, n° 30506/07, 2 février 2010; *Capitani et Campanella c. Italie*, n° 24920/07, 17 mai 2011). 21. Dans lesdites affaires, la Cour a observé que le déroulement en chambre du conseil des procédures visant l'application des mesures de prévention, tant en première instance qu'en appel, est expressément prévu par l'article 4 de la loi n° 1423 de 1956 et que les parties n'ont pas la possibilité de demander et d'obtenir une audience publique. 22. Tout en admettant que des intérêts supérieurs et le degré élevé de technicité peuvent parfois entrer en jeu dans ce genre de procédures, la Cour a jugé essentiel, compte tenu notamment de l'enjeu des procédures d'application des mesures de prévention et des effets qu'elles sont susceptibles de produire sur la situation personnelle des personnes impliquées, que les justiciables se voient pour le moins offrir la possibilité de solliciter une audience publique devant les chambres spécialisées des tribunaux et des cours d'appel. 23. La Cour considère que la présente affaire ne présente pas d'éléments susceptibles de la distinguer des affaires précitées. 24. Elle conclut, par conséquent, à la violation de l'article 6 § 1 de la Convention».

soggettivamente ed oggettivamente. Sotto il primo profilo, nessun componente del tribunale deve avere pregiudizi personali verso gli imputati. Tale imparzialità personale si presume salvo prova contraria (vedi *Le Compte, Van Leuven e De Meyere c. Belgio*, sentenza del 23 giugno 1981). L'imparzialità oggettiva consiste invece nell'escludere ogni legittimo dubbio, anche apparente e non dipendente dalla condotta personale dei giudici (*Gautrin e altri c. Francia*, sent. 20 maggio 1998; *Kyprianou c. Cipro*, sent. 15 dicembre 2005).

Nel caso in specie, la Corte rileva la violazione del criterio di imparzialità oggettiva, in quanto il processo si era svolto senza la presenza di un pubblico ministero. Il ragionamento della Corte è, sul punto, assai articolato, perché si tratta di valutare regole e condotte processuali dei singoli Stati nazionali. La Corte, in motivazione, richiama, a questo proposito, quanto di recente già stabilito nella decisione *Ozerov c. Russia* (sent. 18 maggio 2010), ove si afferma che vi è un vizio nel processo quando vi sia confusione tra il ruolo del giudice e quello del pubblico ministero. Invero, nell'analogo caso *Thorgeir Thorgeirson c. Islanda* (sent. 25 giugno 1992), la Corte non aveva riscontrato violazione dell'articolo 6 c. 1, ma sul presupposto che il pubblico ministero era assente in alcune udienze in cui il giudice non aveva svolto indagini di merito e quando, comunque, il pubblico ministero non avrebbe potuto intervenire nel dibattito processuale.

Nel caso esaminato *Krivoshapkin c. Russia*, invece, il pubblico ministero è stato assente per tutto l'iter processuale, né si può desumere dagli atti processuali se esso sia stato avvertito del processo e quali siano stati gli eventuali motivi della sua mancata partecipazione. Il giudice di primo grado ha perciò confuso le sue funzioni con quelle dell'accusa, né la Corte di appello ha rilevato tale vizio, nonostante che il ricorrente abbia eccepito, sia in primo che in secondo grado, l'anomalia di un siffatto processo.

Nel caso *Kontalexis c. Grecia* (sent. 31 maggio 2011), l'imparzialità viene declinata sotto il profilo della necessità che il giudice sia precostituito per legge.

La Corte richiama la già nota idea di imparzialità intesa in senso soggettivo ed oggettivo, definita come assenza di pregiudizi o preconcetti[4]. Ma, la peculiarità di questa decisione è la pronuncia circa la sussistenza di un giudice precostituito per legge. A questo proposito, nel caso in specie, il ricorrente ritiene viziata la fissazione anticipata della data di udienza e la sostituzione improvvisa di un giudice il giorno stesso dell'udienza.

La Corte, secondo un impianto tipico delle sue sentenze, afferma che la precostituzione per legge del giudice, essendo un fondamento dello Stato di diritto, è regolata dai singoli ordinamenti processuali nazionali, che mantengono sul punto un margine di apprezzamento che la Corte non intende intaccare.

Pur tuttavia, la decisione della Corte finisce per pronunciarsi sul caso specifico, valutando se le eccezioni proposte dal ricorrente costituiscano o meno violazione del principio del giudice precostituito per legge[5].

Sul primo rilievo, la Corte osserva che la fissazione dell'udienza in tempi brevi se, come nel caso, intende evitare la prescrizione non attenta all'imparzialità, avendo i giudici

[4] «53. La Cour rappelle que l'impartialité au sens de l'article 6 § 1 de la Convention se définit d'ordinaire par l'absence de préjugé ou de parti pris. Son existence s'apprécie selon une double démarche : la première consiste à essayer de déterminer ce que tel juge pensait dans son for intérieur ou quel était son intérêt dans une affaire particulière ; la seconde amène à s'assurer qu'il offrait des garanties suffisantes pour exclure à cet égard tout doute légitime (voir, par exemple, *Gautrin et autres c. France* du 20 mai 1998, *Recueil des arrêts et décisions* 1998-III, § 58, et *Kyprianou c. Chypre* [GC] no 73797/01, § 118, 15 décembre 2005)».

[5] 38. La Cour rappelle qu'en vertu de l'article 6 § 1, un « tribunal » doit toujours être « établi par la loi**».** Cette expression reflète le principe de l'Etat de droit, inhérent à tout le système de la Convention et de ses protocoles. En effet, un organe n'ayant pas été établi conformément à la volonté du législateur, serait nécessairement dépourvu de la légitimité requise dans une société démocratique pour entendre la cause des particuliers. La « loi » visée par cette disposition est donc non seulement la législation relative à l'établissement et à la compétence des organes judiciaires, mais également toute autre disposition du droit interne dont le non-respect rend irrégulière la participation d'un ou de plusieurs juges à l'examen de l'affaire. Il s'agit notamment des dispositions relatives aux mandats, aux incompatibilités et à la récusation des magistrats.

applicato la normativa nazionale in tema di sanzioni. Invece, la sostituzione del giudice lo stesso giorno dell'udienza senza una benché minima giustificazione nel processo verbale dell'udienza - come peraltro richiesto dalla legislazione greca - dei motivi tassativi di sostituzione (malattia, ragioni personali inderogabili; motivi insuperabili di servizio) costituisce una violazione del principio del giudice precostituito per legge e, come tale, inosservanza dell'art. 6.

Interessanti sono anche quelle sentenze in cui la Corte, invece, nega che vi sia stata violazione dell'art. 6 sotto il profilo dell'imparzialità del giudicante.

Nel caso *Steulet c. Svizzera* (sent. 26 aprile 2011), il ricorrente lamenta che un giudice abbia fatto parte di più collegi giudicanti in diversi processi a cui era stato sottoposto. Anche in questo caso la Corte ribadisce la teoria dell'imparzialità soggettiva ed oggettiva, rilevando che l'imparzialità di un giudice si presume fino a prova contraria (*Hauschildt c. Danimarca*, sent. 24 maggio 1989), non essendo sufficiente ad integrare una fattispecie di parzialità il fatto che abbia giudicato più volte la stessa persona in processi differenti.

Nel caso specifico, la Corte osserva che il ricorrente ha subito tre processi penali per questioni oggettivamente diverse e con parti differenti, cosicché la presenza di un medesimo giudice, ma in cause oggettivamente diverse, non può costituire motivo di dubbio circa la sua imparzialità, come invece avviene quando il giudice si pronuncia più volte sullo stesso caso (*Mancel e Branquart c. Francia*, sent. 24 giugno 2010).

Nello stesso senso, la Corte giudica inammissibile (*Ekdal e altri c. Turchia*, sent. 25 gennaio 2011) una richiesta attinente l'imparzialità del processo nazionale, ove non vi sia "nessun indizio di arbitrarietà nella condotta del processo né di violazione dei diritti procedurali degli interessati". La Corte rileva che tale eccezione era stata già posta davanti ai giudici nazionali e la sua riproposizione davanti alla Corte costituirebbe un'inammissibile quarto grado di giudizio.

Di particolare interesse una sentenza (*Vernes c. Francia*, sent. 20 gennaio 2011) che condanna lo Stato nazionale innanzitutto perché non è possibile chiedere un'udienza

pubblica nel giudizio davanti ad un'autorità amministrativa indipendente; in secondo luogo, perché costituisce mancanza di imparzialità l'impossibilità di conoscere l'identità dei componenti del collegio; in terzo luogo, per la presenza del commissario di governo alle deliberazioni del Consiglio di Stato (in tal senso già *Kress c. Francia*, sent. 7 giugno 2011 e *Martinie c. Francia*, sent. 12 aprile 2006).

4. LA GIURISPRUDENZA SULL'ART. 13 CEDU: IL RICORSO EFFETTIVO

Secondo l'art. 13 della CEDU, ogni Stato nazionale deve garantire la tutela dei diritti attraverso la possibilità di un ricorso effettivo ad una qualche autorità nazionale giurisdizionale o amministrativa.

Come detto, la violazione di questo principio viene spesso collegata all'equo processo di cui all'art. 6. In questo paragrafo, esaminiamo le sentenze più significative che si pronunciano sul solo art. 13.

Nel caso in cui un cittadino afgano chieda asilo politico, risulta contrario all'art. 13 la procedura di espulsione di urgenza, che, pur prevedendo un ricorso in via cautelare, non consente un'adeguata difesa del ricorrente, che, rimpatriato nel suo Paese di origine, potrebbe essere oggetto di trattamenti disumani vietati dall'art. 3 della CEDU (M.S.*S. c. Belgio e Grecia*, sent. Grande Chambre 21 gennaio 2011).

La Corte si pronuncia poi su alcuni casi di eclatanti violazioni dei diritti di libertà o relativi a trattamenti disumani, sanzionando gli Stati che non hanno adeguati sistemi di tutela né alcuna effettività dei ricorsi, ove previsti. Così vi è violazione dell'art. 13 nel caso di un cittadino russo rapito e torturato da parte di gruppi militari perché sospettato di collusione con i ceceni (*Gisayev c. Russia*, sent. 20 gennaio 2011); quando non vi è un ricorso avverso le limitazioni alle libertà personali avvenute durante un periodo di carcerazione preventiva (*Aydemir c. Slovacchia - Michalák c. Slovacchia*, sentt. 8 febbraio 2011); non vi è ricorso effettivo quando un tribunale russo attribuisce una esigua indennità

forfettaria ai parenti delle vittime di un bombardamento militare su un villaggio in cui si sospetta la presenza di terroristi ceceni (*Esmukhambetov e altri c. Russia*, sent. 29 marzo 2011); oppure quando la polizia interrompe una funzione religiosa dell' associazione Chiesa dell'unificazione, sequestrando materiale di propaganda, senza che sussista un ricorso effettivo per la tutela della libertà religiosa (*Boychev e altri c. Bulgaria* sent. 27 gennaio 2011); nel caso di regime carcerario duro in carceri sovraffollate e con trattamenti disumani non vi è un ricorso effettivo se il pubblico ministero, pur essendo autorità indipendente a cui si possono rivolgere i detenuti non può ottenere la modifica delle decisioni assunte dalle autorità carcerarie (*Csüllög c. Ungheria*, sent. 7 giugno 2011). In tal senso, ma anche con violazione dell'art. 6, *Fatih Taş c. Turchia* (sent. 5 aprile 2011); *Bublákova c. Slovacchia* (sent. 15 febbraio 2011). Nel caso *Rotaru c. Moldavia* (sent. 15 febbraio 2011), la Corte rileva la violazione dell'art. 13, perché i detenuti che vengono sottoposti a regimi carcerari inumani non hanno possibilità di effettivi ricorsi.

Vale la pena di segnalare, anche per constatare i differenti presupposti logici delle sentenze, alcuni casi emblematici in cui la Corte nega il risarcimento per violazione dell'art. 13.

In un caso analogo a quello appena enunciato, in cui viene applicata una sanzione disciplinare ad un carcerato che ha tentato più volte di evadere, la Corte rileva che il ricorrente ha avuto la possibilità di due gradi di giudizio davanti alla giurisdizione amministrativa, cosicché è rispettato il dettato dell'art. 13 che richiede la possibilità di un ricorso effettivo (*Payet c. Francia*, sent. 20 gennaio 2011).

La durata eccessiva del processo non è elemento che, da solo, integri violazione dell'art. 13. Nel caso *Gera De Petri Testaferrata Bonici Ghaxaq c. Malta* (sent. 5 aprile 2011), il diritto di proprietà della ricorrente ha trovato nel sistema nazionale un mezzo di tutela effettivo, pur se il processo è durato più di trenta anni a tre livelli giurisdizionali.

Né si ha violazione dell'art. 13 ove non vi sia un ricorso avverso decisioni adottata dalla Corte costituzionale nazionale (*Paksas c. Lituania*, sent. 6 gennaio 2011).

Infine, nel noto caso *Giuliani e Gaggio c. Italia* (sent. 24 marzo 2011) avente ad oggetto la morte di Carlo Giuliani durante il G8 di Genova, non costituisce violazione dell'art. 13 il rigetto da parte del giudice penale dell'istanza di costituzione di parte civile della famiglia, poiché questa decisione trova fondamento nel diritto interno; ma soprattutto perché la mancata costituzione di parte civile nel processo penale non impedisce la richiesta di risarcimento del danno in sede civile.

5. VIOLAZIONE CONGIUNTA DEGLI ARTICOLI 6 E 13 CEDU

I casi di maggiore interesse sono quelli in cui la Corte riconosce la violazione congiunta degli articoli 6 e 13, ammettendo che non essendovi la possibilità di un ricorso effettivo si è nello stesso tempo dato luogo ad un processo non equo.

Nella sentenza pilota in tema di ragionevole processo penale *Dimitrov e Hamanov c. Bulgaria* (sent. 10 maggio 2011), la Corte rileva che il termine ragionevole del processo serve non solo a garantire le parti processuali, ma anche a indurre fiducia nei cittadini nell'amministrazione della giustizia (in questo senso: *Guincho c. Portugal*, 10 giugno 1984; *H. c. Francia*, 24 ottobre 1989; *Moreira de Azevedo c. Portogallo*, 23 ottobre 1990; *Katte Klitsche de la Grange c. Italia*, 27 ottobre 1994; *Bottazzi c. Italia; Niederböster c. Germania*, sent. 27 febbraio 2003).

Ma la vera novità della sentenza è che si individua una responsabilità dello Stato non solo per il ritardo della decisione del singolo caso, ma anche per la mancata riorganizzazione del sistema giudiziario con un adeguato aumento di risorse da destinare ad un reale miglioramento. Cosicché, configurando una sorta di colpa di apparato, la Corte afferma che "affrontare il problema del ritardo irragionevole nell'ambito di un procedimento giudiziario può quindi chiedere allo Stato di prendere una serie di provvedimenti legislativi, organizzativi, misure di bilancio e altri". Nel caso in specie, la Corte condanna lo Stato per la lunghezza del processo e perché non vi sono rimedi efficaci, ove un'indagine preliminare ed un primo grado di giudizio siano durati dieci anni e otto mesi.

Nel caso in cui il processo sia durato otto anni e tre mesi (*Kashavelov c. Bulgaria*, sent. 20 gennaio 2011), la Corte rileva che la complessità del caso e l'elevato numero degli indiziati non giustifica i ritardi delle Corti, per la lunghezza dell'istruttoria (due anni e mezzo) e del giudizio di appello. La violazione dell'art. 6 per l'irragionevole lunghezza del processo viene collegata all'inesistenza nella legislazione bulgara, fino al 2003, di un rimedio teso ad accelerare il processo; né la successiva introduzione del rimedio avrebbe potuto essere utilizzata nel caso in specie. Perciò vi è stata violazione congiunta degli articoli 6 e 13.

Ed anche quando la modifica del Codice penale bulgaro del 2003 consente all'imputato di chiedere lo svolgimento del processo se l'istruttoria non si sia conclusa in un certo tempo, la violazione dell'art. 13 si configura egualmente, poiché, nel caso in specie, il ritardo accumulato era già eccessivo con violazione dell'art. 6. Di conseguenza, la Corte ritiene che vi sia una violazione dell'articolo 13 della Convenzione in quanto il ricorrente non aveva alcun rimedio interno per far valere il suo diritto ad una causa entro un termine ragionevole, come garantito dall'articolo 6 c. 1 della Convenzione (*Makedonski c. Bulgaria*, sent. 20 gennaio 2011).

Nel citato caso *Fatih Taş c. Turchia* (sent. 5 aprile 2011), la Corte giudica eccessiva la durata del processo (cinque anni e sei mesi) per due gradi di giudizio e conferma che vi è nello stesso tempo violazione dell'art. 13, perché l'ordinamento non prevede un rimedio efficace avverso tali ritardi

Nel caso *Serdar Guzel c. Turchia* (sent. 15 marzo 2011) viene accertato che il ricorrente è stato sottoposto in carcere a trattamenti disumani e che i presunti colpevoli sono stati assolti per prescrizione per l'eccessiva durata del processo. All'accertata violazione dell'art. 3 della CEDU si associa l'inosservanza degli artt. 6 (dodici anni per un processo di primo grado) e 13 (mancanza di un rimedio effettivo avverso i maltrattamenti in carcere).

Analogamente in un processo per divorzio, sussiste violazione dell'art. 6 per la lunghezza del processo, nonché dell'art. 13 perché l'ordinamento nazionale non prevede un

ricorso per limitare la durata del processo (*Kuhlen – Rafsandjani c. Germania*, 20 gennaio 2011).

Infine, l'impossibilità di ottenere un indennizzo per la mancata esecuzione di una sentenza passata in giudicato configura una violazione congiunta degli art. 6 e 13 (*Eltari c. Albania*, sent. 8 marzo 2011).

6. CONCLUSIONE

Dall'esame delle sentenze emanate dalla Corte dei diritti in materia di equo processo ed effettività della tutela si percepisce – come è tipico dei giudizi della Corte – una continuità con la giurisprudenza pregressa, ma altresì alcune novità che è opportuno richiamare sinteticamente. Quanto all'equo processo, il risarcimento per la durata eccessiva non soddisfa più la giurisprudenza della Corte che, rilevati i ritardi dei relativi risarcimenti, chiede agli Stati nazionali di adottare rimedi effettivi. In questo senso la responsabilità viene configurata come mancato aumento di risorse da destinare al sistema giudiziario, che avrebbe bisogno di rimedi strutturali per evitare l'eccessiva durata dei processi.

La Corte poi focalizza i profili dell' imparzialità soprattutto per quanto concerne la terzietà del giudicante e la precostituzione per legge del giudice, con le importanti sentenze citate, in cui la Corte adotta un proprio criterio di giudizio circa l'imparzialità, definendone i contenuti, caso per caso.

La giurisprudenza sull'art. 13 mostra tutta la sua importanza soprattutto in materia di tutela penale o di garanzie dei diritti dei carcerati, poiché in questi casi - soprattutto in alcuni Paesi - le garanzie si affievoliscono. In queste circostanze, certamente più dense di rischi per la dignità umana, la Corte esprime una linea volta a garantire comunque i diritti dei condannati, nella consapevolezza che le società democratiche non possono usare mezzi coercitivi limitativi della dignità della persona. Cosicché la mancanza di mezzi giuridici di tutela costituisce responsabilità degli Stati nazionali. Infine, le poche sentenze che

riconoscono congiuntamente la violazione degli articoli 6 e 13 sono significative per le argomentazioni utilizzate.

In conclusione, le novità giurisprudenziali rilevate indicano che la Corte di Strasburgo persegue, attraverso un affinamento della sua giurisprudenza, una maggiore effettività delle sue pronunce nei confronti degli Stati nazionali.

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RIGHT TO A FAIR TRIAL AND EFFECTIVE REMEDY IN THE RECENT JURISPRUDENCE OF THE STRASBOUTG COURT

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INDEX

1. PREMISE

The jurisprudence of the Court of Human Rights on Article. 6 is commonly known for the convictions to the States as a reasonable duration of the process, but indeed the decisions of recent years, broadly analyze very large number of profiles of a fair trial.

The Art. 6 requires that the process is carried out before a public and impartial tribunal, previously established by law. The Court's decisions on those profiles of due process is often intertwined with the need, established by art. 13, which, for the protection of rights, we can propose an effective remedy to a national authority.

Rights before the Court is, therefore, common practice to be deducted on grounds related to breach of Articles. 6 and 13, but the judgments do not always recognize the violation of both provisions.

Sort this exhibition, we first analyze the decisions that recognize the violation of art. 6, then the related art. 13 and finally those that detect both violations.

2. ARTICLE 6 ECHR: THE DURATION OF THE PROCESS.

Following a wellestablished case law, the Court condemns the States for the excessive length of proceedings.

The Court continues to believe that the reasonable time of a process is not determined a priori, but it is up to it to assess their suitability taking into account the factual circumstances of each case: the object of contention, the number of trial subjects, the degree of difficulty of the investigation evidence.

In a case concerning an innovative process carried out before the Court of Auditors (Capriati vs. Italy, Judgement July 26, 2011), the Court considers excessive a proceedings lasted five years for one level of jurisdiction[1].

The Court reiterates that a reasonable length of proceedings must be assessed in the light of specific circumstances and with reference to the following criteria: the complexity of the case, the conduct of the applicants and competent authorities, the nature of the interests at stake in the dispute (Hoffer and Annen v. Germany, Judgement January 13, 2011)[2] . It's therefore not unreasonable that a preliminary investigation last a year and two sets of proceedings are felt over three years and two months, when judgement concerning serious crimes and many more tests to examine (Buldakov v. Russia, Judgement July 19, 2011).

In case Beru v. Turkey (Judgement, January 11, 2011), the Court recognizes the violation of Article 6, co. 1 of the Convention (in the case: five years for two sets of proceedings), remembering how the character of reasonable duration of the process must be determined taking into account the circumstances of the case, the complexity of the case,

[1] « 20. La Cour a traité à maintes reprises d'affaires soulevant des questions semblables à celle du cas d'espèce et a constaté une méconnaissance de l'exigence du « délai raisonnable », compte tenu des critères dégagés par sa jurisprudence bien établie en la matière (voir, parmi beaucoup d'autres, *Cocchiarella* précité et *Frydlender c. France* [GC], n° 30979/96, § 43, CEDH 2000-VII). La Cour rappelle, notamment, qu'une diligence particulière s'impose pour le contentieux du travail (*Ruotolo c. Italie*, arrêt du 27 février 1992, série A n° 230-D, p. 39, § 17). N'apercevant rien qui puisse mener à une conclusion différente dans la présente affaire, la Cour estime qu'il y a également lieu de constater une violation de l'article 6 § 1 de la Convention, pour le même motif ».

[2] In this case, the Court took into account the particular situation of the country where the event is occurred, considering that it violates freedom of expression to the criminal conviction for defamation of two antiabortion activists who had compared the voluntary termination of pregnancy to holocaust and they had defined Nazi, the doctor who had performed the abortions.

the conduct of the parties and the competent authorities and on the basis of relevance for parties (in this sense Daneshpayeh v. Turkey, Judgement July 16, 2009).

In this case, the Court recognizes the violation of art. 6 for the excessive length of proceedings, but denied damages for the death of a child attacked by stray dogs, which the applicants claim to be treated by the local gendarmerie. This is a typical case in which the Court denies compensation to the applicant for the main issue of the proceedings, but recognizes compensation – usually minor – for the excessive length of proceedings. In accordance with the terms of the reasonable period of time: c. Chuykina Ukraine, Judgement January 13, 2011; Stebnitskiy Komfort and c. Ukraine, Judgement February 3, 2011.

It also says (Ekdal and Others v. Turkey, Judgement January 25, 2011) that even in legal systems based on the initiative of the parties, the attitude of the same does not exempt judges from ensuring the principles of reasonableness contained in Article 6 of the Convention (see also: Varipati v. Greece, Judgement October 26, 1999).

About the actual compensation for the excessive length of proceedings, there is the decision of December 21, 2010 in the case Gaglione et all v. Italy, where the Court finds that the remedy provided by law "Pinto" is not sufficient to ensure that the applicants also get a favorable ruling of the Court itself, as the Italian authorities fail to ensure the effectiveness of the protection with payments in the short term (delays established by the ECHR are of 19 months for 65% of 475 actions). These delays are likely to make unnecessary the measures taken by the Court, and so asked the Italian authorities to take appropriate steps to ensure the right obtained by the applicants.

3. ARTICLE 6 ECHR: PROFILES SUBSTANTIVE DUE PROCESS

The most interesting and innovative case law regards to material respects of fair trial.

The Art. 6 establishes that a process is considered fair when there is a independent and impartial tribunal established by law and when the process is carried out – except in certain exceptional circumstances – publicly.

On these two profiles are pronounced many judgments of the Court that, beyond the time of the process and its material respects, consider an unfair process that has not been done according to precise formal rules.

Confirming an orientation just stated, the Court considers that there is violation of Article. 6 when the procedure for applying the measure to prevent the seizure does not provide the debate in public hearing (Pozzi v. Italia e Paleari v. Italia, Judgments July 26, 2011). While acknowledging the seriousness and importance of the prevention measure, the Court believes unfair the application of a sanction without the recipient may request a public hearing[3].

In the fundamental decision Krivoshapkin v. Russia (Judgement January 27, 2011), the Court provides a complete picture about his concept of impartiality. According

[3] « 20. La Cour observe que la présente espèce est similaire à plusieurs affaires dans lesquelles elle a examiné la compatibilité des procédures d'application des mesures de prévention avec les exigences du procès équitable prévues par l'article 6 de la Convention (*Bocellari et Rizza c. Italie*, n° 399/02, 13 novembre 2007 ; *Perre et autres c. Italie*, n° 1905/05, 8 juillet 2008 ; *Leone c. Italie*, n° 30506/07, 2 février 2010 ; *Capitani et Campanella c. Italie*, n° 24920/07, 17 mai 2011). 21. Dans lesdites affaires, la Cour a observé que le déroulement en chambre du conseil des procédures visant l'application des mesures de prévention, tant en première instance qu'en appel, est expressément prévu par l'article 4 de la loi n° 1423 de 1956 et que les parties n'ont pas la possibilité de demander et d'obtenir une audience publique. 22. Tout en admettant que des intérêts supérieurs et le degré élevé de technicité peuvent parfois entrer en jeu dans ce genre de procédures, la Cour a jugé essentiel, compte tenu notamment de l'enjeu des procédures d'application des mesures de prévention et des effets qu'elles sont susceptibles de produire sur la situation personnelle des personnes impliquées, que les justiciables se voient pour le moins offrir la possibilité de solliciter une audience publique devant les chambres spécialisées des tribunaux et des cours d'appel. 23. La Cour considère que la présente affaire ne présente pas d'éléments susceptibles de la distinguer des affaires précitées. 24. Elle conclut, par conséquent, à la violation de l'article 6 § 1 de la Convention ».

to the Court because the art is respected. 6, the tribunal must be subjectively and objectively impartial. Under the first profile none component of the tribunal should have personal bias toward the defendants. This personal impartiality is presumed unless proved otherwise (See Le Compte, Van Leuven and De Meyere v. Belgium, Judgement June 23, 1981). The objective impartiality consists to exclude any legitimate doubt, however, also apparent and not dependent on the personal conduct of judges (Gautrin and Others v. France, Judgement May 20, 1998, Kyprianou v. Cyprus, Judgement December 15, 2005).

In this case, the Court finds a violation of the objective impartiality, because the process had taken place without the presence of a prosecutor. The Court's reasoning is very articulate, because they are valued rules and procedures of individual States.

The Court refers in motivation, as already established in the recently decision Ozerov v. Russia (Judgement May 18, 2010), where states that there is a defect in the process when there is confusion between the role of the judge and the prosecutor. Indeed, in the same case Thorgeir Thorgeirson v. Iceland (Judgement June 25, 1992), the Court had found no violation of Article 6 c. 1, but on the assumption that the prosecutor was absent in some hearings where the Court had not conducted investigations on the merits, and when, however, the prosecutor could not have been in the debate.

In the case examined Krivoshapkin v. Russia, however, the public prosecutor was absent for the whole course of the case, or it may be inferred from the pleadings if it has been advised of the process and what were the possible reasons for his non-participation. The Court of First Instance confused its functions with those of the prosecution, the Court of Appeal did not detect this defect, although the applicant has found, in both first and second instance, the anomaly of the process.

In the case Kontalexis v. Greece (Judgement May 31, 2011) impartiality is declined in terms of need that Court is established by law.

The Court recalls the familiar idea of impartiality, understood in a subjective and objective, defined as the absence of prejudice or bias[4]. But the peculiarity of this decision regarding the existence of a lawfully constituted Court. In this regard, the appellant considers marred the advance fixing of the date of the hearing and the replacement of a judge the same day of hearing.

The Court, in a typical system of its judgments, claims that the Court established by law, as a basis for the rule of law, is regulated by individual national procedural laws, which keep about a margin of appreciation which the Court does not intend to affect.

However, the decision of the Court ends up ruling on the case, assessing whether the exceptions proposed by the applicant whether or not violation of the principle of a lawfully constituted court[5].

The first relief, the Court notes that the hearing in the short term, if intended to avoid the requirement is not careful impartiality, the judges had applied the national legislation on sanctions. Instead, the replacement of the judge the same day of hearing,

[4] « 53. La Cour rappelle que l'impartialité au sens de l'article 6 § 1 de la Convention se définit d'ordinaire par l'absence de préjugé ou de parti pris. Son existence s'apprécie selon une double démarche : la première consiste à essayer de déterminer ce que tel juge pensait dans son for intérieur ou quel était son intérêt dans une affaire particulière ; la seconde amène à s'assurer qu'il offrait des garanties suffisantes pour exclure à cet égard tout doute légitime (voir, par exemple, Gautrin et autres c. France du 20 mai 1998, Recueil des arrêts et décisions 1998-III, § 58, et Kyprianou c. Chypre [GC] no 73797/01, § 118, 15 décembre 2005) ».

[5] 38. La Cour rappelle qu'en vertu de l'article 6 § 1, un « tribunal » doit toujours être « établi par la loi**».** Cette expression reflète le principe de l'Etat de droit, inhérent à tout le système de la Convention et de ses protocoles. En effet, un organe n'ayant pas été établi conformément à la volonté du législateur, serait nécessairement dépourvu de la légitimité requise dans une société démocratique pour entendre la cause des particuliers. La « loi » visée par cette disposition est donc non seulement la législation relative à l'établissement et à la compétence des organes judiciaires, mais également toute autre disposition du droit interne dont le non-respect rend irrégulière la participation d'un ou de plusieurs juges à l'examen de l'affaire. Il s'agit notamment des dispositions relatives aux mandats, aux incompatibilités et à la récusation des magistrats.

without the slightest justification in the minutes of the hearing – as indeed required by Greek law –, of the replacement reasons (illness, personal reasons compelling) is a violation of the principle of a lawfully constituted Court and, as such, constitutes a violation of Article 6.

Also interesting are the judgments where the Court denies that there has been no violation of art. 6 in terms of the impartiality of judges.

In the case Steulet v. Switzerland (Judgement April 26, 2011), the applicant complains that a judge has been part of most colleges in different judicial processes that had been submitted. So, the Court reiterates the theory of subjective and objective impartiality, noting that the impartiality of a judge is presumed until proven otherwise (Hauschildt v. Denmark, Judgement May 24, 1989), because it's not sufficient, to integrate a case of bias, that the judge decides several times the same person in different processes.

The Court notes that the applicant has undergone three prosecutions for questions objectively different and with different parts, so the presence of a single judge can not constitute grounds for doubt about his impartiality as when the judge pronounced on the same case (Mancel and Branquart v. France, Judgement June 24, 2010).

In the same, the Court considers unacceptable (Ekdal and Others v. Turkey, Judgement January 25, 2011) a request of impartiality of the national process, when there is no evidence of arbitrariness in the conduct of the trial or of violation of rights the procedure involved. The Court notes that this exception had already been placed before the national Courts and its revival before the Constitutional Court would constitute an impermissible fourth instance.

Most important is the sentence Vernes v. France (Judgement January 20, 2011) where the Court sentenced the State, primarily because it is not possible to request a public hearing in the trial before an independent administrative authority, and secondly, because it is a lack of impartiality if is impossible to know the identity of the members of the college and, thirdly, for the presence of Government Commissioner in the deliberations of the

Council of State (in this sense already Kress v. France, Judgement June 7th, 2011 and Martinie v. France, Judgement April 12, 2006).

4. THE CASE LAW ON ARTICLE 13 ECHR: THE EFFECTIVE REMEDY

According to art. 13 of the Convention, each nation State must ensure the protection of rights through the possibility of an effective remedy to any judicial or administrative authorities. As mentioned, the violation of this principle is often connected to a fair trial under article 6. In this section, we examine the most significant judgments on art. 13.

In the event that an Afghan citizen requesting political asylum, is contrary to article 13 the expulsion procedure of urgency, which, while providing a precautionary measure, does not allow an adequate defense of the applicant, who returned to his country of origin, could be subject to inhuman treatment prohibited by article 3 of the ECHR (MSS v. Belgium and Greece, Judgement Grande Chambre January 21, 2011).

The Court pronounces on some cases of flagrant violations of the rights of freedom of or relating to inhumane treatment, penalizing States that do not have adequate systems to safeguard and they do not have effective of appeals. So there is no violation of article 13 in the case of a Russian citizen kidnapped and tortured by military groups on suspicion of collusion with the Chechens (Gisayev v. Russia, Judgement January 20, 2011); when there is an appeal against the limitations on personal freedom that occurred during a period of preventive detention (Aydem v. Slovakia - Michalak v. Slovakia, Judgement February 8, 2011); there is no effective remedy when a Russian Court will gives a small compensation to parents of victims of a military raid on a village where there was suspected Chechen terrorists (Esmukhambetov and others v. Russia, Judgement 29 March 2011); or when the police interrupted a church service of the "Association Unification Church", confiscating propaganda, without an effective remedy for the protection of religious freedom (Boychev

and others v. Bulgaria, Judgement January 27, 2011); in the case of hard prison regime in prisons overcrowded and where there is an inhumane treatment there is not an effective remedy if the prosecutor, although independent authority to which prisoners can address, cannot get the change in the decisions taken by the prison authorities (Csüllög v. Hungary, Judgement June 7, 2011). In this sense, but also with violation of Article. 6, Fatih Taş v. Turkey (Judgement April 5, 2011); Bublákova v. Slovakia (Judgement 15 February 2011), the Court finds a violation of article 13, because the prisoners are subjected to inhuman prison systems and they have no chance of effective remedies.

It 'important to note, also, some emblematic cases in which the Court denies compensation for breach of Article 13.

In a case similar, when you apply a disciplinary sanction to a prisoner who attempted to escape, the Court finds that the applicant had the possibility of two sets of proceedings before the administrative court, so that is respected the provisions of art. 13, which requires the possibility of an effective remedy (Payet v. France, Judgement January 20, 2011).

The excessive length of the process is not element contrary to article 13. In case Gera De Petri Testaferrata Bonici Ghaxaq v. Malta (Judgement April 5, 2011), the applicant's property rights finds in the national system a means of effective protection, although the trial lasted more than thirty years with three levels of jurisdiction.

At the same time you do not have infringed Article. 13 when there is no appeal against decisions taken by the national constitutional Court (Paksas v. Lithuania, Judgement January 6, 2011).

Finally, in case Giuliani and Gaggio v. Italy (Judgement March 24, 2011) concerning the death of Carlo Giuliani during the Genoa G8 summit, the Court found no breach of article 13, because the rejection by the criminal Court of the instance of a civil part by family it's established by internal law. Again it does not prevent the request for damages in the civil Courts.

5. VIOLATIONS OF ARTICLES 6 AND 13 ECHR

The cases of greatest interest are those in which the Court recognizes the violation of articles 6 and 13, assuming that if there's the possibility of an effective remedy has resulted in an unfair trial. In the pilot-judgment on reasonable criminal trial Dimitrov and Hamanov v. Bulgaria (Judgement May 10, 2011), the Court finds that the reasonable time of the process is to ensure the parties to the proceedings, but also to induce trust of people in the administration of justice (in this sense: Guincho v. Portugal, 10 June 1984, H. v. France, 24 October 1989; Moreira de Azevedo v. Portugal, 23 October 1990; Katti Klitsche de la Grange v. Italy, 27 October 1994; Bottazzi v. Italy; Niederböster v. Germany, Judgement February 27, 2003).

But the real news of the judgement is that it identifies a State's responsibility not only for the delay of the decision of the individual case, but also for failure to reorganize the judicial system with an adequate increase in resources for a real improvement. So, setting up a sort of "fault of apparatus", the Court stated that "address the issue of unreasonable delay in judicial proceedings may then ask the State to take a series of legislative, organizational, budgetary and other measures". In the present case, a preliminary investigation and a first instance have been carried out in ten years and eight months, so that the Court ordered the State to the length of the process and why there are no effective remedies to be asserted in this circumstance.

In the event that the process has lasted eight years and three months (Kashavelov v. Bulgaria, Judgement January 20, 2011), the Court notes that the complexity of the case and the large number of suspects does not justify the delay of the Courts, for length of the investigation (two and a half years) and of the appeal proceedings. The violation of article 6 for the unreasonable length of the process is connected to the nonexistence in the Bulgarian legislation, until 2003, a remedy aimed at speeding up the process or indeed the subsequent introduction of the remedy could be used in the present case. So there has been no violation of Articles 6 and 13 combined.

And even when the change of the Bulgarian Penal Code of 2003 permits the accused to ask whether the conduct of the investigation has not been completed at a certain time, the violation of art. 13 is configured because, in the present case, the delay was excessive in violation of article 6. Accordingly, the Court considers that there is a violation of article 13 of the Convention because the applicant had no domestic remedy to enforce his right to a cause within a reasonable time as guaranteed by article 6 c. 1 of the Convention (Makedonski v. Bulgaria, Judgement January 20, 2011).

In the case cited Fatih Tas v. Turkey (Judgement April 5, 2011), the Court considers excessive the trial (five years and six months) for two levels of jurisdiction, and confirms that there is both contrary to article 13, because the law doesn't provide an effective remedy against such delays

In Serdar Guzel v. Turkey (Judgement March 15, 2011) is satisfied that the applicant was subjected to inhumane treatment in prison and that the alleged perpetrators were acquitted for excessive duration of the process. The ascertained violation of article 3 of the ECHR is associated with breaches of articles 6 (twelve years for a first trial) and 13 (lack of an effective remedy against illtreatment in prison.)

Similarly, in a process for divorce, there is a violation of article 6 for the length of the process and art. 13 because the national law does not provide an action to limit the duration of the process (Kuhlen - Rafsanjani v. Germany, January 20, 2011).

Finally, the inability to recover damages for a failure of a res judicata constitute a violation of articles 6 and 13 (c. Eltari Albania, Judgement March 8, 2011).

6. CONCLUSION

An examination of the decisions issued by the Court of the rights relating to fair trial and effective protection, it allows – as is typical of the judgments of the Court – a continuity with the previous case law, but also some news that is appropriate to recall

briefly. In case of fair trial for the excessive duration, it does not meet the Court's case law that found compensation for delays, calls on States to adopt effective remedies. In this sense, the responsibility is configured as a failure to increase resources for the judicial system, which would require structural remedies to prevent the excessive length of proceedings.

The Court then focuses on the profiles of impartiality, especially regarding the impartial tribunal and the Courts established by law, with the major cases cited, in which the Court adopts its own policy judgments about impartially, defining their contents, case by case.

The case law on article 13 shows its importance, especially in criminal law protection or guarantees of the rights of prisoners, because in these cases – especially in some countries – guarantees fade. In these circumstances, certainly more full of risks to human dignity, the Court gives a line to ensure the rights of the condemned, however, aware that democratic societies cannot use coercive means limiting the dignity of the person. So the lack of legal means of protection is responsibility of States. Finally, the few sentences that recognize the violation of articles 6 and 13 are relevant for the arguments.

In conclusion, the new jurisprudence detected that the Court of Strasbourg pursues, through a refinement of its case, greater effectiveness of its case against the nation States.

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THE ITALIAN ADMINISTRATIVE PROCEDURE ACT: PROGRESSES AND PROBLEMS

ANNUAL REPORT - 2010 - ITALY

(November 2011)

Prof. Giacinto DELLA CANANEA

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1. INTRODUCTION

Italian public law, in particular administrative law, is undergoing a fundamental transformation that calls into question not only its adequacy, but also its traditional relationship with the State. This transformation, which is largely the outcome of constitutional reforms and judicial innovations, becomes evident when considering administrative procedures.

Taking advantage of the growing body of literature, and especially of a recent comparative analysis carried out on the twentieth anniversary of the law (n. 241 of August 7th, 1990) which regulates administrative procedures and access to files[1], this report's basic approach will be both descriptive and critical.

The report is divided into four sections. The first provides a brief description of the situation that existed in 1990, before the approval of the Administrative Procedure Act. The second section illustrates some general features of the Act. It argues that, unlike the German law, the one enacted in Italy is not a code, insofar as it lays down general principles and rules concerning only some aspects of administrative procedures. The third section reconsiders critically the traditional opinion, according to which due process of law does not have a constitutional status. It takes into account, however, the problems raised by the constitutional reform of 2001, aiming at strengthening the autonomy of regions and local authorities. In the fourth section, the widespread opinion according to which the Act introduces a sort of procedural democracy will be critically considered . It will be argued that the Act, as it was interpreted by the courts, has provided a stronger procedural protection for a variety of old and new interests, but it was and is still weak with regard to

[1] See the special issue of *Italian Journal of Public Law* (2), 2010, edited by Giacinto della Cananea & Aldo Sandulli, with the English translation of the law, also available at www.ijpl.eu . See also Mario P. Chiti (ed.), *General principles of administrative action* (2006).

rule-making and planning procedures, which are particularly important from the point of view of procedural democracy.

2. DUE PROCESS IN THE TRADITIONAL MODEL OF ADMINISTRATIVE LAW: A CRITIQUE

The traditional model of administrative law developed out of few statutes and judicial decisions since the last decades of the nineteenth century. Such model had sought to reconcile the claims of governmental authority and the increasing range of citizens' rights with regard to public administrations (dialettica autorità-libertà) essentially within the judicial process. Whatever the division of powers between ordinary courts and administrative courts (which were and are still conceived as two distinct systems of courts)[2], the judicial process was at the heart of administrative law, even though at least a part of the academy favoured a broader vision, including the organization and functioning of public authorities.

Three fundamental strains of criticism have been directed against this traditional model. First, it has been often said that such model focused essentially on the final measure taken by the public authority, that is to say the individual decision (provvedimento

[2] See Franco G. Scoca, *Administrative Justice in Italy: Origins and Developments*, 1 It. J. of Public. L. 121 (2009) (arguing that in the last ten years not only has the scope of activity of administrative judges has been enlarged, but that their role has been strengthened after the legislator entrusted them with the power to grant financial compensation to private parties).

amministrativo). Like the German conception of the VerwaltungsAkt[3], this model recognized several peculiarities to the measure adopted by the public authority, including the power to impinge on individual and collective rights and in some cases that to execute the measure coercively.

Second, the individual and collective rights recognized by both the Constitution of 1947 and parliamentary legislation lacked an adequate procedural protection. Procedural requirements existed in legislative provisions regulating several administrative procedures, in particular those leading to expropriation of private ownership and issuing of other measures adversely affecting individuals. However, procedural safeguards lacked in other fields of administrative action, including those concerning government subsidies and planning and rule-making activities, in spite of the proliferation of administrative activities governed only by broad legislative directives.

Third, it was often asserted that too much power was concentrated in the hands of the courts, especially of the Consiglio di Stato. In some cases, the administrative judge conceived the rules laid down by specific statutes as manifestations, or symptoms, of broader principles. In this way, when administrative control of citizens and businesses grew more pervasive, and often intrusive, a body of doctrines and techniques was developed by the courts, in order to reconcile the exercise of power by a more fragmented administrative universe (including regions and several other public bodies) with traditional concerns for private liberties. In other cases, however, the process of abstraction from existing legislative rules was weaker, or even impalpable. In spite of the frequent re-assertions of allegiance to positivistic assumptions, the courts did not hesitate to lay down new principles, such as the principle of reasonableness. Several commentators, therefore, advocated a legislative

[3] See Otto Mayer, *Deutsches Verwaltungsrecht* (1895). See also Giacinto della Cananea, *On Bridging Legal Cultures: The Italian Journal of Public Law*, 11 German Law Journal 1281-1291 (2010) (observing that the German influence on Italian administrative scholarship has weakened since the 1970's) and, for further remarks, Sabino Cassese, *Science of Administrative Law in Italy from 1971 to 1985*, in Jahrbuch des öffentlichen Rechts der Gegenwart (1985), 123.

regulation of administrative procedures as an instrument for a more balanced approach in shaping administrative law[4].

3. THE ITALIAN ADMINISTRATIVE PROCEDURE ACT (1990)

3.1 Judges, professors, and the new legislative framework

The rising expectations of administrative reform were met, at the beginning of last decade of the twentieth century , by three legislative innovations. First and foremost (for our purposes), after decades of debates, in 1990 Parliament decided to adopt an Administrative Procedure Act (APA). Second, the old legislative framework concerning local government was replaced by a new one, soon followed by a constitutional reform, which produced an unexpected contrast with the APA. Third, an antitrust Act was passed by Parliament and an independent authority was set up.

With regard to administrative procedures, why did the Parliament decided to adopt the APA act in 1990, it remains to be explained. There is need for further empirical and historic analysis, therefore. However, at least two things are clear enough. First, although the state of administrative justice, especially before ordinary courts, was far from being satisfactory, there was not a strong pressure coming from the bar. A difference thus emerges with regard to the United States, where the Federal APA (1946) was a product of the reaction against what was perceived as an excess of discretionary powers in the hands of the New Deal agencies.

Second, while most laws are drafted by ministerial bureaucracies, this was drafted by a number of committees made up of academics, judges, and senior officers. They took

[4] For a comparative analysis, see Sabino Cassese, *Legislative Regulation of Adjudicative Procedures: an Introduction, 3 European Review of Public Law* 15 (1993).

into account both existing case-law and foreign legal materials[5]. They aimed at generalising and improving existing standards of administrative action. In this respect, it can be said that the new legislative framework was more the product of judges and professors, than of politicians and bureaucrats. This may explain why the latter constantly tried to dilute the potential for innovation, sometimes successfully.

3.2 An Act laying down general principles, not a code

When considering the contents of the Act of 1990, two things should be made clear. First, the Act is not simply a codification of existing case-law. Second, it is not a code.

With regard to adjudication, the Act codified three fundamental principles: the right to be heard by the authority before a final measure is decided, the right to have access to the files, and the duty to provide reasons (with the notable exception of regulations and administrative acts that lay down rules). However, it would not be fair to say that Parliament has merely codified case-law. Indeed, new procedural safeguards have been introduced, including the duty of public authorities to assign specific responsibility for every kind of administrative procedure. This has gradually attenuated the traditional secrecy of public authorities. Moreover, other rules, aiming at simplifying administrative activities have been introduced, in particular with regard to the situation in which several public authorities are involved in the same procedure[6].

[5] An interesting collection is container in Giorgio Pastori (ed.), *La procedura amministrativa* (1964).

[6] For further details, see Giorgio Pastori, *Recent Trends in Italian Public Administration*, 1 *Italian Journal of Public Law* 15 (2009).

As a second general feature, unlike the German *Verwaltungsverfahrengesetz*, the legislative framework adopted in Italy is not a code. Not only does it not regulate entirely all the aspects of administrative procedures, although new provisions were added in 2005, but in many respects it only lays down some general principles and rules. The question thus arises whether such principles and rules provide only a loose frame of reference for due process of law. The Act codified the principle of legality, as binding public administrations with regard to the goals to be achieved. It was conventional wisdom that, in this way, private autonomy was secured against administrative activities that were *ultra vires*, to borrow an English expression. The Act affirmed other principles, of transparency and effectiveness[7]. It also recognized the right to have access to the records and information held by every public authority. In this respect, a very broad concept of document was adopted, and this applies not only to public authorities, but also to private providers of public services, for example in the area of postal services. A certain degree of cautiousness emerges, instead, with regard to the holders of the right of access, because a specific condition is laid down. As a matter of fact, the exercise of this right is allowed only for the protection of an interest that is legally relevant.

4. IS (PROCEDURAL) DUE PROCESS OF LAW A CONSTITUTIONAL PRINCIPLE?

In the light of this sketchy description of the contents of the APA, two questions arise, that is to say whether (procedural) due process of law has gained a constitutional status, and whether it has produced a sort of procedural democracy.

[7] Another important provision, that cannot be adequately examined here, is the new part of Article 1, as amended in 2005, that refers to the "principles of the legal order of the European Community", thus opening up the whole system of administrative law to the principles of EU law : for further remarks, see Giacinto della Cananea, *Articolo 1. Il rinvio ai principi dell'ordinamento comunitario*, in Maria Alessandra Sandulli (ed.), *Codice dell'azione amministrativa* 20 (2010).

4.1 A 'cold' case: due process as a general principle of law

Despite the attempts made by a handful of academics, for a long time the prevailing opinion has been that due process of law did not have a constitutional status[8], for two reasons. First, from a formal point of view, the Constitution lays down only broad principles of impartiality and sound governance. In other words, there is no such thing as the Due Process Clause of the U.S. Constitution or Article 105 of the Spanish Constitution (1978). Second, and consequently, the Constitutional Court has refrained from interpreting the Constitution in a radically innovative way.

Consider, for example, a 'cold' case, but a very significant one. In 1962, the Constitutional Court was requested to assess the validity of a regional statute that limited directly the building rights of private owners, with providing them with any possibility to be heard by the public authority. A viable option for the Court might have been to say that, although separation of powers was not to be interpreted rigidly, when adopting individual measures public authorities had to respect procedural requirements, including the right to have some kind of hearing. However, the Court declined to do so. Rather, it affirmed that due process of law was a general principle of law, but not a constitutional principle. As a result of this, due process of law was regarded as binding for regional authorities, but not the State. In other words, it could be derogated by Parliament[9].

This ruling, especially in an era of gradual implementation of constitutional principles, was regarded by most observers as a self-restraint. This brought into question the ability of the Constitutional Court to establish coherent principles of law in an area which had been largely the province of the Consiglio di Stato (only in 1971 were regional

[8] See, in particular, Feliciano Benvenuti, *Contraddittorio (principio del) – diritto amministrativo*, in *Enciclopedia del diritto* (1961), 721

[9] See Constitutional Court, judgment n. 13/1962, commented by V. Crisafulli, *Principio di legalità e <<giusto procedimento>>*, *Giurisprudenza costituzionale*, 1962, 130.

administrative courts set up). It ought to be observed, however, that this conception of procedural due process of law was quite similar to the conception of general principles of law, not binding on legislators, that had emerged in France after 1944[10].

4.2 The constitutionalization of due process of law

After 1970, the conclusion reached by the Constitutional Court in 1962 was not changed, although a slightly different awareness of the need to ensure respect for some procedural requirements gradually emerged, especially with regard to the pervasive administrative regulation enacted by regions. At the basis of this, due to the lack of direct access to the Court, there was not only the continuation of concern, expressed by private litigants before administrative courts, about the adequacy of existing procedural rules, but there was also a gradual, but steady re-interpretation of the constitutional paradigm expressed by both lower administrative courts and the Consiglio di Stato. In this process, at least two distinct phases may be identified.

In a first phase, before the APA, the administrative courts sought to redefine their consolidated standards of judicial review, in order to better structure exercise of administrative discretion in procedures open to the holders of individual and collective interests. Consider, for example, the following case concerning the municipality of Rome. In the mid 1980's, the mayor issued an order severely limiting the circulation of private vehicles, without any public hearing or adequate information. When a group of residents and traders from the area affected by such limitation challenged the legitimacy of the order, the administrative court quashed it on procedural grounds. It argued that if the administration introduces new policy and rules, it must respect the principles of reasonableness and accuracy of fact-finding. It observed, in particular, that no accurate fact-

[10] See Benoit Jeanneau, *Les principes généraux du droit de la jurisprudence administrative* (1954).

finding had been carried out, nor had any notice been given[11]. Whether the underlying rationale was the traditional doctrine of Rechtsstaat or a utilitarian approach (in the sense that an administration that hears citizens works better), it remains to be seen[12]. What matters, for our purposes, is that a new interpretation of the Constitution did not emerge.

Such an interpretation did emerge a decade after the entry into force of the APA. The occasion came again from the exercise of power by a municipality. A licence, initially issued to the owner of a shop, had been withdrawn without any notice being given to the licencee. As a result, the latter had not been able to exercise his right to be heard by the administration before the license was withdrawn. The court argued, first, that the right to be heard is a general principle of law. Second, and more important, the courtupheld the thesis according to which the right to be heard is 'directly connected' with the constitutional principles of impartiality and sound administration[13]. As a consequence of this, the court held that every other legislative provision limiting or excluding the exercise of the right to be heard must be interpreted very strictly, in order to safeguard such a right. It was not yet a brand new doctrine of due process. However, it did not only exclude any doctrine of unfettered discretion, even if exercised by political bodies, it also implied the need to consider all relevant interests, with all the well-known difficulties inherent to this kind of intellectual exercise. It excluded, accordingly, that the individual interest of a citizen or an undertaking could simply be left outside the process of interest balancing.

[11] Tribunale amministrativo regionale per il Lazio, secondsection, judgment n. 21/1984, published in Sabino Cassese & Aldo Sandulli (eds.), *Casi e materiali di diritto amministrativo* 335 (1998, 2nd)

[12] For an interesting discussion, see Juli Ponce, G*ood Administration and Administrative Procedures*, 12 Indiana Journal of Global Legal Studies 551 (2005).

[13] Consiglio di Stato, Vth panel, judgment n. 2823/2001, available at www.giustizia_amministrativa.it .

4.3 Procedural due process of law between national and regional legislation

Thus far, a gradual evolution has emerged. However, the story of procedural requirements imposed on public administration is not a linear and progressive one. It is full of old and new obstacles, including the unexpected consequences of the strengthened legislative autonomy granted to the regions.

As a starting point, there is no doubt, on the basis of parliamentary records, that the Act was designed to achieve relative uniformity in the administrative machinery, with regard not only to the State, but also to regional and local authorities. However, the Constitution recognized legislative autonomy to regions (and an even greater autonomy was left to the five regions having special status). As a consequence of this, one of the final provisions of the Act specified that the principles and rules contained in the APA applied directly to regions and local authorities so long as they did not adopt their own norms. This permitted, but did not mandate, regions and local authorities to adopt such norms. Additional procedural requirements, crafted by the courts on the basis of national legislation, would still apply. When, in 1992 a region argued that its sphere of autonomy had been infringed, the Constitutional Court dismissed the case, affirming that administrative procedures fell within the domain of organization, as the result of which regional legislation had to respect the basic principles laid down by State legislation.

The problem re-emerged after the constitutional reform of 2001.Briefly , while the original provisions of the Constitution left only some specific legislative competences to regions, in 2001 this choice was reversed. As a result, the State only enjoys legislative competence where this is expressly provided by Article 117 and no mention is made of administrative procedures therein. The assertion of the State's power to legislate in this field, therefore, may be contested. As was mentioned earlier, the courts have indicated their readiness to consider the procedural requirements laid down by the Act as inherent in the fundamental principles of sound administration and impartiality laid down by Article 97. However, the possibility that one or several regions might contestthe lack of an adequate constitutional basis could not be excluded. At least, this is what a clear majority in the

Italian Parliament thought, when approving an amendment to the Act in 2010. Article 29, as amended, now establishes that:

> *Section 29. (Scope of Application)*
>
> *1. The provisions of the present Law shall apply to state authorities and national public bodies. The provisions of the present Law shall likewise apply to wholly or prevalently publicly-owned companies, limited to when they carry out administrative functions. The provisions contained in sections 2-bis, 11, 15 and 25 (5), (5-bis) and (6), as well as those of Chapter IV-bis shall apply to all public authorities.*
>
> *2. Within their respective fields of competence, the regions and the local authorities shall regulate the subject-matters governed by the present Law in observance both of the constitutional system and of the guarantees for citizens with regard to administrative action, as such guarantees are established by the principles laid down by the present Law.*
>
> *2-bis. The provisions of the present Law concerning the public administration's duties to guarantee the participation of affected parties in procedures, to identify an officer responsible for such procedures, to conclude them within the pre-established timeframe and to guarantee access to administrative documentation, as well as those relating to the maximum duration of procedures, shall pertain to the essential levels of benefits and service provision referred to in Article 117(2)(m) of the Constitution.*

This provision has several important implications. First, the Constitution is interpreted by Parliament as providing a legal basis for statutory requirements of notice and hearing in administrative procedures, access to documents and identification of who is responsible for managing a procedure and ensuring its conclusion within the deadline. This solution, already envisaged by some academics, may certainly be upheld by the Constitutional Court.

Secondly, the distinction laid down in 1990 between principles and rules becomes all the more important, since only the principles produce binding effects on regions and local authorities. Whether a certain norm belongs to principles or to rules, however, is not always easy to determine. As a result, it will be a task for the courts to specify the scope that principles and rules have, respectively. The courts' broad language about general principles of administrative law can certainly cover a number of procedural requirements, even beyond what the legislation provides for. Finally, for all its ambiguity, this legislative language does not rule out, nor it could have done so, the possibility that regional legislation differ at the level of rules. Whether this possibility will be used to improve standards of effectiveness and transparency, for example by reducing the length of administrative procedures, or to protect public administrators from citizens and businesses' rising expectations, remains to be seen.

5. TOWARDS PROCEDURAL DEMOCRACY?

5.1 From right to defence to participation?

The *caveat* mentioned earlier with regard to the linear and progressive narratives of the legislative framework governing administrative procedures applies, *a fortiori*, to the widespread opinion according to which the APA has achieved a sort of procedural democracy. An accurate analysis should take into account at least two fundamental weaknesses of the Act.

First, with regard to the right to be heard in the field of adjudication, what the Act ensures is only the right to present evidence and documents and that to have access to documents, but not the right to be 'heard', by way of a hearing before a specific public officer, such as hearing officers or administrative law judges as happens in the U.S. Nor, consequently, is there any chance for opposing parties to carry out a cross-examination. A narrative emphasising the progress towards procedural democracy is, therefore, far from being convincing.

Second, for all the importance of the rules governing administrative procedures (article 7-12 of the Act), such rules do not apply to what is probably the most salient exercise of discretion, that is to say planning and rule-making. Indeed, Article 13 of the APA excludes planning and rule-making procedures (as well as those concerning taxation) from the scope of application of the Act. To make a brief comparison with the U.S., in Italy there is no such thing as formal on-the-record rule-making. There is not even an informal notice and comment. In conclusion, although rule-making involves the exercise of discretion concerning not only the technical means of implementing a policy, but also the priorities to be accorded to relevant and competing interests, nothing is specified by the law, except the fact that everything is left to specific statutes.

The question thus arises whether the widespread opinion according to which the Act of 1990 creates at least the preconditions for administrative or deliberative democracy – that which in other countries is used in order to enrich political democracy or to overcome some of its limits – is, therefore, simply wishful thinking[14]

5.2 The negative impact of the new legislative rules

The conclusion just reached is confirmed by the legislative changes that occurred in 2005. Whether such legislative changes reflected a real shift in the opinion of Parliament, it remains to be seen. Some observers have argued that the amendments introduced in the

[14] The drawbacks of making administrative procedures a sort of 'surrogate' of political process have been pointed out by R.B. Stewart, *The Reformation of American Administrative Law*, 88 Harvard Law Review 1668 (1974-75). See also Carol Harlow, *Interest Representation in Administrative Procedures. Representative Democracy vs. Participatory Democracy in the EU and the US: A Comment*, in Roberto Caranta (ed.), *Interest Representation in Administrative Proceedings* (2008), 86 and Fabrizio Fracchia, *Administrative Procedures and Democracy: The Italian Experience*, 12 Indiana Journal of Global Legal Studies 580 (2005) (holding that democratic principles also apply to administration).

APA reflected, rather, a reaction by bureaucrats against legislative standards that were regarded as being too demanding. This applies, in particular, to the controversial increase of the default rule (Article 2, last paragraph) concerning the deadline for concluding administrative procedures, which was modified from thirty days to ninety.

However, the least that can be said is that this is not an entirely accurate analysis of legislative changes. Indeed, one of the most controversial changes was supported by some administrative scholars. Regardless of its limited capacity to gain consent within academic circles, a group of scholars advocated a vigorous reaction to what was perceived as an excess of formalism, mentioning the examples of Germany and the EC[15]. In line with this school of thought, the amendment introduced by Parliament aims at preventing the annulment of administrative acts for the infringement of 'formal' requirements (Article 21-octies).

This amendment, and the interpretation according to which such formal requirements include the reasons the authority omitted to specify, may reflect a cultural shift, the idea that procedural constraints are only obstacles to a well-intentioned decision-maker. Or, it may reflect another idea, notably that the individual interest of that party claiming a procedural due process right may not be weighed against the collective interest that the administrative decision maximizes. The risk that the courts defer to the discretion enjoyed by administrators in this respect is not at all a theoretical one, as some judgments show, for example with regard to the duty to give reasons[16].

[15] See, however, Jurgen Schwarze, *Legal Protection by and within the Administrative Procedure. Some Observations on the Legal Situation in German and European Community Law*, in Alberto Massera (ed.), *Le tutele procedimentali. Profili di diritto comparato* (2007), 53.

[16] See, for example, Consiglio di Stato, fifth section, judgment n. 5271/2007 (holding that the prohibition of an *ex post* integration of the reasons adduced by the public administration has been attenuated by the new legislative provision). For a different line of reasoning, see the 6th panel's judgment n. 6386/2009 (pointing out that, if the

5.3 A re-interpretation of the Act based on Article 6 ECHR

Legal positivists, of course, express a different point of view. If Parliament, so their argument goes, decided to amend the APA, it means that the interest that gives rise to the due process claim must be balanced against other competing interests. In particular, quashing an administrative measure only on 'formal grounds' would be unjustified or excessive.

Yet this position is far from satisfactory for at least three reasons. First, unlike economists, lawyers should be aware that formalism is often a shield against the arbitrariness of public authorities, especially in view of the growing importance attached to the majority principle for all levels of government. Second, the positivist and anti-formalist position (two strange bedfellows) provides no basis for considering the balance of interests that the legislator has provided in the light of the general principles laid down by the Act. Indeed, if the APA has any purpose, it is to lay down some procedural requirements for the protection of the individual and collective interests recognized by the legal order.

Third, and probably most important, especially after the constitutional reform of 2001, all legislation must be in line with Union law and the European Convention of Human Rights. This is recognized by positive law. Article 117 of the Constitution now clarifies that national and regional legislation must be in linenot only with the Constitution itself, but also with the legal order of the European Community and with the obligations deriving from international agreements. That such agreements include the European Convention on Human Rights is beyond any shadow of doubt. In the past, administrative courts hesitated to draw all necessary conclusions from this, in particular, that the traditional criterion of *lex posterior* does not apply in this context. A change occurred, however, when the Constitutional Court affirmed that the Convention may not be

administration must take a discretionary decision, the participation of private parties cannot be regarded as irrelevant).

derogated[17]. The question thus arises whether Article 21-octies of the APA may only be interpreted in conformity with Article 6 ECHR. In my view, whatever the legislative intent expressed by elected politicians in 2005, we must have a clear idea of what counts as a constitutional value, and if we balance interests, we must be aware that when balancing the elements that count against each other, procedural due process of law has not only a considerable weight, but also an increased one, within all the States that have signed the ECHR.

6. FINAL REMARKS

Although this report raises some doubts with regard to the widespread, and optimistic, vision of the APA, the importance of this Act may not be overlooked. It was one of the most important innovations ever introduced by national legislation in the field of public law. It is, beyond any shadow of doubt, the Act most frequently invoked by lawyers and judges in this field. It raised, more than any other piece of legislation, questions for academics and practicing lawyers. The conclusion that emerges from the remarks made thus far is that such questions can be properly assessed only from a satisfactory constitutional perspective that takes into account the constitutional relevance of due process.

[17] For further details, see Silvia Mirate, T*he Role of the ECHR in the Italian Administrative Case Law. An Analysis after the two Judgments of the Constitutional Court No. 348 and No. 349 of 2007*, 2 Italian Journal of Public Law, 260 (2010), available at www.ijpl.eu

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2. DUE PROCESS IN THE TRADITIONAL MODEL OF ADMINISTRATIVE LAW: A CRITIQUE

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Three fundamental strains of criticism have been directed against this traditional model. First, it has been often said that such model focused essentially on the final measure taken by the public authority, that is to say the individual decision (provvedimento

[2] See Franco G. Scoca, *Administrative Justice in Italy: Origins and Developments*, 1 It. J. of Public. L. 121 (2009) (arguing that in the last ten years not only has the scope of activity of administrative judges has been enlarged, but that their role has been strengthened after the legislator entrusted them with the power to grant financial compensation to private parties).

amministrativo). Like the German conception of the VerwaltungsAkt[3], this model recognized several peculiarities to the measure adopted by the public authority, including the power to impinge on individual and collective rights and in some cases that to execute the measure coercively.

Second, the individual and collective rights recognized by both the Constitution of 1947 and parliamentary legislation lacked an adequate procedural protection. Procedural requirements existed in legislative provisions regulating several administrative procedures, in particular those leading to expropriation of private ownership and issuing of other measures adversely affecting individuals. However, procedural safeguards lacked in other fields of administrative action, including those concerning government subsidies and planning and rule-making activities, in spite of the proliferation of administrative activities governed only by broad legislative directives.

Third, it was often asserted that too much power was concentrated in the hands of the courts, especially of the Consiglio di Stato. In some cases, the administrative judge conceived the rules laid down by specific statutes as manifestations, or symptoms, of broader principles. In this way, when administrative control of citizens and businesses grew more pervasive, and often intrusive, a body of doctrines and techniques was developed by the courts, in order to reconcile the exercise of power by a more fragmented administrative universe (including regions and several other public bodies) with traditional concerns for private liberties. In other cases, however, the process of abstraction from existing legislative rules was weaker, or even impalpable. In spite of the frequent re-assertions of allegiance to positivistic assumptions, the courts did not hesitate to lay down new principles, such as the principle of reasonableness. Several commentators, therefore, advocated a legislative

[3] See Otto Mayer, *Deutsches Verwaltungsrecht* (1895). See also Giacinto della Cananea, *On Bridging Legal Cultures: The Italian Journal of Public Law*, 11 German Law Journal 1281-1291 (2010) (observing that the German influence on Italian administrative scholarship has weakened since the 1970's) and, for further remarks, Sabino Cassese, *Science of Administrative Law in Italy from 1971 to 1985*, in Jahrbuch des öffentlichen Rechts der Gegenwart (1985), 123.

regulation of administrative procedures as an instrument for a more balanced approach in shaping administrative law[4].

3. THE ITALIAN ADMINISTRATIVE PROCEDURE ACT (1990)

3.1 Judges, professors, and the new legislative framework

The rising expectations of administrative reform were met, at the beginning of last decade of the twentieth century , by three legislative innovations. First and foremost (for our purposes), after decades of debates, in 1990 Parliament decided to adopt an Administrative Procedure Act (APA). Second, the old legislative framework concerning local government was replaced by a new one, soon followed by a constitutional reform, which produced an unexpected contrast with the APA. Third, an antitrust Act was passed by Parliament and an independent authority was set up.

With regard to administrative procedures, why did the Parliament decided to adopt the APA act in 1990, it remains to be explained. There is need for further empirical and historic analysis, therefore. However, at least two things are clear enough. First, although the state of administrative justice, especially before ordinary courts, was far from being satisfactory, there was not a strong pressure coming from the bar. A difference thus emerges with regard to the United States, where the Federal APA (1946) was a product of the reaction against what was perceived as an excess of discretionary powers in the hands of the New Deal agencies.

Second, while most laws are drafted by ministerial bureaucracies, this was drafted by a number of committees made up of academics, judges, and senior officers. They took

[4] For a comparative analysis, see Sabino Cassese, *Legislative Regulation of Adjudicative Procedures: an Introduction, 3 European Review of Public Law* 15 (1993).

into account both existing case-law and foreign legal materials[5]. They aimed at generalising and improving existing standards of administrative action. In this respect, it can be said that the new legislative framework was more the product of judges and professors, than of politicians and bureaucrats. This may explain why the latter constantly tried to dilute the potential for innovation, sometimes successfully.

3.2 An Act laying down general principles, not a code

When considering the contents of the Act of 1990, two things should be made clear. First, the Act is not simply a codification of existing case-law. Second, it is not a code.

With regard to adjudication, the Act codified three fundamental principles: the right to be heard by the authority before a final measure is decided, the right to have access to the files, and the duty to provide reasons (with the notable exception of regulations and administrative acts that lay down rules). However, it would not be fair to say that Parliament has merely codified case-law. Indeed, new procedural safeguards have been introduced, including the duty of public authorities to assign specific responsibility for every kind of administrative procedure. This has gradually attenuated the traditional secrecy of public authorities. Moreover, other rules, aiming at simplifying administrative activities have been introduced, in particular with regard to the situation in which several public authorities are involved in the same procedure[6].

[5] An interesting collection is container in Giorgio Pastori (ed.), *La procedura amministrativa* (1964).

[6] For further details, see Giorgio Pastori, *Recent Trends in Italian Public Administration*, 1 *Italian Journal of Public Law* 15 (2009).

As a second general feature, unlike the German *Verwaltungsverfahrengesetz*, the legislative framework adopted in Italy is not a code. Not only does it not regulate entirely all the aspects of administrative procedures, although new provisions were added in 2005, but in many respects it only lays down some general principles and rules. The question thus arises whether such principles and rules provide only a loose frame of reference for due process of law. The Act codified the principle of legality, as binding public administrations with regard to the goals to be achieved. It was conventional wisdom that, in this way, private autonomy was secured against administrative activities that were *ultra vires*, to borrow an English expression. The Act affirmed other principles, of transparency and effectiveness[7]. It also recognized the right to have access to the records and information held by every public authority. In this respect, a very broad concept of document was adopted, and this applies not only to public authorities, but also to private providers of public services, for example in the area of postal services. A certain degree of cautiousness emerges, instead, with regard to the holders of the right of access, because a specific condition is laid down. As a matter of fact, the exercise of this right is allowed only for the protection of an interest that is legally relevant.

4. IS (PROCEDURAL) DUE PROCESS OF LAW A CONSTITUTIONAL PRINCIPLE?

In the light of this sketchy description of the contents of the APA, two questions arise, that is to say whether (procedural) due process of law has gained a constitutional status, and whether it has produced a sort of procedural democracy.

[7] Another important provision, that cannot be adequately examined here, is the new part of Article 1, as amended in 2005, that refers to the "principles of the legal order of the European Community", thus opening up the whole system of administrative law to the principles of EU law : for further remarks, see Giacinto della Cananea, *Articolo 1. Il rinvio ai principi dell'ordinamento comunitario*, in Maria Alessandra Sandulli (ed.), *Codice dell'azione amministrativa* 20 (2010).

4.1 A 'cold' case: due process as a general principle of law

Despite the attempts made by a handful of academics, for a long time the prevailing opinion has been that due process of law did not have a constitutional status[8], for two reasons. First, from a formal point of view, the Constitution lays down only broad principles of impartiality and sound governance. In other words, there is no such thing as the Due Process Clause of the U.S. Constitution or Article 105 of the Spanish Constitution (1978). Second, and consequently, the Constitutional Court has refrained from interpreting the Constitution in a radically innovative way.

Consider, for example, a 'cold' case, but a very significant one. In 1962, the Constitutional Court was requested to assess the validity of a regional statute that limited directly the building rights of private owners, with providing them with any possibility to be heard by the public authority. A viable option for the Court might have been to say that, although separation of powers was not to be interpreted rigidly, when adopting individual measures public authorities had to respect procedural requirements, including the right to have some kind of hearing. However, the Court declined to do so. Rather, it affirmed that due process of law was a general principle of law, but not a constitutional principle. As a result of this, due process of law was regarded as binding for regional authorities, but not the State. In other words, it could be derogated by Parliament[9].

This ruling, especially in an era of gradual implementation of constitutional principles, was regarded by most observers as a self-restraint. This brought into question the ability of the Constitutional Court to establish coherent principles of law in an area which had been largely the province of the Consiglio di Stato (only in 1971 were regional

[8] See, in particular, Feliciano Benvenuti, *Contraddittorio (principio del) – diritto amministrativo*, in *Enciclopedia del diritto* (1961), 721

[9] See Constitutional Court, judgment n. 13/1962, commented by V. Crisafulli, *Principio di legalità e <<giusto procedimento>>*, *Giurisprudenza costituzionale*, 1962, 130.

administrative courts set up). It ought to be observed, however, that this conception of procedural due process of law was quite similar to the conception of general principles of law, not binding on legislators, that had emerged in France after 1944[10].

4.2 The constitutionalization of due process of law

After 1970, the conclusion reached by the Constitutional Court in 1962 was not changed, although a slightly different awareness of the need to ensure respect for some procedural requirements gradually emerged, especially with regard to the pervasive administrative regulation enacted by regions. At the basis of this, due to the lack of direct access to the Court, there was not only the continuation of concern, expressed by private litigants before administrative courts, about the adequacy of existing procedural rules, but there was also a gradual, but steady re-interpretation of the constitutional paradigm expressed by both lower administrative courts and the Consiglio di Stato. In this process, at least two distinct phases may be identified.

In a first phase, before the APA, the administrative courts sought to redefine their consolidated standards of judicial review, in order to better structure exercise of administrative discretion in procedures open to the holders of individual and collective interests. Consider, for example, the following case concerning the municipality of Rome. In the mid 1980's, the mayor issued an order severely limiting the circulation of private vehicles, without any public hearing or adequate information. When a group of residents and traders from the area affected by such limitation challenged the legitimacy of the order, the administrative court quashed it on procedural grounds. It argued that if the administration introduces new policy and rules, it must respect the principles of reasonableness and accuracy of fact-finding. It observed, in particular, that no accurate fact-

[10] See Benoit Jeanneau, *Les principes généraux du droit de la jurisprudence administrative* (1954).

finding had been carried out, nor had any notice been given[11]. Whether the underlying rationale was the traditional doctrine of Rechtsstaat or a utilitarian approach (in the sense that an administration that hears citizens works better), it remains to be seen[12]. What matters, for our purposes, is that a new interpretation of the Constitution did not emerge.

Such an interpretation did emerge a decade after the entry into force of the APA. The occasion came again from the exercise of power by a municipality. A licence, initially issued to the owner of a shop, had been withdrawn without any notice being given to the licencee. As a result, the latter had not been able to exercise his right to be heard by the administration before the license was withdrawn. The court argued, first, that the right to be heard is a general principle of law. Second, and more important, the courtupheld the thesis according to which the right to be heard is 'directly connected' with the constitutional principles of impartiality and sound administration[13]. As a consequence of this, the court held that every other legislative provision limiting or excluding the exercise of the right to be heard must be interpreted very strictly, in order to safeguard such a right. It was not yet a brand new doctrine of due process. However, it did not only exclude any doctrine of unfettered discretion, even if exercised by political bodies, it also implied the need to consider all relevant interests, with all the well-known difficulties inherent to this kind of intellectual exercise. It excluded, accordingly, that the individual interest of a citizen or an undertaking could simply be left outside the process of interest balancing.

[11] Tribunale amministrativo regionale per il Lazio, secondsection, judgment n. 21/1984, published in Sabino Cassese & Aldo Sandulli (eds.), *Casi e materiali di diritto amministrativo* 335 (1998, 2nd)

[12] For an interesting discussion, see Juli Ponce, G*ood Administration and Administrative Procedures*, 12 Indiana Journal of Global Legal Studies 551 (2005).

[13] Consiglio di Stato, Vth panel, judgment n. 2823/2001, available at www.giustizia_amministrativa.it .

4.3 Procedural due process of law between national and regional legislation

Thus far, a gradual evolution has emerged. However, the story of procedural requirements imposed on public administration is not a linear and progressive one. It is full of old and new obstacles, including the unexpected consequences of the strengthened legislative autonomy granted to the regions.

As a starting point, there is no doubt, on the basis of parliamentary records, that the Act was designed to achieve relative uniformity in the administrative machinery, with regard not only to the State, but also to regional and local authorities. However, the Constitution recognized legislative autonomy to regions (and an even greater autonomy was left to the five regions having special status). As a consequence of this, one of the final provisions of the Act specified that the principles and rules contained in the APA applied directly to regions and local authorities so long as they did not adopt their own norms. This permitted, but did not mandate, regions and local authorities to adopt such norms. Additional procedural requirements, crafted by the courts on the basis of national legislation, would still apply. When, in 1992 a region argued that its sphere of autonomy had been infringed, the Constitutional Court dismissed the case, affirming that administrative procedures fell within the domain of organization, as the result of which regional legislation had to respect the basic principles laid down by State legislation.

The problem re-emerged after the constitutional reform of 2001.Briefly , while the original provisions of the Constitution left only some specific legislative competences to regions, in 2001 this choice was reversed. As a result, the State only enjoys legislative competence where this is expressly provided by Article 117 and no mention is made of administrative procedures therein. The assertion of the State's power to legislate in this field, therefore, may be contested. As was mentioned earlier, the courts have indicated their readiness to consider the procedural requirements laid down by the Act as inherent in the fundamental principles of sound administration and impartiality laid down by Article 97. However, the possibility that one or several regions might contestthe lack of an adequate constitutional basis could not be excluded. At least, this is what a clear majority in the

Italian Parliament thought, when approving an amendment to the Act in 2010. Article 29, as amended, now establishes that:

> *Section 29. (Scope of Application)*
>
> *1. The provisions of the present Law shall apply to state authorities and national public bodies. The provisions of the present Law shall likewise apply to wholly or prevalently publicly-owned companies, limited to when they carry out administrative functions. The provisions contained in sections 2-bis, 11, 15 and 25 (5), (5-bis) and (6), as well as those of Chapter IV-bis shall apply to all public authorities.*
>
> *2. Within their respective fields of competence, the regions and the local authorities shall regulate the subject-matters governed by the present Law in observance both of the constitutional system and of the guarantees for citizens with regard to administrative action, as such guarantees are established by the principles laid down by the present Law.*
>
> *2-bis. The provisions of the present Law concerning the public administration's duties to guarantee the participation of affected parties in procedures, to identify an officer responsible for such procedures, to conclude them within the pre-established timeframe and to guarantee access to administrative documentation, as well as those relating to the maximum duration of procedures, shall pertain to the essential levels of benefits and service provision referred to in Article 117(2)(m) of the Constitution.*

This provision has several important implications. First, the Constitution is interpreted by Parliament as providing a legal basis for statutory requirements of notice and hearing in administrative procedures, access to documents and identification of who is responsible for managing a procedure and ensuring its conclusion within the deadline. This solution, already envisaged by some academics, may certainly be upheld by the Constitutional Court.

Secondly, the distinction laid down in 1990 between principles and rules becomes all the more important, since only the principles produce binding effects on regions and local authorities. Whether a certain norm belongs to principles or to rules, however, is not always easy to determine. As a result, it will be a task for the courts to specify the scope that principles and rules have, respectively. The courts' broad language about general principles of administrative law can certainly cover a number of procedural requirements, even beyond what the legislation provides for. Finally, for all its ambiguity, this legislative language does not rule out, nor it could have done so, the possibility that regional legislation differ at the level of rules. Whether this possibility will be used to improve standards of effectiveness and transparency, for example by reducing the length of administrative procedures, or to protect public administrators from citizens and businesses' rising expectations, remains to be seen.

5. TOWARDS PROCEDURAL DEMOCRACY?

5.1 From right to defence to participation?

The *caveat* mentioned earlier with regard to the linear and progressive narratives of the legislative framework governing administrative procedures applies, *a fortiori*, to the widespread opinion according to which the APA has achieved a sort of procedural democracy. An accurate analysis should take into account at least two fundamental weaknesses of the Act.

First, with regard to the right to be heard in the field of adjudication, what the Act ensures is only the right to present evidence and documents and that to have access to documents, but not the right to be 'heard', by way of a hearing before a specific public officer, such as hearing officers or administrative law judges as happens in the U.S. Nor, consequently, is there any chance for opposing parties to carry out a cross-examination. A narrative emphasising the progress towards procedural democracy is, therefore, far from being convincing.

Second, for all the importance of the rules governing administrative procedures (article 7-12 of the Act), such rules do not apply to what is probably the most salient exercise of discretion, that is to say planning and rule-making. Indeed, Article 13 of the APA excludes planning and rule-making procedures (as well as those concerning taxation) from the scope of application of the Act. To make a brief comparison with the U.S., in Italy there is no such thing as formal on-the-record rule-making. There is not even an informal notice and comment. In conclusion, although rule-making involves the exercise of discretion concerning not only the technical means of implementing a policy, but also the priorities to be accorded to relevant and competing interests, nothing is specified by the law, except the fact that everything is left to specific statutes.

The question thus arises whether the widespread opinion according to which the Act of 1990 creates at least the preconditions for administrative or deliberative democracy – that which in other countries is used in order to enrich political democracy or to overcome some of its limits – is, therefore, simply wishful thinking[14]

5.2 The negative impact of the new legislative rules

The conclusion just reached is confirmed by the legislative changes that occurred in 2005. Whether such legislative changes reflected a real shift in the opinion of Parliament, it remains to be seen. Some observers have argued that the amendments introduced in the

[14] The drawbacks of making administrative procedures a sort of 'surrogate' of political process have been pointed out by R.B. Stewart, *The Reformation of American Administrative Law*, 88 Harvard Law Review 1668 (1974-75). See also Carol Harlow, *Interest Representation in Administrative Procedures. Representative Democracy vs. Participatory Democracy in the EU and the US: A Comment*, in Roberto Caranta (ed.), *Interest Representation in Administrative Proceedings* (2008), 86 and Fabrizio Fracchia, *Administrative Procedures and Democracy: The Italian Experience*, 12 Indiana Journal of Global Legal Studies 580 (2005) (holding that democratic principles also apply to administration).

APA reflected, rather, a reaction by bureaucrats against legislative standards that were regarded as being too demanding. This applies, in particular, to the controversial increase of the default rule (Article 2, last paragraph) concerning the deadline for concluding administrative procedures, which was modified from thirty days to ninety.

However, the least that can be said is that this is not an entirely accurate analysis of legislative changes. Indeed, one of the most controversial changes was supported by some administrative scholars. Regardless of its limited capacity to gain consent within academic circles, a group of scholars advocated a vigorous reaction to what was perceived as an excess of formalism, mentioning the examples of Germany and the EC[15]. In line with this school of thought, the amendment introduced by Parliament aims at preventing the annulment of administrative acts for the infringement of 'formal' requirements (Article 21-octies).

This amendment, and the interpretation according to which such formal requirements include the reasons the authority omitted to specify, may reflect a cultural shift, the idea that procedural constraints are only obstacles to a well-intentioned decision-maker. Or, it may reflect another idea, notably that the individual interest of that party claiming a procedural due process right may not be weighed against the collective interest that the administrative decision maximizes. The risk that the courts defer to the discretion enjoyed by administrators in this respect is not at all a theoretical one, as some judgments show, for example with regard to the duty to give reasons[16].

[15] See, however, Jurgen Schwarze, *Legal Protection by and within the Administrative Procedure. Some Observations on the Legal Situation in German and European Community Law*, in Alberto Massera (ed.), *Le tutele procedimentali. Profili di diritto comparato* (2007), 53.

[16] See, for example, Consiglio di Stato, fifth section, judgment n. 5271/2007 (holding that the prohibition of an *ex post* integration of the reasons adduced by the public administration has been attenuated by the new legislative provision). For a different line of reasoning, see the 6th panel's judgment n. 6386/2009 (pointing out that, if the

5.3 A re-interpretation of the Act based on Article 6 ECHR

Legal positivists, of course, express a different point of view. If Parliament, so their argument goes, decided to amend the APA, it means that the interest that gives rise to the due process claim must be balanced against other competing interests. In particular, quashing an administrative measure only on 'formal grounds' would be unjustified or excessive.

Yet this position is far from satisfactory for at least three reasons. First, unlike economists, lawyers should be aware that formalism is often a shield against the arbitrariness of public authorities, especially in view of the growing importance attached to the majority principle for all levels of government. Second, the positivist and anti-formalist position (two strange bedfellows) provides no basis for considering the balance of interests that the legislator has provided in the light of the general principles laid down by the Act. Indeed, if the APA has any purpose, it is to lay down some procedural requirements for the protection of the individual and collective interests recognized by the legal order.

Third, and probably most important, especially after the constitutional reform of 2001, all legislation must be in line with Union law and the European Convention of Human Rights. This is recognized by positive law. Article 117 of the Constitution now clarifies that national and regional legislation must be in linenot only with the Constitution itself, but also with the legal order of the European Community and with the obligations deriving from international agreements. That such agreements include the European Convention on Human Rights is beyond any shadow of doubt. In the past, administrative courts hesitated to draw all necessary conclusions from this, in particular, that the traditional criterion of *lex posterior* does not apply in this context. A change occurred, however, when the Constitutional Court affirmed that the Convention may not be

administration must take a discretionary decision, the participation of private parties cannot be regarded as irrelevant).

derogated[17]. The question thus arises whether Article 21-octies of the APA may only be interpreted in conformity with Article 6 ECHR. In my view, whatever the legislative intent expressed by elected politicians in 2005, we must have a clear idea of what counts as a constitutional value, and if we balance interests, we must be aware that when balancing the elements that count against each other, procedural due process of law has not only a considerable weight, but also an increased one, within all the States that have signed the ECHR.

6. FINAL REMARKS

Although this report raises some doubts with regard to the widespread, and optimistic, vision of the APA, the importance of this Act may not be overlooked. It was one of the most important innovations ever introduced by national legislation in the field of public law. It is, beyond any shadow of doubt, the Act most frequently invoked by lawyers and judges in this field. It raised, more than any other piece of legislation, questions for academics and practicing lawyers. The conclusion that emerges from the remarks made thus far is that such questions can be properly assessed only from a satisfactory constitutional perspective that takes into account the constitutional relevance of due process.

[17] For further details, see Silvia Mirate, T*he Role of the ECHR in the Italian Administrative Case Law. An Analysis after the two Judgments of the Constitutional Court No. 348 and No. 349 of 2007*, 2 Italian Journal of Public Law, 260 (2010), available at www.ijpl.eu

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LO STATO DELLA COMPARAZIONE NEL DIRITTO AMMINISTRATIVO COMPARATO IN ITALIA

ANNUAL REPORT - 2011 - ITALIA

(Dicembre 2011)

Prof. Roberto CARANTA

INDICE

1. UN PO' DI STORIA

Un antico pregiudizio molto diffuso in Italia, ma non solo, voleva il diritto amministrativo come portato della forma di Stato e di governo di ogni ordinamento e, come tale, non comparabile.

L'asserzione presuppone che le forme di Stato e di governo non siano comparabili; notoriamente, è vero proprio il contrario, tanto che forme di Stato e di governo sono uno

degli oggetti principali del lavoro del costituzionalista comparatista. Soprattutto tra le democrazie occidentali non esistono differenze tali da rendere poco significativa – ancorché peraltro sempre possibile – la comparazione.

Tant'è che i lavori preparatori della legge abolitiva del contenzioso amministrativo testimoniano una buona conoscenza delle istituzioni di tutela nei confronti della pubblica amministrazione di altri paesi europei, quali la Francia e il Belgio[1]. Nella seconda metà dell'ottocento il diritto amministrativo francese era generalmente ben conosciuto in Italia. E niente poco di meno che Federico Cammeo si interessava del diritto amministrativo di oltre oceano[2].

Per cercare di spiegare il pregiudizio si può forse avanzare l'ipotesi che esso sia sorto e cresciuto durante la dittatura fascista. Sotto la dittatura l'esperienza istituzionale italiana si allontanò effettivamente in modo molto marcato dal modello delle democrazie occidentali, e la dottrina filo-fascista non mancò di sottolineare la (pretesa) superiorità del nuovo ordine. A parte che anche questo è un giudizio comparativo, è chiaro che un simile assunto non incoraggia a comparare sul serio, non foss'altro per tema di smentita.

Certo nel periodo in questione continuò l'interesse per l'elaborazione dottrinale tedesca iniziato con Vittorio Emanuele Orlando e caratteristico della scuola classica del diritto amministrativo. Non si tratta, però, di comparazione. La ricerca era quella della teoria giuridica perfetta, o meglio pura, che avrebbe dovuto poi valere in ogni tempo ed in

[1] Si veda A. ANGELETTI, *Le origini del sistema di giustizia amministrativa*, in R. CARANTA (dir.), *Il nuovo processo amministrativo*, Torino, Zanichelli, 2011, 25 ss.

[2] F. CAMMEO, *Il diritto amministrativo degli Stati Uniti d'America*, in *Giur. it.*, 1895, IV, c. 81.

ogni luogo. E con il passare degli anni anche quella parziale attenzione al formante dottrinale del diritto altrove si avvizzì[3].

Forse sarebbe troppo impertinente chiedersi perché un pregiudizio, nato in un preciso periodo storico, si sia poi perpetuato ben dopo la caduta del regime. Probabilmente, al di là della vischiosità delle scuole, la deriva concettualistica del nostro diritto amministrativo, con la conseguente crescente autoreferenzialità del discorso giuridico e correlata scarsa attenzione per la *law in action*, privava di interesse una ricerca che avesse ad oggetto il diritto degli altri.

Fatto si è che il metodo comparato è rimasto molto marginale nel diritto amministrativo fino agli anni '80 del secolo scorso, quando il progresso del processo di integrazione europea rese non più sostenibile l'isolamento culturale del diritto amministrativo italiano.

In questo primo *report*, l'intento è quello di esaminare i percorsi, i temi e le opere del diritto amministrativo comparato italiano.

[3] Con qualche luminosa eccezione, quali A. MASUCCI, *Trasformazione dell'amministrazione e moduli convenzionali : il contratto di diritto pubblico*, Napoli, Jovene, 1988; ID., *La legge tedesca sul processo amministrativo*, Milano, Giuffrè, 1991 (dello stesso Autore anche *Il processo amministrativo in Francia*, Milano, Giuffrè, 1995); S. COGNETTI, *La tutela delle situazioni soggettive tra procedimento e processo : le esperienze di pianificazione urbanistica in Italia e in Germania*, Napoli, ESI, 1987; ID., *Profili sostanziali della legalità amministrativa : indeterminatezza della norma e limiti della discrezionalità*, Milano, Giuffrè, 1993, e più recentemente ID., *Principio di proporzionalità : profili di teoria generale e di analisi sistematica*, Torino, Giappichelli, 2011; D. DE PRETIS, *Valutazione amministrativa e discrezionalità tecnica*, Padova, CEDAM, 1995.

2. I PERCORSI

Si può naturalmente comparare in solitaria, ma normalmente la ricerca beneficia dei contributi provenienti da scambi tra diversi ordinamenti. Oggi le più importanti ricerche comparative sono il risultato dello sforzo di un gruppo prolungato nel tempo: si pensi al *common core*.

A livello internazionale, il mondo del diritto comparato trova la propria tradizionale aggregazione nell'*Association internationale de droit comparé*, composta da membri effettivi ed associati. L'*Association* è articolata in capitoli nazionali – in Italia l'Associazione italiana di diritto comparato – AIDC, e tiene un convegno quadriennale organizzato da una delle sue articolazioni. Il convegno è normalmente articolato in una ventina di temi, parte di teoria generale del diritto e della comparazione, il resto delle singole branche disciplinari, con il diritto amministrativo normalmente coinvolto su due temi. Ogni tema vede la presentazione di *rapports nationaux* da parte dei membri dei capitoli locali sulla base di un questionario preparato da un *rapporteur général* (normalmente un membro dell'*Association*). Il tutto in francese o inglese. Inoltre *l'Association* organizza dei corsi per gli studenti.

Diversi amministrativisti italiani contribuiscono ogni volta ai due rapports, ma non sempre sono presenti al congresso e soprattutto, in generale, a differenza dei cugini francesi ma anche dei privatisti italiani, sono poco presenti e rappresentati nell'AIDC e, ancor meno, hanno rilievo nell'*Association*.

Varie le ragioni, prima di tutto il ritardo e l'esitazione, rispetto non solo ai privatisti ma persino ai costituzionalisti, con cui gli amministrativisti si sono avvicinati al diritto comparato[4].

[4] Osservava già J. RIVERO 'Vers un droit commun européen: nouvelles perspectives en droit administratif' in M. CAPPELLETTI *New Perspectives for a Common Law in Europe – Nouvelles perspectives d'un droit commun en Europe* (Leyden et al., Sijthoff et al, 1978), 391, «Il faut reconnoitre que le droit administrative a fait longtemps

In un'associazione non vale normalmente il "beati gli ultimi" evangelico. Le posizioni di rilievo sono già occupate e sono trasmesse secondo logiche di scuola, mentre i *late comers* hanno possibilità ridotte di farsi spazio.

Tale situazione non incoraggia la fidelizzazione, nel senso che la stessa partecipazione ai convegni mondiali diventa episodica, più che comparare si prepara un *rapport* sul diritto italiano scritto in francese o inglese; questo non porta a vedere l'*Association* come luogo di aggregazione della ricerca comparatistica nella nostra materia.

A questo si aggiunge che l'*Association* è figlia del mondo post-westfaliano, i cui convegni vedono contributi su base paritaria potenzialmente da tutto il mondo, ma con un *coverage* da tema a tema che dipende dal caso (presenza in un dato Stato di un *rapporteur* interessato e disponibile) e non dalla programmazione (manca una dimensione macro-regionale); inevitabilmente, i *rapporteurs généraux* spesso faticano ad organizzare il proprio lavoro in modo più articolato e significativo della mera giustapposizione di contributi disparati[5].

Un simile approccio può soddisfare la curiosità, ma non la possibilità di individuare le imitazioni e trapianti tra diversi sistemi giuridici e le *best practices* che meritano di essere studiate è lasciata al caso.

Analoghi limiti ha l'*Association Capitant des Amis de la Culture Juridique Française*, la quale peraltro, dal punto di vista del diritto amministrativo, presenta almeno l'interesse specifico di vedere una qualche partecipazione di membri del *Conseil d'Etat*.

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figure de parent pauvre dans le monde du droit comparé, et que les spécialistes du droit privé ont occupé, et occupant encore, le devant de la scène».

[5] A volte il *rapporteur général* riesce tuttavia nell'intento di riunire i *rapports* in un volume importante di comparazione: ad es. M. PAQUES (ed.), *Le principe de précaution en droit administratif. The Precautionary Principle and Administrative Law*, Bruxelles, Bruylant, 2007.

Inevitabilmente, dunque, accanto alla partecipazione estemporanea alle attività delle due *Associations* ricordate, l'amministrativista comparatista segue percorsi propri, molti dei quali per così dire "individuali" o quasi, nel senso che interessano un numero ridotto di colleghi, eventualmente parti italiane di *network* tendenzialmente informali che seguono un interesse comune di ricerca.

Alcuni gruppi sono peraltro più stabili, radicati da un comune interesse per il diritto comparato e per le conseguenze del processo di integrazione europea sui diritti amministrativi nazionali.

Tra questi il gruppo di ricerca PRIN guidato a Trento da Giandomenico Falcon, cui partecipano studiosi di diverse università (con qualche cambiamento di volta in volta secondo le mutevoli regole per il finanziamento), e che porta all'organizzazione di conferenze tendenzialmente un po' più che biennali (se arrivano puntuali i finanziamenti, il che non è di solito), e conseguenti pubblicazioni sia del gruppo in sé che dei sottogruppi[6].

Più recentemente, va segnalata la ricerca PRIN guidata a Milano da Guido Greco sui rimedi in materia di appalti pubblici[7].

[6] Tra le pubblicazioni del gruppo nel suo complesso G. FALCON (cur.), *Il procedimento amministrativo nei diritti europei e nel diritto comunitario. Ricerche e tesi in discussione*, Padova, CEDAM, 2010; G. FALCON (cur.), *Il procedimento amministrativo nei diritti europei e nel diritto comunitario. Ricerche e tesi in discussione*, Padova, CEDAM, 2008; G. FALCON (cur.), *Il diritto amministrativo dei Paesi europei tra omogeneizzazione e diversità culturali*, Padova, CEDAM, 2005; tra le pubblicazioni delle unità di ricerca R. CARANTA and A. GERBRANDY (edds), *Tradition and Change in European Administrative Law*, Groningen, Europa Law Publishing, 2011; A. MASSERA (cur.), *Forme e strumenti della tutela nei confronti dei provvedimenti amministrativi. Nel diritto italiano, comunitario e comparato*, Padova, CEDAM, 2010; D. CORLETTO (cur.), *Procedimenti di secondo grado e tutela dell'affidamento in Europa*, Padova, CEDAM, 2007.

[7] G. GRECO (cur.), *Il sistema della giustizia amministrativa negli appalti pubblici in Europa*, Milano, Giuffè, 2010.

A livello europeo, tra i gruppi più strutturati lo *European Public Law Organisation – EPLO*, animato da Spyridon Flogaitis, riunisce accademici e pratici di alto livello, e si riunisce una volta all'anno in Grecia al termine di una *summer school*, affrontando uno o più temi specificamente scelti. Edita non senza ritardi, oltre ad altre pubblicazioni, una rivista multi lingue[8].

Più focalizzato sulla pubblicazione di un'opera sul diritto pubblico in Europa è *Jus Publicum Europaeum*, che vede protagonisti giuristi italiani e tedeschi, oltre che di altri ordinamenti[9].

Sono poi organizzati con struttura simile gli scambi culturali tra amministrativisti italiani da un lato, e tedeschi, francesi e spagnoli. Ogni gruppo si incontra tendenzialmente ogni due anni, una volta in Italia, l'altra nel Paese corrispondente, per discutere uno o più temi di interesse comune con relazioni dai rappresentanti dei due Paesi. Ogni gruppo lavora con le due lingue di riferimento (il che per gli italiani presenta ormai qualche difficoltà in relazione al gruppo italo-tedesco).

Il *Dornburg Research Group on New Administrative Law*, incentrato su Matthias Ruffert dell'Università di Jena, principalmente anglo-franco-tedesco, invita alle sue riunioni biennali in inglese (il francese è stato abbandonato dopo il primo anno) su tematiche generali del diritto amministrativo anche giuristi italiani e di altri Paesi; ogni incontro sfocia in un libro[10].

[8] www.eplo.eu.

[9] A. VON BOGDANDY, S. CASSESE, P.M. HUBER (hrg), *Handbuch Jus Publicum Europ**(a)**eum*, Band III, Müller, Heidelberg, 2010.

[10] Pubblicati sin'ora: M. RUFFERT (ED), *Legitimacy in European Administrative Law: Reform and Reconstruction*, Groningen, Europa Law Publishing, 2011; M. RUFFERT (ED), *The Public-Private Law Divide: Potential for Transformation?*, London, BIICL, 2009; M. RUFFERT (ED), *The Transformation of Administrative Law in Europe / La mutation du droit administratif en Europe*, München Sellier, 2007.

Tra i *network* tematici più sviluppati cui partecipano numerosi italiani merita menzione *Public Contracts in Legal Globalization (PCLG) - Contrats Publics dans la Globalisation Juridique (CPGJ)* a guida franco-tedesca, ma che lavora in francese ed inglese, con riunioni tendenzialmente semestrali, dedicate alla preparazione di opere di analisi comparativa[11]. Nella stessa materia, più incentrato sull'organizzazione di grandi convegni mondiali e scambio di informazioni che sulle pubblicazioni, il *Procurement Law Academic Network*[12].

Jus Publicum completa il panorama come *network* di *networks*, con copertura tendenzialmente a 360° dei vari temi del diritto amministrativo, presentandosi anche come *network* di riviste europee di settore.

La dimensione europea non è però più esclusiva. Il *Global Administrative Law – GAL* organizza annualmente a Viterbo un importante seminario internazionale, strutturato "modernamente" su *panels* e *calls for papers*, per discutere dei temi del diritto amministrativo globale. L'iniziativa è collegata al *Global Administrative Law Project* della New York University, presso la quale si svolgono ulteriori seminari[13].

Globale, ma non programmaticamente comparatistico anche il più antico *International Institute of Administrative Sciences – Institut International des Sciences Administratives*. Si tratta di un'organizzazione molto articolata, il cui scopo è lo studio non solo del diritto, ma delle diverse scienze dell'amministrazione in un'ottica

[11] http://public-contracts.eu ; già pubblicato R. NOGUELLOU U. – STELKENS (eds.) *Droit comparé des contrats publics. Comparative Law on Public Contracts*, Bruxelles, Bruylant, 2010.

[12] www.planpublicprocurement.org

[13] http://www.iilj.org/GAL/default.asp

multidisciplinare. Inevitabilmente, finisce spesso per comparare la situazione – anche giuridica – esistente nei vari Paesi[14].

3. I TEMI

La presentazione che precede ha inevitabilmente anticipato i temi del lavoro comparatistico, ma, visti i mille rivoli in cui si diffonde l'interesse per il diritto altro, è probabile – ma mancano *database* adeguati – che moltissimi temi siano stati toccati durante questa o quella iniziativa.

L'interesse del comparatista tocca i temi generali, come quelli dell'organizzazione, dove è importante il contributo delle altre scienze della pubblica amministrazione, nonché i temi classici, come la giustizia ed i rimedi, compresa la responsabilità della pubblica amministrazione, ma anche moderni, come la regolazione, in particolare mediante autorità amministrative indipendenti[15].

Il progresso dell'integrazione a livello europeo ha ovviamente favorito il concentrarsi di interesse su temi quali il ruolo delle pubbliche amministrazioni nel recepimento e nell'esecuzione di norme dell'Unione europea, ma anche sui procedimenti complessi, oltre che ancora sui rimedi e, come risulta dal punto che precede, sui contratti pubblici[16].

[14] www.iias-iisa.org

[15] P. CHIRULLI e R. MICCÙ (curr.), *Il modello europeo di regolazione. Atti della giornata di studio in memoria di Salvatore Cattaneo*, Napoli, Jovene, 2011.

[16] Ad es. B. MARCHETTI (cur.), *L'amministrazione comunitaria. Caratteri, accountability e sindacato giurisdizionale*, Padova, CEDAM, 2009; E. FERRARI, M. RAMAJOLI, M. SICA (curr.), *Il ruolo del giudice di fronte alle decisioni amministrative per il funzionamento dei mercati*, Torino, Giappichelli, 2006.

4. LE OPERE

Le opere dipendono dagli interessi individuali, e si correlano ai vari *network* e temi affrontati in precedenza. In questa sede, ancora una volta, ci si limita ad alcuni lavori di maggior respiro, non ancora richiamati, dove l'iniziativa è italiana come la lingua.

Per prima merita ricordo la collana di *Studi di diritto pubblico comparato* diretta da Franco Levi presso l'editore UTET ed attiva tra il 1971 e il 1979; tra i sei volumi pubblicati tre, *La tutela del paesaggio*, diretta dallo stesso Levi (1979), *La responsabilità della pubblica amministrazione*, diretta da Eugenio Cannada Bartoli (1976), e *Il controllo giurisdizionale della pubblica amministrazione*, diretto da Aldo Piras (1971), riguardarono tematiche di diritto amministrativo.

Si trattò, evidentemente, di un'opera anticipatrice rispetto ai tempi, probabilmente conclusasi *ante* tempo per la morte di uno dei maestri meno convenzionali del diritto amministrativo torinese.

Oltre un decennio trascorse prima della pubblicazione del manuale di Marco D'Alberti, *Diritto amministrativo comparato. Trasformazioni dei sistemi amministrativi in Francia, Gran Bretagna, Stati Uniti, Italia*, edito da Il Mulino nel 1992 e purtroppo mai riedito. Già si sono ricordati i due libri di Alfonso Masucci dello stesso torno di tempo, un abbozzo di un diritto processuale comparato europeo[17].

Del 2007 è invece il testo curato da G. Napolitano *Diritto amministrativo comparato* nell'ambito del *Corso di diritto amministrativo* diretto da Sabino Cassese per l'editore Giuffré; il lavoro è articolato in sette capitoli: *I grandi sistemi del diritto amministrativo*, del curatore, *L'organizzazione*, di Lorenzo Casini ed Edoardo Chiti, *Il procedimento*, di Stefano Battini, Bernardo Giorgio Mattarella e Aldo Sandulli, *L'attività contrattuale*, di Alberto Massera, *La responsabilità della pubblica amministrazione*, di

[17] Above fn. 3.

Luisa Torchia, *La giustizia amministrativa*, di Daria De Pretis, e *I fattori sovranazionali e internazionali di convergenza*, di Giacinto della Cananea.

Il diritto altro è poi stato studiato in opere monografiche sia di taglio comparatistico (nel senso che diversi ordinamenti, tra cui normalmente quello italiano, erano oggetto di indagine)[18], sia di analisi di un altro ordinamento[19].

Tra le riviste, ampio spazio riservano a contributi aventi ad oggetto il diritto non domestico, di autori italiani e non, la *Rivista trimestrale di diritto pubblico* e *Diritto pubblico*; altre riviste ospitano occasionalmente contributi del genere; esplicitamente dedicata (anche) alla comparazione è *Diritto pubblico comparato ed europeo*, edita dalla Giappichelli[20].

Merita poi ricordare che alcune tra le opere fondamentali del nostro diritto amministrativo recente contengono un capitolo di analisi comparatistica. Così, la *Giustizia amministrativa* di Mario Nigro, pubblicato per i tipi de Il Mulino in numerose edizioni anche dopo la morte dell'Autore, contiene un capitolo su "Le varie esperienze di giustizia amministrativa". Analogamente, il *Diritto amministrativo generale*, parte del *Trattato di diritto amministrativo* curato da Sabino Cassese per l'editore Giuffré e giunto alla seconda

[18] Gli esempi sono relativamente numerosi e diversificati (ad es., talvolta l'interesse è sulla giurisprudenza, altra sui profili normativi ed ordinamentali): tra questi vengono in mente a chi scrive S. MIRATE, *Giustizia amministrativa e Convenzione europea dei diritti dell'Uomo. L'altro diritto europeo in Italia, Francia e Inghilterra*, Napoli, Jovine, 2007; R. CARANTA, *La responsabilità extracontrattuale della pubblica amministrazione. Sistemi e tecnihe*, Milano, Giuffrè, 2003, R. FERRARA, *Contributo allo studio della tutela del consumatore. Profili pubblicistici*, Milano, Giuffrè, 1983.

[19] Anche qui relativamente numerosi: si ricordano ad es. B. MARCHETTI, *Pubblica amministrazione e corti negli Stati Uniti. Il* Judicial Review *sulle* Administrative Agencies, CEDAM, Padova, 2005, e P. CHIRULLI, *Attività amministrativa e sindacato giurisdizionale in Gran Bretagna. Dal* locus standi *alla* justiciability, Torino,Giappichelli, 1996

[20] www.dpce.it

edizione nel 2003, è aperto da un lungo capitolo del Curatore dedicato a "La ricostruzione del diritto amministrativo: Francia e Regno unito".

Un ruolo nella diffusione della conoscenza del (e dell'interesse per il) diritto altro è poi svolto dalle traduzioni. La collana "Civiltà del diritto" dell'editore Giuffrè offrì tra le molte traduzioni quella del *Diritto pubblico* di C.F. Gerber (1971). Opere di diritto amministrativo sono tradotte nella più recente collana dello stesso editore "Giuristi stranieri di oggi" (ad es. E. GARCÍA DE ENTERRÍA, *Le trasformazioni della giustizia amministrativa*, 2010; D.J. GALLIGAN, *La discrezionalità amministrativa*, 1999). Anche qui, la presenza di testi di diritto amministrativo è comunque ampiamente minoritaria rispetto sia al diritto civile che a quello costituzionale.

Altre traduzioni sono pubblicate "fuori collana", e non solo nelle riviste, come il recente J.L. SILICANI, *Libro bianco sull'avvenire dei funzionari pubblici : per la Francia del domani*, con prefazione all'edizione italiana e traduzione a cura di Roberto Cavallo Perin e Barbara Gagliardi; annotazioni a cura di Barbara Gagliardi e Barbara Pallisco[21].

5. CONCLUSIONI

Rispetto al passato anche non troppo lontano, il panorama del diritto amministrativo comparato in Italia si è senz'altro arricchito, anche se è dubbio che il metodo comparato sia ormai accettato come un metodo di studio del nostro settore del diritto *au pair* con gli altri.

Nel frattempo, il contesto è cambiato, almeno in Europa. La conoscenza del diritto altro non si muove solo più tra l'alternativa della conoscenza pura e della individuazione di modelli ed istituti da trapiantare nel diritto domestico. Il diritto comparato serve per

[21] Napoli, Jovene, 2011.

costruire i diritti dell'Europa, quello dell'Unione europea e quello della Convenzione europea dei diritti dell'Uomo[22].

Un'iniziativa in questo senso, che vede una folta partecipazione di torinesi, è l'*European Procurement Law Group*, che si riunisce una volta l'anno e pubblica poi gli atti degli incontri[23].

[22] Si vedano, oltre a S. MIRATE, *Giustizia amministrativa e Convenzione europea dei diritti dell'Uomo*, cit., R. CARANTA, *Pleading for European Comparative Administrative Law: What is the Place for Comparative Law in Europe?*, in K.J. DE GRAAF, J.H. JANS, A. PRECHAL, R.J.G.M. WIDDERSHOVEN (edds.) *European Administrative Law: Top-Down and Bottom-Up*, Groningen, Europa Law Publishing, 2009, 155; M.E. COMBA, *L'esecuzione delle opere pubbliche, con cenni di diritto comparato*, in F.G. SCOCA, F.A. ROVERSI MONACO, G. MORBIDELLI, *Sistema del diritto amministrativo italiano*, Torino, Giappichelli, 2011,

[23] Pubblicati sin'ora S. TREUMER – F. LICHÈRE (edds) *Enforcement of the EU Public Procurement Rules*, Copenhagen, DJØF, 2011; R. CARANTA and M. TRYBUS (edds.) *The Law of Green and Social Procurements in Europe*, Copenhagen, DJØF, 2010; M. COMBA and S. TREUMER (edds.), *The In-House Providing in European Law*, Copenhagen, DJØF, 2010.

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THE PRESENT SITUATION OF COMPARATIVE ADMINISTRATIVE LAW IN ITALY

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Prof. Roberto CARANTA

INDEX

1. SOME HISTORY

A deeply rooted misconception has it that administrative law is the result of the specific ways the government of any State is organised. As such, comparison between the administrative law of different States would not be possible.

This stance implies that the different ways the government of different States is organised cannot be compared. The opposite is obviously true: comparative constitutional

law focuses among other things on the different forms of government. Moreover, modern western democracies are close enough to make comparison not only possible, but quite meaningful with a view to seek best practices for possible imitation and transplant.

Actually, the readiness to learn from our neighbours was one of the key features in the formative era of Italian administrative law. When the Parliament of new Italy debated the reform of judicial review which was to become law in 1865, constant reference was had to the experiences of other European countries, notably France and Belgium[1]. French administrative law was generally well known in Italy during all the second half of the XIX century. And as a leading scholar as Federico Cammeo was interested to US administrative law[2].

To try and understand how the misconception declaring administrative law not comparable arose, one could assume that it was one of the consequences of the Fascist dictatorship. Indeed, under the dictatorship, Italy broke up with the tradition of the western democracies. Filo-fascist scholars underlined the (assumed) superiority of the new institutional arrangement over democratic institutions. This is by itself a comparative assessment, but is chauvinist in nature and in no way encourages scientific comparison (which could easily dismiss the accuracy of the assessment).

Even then, Italian scholars stayed true to the teachings of Vittorio Emanuele Orlando and kept alive their interest for German scholarly works. This however falls well short of true legal comparison. The aim was to build purer and purer legal theories which in

[1] See A. ANGELETTI, *Le origini del sistema di giustizia amministrativa*, in R. CARANTA (dir.), *Il nuovo processo amministrativo*, Torino, Zanichelli, 2011, 25 ss.

[2] F. CAMMEO, *Il diritto amministrativo degli Stati Uniti d'America*, in *Giur. it.*, 1895, IV, c. 81.

principle should hold true everywhere and in any time. In time, even this very limited opening to the outside world closed shut[3].

One could wonder why a misconception born in a very specific institutional environment survived well after the demise of the dictatorship. One reason is probably the inherent traditionalism of an academic system based on schools, where the younger generation sees as its duty to walk the footsteps of the older one. An even stronger reason might have been the strongly conceptual approach which characterised until recently Italian administrative law: such an approach is facts insensitive and does not investigate the law in action. This of course dims interest on how law is in different jurisdictions.

The point is that until the '80s of the past century comparative research was very marginal in Italian administrative law. However, the strengthening of European integration made cultural insulation impossible.

This first report is devoted to investigate the paths, the themes and the works of Italian comparative administrative law.

[3] With a few relevant exceptions, such as A. MASUCCI, *Trasformazione dell'amministrazione e moduli convenzionali : il contratto di diritto pubblico*, Napoli, Jovene, 1988; ID., *La legge tedesca sul processo amministrativo*, Milano, Giuffrè, 1991 (dello stesso Autore anche *Il processo amministrativo in Francia*, Milano, Giuffrè, 1995); S. COGNETTI, *La tutela delle situazioni soggettive tra procedimento e processo : le esperienze di pianificazione urbanistica in Italia e in Germania*, Napoli, ESI, 1987; ID., *Profili sostanziali della legalità amministrativa : indeterminatezza della norma e limiti della discrezionalità*, Milano, Giuffrè, 1993; ID., *Principio di proporzionalità : profili di teoria generale e di analisi sistematica*, Torino, Giappichelli, 2011; D. DE PRETIS, *Valutazione amministrativa e discrezionalità tecnica*, Padova, CEDAM, 1995.

2. PATHS

Comparison is better achieved through networks.

The *Association internationale de droit comparé*, made up by full and associate members, is by far the largest and widest network for comparative law. The *Association* is an umbrella association made up of national associations (the Associazione italiana di diritto comparato – AIDC in Italy). The *Association* meets every four years for a week long conference held in a different country. Each conference covers about twenty different themes, some of them quite general, the rest pertaining to different branches of law, with two facets of administrative law being normally addressed. For each theme, a *rapporteur général* is named well in advance, usually from among the full members of the *Association*. He/she drafts a questionnaire which is sent to the national reporters, who are chosen by the national associations. Proceeding are either in French or in English. Finally, the *Association* organises comparative law seminars for students.

During the past decades, a fair number of Italian administrative law scholars has participated to the conferences. Unlike the French, however, and unlike Italian private lawyers, the role of the Italian administrative lawyers is somewhat marginal, both in the ranks of the *Association*, in its boards and in those of the AIDC, and as general reporters.

This may be due to different reasons, among them the delay in embracing comparative law which was discussed above[4].

[4] As J. RIVERO 'Vers un droit commun européen: nouvelles perspectives en droit administratif' in M. CAPPELLETTI *New Perspectives for a Common Law in Europe – Nouvelles perspectives d'un droit commun en Europe* (Leyden et al., Sijthoff et al, 1978), 391, remarked «Il faut reconnoitre que le droit administrative a fait longtemps figure de parent pauvre dans le monde du droit comparé, et que les spécialistes du droit privé ont occupé, et occupant encore, le devant de la scène».

However, being marginal does not help in building commitment. Italian administrative lawyers may draft the report, but rarely show up at the international conference. This form of involvement hardly can be classed as doing comparative law. It is more drafting a report on Italian law in French or English.

More in general, there are questions on whether the structure of the *Association* is still optimal. It is very much a post-Westphalian type of organisation. The conferences see participants from all over the world, but the actual provenance of the national reporters for any given theme is left to the hazard, depending on whether there is a reporter available in any given jurisdiction: thematic workshops may see quite disparate participants; moreover, the regional dimension so relevant in today world (think of the EU) is simply missing. Too often the *rapporteurs généraux* struggle to chair meaningful comparative discussions going beyond the mere addition of information from more or less distant legal traditions to find out the paths of legal transplants and discuss best practices deserving imitation[5].

The *Association Capitant des Amis de la Culture Juridique Française* has similar limits even if taking part to the conferences it organises has the additional bonus of giving the chance to meet member of the *Conseil d'Etat*.

Inevitably, Italian administrative law scholars interested in comparison follow different paths beyond or rather instead taking parts to events organised by the two *Associations* mentioned.

Comparative research interests may be pursued on individual basis, possibly through participation to small informal ad hoc groups pursuing a common research interests. A few networks are however more structured, taking together scholars interested

[5] It is fair to say that at times time *rapporteur général* manages to collect the National reports in a good comparative law book: e.g. M. PAQUES (ed.), *Le principe de précaution en droit administratif. The Precautionary Principle and Administrative Law*, Bruxelles, Bruylant, 2007.

on comparative law and the effects of European integration upon national administrative law.

Among this, the PRIN research network led by Giandomenico Falcon from Trento University and seeing the participation of colleagues from other Universities, which organises conferences every two-three years and has to date published a number of comparative works[6].

A similar effort has been led by Guido Greco from Milan University on remedies in public procurements[7].

At European level the *European Public Law Organisation – EPLO* led by Spyridon Flogaitis from Athens brings together every year academics and high level practitioners at the end of the Spetzes summer school to investigates one or two relevant topics. Among its publications is a multilingual journal[8].

[6] Among them G. FALCON (cur.), *Il procedimento amministrativo nei diritti europei e nel diritto comunitario. Ricerche e tesi in discussione*, Padova, CEDAM, 2010; G. FALCON (cur.), *Il procedimento amministrativo nei diritti europei e nel diritto comunitario. Ricerche e tesi in discussione*, Padova, CEDAM, 2008; G. FALCON (cur.), *Il diritto amministrativo dei Paesi europei tra omogeneizzazione e diversità culturali*, Padova, CEDAM, 2005; R. CARANTA and A. GERBRANDY (edds), *Tradition and Change in European Administrative Law*, Groningen, Europa Law Publishing, 2011; A. MASSERA (cur.), *Forme e strumenti della tutela nei confronti dei provvedimenti amministrativi. Nel diritto italiano, comunitario e comparato*, Padova, CEDAM, 2010; D. CORLETTO (cur.), *Procedimenti di secondo grado e tutela dell'affidamento in Europa*, Padova, CEDAM, 2007.

[7] G. GRECO (cur.), *Il sistema della giustizia amministrativa negli appalti pubblici in Europa*, Milano, Giuffè, 2010.

[8] www.eplo.eu

More focused on publishing an *opus maior* on public law in Europe is *Jus Publicum Europaeum*; most participants to the network come from Italy and Germany[9].

Three bilateral administrative law groups have Italian and, respectively, German, French, and Spanish members. In principle each group meets every two years, rotating between Italy and the corresponding country, to discuss one or more topics of common interest, besides providing information on the evolution of national administrative law. The proceedings of each group are bilingual, which nowadays gives rise to some difficulties within the Italian-German group.

The *Dornburg Research Group on New Administrative Law* led by Matthias Ruffert from Jena University has a German, French and English core, and scholars from other countries, Italy included, take part to its meetings held every two years. The working language today is English only[10].

A number of thematic networks see the participation of many Italian scholars: among them *Public Contracts in Legal Globalization (PCLG) - Contrats Publics dans la Globalisation Juridique (CPGJ)*, led by French and German scholars but working in French and English; it meets every twice a year to work on different topics which are end up in a

[9] A. VON BOGDANDY, S. CASSESE, P.M. HUBER (hrg), *Handbuch Jus Publicum Europ**(a)**eum*, Band III, Müller, Heidelberg, 2010.

[10] See the proceedings: M. RUFFERT (ED), *Legitimacy in European Administrative Law: Reform and Reconstruction*, Groningen, Europa Law Publishing, 2011; M. RUFFERT (ED), *The Public-Private Law Divide: Potential for Transformation?*, London, BIICL, 2009; M. RUFFERT (ED), *The Transformation of Administrative Law in Europe / La mutation du droit administratif en Europe*, München Sellier, 2007.

number of volumes[11]. On the same subject the *Procurement Law Academic Network* is more devoted to the organisation of large conferences and as an informal contact point[12].

Jus Publicum complements the above mentioned initiatives as a network of networks with a 360 degrees coverage of the different facets of administrative law; it also acts as a network of thematic journals.

The European stage is no more the only one relevant for Italian academics working in administrative law. Every year in Viterbo an important international seminar is organised by *Global Administrative Law – GAL* group. The seminar follows the modern international scholarly standard procedure based on calls for papers and panel discussions. GAL is linked to the *Global Administrative Law Project* of the New York University, which in turn organises further meetings[13].

Also global but not necessarily comparative is the much older *International Institute of Administrative Sciences – Institut International des Sciences Administratives*. It is a quite structured organisation, whose mandate goes beyond law and extends to all sciences studying public administration. Inevitably quite often it ends up doing comparative law research[14].

[11] http://public-contracts.eu ; già pubblicato R. NOGUELLOU U. – STELKENS (eds.) *Droit comparé des contrats publics. Comparative Law on Public Contracts*, Bruxelles, Bruylant, 2010.

[12] www.planpublicprocurement.org

[13] http://www.iilj.org/GAL/default.asp

[14] www.iias-iisa.org

3. THEMES

The above analysis has somewhat anticipated the themes of comparative research. However many more themes are thought to have benefited from some comparative analysis in this or that event, which is impossible to say missing a database of the initiatives in the country.

All administrative law may indeed benefit from comparative analysis, including the more general topics, such as the organisation (for which the contribution from other administrative sciences is relevant too), and judicial review and remedies, including tort liability. The same holds true with modern topics such as markets regulation and independent administrative authorities[15].

The evolution of European integration has helped focusing the research on topics such as the role of public administrations in implementing and executing EU law, the administrative proceedings involving both national and EU authorities, and public contracts[16].

4. WORKS

The comparative administrative law works published in Italy of by Italian scholars are very much linked to the research interests of their authors; they are often linked to the

[15] P. CHIRULLI e R. MICCÙ (curr.), *Il modello europeo di regolazione. Atti della giornata di studio in memoria di Salvatore Cattaneo*, Napoli, Jovene, 2011.

[16] Ad es. B. MARCHETTI (cur.), *L'amministrazione comunitaria. Caratteri, accountability e sindacato giurisdizionale*, Padova, CEDAM, 2009; E. FERRARI, M. RAMAJOLI, M. SICA (curr.), *Il ruolo del giudice di fronte alle decisioni amministrative per il funzionamento dei mercati*, Torino, Giappichelli, 2006.

participation to some of the networks mentioned. Here it is enough to recall some of the works having a wider scope.

First deserving mentioning the is the series *Studi di diritto pubblico comparato* edited by Franco Levi with UTET from 1971 to 1979; among the books which were published three focuses on administrative law: *La tutela del paesaggio*, edited by Levi himself (1979), *La responsabilità della pubblica amministrazione*, edited by Eugenio Cannada Bartoli (1976), and *Il controllo giurisdizionale della pubblica amministrazione*, edited by Aldo Piras (1971).

The series was probably very advanced for the times and was cut short by the untimely death of one of the less conventional among the leading figures in Turin administrative law.

More than a decade went by before Marco D'Alberti, *Diritto amministrativo comparato. Trasformazioni dei sistemi amministrativi in Francia, Gran Bretagna, Stati Uniti, Italia*, was published by Il Mulino in 1992 (but never reprinted). The two already recalled books by Alfonso Masucci from the same period represent the beginning of a work on comparative administrative judicial review[17].

In 2007 Giulio Napolitano edited *Diritto amministrativo comparato* as a volume in the series *Corso di diritto amministrativo* edited by Sabino Cassese with the Giuffré publishing house; the book is divided in seven chapter: *I grandi sistemi del diritto amministrativo*, written by the editor, *L'organizzazione*, by Lorenzo Casini and Edoardo Chiti, *Il procedimento*, by Stefano Battini, Bernardo Giorgio Mattarella and Aldo Sandulli, *L'attività contrattuale*, by Alberto Massera, *La responsabilità della pubblica amministrazione*, by Luisa Torchia, *La giustizia amministrativa*, by Daria De Pretis, and *I fattori sovranazionali e internazionali di convergenza*, by Giacinto della Cananea.

[17] Above fn. 3.

Foreign law is also at the centre of books which are either comparative in the sense that a number of jurisdictions are covered, Italy normally included,[18], or focuses on a country different from Italy[19].

A number of Italian administrative or public law journals also publish comparative articles and other contributions analysing foreign law: among them the *Rivista trimestrale di diritto pubblico* and *Diritto pubblico*; others journals do the same on a more exceptional base; *Diritto pubblico comparato ed europeo*, published by Giappichelli, has comparative law as one of its main focuses[20].

Some of the most recent major works on Italian administrative law have comparative chapters. *Giustizia amministrativa* by Mario Nigro, published by Il Mulino and having gone through a number of editions has a chapter on "Le varie esperienze di giustizia amministrativa" (Different approaches to the judicial review of administrative action). *Diritto amministrativo generale*, the first two tomes of *Trattato di diritto amministrativo* edited by Sabino Cassese and published by Giuffré (the 2nd edition was published in 2003), begins with a long comparative chapter penned by the editor on "La

[18] Examples are numerous and quite disparate, sometimes focusing on the case law, other on the statutory provisions, other again on the general structure of the legal system investigated; among them, the first coming to my mind are S. MIRATE, *Giustizia amministrativa e Convenzione europea dei diritti dell'Uomo. L'altro diritto europeo in Italia, Francia e Inghilterra*, Napoli, Jovine, 2007; R. CARANTA, *La responsabilità extracontrattuale della pubblica amministrazione. Sistemi e tecnihe*, Milano, Giuffrè, 2003, R. FERRARA, *Contributo allo studio della tutela del consumatore. Profili pubblicistici*, Milano, Giuffrè, 1983.

[19] Here again there are numerous instances: among them B. MARCHETTI, *Pubblica amministrazione e corti negli Stati Uniti. Il* Judicial Review *sulle* Administrative Agencies, CEDAM, Padova, 2005, and P. CHIRULLI, *Attività amministrativa e sindacato giurisdizionale in Gran Bretagna. Dal* locus standi *alla* justiciability, Torino, Giappichelli, 1996.

[20] www.dpce.it

ricostruzione del diritto amministrativo: Francia e Regno unito" (Building administrative law: France and United Kingdom).

Translations help in spreading the knowledge of and the interest in administrative law beyond our borders. The series "Civiltà del diritto" (The Civilisation of Law) again published by Giuffrè included a large number of translations, among them the *Diritto pubblico* by C.F. Gerber (1971). More recently, a number of works have been translated in the newer series by the same publisher "Giuristi stranieri di oggi" (Foreign Modern Legal Thinkers) (e.g. E. GARCÍA DE ENTERRÍA, *Le trasformazioni della giustizia amministrativa*, 2010; D.J. GALLIGAN, *La discrezionalità amministrativa*, 1999). Here again however civil and constitutional law books much outnumber administrative law ones.

More translations are published outside these series, including books, such as recently J.L. SILICANI, *Libro bianco sull'avvenire dei funzionari pubblici : per la Francia del domani*, with preface to the Italian edition and translation by Roberto Cavallo Perin and Barbara Gagliardi and notes by Barbara Gagliardi e Barbara Pallisco[21].

5. CONCLUSIONS

Comparative administrative law in Italy has much grown in a relatively short timeframe. It is however doubtful whether the comparative approach has been fully accepted as a research method on the same standing as dogmatic works investigating the Italian scholarly tradition.

In the meantime, at least in Europe the context has much changed. The potential relevance of the knowledge of foreign law is no more limited to a purely cultural dimension or to the search for best practices. Comparative law is instrumental in building law in

[21] Napoli, Jovene, 2011.

Europe, both within the European Union and with reference to the European Convention of Human Law[22].

In this framework, one initiative which sees the active involvement of many academics from Turin University is the *European Procurement Law Group*, which meets once every year and whose proceedings are regularly published[23].

[22] See, besides S. MIRATE, *Giustizia amministrativa e Convenzione europea dei diritti dell'Uomo*, cit., R. CARANTA, *Pleading for European Comparative Administrative Law: What is the Place for Comparative Law in Europe?*, in K.J. DE GRAAF, J.H. JANS, A. PRECHAL, R.J.G.M. WIDDERSHOVEN (edds.) *European Administrative Law: Top-Down and Bottom-Up*, Groningen, Europa Law Publishing, 2009, 155; M.E. COMBA, *L'esecuzione delle opere pubbliche, con cenni di diritto comparato*, in F.G. SCOCA, F.A. ROVERSI MONACO, G. MORBIDELLI, *Sistema del diritto amministrativo italiano*, Torino, Giappichelli, 2011,

[23] See S. TREUMER – F. LICHÈRE (edds) *Enforcement of the EU Public Procurement Rules*, Copenhagen, DJØF, 2011; R. CARANTA and M. TRYBUS (edds.) *The Law of Green and Social Procurements in Europe*, Copenhagen, DJØF, 2010; M. COMBA and S. TREUMER (edds.), *The In-House Providing in European Law*, Copenhagen, DJØF, 2010.

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THE PUBLIC-PRIVATE LAW DIVIDE

ANNUAL REPORT - 2010 - GERMANY

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1. BASIC PRINCIPLES OF THE PUBLIC-PRIVATE LAW DIVIDE IN GERMANY

Coming from the civil law tradition, the German legal system is well acquainted with the public-private law divide. On a preliminary note, it is useful to state that in the German legal order the administration can be subject to private law rights and obligations ("Privatrechtsfähigkeit der Verwaltung"), while still being bound by competence rules and fundamental rights.[1] The actual division between public and private law in Germany – or better: the determination of the scope of application of either public or private law[2] – has been shaped mainly by legal evolution since the 19th century, evolution itself shaped by competence quarrels between the federation, competent for regulating private law, and the federal states (Länder), competent for legislation in public law matters. Furthermore, the question of the submission of public authorities' activities to public or private law has been intensely linked to the question of which regime is more effective in controling the administration and guaranteeing judicial protection to private parties.

[1] See Ulrich Stelkens, Verwaltungsprivatrecht, 2005, pp. 33 ff.

[2] The question of whether a specific legal provision is part of public law or private law is clear in most cases, see Martin Burgi, Rechtsregime, in: Wolfgang Hoffmann-Riem/Eberhard-Schmidt-Aßmann/Andreas Voßkuhle (eds.), Grundlagen des Verwaltungsrechts I, § 18 n° 18 ff.; Hartmut Maurer, Allgemeines Verwaltungsrecht, 18th ed. 2011, § 14 n° 17.

1.1 The origins of the public-private law divide from the turn of the 20th century[3]

Before the entry into force of the German Civil Code (Bürgerliches Gesetzbuch – BGB) on 1 January 1900 there was not "one" German civil law order, but several local civil law orders that persisted from the time before the foundation of the Reich in 1871. Nevertheless, in all German federal states, public authorities were treated like simple citizens when they performed actions that could also be performed by private parties. They were thus subjugated to private law and to the jurisdiction of the ordinary courts. This principle was considered a necessary condition to guarantee the rule of law and equality before the law, because it meant that public authorities had no special rights in the sense of privileges and that their actions could be submitted to judicial review.[4] Illustrations of this principle of the administration being bound by private law ("Privatrechtsbindung der Verwaltung") can be found in §§ 76 and 77 of the Common Law of Prussia of 1794 (Preußisches Allgemeines Landrecht), which stipulated that the State as a property owner shall not enjoy any more rights than a private property owner except if provided for by special statutes. Another example can be found in § 4 of the Introductory Act to the Code of Civil Procedure from 1877 (Gesetz betreffend die Einführung der Zivilprozeßordnung – EGZPO), which stipulates that the federal states cannot exempt private law disputes to which a public authority is a party from the jurisdiction of the ordinary courts. However,

[3] For a survey of this evolution see U. Stelkens (note 1), pp. 53 ff.; Jens-Peter Schneider, The Public-Private Law Divide in Germany, in Matthias Ruffert (ed.), The Public-Private Law Divide: Potential for Transformation, 2009, pp. 85 ff.

[4] « Fiscus iure privato utitur », cf. Julius Hatschek, Die rechtliche Stellung des Fiskus im Bürgerlichen Gesetzbuche, VerwArch 7 (1899), 424 ff.; Otto Mayer, Deutsches Verwaltungsrecht – Vol. I, 1st ed. 1895, pp. 53 ff. and 138; Otto Mayer, Zur Lehre des öffentlich-rechtlichen Vertrages, AöR III (1888), 1, 35.

despite this principle the local civil law orders allowed for many "fiscal privileges", i.e. provisions according particularly favourable conditions to public authorities in their civil law relationships, from a material as well as from a procedural point of view. An example is the principle according to which the State held the estates of the guarantors of its debtors as security in case of non-payment.[5]

When the BGB was drawn up, the federation, which – as mentioned – is competent for lawmaking in the domain of private law, wanted to abolish most fiscal privileges in order to guarantee the unity of the law and the citizens' legal certainty vis-à-vis the administration. Yet the legal relationships between the administration and citizens that were not comparable to relationships between private parties could not be regulated by the federation because they fell under administrative law, for which the federal states had legislative competence. Furthermore, the general "subjugation" of the administration to private law did not mean that private law had to apply in every case in which a relationship between the administration and a private party could theoretically be regulated by private law, e.g. concerning the use of public facilities. Hence, the codification of civil law by the Reich did not exclude the development of specific (administrative/public) legal provisions, even regarding public services.

In this context, the idea emerged that public authorities have the choice to submit such relationships either to public or to private law ("liberty of choice between public and private law"). However, this possibility was not introduced regarding procurement and the management of public estates, as it was deemed impossible to exempt the administration from its *private law obligations* in these fields.[6]

[5] See the decision of the Reichsgericht, 28.6.1881 – III 44/81 – RGZ 5, 136 ff.

[6] U. Stelkens (note 1), pp. 86 ff.; Johannes Masing, La poursuite d'intérêts publics à travers la participation directe des collectivités publiques aux activités économiques – Point de vue allemand, RUDH 2003, 107, 108 ff.

1.2 Inversion of perspectives since the entry into force of the Basic Law (Grundgesetz – GG)

The original reason for the subjugation of public authorities to private law in cases where they act in the same way as a private party could act – i.e. the desire to protect the rights of citizens by treating them on an equal footing as the administration – gradually sank into oblivion as the possibility to act through private law began to appear as a way for the administration to escape its specific *public law obligations*. Indeed, in the modern constitutional order that has been built up since World War II, the public law regime for administrative activities no longer only implies that the administration enjoys specific rights, in the sense of privileges, but also that it is subject to special *public law obligations*, primarily deriving from the fundamental rights granted by the Basic Law, e.g. the obligation to ensure equal treatment and non-discrimination to all citizens. Hence, the administrations' possibility to act through private law became discredited, seen as a way for the administration to "escape into private law" ("Flucht ins Privatrecht"), i.e. to escape from its public law obligations.[7]

Consequently, doctrine and jurisprudence tried to find ways to ensure the administration respected public law obligations during all administrative activities, even those performed through private law. The ordinary courts thus developed a kind of specific private law for the administration, called "Verwaltungsprivatrecht" ("administrative private law")[8], which allows for interpreting general civil law notions, e.g. "good faith" (§ 242

[7] "Flucht ins Privatrecht" ("Escape into private law"), famous expression coined by Fritz Fleiner, Institutionen des Deutschen Verwaltungsrechts, 8th ed. 1928, p. 326.; see also Walter Jellinek, Verwaltungsrecht, 3rd ed. 1931 (supplementary print 1948), pp. 25 ff.; Masing (note 6), 109 ff.

[8] This neologism, invented by Hans Julius Wolff (Verwaltungsrecht I, 1st ed. 1956, p. 73), is nowadays commonly used.

BGB), "public policy" (§ 138 BGB) or "statutory prohibition" (§ 134 BGB), in such a way that the specific public law obligations of the administration can be taken into account. This means, for example, that a private law contract to which the administration is a party can be declared void because its object is contrary to the public law obligations of the administration, such as the principle of equality before the law or the principle of accountability in public budget management.[9] Interestingly, despite in principle being intended to protect private parties, this situation does not always turn out to be advantageous for the private party involved in a concrete case. The principle of the administration being bound by its public law obligations has gradually been recognized for all administrative activities, even for those that had previously been considered as "secondary", i.e. serving only indirectly the "primary" administrative tasks by providing means for the proper functioning of administrative services (procurement or management of public assets). Today, the public-private law divide in Germany is strongly influenced by this "administrative private law", in such a way that the border between public and private law has become blurred.

2. Specific Problems raised by the Public-Private Law Divide in Germany

The problems raised by the public-private law divide in the German legal order can be illustrated by some concrete examples concerning legally founded claims against and entitelements of the administration (2.1), state liability (2.2), contractually founded claims against and entitlements of the administration (2.3), and public sector labour law (2.4).

[9] See for example BGH (Bundesgerichtshof – Federal Court of Justice), 25.1.2006 – VIII ZR 398/03 – nos 26 ff. (www.bundesgerichtshof.de).

2.1 Statutory claims against and entitlements of the administration

The administration can be the object of claims based on private law obligations, just as it can be entitled to sue private parties with claims based on private law obligations.

2.1.1 Statutory claims against the administration[10]

Concerning the administrations' liability to be sued, the border between the application of public and private law is very difficult to draw. When revendications for unjustified enrichment are concerned, the border between public and private law has been quite clearly determined by case law. The applicable law depends on the nature of the presumed obligation of the claimant.[11] On the other hand, the case law concerning prohibitory actions and the related claims for compensation is completely incoherent.[12] The courts often use the same argumentation patterns and yet come to different solutions. The situtation is even worse concerning the border between public state liability law and private indemnity law (see infra 2.2). Furthermore, the scope of private law regulation is disputed regarding the recovery of expenditure related to management without mandate.[13]

[10] See on this point U. Stelkens (note 1), pp. 452 ff.

[11] See Fritz Ossenbühl, Staatshaftungsrecht, 5th ed. 1998, pp. 415 ff.

[12] See the analysis of the case law by U. Stelkens (note 1), pp. 465 ff. and Christoph Althammer/Christian Zieglmeier, Der Rechtsweg bei Beeinträchtigungen Privater durch die kommunale Daseinsvorsorge bzw. erwerbswirtschaftliches Handeln der öffentlichen Hand, DVBl. 2006, 810 ff.

[13] See e.g. the analysis of the case law by Friedrich Schoch, Geschäftsführung ohne Auftrag im öffentlichen Recht, Die Verwaltung 38 (2005), 91 ff.

2.1.2 Statutory entitlements of the administration[14]

Concerning the administrations' capacity to sue, the situation is the following: as the administration has the capacitiy to act under private law, it is entitled to sue private parties for private law statutory obligations if the conditions for the application of these rules are met and if there are no conflicting public law rules.[15] Yet, as the situations in which the administration is entitled to sue private parties for private law obligations are very heterogeneous, there is no general principle or solution. Fields in which the question arises about whether the administration is entitled to sue for private law obligations include unjustified enrichment; prohibitory actions for preventing violations of absolute rights, property rights, and competition rules; compensation; and recovery of expenditure.

2.2 State liability[16]

In the field of state liability, the German public-private law divide is especially complicated. Indeed, German state liability law consists of a mix of rules of different natures, including constitutional as well as statutory dispositions at the level of both the federation and the federal states, and comprising both public and private legal provisions

[14] See on this point U. Stelkens (note 1), pp. 573 ff.

[15] See the general remarks of BVerfG, 22.02.2011 – 1 BvR 699/06 – nos 79 ff. (www.bverfg.de)

[16] For an overhead study see Ulrich Stelkens, Le développement de la responsabilité administrative en droit allemand, 2009, contribution to the workshop series "Comparative, European and Global Public Law" of the Governance and Public Law Center (Chaire "Mutations de l'Action Publique et du Droit Public"), Sciences Po Paris, available at http://chairemadp.sciences-po.fr/pdf/seminaires/2009/Contribution_Ulrich_Stelkens_nov_09.pdf.

and lots of case law. Furthermore, European law, deriving from both the "Frankovich" case law of the European Court of Justice and the dispositions of the European Convention on Human Rights, are superimposed on all this. Fritz Ossenbühl, the leading scholar of state liability law in Germany, has stated that German state liability law is not based on a complete and materially coherent system, but is the result of a century-long chaotic evolution which has led to contemporary contradictions and incongruities.[17] The majority of the discipline shares this view and has called for reforms, but these are very difficult to carry out and politically contentious.

Yet theoretically, concerning damages caused by the administration, the border between the application of public state liability law and private indemnity law is normally drawn in such a way that state liability law applies when the administration causes damages while violating its public law obligations and private indemnity law applies when the administration causes damages while violating its private law obligations. Indeed, the principle is that when the administration acts in the same way that a private party could act, damages should be granted according to private law principles, whereas when the administration acts by means of public law in a way that private parties cannot act (e.g. by issuing an administrative act), damages should be granted according to specific public law principles.

Nevertheless, this apparently clear distinction can raise problems in practice, which can be illustrated by the example of liability for traffic accidents. Article 77 of the Introductory Act to the German Civil Code from 1896 (Einführungsgesetz zum Bürgerlichen Gesetzbuche – EGBGB) and Article 131 of the Weimar Constitution from 1919 – dispositions that were important for the development of state liability law in Germany – use the notion of "public force" to define the domain in which state liability applies. The case law deduced from these dispositions that the army and police forces, even when just using the roads, always exert public force vis-à-vis third parties, probably

[17] Ossenbühl (note 11), p. 438.

because in the early 20th century the idea of army forces just using the roads like simple citizens was difficult to conceive. Subsequently, the case law has developed quite peculiar criteria to determine in which cases the administration exerts public force when in road traffic.[18] Yet to grant equality to all participants in road traffic, the courts also apply special legislation directly addressing the matter of traffic accidents, which leads to a barely comprehensible mix of private and public law.[19] This example shows that part of the imbroglio of state liability law in Germany is due to the fact that no convincing criteria have been established to distinguish between cases in which the administration is responsible according to common private indemnity law and cases in which state liability law applies.

[18] In a case concerning an accident caused by a carriage of the mail services of the Reich, for example (Reichsgericht, 20.11.1924 – IV 314/24 – RGZ 109, 209 ff.), the Reichsgericht examined the question of whether a postillion who drives such a carriage exerts public force by doing so. They came to the conclusion that even if the mail services serve public ends, this does not imply that all civil servants carrying out these services exert public force. Hence, the clearing of post boxes or the sorting of mail would definitely not imply the exertion of public force, and neither would the transport of mail. Thus the notion of the exertion of public force was found to be inapplicable in the case of the aforementioned postillion. On this case and more cases on the matter Stelkens (note 1), pp. 534 ff.

[19] See the cases analysed by Stelkens (note 1), pp. 545 ff.

2.3 Public Contracts[20]

Public contracts – in the sense of contracts concluded by public entities, regardless of whether they are submitted to a public or private law regime[21] – are another field where the public-private law divide is not very clear in German law, which can be illustrated by the example of procurement contracts.[22] On a preliminary note, it must be stated that in German law there is no overarching special regime granting specific powers to the contracting public entities, such as exists in French administrative law.[23] On the contrary, for contracts concluded by the German administration, submission to private law is the rule whereas submission to public law constitutes the exception.[24] Thus, the German "public law contract" ("öffentlich-rechtlicher Vertrag"), codified in Article 54 ff. of the Administrative Procedure Act (Verwaltungsverfahrensgesetz – VwVfG), is not conceived of as being a means for procurement or similar contracts but as an alternative to the issuing

[20] For an overview see Ulrich Stelkens/Hanna Schröder, Allemagne/Germany, in Rozen Noguellou/Ulrich Stelkens (eds.), Droit comparé des Contrats Publics – Comparative Law on Public Contracts, 2010, pp. 307 ff., esp. pp. 313 ff.; Hanna Schröder, Le marché public – contrat de droit privé en Allemagne, Droit et Ville n° 70/2010, 221 ff.

[21] See on this definition Rozen Noguellou/Ulrich Stelkens, Propos introductifs/Introduction, in Noguellou/Stelkens (note 20), pp. 5 f.

[22] On the general question of the public or private law nature of public contracts in the German legal order see Stelkens/Schröder (note 20), pp. 320 ff.

[23] See on this point Johannes Masing, Les prérogatives de contrôle exercées par l'administration relativement à l'exécution des marchés publics en Allemagne, in Gérard Marcou et. al. (eds.), Le contrôle des marchés publics, 2009, pp. 311 ff.

[24] See further Michel Fromont, Droit administratif des États européens, 2006, pp. 313 ff.

of administrative decisions, especially in cases in which preexisting public law relationships are to be modified. The classic example of such a public law contract is a contract concluded between the administration and a construction firm by which the latter is exempted of their statutory obligation to construct parking places if in exchange they participate in the financing of public parking areas.[25]

Meanwhile, procurement contracts are ordinary private law contracts that do not imply any specific powers for the contracting public entity unless provided for by the contractual clauses.[26] Traditionally, this meant that the whole procurement process was submitted to private law, also concerning the rights of competitors related to the award procedure. Indeed, the rules to be respected by the contracting public entities concerned only public budget management and did not confer any rights to competing actors. However, due to the impact of European Union procurement law, this conception had to be totally modified,[27] as EU directives require the Member States to grant enforceable rights of equal treatment and transparency to competing actors in the procurement process. Initially, in Germany it was not clear whether the federation could intervene in the domain of contracts concluded by the administrative entities of the Länder given that administrative procedure law falls under the competences of the latter.[28] Nonetheless, the federation, supported in this matter by the Federal Constitutional Court (Bundesverfassungsgericht –

[25] See for example Maurer (note 2), § 14 n° 12 ff.

[26] See further Schröder (note 20); Masing (note 23).

[27] See on this evolution Peter M. Huber, The Europeanization of Public Procurement in Germany, EPL 7 (2001), 33 ff.

[28] See Hans-Ullrich Gallwas, Verfassungsrechtliche Kompetenzregelungen – ungelöste Probleme des Vergaberechts, VergabeR 2001, 2 ff.; Huber (note 27), 37.

BverfG)[29], justified its competence pursuant to economic law and transposed the directives in the Anti-Trust Code (Act Against Restraints of Competition, Gesetz gegen Wettbewerbsbeschränkungen – GWB)[30]. Since 1998, §§ 97 ff. GWB regulate the award of procurement contracts and establish a special review procedure for aggrieved bidders.[31] Nevertheless, the transposition of the directives has been carried out in a minimalistic fashion, in such a way that outside the scope of the directives the procurement process still falls under private contract law and claims have to be brought to the ordinary courts, who in principle do not grant primary judicial protection to aggrieved bidders pursuant to the right of equal treatment and transparency, but may only grant damages according to the principle of *culpa in contrahendo*. This leads to a complete disjuncture in procurement law according to whether a contract falls under the scope of the EU directives or not. This situation is highly criticised in legal doctrine and administrative courts, which hold that the procedural rules for the award of procurement contracts are administrative procedure rules that should be enforced by administrative courts even if the subsequent contract is a private law contract. Yet the federal courts do not support this critique and approve of the current dichotomy in public procurement law. Firstly, the BVerfG decided that no constitutional provision requires the establishment of effective remedy in procurement matters outside the scope of the EU directives, even if the contracting public entity is bound by fundamental

[29] Bundesverfassungsgericht, 11.7.2006 – 1 BvL 4/00 – nos 56 ff. (www.bverfg.de) = BVerfGE 116, 202, 215 ff.

[30] Gesetz gegen Wettbewerbsbeschränkungen (Act Against Restraints of Competition) in its consolidated version of 15 July 2005 (BGBl. I P. 2114; 2009 I P. 3850), as last amended on 26 July 2011 (BGBl. I P. 1554) (http://www.gesetze-im-internet.de/gwb/, for the English version see http://www.gesetze-im-internet.de/englisch_gwb/index.html).

[31] See on this regulation and the following developments Hanna Schröder/Ulrich Stelkens, Le contentieux des contrats publics en Europe – Allemagne, RFDA 2011, 16 ff.

rights.[32] Secondly, the Federal Administrative Court (Bundesverwaltungsgericht – BVerwG) decided that because of the private law nature of procurement contracts procurement litigation falls under the jurisdiction of the ordinary courts.[33]

This situation exemplifies the problem with the articulation of concurrent public and private rules in German administrative law. Indeed, the rules on equal treatment and transparency during the award procedure of procurement contracts definitely are of a public law nature, in the sense that they establish special rules that are binding for public entities but do not exist for private contracting parties. These regulations cannot remain without implications for subsequent contracts, if only insofar as concerns the consequences in case of illegalities (does an infringement of these rules by the contracting public entity have any consequences for the subsequent contract?).[34] The integration of these rules into a private law regime thus appears problematic and leads to a mixture that is unsatisfactory from a practical as well as from a theoretical point of view.

2.4 Public sector labour law[35]

In Germany, public sector agents are either civil servants, which places them under a public law regime, or employed by way of private law contracts, which theoretically

[32] BVerfG, 13.6.2006 – 1 BvR 1160/03 – nos 50 ff. (www.bverfg.de) = BVerfGE 116, 135, 149 ff.

[33] BVerwG, 2.5.2007 – 6 B 10/07 – nos 6 ff. (www.bverwg.de) = BVerwGE 129, 9, 13 ff.

[34] See on this question ECJ, 10 April 2003, joint cases C-20/01 and C-28/01 (Bockhorn and Braunschweig I), no 36; ECJ, 18 July 2007, case C-503/04 (Bockhorn and Braunschweig II), nos 29 ff.; see further http://ec.europa.eu/internal_market/publicprocurement/infringements/cases/index_en.htm.

[35] See for an overview U. Stelkens (note 1), pp. 835 ff.

should place them under a private law regime. Yet the situation of these contractual agents is characterised by so many public law elements that it would be much easier to recognize their employment contracts as public law contracts, because their contracts can hardly be compared to "real" private law employment contracts. Indeed, it is difficult to integrate contractual agents on a private law basis into the administrative organisational structure, which is completely regulated by public law. Thus, it is not clear which criteria should determine the legal nature of measures taken by an administrative authority vis-à-vis its contractual agents, and in practice this blurs the boundary between public and private law and leads to a mixture of the two in this field.

3. CONCLUSION

This brief overview shows that the actual public-private law divide in Germany is characterised above all by an extreme interweaving of public and private law in the regulation of administrative activity. This is largely due to the historical evolution that was outlined in the first part of this paper, i.e. the fact that it was first (19th and early 20th century) preferred to submit as much administrative activity as possible to private law so as to guarantee judicial protection to private parties, whereas later (since the middle of the 20th century), public law elements were integrated into existing private law regulations. This process has been intensified by the Europeanisation of the regulation of public sector activities, as was illustrated by the example of public contracts. Nowadays, this superimposition of private and public rules gives rise more to auxiliary constructions rather than to theoretically satisfactory and practical solutions, clearly showing that a general theory capable of regulating the public-private law divide for all public sector activities is lacking. Thus, an alternative scientific approach has been developed that stresses the different functions of private law on the one side and public law on the other side[36] and considers public law and private law as "mutually supportive reciprocal models"

[36] See Burgi (note 2), § 18 n° 6 ff.

("wechselseitige Auffangordnungen").[37] However, it seems that this concept is not intended – and therefore not able – to contribute to the solution of specific questions of law.

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[37] See Wolfgang Hoffmann-Riem, Reform des allgemeinen Verwaltungsrechts – Vorüberlegungen, DVBl. 1994, 1381, 1386 f., Eberhard Schmidt-Aßmann, Das Allgemeine Verwaltungsrecht als Ordnungsidee, n° 6/28 ff. and the articles in Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann (eds.), Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen, 1996.

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