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FREEDOM OF RELIGION AND FREEDOM OF DEMONSTRATION DURING THE COVID-19 PANDEMIC: A COMPARATIVE ANALYSIS OF ADMINISTRATIVE CASE LAW IN FRANCE AND BELGIUM

Romain MERTENS[1]

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[1] Ph.D. researcher and teaching assistant at the Faculty of law of the University of Namur (Belgium).

1. INTRODUCTION

During the pandemic caused by the COVID-19, States have adopted several measures to curb the propagation of the virus. In Western Europe, the considerable number of cases and hospitalisations recorded in March triggered the enactment of rules intended to reduce physical contacts and break transmission chains. Many of these measures involved limitations of fundamental rights, namely the right to privacy and family life, the right to education, freedom of enterprise or freedom of movement[2]. This paper focuses on freedom of religion and freedom of demonstration. International and national provisions protect them.

In Belgium and France, public authorities adopted two similar measures. First, they decided to prohibit demonstrations, since gatherings were forbidden. Second, religious ceremonies were cancelled, except for weddings and funerals. As the paper shows, these injunctions were not (successfully) judicially challenged during the early stages of the pandemic. However, the progressive easing of the first lockdown changed the

[2] For a non-exhaustive list regarding Belgium, see: F. Bouhon et. al., 'L'État belge face à la pandémie de Covid-19 : esquisse d'un régime d'exception', *Courrier hebdomadaire du CRISP*, 2020/1, pp. 35-36.

circumstances. In France and Belgium, associations and individuals decided to contest these measures in front of the Council of State during the *'déconfinement'*. The Council of State is the supreme administrative court in each jurisdictional system. The review of acts adopted by administrative authorities is one of its essential prerogatives.

In France, the Council of State ruled in both cases that the restrictions to freedom of religion and freedom of demonstration were unconstitutional. The Belgian Council of State took a different stance: it rejected both claims and thus refused to suspend the prohibitions. This paper aims at analysing this contrasted jurisprudence during the COVID-19 pandemic. On the one hand, it compares the jurisprudence of the two high administrative courts to present their differences and similarities. On the other hand, it attempts to provide explanations for the different patterns of the jurisprudence. This requires studying the legal context in which the decisions are respectively pronounced. Besides, the paper scrutinises specific differences between the cases and the management of the pandemic in France and Belgium. Decisions pronounced during the second lockdown, at the end of 2020, are also briefly evoked.

This paper is structured as follows. First, the paper summarises the timing, facts, rules of procedures and decisions of the Council of State in both countries (2). Second, it compares the French and Belgian legal systems of fundamental rights protection (3). Third, it explores the case law of each Council of State and the characteristics of the cases to attempt to explain the different results reached by the two administrative courts (4). Final remarks close the paper and recapitulate the results of the analysis (5). In short, the paper underlines that no single factor can be isolated to explain the differences of case law between the two Councils of State. It is a combination of several elements, including the test of proportionality, factual differences or specific features of the system of protection of fundamental rights.

2. TIMING, FACTS, PROCEDURES AND DECISIONS

The first two sections introduce the timing of adoption of the contested measures (2.1.) and the specific facts of the cases (2.2.). The third section presents the rules of

procedure applicable in each country (2.3.). Then, the last section analyses the reasoning of the Council of State in France and Belgium, respectively (2.4.).

2.1. Timing

Before analysing these decisions, it is useful to provide a short overview of legal events that led to the adoption of the contested measures in each country. The paper will analyse further the legal bases of the measures adopted to fight the pandemic. This section recounts the succession of decrees adopted in France and Belgium to limit the propagation of the virus.

In France, the legal interventions of public authorities began on 4 March 2020. It is first the Minister of health who implemented several measures[3], namely about mass gatherings. They were completed on 14 March 2020[4]. Then, the Prime Minister got involved with a decree on 16 March 2020[5] enacting the lockdown. Following the adoption of the state of health emergency (see further), he enacted a new decree on 23 March 2020[6], with a comprehensive scope. The text changed on multiple occasions.

[3] Arrêté portant diverses mesures relatives à la lutte contre la propagation du virus covid-19, 4 March 2020.

[4] Arrêté du 14 mars 2020 portant diverses mesures relatives à la lutte contre la propagation du virus covid-19, 14 March 2020.

[5] Décret n° 2020-260 portant réglementation des déplacements dans le cadre de la lutte contre la propagation du virus covid-19, 26 March 2020.

[6] Décret n° 2020-293 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, 23 March 2020.

The Parliament extended the state of emergency on 11 May until 10 July[7]. Then, a new decree replaced the decree of 23 March 2020[8]. The procedure about religious ceremonies targeted this decree. On 31 May, the Prime Minister abrogated this decree and replaced it by a new one[9]. The decision concerning freedom of demonstration concerned this last decree. Other evolutions continued during the pandemic.

In Belgium, the ministerial decree (*arrêté ministériel*) of 13 March 2020 activated the 'federal phase'[10], which meant that the federal level managed the crisis. Consequently, the Minister of Interior had the competence to adopt measures at the national level to contain the crisis. He took the first decisions on the same day[11]. A new ministerial decree replaced them on 18 March 2020[12], which initiated the lockdown. Then, a new ministerial decree

[7]Loi n° 2020-546 prorogeant l'état d'urgence sanitaire et complétant ses dispositions, 11 May 2020.

[8] Décret n° 2020-548 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, 11 May 2020.

[9] Décret n° 2020-663 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, 31 May 2020.

[10] Arrêté ministériel portant le déclenchement de la phase fédérale concernant la coordination et la gestion de la crise coronavirus COVID-19, 13 March 2020.

[11] Arrêté ministériel portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 13 March 2020.

[12] Arrêté ministériel portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 18 March 2020.

was adopted on 23 March 2020[13], which clarified the rules. The Minister of Interior amended the decree on several occasions, namely on 30 April 2020, when the Government announced a strategy of *'déconfinement'*[14]. The decision about freedom of religion concerned this decree, as modified by a decree of 15 May 2020[15]. The Minister finally abrogated this decree at the end of June[16]. He enacted other ministerial decrees throughout the pandemic. In particular, it is worth underlining that French and Belgian authorities adopted several measures at the end of 2020 to curb a second epidemic wave.

2.2. Facts

After this short presentation of the legal context presiding to the health emergency, this section introduces the facts of the cases judged by the two Councils of State. The facts are similar in France and Belgium. The section exposes first the facts of the French cases, then the circumstances surrounding the Belgian decisions.

Based on the state of emergency above-mentioned, the French Prime Minister adopted a decree, stating that any public gathering or activity involving more than ten people for

[13] Arrêté ministériel portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 23 March 2020.

[14] Arrêté ministériel modifiant l'arrêté ministériel du 23 mars 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 30 April 2020.

[15] Arrêté ministériel modifiant l'arrêté ministériel du 23 mars 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 15 May 2020.

[16] Arrêté ministériel portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 30 June 2020.

non-professional reasons was forbidden[17]. The decree provided an exception for the gatherings and activities that were 'essential to the continuity of the nation's life'. Several unions and a human rights association asked the Council of State to suspend this decree because it did not provide an exception for 'demonstrations and gatherings aiming at the collective expression of ideas and opinions'[18]. At the time the Council of State decided on this legal challenge, several demonstrations were taking place against police violence and racism[19].

Concerning the prohibition of religious ceremonies, many individuals and Christian associations launched the procedure. The decree adopted on 11 May, replacing the decree from 23 March, provided that churches and other religious buildings might remain open, but that any gathering or meeting was forbidden, except for funerals[20].

In Belgium, a claimant who was part of a group called '*La santé en luttes'* composed of medical and administrative workers from health institutions initiated the proceedings against the prohibition of demonstrations. The group wished to organise on Sunday 14 June a demonstration of about 200-250 people in front of the federal ministry of health[21].

[17] Council of State (France), nr. 440846, 440856 and 441015, 13 June 2020, § 4.

[18] Council of State (France), nr. 440846, 440856 and 441015, 13 June 2020, § 5.

[19] Le Monde avec AFP, 'Le Conseil d'Etat rétablit la liberté de manifester, dans le respect des mesures barrières', *Le Monde*, 13 June 2020, https://www.lemonde.fr/societe/article/2020/06/13/le-conseil-d-etat-retablit-la-liberte-de-manifester-dans-le-respect-des-mesures-barrieres_6042766_3224.html, (accessed 29 October 2020).

[20] Council of State (France), nr. 440366 and others, 18 May 2020, § 22.

[21] Council of State (Belgium), nr. 247.790, 14 June 2020, § 3.

However, the police informed the claimant on Friday 12 June that the demonstration could not take place due to the measures adopted by the municipal authorities[22]. Following the guidelines of the federal Minister of Interior, the city of Brussels had decided not to allow the demonstration. At that time, the ministerial decree provided that no gathering involving more than twenty people was allowed. Demonstrations were thus forbidden in Belgium.

Concerning the cancellation of religious ceremonies, the Belgian claimants wanted to suspend (and cancel) article 3 of the ministerial decree of 23 March, as amended by the ministerial decree dating from 15 May[23]. This article forbade religious ceremonies and provided three exceptions: funerals, weddings and broadcasted ceremonies. In the first two situations, thirty people might attend the ceremony. In the latter, ten people were allowed, including the ones responsible for broadcasting. The prohibition was applicable from 18 May until 7 June. This article replaced article 5 of the ministerial decree of 23 March, which also prohibited religious ceremonies[24].

2.3. Two Councils of State, two sets of procedural rules

This section examines the procedural rules applicable to the legal challenges. In Belgium, the Council of State has the power to suspend the execution of an administrative act if two conditions are satisfied[25]. First, at least one argument must be serious enough to justify, at first sight, the annulment of the administrative act. This condition implies that the

[22] Council of State (Belgium), nr. 247.790, 14 June 2020, § 4.

[23] Arrêté ministériel modifiant l'arrêté ministériel du 23 mars 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 15 May 2020.

[24] Council of State (Belgium), nr. 247.674, 28 May 2020, § 3.

[25] Lois coordonnées sur le Conseil d'Etat, 12 January 1973, art. 17, § 1.

argument must seem admissible and display illegality that could lead to the cancellation of the act[26]. Second, there must be an emergency that is incompatible with the cancellation procedure. Two elements compose this condition[27]. On the one hand, the execution of the administrative act would cause the claimant damage of some gravity. On the other hand, the standard procedure would not prevent this damage from happening.

Under the procedure of *extreme* emergency, the law further requires that the claimant demonstrates that the emergency is such that it is incompatible with the processing time of a suspension procedure[28]. As underlined by Michel Leroy, 'the administrative referee constitutes a substantial progression of the rule of law'[29]. Thanks to this procedure, the Council of State can adopt decisions that have a practical impact in a short time.

Regarding the emergency, this condition replaced in 2014 the previous requirement of severe damage that is difficult to repair[30]. The emergency still implies the risk of damage, but it is not clear whether it should be severe enough or irreparable[31]. Additionally, the

[26] J. Jaumotte and E. Thibaut, *Le Conseil d'Etat de Belgique*, t. 2, Bruxelles, Bruylant, 2012, p. 1536.

[27] See for example: Council of State (Belgium), nr. 247.585, 19 May 2005.

[28] Lois coordonnées sur le Conseil d'Etat, 12 January 1973, art. 17, § 4.

[29] M. Leroy, *Contentieux administratif*, 5fth ed., Limal, Anthémis, 2011, p. 165.

[30] Loi portant réforme de la compétence, de la procédure et de l'organisation du Conseil d'État, 20 January 2014, art. 6.

[31] M. Vanderstraeten and F. Tulkens, 'Urgence, extrême urgence, mesures provisoires et balance des intérêts devant le Conseil d'Etat', in F. Viseur and J. Philippart (eds.), *La justice administrative*, Bruxelles, Larcier, 2015, pp. 138-139.

emergency condition is not fulfilled by the sole circumstance that the cancellation decision will intervene too late[32].

If the case meets these conditions, the suspension of the administrative act is not automatic. If the adverse party requests it, the Council of State must balance all competing interests to decide if the suspension would not cause more significant damage[33]. When the procedure is that of extreme emergency, the claimant must also demonstrate that he has acted diligently to prevent the damage from happening and to initiate the proceedings[34].

The organisation of administrative justice is different in France. In contrast to Belgium, there is a coherent hierarchical set of administrative jurisdictions, spearheaded by the Council of State. The Council of State judges only 20% of the cases in first instance, including the procedures against a decree[35]. It makes sense that the Council of State is competent and not a local administrative court of first instance with a limited territorial jurisdiction, considering the national scope of a decree[36]. Such text is also particularly critical since it emanates from the highest administrative authorities of the State.

[32] See for example: Council of State (Belgium), nr. 229.477, 8 December 2014; Council of State (Belgium), nr. 227.963, 2 July 2014.

[33] M. Leroy, *Contentieux administratif*, 5th ed., Limal, Anthémis, 2011, pp. 772-773.

[34] M. Leroy, *Contentieux administratif*, 5th ed., Limal, Anthémis, 2011, p. 791.

[35] J. Waline, *Droit administratif*, 22nd ed., Paris, Dalloz, 2008, p. 575. See also: Code de justice administrative, art. R. 311-1.

[36] P. Gonod, F. Melleray and P. Yolka, *Traité de droit administratif*, t. 2, Paris, Dalloz, 2011, p. 456.

Concerning the decisions analysed, the procedure used in front of the French Council of State is the '*référé liberté*'[37]. This procedure is available on three conditions: first, emergency justifies the action; second, a fundamental freedom is violated by a public legal person or by a private person in charge of a public service; third, the infringement is serious and illegal[38].

Therefore, the conditions governing the legal actions in France and Belgium are broadly similar. They share the requirement of emergency. The criterium of illegality seems stricter in France since the illegality must be manifest, while the Belgian procedure only requires illegality susceptible to lead a cancellation. Finally, the French administrative justice code requires a severe infringement of a fundamental right. In Belgium, any damage of enough gravity suffices.

2.4. The prohibition of demonstrations

Based on the facts and procedures described hereabove, this section exposes the reasoning of the French and Belgian Councils of State concerning freedom of demonstration. The section begins with the French case and follows with the Belgium one. While the French institution relies heavily on the proportionality test, the Belgian Council of State focuses on the emergency condition.

2.4.a. In France

As a foundation of its reasoning, the Council of State mentions that freedom of expression is a human right guaranteed by the Constitution and the European Convention of Human Rights. However, the State must conciliate it with the public order and the

[37] J. Waline, *Droit administratif*, 22nd ed., Paris, Dalloz, 2008, p. 631.

[38] Code de justice administrative, art. L. 521-2.

protection of health[39]. The Government brings forward two arguments to justify the prohibition of demonstrations. First, it would be complicated to enforce the physical distancing (*mesures barrières*) during demonstrations. Second, since the ban applies only to demonstrations involving more than ten people, and that the prefect (state representative at the local level) can provide derogations, the measure is not general or disproportionate[40].

The Council of State acknowledges that it may be more challenging to enforce the *mesures barrières* during demonstrations. However, it considers that nothing shows that a demonstration would be impossible everywhere in France, whichever form the demonstration may take[41]. Furthermore, the possibility of derogation has not been used, notwithstanding the numerous demonstrations held after the enactment of the ban[42]. Finally, demonstrations are in any case subject to a declaration system. The administrative authorities have the power to prohibit any demonstration that could disturb public order, which includes public health. According to the criminal code, any person participating in a

[39] Council of State (France), nr. 440846, 440856 and 441015, 13 June 2020, § 10. According to the Constitutional Council, the state of health emergency is linked to the objective of protection of health inscribed in the preamble to the Constitution of 1946. See: P. Rrapi, 'Le Préambule de la Constitution de 1946, fondement constitutionnel de l'état d'urgence', *La Revue des Droits de l'Homme*, 2020, http://journals.openedition.org/revdh/9466 (accessed 9 November 2020).

[40] Council of State (France), nr. 440846, 440856 and 441015, 13 June 2020, § 12.

[41] Council of State (France), nr. 440846, 440856 and 441015, 13 June 2020, §§ 13-14.

[42] Council of State (France), nr. 440846, 440856 and 441015, 13 June 2020, § 15.

forbidden demonstration can be fined (art. R-644-4). The Council of State considers thus that the ban is not necessary, not adequate and not proportionate[43].

As for the emergency requirement, the Council of State deems it fulfilled since several demonstrations were to occur in the days following the procedure[44].

2.4.b. In Belgium

As a reminder, the coordinated laws on the Council of State (*lois coordonnées sur le Conseil d'État)* require two elements to suspend the execution of an administrative decision under the emergency procedure. On the one hand, an emergency that is incompatible with the treatment of the case under the cancellation procedure. On the other hand, the claim must display at least one serious argument[45]. In the case at hand, the Council of State says that the claimant must show that the execution of the administrative act would cause inconveniences of such gravity that their consequences would be irreversible[46]. Besides, the emergency depends on the interests invoked by the claimant[47].

Furthermore, under the *extreme* emergency procedure, the claimant must demonstrate that the ordinary emergency procedure would be incompatible with the resolution of the case and that he has acted diligently to launch the procedure. In any case, the extreme emergency procedure must remain exceptional, since it severely diminishes the procedural

[43] Council of State (France), nr. 440846, 440856 and 441015, 13 June 2020, § 17.

[44] Council of State (France), nr. 440846, 440856 and 441015, 13 June 2020, § 18.

[45] Council of State (Belgium), nr. 247.790, 14 June 2020, § 10.

[46] Council of State (Belgium), nr. 247.790, 14 June 2020, § 11.

[47] Council of State (Belgium), nr. 247.790, 14 June 2020, § 11.

rights of the parties[48]. In the case at hand, the Council of State observes that the claimant introduced his action on 13 June. The claimant received the decision on 12 June, and the demonstration was supposed to occur on 14 June. It is therefore clear that the ordinary suspension procedure would not have intervened in due time[49].

Even if the inconveniences concern fundamental rights, the Council of State does not automatically consider them severe[50] , which is in line with its previous case law. Indeed, the claimant does not argue that the date chosen for the manifestation is of particular significance[51]. Moreover, the Council observes that the measures provided by the ministerial decree are applicable until 30 June, unless the Minister extends them[52]. They are thus evolutive. Therefore, the Council considers that the prohibition does not durably, severely and irreversibly harm the fundamental right to gathering and demonstration, since other ways of expression exist[53]. According to the Council of State, the inconvenience is not severe enough.

The reasoning of the Council of State raises several criticisms. First, the prohibition of the demonstration is not isolated. It has an impact on the whole territory of Belgium and not only in Brussels, where the claimant intended to manifest. Indeed, it is the inevitable consequence of the ministerial decree, which forbade all gatherings of more than twenty

[48] Council of State (Belgium), nr. 247.790, 14 June 2020, § 12.

[49] Council of State (Belgium), nr. 247.790, 14 June 2020, § 10.

[50] Council of State (Belgium), nr. 247.790, 14 June 2020, § 12.

[51] Council of State (Belgium), nr. 247.790, 14 June 2020, § 13.

[52] Council of State (Belgium), nr. 247.790, 14 June 2020, § 13.

[53] Council of State (Belgium), nr. 247.790, 14 June 2020, § 13.

people. Nevertheless, the Belgian case pertained formally to one demonstration, while the French one directly concerned the general prohibition established by the decree. Second, the effects of the decision last for several weeks and cannot be limited to a single event. Third, there is no derogatory procedure to allow demonstrations. Fourth, the demonstration concerned a central public debate, especially during the COVID-19 crisis. Indeed, the demonstration aimed at defending the interests of healthcare workers. Furthermore, the demonstration was even more critical because political negotiations to form a federal government had resumed. Finally, a proportionality test could have shown, as in the French case, that other measures infringed less freedom of demonstration. These elements could have weighed more heavily in the balance.

2.5. The cancellation of religious ceremonies

Having compared the reasoning of the Councils of State regarding freedom of demonstration, this section engages with freedom of religion. It presents first how the French Council of State dealt with the ban on religious ceremonies. The analysis of the Belgian case follows. As underlined hereafter, timing is important in these cases. Indeed, both Councils of State have pronounced different decisions on the same question during the second lockdown at the end of 2020.

2.5.a. In France[54]

While the Belgian Council of State decides that the emergency condition was not satisfied, the French Council of State deems if fulfilled. The French Council of State observes indeed that no religious ceremony has occurred since 23 March, which bears severe consequences. Believers have not been able to practise their religion collectively for several weeks. Besides, the main religions present in France hold essential celebrations during the spring. For these reasons, the Council of State declares that 'considering the improvement of the sanitary situation which has justified the *déconfinement*, the condition of characterised emergency (…) must be deemed fulfilled'[55]. In an earlier decision dating from 24 March 2020, the Council of State had judged otherwise that there was no emergency[56]. However, this decision was pronounced at the worst stage of the pandemic, when a complete lockdown was applicable.

Notwithstanding the finding of an emergency, it does not follow automatically that the prohibition is illegal. According to the French Council of State, the risk of contamination is higher during religious ceremonies since they are held inside, involve numerous people, and imply songs, prayers and ritual movements[57]. It results that it is necessary to regulate

[54] On this case, see: M. Nihoul, S. Wattier and F. Xavier, 'L'art de la juste mesure dans la lutte contre le coronavirus face à la dimension collective de la liberté de culte', *Rev. trim. D.H.*, 2020, pp. 1029-1063 ; J. Fialaire, 'Liberté de culte et urgence sanitaire : les leçons de la jurisprudence', *La semaine juridique*, nr. 21-22, pp. 38-43.

[55] Council of State (France), nr. 440366 and others, 18 May 2020, § 24.

[56] Council of State (France), nr. 439694, 24 March 2020.

[57] Council of State (France), nr. 440366 and others, 18 May 2020, § 27.

the access to religious ceremonies which 'cannot be considered similar to securing the access to basic goods and services'[58].

The judge underlines that the rules applicable to several other activities are less rigid. However, they do not necessarily involve a risk equivalent to the one existing during religious ceremonies[59]. Public transports, libraries, shopping malls, schools and shops are allowed to open during the *déconfinement*. Decidedly, the fundamental rights involved in these places are not the same[60]. The Council of State does not indicate, however, if it judges that religious activities are more important than commercial or educational ones. Finally, the French Council observes that the prohibition has been adopted only to avoid risky activities, but without regard to the potential difficulty to adopt measures ensuring distancing or to the ability of the religious authorities to enforce them[61].

The French Council of State concludes that the prohibition of religious ceremonies is not proportionate and constitutes a severe and manifest violation of the freedom of religion[62]. The Council of State carried out a true test of proportionality, weighing the interests at stake and the concrete possibility to enforce physical distancing.

[58] Council of State (France), nr. 440366 and others, 18 May 2020, § 29.

[59] Council of State (France), nr. 440366 and others, 18 May 2020, § 31.

[60] Council of State (France), nr. 440366 and others, 18 May 2020, § 32.

[61] Council of State (France), nr. 440366 and others, 18 May 2020, § 33.

[62] Council of State (France), nr. 440366 and others, 18 May 2020, § 34.

However, at the end of its reasoning, the Council of State seems to indicate that places of worship[63] and private or public places dedicated to religious activities do not enjoy the same protection[64]. Even if the decision of the French Council of State accepts the demand of the claimants, the impact of the decision was probably small because it arrived late[65]. At best, believers gained a few days[66].

2.5.b. In Belgium

The analysis now shifts towards the Belgian case. The Council of State mentions first that it can grant a suspension based on the extreme emergency on two conditions: a serious argument and an emergency such that the Council cannot rule the case under the habitual

[63] Such as churches, synagogues and mosques.

[64] B. Mérand, 'Liberté des cultes : la décision ambivalente du Conseil d'État du 18 mai 2020', *Actu juridique*, 6 August 2020, https://www.actu-juridique.fr/administratif/liberte-des-cultes-la-decision-ambivalente-du-conseil-detat-du-18-mai-2020/, (accessed 28 October 2020).

[65] R. Letteron, 'Covid-19 : Le Conseil d'Etat arrive en retard', *Liberté, Libertés chéries*, 19 May 2020, http://libertescheries.blogspot.com/2020/05/covid-19-le-conseil-detat-arrive-en.html (accessed 29 October 2020).

[66] The opportunity of this claim was not unanimously shared by the religious communities. It seems that only the catholic cult, especially its radical branch, wished to hold religious ceremonies before the 2 June, which was the date announced by the Government. See: B. Sauvaget, 'Les cultes accueillent avec prudence la décision du Conseil d'Etat', *Libération*, 19 May 2020, https://www.liberation.fr/france/2020/05/19/les-cultes-accueillent-avec-prudence-la-decision-du-conseil-d-etat_1788833 (accessed 4 November 2020).

procedure of emergency[67]. In this regard, in the Belgian case like in the French one, the claimants have not immediately protested against the prohibition of religious ceremonies. The procedure targets the ministerial decree of the 15 May, which confirms the prohibition, while other activities are allowed.

The Council of State also adds that the extreme emergency procedure must remain exceptional[68]. For this reason, the claimant cannot successfully invoke the extreme emergency procedure if he has waited passively before the introduction of his claim[69]. The Council of State considers that the claimants should have acted earlier. Following its analysis, it should have been clear from the 24 April, date of the announcement of the '*déconfinement*', that religious ceremonies would not be allowed before June[70]. However, this reasoning would lead to the consequence that a claimant must immediately attack a measure, even though it may be proportionate in the first place[71].

Then, the Council of State holds reasoning similar to the one followed in the case pertaining to freedom of demonstration. According to the administrative court, a violation of freedom of religion does not automatically constitute 'an urgent matter of public

[67] Council of State (Belgium), nr. 247.674, 28 May 2020, § 5.

[68] Council of State (Belgium), nr. 247.674, 28 May 2020, § 7.

[69] Council of State (Belgium), nr. 247.674, 28 May 2020, § 7.

[70] Council of State (Belgium), nr. 247.674, 28 May 2020, § 9.

[71] F. Judo, 'De Geest is niet gehaast', *Juristenkrant*, 10 Juni 2020, p. 13.

interest'[72]. The violation of freedom of religion does not concern the emergency condition but the requirement of a serious argument[73].

In addition, the Council of State pays attention to an argument of the Government. According to it, even if a decision allowing religious ceremonies was adopted, there would not be enough time to take measures sufficient enough to ensure the protection of the public[74]. This argument is quite noteworthy since it underlines that it is possible to organise religious ceremonies with proper distancing measures. By comparison, the French Council of State referred to official scientific guidelines to determine that distancing measures were possible during religious ceremonies.

The Council of State also refers to the fact that the bishops of Belgium have agreed that baptisms should take place when the general *déconfinement* happens[75]. Finally, the Council relies on the dialogue maintained by the Government with the representatives of the different religions to dismiss the argument saying that the Government neglects the rights of believers[76]. In particular, the Government announced that it would discuss the question of religious ceremonies on 3 June[77].

[72] Council of State (Belgium), nr. 247.674, 28 May 2020, § 8.

[73] Council of State (Belgium), nr. 247.674, 28 May 2020, § 8.

[74] Council of State (Belgium), nr. 247.674, 28 May 2020, § 10.

[75] Council of State (Belgium), nr. 247.674, 28 May 2020, § 12.

[76] Council of State (Belgium), nr. 247.674, 28 May 2020, § 12.

[77] Council of State (Belgium), nr. 247.674, 28 May 2020, § 12.

The assessment of the Council of State entails several criticisms. First, one can wonder whether the proportionality test required was robust enough. Indeed, the Council of State could have judged that appropriate distancing measures, such as the wearing of a mask, physical distance between people attending the ceremonies and the prohibition of certain ritual aspects (for instance the Eucharist) were sufficient to attain the legitimate goal of impeding the propagation of the COVID-19. Retrospectively, the ministerial decree of 18 October seems to confirm this thesis. Indeed, while this decree is adopted in a context characterised by a rapid increase of the contaminations and admissions to the hospital of people infected by the COVID-19, the decree maintains the churches open on the conditions that no more than forty people attend the ceremony and that a facial mask is worn[78]. Ten days later, the ministerial decree of 28 October reiterates the same rules[79]. It is only on 1 November that religious ceremonies are again prohibited[80].

Second, should a violation of a fundamental right not be an urgent matter? Especially as, in this case, it is a right which is at the core of freedom of religion that is restricted (see further). As the paper explains further, the Belgian Council of State does not depart from its previous case law here. On this matter, the French Council of State took a completely different position than the Belgian Council of State.

[78] Arrêté ministériel portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 18 October 2020, art. 20.

[79] Arrêté ministériel portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 28 October 2020, art. 17.

[80] Arrêté ministériel modifiant l'arrêté ministériel du 28 octobre 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 1st November 2020, art. 10.

Third, the argument of the evolutive nature of the decisions works both ways. The Council of State used this argument to dismiss the emergency. However, it could also have considered that the evolutive nature of the measures does not offer any guarantee nor predictability about the possibility to hold religious ceremonies shortly.

Fourth, while the lockdown was general and targeted every activity, economic or not, the *déconfinement* led to differentiated measures, that the principle of equality and of non-discrimination can question. Understandably, they generate a feeling of injustice in the mind of the people whose demands (or hopes) are ignored[81]. The balance also requires weighing the importance of freedom of religion against other fundamental rights, such as freedom of enterprise, which is guaranteed by international conventions[82] and by national provisions[83]. In this respect, one can wonder whether freedom of religion and freedom of enterprise received equal treatment.

[81] M. Nihoul, S. Wattier and F. Xavier, 'L'art de la juste mesure dans la lutte contre le coronavirus face à la dimension collective de la liberté de culte', *Rev. trim. D.H.*, 2020, pp. 1058-1059.

[82] The European Convention on Human Rights does not explicitly protect freedom of enterprise. However, companies enjoy several human rights. On this subject, see: P. Oliver, 'Companies and their fundamental rights: a comparative perspective', *I.C.L.Q.*, vol. 64, 2015, pp. 661-696; M. Teller, 'Les droits de l'homme de l'entreprise', in L. Boy, J.-B. Racine and F. Siiriainen (coord.), *Droit économique et droits de l'homme*, Bruxelles, Larcier, 2009, pp. 257-268. In European Union law, the freedom of enterprise is protected by article 16 of the Charter of fundamental rights, which states that: 'the freedom to conduct a business in accordance with Community law and national laws and practices is recognised'.

[83] In Belgium, freedom of enterprise is protected by articles II.3 and II.3 of the Economic Code (*Code de droit économique*) and the Constitutional Court recognises its existence. In

3. LEGAL CONTEXT

As underlined before, the reasoning of the two Councils of State examined whether the restriction of a fundamental right constituted an emergency and was illegal. This first section presents the international provisions applying in Belgium and France to understand the scope and limits of freedom of religion and freedom of demonstration. The second section analyses national constitutional provisions. Subsequently, the third section carries out a brief comparison of the two Councils of State to highlight the differences between the institutions.

3.1. The same international protections

France and Belgium have two similar systems of protection of fundamental rights. Both countries have signed the European Convention on Human Rights and are subject to the jurisdiction of the European Court of Human Rights. However, the European Convention on Human Rights is part of the *'bloc de constitutionnalité'* in France, but not in

France, the jurisprudence of the Constitutional Council bases freedom of enterprise on articles 2 and 17 of the *Déclaration des droits de l'homme et du citoyen*. On this subject, see: T. Léonard (coord.), *La liberté d'entreprendre ou le retour en force d'un fondamental du droit économique*, Bruxelles, Bruylant, 2015; V. Audubert, 'La liberté d'entreprendre et le Conseil constitutionnel : un principe réellement tout puissant ?', *Revue des droits de l'homme*, nr. 18, 2020, http://journals.openedition.org/revdh/9921 (accessed 29 October 2020); R. Ergec, 'La liberté de commerce et d'industrie à l'aune de la jurisprudence constitutionnelle', in *Libertés, (l)égalité, humanité*, Bruxelles, Bruylant, 2018, pp. 417-431.

Belgium. The Constitutional Court has thus developed a method to interpret articles of the Belgian Constitution in light of the European Convention on Human Rights[84].

Regarding freedom of religion, article 9 provides that:

'1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.

Contrarily to the Constitutions of France and Belgium, the European Convention explicitly allows the limitation of religious freedom for health reasons. Article 9 provides three guarantees: 'the freedom of thought, conscience, and religion as such; the freedom to change one's religion or belief; and the freedom to manifest religion or belief'[85]. Freedom of religion is 'one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the

[84] On this question, see: S. Wattier, 'The « Added Value » of the European Convention on Human Rights in the Ambit of Religious Freedom and Religious Autonomy in Belgian Constitutional Case Law', *R.I.E.J.*, 2016/2, pp. 297-317.

[85] W.A. Schabas, *The European Convention of Human Rights. A Commentary*, Oxford University Press, 2015, p. 420.

unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it'[86].

The most relevant case judged by the European Court of Human Rights about an interference based on health reasons concerns the wearing of religious symbols[87]. Ms Chaplin was a Christian nurse who wished to wear a cross on a chain during her work. The hospital asked her to remove it for safety reasons, but she refused. A discrimination trial followed, which she lost, and Ms Chaplin decided to appeal to the European Court of Human Rights. In this case, the Court considered that there was no violation of article 9, since 'the protection of health and safety on a hospital ward, was inherently of a greater magnitude'[88] than her right to manifest her religious beliefs. The Court judged that the measures were proportionate. In particular, the hospital had offered two possibilities to manifest her belief: wearing a cross in the form of a brooch or a necklace covered by a high-necked top under her uniform[89].

The European Court has recognised that freedom of religion includes the right to assemble and pray in community: an interference in this freedom implies an interference in article 11 interpreted in the light of article 9[90]. More specifically, the Court has judged that

[86] ECHR, Kokkinakis v. Greece, 25 May 1993, § 31.

[87] ECHR, Eweida and others v. The United Kingdom, 15 January 2013.

[88] ECHR, Eweida and others v. The United Kingdom, 15 January 2013, § 99.

[89] ECHR, Eweida and others v. The United Kingdom, 15 January 2013, § 98. However, the second option did not really allow Ms Chaplin to manifest her beliefs to other people, but only to herself.

[90] ECHR, Barankevich v. Russia, 26 July 2007, § 20.

if a religious community has no place to practise its faith, freedom of religion loses all its substance[91].

While freedom of religion can be exercised individually, like Ms Chaplin, or collectively, freedom of demonstration is only collective. Regarding the protection of freedom of demonstration, article 11 states that:

'1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others (…)'.

Article 11 is intimately linked to articles 9 and 10 of the Convention. Indeed, 'although its scope extends well beyond the exercise of the freedoms of assembly and association in the exercise of freedom of religion and expression, the visceral connection is undeniable'[92]. According to the jurisprudence of the European Court of Human Rights, 'any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy'[93].

[91] ECHR, Affaire association de solidarité avec les témoins de Jéhovah c. Turquie, 24 May 2016, § 90.

[92] W.A. Schabas, *The European Convention of Human Rights. A Commentary*, Oxford University Press, 2015, p. 491.

[93] ECHR, Sergey Kuznetsov v. Russia, 23 October 2008, § 45.

However, the Court accepts that a State uses an authorisation system or a notification procedure when people want to exercise their right to demonstration[94]. As underlined hereafter, these systems apply in Belgium and France. The Court also judges that the exceptions to freedom of gathering must be strictly interpreted and that States must justify them convincingly[95]. The proportionality analysis is paramount and requires that there are no 'effective, less intrusive measures available to attain the said aims in a proportionate manner'[96].

The situations leading to the decisions of the Councils of State are conflicts of rights. Indeed, freedom of religion and freedom of demonstration can be opposed to the right to life, guaranteed by article 2 of the European Convention on Human Rights. This right compels the State to take appropriate measures to avoid predictable deaths[97]. However,

[94] ECHR, Güneri and others v. Turkey, 12 July 2005, § 79; ECHR, Balçik and others v. Turkey, 29 November 2007, § 49.

[95] ECHR, Kudrevicius and others v. Latvia, 15 October 2015, § 142.

[96] ECHR, Schwabe and M.G. v. Germany, 1 December 2011, § 118.

[97] For the ECHR, 'bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising' (ECHR, Olewnik-Cieplińska and Olewnik v. Poland, 5 September 2019, § 119). See also: F. Bouhon et. al., 'L'État belge face à la pandémie de Covid-19 : esquisse d'un régime d'exception', *Courrier hebdomadaire du CRISP*, 2020/1, p. 7.

States must tailor the measures to the level of risk[98]. There are lots of circumstances or human activities that entail a risk of death, but they do not mean that the State is free to adopt any measure to prevent them. The test of proportionality limits the measures that the authorities can adopt.

In this regard, the President of the Parliamentary Assembly of the Council of Europe has insisted on the proportionality test in the fight against the coronavirus: 'I should like to stress that the overarching principle of proportionality limits the action that may be taken, via the stringent test of what is "strictly required by the exigencies of the situation"'[99]. As underlined previously, this principle appears in the jurisprudence of the French Council of State, but not in the reasoning of the Belgian Council of State.

Finally, neither Belgium nor France has invoked article 15 of the European Convention of Human Rights. According to article 15, States can derogate from particular articles of the Convention, including articles 9 and 11, in a situation of war or other danger to the life of the nation[100]. The rights concerned are 'derogable'[101]. The Court described the danger to the

[98] ECHR, Öneryildiz v. Turkey, 30 November 2004, § 90.

[99] Parliamentary Assembly of the Council of Europe, *COVID-19: President urges states to abide by the ECHR when responding to the crisis*, 24 March 2020, https://pace.coe.int/en/news/7825 (accessed 27 October 2020).

[100] Article 15, § 1, of the European Convention on Human Rights states that: 'in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'. See: C. Nivard, 'Le respect de la Convention européenne des droits de l'homme en temps de crise sanitaire mondiale', *La Revue des Droits de l'Homme*, 2020, http://journals.openedition.org/revdh/8989 (accessed 9 November 2020); C. Le Bris, 'Du

life of the nation as 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed'[102]. It seems that article 15 had never been used previously in the context of a pandemic[103]. For Belgium and France, usual rules remain fully applicable.

3.2. Constitutional guarantees that differ slightly

After the international protections, the paper compares the constitutional provisions applicable in France and Belgium. The Belgian Constitution protects freedom of religion through three articles. Article 19 addresses the positive aspect of freedom of religion: people have the right to adhere to a religion and to manifest their belief[104]. Article 20 protects the 'negative side' of the freedom of religion: people cannot be forced to believe or

juste équilibre : les limitations aux droits de l'homme en période de crise sanitaire (Première partie)', *La Revue des Droits de l'Homme*, 2020, http://journals.openedition.org/revdh/10551 (accessed 9 November 2020).

[101] On this question, see: A. Greene, *Emergency Powers in a Time of Pandemic*, Bristol University Press, 2020, pp. 61-92.

[102] ECHR, Lawless v. Ireland, 1st July 1961, § 28.

[103] M. Nihoul, S. Wattier and F. Xavier, 'L'art de la juste mesure dans la lutte contre le coronavirus face à la dimension collective de la liberté de culte', *Rev. trim. D.H.*, 2020, p. 1052.

[104] Article 19 states that: 'freedom of religion, freedom to practise it in public, as well as the freedom to express one's opinions in all matters, are guaranteed, except for the repression of offences committed in the use of these freedoms'.

to participate in religious activities if they do not wish to[105]. Article 21 forbids the State to intervene in the nomination of ministers of religion, which courts and doctrine equate to the protection of the organisational autonomy of religions[106].

As for France, the Constitution of 1958 contains no bill of rights. However, the preamble refers to the human rights proclaimed by the *Déclaration des droits de l'homme et du citoyen* of 1789 and by the preamble of the 1946 Constitution. The article 10 of the 1789 Declaration protects freedom of religion in such terms that its only limit is public order[107].

Thus, France and Belgium protect freedom of religion broadly, even if they do not share the same conception of 'secularism'. The French system is famous for its principle of '*laïcité*'[108]. Under this understanding, the 1905 law about the separation of Church and State

[105] Article 20 provides that: 'no one can be compelled in any way to take part to the acts and ceremonies of a cult, nor to observe its days of rest'.

[106] Article 21, § 1, reads as follows: 'the State has no right to interfere in the appointment or installation of ministers of any religion, nor to forbid them to correspond with their superiors, and to publish their acts, except, in the latter case, the ordinary liability for the press and publication'. See: S. Wattier, *Le financement public des cultes et des organisations philosophiques non confessionnelles : analyse de constitutionnalité et de conventionnalité*, Bruxelles, Larcier, 2016, pp. 188-198.

[107] Article 10 of the 1789 Declaration proclaims that: 'no one should be worried about his opinions, even religious, as long as their manifestation does not disturb the public order established by the law'.

[108] On this subject, see: F. Messner, P.-H. Prélot and J.-M. Woehrling (eds.), *Droit français des religions*, 2nd edn, Paris, LexisNexis, 2013; D. Koussens, *L'épreuve de la neutralité*, Bruxelles, Bruylant, 2015; E. Daly, 'The Ambiguous Reach of Constitutional Secularism in Republican France: Revisiting the Idea of Laïcité and Political Liberalism as Alternatives',

proclaims that the French Republic does not recognise nor subsidise any religion[109]. By contrast, 'Belgium has a resolutely active conception of the principle of pluralism'[110]. One of the main differences between the two regimes is the fact that Belgium has a system of recognition and funding of some religions[111]. Article 181 of the Constitution establishes this regime, which is as old as the Belgian State[112]. For this reason, it would be incorrect to say that Belgium lives under a strict separation regime. Authors use terms such as the

Oxford Journal of Legal Studies, 2012, pp. 583-608; C. Kintzler, 'Construire philosophiquement le concept de laïcité. Quelques réflexions sur la constitution et le statut d'une théorie', *Cités*, 2012, pp. 51-68, M. Barthélémy and G. Michelat, 'Dimensions de la laïcité dans la France d'aujourd'hui', *Revue française de science politique*, 2007, pp. 649-698 ; N. Baillargeon, Deux concepts de laïcité et leurs enjeux, in *Laïcité et humanisme*, Ottawa, University of Ottawa Press, 2015.

[109] Loi concernant la séparation des Eglises et de l'État, 9 December 1905, art. 2.

[110] H. Dumont, 'Conclusions', in C. Romainville et. al. (dir.), *État et religions*, Limal, Anthémis, 2016, p. 245.

[111] On this subject, see S. Wattier, *Le financement public des cultes et des organisations philosophiques non confessionnelles : analyse de constitutionnalité et de conventionnalité*, Bruxelles, Larcier, 2016.

[112] Article 181, § 1, of the Constitution provides that: 'the salaries and pensions of ministers of religion are paid by the State; the sums needed to cover them are charged annually to the budget'. The second paragraph gives the same guarantees to philosophical non-confessional organisations.

'independence'[113], 'mutual independence'[114] or 'benevolent separation'[115] between Church and State.

However, the differences between the two systems remain limited[116]. Indeed, even if the French political and legal discourse puts a great emphasis on the principle of *laïcité*, several elements lead to the conclusion that the separation is not as strict as it seems. For instance, due to the *concordat* signed by Napoleon, religions are funded in Alsace-oselle[117].

[113] F. Delpérée, *Le droit constitutionnel de la Belgique*, Bruxelles and Paris, Bruylant and LGDJ, 2000, p. 231.

[114] H. Wagnon,'La condition juridique de l'Église catholique en Belgique', *Ann. dr. sc. pol*., 1964, p. 72.

[115] S. Wattier, 'Le financement des cultes au XXIe siècle : Faut-il réviser l'article 181 de constitution ?', *R.B.D.C.*, 2011/1, p. 25 ; L.-L. Christians, 'Le financement des cultes en droit belge : bilan et perspectives', *Quaderna di diritto e politica ecclesiastica*, 2006, p. 83; S. Wattier, 'Inscrire le principe de laïcité dans la Constitution belge ? Quelques pistes pour une réflexion juridique', *Cahiers du CIRC*, nr. 4, 2020, p. 80; X. Delgrange, 'Faut-il enchâsser la laïcité politique dans la Constitution belge ?', *Cahiers du CIRC*, nr. 4, 2020, p. 12.

[116] S. Wattier, 'Entre sécularisation et retour du religieux : repenser les relations entre État et religions dans une Belgique paradoxale', in C. Romainville et. al. (dir.), *État et religions*, Limal, Anthémis, 2016, pp. 27-30.

[117] On this subject, see: F. Messner, 'Le droit local des cultes alsacien-mosellan au défi du pluralisme religieux', *Recht, Religie and Samenleving*, 2017/2, pp. 45-78.

The principle of *laïcité* is not opposed to freedom of religion. On the contrary, it is 'devised as a means to ensure the free exercise of religion by all citizens'[118].

Nevertheless, the absence of a strict separation had an incidence in the Belgium case about freedom of religion. The Council of State referred to the dialogue between the State and the religious authorities to dismiss the claim[119]. Such dialogue is contrary to the French principle of *laïcité*. Still, the reference to the press release of the bishops of Belgium, stating that baptism could wait until the end of the lockdown, is questionable. As underlined by Frank Judo, this argument seems contrary to the principle that courts should not evaluate the content of the belief but only examine if the claimant has an opinion that is cogent and serious[120]. People are not required to follow the religious authorities of their faith strictly.

Concerning freedom of demonstration, it is subject to police laws in both countries. According to article 26 of the Belgian Constitution, open-air gatherings are fully subject to the police laws[121]. Similarly, the French *Déclaration des droits de l'homme et du citoyen*

[118] M. Hunter-Henin, 'Why the French don't like the burqa: laïcité, national identity and religious freedom', *The International and Comparative Law Quarterly*, 2012, p. 617.

[119] This dialogue is however not constant. Besides, no legal framework provides its existence and conditions in Belgian law. The situation is different in European Union law. See: S. Wattier, 'Quel dialogue entre l'Union européenne et les organisations religieuses et non confessionnelles. Réflexions au départ de la décision du Médiateur européen du 25 janvier 2013', *Cahiers de droit européen*, 2015, pp. 535-556.

[120] F. Judo, 'De Geest is niet gehaast', *Juristenkrant*, 10 Juni 2020, p. 13.

[121] Article 26 of the Constitution states that: 'Belgians have the right to assemble peacefully and unarmed, in compliance with the laws that may regulate the exercise of this right

states that the manifestation of one's opinions cannot disturb public order. The French Constitutional Council has stated that freedom of demonstration and freedom of expression, guaranteed by article 11 of the *Déclaration*, are intertwined[122]. Freedom of demonstration can be distinguished from freedom of assembly by the fact that there is an intent to manifest one's opinions or ideas[123].

However, the two countries differ sharply in one respect. In principle, French law applies a system of prior notification. The organiser of a demonstration must notify the administrative authorities, which can prohibit it on legitimate grounds. By comparison, most Belgian cities have enacted regulations that subject any demonstration to prior authorisation. Even if a regime of authorisation is constitutionally valid in Belgium, 'the State has a positive obligation to allow the effective exercise of this right'[124]. The difference of system displays apparently broader protection of freedom of demonstration in France, which can explain why the French Council of State judged the prohibition disproportionate.

The proportionality test is critical to determine whether a restriction to the freedom of demonstration is constitutionally valid. A higher interest can justify a prohibition if it is

without, however, being subject to prior authorisation. This provision does not apply to open-air gatherings, which remain entirely subject to police laws'.

[122] Constitutional Council, nr. 2019-780, 4 April 2019, § 11.

[123] P. Nihoul, 'Le droit de se réunir librement', in M. Verdussen and N. Bonbled (eds.), *Les droits constitutionnels de Belgique*, Bruxelles, Bruylant, 2011, p. 1071.

[124] P. Nihoul, 'Le droit de se réunir librement', in M. Verdussen and N. Bonbled (eds.), *Les droits constitutionnels de Belgique*, Bruxelles, Bruylant, 2011, p. 1071.

adapted to the circumstances of time and place[125]. In front of the Council of State, the control of proportionality amounts to control 'the manifest error of appreciation, in other words, the error that would not be committed by any administrative authority placed in the same situation'[126].

3.3 The Belgian Council of State, a copy of its French homologue?

After the comparison of legal norms applicable at the international and national levels, the paper points out some essential characteristics of the two institutions. Although they are similar in their organisation, their powers differ slightly.

The French Council of State is an old institution, dating back to Napoleonic times. Comparatively, the Belgian Council of State is relatively recent, since it was created after the Second World War. The law of 23 December 1946 set it up, and the institution was effectively born in 1948[127]. The legislative and doctrinal debates preceding the adoption of the law about the Council of State show that the 'French model' was very much influencing the idea of having a judge for controlling the administration[128].

[125] P. Nihoul, 'Le droit de se réunir librement', in M. Verdussen and N. Bonbled (eds.), *Les droits constitutionnels de Belgique*, Bruxelles, Bruylant, 2011, p. 1076.

[126] Council of State (Belgium), nr. 232.012, 30 July 2015.

[127] M. Leroy, *Contentieux administratif*, 5th ed., Limal, Anthémis, 2011, p. 59.

[128] See P. Bouvier, *La naissance du Conseil d'État de Belgique : une histoire française ?*, Bruxelles, Bruylant, 2012, pp. 107-152.

In both countries, the Council plays a role as a jurisdiction and a counsellor. In France, six sections compose the Council of State, five of which have an advisory competence and the last having a jurisdictional competence[129]. For organisational reasons, this last section includes several subsections. In order for the Council of State to remain impartial, a counsellor must recuse himself if a case involves a question on which he has given an opinion during the advisory phase[130]. During the pandemic, a debate concerned the impartiality of the Council of State in France. The Council of State sometimes had to judge the legality of a decision on which he had given its opinion only a few hours before the claim[131]. In Belgium, the Council of State includes two sections: one is advisory, and the other is jurisdictional. The advisory section has the competence to provide advice about a project of legislative or executive text emanating from a parliament or a government before its adoption[132]. Its competence is similar in France, but more limited regarding executive norms[133].

[129] J. Waline, *Droit administratif*, 22nd ed., Paris, Dalloz, 2008, pp. 570-571.

[130] J. Waline, *Droit administratif*, 22nd ed., Paris, Dalloz, 2008, pp. 572. This requirement is a consequence of the jurisprudence of the European Court of Human Rights. See: ECHR, *Procola v. Luxembourg*, 28 September 1995, § 45.

[131] P. Cassia, 'Le Conseil d'Etat et l'état d'urgence sanitaire: bas les masques!', *Mediapart*, 11 April 2020, https://blogs.mediapart.fr/paul-cassia/blog/100420/le-conseil-d-etat-et-l-etat-d-urgence-sanitaire-bas-les-masques (accessed 5 November 2020).

[132] If the text emanates from a Government, the advice is mandatory. If the text emanates from a Parliament, the advice is optional. See: Lois coordonnées sur le Conseil d'Etat, 12 January 1973, art. 2 to 6*bis*.

[133] Articles 38 and 39 of the Constitution.

Perhaps the main difference in terms of organisation concerns the training of counsellors. In Belgium, the law requires a law degree to access the position of counsellor[134]. In France, this requirement does not apply, and the National School of Administration (*Ecole Nationale d'Administration*) trained many counsellors. This difference of cognitive mindsets might have an impact on the control over administrative action[135].

Pertaining to the jurisdictional competences, the Belgian Constitution provides that the protection of civil and political rights is the mission of the judiciary power, even if the law can provide some exceptions for political rights and if the Council of State has the power to adjudicate on the civil effects of its decisions[136]. Thus, in principle, when a citizen argues that a royal or ministerial decree has violated one of his rights and seeks compensation, the judiciary power will judge the claim. The conditions for the Council of State to be competent is that the procedure constitutes objective litigation (*'contentieux objectif'*). In other words, the claimant pursues the cancellation and, in some instances, the suspension of an administrative act because it is illegal[137]. The real subject matter of the procedure is not the right of the claimant but the act of the administration.

On the contrary, in France, the Council of State and the administrative jurisdictions are supposed to judge any litigation involving the administration. Their competence is not limited to the annulment of administrative decisions: they also have full jurisdiction,

[134] Lois coordonnées sur le Conseil d'Etat, 12 January 1973, art. 70.

[135] On this question: B. Latour, *La Fabrique du droit, une ethnologie du Conseil d'Etat*, Paris, La Découverte, 2002.

[136] Articles 144 and 145 of the Belgian Constitution.

[137] D. Renders and B. Gors, *Le Conseil d'Etat*, Bruxelles, Larcier, 2020, p. 10.

namely for administrative sanctions and public contracts. Besides, the Belgian institution does not have a procedure equivalent to the *'référé-liberté'* allowing the Council of State to pronounce injunctions against the administrative authorities. The Belgian Council of State can only suspend or cancel an administrative act[138]. As the analysis underlines further, this element had an impact on several claims against the measures adopted against the coronavirus.

4. SPECIFIC CIRCUMSTANCES THAT EXPLAIN THE DIFFERENCES

While the previous chapter focused on general features of the human rights protection systems in France and Belgium, this last chapter deepens the analysis about the specific cases and situations at hand. To begin with, the first section explores the different grounds of the emergency measures adopted. The second section analyses the past jurisprudence of both Councils of State to compare how the decisions follow it. Finally, the last section

[138] The situation is slightly different in the case of a *référé* introduced in front of the ordinary judge. The judge can decide provisional measures on the condition that a subjective right is violated by an administrative act. The criterium is, however, not straightforward (D. Mougenot, 'Principes de droit judiciaire privé', in *Rép. not.*, t. XIII, Bruxelles, Larcier, 2019, n° 222). An action introduced by almost 200 people against the COVID-19 measures has been rejected by the court of first instance of Brussels in July. The judge considered that no subjective right could be identified and that the Council of State was competent for such action. See: Belga, 'Coronavirus en Belgique : l'action en référé afin d'obtenir la levée d'une série de mesures liées au Covid rejetée', *RTBF.be*, 03 July 2020, https://www.rtbf.be/info/belgique/detail_coronavirus-en-belgique-l-action-en-refere-afin-d-obtenir-la-levee-d-une-serie-de-mesures-liees-au-covid-rejetee?id=10535960 (accessed on 5 November 2020).

discusses the specific differences between the cases and the case law of the two administrative courts through the pandemic, including decisions pronounced during the second lockdown.

4.1. Different foundations for emergency measures

Crises often imply the activation of specific mechanisms to accelerate and centralise decision-making[139]. In Belgium, the Parliament granted the 'special powers' to the Government[140]. They give the executive branch the power to amend, adopt and even cancel legislative rules. The Parliament indicates the means and limits of this power. All the decisions adopted by the Government must be validated in due time by the Parliament[141]. However, the situation was somewhat peculiar in Belgium when the crisis of coronavirus started since the Government was in caretaker mode ('*en affaires courantes*'). In this context, the Government does not have a majority in Parliament and has not its confidence. Its competences are thus limited to dealing with urgent or day-to-day matters. In theory, nothing prevents the Parliament from granting special powers to a Government in caretaker mode. However, a majority of political parties decided to vote the confidence[142].

[139] On this question, see: F. Ní Aoláin and O. Gross, *Law in Times of Crisis. Emergency Powers in Theory and Practise*, Cambridge University Press, 2006.

[140] These powers are based on article 105 of the Constitution, which provide that: 'the King has no powers other than those formally assigned to him by the Constitution and by the special laws enacted by virtue of the Constitution itself'.

[141] For more details about the special powers in Belgian law, see: M. Leroy, 'Les pouvoirs spéciaux en Belgique', *A.P.T.*, 2014, pp. 483-504.

[142] For more details about the course of events at the time, see: J. Faniel and C. Sagesser, 'La Belgique entre crise politique et crise sanitaire (mars-mai 2020)', *Courrier*

Nevertheless, the basis of the measures fought in front of the Council of State was not these special powers. The measures relied on the law of 31 December 1963 on civil protection, the law of 15 May 2007 on civil security and the law on the police function[143]. The law on civil protection provides that the Minister of Interior is competent to take the necessary measures to ensure civil protection. Civil protection encompasses 'the set of measures and means dedicated to ensuring the protection and survival of the population'[144]. As for the law on civil security, it allows the Minister to forbid the population to move or to attend certain places or regions[145]. The Belgian Constitution sets one crucial limit to the measures that can be adopted: according to article 187, 'the Constitution cannot be suspended'.

In France, the decrees judged by the Council of State depended upon the activation of the 'state of health emergency'[146]. The law of 23 March 2020 had newly created this state of emergency. However, the opportunity of creating this new exceptional regime is questionable, since other legislative provisions of French law could have worked in this

hebdomadaire du CRISP, 2020/2; N. Bernard, 'Les pouvoirs du gouvernement fédéral en période de crise : le gouvernement Wilmès face à l'épidémie de Covid-19', *J.T.*, 2020, pp. 372-375.

[143] Arrêté ministériel portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 23 March 2020.

[144] Loi sur la protection civile, 31 December 1963, art. 1 and 4.

[145] Loi sur la sécurité civile, 15 May 2007, art. 182.

[146] On this subject, see: V. Sizaire, 'Un colosse aux pieds d'argile. Les fondements juridiques fragiles de l'urgence sanitaire', *La Revue des Droits de l'Homme*, 2020, http://journals.openedition.org/revdh/8976 (accessed 9 November 2020).

context[147]. However, the new state of emergency provides that the Prime Minister can decide to temporarily close certain places of meeting and limit or forbid public gatherings[148]. The provisions explicitly indicate that the measures must remain proportionate to the sanitary risk and that they must disappear as soon as they are no longer required. The Council of State can judge any dispute arising from these measures pursuant to the procedure of the *référé-liberté*.

France is familiar with the state of emergency. The terror attacks of 2015 and 2016 already led to its activation[149]. During this period, several religious places were closed on the motive that discourses propagated extremist ideas inside[150]. The Council of State

[147] M. Nihoul, S. Wattier and F. Xavier, 'L'art de la juste mesure dans la lutte contre le coronavirus face à la dimension collective de la liberté de culte', *Rev. trim. D.H.*, 2020, pp. 1040-1041; A. Gelblat and L. Marguet, 'État d'urgence sanitaire : la doctrine dans tous ses états ?', *La Revue des Droits de l'Homme*, 20 April 2020, http://journals.openedition.org/revdh/9066 (accessed 5 November 2020), pp. 2-3.

[148] Loi n° 2020-290 d'urgence pour faire face à l'épidémie de covid-19, 23 March 2020, article 3.

[149] On this subject: S. Hennette Vauchez, 'The State of Emergency in France: Days Without End?', *European Constitutional Law Review*, vol. 14, 2018, pp. 700-720; O. Pluen, 'Le(s) rôle(s) de contrôle du Conseil constitutionnel et de la juridiction administrative pendant la période d'état d'urgence 2015-2017 : entre progression et limites d'une spécificité française', *Droits*, 2019/1, pp. 219-241.

[150] Nineteen religious places had been closed during the state of emergency. See: Senate (France), *Rapport d'information fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale (1) par la mission de contrôle et de suivi de la loi du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme (2)*, 19 December 2018, p. 21.

generally refused to cancel the administrative decisions. However, one weighty argument was the fact that other religious places were available around the closed places (see further)[151].

Thus, while Belgian measures relied on ordinary laws, French ones were adopted in a derogatory set of rules. In this context, it is even more paramount that the jurisdictions protect the rights of individuals. In France, the principle of proportionality receives emphasis from the law instigating the state of health emergency.

4.2. Decisions embedded in the established respective case law of each Council of State

The previous section has shown that an unusual legal context led to the adoption of the measures. As underlined hereafter, it does not mean that the decisions depart from the classical line of the jurisprudence of each Council[152].

However questionable they may be, the decisions rendered by the Belgian Council of State are in line with its past case law. The Council of State regularly considers that 'when the alleged damage harms fundamental rights, it does not result *ipso facto* that this damage

[151] Council of State (France), nr. 405476, 6 December 2016 ; Council of State (France), nr. 406618, 20 January 2017; Council of State (France), nr. 416398, 11 January 2018. See also: M. Nihoul, S. Wattier and F. Xavier, 'L'art de la juste mesure dans la lutte contre le coronavirus face à la dimension collective de la liberté de culte', *Rev. trim. D.H.*, 2020, pp. 1049-1050.

[152] Neither the Belgian Council of State, nor the French Council or State is bound by the rule of precedent.

should be considered as serious and difficult to repair'[153]. Besides, the Council of State stresses that it cannot substitute its opinion to one of the administrative authorities: it is only in case of manifestly disproportionate measure that the Council of State can act[154]. It does not decide on the merits of an administrative decision. In both countries, the judge gives 'a wide margin of appreciation as to the degree of seriousness of the factual circumstances likely to undermine public order, the extent of the means to be employed to maintain and, where necessary, restore public order and the choice of the most appropriate and least restrictive measure possible in the specific circumstances of the case'[155].

Concerning demonstrations in Belgium, previous decisions from the Council of State mentioned several elements. For instance, a decision about the prohibition of demonstrations justifies the absence of serious damage on the following grounds: the fact that the prohibition applies only in specific neighbourhoods, that the claimants can manifest their opinions in other places and that the prohibition applies to gatherings of more than ten people only[156]. This last element is interesting since gatherings involving less than twenty people were allowed during the *déconfinement*. In another case, the Council of State takes into account three facts to determine that the damage is severe enough to justify the

[153] Council of State (Belgium), nr. 217.060, 23 December 2011; Council of State (Belgium), nr. 242.017, 29 June 2018; Council of State (Belgium), nr. 221.934, 4 January 2013. According to the Council of State, this argument has even more importance due to the fact that demonstrations are subject to police laws, as provided by article 26 of the Constitution.

[154] Council of State (Belgium), nr. 87.974, 51 June 2000.

[155] R. Andersen, 'Liberté de manifester et ordre public' in *Liber amicorum Anne Mie Draye*, Anvers, Intersentia, 2015, p. 218.

[156] Council of State (Belgium), nr. 217.060, 23 December 2011.

emergency procedure: the prohibition applies to the entirety of the territory of Brussels, it forbids static as well as moving demonstrations, and the decision amounts to a 'decision of principle' for any similar demand emanating from the claimant[157]. In another case, the possibility to hold a static demonstration combined to the fact that there is generally a demonstration organised per month shows that there was no infringement of the freedom of demonstration of the claimant[158]. The past jurisprudence is thus not unequivocal. Indeed, in the case at hand, a static demonstration was forbidden. Moreover, although the decision formally pertained to one demonstration, its scope was broader since the prohibition ensued from the ministerial decree and was thus the application of a general rule.

In France, the control of proportionality is enshrined in the jurisprudence of the Council of State even if the expression is absent[159]. It is first in the Benjamin case, in 1933, that the Council of State judged that the objective of maintaining the public order must be conciliated with the freedom of assembly[160]. Furthermore, the French Council of State has for long considered that a police measure cannot enact a general authorisation system unless there is no other mean available[161].

Regarding the specific question of demonstrations, the French Council of State normally has no competence about them. The questions arising from their prohibition are dealt with by local administrative tribunals. However, appeals are possible against these

[157] Council of State (Belgium), nr. 242.017, 29 June 2018.

[158] Council of State (Belgium), nr. 221.934, 4 January 2013.

[159] X. Lamprini, *Les principes généraux du droit de l'Union européenne et la jurisprudence administrative française*, Bruxelles, Bruylant, 2017, pp. 347-348.

[160] Council of State (France), nr. 17413 and 17520, 19 May 1933.

[161] Council of State (France), nr. 00590.02551, 22 June 1951.

decisions. For instance, the Council of State judged that a prohibition motivated by past violence and damage to goods from the demonstrators was valid[162].

As for religious ceremonies, the closing of religious places has led to some case law in Belgium and France. Apart from isolated decisions, most of them concern the closing of a place by the local authorities ('*bourgmestres*') on the motive of terrorism offences[163]. The Council of State generally considers that the claimants do not fulfil the emergency condition, since they do not show that they cannot practise their religion in another place, especially when the closing is temporary[164]. As underlined hereabove, French jurisprudence follows the same line on this question.

However, the critical difference in the cases deferred to the two Councils of State is the fact that every religious ceremony was forbidden and the only alternative was to attend the religious services online. One can wonder whether the possibility of online religious ceremonies is sufficient enough to judge that the prohibition of physical ones is proportionate. There may be a symbolic and social dimension consubstantial to a religious ceremony that differs from other activities. Attending a religious ceremony could be considered as a crucial moment of social bonding, incorporated by the belonging to a 'religious community' which is not adequately replaced by an online alternative, especially during several months.

[162] Council of State (France), nr. 383091, 26 July 2014.

[163] On this question, see: F. Xavier, 'La fermeture par le bourgmestre des établissements suspectés d'abriter des activités terroristes', *C.D.P.K.*, 2018, pp. 22-50.

[164] See Council of State (Belgium), 203.428, 29 April 2010; Council of State (Belgium), 192.404, 18 April 2009.

Besides, this reasoning could apply demonstrations as well. As underlined previously, they are a crucial mean to express opinions. They also create social links and diffuse messages as to the identity, needs and vulnerabilities of people who attend them. Public authorities should not underestimate the symbolic dimensions of freedom of religion and freedom of manifestation.

4.3. Timing, factual differences or a different willingness to use its powers?

The preceding section has put the cases at hand in the context of the previous case law of the two administrative courts. Subsequently, this section examines some of the other decisions pronounced during the COVID-19 pandemic[165]. In general, the tendency followed by the two Councils of State is to protect the decisions adopted by the public authorities.

Even if the Council of State of France has accepted the two claims analysed in this paper, it is not true for all the actions it received during the first lockdown (March-June 2020). For instance, the prohibition of open or inside markets was considered proportionate by the Council of State[166]. Nevertheless, 'in both cases, the Council of State of France has been careful to ensure that the measures maintained in the context of deconfinement do not disproportionately infringe fundamental freedoms'[167].

[165] At the time of writing this paper, the pandemic is still ongoing. The Belgian and French Councils of State continue to pronounce decisions about the measures adopted in this context.

[166] Council of State (France), nr. 439762, 1st April 2020.

[167] M. Nihoul, S. Wattier and F. Xavier, 'L'art de la juste mesure dans la lutte contre le coronavirus face à la dimension collective de la liberté de culte', *Rev. trim. D.H.*, 2020, p. 1047.

Still, the French Council of State has accepted, at least partially, several demands[168]. For instance, it has rejected the request to enforce a total lockdown but has ordered the Government to detail the scope of certain measures and to evaluate the risks of specific situations[169]. It has also considered that administrative authorities could not generally impose the wearing of a facial mask[170]. The Council of State has also given the authorities an injunction to distribute facial masks to prisoners[171]. It also judged that the obligation to wear a mask should be limited to coherent zones characterised by a high density of population[172]. The Council of State has considered that thermic cameras were contrary to

[168] But only a 'tiny proportion of the demands' (L. Vatna, 'Le juge administratif et la crise de la covid-19. Entre protection de la santé et respect des libertés : le juge administratif à l'épreuve de la covid-19', *La Revue des Droits de l'Homme*, 2020, http://journals.openedition.org/revdh/10542 (accessed 9 November 2020)).

[169] Council of State (France), nr. 439674, 22 March 2020. See: J. de Gliniasty, 'La gestion de la pandémie par la puissance publique devant le Conseil d'État à l'aune de l'ordonnance de référé du 22 mars 2020', *La Revue des Droits de l'Homme*, 2020, http://journals.openedition.org/revdh/9447 (accessed 9 November 2020).

[170] Council of State (France), nr. 440057, 17 April 2020;Council of State (France), nr. 443.750, 6 September 2020. About the first decision, see: J. Mattiussi, 'La liberté vestimentaire démasquée ? À propos de l'ordonnance du Conseil d'État en date du 17 avril 2020', *La Revue des Droits de l'Homme*, 2020, http://journals.openedition.org/revdh/9116 (accessed 9 November 2020).

[171] Council of State (France), nr. 440151, 7 May 2020. As such, this decision does not disturb the lockdown. It provides rather a humanitarian measure.

[172] Council of State (France), nr. 443750, 6 September 2020.

the GDPR[173] as well as the use of drones[174]. Besides, it has estimated that the generalisation of a procedure involving one judge for asylum procedures was disproportionate[175]. Perhaps more anecdotal, the Council of State has enjoined the authorities to adapt the regulation to make unambiguous that the bicycle was a perfectly valid mean of transport during the lockdown[176]. Far more actions have nonetheless been dismissed[177], including some challenging directly the state of health emergency[178]. One critical element is the fact that the Council of State accepted the actions either before the full lockdown or after the easing.

On the contrary, during the crisis triggered by the pandemic, the Belgian Council of State has been reluctant to suspend the measures adopted by the authorities. It rejected some actions on purely procedural grounds[179]. Other demands were denied because the

[173] Council of State (France), nr. 441065, 26 June 2020.

[174] Council of State (France), nr. 440442 and 440445, 18 May 2020.

[175] Council of State (France), nr. 440717, 440812 and 440867, 8 June 2020.

[176] Council of State (France), nr. 440179, 30 April 2020.

[177] See for instance: Council of State (France), nr. 439693, 28 March 2020; Council of State (France), nr. 439726, 28 March 2020; Council of State (France), nr. 440321, 22 May 2020; Council of State (France), nr. 440701, 8 June 2020; Council of State (France), nr. 444741, 8 October 2020. These arrests pertain to alleged violation arising from insufficient measures of the State, namely regarding the equipment of healthcare workers or the distribution of facial masks. See also: Council of State (France), nr. 441449, 441552 and 441771, 13 July 2020; Council of State (France), nr. 439762, 1st April 2020.

[178] See: Council of State (France), nr. 445367, 29 October 2020.

[179] See for instance: Council of State (Belgium), nr. 247.710, 4 June 2020; Council of State (Belgium), nr. 247.714, 4 June 2020; Council of State (Belgium), nr. 248.213, 4 September

damage sustained by the claimant was financial and, thus, reparable[180], not severe enough[181] or insufficiently substantiated[182]. While most decisions rejected the claim on the motive that there was no emergency, recent decisions have dismissed demands because the argument was not serious[183]. Interestingly, the analysis was more thorough in these decisions than in the previous ones, as if the need for justification was greater now.

2020. These arrests dismiss the actions on the motive that the claimants ask the Council of State to partially suspend a ministerial decree, which is not one of its prerogatives. See also: Council of State (Belgium), nr. 248.108, 3 August 2020; Council of State (Belgium), nr. 248.109, 3 August 2020. These arrests reject the actions because the suspension of the acts would have no effect on the situation of the claimants. See as well: Council of State (Belgium), nr. 247.472, 29 April 2020; Council of State (Belgium), nr. 248.189, 28 August 2020; Council of State (Belgium), nr. 248.231, 8 September 2020. The applications were dismissed because the claimants have delayed the introduction of their claims, which is incompatible with the notion of emergency. See then: Council of State (Belgium), nr. 247.919, 26 June 2020. The action of the claimant is rejected because the act attacked has been withdrawn.

[180] See for instance: Council of State (Belgium), nr. 247.856, 22 June 2020.

[181] See for instance: Council of State (Belgium), nr. 247.939, 26 June 2020.

[182] See for instance: Council of State (Belgium), nr. 248.270, 15 September 2020; Council of State (Belgium), nr. 248.130, 7 August 2020.

[183] See for instance: Council of State (Belgium), nr. 248.780, 28 October 2020; Council of State (Belgium), nr. 248.818, 30 October 2020; Council of State (Belgium), nr. 248.819, 30 October 2020. These arrests concern the closing of restaurants and the curfew.

In a decision pronounced in chamber and not by a single counsellor[184], the Belgian Council of State insisted that it is competent 'to examine whether the Minister relied on genuinely existing and relevant elements of fact, which have been ascertained with all necessary rigour, whether he correctly assessed and rigorously weighed up all the interests involved and whether, on this basis, he was able to make his decision within the limits of reasonableness'[185]. This formulation shows the broad margin of appreciation that the State enjoys. It indicates that the control of proportionality is marginal and does not replace the appreciation of the administrative authorities.

Concerning freedom of religion, the Council of State relied on the Belgian episcopal conference to decide that the inconvenience of wearing the mask during religious ceremonies was not sufficiently severe[186]. There are thus two decisions in which the Council of State refers to the official position of the religious authorities. Such reference is questionable since believers can have convictions that do not precisely follow the official position of their religious authorities, and they should be respected.

Regarding the two questions analysed in this commentary, authors have also underlined the importance of the timing to explain the diverging decisions of the French Council of State and its Belgian homologue[187]. It seems complicated to be 'on time' in front of the Belgian Council of State…

[184] Which is usually the rule for an extreme emergency procedure.

[185] Council of State (Belgium), nr. 248.781, 28 October 2020.

[186] Council of State (Belgium), nr. 248.124, 5 August 2020.

[187] M. Nihoul, S. Wattier and F. Xavier, 'L'art de la juste mesure dans la lutte contre le coronavirus face à la dimension collective de la liberté de culte', *Rev. trim. D.H.*, 2020, pp. 1061.

Another difference in the decision about freedom of demonstration is numerical. While Belgium authorised gatherings of twenty people, they were limited to ten in France. Since the numerical limit was lower in France, the infringement seemed more severe. This is an element weighing in favour of the annulment in the proportionality test.

Besides, in French affairs, the Council of State judged that the restrictions to fundamental freedoms had an absolute and general scope[188]. On the contrary, the Belgian Council considered only an isolated demonstration and decided that the prohibition of religious ceremonies was not general since an evaluation was coming.

In addition, the French Council of State relied on official scientific arguments, which is not at all the case of the Belgian Council of State[189]. The French Council of State also took into account the lack of effectivity of the prohibition of demonstrations to decide that the decree was unconstitutional[190]. The Belgian Council of State largely ignored the fact that

[188] S. Degirmenci, 'Liberté de manifester en état d'urgence sanitaire: le Conseil d'État desserre enfin la nasse !', *Goutal, Alibert et Associés*, 16 June 2020, http://www.goutal-alibert.net/liberte-de-manifester-en-etat-durgence-sanitaire-le-conseil-detat-desserre-enfin-la-nasse-ce-13-juin-2020-req-n-440846-decret-n-2020-724-du-14-juin-2020/ (accessed 28 October 2020).

[189] On this subject, see the *Revue française d'administration publique*, nr. 173, 2020, whose theme is 'L'action publique, l'expertise et le juge'.

[190] S. Degirmenci, 'Liberté de manifester en état d'urgence sanitaire: le Conseil d'État desserre enfin la nasse !', *Goutal, Alibert et Associés*, 16 June 2020, http://www.goutal-alibert.net/liberte-de-manifester-en-etat-durgence-sanitaire-le-conseil-detat-desserre-enfin-la-nasse-ce-13-juin-2020-req-n-440846-decret-n-2020-724-du-14-juin-2020/ (accessed 28 October 2020). About effectiveness, see: M. de Benedetto, 'Effective Law from a Regulatory and Administrative Law Perspective', *European Journal of Risk Regulation*, nr. 9, 2018, pp. 391-415.

several demonstrations took place despite the prohibition established by the ministerial decree[191].

As for demonstrations, the French Council of State pronounced another decision on 6 July 2020[192]. The Prime Minister had indeed enacted a new decree after the first decision: the prefect should authorise any demonstration, and no demonstration could take place with more than five thousand people. The Council considered that such a regime was contrary to the fundamental freedoms since it added an authorisation mechanism to the system of declaration. Indeed, any demonstration was forbidden, except if the prefect gave its authorisation. This second decision shows the importance that the French Council of State gave to certain fundamental rights during the pandemic, namely the right to express one's ideas in a context marked by the necessity of debate[193]. The extent of powers given to the prefect, who is a non-elected state representative, might also have justified the annulment.

[191] For instance, some demonstrations were not authorised but tolerated, namely in Brussels. See: Belga, 'La Ville de Bruxelles tolère la manifestation du mouvement Black Lives Matter', *Le Soir*, 5 June 2020, https://www.lesoir.be/305282/article/2020-06-05/la-ville-de-bruxelles-tolere-la-manifestation-du-mouvement-black-lives-matter (accessed 5 November 2020).

[192] Council of State (France), nr. 441257, 441263 and 441384, 6 July 2020.

[193] The existence of a public debate is a criterion used by the ECHR in its case law, especially in cases involving freedom of expression. See for instance: ECHR, Giesbert and others v. France, 1 June 2017, §§ 92-94; ECHR, Von Hannover v. Germany, 19 September 2013, § 46, ECHR, Editions Plon v. France, 18 May 2004, § 44.

Finally, it is worth mentioning the decisions pronounced by the two Councils of State about freedom of religion during the second lockdown. In France, the Council of State judged on 7 November 2020 that the prohibition of religious ceremonies, except for weddings and funerals, was proportionate[194]. A few weeks later, the government eased the restrictions and allowed religious ceremonies up to thirty people. However, the Council of State considered that this numerical limit was not proportionate, namely because it was not adapted to the size of the religious places[195]. It seems thus that the French Council of State has a stricter appreciation when an easing of the lockdown is decided, which is understandable.

As for the Belgian Council of State, it decided for the first time during the pandemic that a restriction on fundamental rights was disproportionate[196]. In particular, the numerical limit imposed on weddings and funerals was not adequately justified. While fourteen people could attend funerals, only five were allowed at weddings. This limit was particularly strict in the case of Jewish weddings, which require the presence of ten men. The decision of the Council of State remains surprising, since it takes a completely different perspective compared to the decision pronounced during the first *déconfinement*.

5. CONCLUSIONS

To conclude, it seems that no unique explanation can be persuasively singled out for the difference of case law between the two Councils of State. However, the importance of proportionality percolates through French law and the jurisprudence of the Council of State.

[194] Council of State (France), nr. 445825 and others, 7 November 2020.

[195] Council of State (France), nr. 446930 and others, 29 November 2020.

[196] Council of State (Belgium), nr. 249.177, 8 December 2020.

In Belgium, the principle barely appears in the COVID-19 case law at hand. Besides proportionality, the paper has emphasised several elements that could explain the divergence between the jurisprudence of the two Councils of State.

On the one hand, the Belgian Council of State remains in a procedural approach of the cases brought to it[197]. On the other hand, the French Council of State relied on scientific arguments and perhaps on 'pragmatism'[198] to strike down the decrees adopted by the Prime Minister. Thus, it is likely that the difference of approach between the two administrative courts depends on the degree of emphasis on the procedural rules. It seems in particular that the condition of emergency is appreciated far more severely in Belgium than in France.

Furthermore, the variations in the system of protection of fundamental rights bring an explanation as well. Indeed, demonstrations are under a system of notification in France. Shifting the paradigm towards a system of prohibition, unless authorisation, is thus a greater move than in Belgium where any demonstration must be authorised. As for religious ceremonies, the dialogue maintained by the Belgian State with religious authorities during these exceptional circumstances seems to have worked against the short term interests of the believers.

[197] Such legalistic approach is (understandably) a characteristic of the case law of the Belgian Council of State. It is one of the reasons that explain the reform of 2014. See: B. Cuvelier, M. Joassart and R. Born, 'La genèse de la réforme du Conseil d'Etat', *A.P.T.*, 2016/3, pp. 213-234.

[198] R. Matta-Duvignau, 'Le Conseil d'État garant de la liberté de manifester dans le contexte d'état d'urgence sanitaire', *Le blog des juristes*, 24 June 2020, https://www.leclubdesjuristes.com/blog-du-coronavirus/que-dit-le-droit/le-conseil-detat-garant-de-la-liberte-de-manifester-dans-le-contexte-detat-durgence-sanitaire/ (accessed 28 October 2020).

Besides, despite the close similarities of the cases analysed, factual differences remain central. Numerical limits bear a substantial effect. The timing of the decisions is also not identical. Little details can sometimes have a decisive impact.

In general, the Belgian Council of State has been less keen than its French homologue to suspend the measures adopted during the coronavirus pandemic[199]. Nonetheless, the number of French decisions that lead to a suspension remains scarce compared to the ones rejecting the claim[200]. Besides, the analysis does not take into account the fact that certain decisions, especially at the local level, could have been negotiated with the civil society, which diminishes the probability of a legal challenge.

To sum up, while there are differences between the jurisprudence of the two Councils of State, they should not be exaggerated. The French Council of State has visibly attached greater importance on some issues than the Belgian Council of State. Whether this is a general trend of administrative jurisprudence remains to be studied.

[199] See however: Council of State (Belgium), nr. 248.541, 9 October 2020.

[200] The President of the contentious section of the Council of State wrote an opinion in the press to remind the public that it was not the mission of the judge to replace the administration (J.-D. Combrexelle, 'Les juges administratifs du Conseil d'Etat se situent loin des polémiques', *Le Monde*, 12.04.2020, https://www.lemonde.fr/idees/article/2020/04/12/jean-denis-combrexelle-les-juges-administratifs-du-conseil-d-etat-se-situent-loin-des-polemiques_6036387_3232.html (accessed 5 November 2020)).

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UK HUMAN RIGHTS CHALLENGES IN THE TIME OF COVID-19

Jamie Grace[1]

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1. INTRODUCTION TO THE UK CONTEXT

This piece explores the way that administrative law and judicial review cases, including claims for violations of the European Convention on Human Rights (1950) ('the ECHR'), whether resolved before a hearing or otherwise, have shaped the way that the UK government has been held to account during the coronavirus pandemic. As Tom Hickman QC has explained, the UK government, unlike some other European executives and administrations, did not seek to derogate from the any fundamental rights under the ECHR using Article 15 ECHR procedures, even if, as the European Court of Human Rights has held in *Lawless v Ireland (No.3) (1961)*, that derogation is possible in a situation comprising a "crisis or emergency which affects the whole population and constitutes a

[1] Sheffield Hallam University

threat to the organised life of the community"[2]. There is a vocal lobby in opposition to the 'lockdown' measures deployed by the UK government that, despite 126, 000 coronavirus deaths at the time of writing, argues that the true 'threat to the organised life of the community' is in fact the deployment of 'lockdown' laws themselves. This is not to say that there have not been serious concerns about the human rights impacts of a very wide range of coronavirus restrictions (some of which are discussed below), and considerable constitutional impropriety from the UK government at times. In Lord Sumption's words, the "sheer scale on which the government has sought to govern by decree, creating new criminal offences, sometimes several times a week on the mere say-so of ministers, is in constitutional terms truly breathtaking"[3].

Judicial review claims in the UK throughout the 2020-21 pandemic phase have highlighted both the social justice and the civil liberties issues with the government response to the impact and seriousness of COVID-19[4]. These legal claims have been based around Human Rights Act grounds, and sometimes on wider international human rights law instruments, and also on traditional common law grounds of review; such as irrationality, failure to consult, and other types of illegality ground. The COVID-19 pandemic has shown us the multitude of ways in which drastic public health policy can undermine human rights even as it brings legislative measures that are taken to protect us from a virulent disease, given the all-too-often fatal consequences for those who are infected. As shown in the important Court of Appeal judgment in the 'lockdown' case of *Dolan*, discussed below,

[2] See Tom Hickman QC, 'The coronavirus pandemic and derogation from the European Convention on Human Rights', E.H.R.L.R. 2020, 6, 593-609; quoting the judgment of the Strasbourg Court in *Lawless v Ireland (No.3)* (1961) 1 E.H.R.R. 15 at 28.

[3] Jonathan Sumption, *Law in a Time of Crisis*, Profile Books, 2021, 228.

[4] On procedural impacts of the pandemic, see Joe Tomlinson, Jo Hynes, Emma Marshall, and Jack Maxwell, 'Judicial review during the COVID-19 pandemic', P.L. 2021, Jan, 9-19.

rights under the European Convention on Human Rights (1950), and taking effect in the UK through the Human Rights Act 1998, work on the basis of a variety of structures and degrees of importance and protection, depending on the rights concerned. The range of ECHR rights interfered with, through the coronavirus pandemic, has been very great indeed. And yet there have been constitutionally drastic inroads into the rule of law in the UK in the last 12 months, too. As a result, this piece concludes with a short discussion of the importance of the values and operation of the rule of law during a time of crisis such as in the current pandemic.

I was motivated to write a first draft of this piece on the 8th December 2020, as hopeful news broke of the first person in the UK, Margaret Keenan, being vaccinated against COVID-19 outside of a trial programme, and using a vaccine developed by Pfizer/BioNTech. Very sadly, many more deaths related to the coronavirus pandemic lie ahead, globally and in the UK itself. The emergence of more transmissible strains of COVID-19 saw rates of deaths and hospitalisations both increase in the winter of 2020-21 in the UK, necessitating a third, lengthy 'lockdown' by way, once more, of ministerial health protection regulations - approved by the UK Parliament on the 6th January 2021.

Joshua Rozenberg has explained that following the landmark judgment in *Miller No. 2* on the (non-)prorogation of Parliament in late 2019[5], an advocate in the case made the point to him that "the thing about great cases is that what once seemed impossible now seems inevitable"[6]. It would seem that the thing about pandemics is that what once seemed impossible now seems inevitable. Across the UK, secondary legislation has been used to impact on the freedoms, liberties, health, education and labour of tens of millions of people, largely without Parliamentary scrutiny at the time of restrictions coming into force; albeit

[5] *R (Miller and others) v Prime Minister* [2019] UKSC 41

[6] Anonymous, in Joshua Rozenberg, *Enemies of the People? How judges shape society*, Bristol University Press 2019, 189.

with the overarching goal of preserving the function and integrity of the National Health Service (NHS), and with it, preserving life and meeting substantive Article 2 ECHR obligations on a mass scale. But as a result, many different ECHR rights have been affected on a similarly mass scale and in novel, unexpected ways, due to the impact of COVID-19 and the measures taken to suppress it in the UK.

The coronavirus pandemic of 2020-201 has arguably 'engaged' the absolute right to freedom from inhuman or degrading treatment under Article 3 ECHR, for example, when families have been prevented from visiting vulnerable loved ones in residential care, thanks to a lack of 'personal protective equipment' (PPE), or the lack of accurate, accessible and prompt testing of possible cases, or both. At the same time, and in particular in the spring of 2020, twenty thousand estimated coronavirus deaths in adult residential case homes occurred in the 'first wave' of the pandemic in the UK, leading to claims of a violation of the 'operational' duty on the state to preserve life under Article 2 ECHR[7]. At the time of writing, as of 26th March 2021, at least 126, 000 people, most with underlying health conditions, had succumbed to coronavirus-related deaths in the UK alone. Alongside this stark reading of the pandemic in the UK, the argument has been made that the fall in access to and provision of NHS services concerning, amongst other things, cancer care and treatment have raised other Article 2 ECHR issues due to a fall in screening and diagnosis during the earlier waves of the pandemic[8].

As phases of the pandemic have progressed, a number of judicial review cases have received national media coverage in the UK, as the pandemic has continued into a 'second wave' in the UK, from September 2020 onwards. For example, the Doctors'

[7] See https://www.clydeco.com/en/insights/2020/11/permission-granted-for-judicial-review-of-covid-19 (accessed 08.12.2020).

[8] See for example, in Miroslav Baros (2020), 'The UK Government's Covid-19 Response and Article 2 of the ECHR *Laws* 2020, *9*(3), 19; https://doi.org/10.3390/laws9030019

Association UK began a JR claim over the shortage of NHS PPE, focusing on the need for a public inquiry, raised by allegedly insufficient protection from viral infections[9]. In terms of human rights grounds and freedom of religion, Catholic worshipper Lauren Monks challenged the 'lockdown' Regulations in their different iterations, and at a point before their restrictions began to be eased, resulting in some consideration that restrictions on religious worship in larger gatherings may have been unlawful[10]. And perhaps most prominently amongst those claims to be granted a full hearing to date in the High Court in England and Wales, microbiologist Dr Cathy Gardner has sought JR of alleged decisions, and a policy failing, to discharge untested and possibly-COVID-19-infected patients from hospitals into adult residential care homes; the site of arguably the most horrible and preventable loss of life in the pandemic within the UK[11].

In terms of broader international human rights standards, there have been challenges to policy arising from the impact of the pandemic in situations where instruments like the United Nations Convention on the Rights of Persons with Disabilities 2006 (UNCRPD) or the UN Convention on the Rights of the Child 1989 (UNCRC) apply. This might be only in an interpretive sense, given the dualist UK constitution, since these instruments are non-incorporated international instruments, meaning that findings of violations of rights in the context of claims involving ECHR rights can be so 'fortified'[12]; or

[9] See https://www.theguardian.com/society/2020/jun/08/uk-ministers-face-legal-challenge-for-refusal-to-order-ppe-inquiry (accessed 08.12.2020)

[10] See https://catholicherald.co.uk/high-court-judge-rules-that-public-mass-ban-may-have-been-illegal/ (accessed 08.12.2020)

[11] See https://www.theguardian.com/world/2020/jun/12/matt-hancock-faces-legal-action-from-daughter-of-covid-19-care-home-victim (accessed 08.12.2020)

[12] *Per* Mostyn J, in *R (RF) v SSWP* [2017] EWHC 3375 (Admin) at 60. Mostyn J was explaining how submissions on the application of Article 19 UNCRPD helped him reach

that these instruments might be more broadly justiciable in the sense of accountability over breaches of an aligned UK statute, such as with the Care Act 2014 with regard to the UNCRPD, for example.

In one recent action, disabled man Luke Runswick-Cole successfully threatened Derbyshire Council with a judicial review claim over their proposed reductions in Care Act-related provision in the pandemic, on the basis of a lack of necessity of those plans[13]. This successful pre-action example, in the context of the standards under the UNCPRD, was followed by a successful claim in a different case, in the end, for the charity Article 39. The charity had started a judicial review claim relating to pandemic-prompted regulations which allowed for a reduction in safeguards around the rights of young people, like inspections of children's homes, and were granted permission for a hearing[14]. After an initial defeat for the charity in the High Court stage of the case, in a reversal of that decision, the Court of Appeal held in *R (Article 39) v SSfE* [2020] EWCA Civ 1577 that the creation of changes to inspections of children's care accommodation was unlawful, since it did not take place with sufficient consultation either with the Children's Commissioner or with other key interested bodies, and that there had been a duty to consult that still applied during the pandemic. In an even more high-profile case, food charity Sustain sent a pre-action protocol letter over a lack of free school meals over the 2020 summer period for

conclusions as to the unlawfulness of an interference with Article 8 and Article 14 ECHR rights in that case.

[13] See https://rookirwinsweeney.co.uk/challenging-derbyshires-care-act-easements/ (accessed 08.12.2020)

[14] See https://www.independent.co.uk/news/uk/politics/children-care-coronavirus-sexual-abuse-anne-longfield-a9551596.html and https://article39.org.uk/2020/06/26/removal-of-safeguards-for-children-in-care-judicial-review-given-go-ahead/ (both accessed 08.12.2020)

poorer children[15] - and eventually a government U-turn followed after a famous, and very effective, intervention from campaigner and footballer Marcus Rashford[16].

2. THE SIGNIFICANT JUDGMENT OF THE COURT OF APPEAL IN *DOLAN*

The first UK lockdown regulations (the Health Protection (Coronavirus, Restrictions) (England) Regulations (SI 2020/350)) were tough in their effects, and restricted the enjoyment of many ECHR rights on the part of tens of millions of people in England; while other parts of the UK faced similar restrictions, in turn, in the spring of 2020. There have been a number of permutations of 'lockdown' regulations in England alone[17], and even more variation when we look across the UK as a whole, but while the combined effect of these restrictions by way of secondary legislation may have been lawful, in the sense of not being *ultra vires* their statutory underpinnings (the *Public Health (Control of Disease) Act 1984)*, they have certainly been the most significant shift in living conditions, as a matter of law, in any peacetime period of government in the UK in modern times. This section of this paper highlights the way in which the Court of Appeal addresses these sorts of wider, more universal impacts on human rights in the UK, as stemming from coronavirus-related restrictions, in *R (Dolan and others) v SSHSC* [2020] EWCA Civ 1605.

[15] See https://www.bbc.co.uk/news/education-52931665 (accessed 08.12.2020)

[16] See https://www.bbc.co.uk/news/uk-england-53079784 (accessed 08.12.2020)

[17] Barrister Adam Wagner had tracked 64 sets of changes to English lockdown rules by the 12th January 2021, for example. See: https://www.theguardian.com/world/2021/jan/12/england-covid-lockdown-rules-have-changed-64-times-says-barrister (accessed 27.01.2021)

Simon Dolan, a successful businessman, was affected as so many others were, in suffering significant interferences with their ECHR rights thanks to the strictures of 'full lockdown'[18], when, in essence, leaving one's residence could only be done lawfully with 'reasonable excuse' and gatherings with others from outside of one's household were criminalised. The Court of Appeal, however, dismissed all of Dolan's Human Rights Act-based grounds. Presented here are snippets of the reasoning that the judgment provided in *Dolan* for rejecting this claim, Article by Article, in ECHR terms:

- In *Dolan*, with regard **Article 5 ECHR**, the Court of Appeal found that there had been no unlawful interference with the right to liberty in the original coronavirus 'lockdown' beginning in March 2020, explaining at [93] that: "…it is a mischaracterisation to refer to what happened under the regulations as amounting in effect to house arrest or even a curfew."[19]

- With regard to the effect of the original 'lockdown' on family life, and in terms of impacts on **Article 8 ECHR** rights through an inability to meet loved ones, the

[18] A successful claim for a violation of ECHR rights starts with the courts establishing a 'victim' of interferences with the right or rights concerned. In relation to an application lodged with the European Court of Human Rights in April 2020, *Le Mailloux v. France* (application no. 18108/20), the claimant could not show that had been personally affected in their healthcare by French measures to deal with coronavirus, so they did not meet the requirements or Article 34 ECHR.

[19] In *R (Francis) v SSHSC* [2020] EWHC 3287 (Admin), the regulations requiring self-isolation following a positive test for SARS-COV-2 were challenged as to their lawfulness. But the High Court found that the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 (SI 2020 No 1045) were lawfully made.

Court of Appeal found in *Dolan* [at 96] that: "There can be no doubt that the regulations did constitute an interference with article 8 but it is clear that such interference was justified under article 8(2). It was clearly in accordance with law. It pursued a legitimate aim: the protection of health. The interference was unarguably proportionate."

- On **Article 9 ECHR**, and impacts of restrictions on the right to manifest religious beliefs through communal worship indoors, the Court of Appeal in *Dolan* reserved judgement, since the Court was aware of a substantive hearing pending (at the time of handing down judgment in *Dolan* on 1st December 2020) in relation to *R (Hussain) v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin).[20]

- On **Article 11 ECHR**, the Court of Appeal found in *Dolan* [at 103] that: "…the regulations cannot be regarded as incompatible with article 11 given the express

[20] However, in *Hussain*, the High Court found that the lockdown restrictions on communal worship in mosques and other communal faith meetings were lawful, and proportionate. Swift J considered [at 21-22] that: "What steps are to be taken, in what order and over what period will be determined by consideration of scientific advice, and consideration of social and economic policy. These are complex political assessments which a court should not lightly second-guess… In the circumstances of the present case, the issue is not whether it is more important, for example, to go to a garden centre than to go to communal prayer; the issue is not whether activities that are now permitted and those that are prohibited are moral equivalents. Rather, the question is as to the activities that can be permitted consistent with effective measures to reduce the spread and transmission of the Covid-19 virus; that so far as they interfere with Convention rights, strike a fair balance between that inference and the general interest. That will be a delicate assessment. There will be no single right answer. The Secretary of State is entitled, in my view, to adopt a precautionary stance."

possibility of an exception where there was a reasonable excuse [to avoid a fine, when meeting others]. It may well be that in the vast majority of cases there will be no reasonable excuse for a breach of regulation 7 as originally enacted. There were powerful public interests which lay behind the enactment of regulation 7, given the gravity of the pandemic in late March [2020]."

- On **Article 1 of the First Protocol** to the ECHR, the Court of Appeal found in *Dolan* [at 110] on the impact on businesses that: "…it is impossible to conceive that there was a disproportionate interference with the right in A1P1. The margin of judgement to be afforded to the executive is particularly wide in this context, because this was a "control of use" case and not a deprivation of property case. Furthermore, the balance to be struck under this A1P1 [sic] would have to take account of the well-known measures of financial support which the Government introduced in the exceptional situation created by the pandemic."

- On **Article 2 of the First Protocol**, and given that schools and typically remained open to the children of key workers during the pandemic in the UK in 2020, and as some teaching continued online and remotely, the Court of Appeal found in *Dolan* [at 113-114] that: "…article 2 of the First Protocol, reflecting a theme which runs throughout the Convention, envisages a fair balance having to be struck between the rights of the individual and the general interests of the community. In the exceptional circumstances of the pandemic, there is no arguable ground on which a court could interfere with the actions of the Government in this respect."

3. DISCRETION AFFORDED TO POLICYMAKERS DURING A PANDEMIC

The decision of the Court of Appeal in *Dolan* recognises that 2020 saw wide-scale human rights impacts, and interferences with a number of ECHR, but not unlawful interferences, to date, given the justification available to the courts on the basis of an important public health rationale. So far, UK government responses to unprecedented challenges caused by a respiratory virus pandemic, that is far more fatal to the elderly and

the chronically unwell, have received benevolent treatment from the judiciary in England and Wales. In terms of wider avenues of accountability, it remains to be seen what the outcomes of a future public inquiry report might be, of course[21]. However, the issue remains that government ministers have been able to defend themselves against a range of judicial review claims based on human rights grounds, essentially by drawing on i) the flexibility of a precautionary approach to proportionality in the pursuit of health protection, ii) the principle in administrative law of executive discretion, and iii) the 'margin of appreciation' doctrine in relation to the ECHR, and as seen from the perspective of the European Court of Human Rights. In recognising these factors, and when scrutinising government health protection policy in the pandemic from a human rights perspective, the UK courts have already begun to accept arguments about COVID-19 impacts based on recognition of policymaker discretion. For example, in *Dolan* the Court of Appeal highlighted [at 97] that:

> "In this context [of impacts on qualified ECHR rights in a pandemic] we consider that a wide margin of judgement must be afforded to the Government and to Parliament. This is on the well-established grounds both of democratic accountability and institutional competence. We bear in mind that the Secretary of State had access to expert advice which was particularly important in the context of a new virus and where scientific knowledge was inevitably developing at a fast pace. The fact that others may disagree with some of those expert views is neither

[21] On 17th March 2021, a group of families bereaved as a result of COVID-19 issued a pre-action protocol letter to the UK government, demanding a decision is made to announce a public inquiry into pandemic preparedness, the issue of border control and travel restrictions (or the lack of them with regard to the ports and airports of the UK), and the timing of lockdowns. See https://www.theguardian.com/world/2021/mar/17/bereaved-families-issue-legal-ultimatum-to-boris-johnson-over-covid-inquiry (accessed 25.03.2021)

> here nor there. The Government was entitled to proceed on the basis of the advice which it was receiving and balance the public health advice with other matters."

Furthermore, as a sort of interpretative fix, or a safeguard in the event of future lockdown restrictions which are not judged to be so proportionate at some given point, the Court of Appeal in *Dolan* also took pains to highlight the strength of the human rights law framework in the UK. This of course includes an obligation on the courts to 'read into' legislation a degree of relevant protection for ECHR rights, even when applying primary legislation like an Act of Parliament, and certainly when applying and interpreting a statutory instrument like the 2020 'lockdown' Regulations. On this requirement of section 3 of the Human Rights Act 1998 (the HRA) and the lockdown Regulations, the Court of Appeal in *Dolan* noted [at 106] that:

> "…the HRA is primary legislation, whereas the regulations are subordinate legislation. If there were any conflict between them, it is the HRA and not the regulations that would have to take priority. It would be possible to resolve any potential conflict by the process of interpretation required by section 3 of the HRA were there an incompatibility with a Convention right…"

So while the observance of a doctrine of recognising policymaker discretion presumably has its limits for the UK judiciary, so long as lockdown restrictions continue to be made under secondary legislation and in a way that aspires or purports to be proportionate, and is reviewed by Parliament on a proper basis, the UK courts will reassure themselves that COVID-related restrictions can be 'read down' if necessary to ensure ECHR compliance. However, this does not alleviate the everyday experience for tens of millions of people in relation to the restrictions involved in the pandemic response, or its enforcement. And in relation to the 2020-21 pandemic, the UK government will not be able to easily brush off claims that there have been violations of the right to life, and in particular the positive obligation to preserve life under Article 2 ECHR; or to protect the right to respect for private and family life under Article 8 ECHR. More evidence about the human rights impacts of the pandemic is coming to light, in this regard. For example, there has been a shocking report by the Care Quality Commission (CQC) which found that

decision-making by clinicians was at times poor with regard to 'do not attempt cardio-pulmonary resuscitation' (DNACPR) notices being placed on patients records. This report found that "increased pressure on staff time and resource due to the pandemic meant that conversations about people's care [and DNACPR notices] were often taking place at a much faster pace in busier settings", while the CQC also "heard evidence from people, their families and carers that there had been 'blanket' DNACPR decisions in place"[22]. This creates a severe risk of violations of the ECHR rights of dying patients and their families, as the CQC has explained:

> "Though clinicians can make DNACPR decisions, if these decisions are made in ways that do not protect people's rights to life, it is possible that this may be a breach of Article 2. This may happen, for example, by putting a DNACPR decision in place without the knowledge of the person and/or those close to them and then failing to provide CPR should the person's heart stop beating. Not consulting with the person or their representatives when making a DNACPR decision also risks breaching Article 8 of the of the European Convention on Human Rights, which protects their right to respect for their private and family life."[23].

4. HUMAN RIGHTS AND STANDARDS OF 'REASONABLENESS'

Article 2 ECHR case law concerning positive obligations to take steps to preserve life can turn on what is *reasonable*, as highlighted below, and what is reasonable can be

[22] Care Quality Commission, *Protest, respect, connect - decisions about living and dying well during COVID-19: Final report*, March 2021, 11.

[23] Care Quality Commission, *Protest, respect, connect - decisions about living and dying well during COVID-19: Final report*, March 2021, 15.

hard to determine when there are few comparators. As Oswald and Grace have recently explained in a short comment article for the UK journal *Public Law*, on the human rights obligation to create a functioning COVID-19 tracing app, and contact tracing systems more generally, "[t]here is doubt, however, as to whether art.2 obliges *particular* measures to be taken to prevent infection."[24] For example, needle sterilisation tablets provided in UK prisons were not an unlawful alternative to needle exchange programmes, as determined in the European Court of Human Rights case of *Shelley v United Kingdom (2008) 46 E.H.R.R. SE16*. Under Article 2 ECHR, the positive obligation on the state to take preventive steps, where a real and immediate risk to life exists, is not without practicable limit, and is to be measured by the administrative law concept of *reasonableness*. As Dyson LJ explained in *R. (on the application of Rabone) v Pennine Care NHS Foundation Trust [2012] UKSC 2; [2012] 2 A.C. 72* at [43], the "standard demanded for the performance of the operational duty is one of reasonableness". What is *unreasonable* will be highly contextual: and in the case of SARS-COV-2, the full context will often mean taking into account the age of those infected, and who might be far more likely to die, based on 'co-morbidities' such as excess weight, diabetes, pre-existing lung/respiratory and heart/vascular diseases, and so forth.

So the protection of the most vulnerable in the case of COVID-19 infection is, from a perspective of Article 2 ECHR positive obligations, about the reasonableness, or unreasonableness, of measures, or inactions, in *protecting those most at risk*, based on what authorities knew or ought to have known, as at particular points in time, and even between different phases of the pandemic. It is for these reasons that the most controversial judicial review started in 2020 is likely to be a case now set to be heard in the spring of 2021, whatever the extent of the UK 'second wave' of COVID-19. This is the application for judicial review made by Dr. Cathy Gardner in relation to arguable Article 2 ECHR failings in advance of the peak of the 'first wave' of the pandemic as it occurred in the UK,

[24] Marion Oswald and Jamie Grace, 'The COVID-19 contact tracing app in England and "experimental proportionality"', P.L. 2021, Jan, 27-37, 31.

concerning the discharge of (untested) possibly-COVID-19-infected patients from hospitals into care homes, thought to have led to so many untimely and early deaths of older people.

5. A CONCLUDING THOUGHT ON COVID-19 AND THE RULE OF LAW

Most of the restrictions on the full exercise of qualified ECHR rights during the UK coronavirus pandemic have been less-than-ideally scrutinised by Parliament and the courts. The defence that HM Government will use if further challenged on this, that the use of secondary legislation allows for quicker lawmaking when a rapid response of variation of the applicable rules is needed to preserve more lives, will seem weak, given the repeated delays by government in deciding to act to restore lockdown in the crucial days of late December 2020, and the first few days of January 2021. However, it must be said that there is a crucial and material difference between the effect on the rights of individuals in England and Wales, say, brought about by this use of secondary legislation to create COVID-related restrictions for so many people; versus the kind of denial of access to justice, and breach of the rule of law, represented by the use of secondary legislation that was used to increase employment tribunal fees, and which were quashed in *R (UNISON) v Lord Chancellor* [2017] UKSC 51. The UK constitution preserves the supremacy of the rule of law in a Parliamentary democracy, as a kind of meta-principle which is seen in application through the facilitation of access to justice in the outcome in *UNISON*. The most fundamental extension of the meta-principle of the rule of law is the way that the courts are empowered to ensure the democratic functioning of the Parliamentary system (witness the unanimous stance of the 11-member panel of the Supreme Court in *Miller No.2* determining in late 2019 that Parliament not been prorogued lawfully or otherwise). In *UNISON* [at 68] the Supreme Court explained that:

> "At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the

> Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them."

In *Dolan*, by way of contrast, qualified ECHR rights are applied in a way that tests the proportionality of coronavirus-related restrictions; and through the judicial review of these restrictions, despite the rejection of claims those restrictions are disproportionate, we can see strong jurisprudential evidence that the rule of law is at least intact, even if confidence in HM Government is shaken. It remains to be seen what further reputational damage the Johnson government can withstand through the period of the pandemic, and how that might transfer to its electoral fate. The eventual outcome of the Article 2 ECHR claim for judicial review made by Dr. Cathy Gardner in relation to coronavirus deaths in care homes in 2020 may be highly influential in this regard.

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REGULATION ISSUES OF ALGORITHMIC ADMINISTRATIVE DECISIONS: LOOKING FOR AN ITALIAN LEGISLATIVE MODEL

Luigi PREVITI*

Link to the Italian version of the Article

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* Dottore di ricerca in Diritto Amministrativo e Avvocato nel foro di Palermo.

1. FOREWORD: DELIMITATION OF THE FIELD OF RESEARCH

Although the digitalization of public administrations has not been a recent issue in administrative law studies ([2]), in recent years it has offered new opportunities for the development of the traditional organizational and operational modules of public authorities.

As it is well known, the current phase of computerisation no longer concerns experimentation with different forms of expressing the will of the administration towards private individuals or the introduction of particular platforms for the exchange of data and information between public authorities ([3]).

([2]) The importance of the subject has already been highlighted by M.S. GIANNINI, *Rapporto sui principali problemi della Amministrazione dello Stato*, in *Riv. trim. dir. pubblica*, 1982, 722 ff., who, after pointing out that such a process should not only concern the internal organisation of offices, but also the same modalities of adoption of administrative acts ("[...] information systems are no longer used by administrations for internal management purposes, but are actually used to administer, i.e. they are increasingly projected outwards"), pointed out the circumstance that the feasibility of the new paradigm of action would have required specific technical skills, difficult to find within the staff working in the single administrations. It should also be noted that the relevant problems linked to the use of computer systems in the exercise of administrative activity have also been addressed in the work of A. PREDIERI, *Gli elaboratori elettronici nell'amministrazione dello Stato*, Bologna, 1971, and G. DUNI, *L'utilizzabilità delle tecniche elettroniche nell'emanazione degli atti e nei procedimenti amministrativi. Spunti per una teoria dell'atto amministrativo emanato nella forma elettronica*, in *Riv. amm. Rep. it.* , 1978, 407 ff.

([3]) On this point, see D.U. GALETTA, J.G. CORVALAN, *Intelligenza artificiale per una pubblica amministrazione 4.0?*, in *Federalismi.it*, n. 3/2019, 2, according to which it is possible to divide the digitalization process that has affected the public sector in the Italian legal system into four phases: the initial phase, in which the public administration of the 19th century was characterised by the use of paper and typewriters within public offices; the second phase, in which the public administration began to equip itself with new technical tools (mainly computers, printers and fax machines) to carry out its institutional activities; the third phase, started at the beginning of the 21st century, in which internet, digital portals, mobile applications and social networks began to spread within the public sector,

On the contrary, it concerns the possibility of entrusting the administrative decision-making process itself to specific software, that is computer tools which, on the basis of the *input* data and the provided calculation instructions (i.e. algorithms), are able to perform all the operations necessary to achieve a result (*output*) ([4]).

Concrete examples of the process of algorithmic transformation of public action are numerous and seem to affect the most different sectors of administrative activity ([5]).

significantly changing the way it interacts with the outside world; the fourth phase, the so-called Administration 4.0., characterised by an advanced level of automation and interconnection of administrative activities. For a similar reconstruction of the evolutionary path of public digitalization in Italy, see also S. CIVITARESE MATTEUCCI, L. TORCHIA, *La tecnificazione dell'amministrazione*, in Id. (ed.), *La tecnificazione* , directed by L. Ferrara, D. Sorace, *A 150 anni dall'unificazione amministrativa italiana* , IV, Firenze, 2016, 15 ff.

([4]) Some doctrine has tried to summarise the transition to this innovative paradigm of action by recalling the conceptual distinction between electronic form act and electronic content act. On the distinction in question, see, *ex multis,* A. MASUCCI, *L'atto amministrativo informatico. Primi lineamenti di una ricostruzione*, Napoli, 1993, 13 ff., who highlighted the opportunity to make a qualitative leap in the use of computers in the public sector, and that is "to go beyond the management (however sophisticated) of data and entrust the computer with tasks before reserved for man: it is possible to move from the computer-archive phase to the computer-official phase"; A. USAI, *Le prospettive di automazione delle decisioni amministrative in un sistema di teleamministrazione*, in *Dir. inf.*, 1993, 164 ff.; D. MARONGIU, *L'attività amministrativa automatizzata*, Rimini, 2005, 17 ff.; A.G. OROFINO, *La patologia dell'atto amministrativo elettronico: sindacato giurisdizionale e strumenti di tutela*, in *Foro amm*., 2002, 2256.

([5]) On the conceptual and operational revolution brought about by the spread of algorithmic reasoning, both in the public and private sectors, see J.M. BALKIN, *The Three Laws of Robotics in the Age of Big Data*, in *Ohio State Law Journal*, 78, 2017, 1219 ff.; S. ZUBOFF, *The Age of the Surveillance Capitalism. The Fight for a Human Future at the New Frontier of Power*, London, 2019; M.C. CAVALLARO, G. SMORTO, *Decisione pubblica e responsabilità dell'amministrazione nella società dell'algoritmo*, in *Federalismi.it.*, n. 16/2019, 2, who underline that in the current social context "algorithms include or exclude, establish hierarchies, decide rewards and punishments. And this happens in both the private

In this regard, all the cases in which public administration decides to use a telematic procedure to interface with the citizen, asking to insert the data necessary for the adoption of the administrative measure, can be seen. These hypothesis seem to be an increasingly frequent occurrence in the case of public competitions of various type, of the submission of applications for public funding or incentives, of participation in tenders and of organisation of mobility procedures for teaching staff ([6]).

More recently, the use of algorithmic formulas has also shown its potential in the health field, being one of the main tools implemented at government level to coordinate the national management of the Covid-19 epidemiological emergency ([7]).

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and the public sector, from commerce to employment, from health to criminal justice: they preside over voting systems and the provision of mortgages, decide the issuing of credit cards, the dismissal of a worker and even personal freedom"; S. RODOTÀ, *Il mondo nella rete, Quali i diritti, quali i vincoli*, Roma-Bari, 2014, 37, according to whom "important or only apparently minor decisions, choices relevant to the economy and to daily life itself, are increasingly entrusted to automated procedures, to software developed thanks to mathematical models which, by reducing or eliminating human intervention altogether, should make many operations faster and more reliable, reducing their risks".

([6]) For an analysis of these hypothesis in case law, see, *ex multis*, TRGA Trento, sez. I, 15 April 2015, n. 149, in *www.giustizia-amministrativa.it*, with reference to the issuance of authorizations for the opening of pharmacies; Cons. Stato, sez. VI, 7 November 2017, n. 5136, in *www.giustizia-amministrativa.it*, with reference to the submission of applications for public funding; TAR Lazio, Roma, sez. III-bis, 22 March 2017, n. 3769, in *www.giustizia-amministrativa.it*, with reference to the automated performance of a mobility procedure for teaching staff (on which we will say more below); TAR Lazio, Roma, sez. III, 3 July 2018, n. 7368, in *www.giustizia-amministrativa.it*, with reference to the automated exclusion from participation in a public competition; and, most recently, TAR Lazio, Roma, sez. III-bis, 30 June 2020, n. 7370, in *www.giustizia-amministrativa.it*, with reference to the automated performance of the correction of the selective tests of the competition for school managers.

([7]) In this regard, see the automatic mechanism for determining the different levels of alert for the spread of viral contagion within the national territory, which operates on the

This seems to demonstrate the importance of bringing back to the centre of the debate not only the controversial relationship between political choices and (knowledge-based) technical choices, but also between decisions that are the result of human intelligence and decisions entrusted to artificial intelligence systems ([8]).

However, considering the growing use of automated decision-making process in the public sector, it seems to be a greater need to define a clear and organic regulatory framework for this phenomenon within Italian legal system.

In particular, the above-mentioned regulatory needs seem to relate to two main aspects.

basis of 21 indicators defined by the Ministry of Health under art. 2 of the DPCM of 3 November 2020.

([8]) For an all-encompassing definition of the different computer systems related to artificial intelligence, cf. the recent study by the European Commission's High Level Expert Group "*A definition of AI: Main capabilities and scientific disciplines, High-Level Expert Group on Artificial Intelligence"* of 8 April 2019, in *www.ec.europa.eu*, according to which "Artificial intelligence (AI) systems are software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behaviour by analysing how the environment is affected by their previous actions. As a scientific discipline, AI includes several approaches and techniques, such as machine learning (of which deep learning and reinforcement learning are specific examples), machine reasoning (which includes planning, scheduling, knowledge representation and reasoning, search, and optimization), and robotics (which includes control, perception, sensors and actuators, as well as the integration of all other techniques into cyber-physical systems)".

The first one is related to the ways of collection, storage and supervision of data and information involved in automated decision-making process ([9]).

A issue affected by the difficulties linked to the failure to modernise the technological and organisational resources available to public bodies ([10]), which have not been solved by the recent introduction of specific databases in certain sectors of administrative activity ([11]).

The second aspect concerns the functioning and articulation modes of the algorithmic administrative procedure, the regulation of which requires, as it will be discussed in detail shortly, the identification of a balance between the different legal interests concerned in the automated exercise of public action.

([9]) As pointed out by D.U. GALETTA, *Algoritmi, procedimento amministrativo e garanzie: brevi riflessioni, anche alla luce degli ultimi arresti giurisprudenziali in materia*, in *Riv. it. dir. pubbl. com.*, 2020, 501 ff., for the good functioning of the automated processes it is essential to implement an adequate governance of the data available to the public administrations, since the latter are required to adopt their decisions on the basis of the data and information collected in the preliminary phase of the administrative procedure.

([10]) On the dramatic digital backwardness of Italy compared to the European average, see the DESI report (Digital Economy and Society Index) drawn up by the Commission for the year 2019, in *www.ec.europa.eu/digital-single-market/en/desi*, which sees Italy in third place for the implementation of the European Digital Agenda. On this point, recently, see E. CARLONI, *Algoritmi su carta: politiche di digitalizzazione e trasformazione digitale delle amministrazioni*, in *Dir. pubbl.*, n. 2/2019, 3632 ff.

([11]) One of the most obvious examples in this sense is represented by the failure to set up the National Database of Economic Operators referred to in art. 81 of Legislative Decree n. 50 of 18 April 2016. More generally, on the issues related to data management by public administrations, see, for all, the monographic work by G. CARULLO, *Gestione, fruizione e diffusione dei dati dell'amministrazione digitale e funzione amministrativa*, Torino, 2017.

The aim of this paper is to highlight the most relevant problematic points that should be taken into consideration by the legislator in order to introduce a regulation of the institution of automated administrative decisions, limiting the purpose of the investigation to the use of the most straightforward automation systems ([12]).

In particular, after having briefly recalled the current legal framework on the digitalization of administrative acts and the main doctrinal theories on this subject, the relevant positions expressed in recent administrative case law will be examined.

This analysis will make it possible to emphasize, in particular, the absence of a precise regulation of algorithmic decision-making process and the consequent urgency of guaranteeing a minimum protection for the rights of citizens affected by public action.

With the intent to discuss possible regulatory measures, the main legislative and interpretative solutions developed in this regard in the French legal system will then be recalled from a comparative law perspective.

At the end of the survey, some conclusive remarks will be made regarding the principal needs to regulate the phenomenon within the Italian legal system.

([12]) The aforementioned delimitation of the scope of the investigation is justified by the fact that the recent revaluation of the phenomenon of decision-making automation has focused precisely on deterministic or deductive automated processes, while forms of automation based on the use of more advanced artificial intelligence tools are still far from receiving a judgement of full admissibility in the Italian legal system. This, however, does not eliminate the circumstance that the main problematic aspects characterising the use of the simplest automated mechanisms can also be found in relation to the more sophisticated and technologically advanced ones.

2. THE MYTH OF DIGITALIZATION AND THE MEASURES OF THE ITALIAN LEGISLATOR: MUCH ADO ABOUT NOTHING?

In attempt to recall the current state of the legal debate on automated administrative decisions, it seems appropriate to analyse, first of all, the legislative provisions which, directly or indirectly, refer to the phenomenon in question ([13]).

In this regard, it should be noted that one of the first regulatory measures related to automated decision-making was Legislative Decree no. 39 of 12 February 1993, entitled *"Norme in materia di sistemi informativi automatizzati delle amministrazioni pubbliche",* which defined, for the first time, the general objectives and operational criteria of the process of computerising of public administration.

Specifically, the mentioned decree established the principle according to which "administrative acts adopted by all public administrations are normally prepared through automated information systems" ([14]).

([13]) For an analysis of the main regulatory measures on *e-Government* in Italy, see G. PESCE, *Digital first. Amministrazione digitale: genesi, sviluppi, prospettive*, Napoli, 2018, 39 ff., as well as G. DUNI, *Amministrazione digitale. Il diritto amministrativo nell'evoluzione,* Milano, 2008, 14 ff., who points out that the first references to digitalization can be found in sectoral provisions, such as in art. 15-quinquies of Law no. 38 of 28 February 1990, concerning the possibility of automatic issuance of certificates.

([14]) Indeed, although the rule in question has received little application (on this point, see G. DUNI, *Amministrazione digitale*, cit., 16, who underlines how the only application of art. 3 was the start of the reform of the computerised payment mandates by the State Administrations under Presidential Decree no. 367 of 20 April 1994), it is necessary to underline that the diffusion of the so-called automated administrative acts had also been hoped by a part of jurisprudence, which has highlighted how "the use of computerised procedures and electronic machines in the performance of administrative activities is not only legitimate, but is now permitted and regulated by the legislation in force, also in view of the greater objectivity and impartiality that the machine can ensure, especially in the performance

According to the perspective adopted by the legislator, in fact, the use of such instruments in the public sector would have contributed to: the improvement of the public services; the achievement of a higher level of transparency in administrative action; the strengthening of the cognitive supports used until then to take decisions; the containment of costs incurred by public structures.

These objectives would be achieved, in particular, following a process of integration and interconnection between the various ICT systems of the public administrations, which would be linked, in turn, to a national telematic plateform set up in accordance with the standards defined also at European level.

However, in spite of the appreciable effort to lay down a first organic discipline of digital administration ([15]), the intention of the new legislation does not seem to have been actually achieved. This is justified because of the relevant sectorial measures adopted in the following years, such as Law no. 59 of 15 March 1997 (the so-called Bassanini I), which

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of repetitive operations, since it is not subject to the loss of attention found in man after a certain time of application to the same task". In these terms, Cons. Stato, sez. VI, 24 October 1994, n. 1561, in *Foro amm*., 1994, I, 2438; Cons. Stato, sez. VI, 7 February 1995, n. 152, in *Cons. Stato*, 1995, I, 242.

([15]) On this point, it should be pointed out that, prior to the adoption of the aforementioned legislation, the legislator had already intervened in the field of automation through specific and sectorial provisions. See, in this regard, art. 15-quinquies, paragraph 1, of Law Decree no. 415 of 28 December 1989, according to which: "Municipal administrations may make use of automated systems for the direct issue to the applicant of certificates of registry and civil status, guaranteeing in any case the payment of any tax or duty on the acts issued. To this end, it is permitted to replace the handwritten signature of the registry or civil status officer with the graphic signature of the mayor or the delegated councillor, affixed at the time of the automatic issue of the certificate. Certificates issued in this way are valid for all legal purposes if their originality is guaranteed by systems that do not allow photocopying for identical copies, such as the use of watermarked sheets or embossed stamps. The system used must be approved by decree of the Minister of the Interior in agreement with the Minister of Justice".

conferred full legal validity to all acts, data and documents formed by the public administration and by private individuals using ICTs or telematic instruments (art. 15), directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on electronic signatures, and the well-known unique text of the legislative and regulatory provisions on the subject of administrative documentation (d.P.R. no. 445 of 28 December 2000), which conferred full legal validity on all acts, data and documents formed by the public administration and by private individuals using ICTs or telematic instruments (art. 15), which has regulated in detail the "electronic documents" drawn up by public administrations (art. 8 ff.).

In an attempt to achieve a more effective coordination and reorganisation of the previous provisions, the Italian legislator adopted the Digital Administration Code (Legislative Decree no. 82 of 7 March 2005, henceforth simply CAD) ([16]), which regulates central institutions and mechanisms for achieving a more advanced level of public computerisation ([17]).

([16]) Among the first comments on the regulatory text, adopted in implementation of the Law no. 229/2003, see, *ex multis*, E. CARLONI (ed.), *Codice dell'amministrazione digitale*, Rimini, 2005; S. CACACE, *Codice dell'amministrazione digitale. Finalità e ambito di applicazione*, in *www.giustizia-amministrativa.it*, 2006; M. PIETRANGELO, *La società dell'informazione tra realtà e norma*, Milano, 2007, 86 ff., who points out how the Code, although significantly innovating the previous discipline, failed to give an effective impetus to the process of computerisation, due to the presence of a significant number of programmatic and principled statements, not accompanied by as many preceptive norms, the absence of concrete measures against the *digital divide* and insufficient provisions to link the powers of regional and local authorities.

([17]) On the measures introduced by the legislator to improve the organisation and management of the rich information heritage in public hands, see also B. PONTI, *Il patrimonio informativo pubblico come risorsa: i limiti del regime italiano di riutilizzo dei dati delle pubbliche amministrazioni*, in *Dir. pubbl.*, n. 3/2007, 991 ff.

The aforementioned legislation has been the subject of numerous reforms, including, at the very least, the Legislative Decree no. 179 of 26 August 2016, implementing art. 1 of Law no. 124 of 7 August 2015 (the so-called Madia Reform) ([18]).

In particular, this legislative act tried to give a significant boost to the implementation of national *e-Government* strategies, pursuing the objective of "guaranteeing citizens and businesses, including through the use of information and communication technologies, the right to access all data, documents and services of interest to them in digital form" and of "guaranteeing simplified access to personal services, reducing the need for physical access to public offices" (art. 1).

To this end, it was introduced, among the directive legislative criteria, the principle of '*digital first*', as a new parameter in the light of which to redefine and simplify the traditional methods of managing front office procedures and back office procedures ([19]).

([18]) On the main innovations introduced by the new legislation on digitalization, see B. CAROTTI, *L'amministrazione digitale: le sfide culturali e politiche del nuovo Codice*, in *Giorn. dir. amm.* n. 1/2017, 7 ff., who notes how, beyond the individual aspects of content, the introduced legal changes convey a basic message, by virtue of which the need for efficiency in public administration passes through the overall review of the means the latter uses; M.L. MADDALENA, *La digitalizzazione della vita dell'amministrazione e del processo*, in *Foro amm*, n. 10/2016, 2555, who points out that the reform had three basic objectives: to effectively implement the Italian Digital Agenda of 2012; to define the rights of the so-called digital citizenship; to coordinate the previous text of the CAD with the EU Regulation n. 910/2014 of 23 July 2014 on digital identity (so-called eIDAS regulation, *electronic Identification Authentication and Signature*). More generally, for an analysis of the novelties introduced by the Madia law, see, for all, B.G. MATTARELLA, *Il contesto e gli obiettivi della riforma*, in *Giorn. dir. amm*., n. 5/2015, 621ff.

([19]) See Article 1, par. 1, lett. b) of the aforementioned Law no. 124/2015, according to which it is necessary to: "redefine and simplify administrative procedures, in relation to the need for speed, time certainty and transparency towards citizens and businesses, through

As it was pointed out, the reform in question aimed to launch a new phase in public digitalization, in which the aim is to promote the standardisation of proceedings, give priority to electronic communication and facilitate the search and exchange of information between individual administrations ([20]).

However, even then the legislator did not provide any regulatory indication on the phenomenon of automated decisions, leaving a clear gap in the regulation of this point in the Italian legal system ([21]).

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a discipline based on their digitalization and for the full implementation of the "digital first" principle, as well as the organisation and internal procedures of each administration".

([20]) In these terms, cfr. F. MARTINES, *La digitalizzazione della pubblica amministrazione*, in *Medialaws*, n. 2/2018, 7; M.L. MADDALENA, *op.ult.cit.*, 2561 ff. On the digitalization of administrative activities, see, *ex multis*, D. MARONGIU, *Il governo dell'informatica pubblica*, Napoli, 2007, 35 , who agrees that the public computerisation process should be by procedures and not by subjects, as this is the only way to achieve an effective 'application cooperation', i.e. the possibility for administrations to interact remotely with the same software that allows them to carry out common tasks.

([21]) See F. CARDARELLI, *Amministrazione digitale, trasparenza e principio di legalità*, in *Dir. inf.*, 2015, 227 ff.; S. CIVITARESE MATTEUCCI, *Umano troppo umano. Decisioni amministrative automatizzate e principio di legalità*, in *Dir. pubbl.*, n. 1/2019, 10 ff.; E. CARLONI, *I principi della legalità algoritmica. Le decisioni automatizzate di fronte al giudice amministrativo*, in *Dir. amm.*, n. 2/2020, 278, who points out that the current legislation contained in the CAD deals only with some aspects of the *e-Government* phenomenon, focusing on the reengineering of processes and procedures only from a formal and/or organisational point of view. Thus, currently "the digital administration Code does not allow the issue of the legitimacy (and conditions) of algorithmic decision-making to be resolved, ending up by placing itself in the background with respect to the most topical challenges". This is a not surprising circumstance, also in view of the fact that, as it is well known, algorithms constitute the essential elements of any computerised procedure, from the simplest to the most advanced. This led part of the doctrine to question the real objectives pursued by the digital transformation of the public sector, sometimes described as a "false

A different conclusion does not seem to be reached when analysing the current provisions on the use of ICTs in the performance of administrative activities.

In this regard, it can be considered the art. 12 CAD, according to which public administrations use information and communication technologies in their internal relations, in those with other public administrations and with private parties, "in order to achieve the objectives of efficiency, effectiveness, cost-effectiveness, impartiality, transparency, simplification and participation"; in the same way, it can be taken into consideration the art. 41 CAD, according to which "public administrations manage administrative procedures using information and communication technologies".

These arrangements seem to emphasize the instrumental function of digital tools with respect to the pursuit of the fundamental principles of public action, without indicating, however, the operational modes through which ICTs can concretely contribute to the achievement of such objectives ([22]).

Art. 3-bis of Law no. 241 of 7 August 1990, under the heading "*Uso della telematica*", is equally generic, which states, in the original version introduced by art. 3 of Law no. 15 of 11 February 2005, that: "In order to achieve greater efficiency in their

digitalization that has simply transferred sheets of paper [...] into computers", as noted by F. CAIO, *Lo Stato del digitale*, Padova, 2014, 7.

([22]) On the subject, see G. AVANZINI, *Decisioni amministrative e algoritmi informatici*, Napoli, 2019, 82, who recalls that the same opinion rendered by the Council of State on the draft of Legislative Decree no. 82/2005 (opinion 7 February 2005, n. 11995) stressed the "need to accompany the statements of principle with directly preceptive rules, which do not postpone the implementation of such principles exclusively to the will (changeable by definition) to implement them by the individual administrations". On this point, most recently, see also D.U. GALETTA, *Algoritmi, procedimento amministrativo e garanzie*, cit., 506.

activities, public administrations shall encourage the use of telematics, in internal relations, between the various administrations and between the latter and private individuals".

In fact, although it is now accepted that the term telematics should be understood in a not strictly literal sense, and is therefore referable to the plurality of technological tools that fall within the ICTs sector ([23]), the aforementioned provision is also lacking of any reference to the operational measures and instrumental resources necessary for its implementation ([24]).

Therefore, as it has been argued, the provision must be given a merely programmatic value, comparable to that of a declaration of intent and principles ([25]).

([23]) Thus, F. COSTANTINO, *L'uso della telematica nella pubblica amministrazione*, in A. ROMANO (ed.), *L'azione amministrativa. Saggi sul procedimento amministrativo*, Torino, 2016, 243; F. CARDARELLI, *L'uso della telematica*, in M.A. SANDULLI (ed.), *Codice dell'azione amministrativa* , Milano, 2017, 510; S. DETTORI, *Articolo 3-bis*, in N. PAOLANTONIO, A. POLICE, A. ZITO (eds.), *La pubblica amministrazione e la sua azione*, Torino, 2005, 182. On the literal meaning of the term "telematics", see V. FROSINI, *Telematica e informatica giuridica*, in *Enc. dir.*, XLIV, Milano, 1992, who recalls that the term derives from the semantic contraction between the terms "telecommunications" and "informatics", and commonly indicates the technological method of transmitting thought at a distance through the use of a computerised language that conveys automated information.

([24]) The remarks relating to the original provision of art. 3 seem to remain relevant also in relation to the new wording of the provision, amended by art. 12, par. 1, letter b) of the Decree Law no. 76 of 16 July 2020, on the basis of which the words "encourage the use of telematics" have been replaced by the words "act through computer and telematic tools".

([25]) In this sense, F. CARDARELLI, *op.ult.cit.* 511; S. DETTORI, *op.ult.cit.*, 181, according to whom the rule in question, in addition to having a programmatic value, would also be redundant, since the principle established by the same was already perfectly derivable from the provision of art. 97 of the Italian Constitution, as a corollary of the principle of good performance. *Contra*, F. COSTANTINO, *op.ult.cit.*, 245, according to whom the above argument would fail to prove the low practical value of the provision when, reasoning in these terms, the criticism should be extended to all the existing legislation on digitalization. If it is true, in fact, that the technological transformation of the public sector has been slowed

In the light of the above considerations it can be affirmed that there is no specific rule concerning the use of automated systems in the context of administrative procedures conducted by public bodies ([26]).

In the absence of any regulation of the phenomenon, numerous issues seem indeed to arise with reference to the compatibility of the decision-making mechanisms in question with the principle of legality of the administrative action.

3. TRADITIONAL DOCTRINAL APPROACH: FROM ADMINISTRATIVE SELF-RESTRAINT TO AUTOMATED DECISION-MAKING PROCESS

The lack of a legislative framework on the automation of public decisions has led the doctrine that first examined the issue to search the possibility of finding the theoretical basis of the phenomenon using the existing legal categories.

down due to the emergence of criticalities of various kinds, this does not change the circumstance that the regulatory provisions on the subject are placed in terms of obligation for the public administration, to which is added the fact that Italian legislator has provided for sanction mechanisms for their non-compliance by the addressees (see, in this sense, art. 12, par. 1-ter, CAD).

([26]) In this regard, it should be noted that while, on the one hand, there are regulatory provisions which refer, with regard to certain specific procedures, to hypotheses of automated data processing (such as, for example, art. 56 of Legislative Decree no. 50 of 18 April 2016, relating to the institution of "Electronic Procurement"), on the other hand, it does not seem possible to derive from such limited measures a more general legal framework of the institution of automated decision-making act; and this for two fundamental orders of reasons: on the one hand, due to the sectorial nature of the use of the aforementioned computerised processing, the conditions of admissibility of which change depending on the administrative procedure taken into consideration; on the other hand, due to the total absence of legislative references to the issues of transparency and controllability of the results of the processing, tha value of which is highlighted by recent evolution of jurisprudence on the matter (on these profiles, see below).

As it is well known, one of the main problematic aspects addressed by doctrine has concerned the issue of the transposition of legal language into computer language, also known as the phenomenon of 'normalisation' ([27]).

In this regard it was pointed out that achieving the normalisation of a legal text implies that the latter "can be translated, according to the rules of analysis, into a formal language, in which each sign has one and only one function" ([28]), so that it can be understood by the software and easily replicated in the programming phase by technicians.

Starting from the constraints of technical nature that characterize the programming phase, two fundamental conditions have been outlined for the success of the automated decision-making process: *a*) the circumstance that the law to be applied contains precise and determined legal concepts, to which it is possible to attribute exclusively a single meaning or a single interpretation among those abstractly obtainable from the legal text in the concrete case ([29]); *b*) the possibility of tracing the logical reasoning used to adopt the final decision to

([27]) As it is well known, the subject was first addressed by foreign literature (on this point, see L.E. ALLEN, *Una guida per redattori giuridici di tesi normalizzati*, in *Inf. e dir.*, 1979, 61 ff.). With reference to the Italian doctrine see, *ex multis*, L. NIVARRA, *Come normalizzare il linguaggio legale*, in *Contratti e impresa. Dialoghi con la giurisprudenza*, Padova, 1987, 262 ff.; A. MASUCCI, *L'atto amministrativo informatico*, cit., 19 ff.; D. MARONGIU, *L'attività amministrativa automatizzata*, cit., 30 ff.; F. SAITTA, *Le patologie dell'atto amministrativo elettronico e il sindacato del giudice amministrativo*, in *Riv. dir. amm. el.*, 2003, 17 ff.; P. OTRANTO, *Decisione amministrativa e digitalizzazione della p.a.*, in *Federalismi.it,* n. 2/2018, 17 ff.; S. VACCARI, *Note minime in tema di Intelligenza artificiale e decisioni amministrative*, in *Giust. amm.*, 2019, 3-4.

([28]) A. MASUCCI, *op.ult.cit.*, 19.

([29]) In this sense, consider legal concepts referring to value judgments, which require an assessment by the official in relation to the concrete case examined. Examples include the concepts of 'uncommon beauty', 'urgency' or 'public utility'. More recently, see D. MARONGIU, *L'attività amministrativa automatizzata,* cit., 53 ff.; P. OTRANTO, *Decisione*

the logical scheme of conditional judgement, which can be summarised with the locution "*If ... then"* ([30]).

On the other hand, where the legal text contains imprecise and indeterminate notions or concepts, such as to make it difficult to predetermine the meanings related to them in practice, it would not be possible to define "valid criteria for establishing whether a given situation is subsumed under a given rule or whether a given fact falls within a given concept".

amministrativa e digitalizzazione della p.a., cit., 18 ff., who stresses how the formulation of regulatory acts can be an obstacle to automation.

([30]) This is, therefore, the possibility of identifying within a legal rule a relationship of conditionality between its own parts, in such a way that the occurrence of all the conditions required by the rule is linked to the occurrence of certain legal consequences (on this point, see L. NIVARRA, *Come normalizzare il linguaggio legale*, cit., 262 ff.). It is worth noting that this approach has deeply influenced the subsequent doctrinal debate on the subject of automation, as underlined by CARIDI, *Informatica giuridica e procedimenti amministrativi*, Milano, 1983, 49 ff.; F. SAITTA, *Le patologie dell'atto amministrativo elettronico e il sindacato del giudice amministrativo*, cit., 18; G. SARTOR, *L'informatica giuridica e le tecnologie dell'informazione*, Torino, 2016, 292; L. VIOLA, *L'intelligenza artificiale nel procedimento e nel processo amministrativo: lo stato dell'arte*, in *Federalismi.it*, n. 21/2018, 7. Of course, these are models based on computer programs that are structurally very simple and that use linear or deterministic algorithms, which do not develop an autonomous reasoning compared to that indicated in the programming code, as it happens, instead, for the most advanced artificial intelligence technologies. It should be noted, in this regard, that according to A. MASUCCI, *op.ult.cit.*, 25, it would not be possible to overcome the difficulties of formalizing indeterminate legal concepts, both for the alleged logic incompatibility of programming with the provision of a series of alternative interpretations of the same legal concept, and for reasons related to the economic cost of such articulated programming (and of the consequent updating of the software). However, as it is easy to understand, the two outlined difficulties would be excessive today, given the considerable technological evolution that has taken place in recent years.

This circumstance would make it impossible to replicate the content of the relevant rule in the concrete case in specific commands capable of guiding the operations of the computer program ([31]).

The aforementioned conceptual approach has indeed had a significant impact on following reflections in the field of automated administrative decisions.

In particular, in doctrine there has been over time a large adhesion to the idea that the adoption of binding administrative acts was fully compatible with the logic reasoning used by the computer and reproducible from a technical point of view ([32]).

In fact, if in presence of a binding administrative power the decision-making process followed by the public administration takes the form of an assessment of presuppositions and requirements laid down by law ([33]), it has been observed that this form of exercising

([31]) In such hypotheses, moreover, part of the doctrine proposed the implementation of a partial automation, in which the software would be entrusted with the performance of part of the investigation (i.e., the verification of requirements and criteria of unambiguous meaning), and the remaining activities would be left to the individual official. Thus, G. CARIDI, *op.ult.cit.*, 100 ff., who proposed the implementation of a "segmented" automation of the administrative procedure, according to which some phases follow an automatic course, while others are carried out in a traditional way, i.e. under the exclusive human control.

([32]) As pointed out by A. USAI, *Le prospettive di automazione delle decisioni amministrative in un sistema di teleamministrazione*, cit., 165, all binding administrative activity can be technically automated: from payroll accounting to the issuing of certificates, notices, and warnings. However, the implementation of this measure encounters some important obstacles, such as the preparation of suitable software and the verification of the legitimacy of the procedures.

([33]) These are the terms of the well-known reflections of E. CAPACCIOLI, *Disciplina del commercio e problemi del processo amministrativo*, in Id. (ed.), *Diritto e processo*, Padova, 1978, 310 ff., according to which the process of adopting a binding act would be reconduct to the scheme "norm-fact-effect", while that relating to the discretionary act would be framed in the scheme "norm-power-effect". Following this approach, binding acts, since

administrative power can well be reduced to the conditional logical judgment ("*If... then*") typical of the simplest software.

On the contrary, numerous doubts have been raised regarding the admissibility of the automation process with respect to the performance of administrative activities of discretionary nature ([34]).

It has been argued, in fact, that in such a case the automatic adoption of the administrative act would have been possible only in the event that the legal text to be applied could be traced back to the above-mentioned logical scheme, i.e. when the decisions that could be adopted by the public administrations in relation to a given procedure were limited and, therefore, predetermined by the proceeding authority (in this regard, it has been talked about "acts of low discretion").

As a consequence, it has been stated that it is not possible to entrust to a computer the adoption of acts of a broadly discretionary nature, which require, as is well known, a careful assessment of the various relevant legal interests and a choice of the way in which to pursue public interest in practice ([35]).

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they do not express any choice by the administration, merely constitute the application of the legal rules to the specific case. Indeed, the debate in question must now be considered outdated in the light of the most recent doctrinal orientations, according to which, even if the content of the binding measure is precisely defined by the law, the exercise of a power by public administration is in any event necessary for the production of legal effects. On this point, for all, see F.G. SCOCA, *Diritto amministrativo*, Torino, 2019, 260 ff.

([34]) Against the idea of automation of discretionary administrative activity, see A. MASUCCI, *op.ult.cit*, 31 ff.; G. CARIDI, *op.ult.cit.*, 145 ff.; A. USAI, *op.ult.cit.*, 181 ff. On the contrary, U. FANTIGROSSI, *Automazione e pubblica amministrazione*, Bologna, 1993, 97 ff.; D. MARONGIU, *L'attività amministrativa automatizzata*, cit., 62 ff.

([35]) See, in particular, the reflections of A. MASUCCI, *op.ult.cit.*, 33, according to whom "if the essence of discretionary power consists in ensuring that the authority, in

Decisions that cannot be made in a stage prior to the conduct of the individual administrative proceeding.

The awareness of the above-mentioned technical limitations has, therefore, led the most recent doctrine to identify the theoretical basis of the institution of the automated administrative decisions in the power of self-organisation and of self-restraint incumbent on every administration in the exercise of its public functions.

On this point, it has been noted that "every subjective figure to which an organisation belongs, indeed, boasts a power of self-regulation of the powers it holds. It can adopt preceptive provisions to regulate the exercise of its powers or, even better, it can provide - with reference to the specific objectives to be achieved - a regulation, in terms of action regulation, of the exercise of the administrative powers belonging to it" ([36]).

pursuing the public interest, can, from time to time, for each specific concrete case, identify the solution that takes into account all the possible interests (public and private) inherent in a concrete case and all the interrelationships that are established between these interests, among the many solutions equally admitted by the rule (which confers discretionary power), then the purposes underlying discretionary power are incompatible with the rigid predetermination of the decision, typical of the logic of computer programming". On the subject of administrative discretion, see M.S. GIANNINI, *Il potere discrezionale della pubblica amministrazione*, Milan, 1939, 78 ff.

([36]) In these terms, A. MASUCCI, *op.ult.cit.*, 53 ff., according to which the exercise of such power is in compliance with the requirements of impartiality and good performance as set forth in art. 97 of the Italian Constitution, since it would allow the public authorities to achieve greater uniformity in the application of the law and in their own actions. On the concept of self-organising power of the public administration, see M. NIGRO, *Studi sulla funzione organizzatrice della pubblica amministrazione*, Milano, 1966; A. ROMANO, voce *Autonomia nel diritto pubblico*, in *Dig. disc. pubbl.*, II, 1987, 34 ff.; P. CERBO, *Il potere di organizzazione della pubblica amministrazione fra legalità e autonomia*, in *Jus*, n. 1/2008, 228 ff.

By virtue of its organisational capacity, in fact, the public authority is in the position to define, in a general and preventive manner, rules of conduct which it will observe in the future in the exercise of its functions. Rules which may be considered "an imperative addressed by the authority to itself".

In other words, if it is recognised that each organisation has the power to predetermine its action by setting criteria and parameters that will bind the process of adopting its decisions, it is necessary to admit, in the same way, public administration's ability to plan its decision-making choices also through the use of appropriate ICT formulas ([37]).

In order to reach this objective, public bodies have to foresee all the possible choices that could be adopted at the end of the individual administrative procedure.

A mechanism that, in theory, could also be applied when the power concretely exercised by the public administration has discretionary nature, at least in the hypotheses in which it can be based on objective criteria of judgement translated into computer instructions ([38]).

([37]) On the phenomenon of the so-called predetermination of administrative action, see F. BASSI, *La norma interna. Lineamenti di una teorica*, Milano, 1963; P.M. VIPIANA, *L'autolimite della pubblica amministrazione*, Milano, 1990; A. POLICE, *La predeterminazione delle decisioni amministrative*, Napoli, 1997; as well as, recently, R. VILLATA, M. RAMAJOLI, *Il provvedimento amministrativo*, Torino, 2017, 182 ff.

([38]) In other words, in such hypotheses, it occurs what was previously defined as the "anticipated exercise of administrative action". With regard to the relationship between automated decision-making process and predetermination of administrative action, it has been observed (F. SAITTA, *Le patologie dell'atto amministrativo elettronico e il sindacato del giudice amministrativo*, cit., 18) that even the discretionary aspects of administrative activity are always reducible to rational logical processes, to the extent that even discretionary activity must be carried out in accordance with certain principles and criteria. Accordingly, through the use of the institution of self-restraint, aimed at determining in advance, at the time of the preparation of the programme, the concrete ways in which discretionary powers

While that above-mentioned may be considered the traditional approach to the issue of automated decisions, it must be pointed out that some of the recent doctrine has raised various doubts towards the sustainability of such an interpretative theory ([39]).

In this respect, it has been argued that the use of technological tools in administrative proceedings can only be justified by reference to the concept of organisational autonomy if the technology used affects the external form of the public decision.

On the contrary, if a software is used for processing the very content of administrative decisions, it would not be possible to take advantage of to the existing legal provisions on public digitalization or to the theory of the self-restraint power.

In particular, these objections seem to be based on two main arguments.

Firstly, it was emphasized that the decision to adopt administrative acts through algorithmic formulas cannot be considered a choice of purely internal or organisational relevance.

Such an operation would, in fact, require a specific authorisation rule allowing the public official in charge of the procedure to delegate the process of taking the administrative decision to a computer program ([40]).

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are to be exercised in the future, it would be possible to process automatically even certain administrative acts of a discretionary nature, representing the computer programme managed by the official "a simple tool to assist in the pursuit of the objective which the official has set himself".

([39]) See S. CIVITARESE MATTEUCCI, *Umano troppo umano*, cit., 10 ff.; G. AVANZINI, *Decisioni amministrative e algoritmi informatici*, cit., 79 ff.; R. CAVALLO PERIN, *Ragionando come se la digitalizzazione fosse data*, in *Dir. amm*., n. 2/2020, 305 ff.

([40]) On this point, it has been observed that the choice of entrusting a computer programme with the issuance of an administrative measure is often the product of a bundle

In the absence of such a provision, therefore, it has been highlighted to continue to guarantee, within the Italian legal system, the respect for the so-called "anthropocentric principle", by virtue of which "the conferral of decision-making power on a certain apparatus implies that it refers to a human intentional act, unless otherwise established" ([41]).

Further arguments in favour of the introduction of a specific legislative basis to legitimize the use of automated administrative decisions have also been identified by the analysis of supranational legislation ([42]).

of decisions coming from several subjects and matured at different times. Thus, M. D'ANGELOSANTE, *La consistenza del modello dell'amministrazione invisibile nell'età della codificazione*, in S. CIVITARESE MATTEUCCI, L. TORCHIA (eds.), *La tecnificazione*, cit., 162.

([41]) Thus, S. CIVITARESE MATTEUCCI, *op.ult.cit.*, 22. According to the author, this principle could be interpreted by analysing some provisions of Law no. 241/90; for instance, those relating to the person in charge of the procedure, who can only be represented by a natural person, because of the specific tasks entrusted to him by the law (art. 6). With regard to the importance of the institution in question, as a subject able to offer citizens an essential point of reference in the performance of the procedure, see, *ex multis*, G. BERTI, *La responsabilità pubblica*, Padova, 1994, 305, who described the figure in terms of an "official designated to give physical semblance to the administrative inquiry". On this point, see also R. CAVALLO PERIN, *Ragionando come se la digitalizzazione fosse data*, cit., 317-318, according to whom the introduction of the automated administrative act does not bring any derogation to the principle according to which the powers of the administrative authority are subject to the principle of legality, but requires, on the contrary, that it is possible to invoke as a legal basis a specific and reasonable provision of the EU or of the Member State to which the data controller is subject.

([42]) On this point, see also what is observed in the White Paper on Artificial Intelligence of the European Commission of 19 February 2020, COM 2020/65, 11, in *www.ec.europa.eu*, in which it is clarified that the definition of a regulatory framework, also at European level, on the possibilities of using artificial intelligence "would strengthen consumer and business confidence in AI and would therefore accelerate the adoption of the technology". On this point, see S. DEL GATTO, *Una regolazione europea dell'AI come veicolo*

As it is well known, an express limitation to the possibility of taking automated decisions is contained within art. 22 of EU Regulation no. 2016/679 ([43]), according to which "the data subject shall have the right not to be subject to a decision which is based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her".

The paragraph 2 of the recalled article provides that the prohibition in question does not apply under certain conditions ([44]).

In particular, as far as relevant here, if the automated decision-making process has been authorised by the law of the Union or the Member State adopting this *modus operandi*, and if this legal authorisation provides for "appropriate measures to protect the rights,

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di eccellenza e affidabilità, in *Osservatorio sullo stato digitale IRPA*, available at *www.irpa.eu*.

([43]) This is the well-known EU Regulation no. 2016/679 of the European Parliament and of the Council of 27 April 2016, entitled "*General Data Protection Regulation"* (hereinafter, GDPR), which repealed the previous Directive 95/46/EC. On the art. 22 see, *ex multis*, F. PIZZETTI, *Intelligenza artificiale, protezione dei dati personali e regolazione*, Torino, 2018, 34 ff.; A. MORETTI, *Algoritmi e diritti fondamentali della persona. Il contributo del Regolamento UE 2016/679*, in *Dir. inf.*, 2018, 799 ff.; A. MASUCCI, *L'algoritmizzazione delle decisioni amministrative tra Regolamento europeo e leggi degli Stati membri*, in *Dir. pubbl.*, n. 3/2020, 956 ff.; S. SASSI, *Gli algoritmi nelle decisioni pubbliche tra trasparenza e responsabilità*, in *Analisi economica del diritto*, n. 1/2019, 114 ff., according to whom the rule responds to the clear objective of putting human being before the algorithmic machine, which should always be considered in a servant function respect to the human kind.

([44]) Art. 22, par. 2, GDPR: "Paragraph 1 shall not apply where the decision: (a) is necessary for the conclusion or performance of a contract between the data subject and a data controller; (b) is authorised by Union law or by the law of the Member State to which the data controller is subject, which also lays down appropriate measures to protect the rights, freedoms and legitimate interests of the data subject; and (c) is based on the explicit consent of the data subject".

freedom and legitimate interests of the data subject", the algorithmic decision may be considered legitimate under the GDPR ([45]).

In the absence of a clear regulation of algorithmic decision-making process, the aforementioned interpretative position has come to exclude the possibility of taking administrative acts on the basis of fully automated procedures ([46]).

With reference to these remarks, a different issue seems to concern the suitability of a legislative provision that merely authorises in general terms the use of software in the

([45]) More in detail, pursuant to art. 23 GDPR, the law of the Union or of a Member State may introduce specific limitations to the right referred to in the aforementioned art. 22 in order to pursue certain public interests (indicated by the same art. 23), on the condition that such limitation respects the essence of the fundamental rights and freedoms of citizens and consists of a necessary and proportionate measure. On this point, see also A. SIMONCINI, *L'algoritmo incostituzionale: intelligenza artificiale e il futuro delle libertà*, in *BioLaw Journal*, n. 1/2019, 80, according to whom the scope of the exceptions mentioned by the rule is in fact very broad, "so much so that one wonders when, in reality, the rule can be applied".

([46]) See G. AVANZINI, *Decisioni amministrative e algoritmi informatici*, cit., 115, according to whom the choice to automate an administrative procedure in which personal data are processed cannot be left to the discretion of the individual administration, but must be based on a specific provision authorising such a decision; D.U. GALETTA, *Intelligenza artificiale per una pubblica amministrazione 4.0?*, cit., 16-17, who, after recalling that, according to Recital 69 of the GDPR, the prohibition of art. 22 GDPR does not apply if the automated processing is "necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller", concludes that automated processing would be admissible in the public sector "provided that it is based on specific legal provisions (principle of legality) and provided that it complies with the principle of proportionality, understood in the classic terms of suitability, necessity and proportionality in the strict sense of the term of processing with respect to the protection of the public interest concretely pursued by the controller".

context of administrative action, without providing for which types of measures (and therefore procedures) may be subject to automation ([47]).

Infact, from this point of view, the lack of precise indications related to the cases and proceedings that can be automated could rise further inconsistencies between the institution of automated administrative decisions and the fundamental principle of legality of public powers ([48]).

([47]) See S. CIVITARESE MATTEUCCI, *Umano troppo umano,* cit., 38 ff., according to whom, in a general legislative framework establishing a set of common principles, "the identification of the single cases [...] could be entrusted to rules designed on the characteristics and specificities of the different structures and procedures to be automated". In other words, without prejudice to the need to be compliance with the principle of legality and the reservation of the law laid down by art. 22 GDPR, "the specific conferral of power on the IA could be the subject of legal provisions that are not necessarily legislative - given the derivative or secondary nature of such power - such as regulations or acts of general content".

([48]) On this matter, it should be noted that in the German system the need to ensure greater predictability of the automation of administrative decisions seems to be more satisfied. In particular, according to par. 35a *VwVfG*, introduced by the law for the modernisation of the tax procedure of 18 July 2016, which entered into force on 1 January 2017, "an administrative act may be entirely adopted by means of ICT tools, if it is authorised by a regulatory provision and does not involve the exercise of discretionary power". On the article in question see, *ex multis*, P. STELKENS, H.J. BONK, M. SACHS, *VwVfG Kommentar*, München, 2018, 1191 ff.; P. KOPP, U. RAMSAUER, *VwVfG. Verwaltungsverfahrensgesetz*, München, 2019, 787 ff., who highlight how the need for the automated act to be authorised by an express legal provision (to be understood not only as a legal provision, but also as a regulation or statutory provision) performs the function of attributing a specific legitimacy in the legal reality of an administrative act referable to artificial intelligence tools. On the inadmissibility of the automation process in case of administrative acts involving the exercise of a discretionary power, see A. BERGER, *Der automatisierte Verwaltungsakt,* in *NVwZ*, 2018, 1262 ff., according to which in these cases the decision can only be the result of a complex cognitive process performed by the person.

4. THE OPENINGS OF RECENT ADMINISTRATIVE CASE LAW AND THE ROLE OF EUROPEAN PRINCIPLES

After briefly recalling the traditional theoretical framework on the subject of automated decisions, it now seems appropriate to turn the attention to the relevant positions taken on this field in recent administrative case law.

In fact, if we disregard those initial approaches that excluded the possibility of automating the administrative procedures ([49]), it is possible to note that, in its latest pronouncements, the Italian Council of State has inaugurated a more open interpretation of the use of computer systems by public administrations ([50]).

In particular, in two interesting occasions administrative judges have expressly recognised that a higher level of digitalization of administrative action would not only be entirely desirable within the Italian legal system, but it would also be fully compliant with

([49]) See TAR Lazio, Rome, sez. III-bis, 11 July 2018, n. 9230; Id., 10 September 2018, nn. 9224, 9225, 9226, 9227; Id., 27 May 2019, n. 6606; Id., 9 July 2019, n. 9066; Id., 13 September 2019, nn. 10963 and 10964, all available at *www.giustizia-amministrativa.it*. On this point, R. FERRARA, *Il giudice amministrativo e gli algoritmi. Note estemporanee a margine di un recente dibattito giurisprudenziale*, in *Dir. amm*., n. 4/2019, 784 ff., who points out that on such occasions the administrative judges have shown a convinced recognition of the role that the human person (the official) is called to play in all administrative procedures, even the automated ones, when "it is information technology and the digitalization of procedures at the service of Man, and not vice versa". To the contrary, see TAR Lazio, Roma, sez. III-bis, 22 March 2017, n. 3769, cit., which acknowledged that, in relation to binding administrative activity, the electronic processing of the administrative act is legally admissible, since such activity is compatible with the logic of the computer programme.

([50]) Cons. Stato, sez. VI, 8 April 2019, n. 2270; Cons. Stato, sez. VI, 13 December 2019, n. 8472, in *www.giustizia-amministrativa.it*.

the principles of good performance and impartiality laid down in art. 97 of the Italian Constitution ([51]).

The use of software capable of autonomously elaborating administrative acts would, indeed, determine numerous advantages for the action of the public authorities, such as a considerable reduction in the procedural timeframe and the exclusion of possible interferences due to the negligence (or malice) of the official in charge of the procedure.

According to the Supreme Administrative Court, the benefits deriving from the use of such a *modus operandi* would be particularly evident with reference to serial or standardised administrative procedures, as procedures which, although complex for the large number of applications to be examined, are articulated in the acquisition and evaluation of certain and objectively verifiable data.

In this sense, the final act of the administrative proceeding could well be drawn up by a computer program, because of the fact that the latter would be able to "reasonably foresee a definite solution for all possible concrete cases" ([52]).

Moreover, given that the software is to be considered in terms of an "organisational module", i.e. as an investigative tool that the proceeding authority may choose to use in the

([51]) As noted by R. FERRARA, *op.ult.cit.*, 780, these statements are a sign of the contemporaneity of the reasoning of the Council of State, which shows awareness of the processes of transformation at the time of the digital revolution, although the latter, as mentioned, is devalued and reported in its critical profiles by other parts of the jurisprudence, "almost in the sign of an aprioristic and ideological rejection of modernity".

([52]) In other words, the software must be designed in such a way that, in the presence of certain elements, it is always possible to arrive at a predictable solution that complies with the instructions given when the machine is developed.

exercise of its functions ([53]), "there are no reasons, in principle or in practice, to limit the use [of the organisational module] to binding administrative activity rather than to discretionary one, both of which referred to authoritative action carried out in pursuit of public interest".

It follows that, even in the performance of activities characterised by areas of discretion, the procedural authority may in theory make use of the automated systems, in spite of benefits deriving from the use of such instruments in the performance of binding activities are more significant in qualitative and quantitative terms.

In the expressions used by the administrative judges, it can be noted a great awareness of the legal debate of recent years ([54]), which seem to have adopted a new perspective of analysis.

([53]) On this point, see M. TIMO, *Algoritmo e potere amministrativo*, in *Dir. ec.*, n. 1/2020, 775, who states that the decision, by not aligning with the previous jurisprudential orientations that equated the software with the computerized administrative act, succeeded in pointing out that the most relevant problematic aspect in the matter of automated decision is not so much the outcome of the automated procedure, but the way in which the administration reached its decision. According to the author, moreover, the approach conferring nature of administrative act to the computer program would not be convincing, because "since art. 21-septies of Law no. 241/90 requires, under penalty of nullity, a minimum content of the administrative act - at least, in terms of subject, object, will and form - it does not seem that a mere computer program, as a mathematical formula, has the essential elements required for the act to come into legal existence". This is an approach that deserves to be fully shared, as it allows, more correctly, to attribute a true and proper nature not to the software itself, which is a technological means functional to the better pursuit of public interests, but to the choices of predetermination of its action made by the public administration.

([54]) In this regard, see the reference to the well-known decision of the Supreme Court of the State of Winsconsin (State vs. Loomis, 881 N.W.2d 749, Wis. 2016) on the principle of non-exclusivity of the algorithmic decision, as well as the reference to the provisions of the GDPR and the "*Robotics Charter*" adopted by the EU Parliament Resolution of 16 February 2017 (on which see *infra*).

In the current economic and social context, which is increasingly digitalized and interconnected, there should be no further questioning of the admissibility of the phenomenon of automation within the Italian legal system, but it would be more appropriate to reflect on the possibility of defining the minimum conditions of legitimacy that any automated administrative decision must fulfill, regardless of the abstract possibility of bringing it within the conceptual framework of binding or discretionary public action ([55]).

Following this approach, in fact, the current debate on the use of algorithmic administrative decisions should deal with the identification of a satisfactory balance between two opposing concrete requirements: on the one hand, those relating to the efficiency, speed and simplification of administrative action; on the other hand, those relating to the safeguarding of procedural guarantees normally afforded to private individuals against the action of public authorities.

In attempting to address this issue, the administrative courts have for the first time laid down some fundamental principles, which also have a specific legal basis at supranational level.

In particular, the Council of State has clarified how the introduction of specific algorithmic formulas within the administrative procedures can be considered legitimate where it is ensured: on the one hand, the principle of transparency of the decision-making

([55]) With regard to the perplexities moved by the most recent doctrine on the tightness of the categorisation in question, see M.C. CAVALLARO, G. SMORTO, *Decisione pubblica e responsabilità dell'amministrazione nella società dell'algoritmo*, cit., 12; F. FOLLIERI, *Decisione amministrativa e atto vincolato*, in *Federalismi.it*., n. 7/2017, 10 ff., who speaks, in this regard, of "scepticism on bindingness"; as well as R. VILLATA, M. RAMAJOLI, *Il provvedimento amministrativo*, cit., 74 ff., to whom we refer also for the extensive bibliography cited.

process followed by the public administration; on the other hand, the principle of responsibility of the authority that adopted the final measure in an automated way ([56]).

In order to better understand the relevance of the above statements, it seems appropriate to proceed now to analyse separately the recalled conditions of legality of the algorithmic administrative decision.

4.1 The full knowledge of the decision-making process

With reference to the first of these conditions of legitimacy, the administrative judges have come to recognise a special or "strengthened" right of access for citizens involved in automated procedures.

In particular, it has been affirmed that, in order to consider the automation process fully compliant with the principle of transparency, interested parties must be granted not only the possibility of accessing the source code that guides the functioning of the software ([57]), but also the right to a full knowledge of the main features that characterize the decision-making process itself.

Specifically, by virtue of a new declination of the traditional right of access, an algorithmic administrative decision can be said to be truly transparent only when the citizens concerned can acquire knowledge of:

([56]) See Cons. Stato, n. 8472/2019, cit., point 12 of the decision.

([57]) The accessibility of the source code has been acknowledged, as it is known, since TAR Lazio, Roma, sez. III-bis, 22 March 2017, n. 3769, with a comment by I. FORGIONE, *Il caso dell'accesso al software MIUR per l'assegnazione dei docenti*, in *Giorn. dir. amm.*, n. 5/2018, 647 ff. For a detailed analysis of the judgment, see also P. OTRANTO, *Decisione amministrativa e digitalizzazione della p.a.*, cit., 19 ff.

a) the instructions executed by software written in a formal language, accompanied by the explanations translating "the technical rule" into the "underlying legal rule", in order to make it readable and understandable both for citizens and for the judge ([58]);

b) the exact breakdown of the software development chain and the people who worked on it;

c) the functioning of the decision-making mechanism, with specific reference to the priorities, parameters and criteria assigned to the machine;

d) the origin and type of data and/or information used in the course of the administrative procedure.

The above list emphasizes that, according to the most recent legal guidelines, in the hypothesis of decision-making automation, the exercise of the right of access by private party must make possible to obtain any information inherent in the design phase and in the logic functioning of the ICT tools.

In fact, as the Council of State has observed, only by adhering to such an approach the citizen, first, and the judge, eventually, will be able to "verify that the criteria, prerequisites and outcomes of the robotized procedure are complaint with the prescriptions and purposes established by the law or by the administration itself upstream of such

([58]) The need to provide the above-mentioned "explanations", it is possibile to note that the obligation required by administrative case law seems to constitute a derogation from the legislative provision that excludes the possibility of imposing on the administration holding administrative documents a burden of processing the information contained in such documents. Thus, M. TIMO, *Algoritmo e potere amministrativo*, cit., 772, who recalls that, pursuant to art. 2, par. 2, of the d.P.R. 12 April 2006, n. 184, "*Regulation containing rules on access to administrative documents*": "the public administration is not obliged to process data in its possession in order to meet access requests".

procedure, and that the modes and rules on the basis of which the decision was established are clear and consequently opened to review" ([59]).

In this respect, it should be noted that the need to adopt a broader definition of the traditional right of access had already been explicitly recognised in the European rules on the processing of personal data ([60]).

According to the GDPR, when an automated process in which data of personal nature are involved is started, the data subject can enjoy a series of rights of information (art. 13 and 14) and of access (art. 15), which constitute, by express legislative prevision, a corollary of the principle of transparency ([61]).

([59]) Cons. Stato, n. 8472/2019, cit., point 13.1 of the decision. Although it is not possible here to analyse the issue of the administrative judge's review of the automated administrative act, we can limit to pointing out that, even in the case where the administrative procedure has been conducted through digital tools, the judge who examines the correctness and reasonableness of the algorithmic decision must be able to have full knowledge of the evaluations and assessments carried out by the software during the procedure, also by resorting to technical consultancy, as in the context of similar proceedings carried out in traditional modes. On this point, see F. SAITTA, *Le patologie dell'atto amministrativo elettronico e il sindacato del giudice amministrativo*, cit., 24 ff.; A.G. OROFINO, *La patologia dell'atto amministrativo elettronico: sindacato giurisdizionale e strumenti di tutela*, cit., 2263 ff., as well as, most recently, F. PATRONI GRIFFI, *La decisione robotica e il giudice amministrativo*, in CARLEO A. (ed.), *Decisione robotica*, Bologna, 2019, 170 ff.

([60]) As noted by G. AVANZINI, *Decisioni amministrative e algoritmi informatici*, cit., 102 ff., as well as E. CARLONI, *I principi legalità algoritmica*, cit., 290, who points out, in particular, that in recognising the centrality of the principle of transparency of algorithmic decisions, the most recent pronouncements of the Council of State have taken (not by chance) as a point of reference the discipline dictated on the matter within the GDPR.

([61]) See Art. 12, par. 1, GDPR, "*Transparent information, notices and modalities for the exercise of the rights of the data subject*": "The controller shall take appropriate measures to provide the data subject with all the information referred to in Articles 13 and 14 and the notices referred to in Articles 15 to 22 and Article 34 relating to the processing in a concise,

In particular, the information communicated to the private party must have very precise characteristics: in regards to its form, it must be expressed in a concise and intelligible manner, through a clear language accessible to all (art. 12); in regards to its subject matter, it must contain specific references to the choice of adopting automated decision-making process, to the legal consequences that will derive from the procedure for the data subject and to the concrete operating modes of the software used (art. 13 and 14).

Indeed, if the objective of the GDPR is to ensure that data subjects have full control over the data concerning them, they must be put in position to know not only the fact that the procedure is the result of an automated process, but also the algorithmic logic underlying the proceeding. Without a clear understanding of these aspects, an informed exercise of the other forms of protection provided by GDPR would not be possible ([62]).

transparent, intelligible and easily accessible form, using clear and plain language". For a significant comment on this article see, *ex multis*, F. PIZZETTI, *Intelligenza artificiale, protezione dei dati personali e regolazione*, cit., 20 ff. Specifically, while the first two provisions are formulated in such a way as to impose on the owner of the treatment of the data a precise and articulated obligation of information, which operates both in the case in which the data has been obtained directly from the interested party (art. 13) and in the case in which it has been acquired indirectly (art. 14), art. 15 recognizes to individuals a real and proper right of access, which can be exercised also in the case in which the treatment of the data has already been concluded.

([62]) In this field, see the observations made in the European Parliament Resolution of 14 March 2017, *Implications of Big Data for fundamental rights: privacy, data protection, non-discrimination, security and law enforcement*, 2016/2225 (INI), in *www.europarl.europa.eu*: "Accountability and transparency at the level of algorithms should reflect the application of technical and operational measures that ensure transparency, non-discrimination of automated decision-making and the calculation of the probabilities of individual behaviour; [...] transparency should provide individuals with meaningful information about the logic used, the significance and the intended consequences; [...] this should include information about the data used to form Big Data analysis and enable individuals to understand and monitor decisions that affect them" (Recital N).

Furthermore, apart from the fulfilment of the aforementioned communication obligations, pursuant to art. 15 GDPR the data subject has the right to obtain information directly from the data controller concerning the logic and consequences of automated process.

Thus, it seems possible to observe how, from the perspective of the European legislator, the extension of the sphere of knowledge of the private individuals derives directly from the need to guarantee an adequate level of protection of *privacy* of people subjected to automated processing of their data.

However, outside the field of application of the GDPR the requests of full knowledge didn't found a specific regulatory recognition within the Italian legal system. Hence the need to introduce, not only by way of interpretation, a general system of protections for all the subjects involved in the context of a automated administrative procedure.

In this perspective, important considerations have recently been formulated in a number of European policy documents.

On this point see, in particular, what highlighted by the European Parliament resolution of 12 February 2019 on robotics and artificial intelligence ([63]), in which the following principles, among others, were set out:

a) the intelligibility of automated decisions must be clearly stated by a rule of EU law, along the lines of the above-mentioned articles 13, 14 and 15 of the GDPR (par. 158);

([63]) See European Parliament resolution of 12 February 2019, *A comprehensive European industrial policy on robotics and artificial intelligence*, 2018/2088 (INI), in *www.europarl.europa.eu*.

b) any system involving the use of artificial intelligence must be developed in accordance with the principles of transparency and accountability, allowing a human understanding of the actions performed by the software (par. 158);

c) in order to build a more general climate of trust in automated mechanisms, users must be made fully aware of how their data have been used (and whether other data have been derived from them), and of the processes and parameters followed by the robot systems, in such a way that they are understandable to a non-technical audience (par. 161);

d) in order to ensure transparency in the use of artificial intelligence, mere disclosure of the 'computer code' is not in itself adequate to address the problem of intelligibility, as it would not reveal inherent errors that may exist in the machine and would not explain the mechanism by which the machine learning process works (par. 166).

These statements confirm the need to ensure a higher level of transparency in cases where administrative decisions have been taken on the basis of automated mechanisms, especially if technologically complex.

4.2 Accountability and control of automated decisions

The knowledge of the logical steps and criteria that characterize the automated administrative procedure is not the only element to be assessed for formulating a judgment on the legality of the algorithmic administrative decision.

Alongside this, administrative case law has indicated a second condition for the validity of the institution in question, that is the responsibility of the public administration competent to adopt the final act of the proceeding ([64]).

According to the Council of State, irrespective of the possibility of assessing who has actually determined the unlawfulness of the administrative act (and any damage resulting therefrom), every decision adopted by the software must be considered as the result of a genuine administrative proceeding.

This is a principle that, although obvious with reference to the simplest automation systems, acquires its full relevance when referred to the use of the most advanced digital technologies.

As it is well known, in automation processes carried out using machine learning technologies, the result of processing the inputs provided to the machine is not always predictable in advance.

In fact, the latter can be influenced by the software's ability to transform the instructions prepared during the design phase and to draw up new solutions that cannot be explained by deductive reasoning ([65]).

In such cases, therefore, there is a risk that the procedural authority will attempt to avoid responsibility for the negative consequences of the adoption of automated decisions invoking an inscrutable calculation error of the software or of the computer technicians themselves.

([64]) See Cons. Stato, n. 8472/2019, cit., point 12 of the decision.

([65]) See G. AVANZINI, *Decisioni amministrative e algoritmi informatici*, cit., 7 ff.

On the contrary, as stated by the administrative judges, the citizens concerned may always impute to the public authority that conduct the automated procedure the possible unlawfulness of the final administrative act and claim from it, if the other relevant conditions are met, compensation for any damage suffered ([66]).

In relation to this principle there have already been some important guidelines adopted at supranational level.

Consider, in this respect, the provisions of the Robotics Charter annexed to the European Parliament resolution of 16 February 2017 on the introduction of "*Civil law rules on robotics*" ([67]).

In this document, the need to trace back to human behaviour any consequences or negative effects resulting from the use of robotized decision-making mechanisms was clearly

([66]) Moreover, as noted by S. VERNILE, *Verso la decisione amministrativa automatizzata?* in *MediaLaws*, n. 2/2020, 13, when the public administration decides to use automated decision-making mechanisms, the burden of proof relating to the subjective element could be discharged through reference to the concept of "fault of the apparatus", which today includes every hypothesis of disorganization of the public body in the management of its resources. In doctrine, with reference to the notion of "fault of the apparatus", see, at least, S. CIMINI, *La colpa nella responsabilità civile delle amministrazioni pubbliche*, Torino, 2008; F. FRACCHIA, *Elemento soggettivo e illecito civile della pubblica amministrazione*, Napoli, 2009.

([67]) European Parliament, Resolution of 16 February 2017, *Civil law rules on robotics*, 2015/2103 (INL), in *www. europarl.europa.eu*, with which the Commission was invited to propose new common rules on artificial intelligence capable of contemplating the degree of autonomy achieved by some technological tools and of overcoming the current regulatory gaps regarding the liability of the official in the use of such systems.

affirmed, and the absence of a regulation capable of establishing whether and under what conditions the ICT tools should be considered independently responsible was underlined ([68]).

Indeed, in addition to recognising in general terms the above-mentioned principle of responsibility, the Council of State made some interesting considerations on a further issue of great importance, that is the supervision of the outcome of the computerised administrative proceeding ([69]).

In fact, on the one hand if the electronically processed act must be considered to all intents and purposes as the expression of the willing of public authority, on the other hand the possibility of carrying out a verification (although a summary one) of the decision suggested by the computer program provides an opportunity to identify, with greater precision, the person actually responsible for any illegality of the administrative act.

([68]) In particular, "in the current legal framework, robots cannot be held liable in their own right for acts or omissions that cause damage to third parties; that the existing liability rules cover cases where the cause of an action or omission of a robot can be traced back to a specific human agent, such as the manufacturer, operator, owner or user, and where that agent could have foreseen and avoided the harmful behaviour of the robot; [...] that, in the event that a robot is able to make autonomous decisions, the traditional rules are not sufficient to trigger liability for damage caused by a robot, since they would not make it possible to determine who is liable for compensation or to require that person to make good the damage caused" (Recital AD).

([69]) Cons. Stato, n. 8472/2019, cit., point 14.1 of the decision: "As regards the verification of the outcomes and the related accountability, downstream verification must be guaranteed, in terms of the logic and correctness of the outcomes. This is to ensure that the choice can be imputed to the holder of the authoritative power, identified on the basis of the principle of legality, as well as to verify the consequent identification of the person responsible, both in the interest of the public authority itself and of the persons involved and affected by the administrative action entrusted to the algorithm".

This would also be in the interest of the administration itself, since the latter would be able to intervene promptly on any malfunctioning of the machine before it affects the recipients of the automated acts.

Moreover, the recognition of this principle is also supported by reference to a similar right established at European level in the same field, in particular by art. 22 GDPR ([70]).

As it is known, by virtue of this provision, unless one of the exceptions contemplated in paragraph 2 applies, any automated decision-making process requiring the processing of personal data must be carried out in compliance with the principle of non-exclusivity of the algorithmic decision.

This principle, as interpreted by the Italian Council of State, would require individual administrations to intervene in the procedure in order to confirm or revise the content of the administrative act proposed by the software ([71]).

Therefore, in all cases where public administrations make use of automated mechanisms, it would be necessary to control the outcomes of the proceeding according to the model that, in the ICT field, is expressly defined as "*human in the loop*" (HITL).

([70]) On this point, see note 43.

([71]) On the doctrinal debate concerning the identification of the level of human supervision able to guarantee an adequate scrutiny of automated processing, see S. WACHTER, B. MITTELSTADT, L. FLORIDI, *Why a Right to Explanation of Automated Decision-Making does not exist in the General Data Protection Regulation*, in *International Data Privacy Law*, n. 7/2016, 76 ff., as well as, for all, A. SIMONCINI, *L'algoritmo incostituzionale: intelligenza artificiale e il futuro delle libertà* , cit., 79 ff., according to whom the principle of non-exclusivity would risk being circumvented in all the hypotheses in which, although it is possible to operate a control downstream of the decision suggested by the algorithm, for reasons of practical convenience the proceeding authority decides to comply with the outcome of the algorithm.

Indeed, the latter consideration seem to expose itself to some significant objections, which can be divided into two main points.

In the first place, it is possible to note how the mentioned interpretative position is in contrast with what is indicated on this subject in the recent "*Ethics Guidelines for Trustworthy AI"* developed by the High Level Expert Group on Artificial Intelligence of the European Commission ([72]).

In particular, the Guidelines state that human oversight should be included among the fundamental principles of the development of A.I. at European level.

However, this principle can be put into practice by implementing three different models of human-software interaction ([73]):

([72]) European Commission, *Ethics guidelines for trustworthy AI*, 8 April 2019, in *www.ec.europa.eu.*

([73]) Cfr. par. 1.1. of the Guidelines: "*Human oversight helps ensuring that an AI system does not undermine human autonomy or causes other adverse effects. Oversight may be achieved through governance mechanisms such as a human-in-the-loop (HITL), human-on-the-loop (HOTL), or human-in-command (HIC) approach. HITL refers to the capability for human intervention in every decision cycle of the system, which in many cases is neither possible nor desirable . HOTL refers to the capability for human intervention during the design cycle of the system and monitoring the system's operation. HIC refers to the capability to oversee the overall activity of the AI system (including its broader economic, societal, legal and ethical impact) and the ability to decide when and how to use the system in any particular situation. This can include the decision not to use an AI system in a particular situation, to establish levels of human discretion during the use of the system, or to ensure the ability to override a decision made by a system. Moreover, it must be ensured that public enforcers have the ability to exercise oversight in line with their mandate. Oversight mechanisms can be required in varying degrees to support other safety and control measures, depending on the AI system's application area and potential risk. All other things being equal, the less oversight a human can exercise over an AI system, the more extensive testing and stricter governance is required*".

1. a first model, namely the aforementioned "*human-in-the-loop"* (HITL), which represents the form of greater human control over the operation of the machine and implies the possibility of intervening in every logical step taken by the system;

2. a second model, defined as "*human-on-the-loop*" (HOTL), which is characterized by the fact that human intervention is only required during the software design cycle and during periodic software monitoring;

3. finally, the third model, the so-called "*human-in-command*" (HIC), which is a more limited form of supervision, and consists in the possibility for the controlling body to decide in which contexts to use automation tools, which stages of the procedure to continue to carry out in the traditional way, and on which occasions to deviate from the final decision suggested by the algorithm.

Although the document does not express any preference for one of these models, the European Group of Experts points out that, in many cases, the adoption of a system based on the human in the loop model would be "neither possible nor desirable".

This seems to be justified both by the technical difficulty of setting up an automated system capable of allowing the human manager to intervene at each stage of the administrative proceeding, and by the bulky nature of such an operational solution, which could only lead to a significant loss of efficiency of the decision-making mechanism itself ([74]).

([74]) As noted in doctrine, except in the case of macroscopic defects in the functioning of the machine, denying the result obtained by software would in fact end up neutralising the initial administrative choice of entrusting the management of the public procedure to a robot, making the investigation carried out by means of automated systems completely useless and, thus, requiring a new investigation to be carried out according to traditional methods. In this

Thus, although a minimum level of supervision of the automated process should always be guaranteed ([75]), the generalised introduction of a form of downstream control for all administrative acts would not seem to provide an optimal trade-off between the benefits and risks of using these technologies.

In a *de iure condendo* perspective, it is to be hoped that future regulatory measures will be able to strike a more convincing balance between the interests at stake, providing for control methods tailored to the different types of automated systems used in the specific case ([76]).

Moreover, a second critical remark could be made regarding the approach followed by the Council of State, concerning the interpretation of the principle of non-exclusivity under art. 22 GDPR.

Indeed, while it is true that, if an automated decision is taken, the European framework ensures the data subject's right to obtain the intervention of the data controller

sense, S. TRANQUILLI, *Rapporto pubblico-privato nell'adozione e nel controllo della decisione amministrativa "robotica"*, in *Dir. soc.*, n. 2/2020, 297.

([75]) On the importance of promoting the implementation of the principle at stake, including through the introduction of algorithmic impact analyses, centralized software certification structures and specific protocols for monitoring and identifying any distortions, see G. ORSONI, E. D'ORLANDO, *Nuove prospettive dell'amministrazione digitale. Open data e algoritmi*, in *Ist. del Fed*., n. 3/2019, 615-616.

([76]) In particular, at least with reference to the most elementary hypotheses of automated decisions, the activity of human supervision could find expression at a time prior to the final decision, such as at the end of the design of the software by computer technical programmers and during the necessary periodic monitoring of the operation of the machine.

([77]), the legal provision does not oblige the latter to carefully scrutinise the outcome of the procedure.

On the contrary, it is possible to argue that, in the perspective adopted by the European legislator, the right to obtain human intervention translates in practice into the implementation of an organisational model more similar to that of human in command or that of human on the loop.

In this direction it can be seen the provisions of Recital 71 of the GDPR, which specifies that the data controller is obliged to implement "should use appropriate mathematical or statistical procedures for the profiling, implement technical and organisational measures appropriate to ensure, in particular, that factors which result in inaccuracies in personal data are corrected and the risk of errors is minimised, secure personal data in a manner that takes account of the potential risks involved for the interests and rights of the data subject, and prevent, inter alia, discriminatory effects [...]" ([78]).

Indications from which it seems to be possible to deduce that, especially in cases where the outcome of the digitalized proceeding is easily foreseeable, the right to human

([77]) On this subject, see F. PIZZETTI, *Intelligenza artificiale, protezione dei dati personali e regolazione*, cit., 34 ff.

([78]) On the risks of discrimination inherent in the use of automated decision-making mechanisms, see, *ex multis*, F. COSTANTINO, *Rischi e opportunità del ricorso delle amministrazioni alle predizioni dei big data*, in *Dir. pubbl.*, n. 1/2019, 56 ff.; A. SIMONCINI, *L'algoritmo incostituzionale: intelligenza artificiale e il futuro delle libertà*, cit., 84 ff.; F. DE LEONARDIS, *Big data, decisioni amministrative e "povertà" di risorse della pubblica amministrazione*, in E. CALZOLAIO, *La decisione nel prisma dell'intelligenza artificiale*, Padova, 2020, 152 ff.; P. SAVONA, *Administrative Decision-Making after the Big Data Revolution*, in *Federalismi.it*, n. 19/2018, 22 ff.

intervention can also be ensured by checking for any errors or inaccuracies in the source data processed by the software.

Therefore, as it has been effectively noted in doctrine, the human supervision required in the automated decision-making process could also be guaranteed through the affirmation of the further principle (indeed not expressly mentioned by the administrative judges) of the correctness and quality of the data on which the decision is based ([79]).

In such a context, this principle assumes its value indeed from a logical rather than a legal point of view, since the quality of the measure adopted downstream of the procedure cannot but depend, inevitably, on the quality of the information on the basis of which the decision was taken ([80]).

Leaving aside the remarks above made, however, the principle expressed by the Council of State constitutes an appreciable attempt, although an unripe one, to reaffirm the

([79]) Thus, E. CARLONI, *I principi della legalità algoritmica*, cit., 298, who underlines how the risk that automated treatments may produce new forms of discrimination against the recipients of algorithmic decisions is one of the main critical issues that appear on the horizon in the hypothesis of the use of artificial intelligence systems. This would seem to fully justify the inclusion, by the administrative judges, of the principle of algorithmic non-discrimination among the fundamental rules that should guide the use of automated decision-making mechanisms. On this point, see also what is underlined in the White Paper entitled "*Artificial Intelligence at the service of the citizen*" of March 2018, edited by a special *task force* of the Agency for Digital Italy, available at *www.agid.gov.it*, where it is highlighted that machine learning systems should be based on selected and prepared data, when the possible presence of inaccuracies or biases in the data, as well as possible calculation errors due to the work of the designers, risks producing a program that replicates the initial errors in any future application (p. 40).

([80]) The principle in question is today well summarised by the fortunate expression, widespread also among scholars of mathematical sciences, "rubbish in = rubbish out". This does not mean, of course, that the control of the quality of the used data should not be accompanied by frequent monitoring and updating of the software by public administration.

need for a virtuous interaction between the individual pubblic official and the computer program.

A relationship which, as we have tried to highlight, deserves to be interpreted differently depending on the functioning of the automated system used by the public authorities in each individual case.

This circumstance would make it possible, on the one hand, to avoid a considerable attenuation of the advantages deriving from the automated process and, on the other, to maintain the anthropocentric approach that should characterize any application of the ICT tools in question ([81]).

The analysis has thus revealed the first attempts to give clearer legal shapes to the institution of algorithmic administrative decision.

([81]) The importance of recovering the aforementioned anthropocentric dimension in the use of artificial intelligence technologies has been well highlighted in numerous European guidelines. In this regard see, *ex multis*, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 8 April 2019, *Building Trust in Anthropocentric Artificial Intelligence*, COM/2019/168, where it is emphasized that "the European AI Strategy and the Coordinated Plan on AI clearly indicate that trust is a prerequisite for ensuring an anthropocentric approach to AI: artificial intelligence is not an end in itself, but a tool at the service of people whose ultimate goal is to improve the well-being of human beings. This requires ensuring the trustworthiness of AI", as well as the three documents adopted on 19 February 2020 by the European Commission: the White Paper on Artificial Intelligence, cit.; the Report to the European Parliament, the Council and the European Economic and Social Committee, *Report on the security and liability implications of artificial intelligence, the Internet of Things and robotics*, COM/2020/64; and the Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Shaping Europe's digital future*, COM/2020/67, all available in *www.ec.europa.eu*.

The above-mentioned measures seem to show, however, the inadequacy of a regulatory approach based on general principles and case-by-case solutions, which does not allow to draw a clear and definite systematic framework from the significant case-law statements.

In an attempt to make some final considerations on the possible strategies for regulating the phenomenon in exam, it is appropriate to recall, even though briefly, the interesting regulatory approaches that have been adopted in this field within the French legal experience.

5. THE FIRST REGULATORY MEASURES IN THE FRENCH LEGAL SYSTEM

The possibility of using algorithmic formulas to take public decisions is not a recent issue also in the transalpine legal context ([82]).

As it is well known, one of the first provisions on this subject was contained in art. 10 of *Loi* no. 1978-17, as amended by *Loi* no. 2004-801 of 6 August 2004, on the processing of personal data ([83]).

This article set two clear limits to the use of automated systems: a first one, more specific, addressed to judicial statements, which cannot be based on automated processing of personal data if they imply an assessment of individual conduct by the judge; a second one, more generic, addressed to administrative decisions, which cannot be taken on the basis of

([82]) Among the first doctrinal reflections on the subject see, for all, D. BOURCIER, *La Décision artificielle: le droit, la machine et l'humain*, Paris, 1995.

([83]) *Loi n. 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés*, in *www.legifrance.gouv.fr.*

automated processing of personal data if they aim at defining the profile or the personality of a person ([84]).

This measure, although of a sectoral nature, seems to show that the French legislator took an early interest in the risks linked to the use of automated procedures by public authorities, which resulted in the establishment of certain general restrictions.

As the process of digitalization of the public sector has spread, the regulatory framework has been progressively enriched. More recently, in fact, a specific impetus towards the achievement of an effective digital transformation of public action was given through the adoption of *Loi* no. 2016-1321 of 7 October 2016, entitled '*Loi pour une République numérique*' ([85]).

([84]) *"Aucune décision de justice impliquant une appréciation sur le comportement d'une personne ne peut avoir pour fondement un traitement automatisé de données à caractère personnel destiné à évaluer certains aspects de sa personnalité. Aucune autre décision produisant des effets juridiques à l'égard d'une personne ne peut être prise sur le seul fondement d'un traitement automatisé de données destiné à définir le profil de l'intéressé ou à évaluer certains aspects de sa personnalité"*. This provisions ha been, recently, modified by *Loi* n. 2018-493 of 20 June 2018, in order to update national privacy legislation to the novelties introduced by the GDPR and to remove the previous legislative limits related to the automation of individual administrative decisions. Thus, J.B. DUCLERCQ, *L'automatisation algorithmique des décisions administratives individuelles*, in *Revue du droit public*, n. 2/2019, 296 ff.

([85]) The legislative reform in question was the result of an intense political and legal debate, followed by a period of public consultation on the text of the law. In this regard, see the report edited by the Conseil d'Etat, *Le Numérique et les droits fondamentaux*, 2014, in *www.vie-publique.fr*, spec. 278 ff., in which it is emphasized the importance to follow an approach inspired by the "principle of loyalty" of the algorithm, that is to promote regulatory solutions that may lead to fostering (and not to undermine) the trust of the community in the ICT tools used by the public authorities; as well as the report *Ambition Numérique* of June 2015 edited by the National Digital Council (Cnnum), available in *www.cnnumerique.fr*., which brings together some 70 proposals for action by citizens to implement the digital

The aim of the reform is to implement the technological development strategies defined at national level, which would not be able to produce the desired outcomes without a regulatory framework that addresses, at the same time, the issues of digital innovation, the openness and transparency of public data and the protection of people's fundamental rights ([86]).

In particular, on the one hand it aims at giving France a competitive advantage on the international scenario in the field of digitalization, by promoting a policy of re-use of public information, on the other hand it intercepts the need to promote a new approach to the

strategy outlined by the government, stating that "*Le numérique permet d'augmenter la transparence et la traçabilité de l'action publique. Mais ce n'est que s'il est mobilisé pour développer de nouveaux modes de participation aux processus décisionnels qu'il pourra renforcer effectivement le pouvoir d'agir des citoyens. Le défi est donc de rompre avec une vision de l'expertise verticale et cloisonnée, et de développer des pratiques de co-construction des politiques publiques intégrant l'ensemble des acteurs de la société numérique"*. Thus, according to the Council, "*La transformation numérique de l'action publique n'a de sens que si elle respecte un certain nombre de principes, inhérents aux fondements du droit public. Ces principes constituent autant de prérequis pour l'intégration de tous et le respect des libertés et droits fondamentaux"*.

([86]) As it is known, the law is developed around three fundamental questions: "The circulation of data and information" (Title I), "The protection of rights in a digital society" (Title II), and "Access to digital information" (Title III). Among the most significant comments on the reform see, in particular, D. BOURCIER, P. DE FILIPPI, *Les algorithmes sont ils devenus le langage ordinaire de l'administration?* in *LGDJ*, 2018, 193 ff.; B. BARRAUD, *L'algorithmisation de l'administration*, in *Revue Lamy Droit de l'immatériel*, 2018, 42 ff.; H. OBERDORFF, *La République numérique: un nouvel espace pour de nouveaux droits?* in *Revue du droit public*, n. 3/2018, 665 ff.; L. CLUZEL-MÉTAYER, *La loi pour une République numérique: l'écosystème de la donnée saisi par le droit*, in *AJDA*, n. 6/2017, 340 ff.; J.B. DUCLERCQ, *Le droit public à l'ère des algorithmes*, in *Revue du droit public*, n. 5/2017, 1401 ff..

technological revolution, capable of keeping at the centre the rights of individuals in the digital world ([87]).

Within this general framework, the legislator has introduced a number of significant provisions concerning the possibility of adopting administrative acts using special algorithmic formulas ([88]).

Specifically, the regulatory changes that have taken place on this field seem to be motivated by the intention of ensuring a stricter application of the principle of transparency of public action in the context of automated procedures.

In this respect, two important provisions (artt. 4 and 6) reforming the previous text of the *Code de relations entre le public et l'administration* (hereinafter CRPA) are worth mentioning.

The first of the innovations introduced concerns the new art. L311-3-1, according to which the recipient of an individual administrative decision taken on the basis of algorithmic processing must be informed of this fact and, if he or she so requests, must be able to know the rules under which the processing was carried out and the main features of its operation.

In other words, if public administration adopts an algorithmic decision, it is obliged to provide the data subject, upon his/her request, with clear and intelligible information concerning: 1) the modes through which the automated processing contributed to the decision-making process; 2) the data analysed and their origin; 3) the parameters of

([87]) In this sense, see *Dossiers législatifs, Exposé des motifs de la LOI n° 2016-1321 du 7 octobre 2016 pour une République numérique*, in *www.legifrance.gouv.fr*.

([88]) As noted above, within the new legislation, the issue of automated decision-making process seems to find a more general discipline, which is concerned with providing a series of guarantees to protect the rights of the data subject that go well beyond the right to the proper processing of personal data.

judgement established and their concrete use to reach the individual decision; 4) the operations carried out through the aforesaid processing ([89]).

It is clear from the above-mentioned article that the French legislator wished to introduce a real obligation of communication towards public authorities, which determines, correlatively, the right of the recipient of the administrative act to have access the computerised proceeding and to know the way in which the software has devoloped the final decision ([90]).

([89]) See R. 311-3-1-2 del CRPA, introduced with Decree n. 2017-330 of 14 March 2017, on which P. COPPOLANI, *Le décret n. 2017-330 du 14 mars 2017 relatif aux droits des personnes faisant l'objet de décisions individuelles prises sur le fondement d'un traitement algorithmique: vers une victoire à la Pyrrhus*, in *Information, données et documents*, n. 54/2017, 16 ff.

([90]) There seems to be no uniformity of views on the scope of the right of access defined by the above-mentioned provision. As noted by J.M. PASTOR, *Accèc aux traitements algorithmiques utilisés par l'administration*, in *AJDA*, 2017, 604, the legislator's objective is not to guarantee the data subject the possibility to know every aspect of the automated processing, but only to know the criteria and the main characteristics that define its functioning. Moreover, as in Italy, the French legal system has also dealt with the important question of recognising the right to access the source code of the software used in the context of the automated administrative procedure. The issue in question has long been discussed before the *Commission d'accès aux documents administratifs* referred to in articles L. 341-1 and L. 342-1 of the CRPA and led to an initial sectoral recognition with the *avis* of 8 January 2015, n. 20144578 and to more general statements since the *avis* of 23 June 2016, n. 20161989 (both of decisions can be found at *www.cada.data.gouv.fr*). In particular, in the context of the latter case, concerning a request for access to administrative documents relating to the well-known automated procedure for pre-enrolment to university campuses managed by the French Ministry of Education (on which more will be said shortly), the *Commission d'accès* allowed the applicants to know the source code of the procedure, stating that the computer files composing the code can be assimilated to real administrative documents and are, consequently, communicable to anyone who can exercise the right of access under art. L. 311-1 of the CRPA (*La commission [...] estime que les fichiers informatiques constituant le code source ou algorithme sollicité, produits par l'Institut national polytechnique de*

In other words, in the hypothesis that the final act of the administrative procedure has been processed electronically, it seems necessary to recognise in the legal sphere of the private individual the possibility of exercising a broader right of access than that recognised in the context of traditional administrative proceedings ([91]).

The same observations seem to have been made also within the Italian legal system, where the initial resistance of a part of the jurisprudence was later overcome, as mentioned above, in the name of the principle of full knowledge of the functioning of the computer program on the basis of which the administrative decision was taken.

However, in spite of these important openings, it is not yet possible to formulate a judgment of homogeneity between the means of protection offered to private individuals within the two legal systems ([92]).

Toulouse pour le ministère de l'éducation nationale, de l'enseignement supérieur et de la recherche dans le cadre de leurs missions de service public respectives, revêtent le caractère de documents administratifs, au sens de l'article L300-2 du code des relations entre le public et l'administration. Ce code est, de ce fait, communicable à toute personne qui le demande, conformément à l'article L311-1 du même code). In accordance with these guidelines, the 2016 legislature amended art. L. 300-2 of the CRPA, which now includes the expression '*codes sources*' among the administrative documents that may be shown.

([91]) Thus, A.G. OROFINO, L'*attuazione del principio di trasparenza nello sviluppo dell'amministrazione elettronica*, in *Iudicium*, October 2020, 9. Moreover, it should be noted that, also with reference to the aforementioned disclosure obligation, limitations to the right of access are set forth by art. L. 311-5, par. 2, of the CRPA.

([92]) On this point, see also the provisions of *Loi* n. 2018-493 of 20 June 2018 on the protection of personal data, by which, in adapting French legislation to the new European regulation, the aforementioned art. 10 of *Loi* No 1978-17 was amended. According to the current text of the rule, all individual administrative decisions taken on the basis of algorithms must comply, on pain of nullity, with the communication obligations provided for in art. L. 311-3-1 of the CRPA. Thus, from the point of view of the transalpine system, the violation of the prescriptions aimed at establishing a public-private relationship marked by the

This consideration is reached, in particular, by analysing the second provision introduced by the 2016 amendment to the CRPA.

In particular, under art. L. 312-1-3, public administrations are required to publish online the rules defining the functioning of the main algorithmic processes used to take individual decisions in the exercise of their functions.

Adopting a perspective that is, in some ways, mirroring that which led to the introduction of the reporting obligations, the French legislator has thus given public authorities wishing to use automated systems a further important task.

This task is the obligation to publish the criteria of judgement and the logical operations carried out by the software that develops administrative acts.

This provision seems to meet a different need for transparency from that felt by the recipients of the acts, to whom the mentioned reporting obligations are addressed ([93]).

From this perspective, the rule moves in two main directions: on the one hand, it allows the exercise of a form of widespread control over the operation of computer programmes, also aimed at subjects not affected by the adoption of a specific administrative act; on the other hand, it increases the sense of trust of the entire community of those

principle of transparency of the administrative action is sanctioned with a form of invalidity more serious than that which affects the automated administrative acts which do not comply with the principle of full knowledge established in the Italian legal system.

([93]) E. MOURIESSE, *L'opacité des algorithmes et la transparence administrative* , in *Revue française de droit administratif*, 2019, 47, which highlights how, through the provision in question, "*les règles de fonctionnement des algorithmes ne sont pas seulement quérables: elles doivent être diffusées spontanément. Toute personne ayant connaissance de l'utilisation d'un algorithme par l'une des administrations précitées peut, si elle constate l'absence d'explication de cet algorithme en ligne, demander qu'une présentation soit publiée et éventuellement contester le refus d'y procéder*".

administered in relation to the use of such technologies, which are thus less opaque and more comprehensible to the outside world.

These elements lead to a positive judgement on the mechanism devised by the French legislator, which shows that it has understood the importance of promoting citizens' participation in the process of digital transformation.

Indeed, even the interesting regulatory choices made in the transalpine system seem to present some critical issues.

First of all, it should be noted that the publication obligations in art. L312-1-3 have been formulated in a rather elastic and undefined manner.

Therefore, in order to be able to know precisely what it is about and to be able to assess whether or not it is adequate in terms of the transparency requirements of the interested parties, it will be necessary to wait for the adoption of further details by future implementing decrees ([94]).

([94]) In fact, unlike what happened with the obligations under art. L. 311-3-1, the content of the obligations to publish on the institutional websites of public administrations is still vague. This has led not only to consider uncertainty the application of the provisions of the legislation, but also to the spread of different practices among the individual administrations. On this matter, see H. PAULIAT, *La décision administrative et les algorithmes: une loyauté à consacrer*, in *Revue du droit public*, n. 3/2018, 648, who observes that "*ces éléments sont informatifs mais les obligations demeurent trop limitées*"; E. MOURIESSE, *op.ult.cit.*, 46 ff., according to whom the fulfilment of the aforementioned obligation would require individual administrations to disclose the instructions they have given when developing the software and to explain them in a language understandable to non-experts.

Secondly, it should be noted that, from the legislator's perspective, the crucial principle around which the protection of the private party involved in a process of decision-making automation is centred is that of administrative transparency.

However, on the one hand the reform aims at affirming the full knowledge of the algorithmic decision, on the other hand it does not pay adequate attention to the related issue of the comprehensibility of the decision-making mechanisms that justified the adoption of the automated act ([95]).

With regard to the characteristics and limits of the application of the robotic administrative decision, it is important to recall two recent significant pronouncements of the *Conseil constitutionnel* ([96]).

In particular, in a first judgment, the French constitutional court is concerned with defining the minimum conditions for the legitimacy of the institution in question ([97]).

([95]) J.B. DUCLERCQ, *L'automatisation algorithmique des décisions administratives individuelles*, cit., 313, who highlighted that "*[...] l'accessibilité à la décision suppose de distinguer la transparence de l'intelligibilité. Transparency implies the possibility of access to the information specific to the object, while intelligibility implies that this information is easily accessible to human intelligence".*

([96]) Reference is made, in particular, to Décision n. 2018-765 DC of 12 June 2018, by which the *Loi* n. 2018-493 of 20 June 2018 (*Loi relative à la protection des données personnelles*) was deemed to be constitutionally compliant, and to Décision n. 2020-834 QPC of 3 April 2020, in which the *Conseil* expressed its opinion on the constitutional compatibility of art. L. 612-3 of the *Code de l'éducation*, both available in *www.conseil-constitutionnel.fr*.

([97]) On the pronouncement under consideration, see J.B. DUCLERCQ, *op.ult.cit*., 306 ff., as well as S. TRANQUILLI, *Rapporto pubblico-privato nell'adozione e nel controllo della decisione amministrativa "robotica"*, cit., 309 ff.

On that occasion, it was pointed out that, by introducing a specific right for the recipient of the algorithmic decision to know the main operating characteristics of the software, the legislator implicitly affirmed the impossibility for the public administration to use those automated systems that are not accessible to the private party.

This hypothesis occurs, in particular, where the operational procedure followed by the programme to adopt the concrete decision is not transparent in itself, or where the right of access to administrative documents cannot be exercised by express willing of the legislator ([98]).

Secondly, the *Conseil constitutionnel* stated that, in order to consider the automated decision-making process to be legitimate, the mere recognition of a right of access to the acts of the computerized proceeding is not sufficient; on the contrary, the recipients of the administrative act must be guaranteed the right to obtain an explanation, in intelligible language, of the manner in which the administrative act was adopted.

Thus, computer systems capable of autonomously changing their operating rules cannot be used to take administrative decisions if there is no provision for supervision and validation of the result achieved by the machine ([99]).

([98]) See, for example, the categories of documents and acts listed by the aforementioned art. L. 311-5, par. 2, of the CRPA. Cfr. CC, n. 2018-765, DC, point 70: "*conformément à l'article L. 311-3-1 du code des relations entre le public et l'administration, la décision administrative individuelle doit mentionner explicitement qu'elle a été adoptée sur le fondement d'un algorithme et les principales caractéristiques de mise en œuvre de ce dernier doivent être communiquées à la personne intéressée, à sa demande. Il en résulte que, lorsque les principes de fonctionnement d'un algorithme ne peuvent être communiqués sans porter atteinte à l'un des secrets ou intérêts énoncés au 2° de l'article L. 311-5 du code des relations entre le public et l'administration, aucune décision individuelle ne peut être prise sur le fondement exclusif de cet algorithme"*.

([99]) See CC. n. 2018-765 DC, point 71: "*le responsable du traitement doit s'assurer de la maîtrise du traitement algorithmique et de ses évolutions afin de pouvoir expliquer, en*

Lastly, the French judges pointed out that it is necessary to ensure that the administrative act that is processed electronically can be challenged by the person concerned before the administration and the administrative courts, specifying that, in the first case, the public administration before which the case is brought is obliged to give its decision without using once again automated mechanisms.

This latter condition seems to be closely linked both to the need to know all the most relevant aspects of automated decision-making process and to the need to understand the concrete modes of functioning of the software ([100]). It is aimed, in fact, at ensuring the

détail et sous une forme intelligible, à la personne concernée la manière dont le traitement a été mis en œuvre à son égard. Il en résulte que ne peuvent être utilisés, comme fondement exclusif d'une décision administrative individuelle, des algorithmes susceptibles de réviser eux-mêmes les règles qu'ils appliquent, sans le contrôle et la validation du responsable du traitement". These considerations still seem to stress the need to ensure forms of supervision of algorithmic systems, which cannot be imposed as a single subject of the automated process, but must, on the contrary, take on a collective dimension, as suggested by the study conducted by *Commission nationale de l'Informatique et des Libertés*, *Comment permettre à l'homme de garder la main? The ethical challenges of algorithms and artificial intelligence*, December 2017, in *www.vie-publique.fr: "ce principe de vigilance doit avoir une signification collective. Plus que d'algorithmes, sans doute faudrait-il parler de systèmes algorithmiques, de complexes et longues «chaînes algorithmiques» composées de multiples acteurs (du développeur à l'utilisateur final, en passant par la société ayant collecté les données utilisées pour l'apprentissage, le professionnel qui réalise cet apprentissage, par celui qui a acheté une solution de machine learning qu'il va ensuite déployer, etc.)"*. On this point, see J.B. DUCLERCQ, *L'automatisation algorithmique des décisions administratives individuelles*, cit., 303 ff.

([100]) As noted by J.B. AUBY, *Il diritto amministrativo di fronte alle sfide digitali*, in *Ist. del fed.*, n. 3/2019, 631-632, judicial review of algorithm-based administrative decisions is far from straightforward. This is because "not only judges will not be better at understanding algorithms than the average citizen, but there is a risk that the techniques usually used to scrutinise the motivation of administrative acts and the relationship between them and their reasoning, may lose their current effectiveness. These techniques [...] are

effectiveness of the remedies invoked by the people concerned against the improper exercise of administrative power.

The conditions of legitimacy established by French constitutional jurisprudence have thus supplemented the regulatory provisions introduced by *Loi* no. 2016-1321 and focused attention not only on the well-known requirements of transparency of the algorithmic procedure, but also on the principles of comprehensibility and justiciability of the automated administrative act.

Principles which, following the statements made in the mentioned decision, will have to be taken into account in subsequent applications of the institute.

On this point, however, it is necessary to emphasize that the recalled conditions of legitimacy of automated adminsitrative decisions may also be subject to certain exceptions in relation to specific sectors of public activity.

This conclusion can be reached by analysing another significant judgment of the *Conseil constitutionnel* on this field, which assessed the constitutional compliance of the derogation from the reporting and publication obligations laid down by the last paragraph of the first subparagraph of art. L. 612-3 of the *Code de l'éducation* ([101]).

based on classical models of causal rationality. They may have a limited impact on motivations that are based on statistical correlations, as in many algorithms".

([101]) See art. L. 612-3, par. 1.4: "*Afin de garantir la nécessaire protection du secret des délibérations des équipes pédagogiques chargées de l'examen des candidatures présentées dans le cadre de la procédure nationale de préinscription prévue au même deuxième alinéa, les obligations résultant des articles L. 311-3-1 et L. 312-1-3 du code des relations entre le public et l'administration sont réputées satisfaites dès lors que les candidats sont informés de la possibilité d'obtenir, s'ils en font la demande, la communication des informations relatives aux critères et modalités d'examen de leurs candidatures ainsi que des motifs pédagogiques qui justifient la décision prise".*

In particular, this provision was introduced with reference to the well-known automated university pre-enrolment mechanism used by the French Ministry of Education since 2009 ([102]).

On the basis of this article, the right of access to the documents of the administrative procedure was limited to the criteria and modes for assessing students' applications established at central level, thus excluding the possibility for interested parties to know the requirements defined by the special Commissions (*Commissions d'examen des voeux*) set up at the universities to examine and classify the applications submitted via telematic platform ([103]).

The mentioned rule is justified by the need to preserve the secrecy and independence of the evaluation activities assigned to the local commissions, so as to prevent them from being subject to external pressure when determining the annual ranking of each faculty.

The system devised by the French legislator has, however, attracted a great deal of criticism from the public and from students' representative associations, since it does not

([102]) This is a computerized system managed through the Apb platform (*Admission post bac*), replaced from January 2018 by the similar *Parcoursup* portal, through which applications for admission to university faculties are assessed on the basis of the student's educational background and the parameters set by the Assessment Board set up in the individual universities. At the end of the procedure, in relation to the number of places available, the system sends individual applicants proposals for enrolment compatible with their personal profiles. On this subject, see the report edited by C. VILLANI, G. LONGUET, *Les algorithmes au service de l'action publique: le cas du portail admission post-bac*, 15 February 2018, in *www.senat.fr.;* E. MAUPIN, *La CNIL impose une réforme du portail de l'admission post-bac*, in *AJDA*, 2017, 1860 ff.

([103]) Pursuant to par. 1.4. of art. L. 612-3, these requirements must, in any case, be taken into account "*d'une part, des caractéristiques de la formation et, d'autre part, de l'appréciation portée sur les acquis de la formation antérieure du candidat ainsi que sur ses compétences*".

allow individuals to obtain comprehensive information on the assessment criteria used in the selection process ([104]).

Consequently, when called upon to rule on the constitutional legitimacy of the recalled provision of the *Code de l'éducation* ([105]), the *Constitutional Council* had the opportunity to specify the conditions that may justify a legislative limitation of the citizen's right of access to administrative documents ([106]).

After stating that, in the specific case, the processing of candidates' applications by the ICT platform had to be considered as only partially automated, the French judges held that the censured provision was constitutionally legitimate, since it was intended to pursue, in a proportionate manner, a specific objective of general interest (i.e. the independence and authority of the judgments of local evaluation boards).

([104]) See CC, n. 2020-834, cit., point 12: "*Il résulte de la jurisprudence constante du Conseil d'État que les dispositions contestées réservent ainsi l'accès aux documents administratifs relatifs aux traitements algorithmiques utilisés, le cas échéant, par les établissements d'enseignement supérieur pour l'examen des candidatures, aux seuls candidats qui en font la demande, une fois prise la décision les concernant, et pour les seules informations relatives aux critères et modalités d'examen de leur candidature*".

([105]) A right which, in the French legal system, finds express constitutional recognition in art. 15 of the Declaration of the Rights of Man and of the Citizen of 1789.

([106]) This question was raised, in particular, in the context of a dispute brought before the *Conseil d'Etat* (EC, 15 January 2020, nn. 433296 and 433297) by the *Union nationale des étudiants de France* in order to challenge the refusal of two French universities to disclose the source codes and algorithms used to assess the applications of students registered through the *Parcoursup* platform.

Firstly, examining the position of the student applicants, it was pointed out that, on the basis of art. L. 612-3, the latter may know, although at the end of the selection process, the general criteria established for the evaluation of applications at ministerial level.

Communication to which, according to the constitutional judges, should be added that concerning the selection criteria established by the local boards for the ranking of applications.

Secondly, with reference to the requirements of transparency of the procedure claimed by non-participants, it was noted that the absence of an express legislative provision recognising the right of access of third parties cannot justify the automatic exclusion of the latter from the group of those entitled to know the process for selecting candidates.

Indeed, such an interpretation of the legal framework would be disproportionate towards the general interest objective pursued by art. L. 612-3 and, therefore, not in compliance with the constitutionally guaranteed right of access to administrative documents ([107]).

Consequently, in order to consider the derogation from art. L. 311-3-1 and art. L. 312-1-3 CRPA to be legitimate, each university will be required to publish online, at the end

([107]) See CC, n. 2020-834, cit., point 17: "*Or, une fois la procédure nationale de préinscription terminée, l'absence d'accès des tiers à toute information relative aux critères et modalités d'examen des candidatures effectivement retenus par les établissements porterait au droit garanti par l'article 15 de la Déclaration de 1789 une atteinte disproportionnée au regard de l'objectif d'intérêt général poursuivi, tiré de la protection du secret des délibérations des équipes pédagogiques. Dès lors, les dispositions contestées ne sauraient, sans méconnaître le droit d'accès aux documents administratifs, être interprétées comme dispensant chaque établissement de publier, à l'issue de la procédure nationale de préinscription et dans le respect de la vie privée des candidats, le cas échéant sous la forme d'un rapport, les critères en fonction desquels les candidatures ont été examinées et précisant, le cas échéant, dans quelle mesure des traitements algorithmiques ont été utilisés pour procéder à cet examen".*

of the pre-enrolment procedure, the algorithmic formulas and criteria according to which the applications were examined.

It seems to follow from the judgment in question that any infringement of the rights of private individuals arising from the adoption of automated decision-making systems may be considered legitimate if it is aimed at the pursuit of an important public interest and if, in application of the principle of proportionality, it is strictly necessary in relation to the objective.

A conclusion that shows that, when dealing with automated administrative decisions, the most appropriate perspective of analysis is to seek a satisfactory balance between the multiple legal interests involved in the concrete case.

6. CONCLUDING REMARKS

At the end of this work, it seems possible to formulate some considerations regarding the need to regulate the institution of automated administrative decision-making process within the Italian legal system.

From what above observed it has emerged that the growing use of algorithmic formulas by public administrations has so far left the Italian legislator substantially indifferent, with the consequent statement of a supplementary role of administrative jurisprudence as keeper of the rights of private individuals involved in the exercise of public powers ([108]).

([108]) On this point, see also D.U. GALETTA, *Algoritmi, procedimento amministrativo e garanzie*, cit., 510 ff.

This approach to the issue of automated decisions has therefore resulted in the establishment of general principles, often supported by references to European legislation or guidelines ([109]).

Without going back into the merits of the matter, it seems necessary to point out that the Italian Council of State's significant statements are unable to satisfy the urgent need to define more precise and contextualised rules on the subject.

In fact, if the need for transparency and supervision of ICT systems is now unanimously recognised in doctrine and jurisprudence, the operational modes through which these principles can be concretely applied in relation to the different types of software in use in the public sector still are the subject of an intense debate.

On this point, it is to be hoped that the future legislative measures will not be limited to merely transposing the indications formulated by the administrative judges, but that they will establish a more articulate and complete discipline of automated administrative acts ([110]).

([109]) See A. CELOTTO, *Come regolare gli algoritmi. Il difficile equilibriomento tra scienza, etica e diritto,* in *Analisi giuridica dell'economia,* n. 1/2019, 47 ff., who notes that, even at supranational level, the legal framework on the matter is still insufficient to provide a precise regulation of the phenomenon, with reference to which, also due to the EU's legislative competence on technological innovation, only a few general principles have been indicated so far.

([110]) A discipline which, however, can only be subject to further modifications as scientific research moves forward in the field of information technology. See M. BASSINI, L. LIGUORI, O. POLLICINO, *Sistemi di intelligenza artificiale, responsabilità e accountability. Verso nuovi paradigmi?* in F. PIZZETTI, *Intelligenza artificiale, protezione dei dati personali e regolazione,* cit., 334 ff., who stress that the rapid obsolescence of the rules designed to govern the process of technological transformation has always been a typical variable in the relationship between law and technology.

In this regard, some interesting food for thought may be drawn from the analysis of the French legal experience, where there has been a progressive expansion of the regulatory framework of the use of automated processing in the adoption of individual decisions.

In particular, the changes deriving from *Loi* no. 2016-1321 introduced a number of important provisions, which, above all, met citizens' demands for transparency of public action.

From this perspective, the reinforced declination of the principle of transparency made by the French legislator led to the implementation of a form of social control on the use of these technological systems by public authorities.

They are now bound to be compliance with the reporting and publication obligations established (though imperfectly) in general.

Also in this case, however, the need to protect the legal position of individuals affected by the adoption of an administrative act with electronic processing has found further answers in some recent case law.

Measures which have provided an opportunity, on the one hand, to recognise the right to comprehensibility of the logical process followed by the software and to judicial and non-judicial review of the outcomes of the automated procedure; on the other hand, to specify that in such a context the traditional procedural guarantees may be legitimately derogated, under certain conditions, in the name of an equally relevant public interest ([111]).

([111]) Indeed, these profiles have also been partly addressed by Italian administrative case law (see Cons. Stato, nn. 2270/2019 and 8472/2019, cit.), which emphasizes that "the use of robotized procedures cannot be a reason for circumventing the principles that shape our legal system and govern the conduct of administrative activity".

Also in the light of these considerations, in a *de iure condendo* perspective, it is possible to state that the Italian strategy on artificial intelligence, currently only drafted ([112]), must deal, in a more practical point of view, with two main profiles.

First of all, that relating to the balance between the benefits offered by the use of automated systems to the activities of public authorities and the inalienable need to protect the individual positions that come into contact with them ([113]).

([112]) See Strategy '*Italy 2025*' drawn up by the Ministry for Technological Innovation and Digitalization (available in *www.innovazione.gov.it*). In this document, with a view at promoting the spread of socially, culturally and democratically sustainable A.I., it is stated that "Artificial intelligence and *big data* are able to guide public decision-makers towards more and more conscious choices, efficiently managing a series of administrative procedures, especially if repetitive and with low discretionary power. Designing, developing and testing artificial intelligence solutions applied to administrative procedures and justice that are ethically and legally sustainable means implementing in a modern way the constitutional principles of efficient administration and transparent and brief due process. It is not something we can choose to do or not to do, it is something we have to do" (p. 18).

([113]) See the recent study by the European Union Human Rights Agency of 14 December 2020, *Getting the future right - Artificial intelligence and fundamental rights*, in *www.fra.europa.eu*, in which it is underlined that: "*The intent to increase efficiency drives the use of AI in the public sector - an aim that directly speaks to improving administration and benefiting citizens. Respondents in public administration by far most often indicate efficiency as the reason for considering the use of AI or for presently using AI. One respondent, who advises ministries on digital strategies and their use of AI, said that the main reasons for adopting AI are to improve the service to citizens and to reduce the costs of these services for public administration. Interviewees also indicate that public administration has particular requirements, meaning AI cannot be used for all purposes and needs particular attention when it comes to decision making. […] . Public administration can only process data on a legal basis. Decisions need to be fair and transparent and pathways to challenge decisions need to be available and accessible*" (p. 81-82).

This operation should be carried out with reference to the specific sector of activity in which public administrations use the aforementioned "organisational modules", as well as in compliance with the fundamental principle of proportionality of administrative action ([114]).

Secondly, and more generally, it is necessary to deal with the issue related to the identification of the types of administrative procedures susceptible to be automated, which should be carryed out through a careful assessment of the concrete impact of ICTs in different cases.

In fact, it is only by delimiting the hypotheses in which the use of algorithmic formulas can actually contribute to the improvement of public action that it is possible to prevent the choice of digitalizing the performance of administrative proceedings from remaining within the organisational autonomy of each public administration.

The French experience seems to offer some interesting indications also in this respect, where it was noted that, in order to legitimately adopt a robotic administrative act, the proceeding authority must ascertain, among other factors, if it is possible to guarantee that the decision is knowable and comprehensible to its addressees ([115]).

Aware of the difficulties inherent in responding to the analyzed regulatory needs, it can be finally observe that the possibility of exploiting the advantages offered by the digital

([114]) On the principle of proportionality of administrative action see, among many contributions, D.U. GALETTA, *Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo*, Milano, 1998; Id., *Il principio di proporzionalità*, in M. RENNA, F. SAITTA (*eds.*), *Studi sui principi del diritto amministrativo,* Milano, 2012, 389 ff.; A. SANDULLI, *La proporzionalità dell'azione amministrativa,* Padova, 1998; S. COGNETTI, *Principio di proporzionalità. Profili di teoria generale e di analisi sistemica*, Torino, 2011; V. FANTI, *Dimensioni della proporzionalità: profili ricostruttivi tra attività e processo amministrativo,* Torino, 2012.

([115]) See CC., n. 2018-765 DC, cit.

revolution in the public sector will depend, to a large extent, on the ways in which the automated decision-making process will be brought within the fundamental framework of the principle of legality of public action.

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HEALTH CRISIS AND PUBLIC CONTRACTS.

A LEGAL SOCIOLOGY APPROACH.

François LICHÈRE[1]

Fanette AKOKA, Valentin LAMY, Adeline MEYNIER POZZI[2]

INDEX

ABSTRACT

Health crisis and public contracts" is the first research theme chosen by the Chair of Public Contract Law of the Lyon Public Law Team. Through qualitative and quantitative field surveys, using legal sociology methods, the Chair has probed the practical implementation of public contract law rules and regulations during the Covid-19 health crisis. Studies of private law and comparative law completed this data to propose, in a report published on

[1] Professor of Public Law at the University Jean Moulin Lyon 3, Director of the Chair of Public Contracts Law - Lyon Public Law Team (EA 666)

[2] Postdoctoral Researchers at the Chair of Public Contracts Law, Lyon Public Law Team (EA 666)

the Chair's website, a complete and exhaustive analysis accompanied by recommendations. This report is a presentation of this work.

1. INTRODUCTION

The past year has brought back practices and rules that were thought to have been buried in the past. Lockdowns, curfews and massive mobilization of public resources are just the most prominent examples. Venerable jurisprudential theories have in turn shown that they are not only reserved for timeless teaching but are simply dormant. Such has been the case with the theory of exceptional circumstances, invoked both by the Council of State[3] and by the Constitutional Council[4]. This has also been the case, considering more specifically public contracts, of the theory of unforeseeability, which has shown that it has not fallen into "disuse"[5]. We have even seen a resurgence of the idea of an "administrative force majeure", although it was threatened with extinction[6], like the fire of the old volcano that was thought to be too old.

In this context, the Chair in Public Contract Law of the Lyon Public Law Team chose to focus its first thematic report on the subject of "Health crisis and public contracts". Created in September 2020, the Chair's mission is to conduct, with the help of its public and private partners, field surveys aimed at collecting empirical data on the practical application

[3] Case law: CE, 22 Dec. 2020, Mme A. et autres, n°439804.

[4] Case law: CC, 26 March 2020, Loi organique d'urgence pour faire face à l'épidémie de covid-19, n°2020-799 DC.

[5] L. Clouzot, *"La théorie de l'imprévision en droit des contrats administratifs : une improbable désuétude"*, RFDA, 2010, p. 937.

[6] B. Plessix, *"La force majeure administrative: une occasion manqué"*, Dr. adm., 2019, marker 2.

of public contract law rules and regulations. By probing the substance of practice, which is often little explored by the doctrine, it is possible to make a more detailed assessment of the relevance of the rules and regulations and to formulate recommendations that give full meaning to the prospective function of the research. The latter, placed above the sometimes diverging interests of contracting authorities and economic operators, is well suited to make reasoned proposals.

The elements presented here are only the "broad outlines" of a much more exhaustive report published on the Chair's website, which the reader may usefully consult. As this presentation is the first of its kind, a presentation of the method will precede the results obtained and the recommendations made.

2. THE METHOD USED

General justification. According to J. Carbonnier, "legal sociology [...] sets itself the task of observing and explaining these social phenomena that are the phenomena of law"[7]. Little used in public law, with the exception of administrative science[8], the methods of legal sociology have never been used to probe the practical application of the rules of public contract law. However, public contracts have a considerable economic weight, around 10% of GDP, so that they are rightly considered as levers of economic recovery policies. Faced with an economic crisis of the magnitude of the one following the coronavirus pandemic, it appeared essential to be able to have field data in order to be able to assess the relevance of the rules applicable to public contracts, not only the general rules, but also the specific rules enacted to deal with the crisis and to formulate appropriate

[7] J. Carbonnier, *"La sociologie juridique et son emploi en législation", Communication to the Académie des sciences morales et politiques of 23 October 1967*, L'année sociologique, 2007/2, vol. 57, p. 393.

[8] J. Chevallier, *Science administrative*, 6th ed., PUF, 2019, p. 62.

recommendations. For this purpose, recourse to legal sociology and the empirical methods it promotes has become essential.

But recourse to empiricism is here envisaged only as a method based on "particular concrete experience"[9], not as a doctrine. The data thus collected are not abstracted from the "immutable paradise of notions and rules"[10], but are indeed confronted with these notions and rules, it being understood that the jurist remains "condemned to abstraction"[11], as Law cannot be reduced to a simple "science of facts"[12].

From then on, the "surprisingly complex reality"[13] of the application of the rules of public contract law revealed by empiricism is scrutinized in terms of the philosophy underlying these rules.

More specifically, the field survey was inspired by the method used in the 1960s by the Civil Affairs Directorate of the Ministry of Justice in matters of succession and matrimonial regimes. In order to enlighten the legislator with a view to reforming these legal systems, the Ministry had thus commissioned two surveys, both subdivided into two phases: a qualitative phase "consisting of in-depth interviews [...] according to a semi-structured, flexible interview guide"[14] and a quantitative phase, a "survey conducted on the

[9] T. Fortsakis, *Conceptualisme et empirisme en droit administratif français*, LGDJ, Bibl. de droit public, t. 152, 1987, p. 23.

[10] B. Chenot, *"L'existentialisme et le Droit"*, RFSP, 1953, n°1, p. 58.

[11] J. Rivero, *"Apologie pour les "faiseurs de systèmes"*, D., 1951, chron. 23, p. 99.

[12] C. Atias, D. Linotte, *"Le mythe de l'adaptation du droit au fait"*, D., 1977, chron. 34, p. 251.

[13] C. Atias, *Épistémologie juridique*, Dalloz, coll. "Précis droit privé", 2002, p. 208.

[14] J. Carbonnier, *op. cit*.

basis of a rigid questionnaire on a representative sample"[15]. To these two surveys were associated comparisons of domestic law and foreign law, in order to obtain the broadest view of the research theme.

The qualitative survey. The qualitative survey was based primarily on 18 interviews conducted with lawyers representing the Chair's partners and other public contracting stakeholders between mid-October and early December 2020. It involved representatives of contracting authorities, companies holding public contracts and specialized lawyers. It also covered a wide range of public contracts and sectors of activity, thus providing a broad view of the practical application of general and specific rules of public contract law in times of health crisis. It was carried out by means of a unique semi-structured questionnaire whose questions had been designed on the basis of an exhaustive analysis of the state of the doctrine on the subject and informal reflections collected from lawyers of contracting authorities and incumbent companies. The questionnaire was subdivided into several parts: suspension of the contract; termination of the contract; degraded performance; competitive bidding and finally proposals for improving the law.

The participants were systematically informed of the strict confidentiality of the exchanges and of the fact that the processing of their answers would be the subject of a report in which it would be impossible to identify them, allowing them to feel confident and to express their point of view in complete freedom.

The quantitative survey. The quantitative survey was based on an essentially directive online questionnaire with 101 questions, which included the sub-sections of the qualitative survey. However, these questions were not only inspired by the qualitative

[15] *ibidem*

survey that was in progress at the time of the launch of the quantitative survey, but were designed to be broad, so that this survey would not only confirm the results of the qualitative survey but would also be a potential source of new data. The questionnaire, carried out with the LimeSurvey software, was distributed between November 17 and December 6, 2020 via different channels. Although the website was not yet operational for this first survey, the Chair was nevertheless able to communicate about the opening of the online questionnaire via social networks as well as through its partners and certain federative bodies (Fédération Nationale des Travaux Publics, Fédération des Entreprises Publiques Locales, Association Nationale des Juristes Territoriaux and France Urbaine), which widely distributed the questionnaire.

The participants in the survey were informed that the answers to the questions were anonymous and it was made clear to them that they had the possibility of answering the questionnaire several times in different capacities, if they had found themselves alternately in the position of contracting authority and holder during the health crisis (this was the case for the lawyers of the mixed-capital companies and local public capital companies for example).

It should be pointed out that some questions called for a response according to pre-existing propositions, with the participant having to tick the one that suited him/her, while others allowed a written response. It is regrettable that for the latter, the participant's number appears, whereas it was impossible to trace this number for the answers to the "check-the-box" questions. The fact of knowing, by participant's number, all his answers could, in the future, be a precious tool to know at least the organic nature of the participant who hides behind each number without this being able to put at risk the principle of anonymity.

Finally, 141 people answered at least one question. Although the response rate decreased gradually as the questionnaire progressed, since 59 people completed it, the data collected was satisfactory and allowing an in-depth analysis. In particular, the panel offered a real diversity in the profiles of the participants and the contracts concerned. Of the participants, a majority (54%) were contracting authorities, 32% were holders of public

procurements or concessions, and 14% were legal advisors. As regards contracts, the trend is even more pronounced in favor of public procurements, since 84% of the participants were parties to at least one public procurement. Moreover, 15% of the participants were party to a concession and 1% to a partnership contract.

The doctrinal analysis of private law. The section on private law is more traditional and was written mainly with regard to the doctrinal publications that have dealt with the consequences of the health crisis on private contracts. It has been enriched by the reflections of some interviewees with knowledge of the subject matter and has made it possible to clarify certain aspects, in particular the question of the suspension of the contract in the face of an event of force majeure, envisaged by the Civil Code, but not by the Code of public procurement and concession contracts.

The use of comparative law. On the basis of a simplified English version of the quantitative survey questionnaire, five foreign university correspondents representing Germany, Spain, Italy, the United Kingdom and Poland were asked to specify the legal response to the health crisis in their countries with regard to public contracts. This comparative approach is intended to be used more widely in the Chair's future research themes.

3. RESULTS OBTAINED

Suspension of the contract. The health crisis has revealed that the suspension of contracts is something unthought of in public contract law. Nourished by the principle of continuity of public service, the law of public contracts simply does not deal with the hypothesis of suspension of contracts, unlike private law, which provides for it in the event of temporary impediment to performance due to force majeure (art. 1218 Civil C.) and in

the context of the exception of non-performance (art. 1220 Civil C.). Moreover, in certain foreign systems, the suspension of public contracts is provided for in ordinary law, as in Italy where the question is dealt with in article 107 of the Codice dei conttrati pubblici, whereas other States have opted for a very complete legal security of suspensions in a specific text, following the example of Spain[16]. In French public law, it is only with the ordinance of March 25th, 2020 that the hypothesis of suspension was apprehended, sometimes expressly, sometimes indirectly, always in a nebulous manner and subject to interpretation. Suspension is mentioned directly in Article 6(4) and (5), on the one hand to oblige the purchaser to continue payment of a suspended lump-sum contract, and on the other hand to prohibit, in the case of concessions, any payment to the conceding authority and to allow the payment of advances to the concessionaire. It is indirectly referred to in 1° and 2°, which allow for the extension of performance deadlines, the conclusion of substitute contracts and prohibit the application of penalties when the contractor cannot meet these deadlines or is unable to perform all or part of its obligations, in particular when the contractor demonstrates that he does not have the means necessary to continue the performance of the contract or that performance would require the use of means which would place a manifestly excessive burden on him. Needless to say that many questions were "left open"[17], in particular those of the procedure leading to the suspension of the contract and the formalization of this procedure, and of the compensation of the additional costs directly attributable to the suspension.

From this point of view, neither the objective rules applicable to all contracts, nor the contractual clauses, in particular the CCAG (« cahier des clauses administratives générales », i.e. General Administrative Terms and Conditions), were fully satisfactory for dealing with the situation, so that the surveys revealed a practice that was profoundly disparate and legally insecure as a whole. This profound diversity could first be observed

[16] Article 34 of Royal Decree 8/2020 of March 17th, 2020.

[17] F. Lichère, *"Catastrophes naturelles, calamités publiques et droit des contrats publics*", AJCT, 2020. 407.

on the questions of formalization and the moment of suspension. Thus, the formalization could be recorded in a service order or simply factual. It may have been decided by the contracting authority or by the contractor company. Its legal basis could be found in force majeure or in the contractual clauses, in particular relating to postponement[18], except that many contracting authorities have been reluctant to pronounce postponement taking into account the indemnity consequences that it entails. It is also the question of compensation for the additional costs associated with the suspension that has often proved thorny, since apart from adjournment and specific clauses, all the mechanisms of objective law have been ill-suited: force majeure is not a source of compensation, the theory of unforeseeability presupposes continued performance of the obligations, and the theory of the fait du Prince could only concern State contracts. Moreover, the provisions of the Ordinance of March 25th, 2020 were generally considered unsuitable, unclear and, in any event, unrelated to compensation issues. It was therefore often through negotiation that the parties were able, at times, to find the most appropriate solutions, although these were not entirely satisfactory.

Termination of the contract. While suspension has been widely practiced, termination has been reduced to a minimum, both in France and abroad. Moreover, it seems that this has only concerned contracts with short execution, those whose term was close or only the cancellation of purchase orders, on the basis of force majeure or, more rarely, of misconduct by the contractor. Nevertheless, it is possible to observe a notable diversity of situations, in particular at the level of the compensation process, which augurs difficulties in the future, especially since positive law does not provide much clarification on this issue.

Indeed, the Ordinance of March 25th, 2020, in its article 6, 3°, only refers to the hypothesis of compensation for costs incurred for the execution of a public procurement or a purchase order, excluding, in particular, loss of profit. Moreover, ordinary law is of no

[18] Article 49.1.1, CCAG Travaux (General Administrative Terms and Conditions for work activities)

help, since articles L.2195-1 to -6 of the Code of public procurement and concession contracts for public procurements and L.3136-1 to -6 for concessions never mention the issue of compensation. At most, article L.6 5° of the Code provides that when termination occurs for a reason of general interest, the contracting party has "the right to compensation", without any further specification.

Degraded performance of the contract. Drawn from practice, the expression "degraded" performance of the contract[19] encompasses all situations in which the continued performance of the contractual obligations cannot be carried out according to the initial forecasts of the parties, who have been overtaken by circumstances making it imperative to adapt the content of the contract. From this perspective, the question of extending the performance period has not been subject to any major practical difficulties, nor has the question of advances, as the actors in the public procurement sector have taken full advantage of the new possibilities offered by the Ordinance of March 25th, 2020. Two major issues, however, revealed the weaknesses of public contract law.

The first and perhaps most difficult question is that of compensation for additional costs. Overall, the general observation that can be made without much doubt is as follows: neither the contractual clauses (specific or drawn from the CCAG), nor the general rules applicable to administrative contracts were sufficiently adequate to deal with the performance difficulties caused by the health measures enacted in March 2020 by the Government, while guaranteeing contractors a certain degree of contractual security. More specifically, in the absence of a specific clause on compensation for additional costs related to an unforeseen situation, the contracts proved to be inadequate to deal with this issue. The CCAG applicable to public procurements do not contain such a clause and it was noted that the actors of public procurement have tried to activate certain clauses whose content did not really allow for an effective treatment of the issue. One thinks in particular of article 10.1.1. of the CCAG travaux, which excludes from the prices the normally foreseeable difficulties

[19] F. Lichère, *"La commande publique, la crise sanitaire et la relance économique"*, AJDA, 2020. 1105.

of all kinds, but which does not set any compensation guidelines. Moreover, the general rules applicable to administrative contracts have shown their shortcomings. Apart from the theory of the fait du Prince, applicable only to contracts entered into by the State, only the theory of unforeseeability offered a relevant basis for compensation. The theory of unforeseeability, which is of public order and can be invoked notwithstanding the contractual clauses[20], gives the right to partial compensation of the contracting party if, in the presence of an unforeseeable event external to the parties, the economic balance of the contract is upset[21]. However, there are significant uncertainties regarding two elements. On the one hand, the assessment of the disruption of the economic balance of the contract, which case law generally sets at between 5 and 10% of the initial amount for public procurements (but sometimes higher) and assesses in the light of the concept of operating deficit for concessions. These uncertainties have resulted, in practice, in a profoundly disordered use of the theory of unforeseeability, making clarification necessary in positive law. On the other hand, the rate of compensation for extra costs suffers from the same problems. Although case law generally compensates 80 to 95% of the additional costs in public procurement or the operating deficit in concessions, there is no rule for determining this rate. Here again, the survey revealed a highly disparate practice.

The second question, which is not entirely disconnected from the first, concerns the modification of contracts. While the data collected show that recourse to the rider has been favored over unilateral modification by the public authority, the fact remains that the limits that the objective law assigns to contract modification have sometimes acted as psychological brakes on modifications that are nevertheless authorized. This is the case, in particular, of the limitation of modifications to public procurements to 10 or 15% of their value, depending on their purpose, which was cited by purchasers as a reason not to modify their contracts. This argument is all the more surprising as there is little doubt that the

[20] Council of State case law: CE, Sect., 5 Nov. 1937, Dép. des Côtes-du-Nord.

[21] Council of State case law: CE, 30 March 1916, Cie générale d'éclairage de Bordeaux.

pandemic falls within the unforeseen circumstances of article R.2194-5 of the Code of public procurement and concession contracts, justifying a modification of up to 50% of the initial amount of the contract. Under these conditions, the widespread use of review clauses should be encouraged so that these "psycho-legal" blockages do not hinder the continued performance of a contract under deteriorated conditions.

From all points of view, the foreign systems surveyed also show similar weaknesses in the treatment of degraded contract performance.

Competitive bidding. Although the Covid-19 pandemic has mainly highlighted difficulties in the execution of public contracts, the question of adapting procurement procedures naturally arose. In addition to the possibilities offered by ordinary law, in particular the award of contracts without advertising or competitive bidding in cases of extreme urgency[22], Ordinance n° 2020-319 of March 25th, 2020 includes two provisions allowing for the adaptation of procedures during the period running from March 12th to July 23rd, 2020. On the one hand, article 2 allowed for an extension of the deadlines for the receipt of applications and offers, with the exception of orders that cannot suffer any delay. On the other hand, article 3 allowed, in compliance with the principle of equality between candidates, to adapt the modalities of the call for competition. The investigations revealed that it was mainly the extension of the deadlines that the contracting authorities had turned to.

Indeed, for procedures launched before the first lockdown, the extension of the deadlines for the receipt of applications and tenders was massively activated by the contracting authorities, which at the same time increased their recourse to the dematerialization of procedures. However, the surveys revealed that the competitive bidding procedures had little impact, as did the content of the contract, which was modified only marginally. This can probably be explained by the abnormality of the process and the

[22] Provided for in Article R. 2122-1 of the Code of public procurement and concession contracts.

vagueness of article 3 of the ordinance, which may have induced a certain fear of litigation among the contracting authorities.

4. THE RECOMMENDATIONS MADE

Clarifying the theory of unforeseeability in the Code of public procurement and concession contracts. Clarifying the notion of unforeseeability for public procurements and concessions would bring legal security to a theory that is widely criticized or misunderstood. The Chair therefore proposes a reform of articles R. 2194-5 and R. 3135-5 of the Code of public procurement and concession contracts. First, the Code could provide that, in the event of circumstances that a diligent contracting authority could not foresee at the time of the conclusion of the contract, a review clause could be inserted into the contract *a posteriori* without calling into question the initial conditions of the call for competition. Secondly, the notion of disruption of the economic balance of the contract and the rate of compensation for additional costs should be defined, in the manner of the circular of November 20th, 1974 and based on administrative case law and field surveys. For public procurements, the disruption of the economic balance of the contract could be characterized, in any case, if the additional costs exceed 10% of the initial amount of the contract. However, in order to give some flexibility to those involved in public procurement, provision could be made for this disruption to be characterized as from additional costs exceeding 5% of the amount, taking into account the particular situation of the holder. In the case of concessions, the disruption of the balance of the contract is characterized from the moment when the operation of the concession is in deficit due to the circumstances. In both cases, the compensation rate could be set at between 80 and 95% of the additional costs for public contracts and of the deficit for concessions. Such a range is consistent with case law and allows the parties flexibility to take into account specific contractual situations.

Codify administrative force majeure in matters of concessions. A praetorian creation[23] of limited practical use[24], the improperly named administrative force majeure could be incorporated into the Code of public procurement and concession contracts with regard to concessions. It would then be necessary to specify that if the disruption of the economic balance of the contract creates a definitive situation, the concessionaire is entitled to request, in the absence of an amicable agreement, the termination of the contract before the administrative judge. The concessionaire would then be entitled to compensation, depending on the circumstances of the case and exclusive of coverage of the loss of earnings.

Clarify the provisions of the Code of public procurement and concession contracts relating to exceptional circumstances. The law of December 7th, 2020 on the acceleration and simplification of public action codified certain mechanisms of the ordinance of March 25th, 2020 in the Code of public procurement and concession contracts, in two new sections relating to exceptional circumstances (one for public procurements, the other for concessions). However, these provisions were enacted without a real impact study being conducted: they were the result of a government amendment tabled in committee at the National Assembly, were not subject to an opinion from the Council of State and were not the subject of any real debate in Parliament. The Chair therefore proposed several formal improvements and the addition of two provisions concerning both public procurements and concessions. The first is to authorize the contracting authority to modify the conditions of an award procedure in progress when exceptional circumstances are declared, without requiring a new consultation and provided that the modifications are not substantial. A second proposal is to exempt from the opinion of the competent committees amendments that increase the value of the contract by more than 5%, as was provided for in

[23] Council of State case law: CE, 9 Dec. 1932, Cie des tramways de Cherbourg, Lebon 1050.

[24] The last Council of State case law occurrence is more than twenty years old: CE, 14 June 2000, Cne de Staffelfelden, Lebon 227.

the Ordinance. These proposals are intended to make purchasing procedures more fluid in times of exceptional circumstances.

Participation of the Chair in the reform of the CCAG. The Chair participated in the public consultation launched by the Legal Affairs Directorate of the Ministry of the Economy concerning the reform of the CCAG applicable to public procurements. It formulated proposals, related to its first research theme, aiming at the precision of the new suspension clause of public procurements and at the implementation of a device aiming at contractualizing the treatment of the consequences, notably financial, of unforeseeable circumstances. In the end, the Legal Affairs Directorate retained the creation of two distinct clauses to deal with such circumstances: a suspension clause and a general review clause to overcome the deteriorated performance of the contract, which is fully in line with the initial idea developed by the Chair.

The first clause allows, when the continuation of the execution of the contract is temporarily impossible due to circumstances, to pronounce the total or partial suspension of the contract, which can be requested by the contractor. A period of not more than fifteen days will then begin during which the parties will take note of the parts of the contract already performed, the supplies made and the fixed assets required, and agree on the obligations remaining to be assumed by the parties. Thereafter, within a reasonable period of time adapted to the circumstances and fixed by the parties, they shall agree on the terms of the takeover, the changes to be made to the contract and the distribution of the additional costs directly related to the circumstances.

The second clause allows the parties, whether or not there has been a suspension, to examine the contractual and financial consequences of unforeseeable circumstances which would have led to significant changes in the conditions of performance of the contract. This clause is independent of the application of the theory of unforeseeability. It

can be applied more broadly and is in any event an invitation to dialogue between the parties in the face of the most serious external contingencies[25].

[25] More exhaustive comments on these clauses are available on the Chair's website. The next report of the Chair will focus on the links between procurement rules and difficulties in the execution of public contracts. Fieldwork is currently underway and it will be published in the summer.

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CENTRAL OR REGIONAL CORONA-MANAGEMENT? A JOURNEY THROUGH TIME IN THE JUNGLE OF ORDINANCES

Peter BUßJÄGER, Mathias ELLER, Alice MEIER*

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1. INTRODUCTION

Times of crisis naturally put the rule of law to a severe test. The legislator and the regulator are both particularly challenged in this regard: the measures anticipated by the policy-makers need to be translated into legislative text as quickly as possible, whereas fundamental rights and freedoms (such as the right to liberty, the freedom of movement or the freedom of assembly and association) need to be specifically accounted for. In fulfilling this task, clear and simple language is key to allow the addressees to comprehend and ultimately adhere to the measures. This is all the more difficult when the measures change nearly on a weekly basis. Hence, individuals cannot be expected to maintain an overview of the measures currently (and barely still) in force or (just recently) expired. A certain degree of persistence and predictability of the law is notoriously indispensable for the acceptance of and the adherence to legal norms.[2] In an ideal scenario the legal framework would already have been set and preceded the outbreak of the public health emergency. This conclusion could not apply to Austria, as will be further illustrated herein. The present contribution elucidates and critically analyses the legislative efforts undertaken at federal and provincial level throughout the COVID-19 crisis.

[2] Not however for a flood of laws and its negative consequences. Cf. in this respect Adamovich, Die Gesetzesflut (1994), in VfGH (Supreme Constitutional Court) (ed.), Ausgewählte Werke – FS Ludwig Adamovich (2012) 151 ff.; Bußjäger, Gehorsam und Gesetzesflut, ÖJZ 1993, 185 ff; Bußjäger, Der Rückzug des Rechts aus dem Gesetzesstaat (1996).

2. THE LEGAL FRAMEWORK OF COMPETENCES IN CRISIS MANAGEMENT

One would only vainly attempt to find emergency law in the Austrian federal Constitution. There is also no specific field of competence comparable to that existing with regard to disaster control or disaster relief. Nonetheless, linkages to disaster prevention, contrast and recovery can be found in several existing subject matters. In terms of the constitutional allocation of competences, following picture emerges in relation to the COVID-19 pandemic: Pursuant to Art. 10, par. 1, sub-par. 12, the Federation has statutory and executive powers in the subject matter of public health, albeit "*with the exception of burial and disposal of the dead, municipal sanitation and first aid services, but only sanitary supervision with respect to hospitals, nursing homes, health resorts and natural curative resources*"[3]. Thus, the statutory basis to contrast emerging pandemics and epidemics needs to be introduced at the federal level. In the absence of dedicated federal authorities, the enforcement of the measures is carried out by the district administrative authorities of the Provinces. Indirect federal administration represents an important instrument in the Austrian federal system for bringing together federal and provincial enforcement segmentation and can prove to be an advantage not to be underestimated, especially in response to a pandemic. Ultimately, the competences in epidemic and pandemic control are therefore clearly defined and do not, in principle, stand in the way of an efficient and rapid response to public health crises.

Therefore, in light of the illustrated allocation of competences, the federation would have been responsible for developing a pandemic plan before the outbreak of the COVID-19 crisis. And yet, even months after its outbreak, the aforementioned plan was not in sight, even though, at same time, the development of the 'influenza pandemic plan' had already been

[3] See for example "*Österreichischer Pandemieplan wird derzeit überarbeitet*", in: Kurier of 30. 01.2020, available at: https://www.kleinezeitung.at/oesterreich/5761121/Coronavirus_Oesterreichischer-Pandemieplan-wird-derzeit-ueberarbeitet (17.03.2021).

envisaged at the end of January 2020. Austria was just as unprepared for a health crisis of this proportion also with reference to the legal framework of March 2020. The Epidemic Diseases Act of 1950, which is essentially based on the Prevention and Control of Communicable Diseases Act of 1913, proved to necessitate a reform and to be unsuitable to contrast the COVID-19 crisis. The intent of the COVID-19 Measures Act, BGBl I[4] 12/2020 et seq. 23/2020, hastily approved by the Parliament, was to introduce a statutory basis for the management of the crisis. A first round of ordinances based on this Act were to enforce the first "lockdown" in Austria.

3. At a glance chronology of the legal basis for the first "corona wave"

3.1 The federal level

The COVID-19 Measures Act was the starting point of a sequence of countless *ad hoc* laws and ordinances, that were either newly adopted or amended at the federal level in response to the COVID-19 pandemic. The most important corona-provisions at the federal level, chronologically ordered according to their entry into force, are illustrated below. It should be noted that the majority of the below-mentioned legal provisions either only remained in force for a short period of time or were amended shortly after their legal validity - in some cases even several times. The numerous COVID- 19 laws also lead to a partial adjustment of the existing federal laws to the new conditions (e.g.: suspension of deadlines; legislative anchoring of video conferences, ordinance on short-time work; ordinance on compensation etc.).

[4] Federal Law Gazette I.

Legal Provision	Federal Law Gazette	Entry into force
COVID-19-FondsG (Crisis Management Fund Act)	BGBl I 12/2020	16.03.2020
COVID-19-Measures Act	BGBl I 12/2020	16.03.2020
COVID-19-Measures-Ordinance-96 (prohibition to enter certain establishments)	BGBl II 96/2020	16.03.2020
Ordinance pursuant to § 2 sub-par. 1 of COVID-Measures Act (ban on entering public places)	BGBl II 98/2020	16.03.2020
COVID-19-Funds-Ordinance (guidelines for the granting of financial resources)	BGBl II 100/2020	16.03.2020
Ordinance on the Entry into Austria by Air	BGBl II 105/2020	19.03.2020
2. COVID-19-Act (in this context also amendment of the Epidemics Act of 1950)	BGBl I 16/2020	22.03.2020
3. COVID-19-Act	BGBl I 23/2020	05.04.2020
4. COVID-19-Act	BGBl I 24/2020	05.04.2020
5. COVID-19-Act	BGBl I 25/2020	05.04.2020
COVID-Short-time working-Maximum limits-Ordinance	BGBl I 132/2020	07.04.2020

COVID-19-Loosening Ordinance	BGBl II 197/2020	01.05.2020
6. COVID-19-Act	BGBl I 28/2020	06.05.2020
7. COVID-19-Act	BGBl I 29/2020	06.05.2020
8. COVID-19-Act	BGBl I 30/2020	06.05.2020
9. COVID-19-Act	BGBl I 31/2020	06.05.2020
10. COVID-19-Act	BGBl I 32/2020	06.05.2020
11. COVID-19-Act	BGBl I 33/2020	06.05.2020
12. COVID-19-Act	BGBl I 34/2020	06.05.2020
13. COVID-19-Act	BGBl I 35/2020	06.05.2020
14. COVID-19-Act	BGBl I 36/2020	06.05.2020
15. COVID-19-Act	BGBl I 41/2020	15.05.2020
16. COVID-19-Act	BGBl I 42/2020	15.05.2020
17. COVID-19-Act	BGBl I 43/2020	15.05.2020
18. COVID-19-Act	BGBl I 44/2020	15.05.2020

3.2 The regional level

A wide variety of measures were also introduced at the regional level in the form of provincial statutory laws and governmental ordinances, in order to minimize, as much as possible, the impact of the public health crisis and to continuously adapt to the varying epidemiological situation.

Extracts of the most important provisions are presented in the below table, whereby there is a visible tendency to particularly emphasize the protection of more vulnerable groups in the population (children, elderly, care-dependent individuals). Deviating from the measures adopted in other Provinces, Tyrol has notably attempted to overcome the public health crisis by imposing partially stricter traffic movement restriction measures (municipal quarantine). Similarly, also with regard to these legal provisions, it should be noted that in the meanwhile they either are no longer in force or were amended, in some cases recurrently.

Province	Publication	Content	Inkrafttreten
Vorarlberg	LGBl[5] 19/2020	COVID-19-*Ombibus* Amendment	16.03.2020
	LGBl 22/2020	Ban on entering cableways	14.04.2020
	LGBl 23/2020	Restriction on the operation of kindergartens etc.	14.04.2020
Tyrol	LGBl 33/2020, 34/2020, 35/2020, 41/2020, 44/2020	Quarantine – entire provincial territory	originally 19.03.2020 and ff. amendments
	ao. "Bote für Tirol" 128/2020, 155/2020, 163/2020, 166/2020,	Quarantine – single municipalities	varying (between 13.03.2020 and 28.03.2020)

[5] Provincial Law Gazette.

	186/2020, 195/2020 etc.		
	„Bote für Tirol“ 116/2020, 204/2020, 222/2020	Ban on gatherings – all districts	12.03.2020 resp. 04.04.2020
Salzburg	LGBl 26/2020	Playground access ban Ordinance	24.03.2020
	LGBl 37/2020	S. KBBG[6] – Covid-Ordinance	04.04.2020
Upper Austria	LGBl 35/2020	UA COVID-19-Act	25.04.2020
	LGBl 40/2020	Restriction on the operation of childcare facilities	25.04.2020
Lower Austria	LGBl 34/2020	LA COVID-19-Gesetz	18.04.2020
	LGBl 36/2020	Restriction on the operation of childcare facilities	26.04.2020
Carinthia	LGBl 17/2020	Coronavirus – Curfew Ordinance	16.03.2020
	LGBl 29/2020	Carinthia COVID-19-Law	11.04.2020
Styria	LGBl 34/2020	COVID19 – Styr. Municipal Law Amendment Act	08.04.2020
	LGBl 35/2020	COVID-19-Omnibus Act	08.04.2020
	LGBl 39/2020	Corona-Data - Ordinance	17.04.2020
Burgenland	LGBl 8/2020	Curfew for the hospitality sector	16.03.2020

[6] Ordinance ensuring adequate child education and care in times of epidemic spread of SARS-CoV 2.

	LGBl 25/2020	Adaptation of the Provincial legal system due to the corona-pandemic	17.04.2020
Vienna	LGBl 18/2020	Ban to enter certain care facilities	14.04.2020
	Offical Gazette of the City of Vienna 13/2020	Restriction on the operation of childcare facilities	18.03.2020

3.3 Assessment

Throughout the first "lockdown", the statutory laws passed by the National and the Federal Council, as well as the ordinances enacted mostly by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection for the entire federal territory, were generally well accepted by the population. Indeed, the striking images from the city of Bergamo in northern Italy left a significant mark on the perception of Austrian citizens. Further, as the scientific knowledge of the novel SARS-CoV-2 pathogen was also more than scanty at that time, the limitations of fundamental rights and freedoms associated with the restrictive measures, introduced for the sake of society and public health, were widely supported by each individual addressee. However, as it became manifest only few months later, the initial legal basis proved to be insufficient in certain cases (see hereafter Section IV.). This is to be attributed to the high time constraint, on one hand, but also to the scarcity of personnel in the Health Department at the federal level on the other. At the regional level, the preferred approach was to respond to the temporary need for adaptation at the legislative lever through the adoption of separate provincial COVID-19-laws. As far as can be detected, only Salzburg has refrained from issuing its own COVID-Act and rather proceeded with the necessary adjustments in the relevant legislative subject matters. All in all, the first “high-corona-phase” has determined a significant statutory activity, with the introduction of new laws and ordinances, as well as the amendment of existing legal provisions at both the federal and regional level. This, against the backdrop of norms that were partially only valid for a few

days or amended several times, so that most probably even jurists accustomed with the single subject matters struggled to maintain a general overview.

4. THE LEADING DECISIONS OF THE CONSTITUTIONAL COURT (VERFASSUNGSGERICHTSHOF - VFGH)

In its June/July session, the VfGH was confronted with some of the so-called „Corona-Ordinances", which were enacted under the COVID-19-Measures Act. In particular, the Ordinances of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection, which normed the prohibition to access public spaces and customer dedicated sections of commercial establishments of a certain size, were found to be unlawful by the Court[7], since lacking a clear legal authorization for a far-reaching interference with the right of free movement. Conversely, the highly controversial compensation schemes in case of closing business facilities, pursuant to the COVID-19-Measures Act, resisted the constitutional scrutiny. The Court highlighted that the legislator holds a wide margin of discretion in the matter under scrutiny when combating the economic consequences of the pandemic. Along those lines, numerous legislative measures were set to mitigate the economic consequences for affected companies (fixed cost subsidies; hardship funds; short-time). This also compensated the compression of the right to property associated with the closing of businesses.

Although the COVID 19 Measures Act withstood the constitutional scrutiny, a comprehensive revision of the regulatory framework, with the aim of providing clearer guidance to the regulator, was unavoidable.

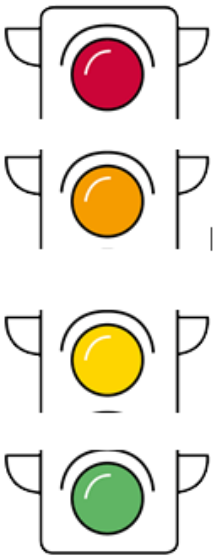
5. REGIONALIZED CORONA-MANAGEMENT THERE AND BACK

[7] Vf 14. July 2020, V 363/2020 and V 411/2020.

In summer 2020, during the easing phase in the spread of the virus, as the numbers of infections largely settled at a lower rate, the attention was fully drawn to developing an effective strategy to face the approaching autumn and winter. The key stakeholders all knew that with the forthcoming decrease of temperatures a renewed aggravation of the situation was only a matter of time. Ultimately, in the attempt to provide a unified response to the crisis, the political front introduced the so called "corona traffic-light system". This system links specific preventive and behavioral measures to the color attributed, from time to time, to each region on the basis of the detected transmission rate. It is hence clear that Austria provisionally opted for a mix of federal-wide and regional regulations to contain the spread of the pandemic. However – as will be further illustrated herein – the contrary trend towards a recentralization in the COVID-19 management could already be detected just a few months later.

5.1 Visualization and evaluation of the corona virus traffic-light system

Following graphic is intended to illustrate the corona traffic-light:



RED: very high risk: uncontrolled infection chains; large-scale spread

ORANGE: high risk: repeated occurrence of clusters; high utilization of intensive care bed capacity

YELLOW: middle risk: moderate increasing number of positive tests; moderate utilization of intensive care bed capacity

GREEN: limited risk: scattered occurrence of clusters; low number of positive tests

A 20-member commission, composed of representatives of the federation, the provinces and experts of the federation, meets weekly on the basis of different criteria for evaluation – transmissibility, search for sources, resources, tests - to propose recommendations for action based on the current epidemiological situation[8]. From the beginning, on September 3. 2020, except the federal capital Vienna, only Linz, Graz and one Tyrolean district were attributed a yellow color, while the rest of Austria was shaded green. Since 5 November 2020, the entire federal territory has been switched to "red" – the situation remained unchanged over the last two months.

The illustrated corona traffic light system is based on an amendment of the COVID 19 Measures Act, BGBl I 104/2020, which entered into force on 26 September 2020. Thus, the legal basis of the system, and in particular the establishment of the "corona commission",

[8] In this regard see in detail: https://corona-ampel.gv.at/ (21.12.2020).

was only generated weeks after the start of the system's operativity. This circumstance is extremely regrettable from the perspective of the rule of law, especially since there would have been sufficient time to initiate the legislative preparatory work already in the summer. The possibility to introduce regionally differentiated measures resulted from a so-called "cascade regulation". Accordingly, additional measures for each provincial territory, or a region thereof, can be stipulated by means of ordinances of the governor or the competent district administrative authority. This strategy has both advantages and disadvantages: The greatest advantage lies in the option to offer a quick and targeted response to different epidemiological conditions encountered at the regional level. As a result, scattered occurring clusters or infection hotspots could be counteracted with more rigid and effective measures. However, on the other hand, differentiated regulations at provincial and district level further complicated the efforts to maintain a general overview of the existing and applicable measures. Indeed, in line with this regional differentiation, what would apply in the neighboring district not necessarily applies in one's own district. Regardless, in our opinion, regional diversification still seems to be the better alternative, if compared to the approach of centralized states such as France, where restrictive packages of measures had to be implemented uniformly even in regions with a low infection rate.

5.2 At a glance chronology of the Corona-Ordinances in Autumn 2020

As an output of the federal government's preferred strategy towards an intertwined conglomerate of federal-wide and regional regulations, the following represents an overview of the most important COVID-19 laws and ordinances at the federal, provincial and the district levels - ranked by chronological order.

21.08.2020: Due to the rising of the infection figures, the ordinance on the entry into Austria is amended in no time for the purpose of containing SARS-CoV-2 (BGBl II 372/2020). The result is an unprecedented traffic chaos at the border between Carinthia and Slovenia.

29.09.2020: The COVID-19 Measures Act, BGBl I 104/2020, enters into force.

End of September: the western Provinces Tyrol, Vorarlberg and Salzburg agree to introduce an anticipation of the curfew to 22:00 pm. In Tyrol, the associated ordinance enters into force on 29. September (LGBl 100/2020).

16.10.2020: In Salzburg, in addition to stricter regulations regarding educational institutions etc., a province-wide ordinance by the governor (LGBl 97/2020), imposes even stricter measures for the political district of Hallein and imposes a 14-day "municipal quarantine" on the municipality of Kuchl.

16./17./19.10.2020: Tyrol sets further measures to contain the spread of the virus (registration of guests and customers in the hospitality sector; events; activities of associations; visiting regulations for certain premises) by means of provincial ordinance (LGBI 106/2020).

23.10.2020: Mandatory safe distance obligation of minimum one meter and obligatory mouth-nose protection when entering public places is (re)introduced nationally. At the same time, sport activities and sport events in Burgenland are linked to the compliance with stricter regulations (LGBl 67/2020).

14.11.2020: Carinthia introduces additional restrictive measures to prevent the spread of COVID-19 in long-term nursing and retirement homes (LGBl 94/2020).

17.11.2020: The second lockdown in Austria is regulated by the COVID-19 Emergency Measures Ordinance (BGBl II 479/2020). The measures were originally designed to expire on the 6th of December 2020.

05.12.2020: Styria introduces a prohibition for external individuals to enter child care and education facilities for the purpose of combating the spread of COVID-19 (LGBl 108/2020).

07.12.2020: Upper Austria imposes additional provisions to mitigate the transmission of COVID-19 in nursing and retirement homes by means of a COVID-Measures Ordinance.

21.12.2020: The Lower Austrian COVID-19-Act is published (LGBl 107/2020).

22.12./24.12.2020: Introduction by ordinance of the Governors of additional measures to combat the spread of COVID-19 in Ski-Resorts in Vorarlberg [9], Tyrol[10], Salzburg[11], Styria [12], Upper Austria[13] and Carinthia[14] .

28.12.2020: Following the example of other Provinces, Styria imposes an entry ban for external individuals and further requirements and conditions for the operation of child education and care facilities to avoid further spread of COVID-19 (LGBl 132/2020).

[9] LGBl 92/2020.

[10] LGBl 142/2020.

[11] LGBl 135/2020.

[12] LGBl 130/2020.

[13] LGBl 141/2020.

[14] LGBl 115/2020

5.3 Assessment

The introduction of the coronavirus traffic-light system determined a significant shift of responsibility in the management of the corona crisis towards the Provinces. [15] Considering that the Provinces have extensively made use of their possibility to adopt regionally differentiated provisions, they surely cannot be accused of having abdicated their responsibility. Contact tracing, implemented by the district administrative authorities since the spring, ultimately proved to be a stumbling block in the regional response to corona. This, however, does not come as a surprise, considering the enormous increase of the work-load due to the spread of the virus and increase of the infection rate. The authorities simply reached their capacity limits.

In turn, the no longer retraceable infection hotspots, which emerged in the course of the autumn lead to the adoption of nationally applicable measures and to a re-centralization of the corona-management. This trend became the more evident with the COVID 19 Emergency Measures Ordinance, which came into force on 17 November 2020 and regulated the second "lockdown" in Austria. It therefore proved true, as hypothesized herein, that the regional scope for decision-making in the pandemic-management decreases proportionally to an equal extent of the increase of the number of infections.

6. IMPACTS ON THE LEGAL SYSTEM OF A LACKING LONG-TERM STRATEGY

[15] See for example „*Corona: Wie die Regierung die Verantwortung an die Länder abgibt*“, in: Kurier of 10.07.2020, available at: https://kurier.at/politik/inland/corona-wie-die-regierung-die-verantwortung-an-die-laender-abgibt/400968314 (22.12.2020).

The COVID 19 Emergency Measure Ordinance, which originally contained a sunset clause of three weeks, was lastly extended until the 6th of January 2021, as the epidemiological situation had only marginally changed over time. The operation of restaurants and hotels was supposed to be allowed to resume only after the expiration of the aforementioned term. Retailers and service providers, on the other hand, were allowed to operate their businesses under restrictions, starting from 7 December 2020, and in compliance with a curfew between 20:00 pm and 06:00 am. Exemption regulations were also issued over the Christmas holidays and for New Year's Eve. All the mentioned measures were legally anchored in numerous ordinances at the federal level.

Just two weeks later, most of the measures planned for the Christmas holidays were already "old news". Indeed, as of 26 December 2020, curfew restrictions were normed around the clock once again and larger gatherings of people were no longer permitted. Apart from the (now) usual exceptions, shops were not to reopen until 18 January 2021 - as it later turned out, this deadline could not be met either. The associated ordinances[16] to be followingly amended came into force shortly before Christmas**.**

Currently, the "4th COVID-19 Protection Measures Ordinance"[17], which came into force on the 8th of February 2021, regulates the COVID-19 determined social distancing in Austria. Attempts to prevent, or better mitigate, the spread of the virus were once more pursued with stricter rules, for example by introducing a 2-meter minimum distance regulation in all public places and closed spaces. The newly emerged coronavirus mutations represent the current threat and the new turning point in the evolution of the ongoing pandemic.

[16] This regards the 3. COVID-19-Protection-Measures-Ordinance and the 2. COVID-19-Emergency-Measures-Ordinance.

[17] BGBl II 58/2020

The COVID-19 Virus-Variations-Ordinance, Federal Law Gazette II 63/2021, which came into force on 12 February 2021, also specifically tackled the Tyrolean situation, in light of the significant increase of recorded cases of the virus strain commonly referred to as the "South Africa variant". With the exception of the district of East Tyrol and the Tyrolean municipalities of Jungholz and the Rißtal, in the municipal area of Vomp and Eben am Achensee, the Tyrolean population was isolated until the beginning of March in order to prevent the further spread of the virus mutation. Meanwhile the COVID-19 Virus-Variations-Ordinance of the 12th of February has expired, while special restrictions to contrast the spread of the disease in the Province are still in place at district level, limitedly to the district of Schwaz and in selected municipalities (municipality of Haiming, Roppen, Virgen, Matrei and Arzl im Pitztal).

In general, it should be emphasized that policy-makers so far conclusively lacked a rigorous strategy for combating the pandemic, whilst *ad hoc* decisions are announced almost at weekly intervals. This naturally also affects the corpus of the existing laws, which needs to react flexibly to the ever-changing framework conditions. This dynamic conceals some dangers to the rule of law, which have already been anticipated in the introduction. Indeed, it becomes very challenging for the individual to distinguish between the provisions currently in force and the provisions that have just expired. A lower acceptance of the measures is hence the logical consequence.

As the pandemic continues in its course, it must also be critically questioned whether the massive interference with the fundamental rights and freedoms of citizens, which have persisted for months now, can still be justified. On one hand, from a legal perspective, a distinction between recovered or vaccinated individuals and those who have not yet been infected is impending. The differentiation would rest on the circumstance that the former no longer pose a risk to the general public, being no longer at risk of infection. Measures restricting personal freedoms therefore seem to lack any justification for this - progressively expanding – group. Further, on the other hand, the appropriateness of lockdown-measures to contain the infection rate may also be questioned. Indeed, their suitability mostly depends on the willingness of the population to adhere to the freedom restricting measures. Considering

the recently crowded shopping centers and the circulation on the very populated streets, that is by no means comparable to the situation existing in March 2020, the readiness to adhere to further limitations can be expected to be very low. Again, it will be up to the decision-makers at federal and provincial level to provide the necessary and adequate solutions. At least, with the existing vaccines, there is a glimmer of hope for an upcoming return to the usual "normality".

7. SUMMARY: CHAOS! WHICH CHAOS?

The fight against this public health crisis, which started in mid-March 2020, challenges since then policy-makers and the enforcement authorities at all levels. While the first “lockdown” was regulated through nationally applicable measures, the introduction of the coronavirus traffic-light system has subsequently determined a perceptible shift towards a regional pandemic control. In light of the rapidly increasing infection numbers and the associated overload of the health authorities in the provinces, during the past autumn 2020, we assisted to a recentralization of the corona management. This tendency persisted nearly unaltered in 2021.

From a legal perspective, with regard to the allocation of competences in the context of the management of a health crisis, one could hardly define the situation in terms of chaos. Pursuant to the Austrian Constitution the Federation is to be hold accountable for a statutory response to the crisis. The Federation should provide clear guidelines to be then enacted by the Provinces through the mechanism of indirect administration. The division of tasks is surprisingly clearly defined in this subject matter.

Further, there is no sign of chaos in the statutory provisions and ordinances at federal and provincial level. Whether there has been an "overproduction" of laws and ordinances, with threatening effects on the rule of law, is ultimately a matter of dispute that cannot be conclusively resolved. In any case, it should be emphasized that a regional pandemic response naturally requires "more" provisions due to the quite diverging epidemiological

situations. This diversification may occur at the expense of overall clarity; however, it enables the design of goal-oriented measures.

The lack of a long-term strategy to combat the pandemic so far has negatively reflected on the corpus of existing law. This is now characterized by a tremendous mechanism which is hardly comprehensible for the layman citizen. As an unwanted consequence of the fluctuating easing and tightening of the measures and of the infection rate, the underpinning legal provisions must also be constantly adapted. Conclusively, although the orientation through this jungle of regulations is becoming increasingly arduous, there is no evidence of a complete disorder.

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"LEGISLATION IN EUROPE: A COUNTRY-BY-COUNTRY GUIDE" ULRICH KARPEN, HELEN XANTHAKI (Edited by), HART PUBLISHING, UK, 2020

BOOK REVIEW[1]

Livia LORENZONI[2]

INDEX

1. CONTEXT

Over the last decade, the quality of legislation has gained an increasing relevance in the academic and institutional debate, both at national, European, and international level. The

[1] The book review is not submitted to peer-review

[2] Assistant Professor of Administrative Law, Roma Tre University, Italy

book “Legislation in Europe: A Country-by-Country Guide”[3] contains a series of important essays on the quality of legislation. Its first version, published in 2017, entitled “Legislation in Europe: a comprehensive guide for scholars and practitioners” – aimed at providing a guidebook for national and European drafters – policy makers and legislators focused on the main aspects emerged in the studies on legislation. This new version has widened and completed the work, providing an analysis of the legislative features of several European countries.

The book addresses the general principles and best practices in law making within each single State and in the European Union itself. It refers to the concept of “legisprudence”, as a field of legal studies dedicated to researching and teaching about both the theory and the practice of legislation.

The different legal systems are analysed with particular attention to the regulatory environment and primary legislation. Each chapter examines the processes of formation of laws, the methods of approval and the rules on assent, as well as the methodology and techniques of drafting. It deals, among other things, with the principles of subsidiarity, legitimacy, proportionality, effectiveness, and efficiency. Finally, the essays address the issues of regulatory impact analysis, monitoring and, more generally, the culture of "good legislation".

The authors of this volume – academics, and professionals with specific expertise in this field – delve into the issue of the quality of legislation in their respective countries. Their analysis provides a unique and important basis for comparison, aimed at advising national institutions in the development of guidelines for legislators and regulators.

[3] U. Karpen, H. Xanthaki, *Legislation in Europe: A Country-by-Country Guide*, Hart Publishing, UK, 2020, https://www.bloomsburyprofessional.com/uk/legislation-in-europe-9781509924707/.

2. THE INTRODUCTION OF THE BOOK

The introductory chapter presents, in terms of comparison, the wide theme of legislation in European countries. It highlights that, despite the profound differences in the political structure, the functioning of the law, the organisation, and the process of legislation of each of the countries covered in the book, "they all at least aspire to democracy, the rule of law, the separation of powers and the independence of the judiciary"[4]. Their constitutions, written or not, regulate the main structures of governance of the State, including the form of government, the separation of powers and institutions thereof with their respective competence and layers of governance, territorial subunits, and municipal governance. Finally, all EU Member States have an executive at the central level that is split into the government and the head of State and a parliamentary democratic type of government.

The introduction contains a very helpful overview on the main instruments of enhancing better legislation adopted in the countries considered. It also addresses the common core of national legal frameworks in terms of value, principles, and directives (drawing on Ronald Dworkin leading theory[5]). The main pillars of the constitutional State in Europe are listed: fundamental rights; democracy; and the rule of law. Also, some common aspects of legislation in multi-layered systems are analysed. The focus on the similarities and differences among the States considered appears to be pivotal for achieving a profitable legal comparison.

[4] U. Karpen and H. Xanthaki, Introduction: Law, Legislation and Legisprudence, in U. Karpen, H. Xanthaki, *Legislation in Europe: A Country-by-Country Guide,* Hart Publishing, Bloomsbury, UK, p. 3.

[5] R. Dworkin, Taking Rights Seriously, Harvard University Press, 1977.

The introductory chapter also provides some definitions, useful to limit the scope of the following papers. It clearly explains what is meant by the concept of "law" (as general abstract norm as opposed to decisions in particular cases) and "legislative process" (focusing on the organs and the procedures involved in the enactment of laws) in the countries analysed and what are the relevant definitions for the purpose of the research.

It then states the values and goals of laws, such as good legislation, and evaluation, referring to them as "substantial legisprudence", while the structure, language and techniques of law-drafting is named "formal legisprudence"[6]. Finally, it observes how the topic is understudied in most countries and suggests ways to spread, teach and learn professional legislation.

The introduction is followed by chapters on 30 individual States, in alphabetical order. The analysis also includes States that are not part of the European Union, but which fall within the territorial scope of Europe (such as Switzerland).

The chapters on individual countries are all structured according to a common outline that analyses the following points:

- the national constitutional environment and its connection with European Union law;
- the nature and types of legislation;
- the legislative process;
- the drafting process;
- jurisprudence conventions;
- the training of drafters.

3. INSIGHTS FROM SOME RELEVANT CHAPTERS

The Italian chapter provides interesting insights on the main factors that influence the quality of the national legislative framework. After an introduction on the main Italian literature on

[6] For a recent and comprehensive study on legislative drafting and effectiveness, see M. Mousmouti, Designing Effective Legislation, Edward Elgar Publishers, 2019.

legislation, the author states that "Italian practice in terms of legislation has not had a strong and structured tradition, and the public debate on this topic has not made good progress since then"[7]. She points out the serious gap between theory and practice in the Italian experience. The chapter goes on providing a wide definition of legislation, based on the Italian Constitutional framework and the hierarchy of norms deriving from it. It also refers to the multi-level character of Italian legislation, where EU laws are often binding and cover wide areas of law and regions are entrusted with legislative power on important matters. It also considers the governmental non-primary regulation and the sector-specific regulation adopted by independent administrative agencies and their relevant aspects for studies on legislation.

The following paragraph describes the main aspects of the Italian legislative procedures. It highlights a huge problem of legislative inflation and its harmful consequences on legal certainty, creative compliance, and lack of effective enforcement. Then, it analyses the objectives of legislation from a public policy perspective. The author shows how, in theory, RIA, clear objectives, and evaluation of outcomes should be the core of the legislative process, while, in practice, these instruments have rarely been effectively employed. The analysis distinguishes the formal and the substantial quality of legislation. The formal quality has gained importance in the institutional debate over the last decades. The substantive quality is analysed in three stages. The first period (1999-2005) is characterised by the rise of the better regulation discourse. The second period (2005-2017) has faced attempts of improvement, such as the Simplification Law and the Decree on RIA implementation. The third period (2017-present) is aimed at strengthening the institutional capacity of Better Regulation tools and has been featured by a strong role played by the advisory role of the Consiglio di Stato. A similar role is played in France by the Conseil d'Etat that, together with the Secrétariat general du Gouvernement (SGG), is responsible for ensuring the quality of

[7] M. De Benedetto, Legislation in Italy, in U. Karpen, H. Xanthaki, *Legislation in Europe: A Country-by-Country Guide*, cit., p. 268.

legislative drafting[8]. Finally, the Italian chapter refers to the training on legislation, pointing out the lack of a strong tradition of legislative studies, drafting and Better Regulation in Italian Universities, while some post-graduate courses are available, and it mentions cases of prominent institutional, not exclusively academic training.

The conclusion on the Italian legislative system emphasises its main criticisms, such as, degeneration of the parliamentary system; pressures of groups of interests; public intervention on the economy; symbolic and unstable politics; lack of clarity of the normative texts; the wide use of urgent governmental decrees, that contribute to hinder the confidence in legislation. It recalls the need for a stronger and more stable inter-institutional relationship and a greater awareness of the importance of the issue.

An interesting analysis emerge from the chapters on federal States, such as Germany and Switzerland. The chapter on Germany starts with a general overview of its constitutional framework, with a particular focus on fundamental rights, the rule of law, and the importance of the division of the federation into Länder and their participation in the national legislative process. The author (who is also one of the editors of the book) highlights that the "value-oriented, supra-positive notion of the Basic Law is certainly a product of recent German history"[9]. The hierarchy of laws in Germany and the main aspects of the law-making process are then illustrated. One of the main peculiarities of German parliamentary system is represented by the Bundesrat, that is not a Second Chamber (as, for example, in Italy) and represents the Länder governments.

The author deals with the aspects of substantial quality of legislation referring to the "methodology" of policy-making. This means setting clear goals and principles that the legislator must follow. As for the formal quality of legislation, it refers to structure, language,

[8] K. Gilberg, Legislation in France, in U. Karpen, H. Xanthaki, *Legislation in Europe: A Country-by-Country Guide*, cit., pp. 280 ss.

[9] U. Karpen, Legislation in Germany, in U. Karpen, H. Xanthaki, *Legislation in Europe: A Country-by-Country Guide*, cit., p. 200.

and amendments of legislation. It is interesting to notice how the German legal system includes some express guidance, as, for example, the Handbook for the Preparation of Statutory Laws/Instruments, and the Manual for Drafting Legislation. All bills are structured in a very clear and straightforward way. For example, they start with a front page that indicates, possibly in one word, the problem, the solution provided in the bill, alternative solutions and the reason of the choice, the expected expenditure, the compliance costs and its argument. Systematic order, clear and simple language are also considered of great relevance.
A further interesting example is that of Switzerland: a federal state characterised by a hierarchically organization: federal, cantonal, and communal law. Each of which law is in turn layered into a constitution, primary legislation, and secondary legislation. A key role is reserved for people in the Swiss legal system; indeed, the citizen can participate in legislation with consultation, referendum, and popular initiative. The Swiss Parliament consists of two chambers: a house of representatives (which are elected directly by the people according to a system of proportional representation), that is the National Council, and a senate, the Council of States (that is composed of 46 representatives of the cantons). The Swiss law-making process consists of up to five phases: initiation (introduced by way of legislation or by means of a popular initiative); drafting by the administration (the drafting phase falls into three stages: the preparation of a preliminary draft, the consultation of the public and the preparation of a final draft); parliamentary deliberation (that require the agreement of both chambers); referendum, commencement and publication; and evaluation (article 170 of the Swiss Federal Constitution).
Regarding drafting techniques two elements need to be taken into consideration: the multi-lingualism of the legal system (article 4 and 70, para 1 of Federal Constitution: Switzerland has four national languages; Germany, French, Italian and Romansh) and Switzerland's tradition of plain-language drafting. Even though the Swiss system includes a very little training in the theory of practice of legislation, Switzerland shows a good level of quality of its legislation.
One of the countries that has recently shown a good development of substantial and procedural legisprudence in practice is France, where the term "légistique" is widely used. Only since the 1980s legislation has been subject to requirements of rationality and efficiency. The primary source of French legislation is the statute law, which is an act of

Parliament (Article 6 of Declaration of Human and Citizens), that is also the primary focus of legisprudence in France. Historically, academics consider that the 1958 French Constitution set up a "parliamentary system with a twist", given the prominent role of the government in the law-making process. The French legal system can be described as a highly codified system; indeed, the tradition of codification starts with the Royal Ordonnance of Montil-lés-Tours of 1453 and the Napoleonic codification (1804-10) and continued with the codification of 1948-1987 and 1989. The "constitutionalisation of French Law", the influence of international and EU law, as well as the expansion of intra-legislative norms, and the development of soft law are all factors that played an important role. Despite those phenomena, statute law remains at the very heart of the French legal system.

As mentioned above, two institutional advisors are responsible for the ensuring the quality of legislative drafting in the law-making process: the Secrétariat general du Gouvernement (SGG) and the Conseil d'Etat. Non-governmental actors also play a role in the law-making process. The Guide de Légistique identifies three types of participation: preparatory consultations, concentrations, and open consultation on the internet. The French substantial legisprudence focuses on techniques to improving the preparatory phase of legislation but consider also an ex-post evaluation.

In the French legislative system, there has been a constitutionalization of the drafting rules and French legisprudence also draws legislative drafters' attention to "risky techniques" which should be used with great caution. Some drafting rules also have acquired binding force, like the "principle of clarity", in the 1998 by the Conseil constitutional. Despite all the French system is still considered problematic for the quality of legislation, so preventing over-regulation and providing guidance, training and assistance to legislative drafters could be the key steps to improve the situation.

The above-mentioned examples show how the book provides a great variety of approaches that may be employed to tackle the issue of legislative quality. This constitutes the main usefulness of the book, where legislators, policy-makers, scholars and practitioners may find a great number of tools to improve national legislation.

4. CONCLUSION

The book concludes with an analysis of trends and best practices in Europe.

The study shows that the problems associated with the production of legislation are recurrent in the various countries examined. In particular, the following criticisms are noted: excessive legislative production, poor quality regulatory production, and inaccessibility of legislation. These issues persist, despite the widespread promotion and application of regulatory impact analysis in most countries.

The highly innovative profile of the volume consists in the change of perspective with respect to the study of legislation. The attention, traditionally focused on the scrutiny of the formation phase, on the general regulatory context, or on the subsequent review of the legitimacy of laws, begins to be shifted to the legislation itself, that is conceived as a product.

The aim of the volume is to identify recurrent elements of legislative failures in order to seek common solutions in the European context. The European Union, in fact, has long been committed to the goal of improving the production of legislation, as demonstrated, for example, by the agenda on the quality of regulation. The authors wish that just as much attention will be paid to the quality of legislation, to make it more accessible and comprehensible to those to whom it is addressed.

Restructuring the channel of communication between citizens and national legislators is even more necessary in the current context, in which anyone can access regulatory texts directly on the Web, without the help of professionals. Improving communication between individuals and legislative bodies, through a good law making, would facilitate citizens' understanding of the goals and objectives behind legislative interventions and their acceptance.

The above-mentioned improvement would also enable citizens to have a clear view on the actions they need to take to comply with current legislation. This would produce positive effects in terms of compliance, avoiding recourse to sanctions or other coercive instruments, encouraging greater participation and collaboration in the pursuit of the long-term objectives of legislation. Finally, good legislative production - clear, understandable, accessible by the public - would help increase public trust in institutions. The current tendency towards populism, experienced by several States, could be hindered by an overall change in the communicative relationship between parliamentary institutions and the recipients of the norms, which would promote the establishment of a fiduciary relationship, fundamental for the functioning of democratic systems.

The book concludes with a hope that the impact of the debate, begun with the first edition, may extend not only to the institutions of European countries, but also beyond the continental borders.

This volume contains a very rich and deep comparative analysis of the most important European legal system, based on a quite unique idea: the substantial as well as formal improvement of legislation. It will certainly constitute a fundamental tool both for legal scholars and for -public institutions.