

**STATE LIABILITY FOR LAWFUL ACTS AND THE PRINCIPLE
OF COMPENSATION**

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1. INTRODUCTION

The issue of State liability for lawful acts concerns the circumstances in which, public authorities, in the performance of their duties, causes losses to individuals or singular groups, creating an imbalance between the general public benefit and charges in the hands of only a few¹.

In the Italian legal system, in some cases - such as expropriation, obligatory vaccinations, withdrawal of decisions – there are specific rules that impose on the Public Authorities the duty to grant compensation for losses thereby caused. There is not however, a general rule, nor a uniform law regime for such claims. It leaves several questions unsolved, theoretically and practically. Does such a duty exist when it is not expressly provided for by law? What about its discipline?

For its part, until recently doctrine has given only marginal attention to problem of the State liability for lawful acts: few studies have explored it, generally not analysed in Administrative Law textbooks².

This depends on a number of reasons that reflect, at the root, the relationship between citizens and Public Administration. According to the thesis still prevailing (but not unanimous) such relationships are in fact characterised by the prevalence of general

¹ According to a choice not only of nomenclature, the subject is also studied as the problem of indemnification (or principle of indemnity). See, A. CRISMANI, *Le indennità nel diritto amministrativo*, [Indemnity under Administrative Law], Turin, 2012. It is important to say that in the Italian system the legal terms “indemnity” (*indennizzo* or *indennità*) is referred only to damages caused lawfully (and the term “*risarcimento*” only to unlawful ones) whereas in English “*indemnity*” refers to both lawful and unlawful damages. Similarly “compensation” in the Italian legal lexicon has the meaning of a equalisation or balancing measure.

² Show a most recent reversal of the trend, textbooks by G. CORSO, *Manuale di diritto amministrativo*, [Handbook of Administrative Law], Turin, 2006 and G. FALCON, *Lezioni di diritto amministrativo* [Lessons of Administrative Law] Padua, 2013; see also the recent studies referred to para. 3.

interests on individual *rights*, that become “*legitimate interests*” or “*legitimate rights*” when facing Public Powers (so-called *theory of degradation*)³.

This theory firstly has hindered for a long time the very same State liability for *unlawful* acts. Until the end of the Nineties, the principle of liability did not apply to whole administrative activities. Particularly, it did not concern the infringement of legitimate expectations⁴. Only thanks to European Law, the principle of liability has emerged in these areas⁵; nevertheless the idea of the predominance of general interests on individuals

³ For the different visions of the relationship between Public Authorities and individual rights see ALB. ROMANO, *Amministrazione, principio di legalità e ordinamenti giuridici* [Administration, the Principle of Legality and Legal Systems], in *Dir. am.*, 1999, 111 ss; F. G. COCA, *Contributo alla figura dell'interesse legittimo*, [Contribution to the Figure of Legitimate Interests], Milano, 1990; L. FERRARA, *Situazioni soggettive nei confronti della pubblica amministrazione* [Subjective Legal Situations Vis-a-Vis the Public Administration], in *Dizionario di diritto pubblico* [Dictionary of Public Law], Directed by S. CASSESE, Milano, 2006; A. ROMANO TASSONE, *Situazioni giuridiche soggettive* [Subjective legal situations], in *Enc. dir.*, 1998, *at vocem*.

⁴ That is to say the interest in obtaining favourable action from the Authorities, such as building permits or commercial licences. Such interests, according to the prevailing opinions, do not correspond to individual rights and for this reason, for a long time, were deemed not worthy of compensation (F. G. COCA, *Contributo alla figura dell'interesse legittimo* [Contribution to Legitimate Interest], *cit.*; but for a different opinion see. ALB. ROMANO, *Amministrazione, principio di legalità e ordinamenti giuridici* [Administration, the Principle of Legality and Legal Systems], *cit.*; ID., *Potere amministrativo e situazioni giuridiche soggettive*, [Administrative Power and Individual Rights], in AA.VV, *Interesse pubblico tra politica e amministrazione* [Public Interest between Politics and Administration], edited by A. CONTIERI, F. FRANCIARI, M. IMMORDINO, A. ZITO, vol. II, Naples, 2010, 405 et seq., who highlights the direct relation between public powers and individual rights (included legitimate expectations).

⁵ The impulse for the change came from EU Law that introduced the first exemplum of liability for legitimate expectation injuries, with the Directive No 89/665/EEC of 12.21.1989 (transposed into Italian law by article 13 Law No 142/92). This provided that member States, in the event of a breach of the EU regulation on public procurement, must “*award damages to persons injured by the infringement*” (article 2 No 1). The State liability for legitimate expectation injured was generalised by the Civil Supreme Court judgment, Joint Sections, No 500/1999.

(considering also the limits of public-sector-budget) leads case law to restrictive guidelines⁶.

Even more so, the same theoretical and practical obstacles have prevented liability for *lawful* action.

Indeed, in the debates of the early Twentieth Century, preceding the mentioned *theory of degradation*, there was a firm attempt to sustain the State-liability of lawful acts. In that cultural context, they admitted the coexistence between Public Authorities and individual rights deriving from it the need to compensate the rights even if damaged by the Administration in the legitimate pursuit of general interests⁷.

The emergence, shortly thereafter, of the theory of degradation led to denying this need. It thus excluded the very possibility of a real and proper State liability for lawful acts: the specific provisions for compensation, were thus relegated to an exceptional area.

This conclusion, dominant for a long time, is today debated again. Different factors, legal and non-legal, resulted in the re-opening of this question.

In legal terms, the strongest push for change comes from the influence, on National Law, of ECHR and EU Law that reinforce the protection of individual rights in facing Public Authorities (and in front of the legislature itself). This strengthens the idea that individual rights coexist with public powers deserving protection if they are infringed.

⁶ On this point, please refer, in the relevant section of this Network, to Reports 2011 on liability under Italian Law: M. CAFAGNO, M. FAZIO, *La responsabilità della pubblica amministrazione da provvedimento*, [Liability of Public Authorities for Act], P. CHIRULLI, *La responsabilità da comportamento*, [Liability for Conduct]; G. FALCON, F. CORTESE, *La responsabilità civile della pubblica amministrazione: giurisdizione e processo* [Public Administration Liability: Jurisdiction and Procedure].

⁷ Santi ROMANO, *Principi di diritto amministrativo* [Principles of Administrative Law], Milan, third edition. 1912 (but similarly the previous editions of 1906 and 1901); ref v. *amplius* par. 3.1.

This legal trend corresponds to a better and wider social awareness of fundamental rights. Nowadays people tend to oppose public decisions that damage them, generating unacceptable inequalities⁸ such as the location for landfills, power stations or public transport networks, and in general hazardous or harmful public works. More frequently those disadvantaged by similar works prevent the completion, protesting and blocking. Indeed sometimes Authorities as an alternative to using military force, grant “compensatory” measures to restore the losses suffered.

These legal and social developments renew the debate regarding State liability for lawful acts, giving rise to a revision of the guidelines already prevailing.

It involves the following questions: is State liability for lawful acts a general principle or does it operate only where the law, exceptionally, provides for it? Does liability for lawful acts give rise to a duty of full recovery of the loss suffered, or is it a measure of public solidarity? Does the principle of proportionality require compensation? In other words, shall the burden for the general interest fall on the individual or should the whole community share it?

The analysis that follows will briefly illustrate the state of Italian legislation, jurisprudence and doctrine on the issue posed.

In this report, we are not going to analyse the EU legal system on this matter. Nonetheless, it is important to note that both the European General Court and the Court of

⁸ See, in general, S. CASSESE, *Teoria e pratica dell'uguaglianza* [Theory and Practice of Equality], in *Giorn. dir. am.*, 2000, 1156 et seq.; with reference to urban planning, P. STELLA RICHTER, *Natura ed efficacia dei piani regolatori* [Nature and Effectiveness of Regulatory Plans] in *Giust.Civ.*, 1964, I, 1971; and in relation to emergency powers, R. CAVALLO PERIN, *Il diritto amministrativo dell'emergenza per fattori esterni all'amministrazione pubblica* [Administrative Law for Emergency Owing to Factors External to Public Administration] in *Dir. amm.*, 2005, 777 et seq.

Justice examined the question. While the EGC confirmed the existence of a general principle of liability for lawful acts⁹ of European institution the ECJ denied it¹⁰.

In its last judgment on the issue, however, the Court made two significant clarifications.

First the Court recognized *“the broad discretion which the Community legislature enjoys where appropriate for the purpose of assessing whether the adoption of a given legislative measure justifies, when account is taken of certain harmful effects that are to result from its adoption, the provision of certain forms of compensation”*¹¹

Second, it remembered *“that it is settled case-law that fundamental rights form an integral part of the general principles of law the observance of which the Court ensures”*, concluding that *“a Community legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession that impair the very substance of those rights in a disproportionate and intolerable manner, perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment, could give rise to non-contractual liability on the part of the Community”*¹².

⁹ Court of First Instance (Grand Chamber), 14 December 2005, T 69/2000, FIAMM and Fedon v Council of the European Union and Commission of the European Communities; Court of First Instance (Grand Chamber), 14 December 2005, T 135/2001 Giorgio Fedon & Figli SpA, Fedon Srl and Fedon America, Inc. v Council of the European Union and Commission of the European Communities.

¹⁰ Court of Justice (Grand Chamber), 9 September 2008, C-120/06 P and C-121/06 P, FIAMM and Fedon v Council and others.

¹¹ Court of Justice (Grand Chamber), 9 September 2008, C-120/06 P and C-121/06 P, FIAMM and Fedon v Council and others, paragraph 181.

¹² *Ibidem*, paragraph 183.

In the light of this approach, the following exposition will take in a particular account the infringement of the very substance of fundamental rights that, as we will see, seems to require full compensation (paragraph 2,3,4). A special consideration will be given to the different and minor harmful effects on the same rights, that can be included in their social function and that nonetheless can require “compensation” (in the sense of “equalization”) on the basis of proportionality principle (paragraph 5).

2. THE MAIN CASES PROVIDED BY LAW

2.1. Introduction

There are many cases of liability provided by Italian law. In this section, we will look at the most important ones. They relate to compensation for expropriation and other ablative measures such as compensation for damage caused by public works, revocation, compensation for injuries caused by obligatory vaccinations, unjust detention and miscarriage of justice.

2.2. Expropriation

The most typical case of liability for lawful acts regulated by law is expropriation in the public interest. This regulation is provided, first and foremost, under the Italian Constitution (Article 42, paragraph 3) and previously under the Albertine Statute of 1848 (Article 29). It is also provided under the European Convention of Human Rights (Art. 1), as interpreted by the ECHR Court¹³: both regulations entitle the expropriated owner to compensation.

¹³ ECHR, *Lithgow c. United Kingdom* 7.3.1986 (§ 120).

Moreover, the right to compensation is provided for by law, currently by Consolidated Law on Expropriation in the Public Interest (Presidential Decree no. 327 of 8 June 2001), and earlier by Fundamental Law on Expropriation (Law 25 June 1865, n. 2359, art. 39). Such right was confirmed by later rules that have redefined, in different ways, the criteria in assessing compensation¹⁴.

Despite the clarity of the compensation principle, its application remains unclear. First of all, it is debated, what is expropriation. In particular, Italian Law qualifies “expropriation” not only the formal taking of property but also other measures (“creeping expropriation” in International Law) such as, in certain cases, planning restrictions¹⁵. The Constitutional Court has identified substantial criteria that expand the notion of expropriation (and the connected right to compensation) in order to cover any constraints of the essential content of property.

However, regulation of property in the limits of its social function is not considered expropriation. Along these lines, law can provide limitations depending on the type of property, such as environmental, historical or artistic ones¹⁶. Limitations can also derive from planning regulation, zoning of the area or property destined for specific uses such as public parks, farm land and car parks¹⁷. Therefore, the distinction between

¹⁴ The sequence of these rules will be discussed in a later paragraph.

¹⁵ I.e. restrictions to build in order to expropriate for public works, for more than five years (C. Const. No 55/68).

¹⁶ See Constitutional Court No 56/68 and No 106/76 (on non-expropriation of landscape restrictions); No 417/1995 (on the limitations of environmental property use) No 202/74, (with regards to the limits of historical or artistic property); n. 219/74 (for the prohibition of hunting wild animals); No 529/95 and No 419/96 (on the declaration of public property of surface and groundwater). The principle is confirmed by the Constitutional Court No 179/99 by which «constraints on whole categories of property are not entitled to compensation, such as urban regulation and landscape limits».

¹⁷ On this point, F. SAITTA, *Espropriazione per pubblica utilità*, [Expropriation for Public Interest], Report 2011, in the relevant section of this Network.

regulation and expropriation measures is fundamental. Indeed, according to the prevailing (but not uncontested) idea, only expropriation is eligible for compensation. The basis of this system is in both our Constitution and in ECHR, which provide that the law may regulate the property in accordance with its social function (art. 42, Const.) or with the general interest (art. 1, I protocol ECHR).

Conversely, the European Court of Human Rights has adopted a broad notion of “property” subject to the guarantee of Article 1 Prot. I. It includes any “interest in assets” such as business start-up¹⁸, credit¹⁹. It also includes legitimate expectation²⁰ such as the registration for a trademark²¹, or the legitimate expectation to conserve a property, lawfully or unlawfully obtained, if it has been negligently tolerated by the State. For example an illegal shack close to a landfill²² or a buyer of a work of art purchased in violation of the law of pre-emption of art history²³.

¹⁸ ECHR, *Affaire Iatridis c. Grèce*, 25 March 1999, § 54.

¹⁹ ECHR, *Nicola Silvestri c. Italy*, 9 June 2009, § 70.

²⁰ ECHR, *Plalam Spa c. Italy*, 18 May 2010, § 36; *Grande Chambre, Kopecky v. Slovacchia*, 28 September 2004, § 52; *Dragon c. France*, 28 September 2004, § 68.

²¹ ECHR, *Grande Chambre, Anheuser-Busch Inc. c. Portugal*, 17 January 2007, § 78.

²² ECHR, *Oneryildiz c. Turquie*, 17 January 2007, confirmed by *Grande Chambre, Oneryildiz c. Turquie*, 30 November 2004; ECHR, *Hamer c. Belgique*, 27 November 2007.

²³ It refers to the well-known case concerning the purchasing of a painting by Vincent Van Gogh, "Portrait of a Young Peasant" (ECHR, *Grande Chambre, Beyeler c. Italy*, 5 January 2000, No 33202) in which, despite the violation of the rules of pre-emption, the Court considered contrary to the principle of legitimate expectation, the late exercise of the right of pre-emption by the Italian State. The stand taken by the European Court is innovative, there is no textual evidence in the Convention and breaks from Constitutional tradition of the Member States; with regard to this point v. M.L. PADELLETTI, *La tutela della proprietà nella Convenzione europea dei diritti dell'uomo* [Property protection under European Convention of Human Rights], Milan, 2003, 60 et seq.

In this way, ECHR case-law defines the scope of compensation, which covers the integrity of the individual asset from any State interference.

The ECHR also defines the criteria for compensation, which identifies the effectiveness of the guarantee. The original criteria was the market value taken from Article 39, Law No 2359/1865; however over time, legislation has developed a lot of criteria both general and specific, that chiefly reduced the amount of compensation below the market value. This outcome was initially considered compliant with the Constitution²⁴. The Constitutional Court, in judgement n. 283/1993, stated that *«the compensation guaranteed to the expropriated party by Article 42(3) of the Constitution need not amount to a complete reparation of the loss suffered – since it is necessary to balance the right of the private individual with the public interest which the expropriation aims to satisfy – it cannot however be determined at a negligible or merely symbolic level but must constitute serious relief»*. The Court has also recognised the discretion of the legislature *«in coordinating and balancing private and public interests, however, taking into account also the needs of public budget»*²⁵.

²⁴ The Constitutional Court only declared Law No 865/1971 («Home law») and Law No. 10/1977 («Rules on building areas») unconstitutional. These Laws tried to bring the expropriate compensation value back as agricultural and led to a well-known judgement (No 5/1980) in which the Constitutional Court condemned the broadening of the criteria of agricultural area values with regard to the soils included within urban perimeters, retaining the *ius edificandi* (i.e. the right to build) included in the right to property. Therefore to determine compensation the criteria is *«the value of the land in relation to its basic features, considering its potential economic use, in accordance with law»*.

²⁵ For earlier consistent judgements, see C. Const., No 216/91, which stated that *«provided that the compensation does not become apparent or symbolic, there is ample scope for legislative discretion, given that the market value of the asset is not the compensation, but it is only a benchmark to determine compensation. Therefore the legislature, can legitimately reconcile the market value criteria with adjusted mechanisms of compensation, providing that the amount determined does not fall below an adequate level»*.

The parameters adopted by legislature have instead appeared in contrast to art.1 Prot.1 ECHR and in particular with the principle of full compensation for the loss suffered, as outlined by the European Court. As a result of multiple sentences passed by the Italian State²⁶, the Constitutional Court, in its judgement No 348/2007, revised its position and declared Article 37 of Presidential Decree No 327/2001 (the very same as that declared constitutional in 1993) not compliant with the Constitution because it «*provides for compensation wavering, in practice between 50 and 30 percent of the market value*» and does not present «*a reasonable connection*» with the market value, required by case law of the Court of Strasburg.

The criteria for compensation was rewritten from Law No 244/2007 (Finance Act 2008), Article 2 paragraph 89. The new text provides that (art. 37) «*1. Compensation for expropriation of a building area is the market value of the asset. When expropriation is aimed at carrying out social economic reform measures the compensation is reduced by twenty five percent*».

More recently, the Constitutional Court, consistently with the position of the European Court, used criteria for full recovery of loss, taking also into account the use of the property²⁷. Consequentially the Court declared compensation for agricultural areas determined by «*the average agricultural value depending on the type of farming carried out*» (art. 40, Decree n. 327/2001; judgement n. 181/2011) unconstitutional. With this ruling, the Constitutional Court rejected this tabular method of determining compensation,

²⁶ ECHR, I, *Scordino c. Italy*, 29 July 2004, confirmed by ECHR, Grande Chambre, 29 March 2006.

²⁷ Referring to the expropriation of property used for agricultural purposes, the European Court of Human Rights (Judgment of 11 April 2002, *Lallement v. France*) stated that the requirement for compensation which is reasonably related to the value of the expropriated property may sometimes requires amounts higher than the market value. In that judgment the Court declared that, when the expropriated property is the expropriated party's 'work tools', the compensation shall cover that specific loss or give the possibility of using those tools in some other way after the expropriation.

stating that it disregards the effectiveness of the value of the area ignoring its specific features. Indeed it *«inevitably has abstract characteristics and does not present any ‘reasonable connection’ with the market value, as prescribed by the Court of Strasburg; moreover, it is not the “serious compensation” required by the case law of this Court»*.

2.3. Losses caused by public works

Alongside expropriation, another main case of liability for lawful acts provided for by law is the compensation for injuries caused by public works to individuals not expropriated. These cases are currently regulated by Article 44 of Legislative Decree No 325/2001 (Expropriation for Public Interest Act), and previously by Article 46 of Law 25 May 1865, No 2359²⁸.

It is a kind of indirect expropriation, which regards the loss of property value. The Court has identified its fundamental elements: a lawful activity made by the P.A. (which would otherwise enter into the sphere of tort liability); the imposition of an easement or any other damages resulting in a significant loss; the causal link between public works and the damage²⁹.

The most controversial of these requisites, that defines the boundaries between losses eligible and ineligible for compensation, concerns the damage and its features. Indeed compensation requires a serious compression of the possible uses for the property, taking into account the types of assets, the function of the area and its effective use. Not

²⁸ Under article 44, Legislative Decree No 325/2001, the owner of a land has the right to compensation if he or she *“by execution of public works has suffered the imposition of an easement or a permanent loss in the value or reduced exercise of his property right”*.

²⁹ Civil Supreme Court, First Section, 14 December 2007, No 26261.

therefore just a simple reduction of the value or of the use but *“the cancellation and/or impairment of some of the essential faculties of property law”*³⁰.

Within these limits the Courts have made various applications of such compensation, considering the following cases eligible: noise and fumes from road-works³¹; loss of natural light, fumes, and vibrations caused by construction of motorway viaducts³²; devaluation of the underlying property, inability to carry out extensions, risk of falling objects or construction vehicles³³; obstructions to public access³⁴; damage to irrigation of agricultural land³⁵; limited access to buildings and associated market value reduction³⁶; interference of the dominating space as a result of the construction of motorway viaducts³⁷; invasion of air space with reduced property value³⁸; reduction in living space³⁹.

³⁰ Civil Supreme Court Joint Section, 11 June 2003, No 9341.

³¹ Civil Supreme Court, Third Section, 2 April 2001, No 4790.

³² Civil Supreme Court, Second Section, 9 March 1988, No 2366.

³³ Civil Supreme Court, First Section, 25 September 1990, No 9693.

³⁴ Civil Supreme Court, First Section, 21 December 1990, No 12146.

³⁵ Civil Supreme Court, First Section, 22 January 1993, No 778.

³⁶ Civil Supreme Court, First Section, 12 December 1996 No 11080.

³⁷ Civil Supreme Court, Joint Section, 6 February 1999, No104.

³⁸ Civil Supreme Court, Joint Section, 11 June 2003, No 934.

³⁹ Civil Supreme Court, First Section, 21 December 1990, No 12146.

Conversely, in this perspective, the Court have not compensated damages purely based on transient, minor and diffused prejudices that do not exceed normal levels of tolerance or that are connected to non-essential faculty. Relevant examples include sunlight, broadness of landscape view or minor obstacles in accessing public roads or other pre-existing benefits and amenities not affecting the core area of the property right and as long as it does not generate a significant loss in market value⁴⁰.

2.4. Self-defence

Further cases of compensation for damage caused by lawful acts are provided for by law for the revocation and annulment of administrative measures and withdrawal from agreements in exercise of the right of self-defence.

The framework is disjointed: there are many different regulations. There are specific provisions for compensation in cases of withdrawal from agreements, and for revocation and annulment of administrative measures that affect contracts or agreements. For unilateral administrative measures that do not affect previous agreements, compensation is only provided for revocation (of lawful acts for public interest reasons) and not for annulments (i.e., in Italian terminology, revocation of unlawful acts).

With the exception of the withdrawal of contracts, provided for by law since the nineteenth century⁴¹, all the other cases are recently introduced. They aim to protect legitimate expectations, innovating both statutory and case law. Indeed, previously, in the

⁴⁰ Civil Supreme Court, First Section, 3 July, 2013, No 16619.

⁴¹ See Art 345, Annex F, Law No 2248/1865 and now article 134, No 163/2006, Public Procurement Code under which “*The contracting Authority has the right to withdraw from the contract at any time prior to payment of any work carried out and the value of the materials used on the building site, in addition to a tenth of the cost of the work not completed*”.

absence of statutory provisions, the Courts only required a specific justification for revocation, but do not require also to compensate the damage caused by such measures⁴². In this perspective, it has highlighted that the justification must demonstrate the existence of a specific public interest, and that this interest prevails over private ones⁴³.

Instead, doctrine, time before, conceived the principle of compensation as deriving from the ablative features of revocation and annulment, and from the protection of legitimate expectations⁴⁴.

In this context, our legislature has acted in an episodic way.

The earliest regulations concerned the revocation of agreements. Firstly, the Administrative Procedure Act (Law 8 August 1990, No 241 introduced at Article 11 the right to compensation in the case of withdrawal from agreements concluded during the administrative procedure⁴⁵. Subsequently Law 30 December 2004 n. 311 (2005 Budget)

⁴² Cons. State, Fifth Section, 1 August 2001, No 4184.

⁴³ Cons. State, Sixth Section, 12 May 1998, No 692.

⁴⁴ F. MERUSI, *Buona fede e affidamento nel diritto pubblico, dagli anni trenta all'alternanza*. [Good Faith and Reliance in Public Law from the Thirties to Succession], Milan, Giuffrè, 2001; ID. *L'affidamento del cittadino*, [Citizen legitimate expectation] Milan, Giuffrè, 1970; and more recently M. IMMORDINO, *Revoca degli atti amministrativi e tutela dell'affidamento* [Revocation of Administrative Law and Protection of legitimate expectation], Turin, 2009; L. GIANI, *Funzione amministrativa e obblighi di correttezza*, [Administrative Function and Obligations of Fairness], Naples, 2005.

⁴⁵ These agreements are governed by article 11 of Law No 241/1990. The paragraph 4 provides that “*An authority shall withdraw unilaterally from an agreement for subsequently arising reasons of public interest, without prejudice to its duty to pay compensation for any loss or damage that the private party may have suffered*”.

provided for compensation in the case of *ex officio* annulment of decisions that affect contracts⁴⁶.

Regarding the unilateral measures, the right to compensation has been recognised only later, in 2005. It followed the amendments on Administrative Procedure Law (Law No 241/90 amended by Law 11 February 2005 No 15)⁴⁷, and concerned only revocation of lawful measures for supervening reasons of public interest⁴⁸. No compensation is provided for damages caused by *ex officio* annulments (revocation of unlawful measures). In these cases the only remedy is liability for unlawful acts, which is fault based.

Moreover, where compensation is provided by law, the rules are broad, without conditions or limitations. Nevertheless, the Courts tend to give compensation only in case the legitimate expectation is injured; for example they exclude compensation if only a brief

⁴⁶ According to article 1 paragraph 136 Law No 311 of 2004: “*In order to save or reduce Public Administration financing costs, illegitimate administrative measures can always be ex officio annulled, even if execution is still in process. If the annulment has an impact on contractual relations with private individuals it must indemnify them for any financial loss and in any case, cannot be taken more than three years after the acquisition of the effectiveness of the measure even if ongoing*”.

⁴⁷ Law 11 February 2005 n. 15 amended the Administrative Procedure Act introducing the regulation of validity and effectiveness of administrative decisions including the powers of self-defence (articles 21 bis et seq. Law No 241/90).

⁴⁸ Placed article 21-quinquies Law No. 241/90, introduced from article 14 Law No 15/2005: “*For subsequently arising reasons of public interest or in cases where concrete situations change or the original public interest is re-assessed, administrative measures having continuing effect may be withdrawn by the organ that issued them or by another organ so empowered by the law. The withdrawal shall establish that the withdrawn measure shall not produce further effects. If the withdrawal adversely affects the parties directly concerned, the Authority shall have the duty to compensate them. Disputes regarding the determination and payment of compensation shall fall within the exclusive jurisdiction of the Administrative Court*”.

period of time occurs between the measure and its revocations⁴⁹ or whether the recipient of the revocation has, by conduct, determined the conditions for revocation .

The legislature has outlined specific conditions only for revocation measures that affect contracts. In these cases the compensation is limited “*to the actual loss*”, “*takes into account the knowledge or possible knowledge of the contracting parties that the revoked administrative measure was contrary to the public interest, and the possible involvement of contracting parties or others in erroneous assessment of this measure in the name of public interest*”⁵⁰.

2.5. Injuries caused by obligatory vaccinations

In the field of personal damages, the main case of liability for lawful acts is compensation for injuries caused by obligatory vaccinations. The importance of this case is primarily due to the way in which it was established, lending it as a paradigm.

Provided for by law (Law 25th February 1992, n. 210, *Compensation for those harmed by irreversible complications due to mandatory vaccinations and blood transfusions*), its origin can be traced back to a Constitutional Court judgment (22nd June 1990 No 307). It declared that Law 4 February 1966 No 51 was unconstitutional, because it did not provide fair compensation to those who had suffered a serious health risk as a consequence of the mandatory polio vaccination. The way followed by the Court to overcome this lack of compensation is innovative. Indeed the Constitution only provides, for such treatments that have to be expressly covered by law (so-called *statutory*

⁴⁹ TAR Lazio, Rome, Second-quarter Section, 30 May 2008, No 5317.

⁵⁰ article 21 *quinquies*, paragraph 1-*bis*, Law No 241/90, introduced by article 13 paragraph 8-*duodevicies* Decree Law 31 January 2007, No 7.

reservation)⁵¹. According to the Court, compensation derives from the principle of social solidarity (Article 2 of the Constitution): it would be contradictory to such a principle if the State-community did not compensate the sacrifice made by one for the general public interest.

In subsequent decisions, the Court also included injuries caused by non-mandatory but recommended vaccinations⁵², in the scope of the principle: thus declaring Art. 1, paragraph 1, of Law n. 210/1992 unconstitutional, since it did not provide compensation for injuries caused by vaccinations against “Hepatitis B, Measles, Rubella or Mumps”, all non-mandatory but strongly recommended by the Public Authorities, in an intense awareness-raising campaign.

From the principle of social solidarity, the Court furthermore has derived wide discretion in quantifying the level of compensation, because it “*appears in itself to be aimed not so much at repairing unlawful harm (as damages), but rather at compensating the individual sacrifice which is deemed to correspond to a collective benefit*”⁵³. This conclusion was criticised by some scholars because, *de facto*, it legalised compensation lower than the effective loss regarding health, a primary fundamental right. As we have seen, under-compensation is no longer admissible even in the field of property and other patrimonial rights⁵⁴.

Regardless of the problem of the level of compensation, the outcome of the Constitutional Court judgements is very important. With reference to these, the Civil Courts

⁵¹ Pursuant to article 32, paragraph 2 Const. “*No one can be forced to specific medical treatment unless required by law*”.

⁵² C. Const. No 27/1998 e No 107/2012.

⁵³ C. Const. No 107/2011.

⁵⁴ On this point see *v. amplius* par. 4.4.

have made reference to a *general principle* for compensation for injuries to individual health lawfully caused by Public Authorities. According to minority opinions, this principle could be directly applied even in the absence of a provision; instead, according to the prevailing opinions, it would be necessary to raise the question of constitutionality of the law that does not provide for compensation⁵⁵.

In terms of theories, as we will see⁵⁶, these judgments give constitutional roots to the principle of State liability for lawful acts, whereas fundamental rights are seriously infringed.

2.6. Miscarriage of justice and false detention

In the field of personal rights, false imprisonment and miscarriage of justice are further cases of liability for lawful act.

These cases arise from judicial fields and so differ from the administrative measures mentioned previously. These cases are however symbolic of how the Italian system guarantees fundamental rights infringed in the lawful exercise of public powers.

They are based on Art. 24, paragraph 4, Const., which calls the law to determine «*the conditions and the means for the reparation for judicial errors*».

The reparation for judicial errors (*miscarriage of justice*), the first legislative provision introduced by Code Rocco (1930), is now governed by Art. 647, Code of Criminal Procedure. According to this regulation, in the case where one is first sentenced and then acquitted, he or she has the right to compensation «*in proportion to the length of*

⁵⁵ Court of Ancona 21st December 2010 No 214.

⁵⁶ See paragraph 3.

any sentence or detention and to the personal and family consequences arising from the conviction ».

The *reparation for false detention* is governed under Art 314 ss. Code of Criminal Procedure, only recently introduced (1988). It makes reference to cases of unlawful remand and it gives the right to *«fair reparation»*, with a total limit of around five hundred thousand Euros⁵⁷.

The legitimacy of these disciplines - protected, up until recently, by the strict guidelines given by our Constitutional Court⁵⁸ - today relate to Art. 5 ECHR which enshrines the right to *freedom and our safety*. It defines the specific conditions necessary for the deprivation of freedom and of liberty; and, more generally, provides that *« Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation»*.

In light of such provision, the European Court, on more than one occasion, proclaimed that the Italian system was unlawful, primarily, for the scope of reparation. It occurred, for example, because Italian law did not provide any reparation regarding the detention of foreigners in temporary accommodation awaiting deportation⁵⁹, or in an

⁵⁷ Law No 479/99 increased the amount to 516.456,90 Euros, which was originally limited to one hundred million Liras.

⁵⁸ The position taken in the past by the Constitutional Court regarding the lack of provision for reparation for individuals unjustly detained for precautionary measures is paradigmatic (as we have seen article 344 Code of Criminal Procedure, was introduced only in 1988). The Court declared the choice of legislature to be constitutional, recognising it in article 24, paragraph 4 Const. *“a principle of highest ethical and social value”* which represents coherent development of the protection of human rights (Const. Court No 1/1969).

⁵⁹ ECHR, *Zeciri c. Italy*, 4 August 2005.

immigration centre⁶⁰; because of exceeding the maximum time permitted to be held in pre-trial detention⁶¹, and delaying in recognition of indult⁶².

On the basis of European Law, the Constitutional Court has also changed its position, repeatedly extending the scope of compensation for unlawful detention or miscarriages of justice⁶³. Part of the Doctrine and of case law interpreted Art. 314 of the Code of Criminal Procedure in light of article 5 ECHR, in order to bridge the gap between the two provisions. The prevailing trends⁶⁴ however remain rooted in considering the judgment of the Constitutional Court necessary⁶⁵.

⁶⁰ ECHR, *Seferovic c. Italy*, 1 December 2009.

⁶¹ ECHR, *Picaro c. Italy*, 9 June 2005; ECHR, *Luberti c. Italy*, 23 February 1984.

⁶² ECHR, *Pilla c. Italy*, 2 March 2006.

⁶³ C. Const. No 301/1996, with reference to illegitimate execution of an interim judgement involving deprivation of liberty (on the point ECHR, 18 December 2003, *Pezzone c. Italy*); C. Const. No 109/1999, concerning the arrest in the case of flagrante delicto; C. Const. No 219/2008 regarding the requirement of acquittal on the merits of the charges to obtain fair reparation and the denial of any compensation in other cases such as a pre-trial detention longer than the final sentence.

⁶⁴ Regarding these guidelines v. M. GIALUZ, *Commento all'articolo 5* [Comments on article 5], in *Commentario breve alla Convenzione europea dei diritti dell'uomo*, [Brief Commentary on the European Convention for Human Rights] cit., 171.

⁶⁵ In this regard it seems appropriate to refer to the Constitutional Court judgment No 348 and No 349/07 that recognised that the ECHR is ranked as “*sub-constitutional*”, i.e. subject to the Constitution but superior to the law (and therefore indirect parameter of constitutionality) according to article 117, first paragraph, Const. (“*Legislative power shall be vested in State and the Regions in compliance with the Constitution, as well as constraints deriving from EU legislation and International obligations*”).

In the same way, the maximum limit for compensation provided for false detention⁶⁶ seems to be inconsistent with the ECHR (note that such a limit does not apply for compensation for miscarriage of justice cases⁶⁷). Indeed, according to the ECHR guidelines, the State has to compensate every type of prejudice (material or moral) that is the result of the violation of Art.5 ECHR. Furthermore, the national Courts, on this point, should not require strict proof, taking into account all of the relevant circumstances such as the conditions of the detention, the impact on health, profession, social and family life of the individual.⁶⁸ The ECHR Court, to date, has not examined the Italian system on this point.

3. STATE LIABILITY FOR LAWFUL ACTS AS A GENERAL PRINCIPLE APPLICABLE FOR INJURIES AFFECTING FUNDAMENTAL RIGHTS

3.1. Introduction

In light of the many statutory provisions of liability for lawful acts, the recurring issue is whether a general principle can apply to cases not covered by law. The problem primarily concerns non-economic damages, because, as we have seen, both Italian Constitution and Art. 1 Prot. I ECHR provide compensation for damages to the very

⁶⁶ On this point see E. TURCO, *La riparazione per ingiusta detenzione dopo la recente riforma: profili sistematici e prospettive evolutive*, [Compensation for Unjust Detention After the Recent Reform: Systemic Profiles and Evolutionary Perspectives] in *Cass. Pen.* 2002, 3255.

⁶⁷ With reference to miscarriage of justice, the sums tend to be high, creating a contrasting problem of containment and highlighting the irrationality of the limit imposed for compensation for unjust detention. On this point see, lastly Criminal Supreme Court, Section III, 12 November 2010, No 40094.

⁶⁸ ECHR, *Grande Chambre, Hood c. United Kingdom*, 18 February 1999; ECHR, *S.B.C. c. United Kingdom* 19 June 2001; ECHR, *Danev. C. Bulgaria*, 2 September 2010. *Amplius*, M. GIALUZ, *Commento all'articolo 5*, [Comments on article 5], in *Commentario breve* [Brief Commentary] cit., 172.

substance of property (and other assets) rights. As we will see in the following paragraph, the results of the ongoing debate that began at the end of the nineteenth century, and the more recent evolution within case-law, seems to strengthen the theory of liability for lawful acts as a general principle if the very substance of fundamental rights protected by the Constitution is infringed. With reference to the application of such principle, according to prevailing trend, it is rigorously necessary to raise the issue of constitutionality of the law that does not provide compensation; instead, according to the boldest trends, courts can condemn the Public Administration to compensate the injured party directly applying the principle.

3.2. Origin of the principle

By the end of the nineteenth and the beginning of the twentieth century the Italian Doctrine already supported the liability for lawful acts as a general principle. European Doctrines, particularly the German one⁶⁹, shared such thesis that was aimed to give effective protection to individual rights overcoming the difficulty to assess the liability for *unlawful* act, based on fault. Indeed, the inability of the courts to criticise the Authorities discretion made it almost impossible to define fault⁷⁰.

In response to this problem, the Doctrine suggested a general principle for State liability, not fault-based and extended both to unlawful and lawful acts⁷¹. The theory

⁶⁹ The influences of Otto Mayer's theory on liability (O. MAYER, *Deutsches Verwaltungsrecht*, Leipzig, 1895) on the development of our doctrine are clear and explicit; makes explicit reference to Mayer the works of Vacchelli, Cammeo, Orlando, Santi Romano, Forti, as well as, in a critics sense, of Salemi, Rocco and Miele.

⁷⁰ On this point see. G. CHIRONI, *La colpa nel diritto civile odierno, colpa extracontrattuale* [Fault in the Current Civil Law, Non Contractual Fault] Turin, 1903, II ed., 481 et seq.

⁷¹ SANTI ROMANO, *Principi di diritto amministrativo*, [Principles of Administrative Law]; ID., *Responsabilità dello Stato e riparazione alle vittime degli errori giudiziari* [State Responsibility and Reparation for the Victims of

implied that every special sacrifice imposed to the individuals in the public interest gave rise to compensation. This argument was based, some say, on «*the principles of distributive justice*»⁷²; and, according to others, on the protection of individual rights in conflict with Public powers, so that «*if the public entity, in its powerful action, imposes to an individual right a particular sacrifice, which is not included within normal limits ... must proportionally compensate the loss*»⁷³.

Hence the idea that State-liability (even for lawful acts) is not limited to the cases covered by statutory law. Among these cases, in particular, expropriation is considered an expression of a general principle.

This uniform model of responsibility, both lawful and unlawful, was immediately rejected by Doctrine and by case-law, as an ethical model not provided for by law. Therefore State-liability, in the Italian system, has taken two different forms: the first, for unlawful action, fault-based and governed by the Civil Code; the second, related to exceptional cases of liability for lawful acts and covered by specific provisions in the absence of general rule or principle.

Miscarriage of Justice], in *La legge*, 1903, and now in *Scritti minori* [Minor Writings] II, Milan, 1990, 179 ss.; E. ORLANDO, *Saggio di una nuova teorica sul fondamento della responsabilità civile a proposito della responsabilità diretta dello Stato* [Study on a New Theory of the Basis of Civil Liability with Regard to the State Direct Liability] in *Arch. dir. pubbl.*, vol. III, 1893, 356; G. VACCHELLI, *La responsabilità civile della pubblica amministrazione e il diritto comune*, [Liability of Public Administration and Civil Law] Milan, 1902; F. CAMMEO, *L'azione del cittadino contro la pubblica amministrazione*, [Action by the Citizen Against Public Administration] in *Giur. it.*, 1905, IV, 24 in particle 99-100 and 107-109.

⁷² G. VACCHELLI, *La responsabilità civile della pubblica amministrazione e il diritto comune*, [Liability of Public Administration and Civil Law], cit., 200.

⁷³ SANTI ROMANO, *Il diritto pubblico italiano*, [Italian Public Law], Milan, 1988, but dates back to 1914, with later additions and insertions.

In this context, the doctrine has repeatedly attempted to assert the liability for lawful acts as a general principle. The most common route was to derive the principle from specific provisions. In particular, they proposed to extensively apply the discipline of expropriation in the public interest or of execution of public works⁷⁴.

This proposal however, has long been limited to offer compensation to damages to assets, without covering the non-material prejudices affecting the individual's personal rights.

The extension of the principle to non-material personal damages is due to the mentioned Constitutional Court, judgement No 307/1990 regarding injuries to health derived from obligatory vaccinations. The Court stated that the mandatory healthcare treatment was compatible with the protection of the individuals health, only if related to compensation for damages caused⁷⁵, deriving such link from the principle of social solidarity. Indeed, according to such principle, the burden borne for public interest should not fall on particular individuals, but on the whole community, appropriately compensating the affected individuals.

On the basis of this case law, the Doctrine began to review the traditional opinions in order to extend the compensation to cases not specifically provided for by law, where a fundamental right protected by the Constitution is sacrificed, either if personal or not⁷⁶.

Nowadays, it is generally acknowledged that compensation is not a discretionary choice made by the legislature but that is a duty based on the Constitution. In this

⁷⁴ R. ALESSI, *Responsabilità da atti legittimi*, [Liability for Lawful Acts] in *Noviss. dig. it.*, vol. XV, Turin, 1968, 627 et seq.; si v., *supra*, par. 2.2. And 2.3

⁷⁵ See, *supra*, par. 2.4.

⁷⁶ For a theory of State liability for legislative lawful action, see R. BIFULCO, *La responsabilità dello Stato per atti legislativi*, [Liability of the State for Legislative Acts], Padua, 1999.

perspective, the prevailing trend derives such duty from the principle of social solidarity⁷⁷; instead, according to a different view, such duty is rooted on the principle of effective protection of fundamental rights provided at Constitutional, European and international level⁷⁸.

3.3. *Modus operandi*

If the prevailing doctrine and case law recognise a general principle of compensation, as we have seen⁷⁹, there is not a uniform vision on its *modus operandi*.

According to majority opinion the principle should be assessed by raising the question of constitutionality of the law that does not provide a compensation guarantee⁸⁰.

⁷⁷ G. MANFREDI, *Indennità e principio indennitario in diritto amministrativo*, [Indemnities and Indemnification Principle in Administrative Law], Turin, 2003; A. CRISMANI, *Le indennità nel diritto amministrativo*, [Indemnities in Administrative Law], cit.; P. TROIANO, *La cd. responsabilità della p.a. per atti leciti*, [Public Administration Liability for Lawful Acts], in *Quad. Cons. St.*, 2004, 189 et seq.

⁷⁸ G. CORSO, *La responsabilità della pubblica amministrazione da attività lecita*, [Public Administration Liability for Lawful Action] cit.; R. CARANTA, *Danni da vaccinazione e responsabilità dello Stato*, [Injuries Caused by Vaccinations and State Liability], in *Resp. Civil Code.*, 1998, 6, 1352; ; E. SCOTTI, *Liceità legittimità e responsabilità dell'amministrazione*, [Lawfulness, Legitimacy and Public Administration Liability], cit.

⁷⁹ See the different guidelines on obligatory vaccinations (par. 2.5) and unjust detention (par. 2.6).

⁸⁰ Thus in relation to recommended but not mandatory vaccinations, the Court of Ancona on 21st December 2010 No 214 raised a question to the Constitutional Court, concerning the constitutionality of article 1(1) of Law No 210 of 23 February 1992 (Compensation for individuals harmed by irreversible complications resulting from compulsory vaccinations, transfusions and the administration of blood derivatives), “*insofar as it does not provide that the right to compensation established and governed by the said Law also be available under the conditions set forth thereunder to individuals who have suffered injury and/or illness which has resulted in irreversible damage to their physical and psychological integrity due to their subjection to non-mandatory but recommended vaccination against measles, mumps and rubella*”. The Constitutional Court (judgement No 107/2012), declared

From a more open perspective, which expresses a more intense link between compensation and protection of fundamental rights, the Courts may apply directly the liability for lawful act to cases not provided by law. Reference is made to the judgements that compensated injuries caused by recommended vaccinations other than those cases covered specifically by Constitutional Court judgments⁸¹.

4. LEGAL NATURE OF LIABILITY FOR LAWFUL ACTS

4.1. Introduction

The legal nature of the duty of Public Administration to compensate for damages lawfully caused, is debated.

There are two different perspectives: according to the prevailing opinion, such duty is based on Public Law, and precisely, derives from the principle of social solidarity. According to minority views, it constitutes a form of liability regulated by Civil Law and rooted in the principle of effective protection of fundamental rights.

The question is not purely theoretical but raises many practical issues. The main relates to the amount of compensation, and in particular, whether it needs to cover the entire loss or it can be defined discretionally by the legislature or by Public Administration.

Law No 2010/1992 unconstitutional. In the field of wrongful imprisonment see M. GIALUZ, *Commento all'articolo 5*, [Commented on article 5], cit.

⁸¹ Court of Milan, 13 December 2007, Court of Appeal, Campobasso, 12 June 2006, Court of Appeal Sassari, 5 August 2004.

4.2. *Of a Public nature*

According to the first thesis, lawfully exercising public power cannot give rise to real liability. That is, according to the traditional approach, because liability necessarily requires fault (“*no liability, no fault*”); and, additionally, for the lack of legal damages: the maxim “*qui suo jure utitur neminem laedit*” is enforced in Public Law.

Behind this approach, there is the idea that individual rights weaken in front of public powers⁸².

In this perspective, the concept of (lawful) *sacrifice* for general interest, is separated from *infringement*, and the duty to compensate is not strictly rooted in the legal order, but firstly “*in the principle of distributive justice*”, seen as an ethical standard; and according to most recent views, on the principle of social solidarity, discretionally interpreted by the legislature or by Public Administration. As we have seen, this view has been introduced by the mentioned constitutional judgements on the matter of obligatory vaccinations.

This approach, prevalent today, denies the possibility of *a single category of liability*, extended both to lawful and unlawful acts, and reiterates the difference between State liability for unlawful acts, regulated by Civil Law, and indemnities for lawfully performing public functions, regulated by Public Law⁸³.

⁸² As we have seen in paragraph 1, according to the traditional theory, when facing public powers, individual rights become “legitimate interests” or “legitimate rights”, i.e. interests (to the legitimacy of public action) protected less than individual rights, according to the aforementioned “theory of degradation”, that is still widely shared in Italian system.

⁸³ R. ALESSI, *Responsabilità da atti legittimi*, [Liability for Lawful Acts], cit.; P. TROIANO, *La cd. responsabilità della p.a. per atti leciti* [Public Administration Liability for Lawful Acts], cit., 189 et seq.; A. CRISMANI, *Le indennità nel diritto amministrativo* [Indemnity under Administrative Law], cit.

4.3. As regulated by Civil Law

According to a different approach, damages lawfully caused to fundamental rights, gives rise to real and proper liability, and, as we will see, to a duty to full compensation. This duty cannot be identified as an “indemnity” in the meaning of a measure of solidarity, discretionally determined by the legislature⁸⁴.

This approach is based on the strength of fundamental rights. They cannot be sacrificed (even lawfully) in their very substance without generating a duty to fully compensate.

There are several factors that confirm this approach.

Firstly, the recent perspective of civil liability denies the essential link between liability and fault. Furthermore, there is a growing importance for risk-based liability⁸⁵ and for the principle of solidarity as the root of all types of liability (fault-based, risk-based etc.)⁸⁶. Finally, in this context the tendency to overcome traditional opposition between lawful and unlawful acts arises⁸⁷.

⁸⁴ R. CARANTA, *Danni da vaccinazione e responsabilità dello Stato*, [Injuries Caused by Vaccinations and State Liability], cit.; E. SCOTTI, *Liceità legittimità e responsabilità dell'amministrazione*, [Lawfulness, Legitimacy and Public Administration Liability], cit.

⁸⁵ P. TRIMARCHI, *Rischio e responsabilità oggettiva*, [Risk and Liability], Milan, 1961.

⁸⁶ S. RODOTÀ, *Il problema della responsabilità civile*, [The Problem of Civil Liability] Milan, 1964. A theory of P.A. liability based on the combination of riskiness, solidarity, and equality as an alternative to fault-based liability, is proposed by ALB. ROMANO, *Giurisdizione amministrativa e limiti della giurisdizione ordinaria*, [Administrative Jurisdiction and the Limit of Civil Jurisdiction], Milan, 1975, 282 et seq. spec. 290.

⁸⁷ P. PERLINGIERI, *La responsabilità civile tra indennizzo e risarcimento*, [Civil Liability Between Indemnity and Compensation], in *Rass. dir. civ.*, 2004, 1061; V. SCALISI, *Ingiustizia del danno e analitica della responsabilità civile* [Unfairness of Damage and Analysis of Civil Liability], in *Riv. dir. civ.*, 2004, 1, I, 42; previously see Salv.

A further factor is the role of the ECHR and the European Union that today, reinforces the protection of individual rights in facing Public Powers (whichever: legislative, administrative, and judicial). This favours the rise of new conditions of lawfulness for public action, including compliance to principles of fairness, good faith and protection of legitimate expectations⁸⁸.

According to this perspective, even if lawfully caused, the sacrifice of fundamental rights gives rise to a duty to compensate, regulated by Civil Law⁸⁹.

It is important to note that, with regards to fundamental rights and in particular to health, the Civil Court⁹⁰ have long held that every sacrifice caused by Public Administration was unlawful, without giving relevance to the formal legitimacy of the public action or to the public interest, power, authority etc. The fundamental right has been considered, *non-degradable* and every kind of harmful action, has appeared *unlawful* and deserving firstly

ROMANO, *Trasporto di cortesia*, [Courtesy Transportation], in *Riv. dir. civ.*, 1960, I, 485, and now, Milan, 1980, II, 905.

⁸⁸ ALB. ROMANO, *Conclusioni. Autoritarietà, consenso e ordinamento generale* [Conclusions. Authority, Consensus and General Legal System], in *L'atto autoritativo. Convergenze e divergenze tra ordinamenti. Atti del convegno annuale dell'AIPDA, Bari, 30 settembre-1 ottobre 2011* [Authoritative Act. Convergence and Divergence between legal systems. Annual Proceedings of AIPDA, Bari, 30 September -1 October 2011], Milano, 2012.

⁸⁹ Underlines the importance of these rules, latest, V. CERULLI IRELLI, *Amministrazione pubblica e diritto privato*, [Public Administration and Civil Law], Torino, 2011.

⁹⁰ The Civil Court has the jurisdiction for the protection of the rights against Public Administration, except for the specific (and important) cases conferred by law to the jurisdiction of Administrative Courts. According to article 103, second paragraph, "*The Council of State and the other organs of judicial administration have jurisdiction over the protection of legitimate rights before the public administration and, in particular matters laid down by law, also of subjective rights*".

inhibition⁹¹. That has occurred for example at the location of dangerous public works (such as landfills, power lines, powers stations and antennas).

More recent case-law tends to overcome such approach, in favour of the idea that even fundamental rights can be balanced and that the opposing public interests can prevail.

It happens not only for sacrifices which are in the scope of the social function of the right but also for intolerable interferences which infringe upon the very substance of the rights. In this perspective, C. Const. No 85/2013, in the case of ILVA Taranto (a highly polluted steel plant, in the Apulia region), declared compliant with the Constitution *“the balance between fundamental rights protected by Constitution, in particular the right to health (Art. 32 Const.) from which we have the right to a healthy environments, and the right to work (Art. 4 Const.), from which derives the Constitutional interest in maintenance of employment levels and the public administrations duty to explain every effort in this direction”*.

Under this approach, if based on a fair balance, Public Authority’s action is considered lawful even if infringes fundamental rights. So it cannot be inhibited but only, eventually, determine a duty to compensate the damages lawfully caused.

This view appears to be strengthened by the recent change of jurisdiction, from the Civil Courts to the Administrative ones, in important matters where public action affects

⁹¹ It refers to two known judgements made by the Supreme Court, 9 March 1979, No 1463 (location for nuclear power plants) and 6 October 1979, No 5172 (regarding sewage works on the Gulf of Naples); for a more recent application Supreme Court, 8 November 2006, No 23735 (in a controversial dispute concerning power lines authorised by Decree).

fundamental rights: as happened in locations for landfills⁹² or power plants⁹³; in emergency situations⁹⁴, and in the waste emergency in the Campania region⁹⁵.

This evolution has many implications, that cannot be examined here⁹⁶. It is clear however, that overcoming the theory of the unlawfulness of every sacrifice of fundamental rights, in particular if the very substance of the rights is infringed, it renews once again the issue of liability for lawful acts and above all the problem of effective compensation for individual rights sacrificed for general interests.

4.4. Compensation for loss

The main practical consequence of the issue of the nature of State liability for lawful acts concerns its regulation and, in particular, the quantifying amount of compensation.

⁹² Civil Supreme Court, Joint Sect., 28 December 2007 No. 27187; 29 April 2009, No. 9956; 5 March 2010, No. 5290 («*the Administrative Court has jurisdiction on the power of P.A in organising and disposing of urban waste* » even if they «*claim damages ... to fundamental rights such as the right to health* »).

⁹³ See article 1, paragraph 552, Law No. 311/2005 (financial 2005) and article 41, Law No. 99/2009; the legality of shift in jurisdiction is confirmed by v. C. Const. No 140/2007.

⁹⁴ See article 3, para 2-*bis*, Decree Law No 245/2005, converted into law with amendments by Law No 21/2006 (but now see article 133, lett. *p*, Code for Administrative Procedure).

⁹⁵ See Decree Law No 90/2008 converted into Law by Law No 123/2008 (but now see article 133, lett. *p*, Code for Administrative Procedure) and C. Const. No 35/2010.

⁹⁶ For a deeper analysis see E. SCOTTI, *La localizzazione di opere pubbliche nocive tra responsabilità da atto lecito e principio di compensazione* [The Location of Public Works Between Liability for Lawful Acts and the Principle of Compensation], in *Scritti in onore di Paolo Stella Richter* [Volume in Honor of Paolo Stella Richter], Napoli, 2013 and in www.apertacontrada.it.

Indeed, considering compensation as a duty governed by Public Law and based on the principle of solidarity, it has justified, as we have seen, a wide discretion in determining the level of compensation, sometimes much lower than the actual loss. The Constitutional Court has therefore recognized that the legislature can determine the extent of compensation with only one limit: it cannot be *derisive*. In this perspective, *solidarity* corresponds to *discretion* in defining the effective level of the protection of fundamental rights.

In this way, under-compensation has been provided by law (and approved by the Constitutional Court) in cases of expropriation, obligatory vaccinations and false imprisonment⁹⁷. In all of these cases the Court allowed fundamental rights to be balanced with other interests, one of which includes public sector budget⁹⁸.

As we have seen, with reference to property (and other proprietary rights), this system has been overcome thanks to the European Court of Human Rights that requested a reasonable connection between effective loss and the level of compensation. Paradoxically, the legitimacy of under-compensation still remains for non-proprietary rights of the individual, i.e. the constitutionally hierarchical interests.

Therefore, nowadays the system is in an illogical situation in which damages to proprietary rights are fully restored, while non-pecuniary damages are under-compensated, as a form of solidarity, discretionally interpreted.

In response to this inconsistency, the Doctrine proposed the above-mentioned thesis, that fundamental rights infringed in its very substance by the action of public authorities give rise to liability regulated by Civil Law and to a duty to fully compensate the loss.

⁹⁷ See above.2.

⁹⁸ See, most recently, C. Const. No107/2012 concerning the case of serious damage to health caused by not mandatory vaccinations nonetheless strongly recommended by public authorities.

In light of this approach, that seems to meet the position of the European Court of Justice⁹⁹, it should be considered unlawful to determine compensation that does not relate to the loss suffered, such as it happens in the case of obligatory vaccinations or false imprisonment.

Therefore, discretion in determining the level of compensation in the case of infringing personal rights should be revised by the Constitutional Court, at least in light of the European Court of Human Right's judgments in the field of expropriation.

5. PRINCIPLE OF COMPENSATION

As we have seen, State liability for lawful acts occurs only in the case of a severe and serious injury of a fundamental right in its substance.

Where the sacrifice imposed on the individual in the pursuit of general interests does not infringe this area, the problem of re-balancing the injured individual right gives rise to different terms.

Indeed, beyond their substance, fundamental rights could be sacrificed in view of public interest; the same Court of Justice has long recognised that *“they do not constitute absolute prerogatives, but must be viewed in relation to their social function”*¹⁰⁰; in such case, the protection of the right is primarily based on the application of procedural and substantive principles that guarantee the correct balance between the conflicting interests. It is on this point that protection tends to deplete.

⁹⁹ Court of Justice (Grand Chamber), 9 September 2008, C-120/06 P and C-121/06 P, FIAMM and Fedon v Council and others, paragraph 181.

¹⁰⁰ Court of Justice (Grand Chamber), 9 September 2008, C-120/06 P and C-121/06 P, FIAMM and Fedon v Council and others.

Even in case of a proper balance between the conflicting interests, often the sacrifice of the individual leaves a sense of inequality and creates institutional and social conflicts: it frequently happens in locating landfill or hazardous facilities¹⁰¹. This relates to the environmental, economic, and social degradation and to the risk exposure or to the various sacrifices imposed by emergency powers¹⁰².

In these contexts a need for “compensation” or “indemnity” or “equalisation” (in a very broad sense) emerges. It tends to become relevant for the legal system not as a specific duty but, as a principle (*of compensation* or *of equalisation*) that, according to a recent proposed theory, strengthens the principles governing Administrative discretion¹⁰³.

As we have seen, even the EU Court, while admitting sacrifices of fundamental rights that do not affect their very substance, has highlighted the “broad discretion” in assessing certain forms of compensation¹⁰⁴.

¹⁰¹ As recently reported, «At the end of 2009, there were at least 283 cases of disputed public works, nearly one hundred more than those surveyed in 2005. The vast majority referred to the electricity sector and, within this a good 133 cases, to the energy plants. More than half – but only as a consequence of the highest number of projects presented - are in the North region, while the others are spread equally around the Centre and South. The opposition is expressed mostly by citizen movements (40, 7%) and by local authorities (31, 4%), in particular municipalities (23, 8%). At the root, there are mainly environmental reasons (26, 1%) and procedural deficiencies, especially in stakeholder involvement (17, 9%)» (A. TONETTI, *Localizzazione e consenso nel programma di rilancio del nucleare in Italia*, [Location and Consensus in the Programme to Revive Nuclear Power in Italy], *Giorn. dir. Am.* 2011, 5).

¹⁰² On this point see observations by R. CAVALLO PERIN, *Il diritto amministrativo dell'emergenza per fattori esterni alla pubblica amministrazione*, [Administrative Law for Emergency Owing to Factors External to Public Administration], cit., 777 et seq.

¹⁰³ For this thesis see E. SCOTTI, *Liceità legittimità e responsabilità dell'amministrazione*, [Lawfulness, Legitimacy and Public Administration Liability], cit.

¹⁰⁴ Court of Justice (Grand Chamber), 9 September 2008, C-120/06 P and C-121/06 P, FIAMM and Fedon v Council and others, paragraph 181.

Actually, more and more frequently the possibility for “compensation” for damage caused to individual or local communities appears in law in various forms: environmental mitigation or restoration, organisation of public services, benefits for local communities (scholarships, opportunities of employment, health insurance, etc.) and, where possible, financial contributions.

Environmental and collective compensation tends, as far as possible, to result firstly in recovery of the degraded environment. Thus for this purpose, Law Decree No. 90/2008, concerning the emergency waste situation in the Campania Region, allocated a fund for compensation measures¹⁰⁵. Compensatory measures are also provided for the energy sector¹⁰⁶, including renewable¹⁰⁷, nuclear¹⁰⁸, and gas sectors¹⁰⁹. Furthermore compensation is provided

¹⁰⁵ For such environmental compensation and rehabilitation of polluted sites, granted firstly *de facto*, by agreements between the parties, than on the basis of Law, that provided financial funding, see article 9, paragraph 7 and 11, Law Decree No 90/2008.

¹⁰⁶ See article 1, paragraph 4, lett. f), Law No 239/2004 (*Reform of the energy sector, and delegation to the Government for the reorganisation of existing provisions relating to energy*), which provides that : «*The State and the Regions, in order to ensure over all national territory essential levels of service of energy in its various forms and in terms of homogeneity both with regards to criteria for formation of the tariffs and*

the resulting impact on the pricing, guarantee: [...]f) the appropriate balance of the location of the energy plants, to the extent of the physical and geographic characteristics of each region, providing eventual measures of compensation and balancing territorial and environmental requirements if the national strategic guidelines require territorial concentration for business, facilities and infrastructures with a high territorial impact ».

¹⁰⁷ In the renewable energy sector the compensatory measures were firstly banned by law (and in particular from article 1, paragraph 4, lett. f, Law No 239/2004) and then reinserted by Constitutional Court, declaring the exclusion unconstitutional (C. Const. No 383/2005).

¹⁰⁸ On this point see article 4 of Decree Law No 314/2003, for nuclear storage: Legislative Decree No 31/2010 until the repeal referendum, provided a comprehensive discipline for and consensual and participatory procedure in order to settle social and institutional conflicts. For more details A. TONETTI, *Localizzazione e consenso nel programma di rilancio del nucleare in Italia* [Location and Consensus in the Programme to Revive Nuclear Power in Italy], cit.

for strategic national infrastructures¹¹⁰. In general the law provides “compensatory measures” as necessary elements for environmental impact assessments and for strategic environmental assessments¹¹¹; and for environmental implications assessments, pursuant to the Habitats Directive¹¹². The latter, is particularly eloquent in relation to the function of the principle of compensation where it provides that *«in the presence of solutions having even more negative environmental effects on the site concerned, with regard to the conservation aims of the Directive - the competent authorities have to examine the existence of imperative reasons of overriding public interest, including those of a social or economic nature, which require the realisation of the plan or project in question. All feasible alternatives, in particular, their relative performance with regard to the conservation objectives of the Nature 2000 site, the site’s integrity and its contribution to the overall coherence of the Nature 2000 Network have to be analysed. The Member State shall inform the Commission what compensatory measures are adopted»*¹¹³.

¹⁰⁹ See article 2, c. 558 - 560, Law No 244/2007, for gas storage.

¹¹⁰ For national strategic infrastructure the law provides that the project must indicate *«with adequate mapping the affected areas, its potential buffer zones, and the necessary safeguard measures; it shall also highlight the functions and the spending limits of infrastructure including the limits for compensative works and measures on the social and territorial impacts, not to exceed 5 per cent of the total cost of the works and shall include the infrastructure and works connected; costs for mitigating environmental impacts determined under the environmental impact assessment (EIA) are excluded»* (article 3, paragraph 3, Legislative Decree No 190/2002 amended by article 2, Legislative Decree No 189/2005 merged into article 165, par. 3 Legislative Decree No 163/2006).

¹¹¹ On this point see Directive 85/337/EEC, article 5 and Directive 2001/42/EC, article 5 and the corresponding Annex 1.

¹¹² Refers to Directive 92/43/EEC, on the conservation of natural habitats and of wild fauna and flora.

¹¹³ See article 6, par. 4, Directive 92/43/EEC.

In this way, the compensatory measures that restore a violated balance, allow an action that otherwise would be unlawful: indeed, the Habitats Directive provides that « *If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Nature 2000 is protected* »¹¹⁴.

Although urban planning has always been considered the place for insurmountable inequality¹¹⁵, as a consequence to planning decisions, it opens up today to a more radical implementation to the principles of proportionality and equality. These are achieved through equalization techniques that have a double aim. On one hand, they regard the fair treatment of owners, in the distribution of building rights arising from plans and the costs resulting from the implementation of the necessary public infrastructure. On the other, according to more recent experience, it takes the form of an equalisation spread among all members of the community, implemented through the deduction of part of the increased value of the land following planning decisions (the so called “ground rent”), and its distribution in favour of the whole community (e.g. through the creation of works and public services or the acquisition of areas)¹¹⁶. Beyond the complex discussions and problems that such equalisation techniques

¹¹⁴ See TAR Molise, Sec. I, No 52/2011. On this point see also TAR Lombardy, Sec. III, No 765/2011, that based on the legitimate expectation the compensation awarded to the sellers by the Electricity Authority who imposed several measures in order to protect consumers (removal of the invariance threshold also on pending contracts). The legitimacy of such measures were in fact founded on both the possible limits to economic activity as a social function and on the provision of « *compensatory measures directed specifically to avoid that the losses derived from such removal remain on operators in the sector, so that the compensatory measures represent an appropriate means for protecting the legitimate expectation of the operators or ... the compensatory mechanism ... serves to prevent the wholesaler from bearing the costs related to the elimination of the invariance threshold* ».

¹¹⁵ P. STELLA RICHTER, *Profili funzionali dell'urbanistica*, [Urban Functional Profiles], Milan, 1984.

¹¹⁶ ID., *La perequazione urbanistica*, [Urban Equalisation] in *Riv. giur. ed.*, 2005, 169 et seq.

creates¹¹⁷, case law has recently recognised its legitimacy, emphasising both planning powers and the consensual ways to achieve a more balanced land management¹¹⁸. So even urban planning becomes a tool for sustainable development (within its three pillars: economic development, environmental compatibility and social justice) and derives the principle of compensation (or equalization) from the principle of proportionality of planning decisions, especially considering the disadvantages imposed in some areas in favour of the whole community.

New forms of compensation (or equalization) also emerge in practice, in a variety of fields including situations of emergency (that can legitimately determine the temporary compression of all constitutional rights¹¹⁹), the execution of public works and in particular, of strategic ones, the agricultural policy¹²⁰.

The principle of compensation (or equalization) differs from liability for lawful acts, which is regulated by Civil Law and which arises only if the substance of a fundamental right is seriously infringed. Actually, it is rooted Public Law and constitutes a development of general principles governing Public Administration discretion, such as equality, fairness,

¹¹⁷ On A. BARTOLINI, *La perequazione urbanistica*, [Urban Equalisation], Report 2011, in this Network.

¹¹⁸ See Cons. St., Sec. IV, No 4545/2010.

¹¹⁹ On this point see observations by R. CAVALLO PERIN, who highlights the question, remembering that the “*emergency ordinance power in the field of relative statutory reservation first of all is considered as a public power which temporarily and exceptionally deprives to some benefits that the legal order protect as individual rights, and it is natural in such cases considering that the sacrifice of the individual to the community is compensated with a payment from the authority of an adequate compensation*” (*Il diritto amministrativo dell'emergenza per fattori esterni all'amministrazione pubblica*, [Administrative Law for Emergency Owing to Factors External to Public Administration] cit., 777).

¹²⁰ See Court of Justice, Joined Cases C-20/00; C-64/00 Booker Aquaculture and Hydro Seafood [2003] ECR I-7411, paragraph 85

proportionality, non-abuse, and protection of legitimate expectations. These principles diffuse the authority and express a new level of law culture between Public Powers and Society¹²¹.

In this aspect, it is essential to refer to the solidarity principle. Even in the absence of actual unlawful damage, it imposes to compensate the individual right sacrificed: it would be contrary to the constitutional duty of solidarity if the general community were disinterested in the disadvantages suffered by some for general interest. Conversely, it would be contrary to the same duty if the individual or the local community, correctly compensated, strenuously opposes works or actions necessary for the public interests. To this end, it is fundamental for the legitimacy of such actions that decisions are the result of a consensus-driven process open to all interested parties and based on a reasonable balance between all the various interests involved.

¹²¹ ALB. ROMANO, *Conclusioni. Autoritarietà, consenso e ordinamento generale* [Conclusions. Authority, Consensus and General Legal System] cit.