

SENIOR CIVIL SERVANTS (“DIRIGENTI”) IN ITALY

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1. INTRODUCTION

This annual report has been designed and structured as an update of the 2011 report (F. Merloni, *The senior Civil Servants in Italy*, in this review) that offered a broad and comprehensive overview on the basic discipline of the Italian senior civil service system, the peculiarities of its role and tasks as they relate to the model of distinction between politics and administration, as well as on open questions on the subject. Consistent with this approach, the 2012 report considers only evidence supporting traits of novelty or advances in terms of legislative systems, jurisprudential arrests and scholarly debate.

2. THE EXCLUSIVE POWERS OF SENIOR CIVIL SERVANTS: CLARIFICATION ON THE CONSTITUTIONAL CONSTRAINT

The principle of distinction between political tasks – which belong to the political offices within the administration – and management/day-by-day tasks – which are reserved exclusively to the professional offices (“organi dirigenziali”) – outlines (peculiar to the European framework¹) an articulation of the machinery of government that aims to combine the requirements expressed by Art. 95 of the Constitution – i.e. a *democratic-led administration* – and those of Art. 97 of the Constitution – an *impartial, efficient and*

¹ See F. MERLONI, *Dirigenza pubblica e amministrazione imparziale*, Bologna, Il Mulino, 2006

effective administration. There is no doubt that this articulation has been confirmed and strengthened over time. In particular, in 1998 a general clause expressly arranged that the management tasks previously attributed to political organs of government be transferred to professional offices²; and then, in 2001, it was stated that the principle of distinction could be waived only by a dedicated act of law³. It remained unclear whether that arrangement is actually an option (among different patterns of relationship between politics and administration, all compatible with the Constitution), or if the principle of distinction is to be understood (by now) as constitutionally imposed (and therefore non-cancellable). The Constitutional Court has always linked the principle of distinction in a more or less direct way to the requirements of impartiality (in particular) and efficiency settled in the Art. 97 of the Constitution⁴. Notwithstanding, it remains to be ascertained whether (and under what conditions) the parliament is actually bound to the principle of distinction. Called recently to assess the constitutionality of a rule adopted by a regional authority (the autonomous Region of Sardinia), in which the passing of an environmental permit was conferred to a political body⁵, the Court⁶ reiterated in explicit terms that "the separation [or rather, *the distinction*, e.n.] between activities of political leadership and administrative, day-by-day

² Art. 45 , Legislative Decree 80/1998, after Art. 70, par. 6, Legislative Decree 165/2001 "the provisions conferring to governing bodies the adoption of measures of management or administrative measures referred to in Article 4, paragraph 2, of this Decree shall be construed in the sense that its jurisdiction shall lie with senior civil servants offices".

³ Art. 4, par. 3, Legislative Decree 165/2001 "the tasks of the senior civil servant offices mentioned in paragraph 2 may be departed from only expressly and by specific laws".

⁴ See Constitutional Court, n. 103/2007 and 34/2010;

⁵ Art. 48, par. 3, of Sardinian Regional Law n. 9/2006 - challenged by the local administrative judge - in fact assigned to the Regional Committee (political board, placed at the top of the regional administration) – based on a proposal by the member of committee delegated for environmental protection affairs – the Environmental Impact Statement (EIS) decision.

⁶ See Constitutional Court, n. 81/2013.

functions [...] constitutes a general principle, which finds its foundation in Art. 97 of the Constitution"⁷. However, the Constitutional Court also added that "the identification of the exact demarcation line between the acts of government attributable to the political body and the competence of the bureaucratic bodies, nevertheless, it is up to the Act of law" which, in turn "in identifying political leadership acts and those of administrative nature, [...] cannot make choices that, unreasonably in contrast to the principle of separation, adversely affect the impartiality of public administration". Thus, the legislator seems to have a "room for maneuver", albeit limited, allowing him – into unique, detailed and justified cases – to *reasonably* attract task of administrative nature – if and to the extent that it is characterized by a "special political significance" – within the competence of a political body⁸. The principle of distinction is thus articulated more precisely as a general principle, but with no absolute extent, and which can be waived (only by an Act of law; only in circumscribed and explicit terms), within the limits of a reasonable protection of the administrative impartiality's requirement⁹.

⁷ *Id.* "[the argument that] the principle of separation between political and administrative competences is an expression Art. 97 of Constitution" is considered "in line with the constitutional jurisprudence".

⁸ *Id.* "the choice made by the regional legislature determines a division of powers between the committee and the regional senior civil servants that does not appear unreasonable, in consideration of the particular complexity of the EIA. In the latter act, in fact, along with verification of a technical nature about the environmental compatibility of the project, which fall entirely in the field reserved to bureaucratic offices sense and that are made during the preparatory phase, there are also assessments that – in balancing among them a number of public interests such as environmental protection, local governance and economic development – undoubtedly take a particular political significance. For this reason, the division of powers provided for by the contested provision, in an area characterized by a mix of technical activities and political assessments, does not infringe Article. 97 of the Constitution".

⁹ According to the Court, an exception to the principle of distinction is lawful only if the scope of the derogation is explicitly limited, and if the technical advice provided by administrative offices to the final adjudication plays an effective procedural role.

3. OUTCOME ASSESSMENT: BACKWARD STEPS IN THE PRACTICE OF SO-CALLED “DISTINCTION BETWEEN POLITICS AND ADMINISTRATION”

As has already been pointed out in the 2011's report, the effectiveness of the model of the distinction depends particularly on the actual and effective functioning of the assessment system of the outcome achieved by senior civil servants during the performance of the reserved task, which in turn is a prerequisite for the activation of s.c. “managerial accountability”. Ruling acts immediately following the Legislative Decree no. 150/2009 (which greatly emphasized the centrality of the assessment system as a prerequisite for appointing senior civil servants in accordance with the distinction principle) have largely disregarded this setting, often invoking as a justification the need for spending cut and rationalization, but raising numerous and detailed criticism in the literature¹⁰. Hence, it is no longer mandatory to give reasons for non-renewal in case of expiring assignment (or pending reorganization), also in the absence of a negative assessment¹¹. Moreover, even the early termination of the assignment may be lawful, regardless of the findings of the assessment processes, if aimed at ensuring maximum functionality and flexibility¹². In doing so, those rulings acts of law allow (again) to nullify the impact of performance assessment of senior civil servants on assignment renewal (yet, continuation), and this way help undermine an effective distinction between politics and administration, because the senior civil servant holding an office is indifferent to the performance and outcome

¹⁰ See S. BATTINI, *Il principio di separazione fra politica e amministrazione in Italia: un bilancio*, in *Riv. Trim. Dir. Pubbl.*, 2012, 39; G. GARDINI, *Sulla costituzionalità delle disposizioni in materia di dirigenza pubblica (spoils system) contenute nelle recenti manovre finanziarie*, in *Foro amm-TAR*, 2011, 09, 2968.

¹¹ Art. 9, par. 32, Decree-law n. 78/2010.

¹² Art. 1, par. 18, Decree-law n. 138/2011

achieved (she/he is entitled to be assessed). Rather she/he will tend to satisfy the will of those who can (well, more freely) arrange the assignment (e.g. the political body), thereby compromising the condition of professional autonomy (or rather, personal independence, *see below*), which is a prerequisite for the distinction model to be operational in terms of fairness/impartiality. The formal distinction of tasks is thus contradicted in practice and emptied of structural requirements in the relationship between political bodies and administrative offices.

4. ACCESS TO OFFICE POSITIONS AND ANTI-CORRUPTION ACT

Within the context of policies implemented to fight bribery, administrative corruption and maladministration¹³, innovative regulations on the appointment of positions in bureaucratic offices (including the top administrative positions) have been introduced, together with an equally innovative ruling on disqualification¹⁴. The *ratio* of this intervention is to prevent:

¹³ Policies launched with the Parliament Act of Law, n. 190/2012, s.c. Anticorruption Law: see B. G. MATTARELLA - M. PELISSERO, *La legge anticorruzione. Prevenzione e repressione della corruzione*, Totino, Giappichelli, 2013.

¹⁴ Legislative Decree n. 39/2013, ruled on the basis of the Act of Law n. 190/2012, Art. 1, par. 49 e 50. See F. MERLONI - G. SIRIANNI - B. PONTI, *La nuova disciplina degli incarichi pubblici*, in *Giornale di diritto amministrativo*, n. 8-9/2013, 806.

1) a conflict of interest that favour objectively the distraction of public functions, to the detriment of impartiality, and the maturation of unlawful behavior, relevant to tort or criminal law;

2) the decay of citizens trust on fair exercise of public functions held by the senior civil servants, as clearly politically patronized or placed in a career politically characterized; For these purposes, the following terms are provided:

a) a number of rules that prevent the assignement (so-called “*inconferibilità*”) of office positions to senior civil servants (or to outsourced professionals), who (alternatively):
a.1) were sentenced, also not yet with a final decree, for a crime against the public administration (in case of minor crimes, just for conviction occurred within the previous five years)¹⁵;

a.2) – within the two previous years – have carried out assignments and held positions in state controlled body or corporation, or have played professional activities which were regulated, funded or otherwise paid by the public administration conferring the assignement¹⁶;

a.3) – within the two/one previous years – were members of a political/governing body: the application of that rule is then declined with the territorial level of government involved, depending on whether the managerial assignement is both at local, regional or national level¹⁷;

¹⁵ Legislative Decree n. 39/2013, Art. 3

¹⁶ Legislative Decree n. 39/2013, Art. 4 e 5

¹⁷ Legislative Decree n. 39/2013, Art. 3, 7 e 8

b) a number of situations listed as incompatible with a managerial assignment already in charge (i.e. disqualifications from holding office, subject to forfeiture of the assignment). Those situations are essentially the same¹⁸ as those referred to in points a.2) and a.3).

The above set of rules is certainly consistent with the assumptions and requirements of the principle of distinction (which is strengthened as a result). In particular, on one hand it acknowledges the need to set up specific tools to protect the fair exercise of the administrative action; tools to be modeled after the needs of the offices called to perform the administrative management (see the 2011 report). A requirement that is also reflected in other measures set forth in the Anti-corruption Act, in particular when a specific code of conduct is planned for the holders of executive office assignment¹⁹; or even when it is required to identify the situation - different according to different roles of senior civil servants - in which it is still forbidden to carry out a (remunerated) external assignment²⁰.

On the other hand, this ruling contribute to a condition of the senior civil servants that is more consistent with the requirements imposed by the *distinction principle*, which necessarily involves a shrinking room for maneuver of the political bodies in the distribution of management positions (as already highlighted in the 2011 report), with reference (in this case) to the need to avoid that the appointing power²¹ is used as a way to

¹⁸ Legislative Decree n. 39/2013, Art. 9 to 14

¹⁹ Art. 54 of the Law on public employment (Legislative Decree n. 165/2001), as amended by Act of Law, n. 190/2012. The resulting new *Code of ethics* (d.p.r. n. 62/2013) include some duties specifically designed for public managers (see Art. 13)

²⁰ Art. 53-bis of the Law on public employment (Legislative Decree n. 165/2001), as amended by Act of Law, n. 190/2012.

²¹ On that issue, see F. DI MASCIO, *Partiti e Stato in Italia. Le nomine pubbliche tra clientelismo e spoils system*, Il Mulino, 2012.

"reward" political loyalty (in performing public functions), and to ensure career continuity to political class members.

In this case, therefore, the strengthening of the model of distinction (impartiality side) could benefit from the effects of anti-corruption policies (promoted by the government Monti), that instead are basically inspired by the aim of gaining efficiency, and recovering resources diverted or wasted by corruption²².

5. THE PLURALITY OF SENIOR CIVIL SERVANTS' BODIES

The recent anticorruption policies reproduce the dialectic (enhanced by decentralized legislative competence designed in the Title V, Part II of the Constitution) between uniformity and differentiation with respect to discipline and *status* of senior civil servants. On the one hand, indeed, scholars are increasingly aware of the opportunity to articulate the analysis along the object of study (differentiated because of administrative pluralism²³ and different types of responsibilities imposed on public managers²⁴), while

²² See the *Study Commission on Anticorruption and Transparency issues final report*, november 7, 2012, available at <http://tinyurl.com/lbtwwbx>.

²³ See G. Nicosia, *Dirigenze responsabili e responsabilità dirigenziali pubbliche*, Torino, Giappichelli, 2011

²⁴ See V. PAPA, *Dirigenze pubbliche e responsabilità "al plurale" tra oscillazioni normative e giurisprudenziale*, in *Lav. Pubb. Amm.*, n. 6, 2011.

maintaining the aim to identify a unifying *ratio*²⁵ (an aim frustrated, in some cases²⁶). On the other hand, the national legislature acts (explicitly) towards a standardization of the status of senior civil servants (especially in reference to institutions for the protection of impartiality), posing itself as the single (or preferred) interpreter of the Constitution Act²⁷, as has been pointed out timely²⁸.

²⁵ G. NICOSIA, *op. cit.*, identifies that unifying *ratio* with organizational and employer powers of managers, whereas B. PONTI (*Indipendenza del dirigente e funzione amministrativa*, Maggioli, 2012, *see infra*) with the personal condition of independence to ensure the senior civil servants against political bodies.

²⁶ See V. PAPA, *op. cit.*, for a structuralist interpretation: the relationship between political body (*principal*) and public managers (*agent*) is understood in terms of *agency*.

²⁷ Thus, according to Art. 22, Par. 1, the rules of Legislative Decree n. 39/2013, on appointing-to /dissqualifying-from offices, implement Artt. 54 and 97 of the Constitution, and overrule regional legal discipline on the same issue.

²⁸ See E. CARLONI, *Il nuovo Codice di comportamento ed il rafforzamento dell'imparzialità dei funzionari pubblici*, in *Istituzioni del Federalismo*, 2013, vol II, who refers to a new uniformity model; *see also*, rather critical, A. PIOGGIA, *Gli enti locali di fronte all'attuazione della riforma Brunetta. Chi crede nelle autonomie?*, in G. GARDINI (a cura di), *Il nuovo assetto del pubblico impiego dopo la riforma Brunetta*, Bologna, 2012; as well (with specific reference to the compliance of the Constitutional Court jurisprudence as regards the predominance of the national legislation) as A. BOSCATI, *Ordinamento civile per incarichi dirigenziali ad esterni e per procedure di mobilità tra enti*, in *Riv. it. dir. del lavoro*, 2011, n. 4, II, 1197.

6. THE GUARANTEE OF PERSONAL INDEPENDENCE OF SENIOR CIVIL SERVANTS: A REQUIREMENT TO MAKE EFFECTIVE THE 'DISTINCTION' SCHEME

The recent innovation recalled above show that the effectiveness of the distinction (between politics and administration) principle is fulfilled by the strengthening of structural guarantees of impartiality of the senior civil servants in their interaction with political bodies. In particular, the slackening of the connection to prior or current political mandates, sanctioned by the discipline of appointment and incompatibility of offices positions (*see* paragraph 3), operates at two different levels. First, it protects the confidence of citizens in the fair/impartial exercise of public function, as that excludes access to such charges by the staff more clearly affected (or supposedly affected) by a political bias; and second, at the same time it removes from political bodies a mechanism for influencing and conditioning the holders of executive assignments. On the other hand, the "neutralization" of the system used for assessing senior civil servants (par. 4) goes in the opposite direction: the power to allocate, revoke and renew assignments to executive managers is again fully available to political bodies, and can be used as an effective tool to influence public managers. In this regard, some scholars propose to qualify (and to shape accordingly) the condition of the senior civil servants holding a management assignment (as counterpart to political bodies) as personal independence.. It is suggested that this condition (which is considered as compatible with the imperative of a democratic-led administration) would not be a mere prerequisite of impartiality, but would also represent an essential requirement for the actual functioning of the distinction scheme. Once the tools of direct conditioning on public managers are disabled, political actors would find themselves effectively forced to give priority to mechanisms that assess senior civil servants in terms of performance and outcome as the only available tools for governing and leading the administration.