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Index

Articles

1. Gabriella M. Racca - Roberto Cavallo Perin - Corruption as a Violation of Fundamental Rights: Reputation Risk as a Deterrent Against the Lack of Loyalty
2. Francesco de Leonardis - Policies and Powers of Local Government in the Area of Environmental Protection: an Introduction
3. Alfredo Moliterni - The Multilevel Legal Regime Public Service Concessions
4. Monica Delsignore - Standing in Environmental Lawsuits in Italy : Some Suggestions from the U.S.

Reports

5. Public Bodies - Civil Service
    a. ESP: Luis Ortega Álvarez, Isaac Martín Delgado, Organización administrativa
6. Police - Administrative fines
    a. FRA: Marie-Pierre Lapeyre, Police administrative - Apports des années 2011 - 2013
7. Administrative Justice
    a. ITA: Paolo Cotza, Il merito amministrativo
    b. ITA: Paolo Cotza, Le pouvoir administratif en appréciation ultra-légale ("merito amministrativo")
8. Public Ownership - Public Finance
    a. FRA: Jean Philippe Orlandini, Biens - Propriétés Publiques - Apports des Années - 2012 - 2013
    b. ESP: Francisco López Menudo, Carlos Mingorance Martín, Bienes y obras públicas
9. Liability and accountability
    a. ITA: Elisa Scotti, Responsabilità da atto lecito e principio di compensazione
    b. ITA: Elisa Scotti, State Liability for Lawful Acts and the Principle of Compensation

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CORRUPTION AS A VIOLATION OF FUNDAMENTAL RIGHTS: REPUTATION RISK AS A DETERRENT AGAINST THE LACK OF LOYALTY*

Gabriella M. RACCA[1] - Roberto CAVALLO PERIN[2]

INDEX

1. INTRODUCTION

2. THE LACK OF INTEGRITY AS A VIOLATION OF FUNDAMENTAL RIGHTS

2.1 Social, political, economic solidarity

2.2 Securing Fundamental Rights in the EU

3. THE PROBLEM OF LEGAL RULES, EFFECTIVENESS AND RAPID OBSOLESCENCE. THE INSTRUMENTS OF TRANSPARENCY AND ACCOUNTABILITY. THE NEED FOR FINE-TUNED STRATEGIES FOR FIGHTING COLLUSION AND CORRUPTION

** This article is based on the workshops organized by the "Public Contracts in Legal Globalization" network (http://www.public-contracts.net) directed by Prof. Jean-Bernard Auby and coordinated by Prof. Gabriella M. Racca and Christopher R. Yukins, at the University of Turin - Italy (June 8, 2012) and at the University SciencesPo Paris – France (December 19, 2012). These workshops have also inspired the book "INTEGRITY AND EFFICIENCY IN SUSTAINABLE PUBLIC CONTRACTS. Corruption, conflict of interest, favoritism and inclusion of non economic criteria in public contracts", Gabriella M. Racca - Christopher R. Yukins eds., forthcoming, Bruylant, 2014.*

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3.1 The incentives for compliance in the public sector
3.2 The incentives for compliance in the private sector
4. PUBLIC OVERSIGHT, "SOCIAL WITNESS" EXPERIENCE FOR THE EVIDENCE OF THE QUALITY OF PUBLIC SPENDING
5. NEW SOCIAL SANCTIONS FOR THE INFRINGEMENT OF PUBLIC LOYALTY TO FUNDAMENTAL RIGHTS: A VIOLATION OF SOCIAL SOLIDARITY. TEMPORARY EXCLUSION FROM FULL SOCIAL MEMBERSHIP.

1. INTRODUCTION

It is a commonly shared view that poor integrity undermines the main objectives of private and public activities and distracts from their main goals.[3] The lack of integrity affects human rights[4] and is even more unacceptable and serious when perpetrated by

[3] S. ROSE-ACKERMAN, *Corruption and conflicts of interest*, in J.-B. Auby – E. Breen - T. Perroud (eds. by), *Corruption And Conflicts Of Interest. A Comparative Law Approach*, Edward Elgar Publishing, 2014, 5-10; G. SWEENEY, *Linking acts of corruption with specific human rights*, in *Corruption and human rights in third countries*, Workshop of the European Parliament, 28 February 2013, available at *http://bookshop.europa.eu/*, 8. OECD, *Investing in Trust: Leveraging Institutions For Inclusive Policy Making*, Background Paper of the conference *Restoring Trust in Government: Addressing Money and Influence in Public Decision Making*, Paris 14-15 November 2013, available at *http://www.oecd.org/gov/ethics/Investing-in-trust.pdf*, 2013, 2. "A policy making process conducive to trust (i) secures the inclusiveness of the information available to decision makers, to ensure adequate participation of all actors with a stake in the policy problem at hand; (ii) safeguards the public interest and avoids capture, while effectively aggregating competing, but often legitimate interests; and (iii) is aligned with broader principles and high standards of behaviour".

[4] Council of Europe, Civil Law Convention on Corruption, Art. 13, signed on 4 November 1999, entered into force on 1 November 2003, Preamble, § 4, "corruption represents a major threat to the rule of law, democracy and human rights, fairness and social justice, hinders economic development and endangers the proper and fair functioning of market economies"; Council of Europe, Criminal Law Convention on Corruption, signed on 27

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public authorities. In that event, corruption erodes the pillars of democracy. People's representatives are all too often captured by non-transparent economic interests and divert the pursuit of public and citizens' interests.[5] Illegal behavior buys the loyalty that politicians should have towards citizens, and captures the independent exercise of sovereignty for the benefit of maintaining privileges among the corrupts. Corruption in the public procurement sector represents an emblematic case of such diversion.

2. THE LACK OF INTEGRITY AS A VIOLATION OF FUNDAMENTAL RIGHTS

The corruption of politicians is particularly serious since it becomes pervasive and widespread in both public and private sector activities. Political corruption may influence legislation, its implementation, the public officials involved, competition in the relevant market, and, in the end, fairness and the economic growth of business organizations. It

January 1999, entered into force on 1 July 2002, Preamble, § 5, "corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society". International council on Human rights Policy, *Corruption and Human Rights: Making the connection*, 2009, available at *http://www.ichrp.org/files/reports/40/131_web.pdf*. The report highlights the links between acts of corruption and violations of rights. See also: OECD, *Recommendation of the Council on Enhancing Integrity in Public Procurement*, C(2008)105, 2008, available at *http://acts.oecd.org/*, "the Recommendation provides policy makers with Principles for enhancing integrity throughout the entire public procurement cycle, taking into account international laws, as well as national laws and organisational structures of Member countries".

[5] EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, COM(2014) 38 final, 6. Around three quarters of Europeans (73 %) say that bribery and the use of connections is often the easiest way of obtaining certain public services in their country. Similarly, to 2011, around two in three Europeans (67 %) think the financing of political parties is not sufficiently transparent and supervised. See also the Eurobarometer in *http://ec.europa.eu/*.

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undermines the fundamental rights of the citizens.[6] Corruption undermines a variety of human rights.[7]

The relationship of trust between citizens and the Government is threatened as corruption leads to gains for political parties or interest groups, and undermines public interests and the quality of spending.[8] A 'crisis of trust'[9] is growing and new strategies and measures are required to tackle it.[10]

[6] *International council on Human rights Policy, Corruption and Human Rights: Making the connection*, cit., 9 et seq. "While corruption violates the rights of all those affected by it, it has a disproportionate impact on people that belong to groups that are exposed to particular risks (such as minorities, indigenous peoples, migrant workers, disabled people, those with HIV/AIDS, refugees, prisoners and those who are poor). It also disproportionately affects women and children. Those who commit corrupt acts will attempt to protect themselves from detection and maintain their positions of power. In doing so, they are likely to further oppress people who are not in positions of power, including most members of the groups listed above. The latter tend both to be more exploited, and less able to defend themselves: in this sense, corruption reinforces their exclusion and the discrimination to which they are exposed".

[7] As posited by S. ROSE-ACKERMAN, *International Actors and the Promises and Pitfalls of Anti-Corruption Reform*, in *Pennsylvania Journal of International Law*, 2013, 449, who noted that corruption can undermine human rights but should not be treated as a per se human rights violation, and refers to J. DUGARD, *Corruption: Is there a Need for a New Convention?*, in R. S. Ackerman - P. Carrington (ed. by) *Anti-Corruption Policy. Can International Actors Play a Constructive Role?*, Carolina Academic Press, 2013, 159; C. RAJ KUMAR, *Corruption and Human Rights in India. Comparative Perspectives on Transparency and Good Governance*, Oxford University Press, 2011.

[8] S. ROSE-ACKERMAN, *Corruption and government. causes, consequences and reform*, Cambridge,1999, 30 et seq, on the relationships among corruption and political organizations, as "democratic election are not invariably a cure for corruption" (128 et seq.) ID. *Political corruption and democratic structures*, in A. K. Jain (ed. by) *The Political Economy of Corruption*, London, 2001, 35 et seq.; B. G. MATTARELLA, *Le regole dell'onestà*, Bologna, 2007, 25 et seq.; ID., *The conflicts of interests of public officers: Rules, checks and penalties*, in J.-B. Auby – E. Breen - T. Perroud (eds. by), *Corruption And Conflicts Of Interest. A Comparative Law Approach*, *cit*., 30-31. See also: OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, 2013, available at *http://www.oecd-ilibrary.org/*, 24 et seq. See also: OECD, *OECD Principles for Integrity in Public Procurement*, 2009, available at *http://www.oecd.org/gov/ethics/48994520.pdf*. EU Commission, *Report from the Commission to*

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A basic distinction has recently been drawn between cases where politicians make decisions based on their discretionary power, and intermediation of favours which typically includes the transgression of laws and regulations.[11] Lawmakers and governments shape laws and regulations concerning economic activities, taking into account the demands and interests of campaign donors, as well as those of lobbyists, public opinion, guidelines from political parties and their own convictions.[12] In the second case, "elected officeholders use their influence on civil service to arrange for donors to earn contracts, get access to public loans or earn other benefits. This involves undue political influence on public service and unlawful behaviour of public servants involved in public procurement, licensing,

the Council and the European Parliament, *EU Anti-Corruption Report*, COM(2014) 38 final, in *http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_france_chapter_en.pdf*, 8 "Provoked by the crisis, social protests have targeted not only economic and social policies, but also the integrity and accountability of political elites. High-profile scandals associated with corruption, misuse of public funds or unethical behavior by politicians have contributed to public discontent and mistrust of the political system".

[9] EU Commission, *France annex to the Report from the Commission to the Council and the European Parliament*, *EU Anti-Corruption Report*, *cit*., 2014, 2.

[10] EU Commission, Report from the Commission to the Council and the European Parliament, *EU Anti-Corruption Report*, COM(2014) 38 final, 8. Measures such as: limiting presidential immunity, strengthening the rules on financing of political parties and electoral campaigns, restricting multiple office - holding by politicians, and developing a strategy to prevent conflicts of interest, as provided in the Jospin committee set up in France in July 2012 to prepare a reform on ethical standards in public life.

[11] OECD, *Money in Politics: Sound Political Competition and Trust in Government*, Background Paper of the conference *Restoring Trust in Government: Addressing Money and Influence in Public Decision Making*, Paris 14-15 November 2013, available at *http://www.oecd.org/gov/ethics/Money-in-politics.pdf*, 18.

[12] G. HOUILLON, *Corruption and conflict of interest: Future prospects on lobbying*, in J.-B. Auby - E. Breen - T. Perroud (eds. by), *Corruption And Conflicts Of Interest. A Comparative Law Approach*, *cit.*, 53 et seq.

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permissions or other areas where companies expect illegal favours in return for campaign donations".[13]

All possible links between politicians, members of a Government and public officials can be affected by corruption. Each of them may have a distorted relationship with economic operators interested in public procurement.[14] Moreover, corrupt relationships among undertakings can trigger collusion to the detriment of public interest, collusion, of which, public officials are often unaware. Nor is corruption purely "criminal" in the commonly understood sense: it has been estimated that, for 80% of the time, waste in public procurement could be traced to incompetence, and to classic criminal corruption for the remaining 20% of the time.[15]

Informational asymmetries among all stakeholders involved in a procurement system provide opportunities for corrupt practices.[16] The allocation of public resources in the

[13] OECD, *Money in Politics: Sound Political Competition and Trust in Government*, Background Paper of the conference *Restoring Trust in Government: Addressing Money and Influence in Public Decision Making*, Paris 14-15 November 2013, *cit.*, 18.

[14] Y. LENGWILER - E. WOLFSTETTER, *Corruption in procurement auctions*, in N. Dmitri – G. Piga – G. Spagnolo (ed. by) *Handbook of Procurement*, Cambridge, 2006, 412 et seq. See also: OECD policy roundtables, *Collusion and Corruption in Public Procurement*, 2010, available at *http://www.oecd.org/competition/cartels/46235884.pdf.*

[15] O. BANDIERA - A. PRAT - T. VALLETTI *Active and passive waste in government spending: Evidence from a policy experiment* , *American Economic Review*, 2009, 1278-1308.

[16] P. TREPTE, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation*, Oxford, Oxford University Press; ID., *Transparency and Accountability as Tools for Promoting Integrity and Preventing Corruption in Procurement: Possibilities and Limitations*, in OECD Expert Group Meeting on Integrity in Public Procurement, Château de la Muette, Paris, 20 and 21 June 2005, in *https://bvc.cgu.gov.br/bitstream/123456789/3500/1/transparency_and_accountability_tools.pdf*; OECD, Recommendation on Enhancing Integrity in Public Procurement, 2008, in *http://www.oecd.org/corruption/keyoecdanti-corruptiondocuments.htm*, 38. See also: Transparency International, *Corruption and Human Rights: Making the Connection*, 2009, in *http://www.ichrp.org/files/reports/40/131_web.pdf*; C. R. YUKINS, *A Versatile Prism: Assessing Procurement Law*

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public interest through public contracts and procurement functions provides a large number of opportunities for corruption.[17] The waste of public funds is mainly related to cost overruns, delays of implementation and the loss of effectiveness (including inferior quality and questionable usefulness).[18]

All procurement systems include resources to be allocated by public authorities, and thus hold an evident political function. The 'desiderata'[19] of a procurement system are well-known: competition; integrity; transparency; efficiency; customer satisfaction; best value; wealth distribution; risk avoidance; and uniformity. Public resources should be allocated by public authorities in the best possible way, by proactive and ethical procurement officials aiming at the highest satisfaction of citizens' needs, and through private organizations that consider it an honor to serve public bodies and to provide the best performance in a transparent, efficient and competitive procurement system. However, as is known, each facet of such relationships between the stakeholders in a procurement system can be

Through the Principal-Agent Model, in *PCLJ*, Vol. 40, No. 1, 2010, 63, the article is available also at *www.ssrn.com*.

[17] For an analysis of the different form of corruption see: United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, 2013, available at *https://www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf*, 4 et seq.

[18] Moreover the highest direct public losses concerns corrupt training projects (44% of budget volume lost in projects affected, 29% in urban/utility construction, 20% in road & rail, 16% in water & waste and 5% in Research & Development), PricewaterhouseCoopers study prepared for the European Anti-Fraud office (OLAF), *Identifying and Reducing Corruption in Public Procurement in the EU*, 2013, available at *http://ec.europa.eu/anti_fraud/*, 174 et seq.

[19] S. L. SCHOONER, *Desiderata: Objectives for a System of Government Contract Law*, in *PPLR*, 2002, 103 et seq., where the author introduces nine goals frequently identified for government procurement systems: (1) competition; (2) integrity; (3) transparency; (4) efficiency; (5) customer satisfaction; (6) best value; (7) wealth distribution; (8) risk avoidance; and (9) uniformity.

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distorted towards different goals. The fundamental rights of citizens fall behind all other interests, and are betrayed.[20]

Stakeholders may be kept unaware of such distortions due to a lack of transparency, information asymmetries, or undeveloped competence.[21] A number of factors that encourage corruption in the public procurement sector have been pointed out: political rent-seeking, commercial usage, culture, state of market development, low pay of procurement officials and low capacity.[22]

A cumbersome set of procurement rules approved by citizens' representatives may restrict competitions among economic operators or prevent others from participating in the award procedures. Inadequate internal and external audits may favor certain special

[20] T. SØREIDE, *Democracy's shortcomings in anti-corruption*, in www.u4.no, 2012.

[21] EU Parliament - Directorate General for Internal Policies, *Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: Extent of the phenomenon and overview of practices*, 2013, in http://bookshop.europa.eu/, on the problem of political and other forms of corruption in public procurement in the European Union. It identifies weaknesses in all the stages of the public procurement cycle, allowing corruption to undermine the objectives of integrity and value for money and eventually jeopardise the whole EU internal market policy. The document recommends to strengthen national public administration arrangements and implement effective anti-corruption tools covering transparency, accountability and professionalism in public procurement.

[22] International Council on Human Rights Policy - Transparency International, *Integrating Human Rights in the Anti-corruption Agenda. Challenges, Possibilities and Opportunities*, 2010, available at *http://www.ichrp.org/files/reports/58/131b_report.pdf*, 43; J. G. LAMBSDORFF, *Causes and consequences of corruption: What do we know from a cross-section of countries?*, in S. Rose-Ackerman (ed. By) *International Handbook of the economics of Corruption*, Cheltenham, 2006, 4 et seq., where are identified nine possible causes of corruption in public sector: the size of the public sector, the quality of regulation, the degree of economic competition, the structure of Government, the amount of decentralization, the impact of culture, values And gender, and the role of invariant features such as geography and history. A. MILLS, *Causes of corruption in public sector institutions and its impact on development*, 2012, available at http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan049589.pdf, 7 et seq.

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interests. A lack of accountability in procurement officials permits the waste of public funds, in either the selection or the execution of a public contract.[23]

2.1 Social, political, economic solidarity

A pillar of anticorruption should be the value that holds citizens together in any legal system, from the national to the European[24] level and, from a different perspective, also in international relationships. The value of solidarity should exclude any tolerance for corruption, as corruption undermines the common recognition of fundamental rights.[25]

Indeed, as has already been established, a community of values should grow in the wider context of transnational and international bodies such as the UN, the Council of Europe and EU Member States, all for buttress in a joint system of fundamental rights protection.[26]

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[23] Transparency International, *The Anti-Corruption Plan Language Guide*, 2009, 44 et seq.; International Council on Human Rights Policy - Transparency International, *Integrating Human Rights in the Anti-corruption Agenda. Challenges, Possibilities and Opportunities*, *cit*., 14 and 26.

[24] E.g. Council Decision 2007/252/EC of 19 April 2007, establishing for the period 2007-2013 the specific programme "Fundamental rights and citizenship" as part of the general programme "Fundamental Rights and Justice".

[25] R. HODESS, *Civil Society and Nongovernmental Organisations as International Actors in Anti-Corruption Advocacy*, in S. Rose-Ackerman - P. Carrington (eds.) *Anti-Corruption Policy. Can International Actors Play a Constructive Role?*, Carolina Academic Press, 2013, 75 et seq. Where is considered that to build a "virtuous circle" three elements: accountability, trust and coalitions.

[26] As was presented in detail in the Focus of EU Agency for Fundamental Rights (FRA)'s 2011 Annual report available at: *http://fra.europa.eu/sites/default/files/fra_uploads/2211-FRA-2012_Annual-Report-2011_EN.pdf*; see: UN, *Guidebook on anti-corruption in public procurement and the management of public finance*s, 2013, available at *www.unodc.org*. See also: T. SØREIDE - R. TRUEX, *Collaboration against corruption?:*

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Unfortunately, at the EU level, corruption remains one of the biggest challenges for all societies, harming the EU as a whole by lowering investment levels, hampering the fair operation of the Internal Market and wasting public resources. It is estimated that the economic costs incurred as a result of corruption in the EU amount to around EUR 120 billion per year. The economic costs incurred by corruption in the EU possibly amount to EUR 120 billion per year.[27] This constitutes one percent of the EU GDP, representing only a little less than the EU's annual budget.[28] Four out of five EU citizens regard corruption as a major problem in their State.[29] Transparency International estimates that "systematic corruption can add at least 20-25% to the cost of government procurement."[30]

Multistakeholder groups in natural resource management, in *www.u4.no*, 2011; C. MCCRUDDEN, *Buying Social Justice. Equality, government Procurement, & Legal Change*, Oxford, 2007, 90 et seq. S. R. ACKERMAN, *Introduction: The Role of International Actors in Fighting Corruption*, in R. S. Ackerman - P. Carrington (ed. by) *Anti-Corruption Policy. Can International Actors Play a Constructive Role?*, *cit*., 3.

[27] OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, cit., 2013, 78. OECD, CleanGovBiz, *Integrity in Practice*, 2013 available at *http://www.oecd.org/cleangovbiz/49693613.pdf*, according to the World Bank, the document reported that corruption represents 5 % of global GDP (USD 2.6 trillion), with over USD 1 trillion paid in bribes each year; and whereas corruption adds up to 10 % of the total cost of doing business on a global basis and 25 % of the cost of procurement contracts in developing countries The economic costs incurred by corruption in the EU possibly amount to EUR 120 billion per year.

[28] EU Home Affairs Department, data available at the home page of DG Home affairs: *http://ec.europa.eu/dgs/home-affairs/what-we-do/agencies/index_en.htm*.

[29] EU Commission, *Fighting corruption in the EU*, 6 June 2011, COM (2011) 308 final, in *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0308:EN:NOT*, 3.

[30] International Council on Human Rights Policy - Transparency International, *Integrating Human Rights in the Anti-corruption Agenda. Challenges, Possibilities and Opportunities*, *cit*., 43.

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A firm political commitment is required to restore trust in the effectiveness of anti-corruption policies.[31] The European Union (EU) has a general right to act in the field of anti-corruption policies,[32] within the limits established by the Treaty on the Functioning of the European Union.[33] In particular, the EU should ensure a high level of security, including through the prevention and combating of crime.[34] Indeed, corruption is one of the

[31] S. ROSE-ACKERMAN, *Corruption and government. causes, consequences and reform*, Cambridge,1999, 143 et seq., concerning the form of control of the political power. EU Parliament - Directorate General for Internal Policies, *Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: Extent of the phenomenon and overview of practices*, *cit*., 40.

[32] EU Commission, Consultation on a future reporting and monitoring mechanism on EU Member states progress on fighting corruption, in http://ec.europa.eu/home-affairs/news/consulting_public/consulting_0007_en.htm. In the EU, corruption has been on the agenda since the mid-1990s. Although the focus on it has been sharpened by the two latest waves of enlargement, its effects have been identified across the Union to the extent that the European Commission concludes that "within the EU there is no corruption free-zone."

[33] Treaty on the Functioning of the European Union, Art. 83, § 1. "The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime". Council of the EU - General Secretariat, The Lisbon Treaty's impact on the Justice and Home Affairs (JHA) Council: More co-decision and new working structures, December 2009, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/111615.pdf; C. Di Damian - D. Gareth -G. Monti, European Union Law: Cases and Materials, Cambridge, 2010, 581 et seq.

[34] The EU established its own instruments to tackle corruption as the two conventions on the protection of the European Communities' financial interests and the fight against corruption involving officials of the European Communities or officials of the EU Member States and the European Anti-Fraud Office (OLAF), set up in 1999, which has interinstitutional investigative powers. The first call for action was in 1997 (see: EU Commission, *Action programme on organised crime calls for a comprehensive anti-corruption policy based on preventive measures*, 1997, see: *http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/l33301_en.htm*) followed

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most serious crimes with a cross-border dimension. Moreover, it is often linked to other forms of serious crime, such as the trafficking of drugs and human beings, and cannot be adequately addressed by EU Member States alone.[35] The recent EU Anti-Corruption Report[36] confirms that this objective "cannot be sufficiently achieved by the Member States"[37] and will require an intervention at the Union level.[38]

by a 2003 Commission Communication on "a comprehensive anti-corruption policy" (see: EU Commission, *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a Comprehensive EU Policy Against Corruption*, COM(2003) 317 final, May 28, 2003) and by the 2003 Framework Decision on combating corruption in the private sector since it introduced criminal liabilities for legal persons (EU Council, *Council Framework Decision on combating corruption in the private sector*, 2003/568/JHA, 22 July 2003).

[35] EU Commission, *Fighting corruption in the EU*, cit . See also EU Parliament - Directorate General for Internal Policies, *Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: Extent of the phenomenon and overview of practices*, cit., 36-38. See also: J. DUGARD, *Corruption: Is there a Need for a New Convention?*, in S. Rose-Ackerman - P. Carrington (ed. by) *Anti-Corruption Policy. Can International Actors Play a Constructive Role?*, *cit*., 159 et seq. In the same book see also: K. E. DAVIS, *Does the Globalization of Anti-Corruption Law Help Developiing countries?*, 169 et seq.

[36] EU Commission, *Report from the Commission to the Council and the European Parliament*, *EU Anti-Corruption Report*, *cit*., 3 February 2014, 24, where is reported that "the proposal also included the setting up of oversight monitoring of the implementation of public procurement rules, red flagging and alert systems to detect fraud and corruption. However, Member States raised fundamental objections to such measures which were considered too cumbersome for their administrations".

[37] Treaty of the European Union, Art. 5, § 3: *"Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality."*

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A lack of integrity, either in public institutions or in private markets, undermines fundamental rights. First, it causes a waste of scarce resources and undermines the trust and effectiveness of public powers.[39] Moreover, tolerance of corruption distorts all the rules of civil society and the quality of services provided to citizens.[40]

The current widespread socio-economic crisis requires us to identify shared values in order to cope with the new challenges.[41] The urgent need for resources provides an extraordinary incentive to ensure accountability in public authorities, and to improve social controls over the quality of public spending.

As a result of citizens' growing consciousness of their social rights, there is a greater demand for inclusiveness and opportunities for social mobility. Such citizens may mobilize pressures to establish more open and transparent governments, or for an increase in service provision standards.[42] The urge to gain clear data on the quality of public

[38] EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report, cit.*, 2. Concerning the relationship between the corruption prevention and public procurement infringements see 23 et seq.

[39] Concerning social sectors see: S. GUPTA - H. DAVOODI - E. TIONGSON, *Corruption and the provision of health care and education services*, in A. K. Jain (ed. by) *The Political Economy of Corruption*, London, 2001, 111 et seq. See also: International Council on Human Rights Policy - Transparency International, *Integrating Human Rights in the Anti-corruption Agenda. Challenges, Possibilities and Opportunities, cit.*, 43-45.

[40] Concerning the policy for "zero tolerance" on corruption see: PricewaterhouseCoopers study prepared for the European Anti-Fraud office (OLAF), *Identifying and Reducing Corruption in Public Procurement in the EU*, 2013, available at *cit.*, 318.

[41] EU Agency for Fundamental Rights (FRA), *Fundamental rights: challenges and achievements in 2012*, 2013, available at *http://fra.europa.eu/en/press-release/2013/eu-agency-fundamental-rights-fra-presents-its-annual-report*, 12 et seq.

[42] OECD, Perspectives on Global Development 2012 Social Cohesion in a Shifting World, 14 December 2011, in http://www.oecd.org/site/devpgd2012/.

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spending, for better assessments and consequently better policies, is evident. Demands for quality services can be expected to grow faster and faster, and to require improvements despite the economic crisis.

Public spending in procurement could significantly improve citizens' quality of life, affecting all the sectors of services.[43] In the procurement sector, information tools make it possible to gather data on prices, and disparate higher prices covering bribes should not be tolerated.[44] Two factors converge: the need for quality in spending; and the potential of information technologies to overcome the obscurity of paper documents in historically impenetrable archives.

Civil society has a key role to play in fighting corruption, from monitoring public procurement and services to denouncing bribery and raising awareness of the risks of wasting public money. As representatives of the general public, civil society organizations should investigate and bring to light cases of corruption. In this context, new technologies and social media can be used to gather information and publicly hold governments and public entities to account.[45]

[43] OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, *cit*., 53 et seq. and 101 et seq.

[44] G. M. RACCA, *The Electronic Award and Execution of Public Procurement*, in *Ius Publicum Network Review*, 2012, available at *http://www.ius-publicum.com/pagina.php?lang=it&pag=articoli*, 6. See also: ID., *The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers*, in D. Dragos - R. Caranta (Eds.) *Outside the EU Procurement Directives - Inside the Treaty?*, Djøf, Copenhagen, 2012, 373-395.

[45] Clean gov biz, *Boosting Integrity fighting corruption*, 2013, available at: *http://www.oecd.org/daf/anti-bribery/50350066.pdf.*

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2.2 Securing Fundamental Rights in the EU

According to the Preamble of the EU Charter of Fundamental Rights, "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice".

Within the EU, it is possible to make a distinction between a wider set of values that address areas falling outside the EU scope,[46] an inner set of fundamental rights obligations imposed on and by the EU,[47] and socio-economic rights (especially Title IV 'Solidarity' of the Charter of Fundamental Rights of the European Union). These values all

[46] Treaty on European Union (TEU), Art. 2. The ECJ has interpreted this more widely as referring to situations that are "covered by European Union law". See: European Court of Justice, 15 November 2011, *Murat Dereci and Others* v. *Bundesministerium für Inneres*, in C-256/11, par. 72 and European Court of Justice, 26 February 2013, *Åklagaren* v. *Hans Åkerberg Fransson*, in C-617/10, par. 18. EU Commission, *2012 Report on the application of the EU Charter of Fundamental Rights*, C OM(2013) 271 final, 8 May 2013, available at: *http://ec.europa.eu/justice/fundamental-rights/files/charter_report_2012_en.pdf*.

[47] Treaty on European Union (TEU), Art. 6, where it is stated that "*the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*". See: European Union Agency For Fundamental Rights, *The European Union as a Community of values: safeguarding fundamental rights in times of crisis*, 2012, available at *http://fra.europa.eu/sites/default/files/fra-2013-safeguarding-fundamental-rights-in-crisis_en.pdf*, 8.

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overlap with national social rights, and fundamental rights form part of the founding values in Article 2 TEU. However, the level of compliance with these rights appears to differ.

Amsterdam Treaty and Lisbon Treaty primary law explicitly provides for an EU "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."[48] These foundational values have normative implications for both candidate countries and EU Member States. Nonetheless the sanctioning procedure against a Member State has never been used and might only have a deterrent effect.[49]

The obligation to comply with fundamental rights also arises "from the constitutional traditions common to the Member States" which constitute the general principles of EU law. The recalled multi-level governance of the community of values provides for the sharing, in a coordinated system, of the protection of fundamental rights.[50]

Regrettably, the actions of the Member States must comply with the requirements deriving from the fundamental rights guaranteed in the legal order of the EU "only when they are implementing Union law", according to European Court of Justice case-law.[51] The exact scope of application of fundamental rights obligations under EU law remains open to

[48] Treaty on European Union (TEU), Art. 2 "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".*

[49] Treaty on the Functioning of the European Union (TFEU), artt. 258 - 259.

[50] Presented in detail in the Focus of EU Agency for Fundamental Rights (FRA)'s 2011 Annual report, cit. See: R. CAVALLO PERIN, *Crisis del Estado de Bienestar. El papel del Derecho Administrativo*, in J. L. Piñar Mañas (ed. by) *Crisis económica y crisis del Estado de Bienestar El papel del derecho administrative*, Madrid, 2014.

[51] ECJ, 26 February 2013, *Åklagaren* v. *Hans Åkerberg Fransson*, in C-617/10, par. 18.

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interpretation and discussion. It is up to the Court, also in part to guarantee legal clarity, to fine-tune the limits of the fundamental rights review offered by EU law.[52]

This situation seems to be the consequence of a limited awareness of EU law obligations and limited access to the CJEU for individuals. Moreover, it has been reported that "even where cases reach the CJEU, there remain differences with the ECHR, with the latter hearing a large number of third-party interventions providing on-the-ground information and evidence".[53]

It is important to remember that the "principles" are "judicially recognizable" only in the interpretation of implementing acts. Half of the rights listed in the Charter's title on solidarity refer back to "national laws and practices".[54] This implies that the European Community of values requires that the EU and its Member States respond by working

[52] EU Agency for Fundamental Rights (FRA), *Fundamental rights: challenges and achievements in 2012*, 2013, *cit.*

[53] EU Agency for Fundamental Rights (FRA), *Fundamental rights: challenges and achievements in 2012*, 2013, cit. To gain political consensus on the inclusion of all these rights in the Charter, the drafters included a cross-cutting provision in paragraph 4 of Article 52.

[54] Charter of Fundamental Rights of The European Union, Art. 52, differentiates between rights and "principles". The article "Scope and interpretation of rights and principles" state that "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. 2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties. 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions".

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"closely together to support growth and employment, ensure financial stability, and put in place a better governance system for the future".

EU Member States should not be seen as decoupled from their neighboring states and the EU as a whole. Member States and the EU are increasingly linked by an interdependent, but in some ways "semi-constitutional", construction.[55]

The EU principle of solidarity,[56] together with the corresponding national principles, stipulates that the citizens, as members of a Community of values, should assure loyalty to the deeper meaning of solidarity implied by social cohesion.

It has always been considered that Government representatives and administrators should not only conform to Constitutions and laws, but also adhere to the scope and spirit of such rules (principles).

[55] EU Agency for Fundamental Rights (FRA), *Fundamental rights: challenges and achievements in 2012*, 2013, cit.. S. GRILLER - J. ZILLER (eds. by), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Springer, Wien, 2008, 235-256; J. ZILLER, *Il nuovo Trattato europeo*, Il Mulino, Bologna, 2007, 27 et seq. J.-B. AUBY - J. DUTHEIL DE LA ROCHERE *Introduction*, in J.-B. Auby - J. Dutheil de la Rochère (eds. by) *Traité de droit administratif européen*, Bruxelles, 2014, 30-32. In the same book see: S. DE LA SIERRA, *Les sources constitutionnelles du droit administratif européen*, 487-489.

[56] The principle of solidarity is applied in the context of social protection. Cfr. ECJ, *Poucet* v. *Assurances générales de France* in cases C-159/91 and C-160/91, [1993] ECR 637. The French government cited Article L 111-1 of the Social Security Code, which defines the principles of social protection in France: solidarity and compulsory affiliation. See also: Charter of Fundamental Rights of the European Union, artt. 27-38. The Chapter IV is entitled 'Solidarity.' Artt. 27-34 bear directly on employment and industrial relations: Workers' right to information and consultation, right to collective bargaining and action, right of access to placement services, protection in the event of unjustified dismissal, fair and just working conditions, prohibition of child labour and protection of young people at work, gamily and professional life, and social security and social assistance. The other articles in the Solidarity Chapter concern: health care, access to services of general economic interest, environmental protection and consumer protection.

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By way of example, the Italian Constitution provides for any citizen to be loyal to the Constitution and laws, and elected politicians and public officials have a specific duty of "discipline and honor" in their functions (art. 54 Italian Constitution).[57] The further obligation of civil servants (including elected politicians) implies that their work must aim at reaching the final goal of public interest ("the spirit of the law") with a commitment that in fact goes beyond the legal *minima*.

A lack of loyalty to these aims risks undermining the credibility and effectiveness of public institutions, and may warrant sanctions that should differ from criminal or civil sanctions, but should be either disciplinary or reputational for public servants and undertakings, in the sense of a lack of respect for the community of the citizens. Violation of the integrity principle undermines the link of solidarity typical of citizenship.

Such a commitment might be considered as soft law, and sanctions for its violation might be issued to unfair citizens.

3. THE PROBLEM OF LEGAL RULES, EFFECTIVENESS AND RAPID OBSOLESCENCE. THE INSTRUMENTS OF TRANSPARENCY AND ACCOUNTABILITY. THE NEED FOR FINE-TUNED STRATEGIES FOR FIGHTING COLLUSION AND CORRUPTION.

The two pillars of transparency and accountability should be correctly addressed to encourage correct incentives toward integrity and avoid establishing a further cumbersome

[57] Italian Constitution, Art. 54, "All citizens have the duty to be loyal to the Republic and to uphold its Constitution and laws. Those citizens to whom public functions are entrusted have the duty to fulfil such functions with discipline and honor, taking an oath in those cases established by law".

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procedure either for public authorities or economic operators in the market.[58] Recording and reporting mechanisms together with benchmarking might become useful tools for integrity.[59]

The right incentives and disincentives at the right time for public and private part compliance,[60] as well as the correct quantity/quality of transparency and accountability, should be provided.

[58] OECD, *Recommendation of the Council on Enhancing Integrity in Public Procurement*, C(2008)105, 2008, cit. The principles set out in the Recommendation are anchored in four pillars: transparency, good management, prevention of misconduct, accountability and control. See also: United Nations Office on Drug and Crime (UNODC) and the World Bank, Stolen asset Recovery (StAR), *Initiative: Challenges, Opportunities, and Action Plan*, June 2007 and Interaction, *Anti-corruption and Transparency*, 2013, available at *http://www.interaction.org/document/2013-g20-anti-corruption-and-transparency-background-policy-brief*, 3. "anonymous companies are increasingly being misused by criminals and kleptocrats to conceal their identities while they benefit from the assets derived from their illegal activities. Once these anonymous companies are formed they easily enter the global financial system to begin the process of laundering the criminal proceeds. The lack of transparency of beneficial ownership of these companies makes it too easy to hide the proceeds of corrupt acts. It is estimated that $20 billion to $40 billion are illegally removed from developing countries annually - roughly equivalent to the combined annual GDP of the world's 12 poorest countries, where more than 240 million people live. Furthermore, these stolen assets are often hidden in the financial centres of developed countries. The true cost of corruption far exceeds the value of these stolen assets - siphoning away funds that could have been used to further critical development goals".

[59] G. M. RACCA, *The Electronic Award and Execution of Public Procurement*, in *Ius Publicum Network Review*, 2012, available at *http://www.ius-publicum.com/pagina.php?lang=it&pag=articoli&n=2*, 17 et seq.; OECD, *Checklist for record keeping*, 2013, available at *http://www.oecd.org/*; World Bank, *Country Procurement Assessment Report*, 2013, available at *http://web.worldbank.org/*. Concerning the tools to be implemented see also: EU Parliament - Directorate General for Internal Policies, *Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: Extent of the phenomenon and overview of practices*, *cit*., 57 et seq.

[60] P. TREPTE, *Transparency and Accountability as Tools for Promoting Integrity and Preventing Corruption in Public Procurement*, paper to OECD Expert Group meeting on Integrity in Public Procurement, 2005, 3.

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It seems important to distinguish between different kinds, forms and means of transparency and accountability in order to assure the right incentives for compliance.

At the international level, for example, the United Nations Convention against Corruption (UNCAC) requires the disclosure and declaration of any existing interest, in particular public procurement.[61] It recommends that each party make all information relating to procurement public and that all the requirements for awarding a contract be clearly established in advance and published. The selection criteria must be objective and predetermined, and a system of domestic review and appeal must be available in the event that a conflict arises. Other principles to promote transparency and accountability include a system of accounting and auditing standards and related oversight, as well as effective and efficient systems of risk management and internal control.[62]

A set of instruments has already been foreseen for public officials, at various levels. However, they are often not effective and merely constitute redundant bureaucracy and red tape for economic operators.[63]

[61] United Nations Convention Against Corruption, Art. 9.

[62] United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, *cit*., 8-9.

[63] Tranparecy generally involves: (a) publicity of procurement opportunities and the disclosure of the rules to be followed; (b) undertaking procurement processes publicly and visibly, according to prescribed rules and procedures that limit the discretion of officials; and (c) the provision of a system for monitoring and enforcing applicable rules. Given that procuring entities frequently have a high degree of discretion in the procurement process, it is also transparency which allows this exercise of discretion to be monitored. Concerning the principle of transparency in EU in public contracts see also: M. TRYBUS, *Public Contracts in European Union Internal Market Law*, in (R. Noguellou - U. Stelkens) *Comparative Law on Public Contracts*, Bruxelles, 2010, 103 et seq. and in the same book R. CARANTA, *Transparence et concurrence*, 145 et seq.; J. GONZÁLEZ GARCÍA, *Classic Procurement Prcedures*, in M. Trybus - R. Caranta - G. Edelstam (eds. by), *EU Public contract Law. Public Procurement and Beyond*, Bruxelles, 2014, 61-64.

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Incentives and sanctions on compliance by politicians could be made to turn on the values that they should pursue in the public interest.

Especially with regard to procurement, strategies could be designed by skilled teams of procurement officials to mitigate corruption, for example by tampering with the size of lots to be purchased, or with the kind of products, work or services required on a case by case basis.[64]

These types of strategies could efficiently prevent collusion and nurture competition in the relevant markets; moreover, discouraging repetitive procedures may improve the quality of public spending.[65] The procurement strategies are characterized by rapid obsolescence, due to their need to be frequently changed in order to get the most favorable tenders from the market, improving participation and fostering competition. Working in skilled teams could also prevent the loneliness of the procurement officials, who might otherwise find it difficult to resist the pressure applied by unfair participants. Networking between procuring entities and Central Purchasing Bodies also might strengthen these positive effects.[66]

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[64] United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, *cit*., 14; concerning the Problem of a qualified workforce in the field of the US Public Contracts see: S. L. SCHOONER, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, in *Stanford Law & Policy Review*, 2005, 10-11.

[65] OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, cit., 2013, 32, between the 2008 and the 2013 "the majority of countries reformed their procurement legislation while only 7% reported investing in human, financial and technological resources" to ensure an adequate degree of transparency. See also: OECD, *Survey on Reporting Back on Procurement Recommendation*, 2011.

[66] G M. RACCA - G. L. ALBANO, *Collaborative Public Procurement and Supply Chain: The European Union Experience*, in C. Harland - G. Nassimbeni - E. Schneller (eds. by) *The SAGE Handbook of Strategic Supply Management*, London, 2013, 185-188 and G. M. RACCA, *Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement*, in *PPLR*, 2010, 1130-132. Collaborative procurement in the EU through a network of CPBs is the object of the *Healthy Ageing and*

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3.1 The incentives for compliance in the public sector

Preventing and combating favoritism, conflicts of interest, corruption and collusion cannot be left to the mechanical application of legal rules and procedures.[67]

The legal rules ought to be designed in such a way as to provide "correct" incentives towards integrity. A joint approach and multidisciplinary strategy for effective enforcement is required. Public resources are too scarce (and precious) for any waste to be tolerated, be it for incompetence or corruption.[68] Monitoring the performance of any procurement system requires peer reviews, benchmarks and indicators.[69]

A new emphasis on individual responsibility, organizational design and economic incentives is needed. In addressing these issues, it is necessary to investigate civil servants' ethical obligations as a set of norms which guide public administration towards the public

Public Procurement of Innovation (HAPPI) project funded by the EU Commission (DG Enterprises) - rif. call ENT/CIP/11/C/N02C011 - within the framework of the *Competitivity and Innovation Programme (CIP)*. The project concern the EU joint procurement system in Healthcare. see: *http://www.happi-project.eu/*.

[67] S. ROSE-ACKERMAN, *Corruption and conflicts of interest*, in J.-B. Auby - E. Breen - T. Perroud (eds. by), *Corruption And Conflicts Of Interest. A Comparative Law Approach*, *cit.*, 5-10

[68] OECD, *Bribery in Public Procurement. Methods, Actors and Counter-Measures*, 2007, available at *http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44956834.pdf*, 64.

[69] OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, *cit.*, 2013, 97. G. L. ALBANO, *Discussion Paper on Public Procurement Performance Measures. OECD Meeting of Leading Practitioners on Public Procurement*, 11-12 February 2012, available at *http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/ETH%282013%291&docLanguage=En*, 7-8.

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interest,[70] taking into account that "procurement officials are not recognised as a specific profession in more than a third or OECD countries" and the procurement function is not yet considered to be strategic.[71] In assessing "ethics requirement for public officials, including procurement officials, policymakers may wish to consider that ethics rules and screening procedures are almost always part of part of a broader fabric of social norms, laws and mechanisms for ensuring social harmony".[72] In that light, the ethics rules designed to protect the procurement system "should complement the broader set of norms and rules, and may well draw upon other formal and informal mechanisms for maintaining social order".[73] Preventive policies cover a wide variety of aspects including clear-cut ethical rules, awareness-raising measures, building a culture of integrity within various organizations, setting a firm tone from the top in relation to integrity issues, to effective internal control mechanisms, transparency, easy access to public interest information, effective systems for evaluating the performance of public institutions.[74] Forms of effective external and internal audits and asset disclosure might make it possible to consolidate the

[70] G. M. RACCA, *Disciplina e onore nell'attuazione costituzionale dei codici di comportamento*, in F. Merloni - R. Cavallo Perin, *Al servizio della Nazione. Etica e statuto dei funzionari pubblici*, FrancoAngeli Editore, Milano, 2009, 254 et seq.

[71] OECD, *Implementing the OECD Principles for Integrity in Public Procurement*, cit., 2013, 78. The report identify: Austria, Belgium, Czech Republic, Finland, France, Germany, Italy, Japan, Luxemburg, Norway, Turkey.

[72] United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, *cit*., 11-12. See: OECD, *CleanGovBiz Integrity in practice. Toolkit for Integrity*, available at http://www.oecd.org/cleangovbiz/49891354.pdf, 2012, 96.

[73] United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, *cit*., 11-12.

[74] EU Commission, *Report from the Commission to the Council and the European Parliament*, *EU Anti-Corruption Report*, *cit*., 10.

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accountability of public officials.[75] A clear code of conduct may provide concrete examples of situations officials could face in the course of their work. It should also give the contact details of persons that can provide advice and guidance to procurement practitioners. Many countries have codes of conduct that set general rules by which all public officials are to govern themselves. These general rules are sometimes supplemented by more specific codes related to a high ranking and specific high-risk positions, of which public procurement is one.[76]

Particular difficulties arise from the scarce and weak sanctions applicable to elected officials. Where they cover conflicts of interest, the codes of conduct of various elected assemblies are usually not accompanied by dissuasive sanctions. Party discipline and self-control may not be sufficiently effective in this regard. Cancellation of contracts and procedures concluded or carried out in conflict of interest situations or the recovery of estimated damages are often left to general civil regulations and are not effectively implemented in practice.[77] Integrity in politics is a serious issue in many countries and codes of conduct within political parties or elected assemblies at the central or local level are the exception more than the rule and often lack an effective monitoring mechanism or clear sanctioning regulations, rarely leading to the application of dissuasive penalties. Insufficient accountability has generated a perception of quasi-impunity of political elites.[78]

[75] EU Commission, *Report from the Commission to the Council and the European Parliament*, *EU Anti-Corruption Report*, *cit*., 11 and 13.

[76] OECD, C*ode of conduct for procurement practitioners*, in *http://www.oecd.org/*.

[77] EU Commission, *Report from the Commission to the Council and the European Parliament*, *EU Anti-Corruption Report*, *cit*., 12.

[78] EU Commission, *Report from the Commission to the Council and the European Parliament*, *EU Anti-Corruption Report*, COM(2014) 38 final, 8.

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At the same time, a corresponding obligation for private operators to act with integrity when dealing with a public administration is also required.

Both sides (public and private) must face sanctions for improper behavior, whether by impaired reputation, or through sanctions on individuals acting on the organizations' behalf (criminal, administrative, or disciplinary sanctions, for example).

It is well-known that legal systems punish corruption as a crime,[79] but it is less known that corrupt behavior can also be sanctioned because it undermines a plurality of further public interests and goods protected by the law.[80]

Social cohesion for the benefit of the protection of fundamental rights requires not only that economic operators abide by the rules, but also that they be sufficiently loyal to them to share the goals and accept the loss of a contract if a better tender is submitted.

Most corrupt behavior involves not only the violation of criminal law but also the citizen's lack of loyalty to the State (Republic). The citizen does not hesitate to undermine the proper functioning of the institutions, such as the course of justice (by buying a judgment), or of the administration (by paying an official to win a tender) for individual interest.[81]

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[79] H. CAROLI CASAVOLA, *Global rules for public procurement*, in (R. Noguellou - U. Stelkens) *Comparative Law on Public Contracts*, Bruxelles, 2010, 48 et seq. , deals with the Italian implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Recently, see: Law 6 November 2012, No. 190, and G. M. RACCA, *La prevenzione e il contrasto della corruzione nei contratti pubblici (Art. 1, commi 14-25, 32 e 52-58),* in B. G. Mattarella - M. Pelissero (ed. by) *La legge anticorruzione. Prevenzione e repressione della corruzione*, Torino, 2013, 125-151.

[80] R. CAVALLO PERIN - B. GAGLIARDI, Status *dell'impiegato pubblico, responsabilità disciplinare e interesse degli amministrati*, in *Dir. Amm.*, 2009, 53.

[81] G. M. RACCA, *Disciplina e onore nell'attuazione costituzionale dei codici di comportamento*, *cit*., 250 et seq.

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Non-acceptance of the rules of the game and the will to win unfairly betrays the principle of solidarity between the members of a community, and should trigger exclusion from that community.

Such unfaithfulness does not concern only the corruptor and the person corrupted. Corruptive behavior gives rise to a general distrust of institutions, which weakens other citizens' confidence in the impartiality and effectiveness of public institutions. Similarly, corruption alters the proper functioning of private institutions when these are exposed to corruptive power. Here too, corruption breeds a lack of confidence in the proper functioning of market forces, and undermines public faith in the ability of the market to correct itself.

Loyalty is considered to be a constitutive element of every organization as it represents an element of cohesion.[82] Its deficiency is usually sanctioned by the organization through temporary discontinuation of membership and, in serious cases, through expulsion from the corporate team, i.e., through temporary or permanent deprivation of the benefits enjoyed by belonging to the corporate group.

The relationship between the benefits of citizenship and a violation of the duty of loyalty to the State should be seriously re-assessed. Violation of the latter could lead to the administrative sanction of a temporary suspension of the benefits of citizenship scaled in proportion to the severities of the unloyal behavior.

[82] R. CAVALLO PERIN, *L'etica pubblica come contenuto di un diritto degli amministrati alla correttezza dei funzionari pubblici*, in F. Merloni - R. Cavallo Perin, *Al servizio della Nazione. Etica e statuto dei funzionari pubblici*, *cit.*, 152-155. See also: OECD, *Bribery in Public Procurement. Methods, Actors and Counter-Measures*, 2007, available at *http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44956834.pdf*, 57 et seq. The report moves into the detail of how to prevent and punish bribery. It evaluates transparency issues, as well as preventive measures and controls. One challenge pointed out in the report is to train up staff not only to spot the signs, but also to come forward and report them. This raises important issues about teamwork and loyalty of civil servant involved in public procurement.

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The sanction would not be a fine, but it could mean being denied the right to receive public services, with any privileges of citizenship, for some time (e.g. one month). The essential element of the sanction is not so much the inconvenience that this might cause; it is the impairment and compromising of the person's reputation within the social group, which presents a very evident deterrent effect.

3.2 The incentives for compliance in the private sector

Integrity in the business sector is important because clean companies are more efficient and more competitive, which in turn leads to healthier markets and greater investor confidence. Governments can promote greater private sector integrity by encouraging companies to adopt stronger anticorruption practices and robust corporate governance systems (compliance and ethics systems) and to compete fairly and openly.[83] Corporations are called upon to adopt principles related to human rights protection, social and environmental standards, and anti-corruption in the management of their businesses, on a voluntary basis, according to key UN targets".[84]

[83] Many resources to help keep business clean are available: this includes OECD instruments such as the Anti-Bribery Convention; the Good Practice Guidance on Internal Controls, Ethics and Compliance; the Principles of Corporate Governance; and the Guidelines for Multinational Enterprises. It also includes instruments from other organizations such as the APEC Anti-Corruption Code of Conduct for Business; the Ten Principles of the UN Global Compact; the EITI Principles and Criteria; the World Economic Forum PACI Principles for Countering Bribery. See: *http://www.oecd.org/corruption/ethics/.* United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, cit., 26, "compliance systems include business principles that reject corruption and put standards and procedures in place to ensure that the entity acts according to the legal requirements".

[84] Transparency International, *Handbook for Curbing Corruption in Public Procurement*, available at *http://www.transparency.org/whatwedo/pub/handbook_for_curbing_corruption_in_public_procurement*, 2006, 70. "They derive from the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the World Summit for Social Development in

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Guidelines,[85] recommendations for responsible corporate behaviour, integrity pacts,[86] and standards of conduct (e.g. codes of ethics in business)[87] may favor the prevention of and fighting against illicit conducts by promoting the best practices and integrating legal provisions. However, these tools require a voluntary commitment on the part of the economic operators.[88]

Compliance systems have proven to be an effective instrument for combating corruption inside private organizations.[89] The more advanced experiences in the United

Copenhagen 1995, the Rio Declaration on Environment and Development of 1992 and the United Nations Convention Against Corruption. The 10th Principle "Anti-Corruption" was integrated after long debates in 2004".

[85] See the *OECD guidelines for Multinational enterprises*, available at: *http://mneguidelines.oecd.org/text/*.

[86] Transparency International, *The integrity pact. The Concept, the Model and the Present Applications: a Status Report*, 31 December 2002, 3 e 4; Transparency International, *Handbook for Curbing Corruption in Public Procurement*, 80-81.

[87] See: International Chamber of Commerce, *Combating Extortion and Bribery: ICC Rules of Conduct and Recommendations*, available at *http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2004/ICC-Rules-of-Conduct-and-Recommendations-to-Combat-Extortion-and-Bribery-%282005-Edition%29/*.
Transparency International, in co-operation with Social Accountability International, spearheaded the development of the Business Principles for Countering Bribery (BPCB), introduced in December 2002. The Business Principles as well as the Guidance Document and a document outlining the Six Step Implementation Process can be downloaded for free at: *http://www.transparency.org/global_priorities/private_sector/business_principles*. OECD, *code of conduct for procurement practitioners*, in *http://www.oecd.org/*.

[88] Transparency International, *Handbook for Curbing Corruption in Public Procurement*, *cit*, 68 et seq.

[89] The US legal Framework provide a committee for drafting federal guide-lines on how to state on corporate sentences (see: *Sentencing Reform Act*, Pub. L. No. 98-473, 98. Stat. 1873,1987, 18 U.S.C.A. §§ 3351-3742; 28 U.S.C.A. §§ 991-998) and a guidelines system for establishing and maintaining within the corporates specific internal controls to detect and prevent improper conduct (*United States Federal Sentencing Guidelines*, 1st November 1991, 18 U.S.C. §§ 1365 (f), 1801; 42 U.S.C. §§ 1129(a), 14133; 49 U.S.C. § 31310). About the case-law *United States v. Johnson & Johnson*, 37, Cr-99 (DDC 2011); *United States v. Caputo*, 456 F. Supp. 2d 970

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States permit enterprises to discover and disclose the corrupt practices of their own employees.[90] In the US experience, public officials require the undertaking to provide a substantial compliance system in order to guarantee that future procurement will be fairly conducted.[91] Suspension or debarment from public contracts has proven to be an effective

(N.D. Ill 2006); *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004); *Fanfan v. United States*, 2004 WL 1723114 (D. Me. 2004); *Hollis v. City of Buffalo*, 28 F. Supp. 2d 812, 821 (W.D. N.Y. 1998); *United States v. Exxon Corp.*, No. A90-015 CR (U.S. Superme Court 1990); *Hoffman - LaRoche Ltd. et Rhone Paulenc*, Plead Agreement, 1999; *Caremark Intern. Inc*. Derivate Litigation, 698 A.2d 959 (Del. Ch. 1996); *United States v. Daiwa Bank* (SDNY 1995 Cr 947); *United States v. C.R. Bard, Inc.*, 848 F. Supp. 287 (D. Mass. 1994); *United States v. NME Psychiatric Hospital*, 94 Cr. 0268 (D.D.C. 1994). See J. E. MURPHY, *The EU Takes a Tentative First Step Toward Compliance Programs*, in *Ethikos* Jan./Feb. 2012, Vol. 25, No.4; J. E. MURPHY, *How the CEO can make the difference in Compliance and Ethics Program*, in *Ethikos*, May/June 2007, Vol. 20, No. 9; ID., *Ethic for Ethicists? A code for Ethics and Compliance and ethics professionals*, in *Ethikos*, March/April 2004, Vol. 17, No. 8; J. E. MURPHY - C. VIGALE, *The Role Of Incentives In Compliance Programs*, in *Ethikos* May/June 2005, Vol. 18, No. 6; A. SINGER, *Anti-Corruption Enforcement Gains Traction On a Global Scale*, in *Ethikos* Jan./Feb. 2012, Vol. 25, No. 4; ID., *Even At Smaller Companies Ethics Programs Gain Traction*, in *Ethikos* Jan./Feb. 2010, Vol. 23 No.4; J. KAPLAN, *Key to success when mitigating identified compliance and ethics and ethic risks*, Corporate Compliance and Ethics Insights, June 2011; C. E. CARRASCO - M. K. DUPEE, *Corporate Criminal Liability*, in *Am. Crim. L. Rev.*, 1999, 445 ss.

[90] On compliance and ethics programs in the public procurement sector see: *United States v. Metcalf & Eddy, Inc.*, CA No. 99CV-12566-NG (D. Mass. 1999); *United States v. Depuy*, Inc., 34 (DDC 1999); *United States v. Lucas Aerospace Communications & Electronics, Inc., Wholly Owned Subsidiary of Lucas Industries*, Inc. (1994 Cr 493 E.D. N.Y.); *United States v. Hernandez*, 952 F.2d 1110 (9th Cir. 1991). See: J. E. MURPHY, *A Compliance and ethics & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs*, Society of Corporate and Compliance Ethics, August 2010; J. M. KAPLAN, *Compliance Programs for Smaller Companies*, in *Ethikos* Jan./Feb. 2008, Vol. 21 No. 5; K. W. BUFFINGTON - M. FLYNN, *The Legal Aspects of Public Purchasing*, in *Journal Of Public Procurement*, Vol. 6, 3, 2006, p. 321ss.; C. R. CARTER - M. M. JENNINGS, *The Role Of Purchasing In Corporate Social Responsibility: A Structural Equation Analysis*, in *Journal of Business Logistics*, Vol. 25, No.1, 2004, 145 ss.

[91] On the relevance of compliance and ethics programs for the contracting authorities see *United States Federal Acquisition Regulation*, Vol. 73, §§ 67064 - 67091-92, Rev. 12 November 2008 about the requirements for a federal contractor code of business ethics and conduct, an internal control system, and disclosure to the Government of certain violations of criminal law, violations of the civil False Claims Act, or significant

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tool in the fight against corruption. Depriving private companies of the opportunity to do business with the government is likely to be one of the strongest deterrents for future wrongdoers, and ensures that the government does not enter into contracts with contractors that lack effective internal controls.[92]

Whenever an economic operator tries to avoid competition by persuading a government to give it a protected position, colluding with competitors to fix prices, or artificially dividing requirements among a group of contractors, the result for the public consumer is almost always a higher price for inferior goods.[93] The risk of the loss of not

overpayments. See OECD, *Good practice Guidance on Internal Control, Ethics and Compliance*, 18th February 2010; J. LEET, *A New Compliance and Ethics Certification Program*, in *Ethikos*, Jan./Feb 2007, Vol. 20, No. 4; B. SHARPE, *Checking your Compliance and ethics Program's performance - By the Numbers*, in *Ethikos*, May/June 2003, Vol. 16, No. 10. See also: U.S. Department of Justice, *Largest health care fraud case in U.S. history settled HCA investigation nets record total of $ 1.7 billion*, available at *http://www.justice.gov/opa/pr/2003/June/03_civ_386.htm*.

[92] United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, *cit*., 25. As debarment systems have matured in different countries, two broad models for debarment have emerged. The first is a highly discretionary approach, such as that used by the United States federal procurement system, under which a senior contracting official, acting on behalf of one or more government agencies, may exclude contractors because of almost any serious issue regarding contractor qualification. The alternative model, used by the World Bank (WB) in its sanctions system, is much more focused: under this approach, the reviewing officials act in an adjudicative manner, and a formal determination must be made as to whether the contractor in question has committed acts that qualify as grounds for debarment, under a specific list of prohibited acts. The EU Directives, for example, do not provide for a debarment regime, but for an ad-hoc approach of exclusion in which each procuring entity has to determine, on a case-by-case basis, whether or not a particular company is suitable and reliable or should be excluded from a public tender procedure. See: S. WILLIAMS, *Fighting Corruption in Public Procurement. A Comparative analysis of Disqualification or Debarment Measures*, Oxford, 2012, 38-81. C. R. YUKINS, *Cross-Debarment: A Stakeholder Analysis*, *GW Law Faculty Publications*, 2103, 220 et seq.

[93] G. M. RACCA - R. CAVALLO PERIN, *Material Amendments of Public Contracts during their Terms: From Violations of Competitions to Symptoms of Corruption*, in *European Procurement & Public Private Partnership Law Review*, 2013, 287-290; G.M. RACCA - R. CAVALLO PERIN - G. L. ALBANO, *Competition in the execution*

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only reputation but also the opportunity to win procurements should act as an effective deterrent for improper conduct.

An effective anti-corruption clause might be included in order to guarantee a more effective follow-up in the event of corrupt practices being proven within the lifetime of the contract, "e.g. clear-cut procedures for declaring a contract null and void or for applying other contractual penalties".[94] This would avoid the lengthy procedures involved in the annulment of the "corrupt" public contract with a separate civil action that often risks producing effects too late, when it is difficult or even impossible to fully recover the losses.[95]

4. PUBLIC OVERSIGHT, "SOCIAL WITNESS" EXPERIENCE FOR THE EVIDENCE OF THE QUALITY OF PUBLIC SPENDING

It has been recognized that civil society has an important role to play in the fight against corruption.[96] Governments are realizing the growing importance of civil society participation, and are starting to involve citizens in scrutinizing government activities.[97]

phase of public procurement, in *PCLJ*, 2011, 99 et seq.; OECD instruments such as the Recommendation concerning Effective Action against Hard Core Cartels and the Guidelines for Fighting Bid Rigging in Public Procurement help to ensure free and fair competition. On OECD Legal Instruments on Corruption Prevention see: *http://www.oecd.org/gov/ethics/oecdlegalinstrumentsoncorruptionprevention.htm*.

[94] EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report, cit*., 34.

[95] R. CAVALLO PERIN - G. M. RACCA, *Caratteri ed elementi essenziali nelle sponsorizzazioni con le pubbliche amministrazioni*, in *Dir. Amm.*, 2014, forthcoming.

[96] United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, cit., 26. R. CAVALLO PERIN, *L'etica pubblica come contenuto*

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The monitoring of procurement processes by an independent voice might provide a source of expertise and make it possible "to raise issues and difficult questions, to manage conflict and balance powers and bring together groups of people".[98] In a far-reaching transparency policy, civil society can become very active in the "complex monitoring of procurement processes and public contracts".[99] "Integrity pacts"[100] could present an effective instrument for defining further instruments to provide transparency, monitoring activities by civil society organizations.

Integrity pacts, as agreements between the contracting authority for a particular project and the bidders, who are all committed to abstaining from any corrupt practices,[101] could help enhance public trust in government contracting and therefore contribute to

di un diritto degli amministrati alla correttezza dei funzionari pubblici, cit., 159-161, on the right of citizens to require compliance of civil servant to their duties. P. SZAREK-MASON, *OLAF: The anti-corruption policy within the European Union*, in J.-B. Auby - E. Breen - T. Perroud (eds. by), *Corruption And Conflicts Of Interest. A Comparative Law Approach*, *cit.*, 288.

[97] See also a Mexican case where the participation of "social witnesses" to scrutinise the integrity of the procurement procedure is mandatory for large contracts. A study of the OECD and the World Bank Institute (2006) found that such practice had resulted in savings of approximately USD 26 million in 2006 and increased the number of bidders by over 50%.

[98] Transparency International, *Handbook for Curbing Corruption in Public Procurement*, *cit*., 80 et seq.

[99] EU Commission, *Report from the Commission to the Council and the European Parliament*, *EU Anti-Corruption Report*, *cit*., 31.

[100] EU Commission, *op. ult. cit*., 31. Transparency International, *The integrity pact. The Concept, the Model and the Present Applications: a Status Report*, 31 December 2002, 12.

[101] EU Commission, *Report from the Commission to the Council and the European Parliament*, *EU Anti-Corruption Report*, *cit*., 31.

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improving the credibility of government procedures and administration in general.[102] Integrity pacts can establish the contractual rights and obligations of all the parties to a governing contract and thus eliminate uncertainties as to the quality, applicability and enforcement of criminal and contractual legal provisions in a given country.[103] Moreover, such obligations could attribute a role to third parties in order to assure further monitoring during the selection and execution of the contract. Codes of conduct and integrity pacts may introduce additional constraints on transparency and monitoring during the period of execution of the contract by also allowing for the collaboration of other participants in the competition as well as social witness[104] and citizens' associations.[105]

Voluntary compliance with the terms defined in integrity pacts might allow economic operators to engage in the monitoring activity. The reciprocal obligations

[102] Using the integrity pacts economic operators wishing to participate in a procedure for the award of a public contract, contracting and public officials acknowledge that they understand and accept the obligations arising as a result of their turning. OECD, *Integrity in Public Procurement: good practice from A to Z*, 2007, *cit*., 158.

[103] Transparency International, *The integrity pact. The Concept, the Model and the Present Applications: a Status Report*, *cit*., 3 - 4. "The IP is intended to accomplish two primary objectives: (a) to enable companies to abstain from bribing by providing assurance to them that (i) their competitors will also refrain from bribing, and (ii) government procurement, privatisation or licensing agencies will undertake to prevent corruption, including extortion, by their officials and to follow transparent procedures; and (b) to enable governments to reduce the high cost and the distortionary impact of corruption on public procurement, privatisation or licensing". Transparency International, *Handbook for curbing corruption in public procurement*, 2006, 125 et seq.

[104] OECD, *CleanGovBiz Integrity in practice. Fighting corruption in public procurement*, February 2012, 25 e ss.; OECD, *Integrity in Public Procurement. Good Practice From A To Z*, *cit*., 117 et seq.

[105] Transparency International, *The integrity pact. The Concept, the Model and the Present Applications: a Status Report*, cit., 5. The report highlight the two arguments that "often rised against such a monitoring role for civil society can easily be disarmed: availability of the necessary expertise among the Civil society monitors (…) and the legitimate confidentiality of property information, to which civil society representatives would gain access".

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between private parties and public entities makes each party liable in respect of the others[106] for any violations that occur during the whole procurement cycle.[107]

With a view to ensuring that they are effectively implemented, integrity pacts[108] could be effectively monitored by civil society groups at the initiative of NGOs, especially with regard to certain large public contracts (e.g. large-scale infrastructure projects).[109]

Public oversight requires the transparent management of public finances in order to improve the likelihood of limited resources being used as intended. All countries should establish transparent and accountable public finance management systems, including for budgeting and procurement.[110] Information regarding awarded contracts, including the name of the contractor and the contract price, should be publically available, either through transparency measures or through access to information regimes.[111] Not only is the economic efficiency in procurement important, but so is the perceived legitimacy of public

[106] Transparency International, *The integrity pact. The concept, the Model and the Present application. A status report*, *cit.*, 5. OECD, *Principles for Integrity in Public Procurement*, 2009, 36-37.

[107] Transparency International, *Handbook for curbing corruption in public procurement*, 2007, 82.

[108] EU Commission, *Report from the Commission to the Council and the European Parliament*, *EU Anti-Corruption Report*, *cit*., 31. Integrity pacts are agreements between the contracting authority for a particular project and the bidders, all committing themselves to abstain from any corrupt practices.

[109] EU Commission, *Report from the Commission to the Council and the European Parliament*, *EU Anti-Corruption Report*, *cit*., 31. Integrity pacts are agreements between the contracting authority for a particular project and the bidders, all committing themselves to abstain from any corrupt practices.

[110] United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, *cit*., 30-31.

[111] United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, *cit*., 27.

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decisions. This legitimacy is fostered by due procedures in awarding public contracts even if due processes might represent more economic costs (i.e. less economic efficiency).[112]

Civil society initiatives have already had a "beneficial effect on the accountability of local administrations with regard to transparency of public spending".[113] Civil society, "be it a single citizen, media, a company, an NGO, academia, etc." may identify possible improper public official actions which may be the result of collusion between a public official and a bidder.[114]

Directing media attention onto procurement spending might help in discovering "that the number of computers contracted and purchased for a public school was not delivered or that a procurement official is providing incomplete information to selected bidders in order to favor a certain company, which repeatedly wins contracts from the same procuring entity.[115] The reputation of the subjects involved would be compromised and

[112] EU Parliament - Directorate General for Internal Policies, *Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: Extent of the phenomenon and overview of practices*, 2013, 30.

[113] EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report, cit*., 28.

[114] G.M. RACCA - R. CAVALLO PERIN - G. L. ALBANO, *Competition in the execution phase of public procurement, cit*., 99-100; OECD, *Implementing the OECD Principles for Integrity in Public Procurement, cit*., 119. One of the ten OECD principles for enhancing integrity in public procurement provides that "Member countries should empower civil society organisations, media and the wider public to scrutinise public procurement. Governments should disclose public information on the key terms of major contracts to civil society organisations, media and the wider public. The reports of oversight institutions should also be made widely available to enhance public scrutiny. To complement these traditional accountability mechanisms, governments should consider involving representatives from civil society organisations and the wider public in monitoring high-value or complex procurements that entail significant risks of mismanagement and corruption".

[115] OECD, *Implementing the OECD Principles for Integrity in Public Procurement, cit*., 119. One of the ten OECD principles for enhancing integrity in public Procurement provide that "Member countries should empower civil society organisations, media and the wider public to scrutinise public procurement. Governments should

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might be an incentive for appropriate behavior. Civil society can generate pressure against corruption in public procurement, leading to various kinds of sanctions of the corrupt actors

This practice of "direct social control" could complement more traditional accountability mechanisms under specific circumstances. Strict criteria should be defined so as to determine when direct social control mechanisms may be used, on the basis of the high value, complexity and sensitivity of the procurement, and for the purpose of selecting the external observers.[116] Obviously, a systematic verification should be carried out to ensure that the external observer is exempt from any conflict of interest to participate in the process and that they are also aware of any restrictions and prohibitions with regard to potential conflict-of-interest situations, such as the handling of confidential information. The oversight of third parties could prove extremely useful for ensuring the competitive selection principle is respected and the procurement correctly executed.[117]

Governments should support an effective monitoring by civil society "by ensuring timely access to information, for instance through the use of new technologies, and providing clear channels to allow the external observer to inform control authorities in the case of potential irregularities or corruption".[118]

disclose public information on the key terms of major contracts to civil society organisations, media and the wider public. The reports of oversight institutions should also be made widely available to enhance public scrutiny. To complement these traditional accountability mechanisms, governments should consider involving representatives from civil society organisations and the wider public in monitoring high-value or complex procurements that entail significant risks of mismanagement and corruption".

[116] OECD, *OECD Principles for Integrity in Public Procurement*, *cit*., 47.

[117] G.M. RACCA - R. CAVALLO PERIN - G. L. ALBANO, *Competition in the execution phase of public procurement*, cit., 99-100; United Nations Office on Drug and Crime (UNODC), *Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, *cit*., 26-27

[118] OECD, *OECD Principles for Integrity in Public Procurement*, *cit*., 47.

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5. NEW SOCIAL SANCTIONS FOR THE INFRINGEMENT OF PUBLIC LOYALTY TO FUNDAMENTAL RIGHTS: A VIOLATION OF SOCIAL SOLIDARITY. TEMPORARY EXCLUSION FROM FULL SOCIAL MEMBERSHIP

Reliable judicial systems are crucial for ensuring that laws and regulations are properly enforced.

If verdicts or favors can be bought, any set of laws to curb corruption will be crippled. Clear rules on ethical conduct for judges and court officials, built around the fundamental principles of independence, impartiality, integrity, propriety, equality, competence and diligence, are essential, along with a system to make sure that they are being implemented.[119]

Different forms of sanctions need to be applied, that could also be informal in nature.[120] Informal sanctions mean penalties that do not impose tangible costs on the offender, though they may decrease their utility. It has been proven that "informal sanctions such as social disapproval, ostracism, gossip, peer pressure, or public embarrassment of offenders are often applied to try to alter behavior, and in many cases appear to be effective".[121] In corporations and academic institutions, the failure to perform a level of service activity viewed as appropriate may be penalized through various sorts of sanctions. These may include financial sanctions, such as lower salary increases, or the denial of promotion, as well as the engendering of expressions of disapproval and a degree of social

[119] Clean gov biz, *Boosting Integrity fighting corruption*, 2013, *cit.* , 6. International instruments such as the UN's Bangalore Principles of Judicial Conduct and the UN's work on boosting judicial integrity contribute to putting these systems in place.

[120] P. BLAU, *Exchange and Power in Social Life*, New York: Wiley, 1964.

[121] C. NOUSSAIR - S. TUCKER, *Combining Monetary and Social Sanctions to Promote Cooperation*, in *Economic Inquiry*, Vol. 43:3, 2005, 649.

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ostracism. In organizations such as the military and at some academic institutions, "honor codes exist that overlap with formal policies. One reason that these institutions label cheating and theft as honor code violations may be to create a social prohibition against them in addition to the explicit penalties in force".[122]

According to some recent economic models, social pressure and shame can have highly effective consequences. Social penalties (condemnation, ostracism, loss of esteem)[123] or some form of public "black–listing" of citizens that betrayed the common bonds of solidarity might have a significant effect in terms of reputation, and could therefore be feared.

[122] C. NOUSSAIR - S. TUCKER, *Combining Monetary and Social Sanctions to Promote Cooperation*, *cit*., 650.

[123] See for example: G. A. AKERLOF, *A Theory of Social Custom, of Which Unemployment May Be One Consequence*, in *Quarterly Journal of Economics*, 1980, 749; A. LINDBECK - S. NYBERG - J. W. WEIBULL, *Social Norms and Economic Incentives in the Welfare State*, in *Quarterly Journal of Economics*, 1999, 1; J. ELSTER, *Emotions and Economic Theory*, in *Journal of Economic Literature*, 1998, 47, distinguishes between guilt, an internal type of pressure and shame, an external type of social pressure, as forces promoting pro-social behaviour. Labour economists have modelled the effect of peer pressure on team output. For this aspect see: E. KANDEL - E. P. LAZEAR, *Peer Pressure and Partnership*, in *Journal of Political Economy*, 1992, 801; J. M. BARRON - JOHN M. - G. K. PAULSON, *Peer Pressure in an Agency Relationship*, in *Journal of Labor Economics*, 1997, 235. K. KAMEI - L PUTTERMAN - J.-R. TYRAN, *State or Nature? Formal vs. Informal Sanctioning in the Voluntary Provision of Public Goods*, in *Brown Economics Working Paper*, 2011 available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1752266*, 5, where they remember that James Madison wrote: "If there be no virtue among us, no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people is an illusion." (Speech to Virginia Ratifying Convention, June 20, 1788). The same theme appears almost two millennia earlier in the observation of Horace that "Leges sine moribus vanae" (Laws without morality are useless).

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Informal sanctions may have less of a deterrent effect because they are less certain, but they may have the advantage of avoiding fixed administrative costs.[124] Moreover, in the context of an information society, web reputation can become a great value.

[124] K. KAMEI - L PUTTERMAN - J.-R. TYRAN, *State or Nature? Formal vs. Informal Sanctioning in the Voluntary Provision of Public Goods, cit.*

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POLICIES AND POWERS OF LOCAL GOVERNMENT IN THE AREA OF ENVIRONMENTAL PROTECTION: AN INTRODUCTION

ANNUAL REPORT - 2014 - ITALY

(JULY 2014)

Francesco DE LEONARDIS

INDEX

1. ENVIRONMENTAL PROTECTION AND LOCAL GOVERNMENT ACTION
2. LOCAL GOVERNMENT AND ENVIRONMENTAL PROTECTION UNDER INTERNATIONAL LAW
3. THE ROLE OF LOCAL GOVERNMENT IN ENVIRONMENTAL PROTECTION UNDER EUROPEAN LAW
4. THE ROLE OF LOCAL GOVERNMENT UNDER NATIONAL LAW
5. THE REACTION FROM LOCAL GOVERNMENT
6. SUGGESTIONS

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1. ENVIRONMENTAL PROTECTION AND LOCAL GOVERNMENT ACTION

Many studies assert the global dimension to environmental protection as a kind of hallmark of environmental law which sets it apart from other branches of special administrative law:[1] questions relating to atmospheric or marine pollution, deforestation, the protection of birds, or, above all, climate change[2] can certainly not be addressed from a local perspective.

Focusing on the ascending effect of such protection, it should be stressed that environmental questions, including in particular those of global significance (including - fundamentally - climate change), must be addressed first and foremost by international bodies, and then subsequently by those on lower levels (for our present purposes, the European and national authorities), whilst acknowledging that local government will only play a marginal role.[3]

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[1] A. MASSERA (ed.), *Diritto amministrativo e ambiente,* Editoriale Scientifica, 2011, 51 et seq; G. ROSSI, *Diritto dell'ambiente, 2nd* ed., Giappichelli, 2011, 6; M. CAFAGNO, *Principi e strumenti di tutela dell'ambiente,* Giappichelli, 2007, passim, although specifically 297 et seq; R. FERRARA, *L'organizzazione amministrativa dell'ambiente: i soggetti istituzionali,* in R. FERRARA et al, *Diritto dell'ambiente,* 135; P. DELL'ANNO, *Modelli organizzativi per la tutela dell'ambiente,* in *Riv.giur.amb.*, 2005, 957; ID., *Diritto dell'ambiente,* 2nd ed., 2011, 8; M. SALERNO, *Le strutture,* in *Principi di diritto ambientale,* 2nd ed., (edited by G. DI PLINIO, P. FIMIANI), Giuffré, 2008, 57.

[2] For reflections that are necessarily inter-related with ethics, see F. FRACCHIA, *Climate change: alla ricerca del corretto approccio metodologico del giurista di fronte ai problemi dello sviluppo sostenibile,* in *Econ.fonti energia e ambiente,* no. 1/2010, 67 et seq.

[3] On the organisational framework, see M.RENNA, *L'allocazione delle funzioni normative e amministrative,* in G. ROSSI, *Diritto dell'ambiente,* cit., 135.

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The goal of this study is on the contrary to demonstrate that, having regard to positive law (including above all international law and European law) and case law, the role of local government policies and powers in the areas of environmental protection is (by contrast) of absolute significance not only for micro-management issues but also most general questions, such as specifically climate change.[4]

Moreover, it is not by chance that the document that inspires local government action in accordance with the Charter of European Cities and Towns Towards Sustainability states that "climate change is a global issue which undoubtedly reaches beyond borders and the decision-making capacity of any city or region. However, cities may also provide an important contribution to combating climate change, as 75% of greenhouse gases are produced in urban areas".[5]

Following a brief general overview of the various organisational levels of the environmental system, this paper intends to investigate the role of local government in environmental protection, with specific reference to the way in which supra-national legal

[4] There is a vast bibliography on this issue: see most recently M. MONTINI, *L'accordo di Copenhagen sui cambiamenti climatici. Riflessioni critiche,* in *Riv.giur.amb.,* 2010, 659; G. ZORZOLI, *Cambiamenti climatici e condizionamenti culturali,* in *Ec.fonti energia e amb.,* 2010, 1, 49 et seq; C.VIVIANI, *La posizione italiana nei negoziati sul clima e l'energia,* in *Ec.italiana,* 2010, 435; WANG L., *Verso Copenhagen. La Cina e i cambiamenti climatici,* in *Riv.giur.amb.,* 2009, 567 et seq; L. DE PAOLI, *I cambiamenti climatici: a che punto siamo?,* in *Ec.fonti energia e amb.,* 2009, 5; G. SILVESTRINI, *I dieci anni decisivi per il clima,* in *Ec.fonti energia e amb.,* 2009, 77; L. CASTELLUCCI, *A note on speculation, emissions trading and environmental protection,* in *Riv.pol.ec.,* 2009, 127; A. POSTIGLIONE, *Sostenibilità ambientale e cambiamenti climatici,* in *Dir.e giur.agr.e amb.,* 2008, 78; L. ECCHER, *Il libro verde della commissione europea sui cambiamenti climatici,* in *Riv.giur.amb.,* 2007, 933; M. D'AURIA, *La direttiva euroepa emissions trading e la sua attuazione in Italia,* in *Giorn.dir.amm.,* 2005, 4, 455 et seq; M. DENTE, *Il lungo cammino dell'Italia verso Kyoto. La programmazione italiana in materia di politiche dei cambiamenti climatici e le recenti norme di attuazione,* in *Riv.giur.amb.,* 2005, 59.

[5] Aalborg Charter, as approved by the participants at the European Conference on Sustainable Cities & Towns held in Aalborg on 27 May 1994.

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systems view the relationship between local government and environmental protection. It will therefore start from international law, subsequently focusing also on European law.

It will then provide a summary overview of the powers of local government under national law, highlighting the paths along which the system has developed.

This will lead into a description of how specifically local government in Italy has interpreted the role vested in it under positive law in recent years.

Finally, several suggestions will be provided regarding the need for local action also in relation to issues of general scope.

2. LOCAL GOVERNMENT AND ENVIRONMENTAL PROTECTION UNDER INTERNATIONAL LAW

Under general international law, local government is one of the fundamental institutional actors in relation to the environment.

If one skims through the various types of rule, it is immediately evident that local government bodies and authorities are necessarily and inevitably involved in environmental protection policies along with international bodies (which include: the United Nations Environment Programme (UNEP);[6] the World Health Organisation (WHO) (which encompasses the Radiation and Environmental Hygiene Unit, the ICNIRP[7] and the

[6] On this see G. G. NUCERA, *La governance ambientale internazionale. L'UNEP e la necessità di una riforma verso Rio +20*, in *Riv.quad.dir.amb.*, 3, 2011.

[7] The origins of the International Commission on Non-Ionizing Radiation Protection (ICNIRP) date back to 1973, the year in which a session dedicated to protection from non-ionizing radiation was organised for the first time during the third congress of the International Radiation Protection Association (IRPA). A working group was subsequently formed (1974) followed by a study group (1975) whilst in 1977 the International Non-Ionizing

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International Agency for Research on Cancer)[8]; International Union for Conservation of Nature (IUCUN), or the United Nations Educational, Scientific and Cultural Organization (UNESCO)[9]; international administrative river navigation commissions), European administrations (such as the Environment Directorate-General of the Commission, the European Environmental Agency,[10], the European Environment Information and Observation Network (EIONET)[11], the European Union Network for the Implementation

Radiation Committee (INIRC) was created, which is the precursor to the ICNIRP. The ICNIRP was created during the eighth international congress of the IRPA in May 1992 as an independent organisation (the scientists who are members of it are not permitted to work for the private sector), charged with the task of investigating health risks that could be associated with various forms of NIR (Non-Inonizing Radiation), developing international guidelines to specify the relative exposure limits and treating all aspects relating to protection from this radiation. The ICNIRP is currently financed by the IRPA, the European Union and the WHO.

[8] The IARC (www.iarc.fr) is a body within the World Health Organisation specialising in cancer research, which conducts international monitoring on the impact that cancers have on death rates, and divulges scientific information through publications, meetings and research grants.

[9] These exist alongside the following organisations, which have specific tasks, the World Meteorological Organization (WMO), the Food and Agriculture Organisation (FAO), the World Bank, the G7 and the OECD.

[10] The European Environmental Agency was founded in 1990 (Council Regulation EEC no. 1210/90 of 7 May 1990) and has been operational since 1993.

[11] The network was established in 1994 by the same Regulation which established the European Environmental Agency (www.eionet.eu.int). Information collected by the network is essential for the exercise of the Commission's powers during the drafting and implementation of Community law, the enactment of legislation by the Member States within the limits of their jurisdiction and the dissemination amongst the general public of information concerning the environment. On this point see E. CHITI, *Le agenzie europee. Unità e decentramento nelle amministrazioni comunitarie*, Padova, Cedam, 2002, 251.

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and Enforcement of Environmental Law (IMPEL)[12] and, above all, the scientific commissions[13]) and the national authorities (in Italy, the Ministry for the Environment and the Territory[14], the Environmental Protection and Technical Services Agency,[15] the National Agency for New Technologies, Energy and Sustainable Economic Development,[16]

[12] The network of European environmental operators is informal and has been operating since 1992: its role is expressly recognised under Article 3(2) of the Sixth Community Environment Action Programme. The task of IMPEL is to ensure that the national authorities apply harmonised environmental law in as uniform a manner as possible (thereby avoiding latent discrimination or distortions of competition).

[13] The various committees include: the waste committee (provided for under Article 18 of Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste); the cosmetic products committee (established under Decision 78/45/EEC of 19 December 1977 in order to ensure that these products do not contain substances that are toxic for humans) and the Committee for Proprietary Medicinal Products ("CPMP") established under directive 75/319/EEC.

On the stages in the development of the Community administration which resulted in the formation of the committees (from mission administration to oversight and finally management administration), see S. CASSESE, *Lo spazio giuridico globale*, 2003, 93 and S. CASSESE, *L'arena pubblica. Nuovi paradigmi per lo Stato*, in *Crisi dello Stato*, Ed. Laterza, 2002, 74 et seq.

[14] The Ministry of the Environment was established by Law no. 349 of 8 July 1986: on the related issues, see G. CAIA, *Il ministero dell'ambiente*, in E. SPAGNA MUSSO (editor), *Costituzione e struttura del governo. La riforma dei Ministeri (parte seconda)*, Padua, Cedam, 1988, 463 et seq and M. MALO, entry for *Ministero dell'Ambiente,* in *Dig.disc.pubbl.*, IX, Turin, Utet, 1994, 496 et seq.

[15] The Agency was established by Decree-Law no. 496 of 4 December 1993, converted with amendments into Law no. 61 of 21 January 1994. On this see V. MOLASCHI, *L'Agenzia per la protezione dell'ambiente e per i servizi tecnici*, in *Giorn.dir.amm.*, 2002, 721 et seq.

[16] The ENEA is governed by Italian Law no. 282 of 1991 which transformed a previous body, the original goals of which concerned the promotion of nuclear energy. Italian Legislative Decree no. 36 of 1999 completed the process of its conversion by vesting it with research and experimentation tasks above all in the area of clean energy. See P. DELL'ANNO, *Manuale di diritto ambientale*, 3rd ed., Padua, Cedam, 2000, 93.

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the Central Institute for Scientific Research and Marine Applied Technology,[17] the Water Research Institute[18] and the Superior Institute for Prevention and Workplace Safety).[19]

The local authorities and administrations cited, along with civil society (which expresses its views through interventions by private individuals, environmental associations or ad hoc figure such as environmental consortia), comprise a multi-level system, which is able to ensure effective protection in accordance with Article 3-ter and 3-quinquies of the Italian Environmental Code[20] solely and exclusively if all of its components interact harmoniously.[21]

[17] The Central Institute for Scientific Research and Marine Applied Technology is a scientific non-profit public research body which provides institutional support for policy making by the central authorities with competence to resolve marine environmental problems (its Charter was approved by the Ministerial Decree of 21 May 2001). It was established by Article 9 of Italian Law no. 41 of 17 February 1982 as the ICRAP (Central Institute for Scientific Research and Technology applied to Fishing) with the purpose of supporting the former Ministry for Merchant Shipping. Subsequently, Article 4 of Italian Law no. 220 of 28 February 1992 changed its name to ICRAM whilst its competences were expanded to include the protection of the marine environment and the sustainability of industrial activities. It was subsequently transferred to the Ministry for the Environment and Protection of the Territory under Article 1(10) of Italian Law no. 537 of 1993.

[18] The tasks of the Water Research Institute of the National Research Council are laid down in the "Merli" Law (no. 319 of 1976) and Italian Presidential Decree no. 133 of 1992. On the scaling back of the institute, see P. DELL'ANNO, *Manuale di diritto ambientale*, 2000, cit., 94.

[19] R. FERRARA, *I principi comunitari di tutela dell'ambiente,* in *Dir.amm.*, 2005, 518 effectively describes the enduring vitality of nation states ("after a summary declaration of presumed death") in orienting Community law choices in relation to the environment.

[20] The preference in favour of environmental protection powers for local government is expressed in particular in paragraph 3 of Article 3-quinquies of Italian Legislative Decree no. 152 of 06.

[21] On the principle of loyal cooperation in this area, see also A. ROMANO TASSONE, *Stato, Regioni e enti locali nella tutela dell'ambiente,* in *Dir.amm.*, 1993, 108 et seq.

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Since the adoption of the very first provisions dealing with the environment, it has been clear that international law acknowledges the absolutely vital role played by local government.

According to Article 7 of what may be regarded as the very first general declaration on the environment,[22] the UN Declaration on the Human Environment in Stockholm in 1972, "*local and national governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions*".

Twenty years later, the United Nations Conference on Environment and Development (UNCED), which was held in Rio de Janeiro in 1992, which still constitutes one of the linchpins of international environmental law, approved the action plan entitled "Agenda 21" (things to be done in order to protect the environment in the 21st Century), which grants local government a fundamental role in the achievement of sustainable development.

Chapter 28 of that document contains four assertions, which appear to be of absolute significance in highlighting the role of local government in protecting the environment on an international level.

First it is important to stress the assertion that "*because so many of the problems and solutions being addressed by Agenda 21 have their roots in local activities, the participation and cooperation of local authorities will be a determining factor in fulfilling its objectives*". According to that declaration, participation by local authorities is regarded as a genuine "determining factor" in achieving environmental protection.

Secondly, it is stated that "*local authorities construct, operate and maintain economic, social and environmental infrastructure, oversee planning processes, establish local environmental policies and regulations, and assist in implementing national and*

[22] For a summary and effective overview of the development of international environmental law, see G. ROSSI (editor), *Diritto dell'ambiente*, II ed., 2011, 30 et seq.

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subnational environmental policies", thereby stressing the need to vest the local authorities with specific powers over the environment.

Thirdly - though here from a more specifically educational perspective - it is stated that the local authorities "*as the level of governance closest to the people [...] play a vital role in educating, mobilizing and responding to the public to promote sustainable development*".

Chapter 28 concludes by directing a specific appeal to all local communities to implement a local Agenda 21 which can translate the general objectives of the Agenda 21 into tangible and specific programmes and initiatives in all contexts.

Fourthly, according to Chapter 28 "*the local authorities must launch a process of consultation in order to achieve consensus regarding the local Agenda 21. Each local authority should enter into a dialogue with its citizens, local organizations and private enterprises and adopt a local Agenda 21. This consultation will enable the authorities to acquire the information needed for formulating the best strategies. The process of consultation would increase household awareness of sustainable development issues. Local authority programmes, policies, laws and regulations to achieve Agenda 21 objectives would be assessed and modified, based on local programmes adopted. Strategies could also be used in supporting proposals for local, national, regional and international funding*".

The initiatives provided for under the local action plan can only be implemented if there is closer cooperation between all sectors involved and, within this context, if the local authority is regarded as the most appropriate subject for coordinating the entire process.

Amongst the "special" international law instruments that attribute a specific role to local government it is also important to mention the *Aalborg Charter* or the Charter of European Cities and Towns Towards Sustainability, as approved by the participants at the European Conference on Sustainable Cities & Towns held in Denmark on 27 May 1994 (organised by the International Council for Local Environmental Initiatives - ICLEI), which has been

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confirmed several times during meetings in Lisbon in 1996, Hanover in 2000, Johannesburg in 2002 and Aalborg in 2004 (Aalborg+10).[23]

The Charter was signed by hundreds of European local government bodies (in Italy by around 150 municipalities and provinces, including Florence, Rome, Milan, Palermo and Naples) which undertook to implement the Agenda 21 locally and to draw up long-term action plans to promote sustainable development towards sustainability.

In Italy, the Charter has had particular legal relevance in relation to Article 2 of Italian Decree-Law no. 263 of 9 October 2006 on the waste emergency in Campania, which placed the Extraordinary Administrator under an obligation to adopt measures suitable for ensuring the provision of information to and participation by local residents in accordance with the principles of the Aalborg Charter.

Indeed, it has been applied by the administrative courts, which have annulled orders that had been issued by Prefects that did not comply with the principles enshrined in the Charter.[24]

Another document of particular importance is the Leipzig Charter on Sustainable European Cities[25] signed in May 2007, in which the ministers responsible for urban development in the twenty seven EU Member States voluntarily undertook to enhance energy efficiency in cities and to promote efficient and convenient urban transport networks.

[23] On this see A. GIUFFRIDA, *La Carta di Aalborg*, in F. FRACCHIA-M.OCCHIENA (a cura di), *Climate change. La risposta del diritto*, Editoriale Scientifica, Naples, 2011, 305-311.

[24] Regional Administrative Court for Campania, judgment no. 6075 of 12 June 2007: see with note by M. MANNA, *L'informazione ambientale nella gestione dell'"emergenza rifiuti" in Campania,* in *Foro amm.-TAR*, 10, 2008

[25] *Leipzig Charter on Sustainable European Cities*. The document is available in Italian at www.a21italy.it

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It should be noted that such activities may "effectively combat climate change".[26]

Although the Aalborg Charter from 1994 and the Leipzig Charter from 2007 are instruments of soft law, it cannot be denied that they represent essential (albeit not widely known) starting points and provide a further source of legitimation for environmental protection policies (which are made up primarily of positive initiatives) which "should" be promoted by local government.

This brief summary of the international law instruments that attribute a specific role to local government in relation to environmental protection cannot be concluded without citing the European Landscape Convention adopted on 19 July 2000 by the Committee of Ministers of the Council of Europe, and which entered into force in 2004.[27]

Under that Convention, which pursues the objective of protecting the landscape as "a form of the territory and environment",[28] a "European Network of Local and Regional Authorities for the Implementation of the European Landscape Convention" was established in Strasbourg in 2006, which may be defined – strangely - as a non-governmental international organisation established by local government bodies.[29]

[26] M. PAPARELLE – P. QUAIA, *La politica urbana dell'Unione Europea e la Carta di Lipsia,* in *Dir.com.scambi internaz.*, 2007, 853

[27] On this see G.F. CARTEI (editor), *Convenzione europea del paesaggio e governo del territorio,* Il Mulino, 2007. The Convention entered into force in Italy on 1 September 2006 following its ratification by Italian Law no. 14 of 2006.

[28] According to the renowned definition of A. PREDIERI, *Paesaggio*, in *Enc.dir.*, XXXI, 1981, 506

[29] See on this point R. PRIORE, *La convenzione europea del paesaggi: matrici politico-culturali e itinerari applicativi*, in G.F. CARTEI (editor), *Convenzione europea del paesaggio e governo del territorio,* Il Mulino, 2007, 79

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Once again, as is clear from the persistent references to the principle of sustainable development, local government bodies are vested with front-line environmental protection powers.

3. THE ROLE OF LOCAL GOVERNMENT IN ENVIRONMENTAL PROTECTION UNDER EUROPEAN LAW

An analysis of European law starting from environmental action plans[30] also brings to the fore the central status of the role of local government and its policies in the area of environmental protection.

If it is considered that the territory of the European Union covers more than four million square kilometres, includes a population of four hundred and ninety million inhabitants and collectively generates around one third of world GDP and that sixty percent of Europeans live in urban areas with more than fifty thousand inhabitants,[31] it is inevitable that European law, including first and foremost environmental action programmes, must enable local government to play a decisive role.

[30] European environmental action programmes (see further M. TRIMARCHI, *La tutela dell'ambiente nel diritto comunitario*, in A. TIZZANO (editor), *Il diritto privato dell'Unione europea,* Turin, Giappichelli, 2000, I, 204) have been spread over a number of years: the first action programme, which was drawn up in 1973 (in *OJEC C 112/1*), covered the period 1973-1977 whilst the second action programme, approved in 1977 (in *OJEC C 139*) concerned the period 1977-1981. The first significant environmental directives were adopted during the term of the first two programmes. The third programme was adopted in 1983 (in *OJEC C 46*) and covered the period 1982-1986; the fourth programme, adopted in 1987 (in *OJEC C 328*) following the entry into force of the Single European Act, applied to the period 1987-1992. The sixth environmental action programme was adopted by Decision no. 160/2002/EC of the Parliament and of the Council of 22 July 2002 (in *OJEC L 242* of 10 September 2002) and applied from 1 January 2001 until 31 December 2010.

[31] M. PAPARELLE – P. QUAIA, *La politica urbana dell'Unione Europea e la Carta di Lipsia,* in *Dir.com.scambi internaz.*, 2007, 846.

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The fifth EU environmental action programme[32] states that "*local and regional authorities have a particularly important part to play in ensuring the sustainability of development through the exercise of their statutory functions as 'competent authorities' for many of the existing Directives and Regulations and in the context of practical application of the principle of subsidiarity*".

The programme also stated that "*the purpose of the Community policy must therefore be to encourage local authorities to rise to the challenge that the environmental problems of many cities and towns pose today, and to assist them to find the best way of doing this*".

The sixth Community environmental action programme,[33] which moreover seeks to emphasise "change as an outstanding challenge of the next 10 years" (Article 2 (2)), also promotes "*extended dialogue and exchange of experience with the national and local administrations in the Candidate Countries on sustainable development and preservation of their environmental assets*".

The role of local authorities is not mentioned a great deal in that programme, partly because it is taken entirely for granted, *inter alia* in the light of the principle of integration (which is referred to in recital 13) according to which "*environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development*" (Article 11 TFEU),[34] and

[32] The fifth programme from 1993 (in *OJEC C 138/1*) covered the period 1993-1999.

[33] The sixth environmental action programme was adopted by Decision no. 160/2002/EC of the Parliament and of the Council of 22 July 2002 (in *OJEC L 242* of 10 September 2002) and applied from 1 January 2001 until 31 December 2010.

[34] On this principle, also enshrined in Article 37 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice in 2000, see L. KRAMER, *Manuale di diritto comunitario per l'ambiente*, 2002, 90; P. DELL'ANNO, *Principi del diritto ambientale europeo e nazionale*, 2004, 75-79 and M. WASMEIER, *The integration of environmental protection as a general rule for interpreting community law*, in *Common Market Law Review*, 2001, 159 et seq.

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secondly because EU law is not interested so much with the aspect of how the national organisations operate, as rather that the objectives set are achieved.

In addition, the essential role of local government is referred to in practically each individual constituent sector of environmental law (planning instruments, soil, water, waste, air, damage, etc.).[35]

Finally, it is also important to refer to the Covenant of Mayors,[36] which is regarded by the European institutions as an excellent model of multi-level governance: starting from the position that cities play a decisive role in reducing climate chance, with the aim of achieving ambitious CO2 reductions, the signatories have undertaken to carry out various acts and to submit to monitoring as regards the achievement of targets (including the adoption of a sustainable energy action plan).[37]

4. THE ROLE OF LOCAL GOVERNMENT UNDER NATIONAL LAW

In contrast to the position under international law and EU law where the role of local government may be said to have been asserted in an essentially continuous manner, under national law the relationship between administrative powers over the environment of

[35] See for example the position paper (in http://ec.europa.eu/environment/air/review_air_policy.htm) submitted to the Commission by several regions from various European countries (in Italy Piedmont, Lombardy, Veneto and Emilia Romagna) in order to highlight the need to simplify the system of pollution emissions thresholds and to focus action "*where there are the greatest impacts on human health*". In fact, the air quality directives are currently being reviewed.

[36] www.eumayors.eu and www.pattodeisindaci.eu

[37] On this see S. PICCHIOLUTTO, *Il patto dei sindaci per l'energia sostenibile in Europa,* in *Ambiente e sviluppo*, 2010, 457 et seq.

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local government and the powers of central government has been characterised by repeated swings between the view that the latter should be regarded as the sole protagonist of environmental protection policies and the more inclusive view that it should also be assisted by other actors (i.e. local government).

There has been a cyclical alternation between periods of absolute predominance of the centre and periods marked by greater openness towards local government, with varying levels of consideration to the contribution that local government can make towards environmental protection.[38]

At present, following the Constitutional Court judgments from 2009,[39] the prevailing view favours a "predominance of the centre".[40]

The role attributed to local government under part six of the Environmental Code, transposing the Environmental Liability Directive, is emblematic of this centralising

[38] For an account of these swings back and forth, see M. RENNA, *L'allocazione delle funzioni normative e amministrative*, in G. ROSSI, *Diritto dell'ambiente*, 2008, 145.

[39] The following judgments have been issued: no. 225 (written by Maddalena) on challenges to the entire Code; no. 232 (Silvestri) on soil protection; no. 233 (Finocchiaro) on water; no. 234 (Quaranta) on the EIA; no. 235 (Cassese) on environmental damage; no. 246 (Gallo) on water; no. 247 (Napolitano) on packaging and clean-up work; no. 249 (Tesauro) on waste; no. 250 (De Siervo) on the air and the atmosphere; no. 251 (Saulle) on water. In judgment no. 248/2009 (Tesauro) on significant accidents involving specific hazardous substances, the Court upheld the constitutionality of Puglia Regional Law no. 6 of 7 May 2006. On this see A. CIOFFI, *L'ambiente come materia dello Stato e come interesse pubblico. Riflessioni sulla tutela costituzionale e amministrativa a margine di Corte Cost. n. 225 del 2009*, in *Riv.giur.amb.*, 2009, 970. See also my own article, *La Corte Costituzionale sul codice dell'ambiente tra moderazione e disinvoltura*, in *Riv.giur.ed.*, 2009, 1455.

[40] It should be noted that the judgments form 2009 (no. 225 relating to the entire Code; no. 232 on soil; no. 233 and no. 246 on water; no. 234 on the EIA and no. 235 on damage) came in the wake of two judgments from 2007 (no. 367 and no. 378) and two judgments from 2008 (no. 104 and no. 105).

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drive[41] and the heavy restriction of local government powers which, for the reasons noted above, breaches both international and EU law (even though there may be reasons for such a choice).

According to Article 309 of Italian Legislative Decree no. 152 of 2006, local government is granted the power merely to control and report to the Italian Ministry for the Environment in order to enable the latter to pursue a damages claim or order restoration.

This represents a decline in protection since previously, under Article 18 of Italian Law no. 349 of 1986, the local authorities were able to launch damages actions on their own initiative.[42]

The analysis of the development of national law points to a substantial discontinuity and cyclical operation, swinging between periods of greater or lesser local government involvement, in contrast to the continuity position highlighted under international and EU law.

In layman's terms, it could be said that central government currently does the most important things, the regions have a bit more space (though are often unable to decide),

[41] For this centralising perspective, see also Constitutional Court judgment no. 193 of 4 June 2010, with note by V. SESSA, *Il riparto di funzioni tra Stato e Regioni in materia di aree protette: un altro passo avanti nel consolidamento delle prerogative statali*, in *Riv.quadr.dir.amb.*, 2011, 2 and Constitutional Court judgment no. 227 of 22 July 2011, with note by L. CORTI, *I limiti della potestà normativa regionale in materia di procedimento per la valutazione di impatto ambientale: la Corte Costituzionale ribadisce la prevalenza della legge statale*, in *Riv. giur. Ambiente*, 2012, 1, 49.

[42] On the evolution of protection in this area see R. CHIEPPA, *commento all'art. 310*, in *Codice dell'ambiente* (edited by V. ITALIA), Giuffré, 2008, 2681 and F. FONDERICO, *Le competenze degli enti locali in materia di danno ambientale: profili generali*, in F. GIAMPIETRO (editor), *La responsabilità per danno all'ambiente,* Milan, 2006, 171.

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whilst the municipalities and provinces are left with minor scope for intervention, and are unfortunately granted only oversight and control powers.

5. THE REACTION FROM LOCAL GOVERNMENT

Under these circumstances in which its powers have been limited so severely, local government has attempted to eke out some room for manoeuvre by interpreting the law creatively.

For example, attempts have been made to interpret Article 8(6) of Italian Law no. 36 of 2001 on electro-magnetic pollution extremely broadly. This provision grants the municipalities the power to issue regulations to minimise emissions, and the municipalities were extremely imaginative, adopting the most fanciful constructions over the ten years following its enactment (different limits, distances, allowed and forbidden areas, etc.). However, most of these attempts have been struck down by the administrative courts at both first and second instance.[43]

When the local authorities act directly in order to achieve environmental protection objectives, they come up against resistance in the courts, which cannot avoid applying the terms of the legislation.

Consider the prohibition on the generation of green energy by local authorities, which has been substantially endorsed by the Court of Accounts:[44] there are "significant doubts (…)

[43] On this point see my own book, *Il principio di precauzione, Giuffrè*, 2006, 241

[44] See Court of Accounts, Regional Control Division for Lombardy, opinion 861/2010/PAR. On this point see broadly M. RAGAZZO, *Le politiche sull'energia e le fonti rinnovabili*, Giappichelli, 2011, 254 et seq.

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over the power of municipalities to intervene directly in the production and sale of energy, including renewable energy, under both national and EU law".[45]

Under these circumstances, it must certainly be recalled that the provision of new scope for action to local authorities is precluded not only by positive law but also by a series of critical issues which have arisen out of the practices followed by local government: although local policies and local government are certainly more aware of problems and their solutions, they are more exposed to the "proximity of politics" (which means that the regulator is no longer impartial) than central government, which by contrast often operates within a kind of ideal world far-removed from tangible problems.

In many cases (although - it must be stressed - not in all), this leads to deadlock and an inability to make decisions, resulting in absolutely ineffective solutions, as is demonstrated by the way in which the emergency has been treated in Campania[46] or in the City of Rome.[47]

[45] With specific reference to national law, the accounting courts have specified that "this activity appears to reach beyond the goals of local government, amounting to a typically commercial activity in that it is aimed at the production and sale of goods (…)". On the other hand, as far as EU law is concerned, it has been noted that "the direct involvement of the local government body, even and above all where this occurs through a publicly owned company which could be facilitated as regards the location and construction of facilities, appears to be in stark contrast with competition law and the prohibition on state aid laid down in the EC Treaty, and could in any case distort the free operation of the market. In fact, the involvement as a shareholder of the municipality with powers over planning and territorial oversight in relation to the construction of installations for generating renewable energy is liable to condition the local market".

[46] Campania region has been in a state of emergency since 2004. Various extraordinary administrators have been appointed, including initially the President of the Region, and later other non-political experts such as the Head of the Civil Protection Agency. The competent authorities have not been able to resolve the problem, and around ten prime-ministerial decrees have been issued, along with a dozen ordinances and decree-laws, the establishment of a parliamentary commission of inquiry, Constitutional Court judgments (no. 314 of 2009) and ECJ rulings (C-297/08).

[47] An emergency was declared in the City of Rome in 2011. The Prefect of Rome was appointed as an extraordinary administrator. In ten years (from 2002 to 2012), the region had been unable to approve a waste management plan. No action was taken to set up alternative landfill sites.

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Whilst it is of course the case that, despite these instances of maladministration, there have been many other cases in which local government has done its duty, unfortunately the negative example offers the right excuse to those who seek to reduce the power of local government, in the face of international and EU law.

It should also be added that it is difficult for the local authorities to take action without clear guidelines from central government: without a national energy strategy, local (regional, provincial and municipal) policies on the promotion of renewable energy and the reduction of climate-changing emissions have developed in an entirely disjointed manner. Many regions have still not adopted a specific summary indicator to measure the actual reduction of energy consumption and increases in the production of green energy, the consequences of which vis-a-vis verification of compliance with binding European targets may easily be imagined.

With reference in particular to the reduction of greenhouse gas emissions, five regions have set targets that are consistent with national goals, whilst three have set a lower target and one has set a more stringent target. Three have not yet set targets and two have not specified aggregate indicators. On the reduction of consumption front, three regions have stipulated an actual reduction, seven have not set the summary indicator and two have limited themselves to recalling to objectives consistent with 20-20-20. Also in the area of renewable energy, only four have adopted targets that are expressly consistent with 20-20-20.

It is obvious that this lack of a reference framework has a significant overall effect on the policies adopted over time by local government.

6. SUGGESTIONS

The analysis presented in this study leads rather to suggestions for future study, rather than full-blown conclusions. Having emphasised first and foremost that international and EU law grant local government a much more significant role than national law, local

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government must take much more robust action on international and EU levels in order to defend its prerogatives.[48]

Moreover, it should be noted that these plans essentially attribute a "positive" and "proactive" role to local government, and not by contrast a negative, blocking role as occurs under national law. It therefore appears that, if local government is interested in recovering the role which it is entitled to perform (though which it is not recognised as having) under supra-national law, it must seek to act above all proactively,[49] exploiting so to speak powers that may be found within the darkest corners of national legislation and exploiting its own statutory and regulatory powers to the full extent permitted.

Consider the development plans on green public procurement, energy efficiency, renewable energy and traffic regulation (which have practically immediate effects on climate change[50]), but also cultural and awareness-raising initiatives (such as those relating to waste management that favour recycling companies, etc.).

Moreover, such an assumption by local government of greater responsibility and of a more creative and proactive role, which as noted above is called for under positive law and required the very principles applicable to administrative action in relation to the environment, would undoubtedly lead to more effective environmental protection.

[48] On the significant role of local authorities in the area of renewable energy, see G. CARTEI, *Energia e cambiamento climatico: la disciplina delle fonti rinnovabili*, in this CESIFIN volume (p. 18 type-written)

[49] For example, as noted by G. CARTEI, *Energia e cambiamento climatico: la disciplina delle fonti rinnovabili*, cit., (p. 5 type-written), it is clear from the 2001 and 2009 directives on renewable energy that the Member States should encourage the regions and local governments to set targets above national levels.

[50] It is interesting to note the tangible actions proposed in order to reduce CO2 emissions by C. CLINI, *Prospettive del negoziato globale sui cambiamenti climatici*, in *Econ.fonti energia e ambiente*, no. 1/2010, 66.

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Therefore, the assertion made in the document initially quoted, i.e. that "climate change is a global issue which undoubtedly reaches beyond borders and the decision-making capacity of any city or region. However, cities may also provide an important contribution to combating climate change, as 75% of greenhouse gases are produced in urban areas" appears to provide the substantive paradigm for a genuine challenge, the decision to engage with which will fall to local government, albeit subject to the economic constraints applicable in the immediate future.

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THE MULTILEVEL LEGAL REGIME OF PUBLIC SERVICE CONCESSIONS

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INDEX

1. THE IMPORTANCE OF CONCESSIONS IN THE SCIENTIFIC DEBATE ON THE EVOLUTION OF ITALIAN ADMINISTRATIVE LAW
2. THE "CONTRACTUALIZATION" OF CONCESSIONS UNDER THE EU LAW: THE "SERVICES CONCESSION CONTRACT" IN THE NEW LEGAL FRAMEWORK
3. THE PERSISTENCE OF TENDENCIES RECONSTRUCTING PUBLIC SERVICE CONCESSIONS AS PUBLIC LAW INSTRUMENTS AT NATIONAL LEVEL: AMBIGUITIES AND UNCERTAINTIES
4. THE ISSUE OF THE USE OF PRIVATE LAW FOR THE REGULATION OF PUBLIC SERVICES
5. THE FUTURE OF CONCESSION CONTRACTS IN A "MULTILEVEL CONTEXT" BETWEEN THE PRIMACY OF EU LAW AND THE PRINCIPLE OF "FREE ADMINISTRATION".

1. THE IMPORTANCE OF CONCESSIONS IN THE SCIENTIFIC DEBATE ON THE EVOLUTION OF ITALIAN ADMINISTRATIVE LAW

The study of concessions in the Italian legal system has always constituted a privileged field to analyse the evolution of the "*public/private divide*" in administrative

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law[1]. Particularly in the Twentieth century, the issue of the legal nature of administrative concessions has indeed taken on a paradigmatic value within the more general scientific debate on the distinction between public law and private law[2]. In fact, the various definitions of "administrative act"[3] and of "public law contract" (or "contract with a public object")[4] have been elaborated taking into consideration administrative concessions.

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[1] Also for this reason the issue of administrative concessions has marked the history of Italian administrative law. See in particular: O. Ranelletti, *Teoria generale delle autorizzazioni e concessioni amministrative*, pt. I, *Concetto e natura delle autorizzazioni e concessioni amministrative*, in *Giur. it.*, XVLVI, 1894, IV, p. 7-83; pt. II, *Capacità e volontà nelle autorizzazioni e concessioni amministrative*, in *Riv. it. sc. giur.*, 1894, 3-100, p. 315-372; pt. III, *Facoltà create dalle autorizzazioni e concessioni amministrative*, ibidem, XIX, 1895, p. 3-107; ibidem, XX, 255-337; ibidem, XXI, 1896, p. 77-172, p. 350-379; ibidem, XXII, 1896, p. 177-277 (now in *Scritti giuridici scelti*, edited by E. Ferrari-B. Sordi, III, Naples, 1992, p. 35 et seq.); U. Forti, *Natura giuridica delle concessioni amministrative*, in *Giur. it.*, 1900, pt. IV, p. 369 et seq. (and Id., *Studi di diritto pubblico*, Rome, 1937, I, p. 360 et seq.); F. Cammeo, *Le concessioni per l'illuminazione pubblica*, in *Giur. it.*, 1903, I, p. 473 et seq.; L. Galateria, *Il negozio di concessione amministrativa*, Milan, 1942; C. Vitta, *Concessioni*, in *Nss.D.I.*, III, 1959, p. 919 et seq.; E. Silvestri, *Concessione amministrativa*, in *Enc. dir.*, Milan, 1961, VII, p. 370 et seq.; F. Gullo, *Provvedimento e contratto nelle concessioni amministrative*, Padua, 1965; M. D'Alberti, *Le concessioni amministrative. Aspetti della contrattualità delle pubbliche amministrazioni*, Naples, 1981; M. D'Alberti, *Concessioni amministrative*, in *Enc. giur. Treccani*, Rome, 1988, VII; D. Sorace - C. Marzuoli, *Concessioni amministrative*, in *Digesto disc. pubbl.*, III, Turin, 1989, p. 280 et seq.; F. Fracchia, *Concessione amministrativa*, in *Enc. dir.*, Annali, I, Milan, 2007, p. 250 et seq.

[2] The importance of the debate on the role of administrative concessions in the construction of the so-called "administrative law system" is underlined by B. Sordi, *Pubblica amministrazione, negozio, contratto: universi e categorie ottocentesche a confronto*, in *Dir. amm.*, 1995, p. 509, asserting that «public service concession represented a particularly difficult and contradictory dogmatic issue», which «made the public-private dichotomy difficult to clarify, as long as said dichotomy was based, on the one hand, on the authority and the imperium and, on the other hand, on the consensus and the agreement».

[3] It is very interesting from this point of view Ranelletti's theory (O. Ranelletti, *Concetto e natura delle autorizzazioni e concessioni amministrative*, in *Giur. it.*, 1894, IV). According to Ranelletti the importance of the contract diminishes and administrative authorizations and concessions become the main focus to build the general theory on the acts of the public administration. Ranelletti's aim is to systematize all administrative acts in the same way as private law contracts (p. 11). In particular Ranelletti states that where a public interest is present, public authorities have the power to act unilaterally, and any private situation can be characterized only by a "legitimate interest" which is to be put exclusively under the administrative jurisdiction. This set of rules which is built also around concessions is adopted from a general point of view to define a set of principles applicable to all administrative acts.

[4] See also D. Sorace - C. Marzuoli, *Concessioni amministrative*, cit., p. 290, affirming that administrative concessions represent the main factor of crises of the concept of *imperium* and, consequently, of the administrative measure. The issue of the nature of administrative concessions has in fact come across the debate on the public law contract and has been included in the studies on the administrative contract. In particular, for what concerns the idea of concession as public law contract, see A. De Valles, *I servizi pubblici*, in V.E. Orlando (edited by), *Primo trattato completo di diritto amministrativo*, vol. VI, pt. I, Milan, 1930, spec. 417 et seq. See also G. Miele, *La*

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From this point of view, administrative concessions have been conceived in different ways according to the different phases of development of the administrative law system and of the legal science, and also taking into consideration political, economic and social changes. While in the Nineteenth-century State administrative concessions were usually regarded by the jurisprudence and the first legal science as contracts of the public administration regulating the relationship between public administration and private companies as far as public goods and services were concerned, at the end of the same century the need to build a "system of administrative law" – which was particularly felt by the Italian School of Public Law under the direction of Vittorio Emanuele Orlando – encouraged the reconstruction of concessions as typical example of administrative acts[5]. In particular, Oreste Ranelletti has elaborated a theory considering administrative concessions as expression of discretionary power and characterized by the presence of "self-remedy" powers on the side of the public administration (resembling the "*clauses exorbitantes du droit commun*" of the French tradition)[6].

manifestazione di volontà del privato nel diritto amministrativo, Rome, 1931; M. Gallo, *I rapporti contrattuali nel diritto amministrativo*, Padua, 1936; C. Cammeo, *I contratti della pubblica amministrazione*, Rome, 1939; M.S. Giannini, *L'attività amministrativa*, Rome, 1962, p. 26 et seq.; F. Ledda, *Il problema del contratto nel diritto amministrativo*, Turin, 1965; G. Falcon, *Le convenzioni pubblicistiche*, Milan, 1984.

[5] As underlined by M. D'Alberti, *Concessioni amministrative*, cit., 1 et seq., concessions were first considered as private law instruments because of «metajuridical reasons, related to the economic and political importance of the contracting parties». Moreover, the transformation of many contractual relationships from a unilateral point of view has been a general tendency affecting the reconstruction of the Italian administrative law system at the end of the Nineteenth century: on this point see, B. Sordi, *Pubblica amministrazione, negozio, contratto*, cit., p. 505 et seq. On the role of the legal science in the construction of the Italian administrative law, see A. Sandulli, *Costruire lo Stato. La scienza del diritto amministrativo in Italia (1800-1945)*, Milan, 2009.

[6] O. Ranelletti, *Concetto e natura delle autorizzazioni e concessioni amministrative*, pt. I, cit., p. 16 et seq., stating that as far as a concession is an act adopted in a situation where a private person is involved, it «can only be unilateral, as far as a private person is not endowed with the power to act *iure imperii*, since this person is not a public authority» (79). Ranelletti stresses that public interest and public authority are indissolubly connected in the establishment and control phases of the contract: in particular, the public interest prevails «before the concession is granted, that is to say until its birth» and «afterward, that is to say throughout its life» (O. Ranelletti, *Facoltà create dalle autorizzazioni e concessioni amministrative*, pt. III, cit., p. 257). On this point see also R. Caranta, *I contratti pubblici*, Turin, 2012, p. 11, which explains the reasons why a concession must be considered as an administrative act, mainly because it must grant the public administration the power of termination if the public interest changes. More generally, for the historical analysis of the evolution and construction of the concept of administrative act in Twentieth century legal science, see B.G. Mattarella, *L'imperatività del provvedimento amministrativo. Saggio critico*, Milan, 2001.

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However this idea of concession was not fully accepted because, on the one hand, it hindered the great support and collaboration from private parties in providing public services and, on the other hand, because it did not fully explain the fundamental role which was played by the mutual assent between public administration and private parties[7].

For this reason in 1913 the Italian Court of Cassation elaborated the "concession-contract" theory[8] with the aim to overcome the contrast between the formalist approach of the traditional legal doctrine and the concrete development of the administrative practice. According to this theory, the concession relationship was founded on a "two level" structure: an administrative act followed by the contract. Through the first one the public administration granted privates with the powers to exercise or manage public goods or utilities[9], while the contract regulated the economic aspects of the relationship. This theory, notwithstanding the initial opposition of some scholars[10], was accepted by the predominant jurisprudence and legal science, above all in the second half of the Twentieth century[11]. A compromise was in this way reached between the necessity of preserving the "*clauses exorbitantes du droit commun*" and the need to maintain a room for the mutual assent. Moreover, a more coherent distinction of jurisdiction between the Council of State

[7] At the beginning of the Twentieth Century Ugo Forti, making a distinction between public service concessions and public works concessions, in which works are not always carried out by private operators, underlined the contractual structure of public service concessions, because private companies may be granted the execution of public interest activities (U. Forti, *Natura giuridica delle concessioni amministrative*, cit., p. 396).

[8] Judgement of the Court of Cassation dated 12 January 1910, in *Riv. dir. comm*., 1910, p. 248, concerning maritime state property areas to be exploited for industrial uses, analysed by M. D'Alberti, *Le concessioni amministrative*, cit., particularly 187 et seq. See also judgment of the Court of Cassation dated 27 September 1915, in *Foro it.*, 1915, I, p. 1379.

[9] From this point of view the "core" of the concession instrument coincides above all with the delegation or the transfer of public law powers: see G. Zanobini, *L'esercizio privato delle funzioni pubbliche e dei servizi pubblici*, in V.E. Orlando (edited by), *Primo Trattato completo di diritto amministrativo*, vol. II, pt. 3, Milan, 1935, p. 419.

[10] See, for example, M. Gallo, *I rapporti contrattuali nel diritto amministrativo*, Padua, 1936; A. Amorth, *Osservazioni sui limiti dell'attività amministrativa di diritto privato*, in *Arc. dir. pubbl*., 1938, p. 455 et seq.

[11] See in particular F. Ledda, *Il problema del contratto nel diritto amministrativo*, cit., p. 116 et seq.; E. Silvestri, *Concessioni amministrative*, cit., *passim*.

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(pronouncing on the administrative act) and the Civil Courts (pronouncing on the execution of the contract) was achieved[12].

But this interpretation was not sufficient to fully clarify links and interferences between the administrative act and the contract, especially in case of invalidity or annulment of the former[13]. In fact, the validity and effectiveness of the contract depended completely on the administrative act: the revocation of the administrative act would have also caused the revocation of the contract, without any kind of protection being assured to the private party. But, above all, the interpretation at the basis of the "concession-contract" theory was for some aspects far from the concrete administrative practice: in some cases it was not possible to clearly distinguish the administrative act from the contract, while in other cases it was even difficult to identify the prior administrative act[14].

Also for this reason, at the end of the Twentieth century legal scholars tried to elaborate new different theories. Starting from the analysis of the administrative practice, some scholars regarded the whole concession relationship between public administration and privates as a contract[15]. Other scholars tried to conceive the relationship referring to a single tool, but without renouncing to the "*clauses exorbitantes du droit commun*": this led to the elaboration of the "administrative contract" theory, essentially based on the German "*Verwaltungsvertrag*"[16]. Lastly, other scholars, even if they did not abandon the idea of concessions as administrative acts, affirmed that concessions were not *jure imperii* acts and introduced the category of the non-authoritative administrative act, which granted privates

[12] As underlined by M. D'Alberti, *Le concessioni amministrative*, cit., spec. 190 et seq., the "concession-contract" theory aimed at clarifying in a better and more coherent way the problem of the distinction of jurisdiction between administrative Courts and civil Courts, the first ones pronouncing on issues concerning the administrative act, the second ones on issues (mainly having economic nature) relating to the contract.

[13] On the lack of autonomy of the two acts, see G. Falcon, *Le convenzioni pubblicistiche*, cit., p. 290 et seq.

[14] M. D'Alberti, *Le concessioni amministrative*, cit., p. 294 et seq.

[15] M. D'Alberti, *Le concessioni amministrative*, cit., p. 316 et seq.

[16] G. Falcon, *Le convenzioni pubblicistiche*, cit., p. 290 et seq.

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the possibility to enter the agreement[17]. Notwithstanding this, the "concession-contract" theory continued to predominate in the jurisprudence through the following decades[18].

2. THE "CONTRACTUALIZATION" OF CONCESSIONS UNDER THE EU LAW: THE "SERVICES CONCESSION CONTRACT" IN THE NEW LEGAL FRAMEWORK.

Over the last years the study of administrative concessions (and more generally of the contracts of the public administration) has been enriched by new elements introduced by the EU law. In particular, with the aim of implementing the principles of free market and competition, the EU law has strengthened the contractual aspects of services concessions and public works concessions, making their discipline similar to the one regulating public contracts[19].

The Commission interpretative Communication on concessions under Community law of 12 April 2000[20] has already provided public administration with the possibility of entrusting «to a third party, by means of a contractual act or a unilateral act with the prior consent of the third party, the total or partial management of services for which that

[17] D. Sorace - C. Marzuoli, *Concessioni amministrative*, cit., p. 285 et seq.

[18] See A. Romano, *Profili della concessione di pubblici servizi*, in *Dir. amm.*, 1994, p. 519, who underlines how the concession-contract grants autonomous juridical importance to the two acts which constitute the public service concession: the administrative act and the contract (or, better, the "agreement"). From both these acts derives the «program» of the public service concession which binds the private operator.

[19] On services concessions under the EU Law, see R. Caranta, *I contratti pubblici*, Turin, 2012, p. 161 et seq.; F. Mastragostino, *Le concessioni di servizi*, in M.A. Sandulli - R. De Nictolis - R. Garofoli (directed by), *Trattato sui contratti pubblici*, vol. I, Milan, 2008, p. 97 et seq.; B. Raganelli, *Le concessioni di lavori e servizi*, in C. Franchini (edited by), *I contratti con la pubblica amministrazione*, Turin, 2007, p. 1006 et seq.; G. Calderoni, *La "nuova" concessione di servizi*, in F. Mastragostino (edited by), *La collaborazione pubblico-privato e l'ordinamento amministrativo*, Turin, 2011, p. 213 et seq.

[20] Official Journal of the European Union 121/5 of 29 April 2000.

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authority would normally be responsible and for which the third party assumes the risk»[21]. Therefore, contrary to the centenary tradition of the Italian legal system, what characterizes concessions is no longer the legal nature or the legal regime of the "constitutive act"– which could also have a private law nature – but the economic aspects of the relationship, particularly the fact that the private party assumes the economic risks following the management of the entrusted services[22].

This approach, which has been also approved by the jurisprudence[23], can be fully found in the Directives on public procurement 2004/17/EC and 2004/18/EC, defining not only public contracts but also «public works concessions» and «services concessions». In particular, services concession has been defined as «a contract *of the same type as a public service contract* except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment»[24]. As a consequence, according to the EU law, the main feature distinguishing public service contracts from services concessions is the way in which the provision of services is remunerated. In services concessions, in fact, the risk connected to the economic management of the service (a risk which depends on the uncertainties of the market) weighs completely or mainly on the private concessionaire[25], who is the unique responsible, unlike the service contractor, for the economic failure and the loss of the invested money[26].

[21] Point 2.4. of the Communication.

[22] According to the Commission, «there is a concession when the operator bears the risk involved in operating the service in question (establishing and exploiting the system), obtaining a significant part of revenue from the user, particularly by charging fees in any form» (para. 2.2). As a consequence, in services concessions there is «a transfer of the responsibility of exploitation».

[23] See in particular EU Court of Justice, 10 November 1998, case C-360/1998, in *Foro amm.*, 1999, 1675 and 10 April 2003, cases C-20/01 and C-28/01.

[24] Art. 1, para. 4, of Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Official Journal of the European Union no. 134 of 30 April 2004).

[25] On this point see also judgment of the Court of Justice of 10 March 2011, case C- 274/09, stating that «where the economic operator selected is fully remunerated by persons other than the contracting authority which awarded the contract concerning rescue services, where it runs an operating risk, albeit a very limited one, by reason inter alia of the fact that the amount of the usage fees in question depends on the result of annual negotiations with third parties, and where it is not assured full coverage of the costs incurred in managing its activities in compliance with

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But these Directives do not introduce any innovations as to the proper legal regime of the awarding of service concession contracts: in fact, unlike public procurements and public works concessions, the award of services concessions with a cross-border interest continues to be subject only to the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular to the principles of free movement of goods, freedom of establishment and freedom to provide services, as well as to the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency[27].

Also to overcome this situation of uncertainty in the award of service concession contracts, a specific EU Directive on the award of concession contracts (Dir. 2014/23/EU) has been recently adopted[28]. The first aim of this Directive is to create a much clearer legislative framework in the award of concession contracts in order to «ensure effective and non-discriminatory access to the market to all Union economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen»[29].

the principles laid down by national law, that contract must be classified as a 'service concession' within the meaning of Article 1(4) of Directive 2004/18».

[26] On the issue of the risks connected to concessions see EU Court of Justice, case C-458/03 of 13 October 2005, *Parking Brixen*.

[27] On this point, see UE Court of Justice, 10 March 2011, no. 274, stating that«It should be added that while, as European Union law now stands, service concession contracts are not governed by any of the directives by which the European Union legislature has regulated the field of public procurement, the public authorities concluding them are bound to comply with the fundamental rules of the Treaty on the Functioning of the European Union, including Articles 49 TFEU and 56 TFEU, and with the consequent obligation of transparency, where – that being a matter for the referring court to determine – the contract concerned has a certain transnational dimension».

[28] As underlined in whereas no. 4 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, «There is a risk of legal uncertainty related to divergent interpretations of the principles of the Treaty by national legislators and of wide disparities among the legislations of various Member States. Such risk has been confirmed by the extensive case law of the Court of Justice of the European Union which has, nevertheless, only partially addressed certain aspects of the award of concession contracts. A uniform application of the principles of the TFEU across all Member States and the elimination of discrepancies in the understanding of those principles is necessary at Union level in order to eliminate persisting distortions of the internal market». On the problematic implementation of these principles by national Courts, see A. Moliterni, *L'affidamento delle concessioni di servizi tra principi generali e regole di dettaglio*, in "*Munus – Rivista giuridica dei servizi pubblici*", 2013, n. 3, pp. 669-719.

[29] As affirmed in whereas no. 1, «The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in

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Anyway the Directive dwells deeply on the notion of "concession contract", clarifying that «concessions are contracts for pecuniary interest by means of which one or more contracting authorities or contracting entities entrusts the execution of works, or the provision and the management of services, to one or more economic operators»[30]. So the EU, highlighting the «pecuniary interest that characterizes this contract, clearly reveals the different supranational perspective in the study of concession contracts that seems to overcome the traditional national one based on the myth of "public interest"»[31].

In this perspective, according to art. 5, "services concession" means only a «contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works (…) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment»[32]. Therefore services concession is an ordinary contract, whose object consists in the procurement of services, which is characterized only by a peculiar kind of consideration[33]: for this reason, the uncertainty of the consideration is an essential feature of this type of contract[34].

From this perspective the Directive contributes to better define the concept of "operating risk" which is a risk of «economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions even if a part of the risk remains with the

the functioning of the internal market». For this reason, the rules of this framework «should be clear and simple» and they «should duly reflect the specificity of concessions as compared to public contracts and should not create an excessive amount of bureaucracy» (whereas n. 2)

[30] See whereas no. 11.

[31] This point has been underlined also by R. Caranta, *I contratti pubblici*, cit., p. 167.

[32] See art. 5, par. 1, lett. b).

[33] See whereas no. 11.

[34] Therefore, the Directive underlines that «Contracts not involving payments to the contractor and where the contractor is remunerated on the basis of the regulated tariffs, calculated so as to cover all costs and investments borne by the contractor for providing the service, should not be covered by this Directive» (whereas no. 17).

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contracting authority or contracting entity»[35]. So the risk is related to the exposure to the vagaries of the market, which may consist of either a demand risk or a supply risk, or both a demand and supply risk; and it does not occur if the public bodies are entitled to cover the loss or to guarantee some minimal revenue[36].

In terms of the legal regime in the awarding of these contracts, the aim of the Directive is to reach a "minimum coordination of national procedures" based on the principles of the TFEU so as to guarantee the opening-up of concessions to competition and adequate legal certainty. In particular, the contracting authorities have the freedom to organize the procedure for the choice of the concessionaire in compliance with the rules and principles established in the Directive.

First of all, art. 3 sets forth the duty to «treat economic operators equally and without discrimination» and to «act in a transparent and proportionate manner», which means that information cannot be provided in a discriminatory manner[37]. For this reason the Directive provides for a strict discipline concerning concession notices and indicates the specific essential information that they should contain[38]. In order to guarantee the same need of transparency, the Directive imposes the duty to publish a concession award notice on the results of the concession award procedure[39]. Both for the notices and for the award

[35] See, art. 5 and, in particular, whereas no. 18 of the Directive.

[36] See whereas no. 18: «if the contracting authority or contracting entity relieved the economic operator of any potential loss, by guaranteeing a minimal revenue, equal or higher to the investments made and the costs that the economic operator has to incur in relation with the performance of the contract»; on the contrary «certain arrangements which are exclusively remunerated by a contracting authority or a contracting entity should qualify as concessions where the recoupment of the investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for or the supply of the service or asset». Besides, according to whereas no. 19, «where sector-specific regulation eliminates the risk by providing for a guarantee to the concessionaire on breaking even on investments and costs incurred for operating the contract, such contract should not qualify as a concession within the meaning of this Directive».

[37] An actualization of this principle is established in art. 30, par. 2: «In particular during the concession award procedure, the contracting authority or contracting entity shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others».

[38] See art. 31, par. 2, that recalls Annex V.

[39] See art. 32.

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notice, the Directive sets forth the specific standards of publicity and drafting[40] and imposes to the contracting authorities and entities to respect a minimum time limit for the receipt of applications and tenders in order to ensure the wider participation and openness[41].

As for the procedural guarantees, the Directive pays great attention to the discipline of technical and functional requirements and to the criteria for the selection and qualitative assessment of the candidates in order to encourage the greater possible participation of economic operators and avoid any unduly restriction to the number of candidates[42]. From this perspective the Directive regulates the possibilities for an economic operator to rely on the capacities of other subjects[43] and carefully specifies the exclusion causes of candidates for illicit behavior or for violation of law[44].

Finally, great attention is paid to the award criteria, since «their application to economic operators is crucial for the operators' effective access to the economic opportunities related to concessions»[45]. In fact, the predetermination of clear award criteria is essential in order to limit the freedom of choice of the contracting authority[46]. In particular, these criteria must be proportionate and non-discriminatory in order to ensure an effective competition[47].

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[40] See art. 33.

[41] See art. 39 and whereas no. 62.

[42] For this reason, according to art. 36, par. 2, «technical and functional requirements shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific production with the effect of favouring or eliminating certain undertakings or certain products». Anyway, according to art. 37, par. 3 «The contracting authority or contracting entity may limit the number of candidates or tenderers to an appropriate level, on condition that this is done in a transparent manner and on the basis of objective criteria. The number of candidates or tenderers invited shall be sufficient to ensure genuine competition».

[43] See art. 38, parr. 1-3.

[44] These cases are precisely indicated in art. 39, par. 4-10.

[45] See whereas no. 63.

[46] See in particular art. 41, par. 3

[47] Moreover they «should be disclosed in advance to all potential candidates or tenderers, be related to the subject-matter of the contract and should not offer to the contracting authority or contracting entity an unrestricted freedom of choice»: see whereas no. 73.

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This substantial discipline is completed by the provision of an adequate system of judicial protection. In order to ensure adequate judicial protection of candidates and tenderers in the concession award procedures, the Directive establishes that Council Directive 89/665/EEC and Council Directive 92/13/EEC should also apply to services concessions and to works concessions awarded by both contracting authorities and contracting entities[48].

But one of the most relevant innovations concerns the rules on the performances of concessions[49]: this discipline is crucial since concession contracts typically involve long-term and complex technical and financial arrangements which are often subject to changing circumstances.

From this perspective, the Directive firstly regulates the duration of these contracts, which «should be limited in order to avoid market foreclosure and restriction of competition»; instead, a long duration should be justified only in order to obtain a return on the invested capital[50]. Moreover great attention is paid to the discipline concerning the subcontracting, that aims at imposing to the contracting authorities as well to the applicants duties of transparency and disclosure, in order to limit any distortion of competition[51].

But, above all, the Directive has provided for a complete discipline concerning the contracting authorities' powers of intervention during the execution of contracts[52]. In fact a certain level of flexibility should be ensured to allow contracting authorities and contracting entities to cope with external circumstances that they could not foresee when they awarded the concession.

[48] See art. 46-47.

[49] See Title III of the Directive.

[50] For this reason «for concessions with a duration greater than five years the duration should be limited to the period in which the concessionaire could reasonably be expected to recoup the investment made for operating the works and services together with a return on invested capital under normal operating conditions, taking into account specific contractual objectives undertaken by the concessionaire in order to deliver requirements relating to, for example, quality or price for users» (whereas no. 52).

[51] See art. 42

[52] See artt. 43-44.

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First of all, the Directive regulates the power of modification of contracts during their terms, establishing that this power has to be provided clearly in advance «in the initial concession documents in clear, precise and unequivocal review clauses, which may include value revision clauses, or options»[53]. Moreover it is possible to modify some clauses of the concession contracts whereas it appears essential to assign additional services or to cope with unpredictable circumstances occurred[54]. Besides, contracting authorities may introduce some modifications if these are not substantial: in particular, taking into account the relevant case-law of the Court of Justice of the European Union, the Directive underlines that the duty to carry out a new award procedure is required when new conditions are introduced that, if known in advance, could have encouraged the participation of other candidates, or that could modify the economic balance of the concession or that could extend its scope[55]. But, at the same time, the Directive states that «contracting authorities and contracting entities should have the possibility to provide for modifications to a concession by way of review or option clauses, but such clauses should not give them unlimited discretion»[56].

Furthermore, the Directive regulates the power of termination of the contract[57]. In particular, Member States should «ensure that contracting authorities and contracting entities have the possibility, under the conditions determined by national law, to terminate a

[53] See art. 43, par. 1, let. a).

[54] See art. 43, par. 1, let. c). In particular the notion of "unforeseeable circumstances" is defined, referring to «circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority or contracting entity, taking into account its available means, the nature and characteristics of the specific project, good practices in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value»; anyway, also in this case the modification cannot justify an alteration of the nature of the overall concession (see whereas no. 76).

[55] On this point see art. 43, par. 43. See also whereas no. 75, according to which a new concession procedure is required in the case of «material changes to the initial concession, in particular to the scope and content of the mutual rights and obligations of the parties» that «demonstrate the parties' intention to renegotiate essential terms or conditions of that concession».

[56] Whereas no. 78.

[57] See art. 44.

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concession during its term if so required by Union law»[58]. But according to art. 43, this power of termination can be exercised only when a substantial modification of the concession has taken place, or when the concessionaire has been excluded from the concession award procedure, or, finally, when the Court of Justice of the European Union finds, according to art. 258 TFEU, that a Member State has failed to fulfil its obligations under the Treaties and this Directive[59].

Finally, the main rules regulating "public works concessions" have been extended to services concessions. In this way the discretionary powers of contracting authorities have been strongly limited, in order to ensure maximum transparency in the awarding procedure, but also in the execution of the concession, with regard to subcontracts and to the modification or termination of the contract. This complete discipline contributes to fully include service concession contracts in the general framework of public contracts.

3. THE PERSISTENCE OF TENDENCIES RECONSTRUCTING PUBLIC SERVICE CONCESSIONS AS PUBLIC LAW INSTRUMENTS AT NATIONAL LEVEL: AMBIGUITIES AND UNCERTAINTIES

Notwithstanding the "contractualization" process to which service concessions have been subject in the last decade[60], part of the Italian jurisprudence and doctrine have continued to reject the idea of considering public service concessions like contracts.

[58] See whereas no. 80.

[59] See art. 44.

[60] See V. Ricciuto - A. Nervi, *Il contratto*, cit., p. 38 et seq.; R. Caranta, *I contratti pubblici*, cit., p. 165.

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According to some scholars, in fact, EU law, while extending to the maximum degree public procurement regulation, has not taken into consideration the qualification of the concession instrument, which is provided only at national level[61]. Therefore, the formal reference to the word "contract" does not compromise the exclusive faculty of national legal systems to define the legal regime of concessions[62].

But above all, some argue that – even if the contractual nature of "services concessions" is recognized – these contracts are something distinct from the traditional institution of public service concessions[63]. According to some scholars, in fact, the presence of a *public object* – that is to say the public service – makes the contractual instrument, regulated by the public procurement rules, largely unsuitable to satisfy the public interest, also assuming the transfer of public law powers and responsibilities[64]. In particular, since public services and public goods are "unmerchantable goods"[65], the contract should be also

[61] See R. Villata, *Pubblici servizi. Discussioni e problemi*, Milan, 2008, p. 106 et seq., affirming that «art. 3 of the Public Procurement Code expressly considers services concessions as contracts, but this information does not seem to be relevant, because (…) the identification of said category with the granting of public services is uncertain, and because the EU legislator's aim was that of drawing a line between public contracts and services concessions and not to provide for a general concept and to affect the organizational faculty of Member States».

[62] See F. Fracchia, *Concessioni amministrative*, cit., p. 267 et seq.

[63] See F. Mastragostino, *Le concessioni di servizio*, cit., p. 99 et seq. On this point see also F. Fracchia, *Concessioni amministrative*, cit., p. 260, who affirms that the concept of service concession contained in the Civil Code cannot be referred to the services provided to the public. From this point of view it has been underlined that the relation between services concessions and public service concessions is of the kind *genus ad speciem*, following the distinction at EU level between services defined by art. 57 TFEU and services of general economic interest defined by art. 106: see L. Bertonazzi - R. Villata, *Servizi di interesse economico generale*, in M.P. Chiti-G. Greco, *Trattato di diritto amministrativo europeo. Parte speciale*, cit., p. 1857, assuming that «there are service concessions which cannot be considered as public service concessions, since they have not as object services of general interest directed to the community».

[64] See G. Calderoni, *La 'nuova' concessione di servizi*, cit., p. 268. In particular, on public service concessions see F. Roversi Monaco (edited by), *Le concessioni di pubblici servizi*, Rimini, 1988; A. Romano, *Profili della concessione di pubblici servizi*, cit, p. 459 et seq.; R. Cavallo Perin, *Riflessioni sull'oggetto e sugli effetti giuridici della concessione di servizio pubblico*, in *Dir. amm.*, 1994, p. 113 et seq.; A. Romano - G. Pericu - F. Roversi Monaco (edited by), *La Concessione di servizio pubblico*, Milan, 1995 and *ivi*, in particular, G. Pericu, *Il rapporto di concessione di pubblico servizio*, p. 83 et seq.; R. Cavallo Perin, *La struttura delle concessione di servizio pubblico locale*, Turin, 1998; G. Greco, *Le concessioni di pubblici servizi tra provvedimento e contratto*, cit., p. 381 et seq.; R. Villata, *Pubblici servizi*, cit., p. 106 et seq.

[65] For this old reconstruction see F. Cammeo, *Le concessioni per l'illuminazione pubblica*, cit., p. 473 et seq.; G. Zanobini, *Corso di diritto amministrativo*, I, *Principi generali*, Milan, 1938, p. 223; F. Ledda, *Il problema del contratto del diritto amministrativo*, cit., p. 116 et seq.; G. Falcon, *Convenzioni e accordi amministrativi*, in *Enc. Giur. Treccani*, Rome, 1988, p. 3; G. Greco, *Le concessioni di pubblico servizio*, cit., p. 384, who underlines «the

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regulated by public law and put under the jurisdiction of Administrative Courts for what concerns its execution and management. In order to assure said public law "shelter", legal scholars sometimes continue to refer to the "two level structure" of the concession-contract[66]; other times, the contract regulating public service concessions is reconstructed as a public law contract (the so called "administrative contract")[67].

In particular, analyzing this last approach, it should be underlined that with law no. 241 of 1990 on the administrative proceeding the Italian legislator has provided public administration with the possibility of entering with the private party into "administrative contracts" in the exercise of discretionary powers (art. 11)[68]. Public administrations can conclude, during an administrative proceeding, an agreement which integrates or substitutes an administrative act. Nevertheless, this agreement is disciplined only by the general principles of the Civil Code regulating obligations and contracts and is "protected" by a series of public law guarantees: first of all, it is subject to the same controls of the

temporary transfer of duties reserved to the public administration » as well as the main feature of the object consisting of «activities removed from the ordinary juridical circulation».

[66] In particular, for the two level theory of the "concession-contract" and for the distinction from "public law contracts" see also G. Pericu, *L'attività consensuale dell'amministrazione pubblica*, in L. Mazzarolli - G. Pericu - A. Romano – F.A. Roversi Monaco - F.G. Scoca (edited by), *Diritto amministrativo*, Bologna, 2005, spec. p. 306 et seq., and, more recently, A. Massera, *Lo Stato che contratta*, cit., p. 567, affirming that the contract must "implement" the administrative act. Other scholars, instead, underline the unilateral nature of the relationship: see F.G. Scoca, *La teoria del provvedimento dalla sua formulazione alla legge sul procedimento*, *in Dir. amm.*, 1995, p. 14 et seq.; in the same sense A. Romano, *Profili della concessione di pubblici servizi*, cit, p. 459 et seq., stating that at the basis of the agreement there can be only a unilateral public act, which makes the contractual instrument unsuitable for the purpose (p. 512).

[67] See G. Greco, *Gli accordi amministrativi*, cit., p. 162; S. Giacchetti, *Gli accordi dell'art.11 della legge n. 241 del 1990 tra realtà virtuale e realtà reale*, in *Dir. proc. amm.*, 1997, p. 519; in the same direction, A. Pioggia, *La concessione di pubblico servizio come provvedimento a contenuto convenzionalmente determinato. Un nuovo modello per uno strumento antico*, in *Dir. pubbl*., 1995, p. 567 et seq., affirming that the agreement between the contracting authority and the concessionaire is the «place where public interest is defined; it is the agreement concluded with the persons concerned in order to define the content of the final discretionary measure» (p. 611).

[68] From the point of view of the legal science, among the many contributions on administrative contracts which have followed the implementation of art. 11 of law no. 241 of 1990 we can recall: E. Sticchi Damiani, *Attività amministrativa consensuale e accordi di programma*, Milan, 1992; E. Bruti Liberati, *Consenso e funzione nei contratti di diritto pubblico*, cit.; S. Civitarese Matteucci, *Contributo allo studio del principio contrattuale nell'attività amministrativa,* Turin, 1997; F. Fracchia, *L'accordo sostitutivo: studio sul consenso disciplinato dal diritto amministrativo in funzione sostitutiva rispetto agli strumenti unilaterali di esercizio del potere*, Padua, 1998; P.L. Portaluri, *Potere amministrativo e procedimenti consensuali*, cit.; G. Manfredi, *Accordi e azione amministrativa*, Turin, 2001; G. Greco, *Accordi amministrativi tra provvedimento e contratto*, cit.; F. *Cangelli, Potere discrezionale e fattispecie consensuali*, Milan, 2004.

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administrative act which it replaces; secondly, the public administration is granted a general power to terminate the contract for causes of public interest; lastly, all the facts relating to the agreement are put under the jurisdiction of Administrative Courts.

For all these features some scholars have considered the "administrative contract" as a general legal category which can reconcile public interest and contractual regulation: in this sense art. 11 would essentially introduce the "public law contract" in the Italian legal system, which, already existing in Germany, is different from the administrative act as well as the private law contract[69].

In particular, reference to the administrative contract allows us to consider the concession as a unique relationship, without turning to the two-level "concession-contract" theory, and without renouncing to public law prerogatives[70]. Therefore, with art. 11 a private law relationship coexists with a public law relationship in a single legal instrument, so that the "two level" construction can be avoided[71]. Concessions are in this way subject to the private law rules which regulate ordinary contracts only to the extent to which said rules are "*compatible*" with the public law rules which guarantee the satisfaction of the public

[69] As affirmed by some prominent scholars (G. Greco, *Gli accordi amministrativi*, p. 159), today in art. 11 should be included also the so called «'typical' necessary agreements», that is to say all the «agreements and contracts already classified by their respective disciplines and which do not substitute the administrative act». In the same sense also P.L. Portaluri, *Potere amministrativo e procedimenti consensuali (studi sui rapporti a collaborazione necessaria)*, Milan, 1998 and A. Pioggia *La concessione di pubblico servizio come provvedimento a contenuto convenzionalmente determinato*, cit., p. 622 et seq., stating that art. 11 includes «all consensual agreements to which public administration takes part, without taking advantage of its private autonomy and exercising a public power aiming at pursuing the public interest provided by the law». Lastly A. Massera, *Lo Stato che contratta e che si accorda*, cit., p. 560, defines the nature of the provisions contained in art. 11 as «general provisions on administrative contracts».

[70] On this point, A. Pioggia, *La concessione di pubblico servizio come provvedimento a contenuto convenzionalmente determinato*, cit., p. 623, underlining the importance of art. 11 to grant public service concessions «that uniqueness which legal scholars have always considered as necessary» and which, on the other hand, «provides for a satisfying solution to the uncertain relationship between the destiny of the administrative act and the survival of the contract». For the jurisprudence, see judgment of the Council of State no. 1327 dated 13 March 2000.

[71] According to F. Merusi, *Il coordinamento e la collaborazione di interessi pubblici e privati dopo le recenti riforme*, in *Dir. amm.*, 1993, p. 36, art. 11 of law no. 241 of 1990 marks the end of the "two level construction", since there is no longer reason for «looking for different legal situations referring to the different phases of the agreement»: the legal relationship is unitary.

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interest[72]. Furthermore, since the establishment, the interpretation and the execution of administrative contracts are put under the exclusive jurisdiction of Administrative Courts, the analysis of this instrument also allows to overcome the traditional conflicts of jurisdiction between Civil Courts and Administrative Courts for the decision of legal disputes[73].

In the same direction, also public service contracts (so called "contratti di servizio") are often considered as administrative contracts by the legal doctrine and the jurisprudence[74]. In fact, since they are «contracts with a public object», they «could be included in the same category of the agreements which substitute an administrative act, since they replace the former concession contract which was regulating the relationship between Public Administration and operator»[75]. Within the same consensual relationship public administration is granted with a public law power «converging toward and laying near the contractual autonomy of the party involved»[76].

By the way, the theories which reject the possibility of considering concessions as real contracts underline the necessity that the instrument with which public administration grants the performance of a public service shall be subject to the discipline of the

[72] In particular, E. Bruti Liberati, *Consenso e funzione nei contratti di diritto pubblico*, Milan, 1996, p. 237 et seq.

[73] Conflicts which, as underlined by M. D'Alberti, *Le concessioni amministrative*, cit., p. 255 et seq., have largely influenced the different theories on concessions.

[74] It is well known that the concept of public service contracts traces back in the EU legal system to EEC Regulation no. 1893 of 1991 on transport by rail, road and inland waterway. On the nature of public services contracts see D.U. Galetta - M. Giovinazzi, *Trasporti terrestri*, in M.P. Chiti - G. Greco, *Trattato di diritto amministrativo europeo*. *Parte speciale*, IV, Milan, 2007, II ed., p. 2227 et seq.; lastly, the contractual nature of public services contracts is recognized by A. Mozzati, *Contributo allo studio del contratto di servizio*, Turin, 2010. As far as the jurisprudence, the interpretation relating service contracts to service agreements prevails: see judgment no. 2750 dated 10 June 2010 of the Regional Administrative Court of Piedmont, analyzed by M.P. Genesin, in *Foro Amm. Tar*, 2010, p. 3081 et seq.

[75] See judgment no. 2750 of 2010 of the Regional Administrative Court of Piedmont stating that public administration is entitled to stipulate also «administrative contracts»; these administrative contracts – which are different from the ordinary ones – replace the concession (regarded as an administrative act), but they remain an expression of public authority.

[76] Judgment no. 1750 of 2010 of the Regional Administrative Court of Piedmont.

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«administrative function» (so called «funzione amministrativa»)[77]. Today, nobody considers concessions as authoritative or *juri imperii* acts[78]. But many believe that private law cannot guarantee an adequate satisfaction of the public interest and cannot deeply control the exercise of the granted powers[79].

Traditionally, in order to enhance the performance of the public service, public administration has been entitled to exert "*clauses exorbitantes du droit commun*", other than those explicitly provided for by the law, among which: the power to stop the supply of the service for serious public interest reasons[80]; the power to dismiss the failing concessionaire[81]; and, above all, the power to revoke a concession for public interest reasons[82]. And still today the refusal to use private law contracts to regulate public service relationships is justified by the necessity to provide for a series of exorbitant powers and faculties in order to control that concessions contracts are properly executed and, as a consequence, that the activity performed by the private operator satisfies the public

[77] On this point see E. Bruti Liberati, *Consenso e funzione*, cit., who gives major importance in the study of public law contracts to the issue of the "public function", which today does not relate only to unilateral instruments but can be found also with regard to public law consensual instruments.

[78] Clearly rejected also in public law reconstructions: it is sufficient to look at the analysis of D. Sorace - C. Marzuoli, *Concessione amministrativa*, cit., p. 295 et seq. It is also rejected, even if in unilateralist reconstructions of administrative concessions, for instance, by F.G. Scoca, *La teoria del provvedimento*, cit., p. 24.

[79] On this point B.G. Mattarella, *L'imperatività del provvedimento*, cit., p. 339, states that authoritative elements can be found in the pursuit of public interests, as well as in the subsequent control of the proper exercise of the granted powers. On the necessary "functionalization" to the public interest and discretion which should characterize concessions see, A. Pioggia *La concessione di pubblico servizio come provvedimento a contenuto convenzionalmente determinato*, cit., p. 622 et seq.

[80] See judgment no. 21, dated 18 January 1983, of Regional Administrative Court of Emilia Romagna, Bologna, in *TAR*, 1983, I, p. 925.

[81] A power recognized since the Twenties of the last century: Court of Appeal of Florence, 7 April 1925, in *Giur. it.*, 1925, I, 2, 404; Council of State, section IV, 17 February 1942, in *Giur. it.*, 1942, III, 106. More recently, Council of State, section IV, 29 December 1987, n. 836, in *Cons. Stato*, 1987, I, p. 1771.

[82] On the importance of the authoritative reconstruction to legitimate the power of revocation see B.G. Mattarella, *L'imperatività*, cit., p. 341. The revocation has been regarded by the jurisprudence as the exercise of a discretionary power, characterized by evaluations of opportunities in the pursuit of public interests: *ex multis*, Supreme Court of Cassation, United Sections, 10 May 1979, in *Giur. it.*, 1980, I, 1, 275; Supreme Court of Cassation, section I, 8 September 1983, n. 5527, in *Foro it.*, 1983; Regional Administrative Court of Lombardia, Milan, section II, 20 October 1994, n. 611, in *TAR*, 1994, I, p. 4396. It should be underlined that the administrative judge has gradually strengthened the jurisdictional control also on the substantial reasons which legitimate the use of this power: see, for instance, judgment of the Council of State, section VI, no. 1051, dated 18 December 1963, in *Cons. Stato*, 1963, I, 2010 and, more recently, judgment no. 1230, dated 19 December 1991.

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interest[83]. And thus, for instance, the existence of a power of revocation which falls under the jurisdiction of Administrative Courts is justified[84]; a power to declare forfeiture distinct from the power of revocation with regard to prerequisites and the duty of justification is legitimized[85]; a special power of termination for public interest reasons provided for all administrative contracts by art. 11, para. 4, of law no. 241 of 1990 can be used, beyond all explicit provisions contained in the contract[86]. These are powers which are usually subject to the jurisdiction of Administrative Courts – in compliance with art. 133, para. 1, lett. *c*) of the Code of administrative procedure (regulating the jurisdiction on public service concessions) or, sometimes, in compliance with art. 133, para. 1, lett. *a*) (regulating the jurisdiction on administrative contracts) – which should guarantee, also from a judicial perspective, a greater protection of the public interest.

Anyway, the aforementioned theories maintained by the legal science and the administrative jurisprudence are, for some aspects, ambiguous and uncertain.

[83] From this point of view Ranelletti's words do not appear so distant. Referring to the «life of the concession», he underlines the necessity to provide «public administration with a power to supervise continuously the private operator in the exercise of the granted power, and with a right to issue all the measures deemed necessary to pursue that harmony *in the satisfaction of public interest and of private law*» (emphasis added: O. Ranelletti, *Facoltà create dalle autorizzazioni e concessioni amministrative*, pt. III, cit., p. 256 et seq.). In particular, «the administrative authority, aiming at satisfying public objectives, must do everything which is necessary to achieve said objectives, and, consequently, in our field it shall modify, stop or revoke, depending on the situation, the concession, whether or not the fault of the concessionaire is recognized» (p. 283).

[84] See judgment of the Regional Administrative Court for Sardinia, section I, no. 124, dated 6 February 2008, stating that: «the administrative judge is competent for the dispute on the revocation of a public service concession (with subsequent termination of the agreement) issued by the local authority for public interest reasons (in this case the necessity to adopt a new form of waste management, considered as a public interest, through the implementation of the separate collection of rubbish and a new determination of the tax amount); the dispute is concerned, in fact, with the legitimacy of the public law powers exercised by the local authority, with regard to which the plaintiff holds a position of legitimate interest».

[85] According to judgment no. 5235, dated 3 October 2000 of the Council of State (section IV), the act declaring the "forfeiture" of the concessionaire should be limited to «verify the existence of the conditions provided for by the law which cause the loss of the benefit previously granted», while the revocation should relate to the «evaluation of the reason of public interest».

[86] Even if referring to a concession agreement on public goods (mines) which is related to art. 11 of law 241 of 1990, see judgment no. 2077, dated 30 December 2011, section II, of the Regional Administrative Court of Tuscany, Florence, stating that public administration is entitled to terminate the administrative contract, using the special power of termination provided for by art. 11, para. 4, of law no. 241 of 1990.

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First of all, the reconstruction of a public service concession as an "administrative contract" is not persuasive. The provision contained in the Italian law on the administrative proceeding (art. 11, law no. 241 of 1990) relates to the existence of an administrative procedure and, above all, assumes the participation of a private party before the exercise of a discretionary power on the part of the public authority[87]. Therefore, it has nothing to do with the object of the concession, which consists of the acquisition on the market of a specific service at the best qualitative and economic conditions[88].

But, above all, reference to the administrative contract does not clarify the concrete legal regime which can be applied to concessions, considering that private law rules are "intertwined" with the rules regulating the exercise of the public authority[89]. This very aspect constitutes one of the more important differences between Italian "administrative contracts" and the other "public law contracts" existing in France and Germany, with which the Italian ones are often compared. In fact, these instruments refer to a precise legal regime which is clearly different from the administrative act and the ordinary contract. German public law contracts ("*Verwaltungsvertrag*"), unlike Italian "administrative contracts", have a distinct and autonomous discipline relating to all the aspects and the facts of the relationship: we can think, for instance, of the invalidity regime and the third party protection[90]. With regard to the French "*contrat administratif*", the jurisprudence of the

[87] From this point of view it is very difficult to overcome the normative element: first of all, art. 11 of law no. 241 of 1990 is part of chapter III on the «Participation to the administrative proceeding»; but above all, the agreement can be concluded, in compliance with para. 1 of the same article, «when accepting observations or proposals» presented by the private parties that are entitled to participate to the proceeding.

[88] See A. Massera, *Lo Stato che contratta*, cit., p. 563, which underlines the diversity of powers, objects and purposes between "administrative contracts" and "private law contracts".

[89] It is no coincidence that the same doctrine which had first and decisively stated that public service concessions fall into the category of the administrative contract has admitted the difficulty in establishing if this contract could be "nullified" by a subsequent administrative act: G. Greco, *Le concessioni di pubblici servizi tra provvedimento e contratto*, cit., p. 383.

[90] After the general law on the procedure entered into force in 1976 (*Verwaltungsverfahrensgesetz, VwVfG*), public law contracts (*Verwaltungsvertrag*) have been meticulously disciplined, especially with regard to the regime governing invalidity, the third party protection and the relationship with the Civil Code (par. 54 et seq.). On this issue see also, following the entry into force of said law, W. Henke, *Allgemeine Fragen des öffentlichen Vertragsrechts*, in *JZ*, 1984, p. 441; H. Maurer, *Der Verwaltungsvertrag - Problemen und Möglichkeiten*, in *DVBl*,

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Conseil d'Etat has established, from the Thirties of the last century, a real public law "contractual" system with precise rules which differ from private law provisions[91]. But this has not happened with regard to Italian administrative contracts. Even if twenty years have passed since the Italian law on administrative proceeding has entered into force, these instruments remain something "hybrid" between public law and private law, since the administrative jurisprudence has not adequately filled in the normative gaps[92].

For this reason, said uncertainties on the legal regime applicable suggest to rigorously limit reference to art. 11 only to the hypothesis where private parties intend to "negotiate", within an administrative procedure, the exercise of the discretionary power[93]. All attempts to interpret this instrument as a "general type" which includes all different administrative contracts risk weakening, on the one hand, the potential innovative charge

1989, p. 789; W. Hofling – G. Krings, *Der verwaltungsrechtliche Vertrag: Begriff, Typologie Fehlerlehere*, in *JuS*, 2000, p. 505; M. Werner, *Allgemeine Fehlerfolgenlehre für den Verwaltungsvertrag*, Baden-Baden, 2008; W. Hoffmann-Riem - E. Schmidt-Aßmann - A. Voßkuhle, *Grundlagen des Verwaltungsrechts*, München, 2008; H. Maurer, *Allgemeines Wervaltungsrecht*, München, 2010. With regard to the debate on the "admissibility" of public law contracts see above all: P. *Laband, Das Staatsrecht des Deutschen Reiches*, Tübingen,*1876;* O. Mayer, *Zur Lehere von öffentlichrechtlichen Verträge*, in *Archiv für Öffentliches Recht*, 1888; G. *Jellinek, System der subjektiven öffentlichen Rechte, Freiburg, 1892;* W. Apelt, *Der Verwaltungsrechtliche Vertrag*, Leipzig, 1920; F. Fleiner, *Institutionen des deutsche Verwaltugsrechts*, Tübingen, 1928; K. Stern, *Zur Grundlegung einer Lehre des öffentlich-rechtlichen Vertrag*, in *Verw. Arch.*, 1958; Bullinger, *Vertrag und Verwaltungakt*, Stuttgart, 1962. For the Italian doctrine see A. Masucci, *Trasformazioni dell'amministrazione e moduli convenzionali. Il contratto di diritto pubblico*, Naples, 1988.

[91] The bibliography on the *contrat administratif* is very rich: apart from general dissertations on administrative law, where the issue is given, by the way, a central position, it is worth mentioning G. Jeze, *Les contrats administratifs de l'État, des départements, des communes et des établissements publics,* 3 vol., Paris, 1927-1934; G. Péquignot, *Théorie générale du contrat administratif*, Montpellier, 1945; A. de Laubadere - F. Moderne - P. Devolvè, *Traité des contrats administratifs*, 2 vols., Paris, 1983; S. Flogaitis, *Les contrats administratifs*, London, 1988; R. Drago, *Le contrat administratif aujourd'hui*, in *Le contrat, Droits*, n. 12, 1990, p. 117 ss.; F. Lichère, *Droits des contrats publics*, 2005; F. Lombard, *La cause dans le contrat administratif*, Paris, 2008; J. Martin, *Les sources de droit privé du droit des contrats administratifs*, 2 vol., Paris, 2008; L. Richer, *Droit des contrats administratifs*, Paris, 2010; C. Guettier, *Droit des contrats administratifs*, Paris, 2011.

[92] Most of the times the jurisprudence has simply underlined that administrative agreements cannot be considered as private law contracts, even if it has never clarified, from the point of view of the legal regime, said difference. See on this point M. D'Alberti, *Lezioni di diritto amministrativo*, Turin, 2012, p. 272-273, who affirms that the jurisprudence should play a central role in the definition of the legal regime of administrative agreements, also taking into consideration the experience of the French administrative contracts, where the judge is «*maître de sa jurisprudence*» as far as the use of private law to define the legal regime of these instruments.

[93] In this sense, V. Cerulli Irelli, *Relazione conclusiva*, in *Annuario AIPDA 2011. L'atto autoritativo. Convergenze e divergenze tra ordinamenti*, Naples, 2012, p. 389, stating that administrative agreements are «expressions of the administrative power, they are not negotiations, they constitute *an alternative way to close the administrative proceeding*» (emphasis added).

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which this institute must still display within the administrative law field; on the other hand, they risk making art. 11 a mere formal reference deprived of a meaningful juridical and legal connotation[94].

But, besides referring to the administrative agreement, the refusal to fully extend private law rules leads to a problematic "overlapping" between private law rules and public law ones, especially in the execution phase of the concession relationship. In fact, although different administrative judgments state that in the execution phase of the concession relationship «civil law rules on the non compliance of obligations must be fully and completely enforced» and that said relationship must be subject to «the civil law rules on the fulfillment of duties and on the good faith of the parties involved (art. 1375 of the Civil Code)»[95], the jurisprudence still legitimates, in the execution phase, the presence of "*clauses exorbitantes du droit commun*" in favor of the public administration.

In particular, even when the public administration seems to exercise common rights and bargaining powers to assure the proper fulfillment of the concession, the jurisprudence tends to classify concessions as administrative acts, above all to justify the jurisdiction of the Administrative Courts. And thus, for instance, the power to terminate a concession because the concessionaire fails to fulfill his obligations is regarded as exercise of administrative discretion, even if this same power consists in a mere technical assessment of the proper fulfillment of the conditions established in the contract[96]. Or the act with which the public administration inflicts a penalty for late or irregular fulfillment is considered as discretionary power[97]: as a consequence, even if the penalty is issued because

[94] For a critical analysis on «the emphasis with which the juridical relevance of the administrative contracts provided for by art. 11 is too often underlined» see A. Romano, *Riflessioni dal convegno: autoritarietà, consenso e ordinamento generale*, in *Annuario AIPDA 2011*, cit., p. 380.

[95] Judgment of the Council of State no. 9347 of 2010, cit.

[96] On the reconstruction of the power of termination in authoritative-discretionary terms (even if referring to a concession of goods), see judgment no. 519, dated 14 April 2011, of the Regional Administrative Court of Calabria, Catanzaro.

[97] The Council of State, expressing its opinion on the scheme of a concession for the exercise of legal games (Council of State, section III, 13 November and 4 December 2007, advice no. 3926), has affirmed that the penalty clause provided for in the agreement in favor of the "Amministrazione dei Monopoli di Stato" for non-fulfillment or delay in the execution of the contract, far from being a pecuniary sanction, cannot by the way «be equaled to the

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of the non-fulfillment of the contract, its enforcement is considered as expression of a discretionary power exercised to protect public interests[98].

Nonetheless, the reconstruction of these faculties as administrative discretionary powers is not convincing[99]. If the termination measure aims essentially at verifying the failure of the concessionaire, there is not (and there must not be) place for discretionary evaluations[100]; and if the revocation order is sometimes issued on the basis of the delay in the execution of the service[101], as a consequence, the revocation measure cannot be considered as an administrative power, since it resembles an ordinary resolution clause; and lastly, if to issue a penalty also the public administration must give evidence of the non-fulfillment of the obligations, as it happens for contracts between private parties, then we are not in front of an administrative power[102]. In conclusion, if it must be verified that the contract clauses are respected, as well as the provisions on the fulfillment of obligations, there can be no room for the exercise of an administrative power and, at the same time, there can be no jurisdiction of Administrative Courts.

penalty clauses of private law relationships (…) but takes on only an indirect coercive function, since it is not connected to the presence of a real damage, and becomes effective only in case of actual non-fulfillment».

[98] See judgment of the Council of State no. 3023 of 2011, cit.

[99] On the issue of the juridical nature and the regime which can be applied to the administrative acts which affect negotiations, see G. Greco, *I contratti della pubblica amministrazione tra diritto comune e diritto privato. I contratti ad evidenza pubblica*, Milan, 1986, p. 89 et seq., who makes a distinction between administrative measures and «administrative negotiations», which are defined as «acts with an administrative regime, producing civil law effects and with a negotiation content» (p. 98). On this point see also F.G. Scoca, *La teoria del provvedimento*, cit., spec. p. 20.

[100] On the distinction between discretionary evaluation and technical verification it is insuperable M.S. Giannini, *Il potere discrezionale della pubblica amministrazione*, Milan, 1939.

[101] See judgment no. 1230, dated 6 July 2009, of the Regional Administrative Court for Sicily, Catania, which, given a concession which relates the revocation to the proper execution and fulfillment of the agreement, defines the revocation measure as a real «explicit resolutive clause».

[102] From this point of view, therefore, there is no reason to define the act which implements a penalty as an administrative act, and to refer to the categories of the "*excès de pouvoir*", in the forms of reasonableness and proportionality, if this act is subsequently evaluated from the point of view of the fulfillment of the contractual obligations.

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4. THE ISSUE OF THE USE OF PRIVATE LAW FOR THE REGULATION OF PUBLIC SERVICES

The (national) diffidence in using private law for contractual relationships having as object public services and public goods has been traditionally connected to the idea of legitimating "*clauses exorbitantes du droit commun*" in favor of the public administration when public objects which must be managed in the interest of the community are involved[103]. In particular, public services – which are fundamental to assure the full exercise of the social and civil rights of the citizens[104] – should be managed using an instrument which can closely respond to the public interest[105].

Furthermore, the issue of the "public object" has often been connected to (and confused with) the issue of the activities reserved to the State and, above all, to a

[103] The relation between necessities of "functionalization" to the public interest and the "*clause exorbitante du droit commun*" is underlined by E. Bruti Liberati, *Le vicende del rapporto di concessione*, cit, p. 165.

[104] On the theory of the "*service public*" are fundamental M. Hauriou, *La gestion administrative. Étude théorique de droit administratif*, Paris 1899, vol. I, p. VII; L. Duguit, *Les transformations du droit public*, Paris 1913, p. XIX. For the italian legal science, see U. Pototshnig, *I pubblici servizi*, Padua, 1964; F. Merusi, *Servizio pubblico*, in *Novissimo Digesto Italiano*, Turin, 1970; M.S. Giannini, *Diritto pubblico dell'economia*, Bologna, 1995, p. 141 ss. More recently, on the transformation of the Italian concept of public service following the influence of EU law, see, N. Rangone, *I servizi pubblici*, Bologna, 1999; G. Napolitano, *Servizi pubblici e rapporti di utenza*, Padua, 2001; L.R. Perfetti, *Contributo ad una teoria dei pubblici servizi*, Padua, 2001; F. Merusi, *La nuova disciplina dei servizi pubblici*, in *Annuario AIPDA 2001*, Milan, 2002, p. 63 et seq.; G. Corso, *La nuova disciplina dei servizi pubblici*, in *Riv. quad. serv. pubbl.*, 2002, n. 12, p. 9 et seq.; G. Cartei, *Il servizio universale*, Milan, 2002; E. Scotti, *Il pubblico servizio. Tra tradizione nazionale e prospettive europee*, Padua, 2003; G. Napolitano, *Regole e mercato nei servizi pubblici*, Bologna, 2005.

[105] From this point of view it has been underlined that the relationship between services concessions and public service concessions is of the kind *genus ad speciem*, following the EU distinction between services under art. 57 TFEU and services of general economic interest (SGEI) under art. 106 TFEU: in this sense L. Bertonazzi - R. Villata, *Servizi di interesse economico generale*, in M.P. Chiti-G. Greco, *Trattato di diritto amministrativo europeo. Parte speciale*, cit., p. 1857, affirming that «the relationship between services concessions and public service concessions is similar to the one *genus ad speciem*, since all public service concessions are services concessions, whereas there are services concessions which cannot be considered as public service concessions, since they do not have as object services of general interest directed to the community». For the discipline of SGEI see, in particular, D. Gallo, *I servizi di interesse economico generale*, Milan, 2010.

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"subjective" notion of public service[106]. In his *Principii di diritto amministrativo italiano*, Santi Romano affirms that the right to exercise a public service «is entitled only to the public administration», whereas «it can be exercised by private operators only if the public authority awards said right to them» through a concession[107]. And also more recently, the theories which have considered concessions from a public law perspective continue to underline the fact that the concession instrument brings about «a temporary transfer of duties entitled to the public administration» and concerns «unmerchantable goods»[108].

But, by the way, can we say that the effects of a concession contract on a "public object" – as it is the case for public services – prevent the reconstruction of the concession relationship as a private law relationship?

First of all, it should be underlined that the EU law has prompted a transformation of the concept of public service which, since it does not necessarily entail activities *a priori* "reserved" to the Government, cannot be considered *per se* as a "public object", taken away from private subjects. In particular, the entry into force of articles 41 and 43 of the Italian Constitution[109], and, subsequently, the European integration process and the markets liberalization process (also through the diffusion of the notion of "*Services of general economic interest*" ratified by art. 106 TFEU)[110] have encouraged the abandonment of a

[106] See F. Merusi, *Servizio pubblico*, cit., p. 219 et seq., who underlines the importance of the moment in which a public administration "undertakes" an activity and, consequently, of the variability of the notion of "public service" depending on the changes in the society.

[107] S. Romano, *Principii di diritto amministrativo italiano*, II ed., Milan, 1906, p. 180.

[108] G. Greco, *Le concessioni di pubblici servizi*, cit., p. 384 and, in the same sense, G. Falcon, *Convenzioni e accordi amministrativi*, in *Enc. Giur.*, cit, p. 3, and, more recently, F. Fracchia, *Concessione amministrativa*, cit., p. 257 et seq.

[109] Reference is to M.S. Giannini, *Lezioni di diritto amministrativo*, Milan, 1950, p. 171 et seq., and, more completely, to U. Pototschnig, *I pubblici servizi*, Padua, 1964. Both refer to the constitutional provisions to underline that public service is characterized by the fact that a particular economic activity is subject to the programs and controls provided for by art. 41, para. 3, of the Italian Constitution, and that, above all, said public service remains such also if its management is awarded to private operators. On this point also M. D'Alberti, *Lezioni di diritto amministrativo*, cit., p. 136-137, affirming that the objective notion of public service has been fostered in Italy on the basis of art. 43 of the Constitution.

[110] On the liberalization process in the field of public services see S. Cassese (edited by), *La nuova costituzione economica*, Rome-Bari, 2011; M. D'Alberti, *Poteri pubblici, mercati e globalizzazione*, cit. Especially in the liberalized markets (such as Telecommunication and Energy), traditional concession instruments have been

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"subjective" notion of public service, to the advantage of an "objective" one[111]: also by virtue of a clearer separation between the actual supply of the service and its regulation and control – on the basis of the Anglo-Saxon experience of the *public utilities*[112] – the public service cannot any longer be considered as an activity which is necessarily managed by public bodies, but rather as a set of economic activities which are characterized by the fact that they are subject to a specific regulation in order to guarantee the interests of citizens[113].

Therefore, in the absence of activities actually reserved to the Government, as provided by art. 43 of the Italian Constitution, it is no longer necessary to use public law instruments[114]. Since public service is an economic activity performed essentially as an entrepreneurial business, it is founded first of all on the principle of economic freedom and, consequently, it can be carried out according to the free market principle, with the

replaced by non–discretionary licenses and permissions: on this point N. Rangone, *I servizi pubblici*, cit., p. 265 ss.; F. Fracchia, *Concessione amministrativa*, cit., p. 263.

[111] On the reconstruction of the concept of public service from an "objective perspective", see judgment no. 4870, dated 19 June 2012, of the Council of State, section VI, stating that the notion of public service is intrinsically connected to the presence of a «legislative provision which, alternatively, attributes its establishment and organization to the [Public] Administration», beyond the juridical nature of the operator performing the service. Beside the public nature of the provisions, it is also necessary that the benefits deriving from the exercise of said activity «are directed to the advantage of a more or less wide number of users (in case of indivisible services) or, in any case, of third party beneficiaries (in case of indivisible services)».

[112] See T. Prosser, *Public Service Law: Privatization's Unexpected Offspring,* in *Law and Contemporary Problems*, 2000, p. 63 et seq.

[113] As underlined by the legal doctrine, public services are mainly private activities, sometimes performed within a competitive system, which are subject to special rules and obligations: G. Napolitano, *Regole e mercato nei servizi pubblici*, cit., p. 147. Furthermore, to confirm the fact that we can consider as public services private activities performed within a competitive system, Directive 2006/123/EC on services in the internal market provides that also services of general economic interest are subject to the rules on the freedom of establishment like private services: as underlined, the directive on services is formally applied also to SGEI, since the hypothesis of a «general derogation on social politics» has not been accepted (D. Gallo, *I servizi di interesse economico generale*, cit., p. 441).

[114] On this point M. D'Alberti (edited by), *Concessioni e concorrenza*, Rome, 1998, p. 162, who underlines that the great use of concessions, not only for reserved activities but also for free activities in our legal system, cannot at all be accepted; he states that «the reasons connected to the universality of the service and the reason founded on the controls to be made for social purposes as provided for by art. 41 of the Constitution are not sufficient to justify the use of administrative concessions»; and that «only the exception justifies the use of concessions», whereas in all the other cases concessions should be replaced with «common law instruments». On art. 43 of the Italian Constitution see, in particular, S. Cassese, *Legge di riserva e articolo 43 della Costituzione*, in *Giur. cost.*, 1960, p. 1344 et seq., and F. Galgano - S. Rodotà, *Rapporti economici (art- 41-44)*, in *Commentario alla Costituzione a cura di G. Branca*, Bologna, 1982.

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exception that it must respect public service obligations[115]. And when, in case of market failure, it is necessary to grant a special or exclusive right to a private operator, public law can help in selecting with transparency and without discrimination the best offerer (public tender), while private law can regulate the contractual relationship.

Secondly, as to the discipline applicable to the award of concession contracts, at European level there is not a clear and relevant distinction between public services and other services, especially after the European Directive on concession contracts has been adopted.

In fact, it is true that art. 4 of the new Directive sets forth «the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to»: so the Directive allows Member States to freely define, in compliance with the principles of the TFEU on equal treatment, non-discrimination, transparency and the free movement of persons, which activities can be considered public services, their scope and the characteristics of the services to be provided, including any conditions regarding the quality of said services, in order to pursue their public policy objectives[116].

Nevertheless, these principles do not entail a general exclusion of public service concessions from the scope of the Directive. In fact, even if some judgments of the European Court of Justice (ECJ) seem to legitimate a sort of general exclusion of public service activities from the application of the framework concerning public contracts, with

[115] On this point see D. Sorace, *Servizi pubblici e servizi (economici)*, cit., p. 407. The concept of public service is related to art. 41 of the Constitution, which ratifies the principles of "economic freedom" and "freedom of contract", also by R. Cavallo Perin, *Riflessione sull'oggetto e sugli effetti giuridici della concessione di pubblico servizio*, cit., p. 115, who, however, affirms that concessions realize «the transfer of the economic and juridical situation of the public administration with reference to a specific public service (substitution)». On this point also F. Merusi, *Servizio pubblico*, cit., p. 221, who underlines that in public service concessions «the service is simply an economic activity "planned" through a particular administrative regime (…), founded on art. 41, para. 3, of the Constitution». In the same sense, F. Trimarchi Banfi, *Organizzazione economica ad iniziativa privata e organizzazione economica ad iniziativa riservata negli artt. 41 e 43 della Costituzione*, in *Pol. dir.*, 1992, p. 3 et seq., stating that, from a general and theoretical point of view, everyone can carry out free economic activities according to art. 41 of the Constitution.

[116] On this point, see whereas no. 6.

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the exception of the application of the principle of transparency[117], the Directive expressly excludes only some (limited) kind of public services: first of all, the «non-economic services of general interest»[118]; secondly, the public services characterized by the presence of specific regulations, such as air transport services[119], electronic communications services[120], the water sector[121], concessions in the fields of defence and security which are governed by specific procedural rules[122], the operation of gambling and betting[123], or the emergency services provided by non-profit subjects[124]; thirdly, certain social, health, or educational services are subject only to the general principles of this Directive, but are

[117] See ECJ, Fourth Ch., 14 November 2013, case C-388/12, *Comune di Ancona*, affirming that «public service concessions are not governed by any legislation at EU level», precising later that «in the absence of legislation, the law applicable to service concessions must be assessed in the light of primary law and, more specifically, the fundamental freedoms laid down in the Treaty on the Functioning of the European Union (see case C 324/98 Telaustria and Telefonadress [2000] ECR I 10745, paragraph 60)» (par. 45). For this reason even if «EU law does not preclude the award, without a call for tenders, of a public service concession relating to works", on the other side "the principles of equal treatment and of non-discrimination on grounds of nationality impose, particularly on the contracting authority, a duty of transparency, consisting in the duty to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the award procedure to be opened up to competition and the impartiality of that procedure to be reviewed, without necessarily implying an obligation to call for tenders (Case C 260/04 Commission v Italy [2007] ECR I 7083, paragraph 24, and Case C 324/07 Coditel Brabant [2008] ECR I 8457, paragraph 25)» (par. 46).

[118] See art. 4, par. 2: «Non-economic services of general interest shall fall outside the scope of this Directive».

[119] According to art. 10, par. 3, «This Directive shall not apply to concessions for air transport services based on the granting of an operating licence within the meaning of Regulation (EC) No 1008/2008 of the European Parliament and of the Council (22) or to concessions for public passenger transport services within the meaning of Regulation (EC) No 1370/2007».

[120] See art. 11.

[121] See art. 12, according to which «This Directive shall not apply to concessions awarded to: (a) provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water; (b) supply drinking water to such networks». In fact, concessions in the water sector which are «often subject to specific and complex arrangements which require a particular consideration»: see whereas no. 40.

[122] As referred to in Directive 2009/81/EC: see art. 10, par. 5.

[123] See whereas no. 35.

[124] See whereas no. 36.

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excluded from the application of its rules since they have a "limited cross-border dimension"[125].

Anyway apart from these exclusions, the other services of general economic interest – that are not directly exposed to competition on markets in the Member State concerned[126] – fall within the scope of the Directive. In confirmation of this, the Directive explicitly mentions some typical public service sectors – such as energy, transport and postal services – where it is necessary to introduce some coordination provisions in order to ensure «a real opening up of the market and a fair balance in the application of concession award rules»[127].

Furthermore, the general exclusion from the scope of the Directive of the services whose value is lower than a certain threshold – and that for this reason do not reflect the clear cross-border interest of concessions to economic operators located in other Member States – is applicable, according to the Directive, both to the public services and to the other services[128]. In any case, according to the European jurisprudence, the principles of equal treatment and non-discrimination will apply also to these concession contracts on grounds

[125] In fact, these services are provided within a particular context that varies widely amongst Member States and that is related to the different cultural traditions: for this reason it is sufficient to impose at European level only the obligation to publish a prior information notice and a concession award notice: see art. 19 and whereas no. 53. Besides, whereas no. 54 establishes that «Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate».

[126] See art. 16. On this point whereas no. 33 specifies that «this Directive should not apply to concessions awarded by contracting entities and intended to permit the performance of an activity referred to in Annex II if, in the Member State in which that activity is carried out, it is directly exposed to competition on markets to which access is not limited, as established following a procedure provided for to this purpose in Directive 2014/25/EU of the European Parliament and of the Council».

[127] See whereas no. 24, affirming that «Certain coordination provisions should also be introduced for the award of works and services concessions in the energy, transport and postal services sectors, given that national authorities may influence the behavior of entities operating in those sectors, and taking into account the closed nature of the markets in which they operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the services concerned». For these sectors, only whereas the services concessions are awarded on the basis of a preexistent exclusive right which that operator enjoys under national law and in accordance with European Union, it will be possible to avoid the application of the Directive rules «since such exclusive right makes it impossible to follow a competitive procedure for the award» (whereas no. 3). But in this case there is already a "preexistent exclusive right" granted to the private party in compliance with EU Law.

[128] See art. 8, par. 1 which affirms that «This Directive shall apply to concessions the value of which is equal to or greater than EUR 5 186 000».

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of nationality, thus imposing a duty of transparency and a sufficient degree of publicity by the public authorities[129].

Therefore, the current European legal framework surely recognizes the freedom of Member States in defining public service activities: but once an activity has been recognized as public service, the discipline applicable for the awarding of the concessions is the same that is applicable to the other service concessions. This confirms the fact that public service concessions represent only a specific kind of services concession contracts and that they fall within the general (European) discipline of these tools which are clearly understood as ordinary contracts. From this point of view, the national tendency to provide for a different (public) regime for public service concessions – in consideration of the specific public interests involved – does not appear justifiable, since Member States are free only to choose which activities can be considered as public services.

Thirdly, especially at local level, many national public services are already awarded through ordinary public procurement procedures and tenders[130]: in fact, local authorities are substituting traditional administrative concessions with ordinary contracts to award the management of local public services[131]. In particular, public contracts are used when the private operator is remunerated by the public body and does not assume any economic risk: therefore, the instrument to be used is not chosen on the basis of the "social purpose" of the activity, but on the basis of the economic operation to be carried out[132]. For

[129] On this point see ECJ, Fourth Ch., judgment of 13 September 2007, Case C-260/04, *Commission vs Italy*, par. 24; ECJ, Third Ch., judgment of 13 November 2008, Case C-324/07, *Coditel Brabant*, par. 25; ECJ, Fourth Ch., judgment of 14 November 2013, Case C-388/12, *Comune di Ancona*, par. 45-46.

[130] Actually it is the "privileged" solution in the Italian legal system, especially with the aim of limiting the direct supply of services by public administration through the "in house providing" mechanism. On the reform of the awarding discipline of local public services, see G. Di Gaspare, *I servizi pubblici locali in trasformazione*, Padua, 2010; C. De Vincenti - A. Vigneri, *I servizi pubblici locali tra riforma e referendum*, Rimini, 2011; with particular reference to the effects following the abrogative referendum of 12–13 June 2011, see A. Moliterni, *L'Acqua, i servizi pubblici locali e lo strumento referendario*, in *www.treccani.it*, 2011.

[131] On this point, F. Fracchia, *Concessione amministrativa*, cit., p. 255.

[132] From this point of view see A. Massera, *Lo Stato che contratta e che si accorda*, Pisa, 2011, p. 75, stating that concessions (also public service concessions) are similar to administrative contracts, and underlining that «once less attention is paid to the importance of the moment relating to the specific *aim* of the economic activity, also the distinctive feature of the concession as main way to award public activities to private operators could not remain unaltered».

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example, the service of garbage disposal – which is clearly a public service – has been considered as an ordinary public procurement contract, since its users do not pay directly the private operator[133]. In the same sense, the supply of home assistance services, even if considered as «performance of a public service» by the Council of State, has been regulated through a private law contract since the remuneration for the performance is paid directly by the health administration[134].

All these arguments confirm the fact that – as already understood by Massimo Severo Giannini – the presence of a "public object" does not prevent *per se* the reconstruction of the concession relationship as a contract[135].

Of course the presence of a public service as particular object of the contract imposes some cautions in the construction of the contractual regulation in order to better protect the public interest. In fact, the necessity to ensure the enjoyment of civil and social rights has important consequences for what concerns public service obligations – such as transparency, non-discrimination, low price, regularity and continuity in the supply of the service[136] – which the private operator must perform and which could be scarcely fulfilled only by his spontaneous "entrepreneurial spirit". Furthermore, the awarding of a public service to an operator which does not belong to the public administration clearly has important consequences for what concerns the responsibility of the public authority, which

[133] See ordinance of the Court of Cassation, United Sections, no. 17829, dated 22 August 2007, where the legal relationship is considered as a public procurement contract and not as a public services concession, since there is no transfer of powers from the Municipality to the private party, who, furthermore, cannot claim payment from the users for the service rendered.

[134] This also because «in this particular case the remuneration for the supply of home assistance services consists in a sum to be paid by the health administration for each service rendered»: judgment no. 1623, dated 19 March 2009, of the Council of State, section V.

[135] On this point it is fundamental the teaching of Massimo Severo Giannini who, rejecting the category of the «public law contract», introduces the concept of «contracts with a public object»: M.S. Giannini, *L'attività amministrativa*, cit., p. 87 et seq., and, more recently, Id., *Diritto amministrativo*, cit., vol. II, p. 426. But, by the way, also according to Giannini these contracts, having as object "unmerchantable goods", must be preceded by an administrative act which makes said objects "merchantable".

[136] See M. D'Alberti, *Lezioni di diritto amministrativo*, cit., p. 132, also for the origin of the concept of *service public*. These are obligations which, as underlined, affect the "special duty" of the concessionaire which is the distinctive feature of the public service (see A. Romano, *Profili della concessione di pubblici servizi*, cit., p. 478).

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remains accountable for the way in which the service is supplied to the community and, consequently, for its performance. These very reasons have traditionally legitimated the provision of "*clauses exorbitantes du droit commun*" and other special public rules in order to assure an in-depth control on the proper execution of the contract by the concessionaire and in order to legitimate the possibility to terminate the relationship ahead of time for public interest reasons[137].

Now, given that public interest reasons implied in the exercise of said special powers cannot be renounced, is it really necessary to refer to the categories of public power and administrative discretion to guarantee that the activity performed by the private operator observes the rules contained in a contractual regulation? And, more generally, are the contract and the bargaining powers provided for by private law really inadequate to protect the public interest also during the execution of a contract, as affirmed by predominant scholars when they talk about the necessity to "functionalize" the private law of public administration and, therefore, to "modify" it according to the public interest[138]?

[137] As a matter of fact, the public service should affect also the execution phase of the concession relationship and should confer special powers to the public administration during the control phase, even if these powers are not provided for by the contract: see on this point G. Greco, *La concessione di pubblici servizi*, cit., p. 394. As underlined by M. D'Alberti, *Concessioni amministrative*, cit., p. 11, the reconstruction of the concessions from a "public law perspective" has always served the purpose of recognizing a public law power of revocation which can affect the agreement. In the same sense, G. Pericu, *La concessione*, cit., p. 84 et seq., sees in the revocation the key instrument to define the nature of the agreement. The importance of the issue concerning said powers in the control phase is also recognized by M. Ramajoli, *Orientamenti giurisprudenziali in materia di rapporto concessorio*, in A. Romano - G. Pericu - F. Roversi Monaco (edited by), *La concessione di servizio pubblico*, cit., p. 357 et seq. It is telling that also the doctrine which has reconstructed concessions as contracts has by no means excluded the possibility of a power of revocation which would "precipitate" on the contract as a «factum principis»: M. D'Alberti, *Le concessioni amministrative*, cit., p. 354, who, after reconstructing concessions in contractual terms, and rejecting the idea of the concession-contract, does not exclude the possibility for an «implicit clause of revocation», or for a unilateral act affecting the contract: according to M. D'Alberti, in particular, «the revocation measure could be considered as "*factum principis*"».

[138] The issue of the necessity to "*functionalize*" the private law used by public administration to the public interest is fundamental in the most recent studies on the private law of the public administration: M. Dugato, *Atipicità e funzionalizzazione nell'attività amministrativa per contratti*, Milan, 1996; E. Bruti Liberati, *Consenso e funzione*, cit.; S. Civitarese Matteucci, *Contributo allo studio del principio contrattuale*, cit.; A. Benedetti, *I contratti della pubblica amministrazione tra specialità e diritto comune*, Turin, 1999; S. Vinti, *Limiti funzionali all'autonomia negoziale della pubblica amministrazione nell'appalto di opere pubbliche*, Padua, 2008. *Contra* these opinions, which risk to distort the meaning and the reason of using private law by public bodies, see C. Marzuoli, *Principio di legalità e attività di diritto privato della pubblica amministrazione*, Milano, 1982, p. 133 et seq.; and more recently, C. Cudia, *Funzione amministrativa e soggettività della tutela*, Milano, 2008, p. 178 et seq.

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Actually, also during the execution of a public service concession it is not so much a matter of *public interest*, rather the issue concerns the interest of the *public party*[139]: once the public administration has consensually defined the interests at stake, what matters is only the proper fulfillment of the public service obligations consensually assumed by the parties[140]. This is confirmed by the fact that the jurisprudence, even when excluding the possibility of considering concessions as contracts, continues to refer to the consensual discipline established by the parties and to the one provided by the Italian Civil Code[141]. In fact, many administrative judgments state that also the execution phase of the concession relationship must be subject to «the ordinary civil law rules on the performance of obligations and the good faith of the parties involved (art. 1375 of the Italian Civil Code)»[142].

In substance, if the relationship is essentially governed by the rules of the Italian Civil Code on obligations and contracts, the main interest of the public administration – and, consequently, of the citizens – is that the private operator fulfills the contract, in compliance with the principles of fairness and good faith. But this interest – even if relevant from a "public" point of view – cannot modify the contract and, consequently, cannot justify the presence of "*clauses exorbitantes du droit commun*" in favor of the public administration[143]. The public administration can assure the proper fulfillment of the contract through all the bargaining powers already provided for by private law to the parties

[139] In this sense clearly, F. Ledda, *Il problema del contratto*, cit., p. 112 et seq. Similarly also C. Marzuoli, *Principio di legalità*, cit., p. 135.

[140] G. Falcon, *Le convenzioni pubblicistiche*, cit., p. 216.

[141] See on this point judgment no. 9347, dated 23 December 2010, of the Council of State, section IV, on the execution of a public service concession on the establishment and maintenance of legal gaming machines.

[142] See judgment no. 9347 of 2010 of the Council of State, cit. See also judgment no. 2568, dated 4 May 2010, of the Council of State, section IV, where it is stated that in concession relationships «the judge can and must apply the rules on the non-fulfillment of the contract, when one of the parties claims non-fulfillment of obligations».

[143] As already underlined by D. Sorace - C. Marzuoli, *Concessioni amministrative*, cit., spec. 293 et seq., in presence of a "continuing contract" the possibility of a general legitimation of the public law power of self-protection on the part of the public administration which affects the contract should be excluded.

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with the aim of strengthening the contractual relationship. From this perspective, therefore, it seems that private law already grants the public administration with the legal instruments which can guarantee, during the execution of a continuing contract, that the interests of the parties are pursued in the best way, also when one of them is the public administration[144].

Therefore, beyond the *nomen iuris* used by the parties, in a long-term contract founded on the exchange of rights and obligations, the hypothesis of terminating the contract ahead of time on the part of the administration should in any case be considered as exercise of bargaining powers[145]: also private law, in fact, fully legitimates the presence of unilateral powers allowing the breach of the contract in advance[146]. Nevertheless, unlike public law powers, these are unilateral powers that should not be exercised in case of new assessment of the public interest, but only in case of serious infringements on the part of the private operator which prevents the continuation of the relationship. These powers should be regarded as ordinary instruments used to allocate contractual risks to the parties[147], considering that, after the mutual assent, the public administration is no longer in a position of supremacy: the contractual relationship constitutes a limit to the exercise of bargaining powers[148]. Public law self-remedies could be legitimated, if anything, only to remove

[144] On private law as set of rules common to public authorities and private operators and, more generally, on the full legitimation of the public authorities – as parties usually provided with full "capacity to make contracts" – to make use of all private law instruments to pursue public aims, see M.S. Giannini, *Lezioni di diritto amministrativo*, cit., p. 16. More recently, N. Irti, *Prefazione* a V. Cerulli Irelli, *Amministrazione pubblica e diritto privato*, cit., p. IX.

[145] In this sense D. Sorace - C. Marzuoli, *Concessioni amministrative*, cit., p. 297. On the same point see also judgment no. 1230, dated 6 July 2009, of the Regional Administrative Court of Sicily, Catania, which, given a conventional provision which connects the revocation to the proper fulfillment of the contractual relationship, considers the power of revocation as a real «explicit resolutive clause». On this point it is worth mentioning also a (isolated) case law (judgment no. 1327, dated 13 March 2000, of the Council of State, section V) which has underlined that also the unilateral power of termination of the concession can be considered as typical expression of bargaining powers.

[146] As underlined by G. De Nova, *Recesso*, in *Dig. disc. priv.*, Turin, 1997, XVI, p. 315, the unilateral termination of a contract, contrary to what is provided for by art. 1372 of the Civil Code, has become the basic rule of the contract regulation: and this not only in case of expressed rescission clause provided in the contract, but also by virtue of the analogic implementation made by the jurisprudence.

[147] For this reconstruction of the bargaining powers in "continuing contracts", see F. Galgano, *Diritto civile e commerciale*, vol. II, *Le obbligazioni e i contratti*, t. 1, p. 63 et seq.

[148] G. Greco, *Le concessioni di lavori e di servizi nel quadro dei contratti di diritto pubblico*, in *Riv. it. dir. pubbl. comunit.*, 2000, n. 5, p. 993 et seq.

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invalidity or irregularity in the choice of the service supplier, but not to exercise a *ius poenitendi*[149].

Similarly, also the power to inflict a penalty cannot be regarded as an exercise of administrative discretionary power, but should be considered as an exercise of a bargaining power provided for also by the Italian Civil Code (art. 1382)[150]. It is an instrument provided for by the contract with the aim of strengthening the contractual relationship: and the decision to inflict the penalty can be taken by all parties during the execution of the contract and cannot be considered as an exercise of administrative discretion only because it is taken by the public administration[151].

Nonetheless, these and other instruments which strengthen the position of the public administration in the control phase, far from being implicitly attributed to the public party, must be provided by the law or by the contract and, as a consequence, must operate «within the same contract, like private law self-remedy instruments»[152]: by the way these

[149] Instead, the administrative judge admits the possibility of the administration "to change idea" during the execution of a long-duration contract if there are economic difficulties (judgment no. 4116, dated 11 July 2012, of the Council of State, section III), or the necessity to change in advance the public service management (judgment dated 6 February 2008, of the Regional Administrative Court for Sardinia, Cagliari).

[150] Said provision, in fact, allows the parties to introduce a penalty clause not only to compel the execution of the contract, but also to define the compensation in advance. See in this sense, *ex multis*, judgments no. 6561, dated 10 June 1991, section II, of the Court of Cassation, and no. 11204, dated 6 November 1998, section III, stating that the penalty clause strengthens the contractual bond. These two aims have been recognized also by the legal doctrine which, sometimes, has underlined the sanctioning-punitive feature of this institution, which must guarantee the fulfillment of the contract: A. Magazzù, *Clausola penale*, in *Enc. dir.*, VII, Milan, 1960, p. 186 et seq. (spec. p. 188); A. Marini, *La clausola penale*, Naples, 1984; Id, *Clausola penale*, in *Enc. giur.*, VI, Rome, 1990, p. 3; G. De Nova, *Clausola penale*, in *Dig. disc. priv.*, II, Turin, 1989, 378; judgment no. 9295, dated 26 June 202, section III, of the Court of Cassation, in *Giur. it.*, 2003, 450. Other scholars pay attention more to the compensatory aspect: F. Gazzoni, *Manuale di diritto privato*, Naples, 2007, XIII ed., p. 648; see also C.M. Bianca, *Dell'inadempimento delle obbligazioni (art. 1218-1229)*, in *Commentario del Codice civile a cura di Scialoja e Branca*, Rome-Bologna, 1979, p. 222; judgment no. 2941, dated 3 November 1999, of the Court of Cassation, section III, in *Giust. civ.*, 2000, I, 1118.

[151] With regard to penalties, see M.S. Giannini, *L'attività amministrativa*, cit., p. 52, who, referring to public contracts, argues that also the penalty clauses used by public administration belong to private law and they are not administrative acts.

[152] See A. Massera, *Lo Stato che contratta*, cit. p. 453.

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tools must be the result of the exercise of contractual autonomy, considered as a power of "self–regulation"[153].

All this is clearly confirmed also by the examination of the recent Directive on concession contracts which has introduced an important discipline concerning the performance of concession contracts and in particular concerning the exercise of the powers of modification and termination[154]. For example, art. 43 establishes that the power of modification of contracts during their term has to be provided clearly in advance «in the initial concession documents in clear, precise and unequivocal review clauses, which may include value revision clauses, or options»[155]: this provision explicitly reveals the "contractual" nature of these powers that have to be known in advance by the private parties and, therefore, spontaneously accepted. Furthermore the Directive strictly sets forth the conditions and the limits to modify the concession-contract which bind all the contracting authorities within the European Union[156]: so it is a special power that is based on a legislative provision, rather than on the supremacy of the public party within the relationship. In the same direction, the power of termination of the contract[157] can be

[153] On the transformation of the principle of "freedom of contract" from a subjective perspective (free will) to an objective one (self-regulation of interests) see Salv. Romano, *Autonomia privata (appunti)*, Milan, 1957, spec. p. 62. See also P. Barcellona, *Diritto privato e società moderna*, cit., p. 326 ss., stating that private contractual autonomy is the principle which ratifies the self–regulation power of private parties.

[154] See Title III of the Directive and, in particular, artt. 43-44.

[155] See art. 43, par. 1, let. a).

[156] See art. 43, par. 1, let. c). In particular the notion of "unforeseeable circumstances" is defined, referring to «circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority or contracting entity, taking into account its available means, the nature and characteristics of the specific project, good practices in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value»; anyway also in this case the modification cannot justify an alteration of the nature of the overall concession (see whereas no. 76).

[157] See art. 44.

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exercised only for the substantial and serious conditions which are strictly established by the European Union[158].

Therefore, the Directive has rigorously disciplined the exercise of special powers for the better pursue of the public interest in a long-term contract in order to allow a certain level of flexibility. But these powers are precisely defined and regulated by the law and the conditions and requirements for their exercise are strictly settled at legislative level too, and do not depend on the discretion of the public administration concerned. Furthermore they do not seem to modify the economic balance of the contracts or to undermine the economic interest of the private party that, instead, is taken into adequate consideration. For these reasons they cannot be understood as "*clauses exorbitantes du droit commun*" in favor of the public administration, since they do not attribute a position of supremacy to the public administration: they are ordinary bargaining powers that allow public administration to cope with changing external circumstances, which cannot be foreseen in advance.

Also the analysis of this discipline demonstrates that the use of a contract to award a public service does not deprive *ex se* the public administration of the powers of surveillance and control on the proper execution of the contract. The necessities of a greater flexibility and a more efficacious control on the actual compliance of the private activity to the public interest can be satisfied by those powers which are already provided by private law, in order to share the risks between the parties: annulment, dissolution, modification powers, termination clauses, and penalty clauses can equally be used by public administration to satisfy the public interest[159]. However, these bargaining powers do not

[158] In particular, according to art. 44, when a substantial modification of the concession has taken place, or when the concessionaire has been excluded from the concession award procedure, or, finally, when the Court of Justice of the European Union finds, according to art. 258 TFEU, that a Member State has failed to fulfil its obligations under the Treaties and this Directive.

[159] From this point of view it is telling what affirmed by D. Sorace - C. Marzuoli, *Concessioni amministrative*, cit., p. 296, who, after rejecting a general principle of revocation, state that this «cannot be considered as an unacceptable limitation of the necessary powers which allow the Government to purse adequately the "public interest"», since «the power of unilateral termination of the contract (…) can always be determined by mutual assent».

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undermine the "core" of the contract, because they are provided for by the law or by mutual assent[160].

To conclude, we have seen that the presence of a public service does not impose *ex se* a public regulation of the relationship, since public service activities are ordinary entrepreneurial activities that can be carried out by private subjects with private law instruments. Furthermore, the European discipline concerning services concessions – that clearly understands concessions as contracts – is applicable for every kind of services provided by a concessionaire that assumes an "operating risk", also when public services are involved. However, this does not mean renouncing to a better protection of public interests and public needs that are necessarily involved in the performance of these concessions. In fact, the necessity to better protect public interests during the performance of public service concessions could be satisfied also by private law which, since it is a general category of the legal system[161], can be used to *regulate* private economic activities *performed to fulfill* public interests[162]. Once the best supplier has been identified through administrative procedures which guarantee transparency and equal treatment, the relationship between public administration and private operator – and, consequently, the «public service program»[163] – can be regulated with a contract which may oblige the

[160] As properly affirmed by D. Sorace - C. Marzuoli, *Concessioni amministrative*, cit., p. 297, once the power of unilateral termination of the contract (revocation or termination) has been referred to a specific provision, or to an agreement between the parties, «there is no reason to make a distinction between concession-contracts and the other contracts of the public administration by defining the first ones as public law contracts or contracts with a public object (…) and the other ones as private law contracts». On this point, even if with regard to public contracts, see A. Giannelli, *Esecuzione e rinegoziazione*, cit., p. 51 et seq., who stresses the decrease of a general power of revocation affecting the contract, in favor of a power of termination which seems to be today the only instrument able to «terminate the contract in advance because of the unilateral initiative of the public contracting authority» (p. 52).

[161] As underlined, public administration can use «general legal institutions» (G. Miele, *La manifestazione del privato*, cit., p. 31) provided that said forms are neutral with regard to public and private parties (like the contractual scheme) and, therefore, institutions which do not belong to private law but to common law. In this sense also M. Santilli, *Il diritto civile dello Stato*, Milan, 1985, p. 241 et seq., who affirms that private law is a system which can be extended to fill in the gaps of the public law system.

[162] On this point see F. Merusi, *Servizio pubblico*, cit., p. 220, according to whom, public service concessions are used to «regulate private economic activities». More recently A. Massera, *Lo Stato che contratta e che si accorda*, cit., p. 25, has stressed the "regulatory function" of these concessions.

[163] See A. Romano, *Profili della concessione di pubblici servizi*, cit., p. 479.

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concessionaire to respect public services obligations[164]. From this perspective, as demonstrated by the debate which characterizes many foreign legal systems – especially the common law ones – the private law contract can be conceived as an instrument which can be used to regulate economic activities with public and social aims, as services of general economic interest definitely are[165].

5. THE FUTURE OF CONCESSION CONTRACTS IN A "MULTILEVEL CONTEXT" BETWEEN THE PRIMACY OF EU LAW AND THE PRINCIPLE OF "FREE ADMINISTRATION".

The study of concessions continues to be at the center of the fundamental legal issues concerning the transformation of the administrative law system and, above all, of the "public–private divide"[166]. But nowadays this debate is mainly influenced by the process of supranational integration in a "multilevel" system that contributes to create new "tensions"

[164] As underlined by D. Sorace, *Servizi pubblici e servizi (economici)*, cit., p. 413, the respect of public service obligations can be assured also using contracts.

[165] On the «*Regulation by contract*» see the fundamental contribution by T. Daintith, *Regulation by Contract: a New Prerogative?*, in *Current Legal Problems*, 1979, p. 41 et seq.; more recently see H. Collins, *Regulating contracts*, Oxford, 1999; R. Boschek, *The Nature of Regulatory Contracts*, in *World Competition*, 2003, 25(3), p. 203 et seq.; P.V. Jones, *The New Public Contracting. Regulation, Responsiveness, Relationality*, Oxford, 2006; on the regulation by contract in the field of environment see E.W. Orts – K. Deketelaere (edited by), *Environmental Contracts*, London, 2001.

[166] On the transformation of the "public–private divide" and on the subsequent changes in the administrative law discipline see: M. Taggart, *The Province of Administrative Law Determined?* and A. Aman, jr., *Administrative Law for a New Century*, both in M. Taggart (edited by), *The Province of Administrative Law*, Oxford, 1997; J.B. Auby, *La bataille de San Romano. Réflexions sur les évolutions récentes du droit administratif*, in *Actualité Juridique – Droit Administratif*, 2001, p. 911 et seq.; G. Napolitano, *Pubblico e privato nel diritto amministrativo*, Milan, 2003; R. Stewart, *Il diritto amministrativo nel XXI secolo*, in *Riv. trim. dir. pubbl.*, 2004, 1, p. 1 et seq.; V. Cerulli Irelli, *Amministrazione pubblica e diritto privato*, Turin, 2011; S. Cassese, *New paths for administrative law. A manifesto*, in *International Journal of Constitutional Law*, 2012, 10, p. 603 et seq.

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and "niggles" between the European legal order and the national ones in regulating concessions[167].

As we have seen, in the last century administrative concessions have represented a privileged field for the progressive construction of a public law system by the Italian jurisprudence and the legal science. In fact, at national level the concession has been understood as the *paradigma* of the public power, of the administrative act and of the exercise of administrative discretion; and also when the bilateral structure of the relationship between public body and private party in the administrative practice was evident, this relationship has remained mostly linked to the public law "domain" and has encouraged the emergence of the theory of the so called "public law contract". Actually, especially when a public service to be provided was involved, it was essential to legitimate from a public law perspective the existence of special powers of termination, modification or annulment granted to the public administration, that were inconsistent with the possibility to understand the concession as an ordinary contract. Furthermore, the incidence of these tools on public service activities, that were essential for the development of the Welfare States, has contributed to justify the national prerogative in regulating public service concessions.

Nevertheless, today Member States are losing their grasp on the discipline regulating concessions, since said discipline is understood as a fundamental instrument to promote competition within the European legal order and, consequently, to strengthen the single market[168]. As we know, the aim of the Directive on the award of concession contracts is to reach a «minimum coordination of national procedures» based on the principles of the TFEU so as to guarantee the opening-up of concessions to competition and adequate legal certainty[169]. This is necessary in order to provide for basic and common guarantees as to the

[167] On the general issue concerning the relationship between European legal order and national administrative law, see G. della Cananea – C. Franchini, *I principi dell'amministrazione europea*, Turin, 2010, p. 37 et seq.

[168] On this point, A. Massera, *Lo Stato che contratta*, cit., p. 79.; R. Caranta, *I Contratti pubblici*, cit., 167.

[169] See whereas no. 8.

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awarding process, with the aim of ensuring equal treatment and transparency within the European legal order throughout the awarding process[170].

It is true that this supranational coordination should preserve the «principle of free administration by national, regional and local authorities» provided by art. 2 of the same Directive, that recognizes the right granted to national authorities to «decide how best to manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services»; in fact, since «the concessionaire assumes responsibilities and risks traditionally borne by the contracting authorities and contracting entities and normally falling within their remit (…) contracting authorities and contracting entities should be allowed considerable flexibility to define and organize the procedure leading to the choice of concessionaire»[171].

Nevertheless, according to the same Directive, Member States should exercise this freedom «in conformity with national and Union law»[172]. Thus, the same article that introduces the principle of "free administration" implicitly reaffirms the supremacy of the European Union in the regulation of these contracts in order to strengthen the single market. From this perspective, Member States are entitled only to «complete and develop» the Directive provisions with a «certain degree of flexibility»[173], but they cannot overcome the European law, considering also that it is the duty of the European Commission to monitor the fulfillment of the Directive by Member States according to art. 45 of the same Directive.

[170] In fact, «Since the objective of this Directive, namely the coordination of laws, regulations and administrative provisions of the Member States applying to certain concession procedures cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective» (whereas n. 87)

[171] See whereas no. 68.

[172] See art. 2.

[173] See whereas no. 8.

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Therefore the European Union appears nowadays as the main legal order entitled to define what a services concession is, which rules and principles are applicable to the awarding procedure and to the performance phase, what level of judicial protection has to be assured to the economic operators involved: from this perspective, there is no longer room for Member States in defining an autonomous discipline governing services concessions, since these tools are fully integrated in the general European framework governing public contracts.

Neither the presence of a public service, as specific object of the concession, allows Member States to overcome the European discipline of concession contracts in order to establish a "domestic" one. Member States have a certain freedom in defining which activities can be considered as services of general economic interest within the national legal order, but the regime of public service concessions has to fulfill the rules established at European level for every kind of concession contracts. From this perspective, the new legal framework provided by the Directive expressly excludes only those (few) public services which do not have an economic interest or that are governed by autonomous rules for the awarding procedure, or that are directly exposed to competition: but apart from these limited exceptions, the ordinary services of general economic interest are subject to the new legal regime when public authorities use concession contracts to grant the activity concerned.

Therefore, European Union has provided for a unique discipline concerning concession contracts – that is applicable for public services as well as other services –, which are characterized only by the particular economic operation that is involved[174]. According to this discipline, services concession contracts are ordinary contracts, characterized only by a special form of consideration, consisting either solely in the right to

[174] See V. Ricciuto - A. Nervi, *Il contratto della pubblica amministrazione*, Naples, 2010, p. 38, affirming that the current legislation provides for two types of contract which can be used by public administration (the public contract and the concession), which differ only because of the different «economic substance of the operation». See also A. Massera, *Lo Stato che contratta e che si accorda*, cit., 79, affirming that the differences between «service activities bound to public administration» and «service activities bound to citizens» has decreased from a «finalistic» point of view; the main difference between these two kind of services is only the «trilateral structure» of the legal relationship when also citizens are involved and, subsequently, the fact that, in this case, the service is "paid" by the market. But beyond this aspect, both concession contracts and public contracts are governed by the same principles which regulate the public procurement field.

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exploit the services that are the subject of the contract or in that right together with payment[175]. Moreover, the contractual nature of these tools is not denied by the provision of special powers of modification and termination by the side of public administration, since these powers can be understood as ordinary bargaining powers provided by the European law, which strictly sets forth the conditions that allow contracting authorities to exercise them in order to eliminate any room for the use of administrative discretion. Besides, these provisions take into great consideration the pecuniary interest of the economic operator, as well as the need to preserve the economic balance of the contractual relation and, as a consequence, help ensuring competition also during the performance phase.

This new European perspective in the study of concession contracts should encourage a transformation in the traditional approach held at national level by the legal science. Indeed, the idea of the administrative concession as a discretionary administrative act or, however, as an expression of public powers[176], could be easily replaced by the category of the "*concession relationship*" that finds in the contractual negotiation the main source of the regulation of those private economic activities which are essential for the development of the Welfare State[177]. From this point of view, also at national level, public service concession contract can be considered as a special contract to pursue public goals,

[175] From this point of view, public service concessions can be considered as particular contracts which allow public administration to award the management of public services to private operators, also entailing the transfer of the economic risk and the responsibility for the proper performance of the activity: in this sense A. Massera, *Lo Stato che contratta*, cit., p. 79.

[176] See the definition of concession provided by G. Zanobini, *Corso di diritto amministrativo*, vol. I, *Principi generali*, Milan, 1958, p. 261, stating that the «common feature of these measures is the granting to one or more individuals who do not belong to public administration of new faculties or powers and rights».

[177] Expression which can be already found in judgment no. 226, dated 19 June 1998, of the Italian Constitutional Court, where it is stated that it is not possible «to ignore that, beyond the debate on the general definition of this institution, also public services concession is subject to a so-called *contractual regulation* of the object of the activity granted to the private entrepreneur». On this point see also V. Ricciuto - A. Nervi, *Il contratto della pubblica*, cit., p. 47, affirming that the definition of concession in contractual terms «makes concession an instrument used by public authority, who remains responsible for the protection of social interests, to regulate the performance of activities aimed at satisfying said interests following an entrepreneurial logic».

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that is characterized only by the transfer to the private concessionaire of the economic risk[178].

From this point of view, the "*mystic*" idea elaborated by the classical legal science[179] of the transfer of public powers to the private operator should give way to an approach which pays much more attention to the *economic and functional* dimension of the relationship and which considers concession contracts as privileged instruments used by the public authority to regulate economic activities which are not sufficiently guaranteed by the market, nor can be directly offered by the public administration, but which must, by the way, be necessarily provided to the community, also through a greater use of private resources, founds and potentialities[180]. These very features show that the "regulatory function" in the field of public services cannot be exercised unilaterally and with *command and control* instruments[181], since, on the contrary, the collaboration and the negotiation

[178] Therefore, if the public authority wishes to transfer the economic risk of the organization and management of public activities to the private party, it will use the "public service concession contract"; on the contrary, the public authority will use a "public service contract" if it wishes to grant only the performance of an activity (also concerning public services), keeping, in this way, the responsibility for the organization and management of said activity: see V. Ricciuto - A. Nervi, *Il contratto della pubblica amministrazione*, cit., p. 39; R. Caranta, *I contratti pubblici*, cit., 192.

[179] To use the expression of R. Caranta, *I Contratti pubblici*, cit., 167, stating that «EU law does not consider the aspect, for sure *mystic* but cherished by the Italian doctrine, but also by the French one, and by the Spanish one, of the transfer of public powers from the contracting authority to the concessionaire».

[180] The concession contract «regulatory function» of private economic activities is underlined by M. D'Alberti, *Concessioni amministrative*, in *Enc. giur.*, cit., p. 8; V. Ricciuto – A. Nervi, *Il contratto della pubblica amministrazione*, cit., p. 44, stressing that the public service contract represents the operating instrument used by the local authority to regulate the supply of a particular service to the citizens. On the concept of regulation, see A. Ogus, *Regulation. Legal Form and Economic Theory*, Oxford, 1994; T. Daintith, *Regulation*, in *International Encyclopedia of Comparative Law*, vol. XVII, *State and Economy*, Tübingen, 1997; G. Tesauro - M. D'Alberti (edited by), *Regolazione e concorrenza*, Bologna, 2001; B. Du Marais, *Droit Public de la Régulation économique*, Paris, 2004; M. D'Alberti, *Poteri pubblici, mercati e globalizzazione*, cit.; R. Baldwin - M. Cave, *Understanding Regulation: Theory, Strategy, and Practice*, II ed., Oxford, 2011. In particular on public services regulation, see also E. Bruti Liberati - F. Donati (edited by), *La regolazione dei servizi di interesse economico generale*, Turin, 2010; L. De Lucia, *La regolazione amministrativa dei servizi di pubblica utilità*, Turin, 2003.

[181] For the conflict between the logic of "free market", especially with regard to the supply of goods and services, and the traditional logic of "command", see A. Massera, *Lo Stato che contratta e che si accorda*, p. 15.

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which characterize exchange mechanisms are needed[182]. The public service concession "program" is necessarily "shared" between public authorities and private operators[183]: and in this context, the private law contract could help to overcome the conflict of interest which arises between the contracting authority (accountable for the performance of public services) and the concessionaire, who, on the contrary, aims at maximizing the profit deriving from said services[184].

This approach however, far from undermine the foundations of the "Administrative Law" system, can be considered consistent with it. Indeed, once the idea of the "conflict of values" implied in the "public-private dichotomy"[185] has been definitively overcome also at national level – since the Italian legislator has expressly authorized public administrations to use private law when it is not necessary to use authoritative powers and

[182] As stated by G. Berti, *Il principio contrattuale nell'attività amministrativa*, in *Scritti in onore di M.S. Giannini*, Milan, 1988, II, p. 49 «in a world dominated by exchange (…) it would be absurd to think that public administration should, on the contrary, withdraw in monastic-like exile, to jealously guard the icons of the imperative power, of the unilateral act, and so on». The issue of the "regulatory negotiation" has long been at the center of the debate of the American legal science: in particular see P.J. Harter, *Negotiating Regulations: A Cure for Malaise*, in *Georgetown Law Journal*,1982, 71, p. 42 et seq.; S. Rose-Ackerman, *Consensus versus incentives: a skeptical look at regulatory negotiation*, in *Duke Law Journal*, 1994, 43, p. 1206 et seq.; W. Funk, *Bargaining toward the new millennium: regulatory negotiation and the subversion of the public interest*, in *Duke Law Journal*, 1997, 46, p. 1351 et seq.; A. Shapiro, *Outsourcing Government Regulation*, in *Duke Law Journal*, 2003, 53, p. 389 et seq.

[183] See on this point the considerations of G. Pericu, *Il rapporto di concessione di pubblico servizio*, cit., p. 91, recognizing «a form of collaboration between public power and private enterprise which does not develop through a confusion of roles, but through the definition of a substantially consensual relationship, founded on a clear distinction of responsibilities deriving from different goals».

[184] The function of cooperation or exchange played by contracts also in the field of public law is stressed by F. Ledda, *Il problema del contratto*, cit., p. 109. On the conflict of interest between the (public) owner of a service and the (private) operator see A. Romano, *Profili della concessione*, p. 497; on this issue see also G. Pericu, *Il rapporto di concessione di pubblico servizio*, cit., p. 91.

[185] The public-private dichotomy is very well stressed by G. Napolitano, *Pubblico e privato nel diritto amministrativo*, cit., p. 27 et seq., especially with regard to the contrast between A.V. Dicey's liberal thinking and M. Hauriou's theory of supremacy. As for the analysis of the distinction between private law rules and public law rules see H. Kelsen, *Diritto pubblico e diritto privato*, in *Riv. int. fil. dir*., 1924, p. 340 et seq.; on the issue of the «great dichotomy» in the general theory of law see N. Bobbio, *La grande dicotomia:pubblico/privato*, (1980-1982), now in Id., *Stato, governo, società. Per una teoria generale della politica*, Turin, 1985, p. 3 et seq.

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when the use of public law is not explicitly imposed by the law[186] – the categories of private law and public law shall be understood as "*neutral techniques*" that can be used for the pursuit of every kind of interest (also public) that has been recognized[187]; and this, without referring *a priori* to the categories of the *public interest* and of the *public object* in order to justify the use of public tools[188].

Ultimately, the clear emergence of a "contractualistic" notion of concession contracts at European level imposes, also at national level, to "rethink" the role played by public law and private law in today's administrative law[189]. This is essential not only in order to better pursue the economic integration within the single market – since concession

[186] See art. 1, para. 1-*bis*, of law no. 241 of 1990 providing that «when adopting measures that are not authoritative, the public administration shall act in accordance with the rules of private law save where the law provides differently». On this point see N. Paolantonio, *Articolo 1, comma 1 bis: Principi generali dell'attività amministrativa*, in N. Paolantonio - A. Police - A. Zito (edited by), *La pubblica amministrazione e la sua azione*, Turin, 2005; F. Trimarchi Banfi, *L'art. 1, comma 1 bis della l. n. 241 del 1990*, in *Foro amm.- Cons. St.*, 2005, p. 947; D. De Pretis, *L'attività contrattuale della p.a. e l'articolo 1 "bis" della legge n. 241 del 1990: l'attività non autoritativa secondo le regole del diritto privato e il principio di specialità*, in F. Mastragostino (edited by), *Tipicità e atipicità nei contratti pubblici*, Bologna, 2007. Therefore the Italian legislator has exclude all theoretical incompatibility between the use oft he contract and the presence of a public object: on the fields where the use of public law instruments is necessary, and on the conditions and requirements to prefer the use of private law instruments, see V. Cerulli Irelli, *Diritto privato dell'amministrazione pubblica*, cit., p. 239 et seq.

[187] The *neutrality* of private or public law techniques for the pursuit of public or private interests is underlined by N. Irti, *Prefazione*, in V. Cerulli Irelli, *Amministrazione pubblica*, cit., p. X. Similarly F. Benvenuti, *Suggestioni in tema di contratto tra diritto privato e pubblico*, in *Diritto e processo amministrativo*, 2007, p. 9, has shown, in an unpublished work of 1998, the *neutrality* of the concept of juridical capacity even when referring to public powers.

[188] See A. Orsi Battaglini - C. Marzuoli, *Unità e pluralità della giurisdizione: un altro secolo di giudice speciale per l'amministrazione*, cit., p. 904, affirming that «from no point of view there are in administrative law particular reasons qualitatively different from the ones which are valid for the other branches of law»; and the administrative judge has to merely apply the law, without «showing any sensitivity to the public interest». See also judgment no. 1327, dated 13 March 2000, of the Council of State, section V, with regard to the reconstruction of the juridical nature of the termination measure of a concession contract underlines that «the *aim* of the measure, and the intensity of the teleological link with the best performance of the service are not relevant to define its nature».

[189] On the influence of public law and common law on the evolution of administrative law see the fundamental pages of M.S. Giannini, *Diritto amministrativo*, in *Enc. dir.*, XII, Milan, 1964. From a civil law point of view see R. Nicolò, *Diritto civile*, in *Enc. dir.*, XII, Milan, 1964 and M. Giorgianni, *Il diritto privato e i suoi attuali confini*, in *Riv. trim dir. proc. civ.*, 1961, p. 2 et seq. On this issue see also M. D'Alberti, *Attività amministrativa e diritto comune*, in U. Allegretti - A. Orsi Battaglini - D. Sorace (edited by), *Diritto amministrativo e giustizia amministrativa nel bilancio di un decennio di giurisprudenza*, Rimini, 1988, p. 433 et seq., who sees the advent of a «law founded on common law general principles, above all in the field of obligations and contracts». On the tendency to the development of a «new common law» see also G. Rossi, *Diritto pubblico e diritto privato nell'attività della pubblica amministrazione alla ricerca della tutela degli interessi*, cit., p. 692 et seq.

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contracts firstly represent a fundamental instrument to promote competition[190] –, but especially in order to widely harmonize the different legal traditions of Member States in a real "multilevel context"[191] and, therefore, to contribute to the construction of an actual European administrative system[192].

[190] As underlined by Directive 2014/23/EU, «concession contracts represent important instruments in the long-term structural development of infrastructure and strategic services, contributing to the progress of competition within the internal market, making it possible to benefit from private sector expertise and helping to achieve efficiency and innovation» (whereas no. 3).

[191] On this point see J. Schwarze, *The Convergence of the Administrative Law of the EU Member States*, in *European Public Law*, 1998, p. 191 et seq. On the specific harmonization of public procurements systems, see E. Picozza, *I contratti con la pubblica amministrazione tra diritto comunitario e diritto nazionale*, in C. Franchini (edited by), *I contratti con la pubblica amministrazione*, vol. I, Turin, 2007, spec. p. 17 et seq., who, with regard to the issue of the harmonization of the EU legal categories of public procurement law, refers to a «substantial harmonization» which affects the reconstruction of legal categories at national level.

[192] On the difficulty of establishing a European administrative system see J.B. Auby - J. Dutheil de la Rochère, *Droit Administratif Européen*, Bruxelles, 2007; P. Craig, *European Administrative Law*, Oxford, 2006; J. Schwarze, *European Administrative Law*, London, 2006.; M. P. Chiti, *Diritto amministrativo europeo*, Milan, 2011; G. della Cananea - C. Franchini, *I principi dell'amministrazione europea*, Turin, 2010; E. Picozza, *Diritto amministrativo e diritto comunitario*, Turin, 2004. More generally, on the transformations of the study method and of public law categories, also with regard to EU law, see S. Cassese, *Il sorriso del gatto, ovvero dei metodi dello studio del diritto pubblico*, in *Riv. trim. dir. pubbl.*, 2006, n. 3, p. 597 et seq., now in Id., *Il diritto amministrativo: storie e prospettive*, Milan, 2010, p. 516 et seq., affirming that European law represents the «new common law which obliges legal systems to debate and legal scholars to come out of their shell. The legal positivism finds itself in difficulty in a so-called multilevel system, with many competitive sources. Theoretical analysis, if not abandoned, should at least be included in legal systems which allow the "choice of the law" ».

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STANDING IN ENVIRONMENTAL LAWSUITS IN ITALY : SOME SUGGESTIONS FROM THE U.S.

Monica DELSIGNORE

INDEX

1. INTRODUCTION
2. INDIVIDUAL STANDING AND ENVIRONMENTAL INTERESTS : AN ODD COUPLE.
3. THE ITALIAN PERSPECTIVE…
4. …THE AMERICAN ONE.
4.1. The recent case-law:Much ado about nothing?
4.2. The injury in fact as an improper condition.
5. ONWARD CHALLANGES.

1. INTRODUCTION

This article aims to investigating the limits of standing for organizations in environmental lawsuits, engaging in a comparative perspective with U.S. federal system.

The U.S. system offers some interesting areas for examination[1] which recommend to study that model: first, judicial challenges to administrative action affecting the environment have

[1] M. Cappelletti, in *Appunti sulla tutela giurisdizionale di interessi collettivi o diffusi*, in *Le azioni a tutela di interessi collettivi o diffusi, Atti del convegno di studio (Pavia, 11-12 giugno 1974),*Padova 1976, 191, especially 215, in 1974 enlighted that the U.S. system had a long and developed experience in common interests which must be studied and examined in depth.

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been recurring before the Supreme Court; and, second, the focus of jurisprudence on environmental advocacy organizations with particular consideration of their capacity to meet standing requirements. The choice for U.S. legal system lays not only on the important steps of jurisprudence, but moreover on the special value of public participation in the administrative proceeding and on the consequence in organization judicial standing.

The debate over standing for environmental advocacy organizations is quite recent in Italy. A number of judicial decisions in the 1970's[2] put the focus on the inadequate existing legislative framework, suggesting the opportunity of new solutions in order to guarantee a fair representation to environmental interests, which are not individual positions with judicial access[3].

After 40 years since the original debate, this article seeks to consider and reflect on the present framework as created and developed by legislative and judicial power. The European Union has expressed significant interest in this topic and the ongoing debate stresses the need for reconsideration of this themes. The implementation of Aarhus Convention by European Union underlines the need for high standards in the safeguard of environmental interests, including for NGOs standing in judicial proceeding, as recent decisions of the Court of Justice emphasized[4].

[2] With the well-known decisions of Consiglio di Stato (the higher Italia administrative judge) 9 June 1970, in *Foro it.* 1970, III, 201; Cons. St., sez.V, 9 March 1973, n. 253, in *Foro amm.* 1973, I, 264, Cons. St., Ad. Plen. 19 October 1979, n. 24 in *Foro amm.* 1979, I, 1442, Cons. St., sez. VI, 14 July 1972, n. 475, in *Giur. it.* 1973, III, 261.

[3] As A. Romano observed in the comment to the decision Cons. St., sez. VI 14 July 1972, n. 475, entitled *Interessi "individuali"e tutela giurisdizionale amministrativa*, in *Foro it.* 1972, III, 269.

[4] In the decisions of the cases C-263/08 and C- 240/09 and in the well known Court of justice 12 May 2011, C-115/09, commented by E. J. Lohse, *Surprise?Surprise! - Case C-115/09 (Kohlekraftwerk Lunen)A Victory of the Environment and a Loss for Procedural Autonomy of the Member States?*, in *Public Law Rev.* 2013, and with tone of approval F. Goisis, *Legittimazione al ricorso delle associazioni ambientali ed obblighi discendenti dalla*

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The comparison of standing requirements between different legal systems can undoubtedly offer various solutions and answers to environmental standing issues.

A great Italian scholar[5] pointed out the value of comparative law both in enlightening the legislator – offering different features and solutions from other Countries – and in corroborating the given solution with the experience offered in a different legal system.

In modern times comparison is a hard work, as comparative law is more than the mere knowledge of a foreign law system. That knowledge is a prerequisite, which the scholar needs in order to understand the features, the peculiarities, the affinities or contrasts in interpreting the examined institution, for the construction of general categories[6].

Convenzione di Aarhus e dall'ordinamento dell'Unione Europea, in *Dir. proc. amm.* 2012, 91. Critics to Italian law provisions in respect of Aarhus Convention are moved by R. Leonardi, *La legittimazione processuale delle associazioni ambientaliste: alcune questioni ancora giurisprudenziali*, in *Riv. giur. ed.*, 2011, 3 e G. Tulumello, *Access to Justice from the point of view of a judge*, in www.giustizia-amministrativa.it. For a very recent analysis of Aarhus Convention impact in standing see the Conclusions of 18 may 2014 in C- 401/12 P, 402/12P and C-403/12 P.

[5] A. Amorth, *Introduzione al diritto comparato e al diritto pubblico*, in *Scritti giuridici*, 1940-1948, II, 817. For the importance of a comparative perspective in the study of administrative law M. D'Alberti, *Diritto amministrativo comparato*, Bologna, 1992, spec. 9 and *Manuale di diritto amministrativo*, 2014 and G. Napolitano in the Introduction of the volume, Diritto amministrativo comparato, Corso di diritto amministrativo, diretto da S. Cassese, IV, Milano 2007, IX.

[6] The debate on the necessary rethinking of the tradistional categories in comparative administrative law is enlighted in F. Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 *American Journ. Comparative Law* 859 (2011) and Bruce Ackerman, in *Good-bye Montesquieu*, in *Comparative Administrative Law*, edited by Susan Rose-Ackerman e Peter L. Lindseth, 2010, 128, where the Author underlined the need for "a new framework for analysis". For a consonant approach J.L. Mashow, in *Explaining administrative law: reflections on federal administrative law in nineteenth century America*, in *Comparative Administrative Law*, ult. cit., 37. The book *Methods of comparative law*, edited by P.G. Monateri, Edward Elgar 2012, contains numerous articles on the subject and particularly G. Monateri, (*Methods of comparative law: an intellectual overview*, 1) focuses on comparative law, "*as the best intellectual device we can*

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Comparison is useful when the objects are comparable such as *legittimazione* in Italy and standing in the U.S., which both refer to a pre condition for the judicial examination of the lawsuit[7]. Examining the threshold for standing in environmental interests lawsuits means analyzing the nature and scope of judicial review in environmental interest lawsuits.

The rules for standing affect and influence the construction of judicial review of Public Authorities decisions: Narrow standing rules that require the applicant to have a personal interest in or be personally affected by the decision under review identify judicial review as a mechanism for ensuring that individual interests are properly taken into account by administrative decisionmakers. By contrast, broad standing rules that allow representatives of groups or of the public to challenge administrative decisions by making application for judicial review identify judicial review not only as a mechanism for protecting the interest of individuals but also as a way of contesting the social interests promoted by the decision under review, as Peter Cane explained regarding Administrative tribunals[8]. Similarly in the U.S. the rules of standing play an important role in the balance and separation of powers, with respect to limits on judicial authority over administrative powers[9].

use to depict the figurality of Law and to construct a theory of representational understanding of a normative world".

[7] An Italian scholar, V. Molaschi, has already reflected on this topic, a few years ago, in *Standing to Sue of Environmental Groups in Italy and in the United States of America*, in *Jeelp*, 2006, 52. Even in a wider perspective analyses the U.S. system framework in environment safeguard, F. Fracchia, Amministrazione, ambiente e dovere: Stati Uniti e Italia a confronto, in Ambiente, attività amministrativa e codificazione, a cura di De Carolis-Ferrari-Police, Milano, 2005, 120.

[8] P. Cane, *Administrative Tribunals and Adjudication*, Hart Publishing, 2010, 229.

[9] As enlighted by Richard Pierce Jr., *Is standing law or politics?*, 77 N.C.L. Rev. 1741(1999) e J. H. Adler, *God, gaia, the taxpayer, and the Lorax: standing, justiciability, and separation of powers after Massuchessetts and Hein*, 20 Regents U.L. Rev. 175 (2007-2008).

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This must keep in mind the difference between the two legal systems. In the U.S. judicial review is an extreme remedy, after an administrative proceeding similar to a trial[10]; instead in Italy judicial review is very common even though, particularly for environmental interests, it is more often practical, moved from political interests, such as delaying the construction of the building or the beginning of the commercial activities, instead of a real request of rights protection.

In sum, this paper will argue on the proper role of organizations in environmental safeguard. After examining the actual landscape in Italy and in the U.S., attention will focus on jurisprudence in order to find the reasons the judges had differently chosen for admitting or excluding standing in environmental cases. The study of legislative prescriptions, as construed in cases, will prove that environmental associations are not entitled of a general power of control in whatever activities interesting nature, but organizations must prove they have a reasonable interest in the favorable outcome of the case. The protection of natural resources is a public interest conferred to administrative authorities and Courts have to intervene just in the pathological contest as the administrative proceeding is the proper contest where to contemplate all the interest at stake.

2. INDIVIDUAL STANDING ANE ENVIRONMENTAL INTERESTS: AN ODD COUPLE.

The Italian legal system contemplates a peculiar category for environmental interests: They are both different from individual interests - which can be equal but with distinct objects – as well as from the common interest, not yet qualified as relevant by law. The

[10] As underlined by D. de Pretis, *La giustizia amministrativa*, in *Corso di diritto amministrativo*, directed by S. Cassese, IV, *Diritto amministrativo comparato*, cit. e B. Marchetti, *Pubblica amministrazione e corti negli Stati Uniti. Il judicial review sulle administrative agencies*, Padova 2005.

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specific category of "*interessi diffusi*"[11], which we can translate as "common interests", recalls the idea of rights which are not precisely ascribable to one organized group, but widespread in society and somehow connected and useful for the best safeguard of public interests. And this distinction and separation of environmental interests from general public interest represents the novelty, signaling a growing sense of unease by local and federal authorities with the inefficiency and insufficient concern of environmental quality and living standards.

Citizens feel administrative action takes inadequate care of nature and try to replace it organizing in environmental advocacy groups. If a local authority does not order the closing of an old and polluting incinerator after a petition by local residents, residents would probably spontaneously create a group or organization with the purpose to guarantee living standards. If urban planning provisions contemplate a new industrial area not far from the green area where residents enjoy their summer, notwithstanding the participatory proceeding and the community and local authorities involvement which may have occurred, the residents would call for a committee concerned with the potential destruction and degradation of ecosystems, climate change and global warming.

These emerging common interests could not find a proper position in a judicial system based on individual situations and rights. So scholars and jurisprudence tried in some way

[11] Italian scholars have studied in depth the category. In sum the most important essays on the topic are: N. Trocker, *voce Interessi collettivi e diffusi*, in *Enc. giur.*, XVII, Roma, 1989, F. G. Scoca, *Tutela dell'ambiente: la difforme utilizzazione della categoria dell'interesse diffuso da parte dei giudici amministrativo, civile e contabile*, in *Dir. soc.* 1988, 655, G. Berti, *Interessi senza struttura (i c.d. interessi diffusi)*, in *Studi in onore di A. Amorth*, Milano, 1982, I, 67, R. Ferrara, *voce Interessi collettivi e diffusi (ricorso giurisdizionale amministrativo)*, in *Dig. disc. pubbl.*, vol. VIII, Torino 1993, 482;M. Nigro, *Le due facce dell'interesse diffuso: ambiguità di una formula e mediazioni della giurisprudenza*, in *Foro it.*, 1987, 10; R. Federici, Gli interessi diffusi: il problema della loro tutela nel diritto amministrativo, Padova, 1984, R. Lombardi, *La tutela delle posizioni giuridiche meta-individuali nel processo amministrativo*, Torino, 2008 and C. Cudia, *Gli interessi plurisoggettivi tra diritto e processo amministrativo*, Santarcangelo di Romagna, 2012.

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to justify the collocation of common interests in individual situations, in order to ensure common interests judicial standing.

The inadequacy of the category and the inappropriateness of existing tools in legal order somehow recall the new property paradigm: The need to apply safeguards of due process clause to administrative benefits stretched the property category as to take care even of those new positions[12].

Nevertheless this interpretation is the incentive and encouragement for a legislative reform in order to supply the incongruence of the legal order.

Alberto Romano[13] highlighted that referring to common interests as individual positions could lead to a rethinking of administrative judicial review proceeding, if not revolutionizing it. Constitutional clauses take care of individual positions, but, as all safeguard provisions contemplate for a minimum, and do not preclude a wider protection.

The lack of judicial access for environmental advocacy organizations sets the issue of finding the right way to open trial proceedings, giving space to these new meta-individual positions.

In looking for the best solution, legislators must keep in mind that the standing threshold represents a guarantee that the trial is connected and inherent to the position and subjective sphere of the plaintiff, as *actio popularis* must be exceptional[14].

[12] For an Italian analysis see D. Sorace, *Il problema degli interessi non-diritti da tutelare nell'admistrative law americano (linee di un dibattito in corso)*, in *Scritti per Mario Nigro*, III, Milano, 1991, 581.

[13] *Gli interessi "individuali"*, cit., 271.

[14] M. Cappelletti, *Appunti sulla tutela giurisdizionale*, cit., 199.

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3. THE ITALIAN SITUATION PERSPECTIVE…

Standing for organizations is a central issue in environmental common interests' protection and stretches the necessity of continuity between what the law says and how much the trial proceeding recognizes[15].

Traditionally standing is a precondition which occurs when the plaintiff is entitled by judicial order to raise the cause or controversy in front of judicial authorities[16].

In civil action standing is useful to avoid situations where judicial authorities decide cases in which the plaintiff is not entitled to relief, as where others people's interests have been damaged.

Instead, in administrative judicial proceeding Courts rarely distinguish standing from interest in the outcome, which regards the utility and advantage the plaintiff can reasonably attend from a favorable decision. Nevertheless the traditional meaning of standing is related to an individual position[17], which immediately underlines the contrast with representation of common interests.

[15] A. Travi, *La tipologia delle azioni nel nuovo processo amministrativo*, in *La gestione del nuovo processo amministrativo: adeguamenti organizzativi e riforme strutturali*, Atti del LXVI convegno di studi amministrativi, 23-25 maggio 2010, Varenna, Milano 2011, 75.

[16] See R. Villata, voce *Legittimazione processuale*, in *Enc. giur.* and R. Villata, *Dodici anni dopo: il codice del processo amministrativo*, in *Il codice del processo amministrativo. Dalla giustizia amministrativa al diritto processuale amministrativo*, a cura di B. Sassani e R. Villata, Torino, 2012, 41.

[17] A. M. Sandulli, *Il giudizio innanzi al Consiglio di Stato e ai giudici sottordinati*, Napoli, 1963, 210.

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The function of standing, as a guarantee of exclusive positions which are selected and pertinent just to particular plaintiffs, succumbs as, with no doubt, more than one organization can advocate the same environmental interests.

In that sense, standing for environmental advocacy organizations and groups has a special meaning, referring not to the positions which must be safeguarded in the judicial proceeding, but instead to the ability and competence of the organizations and groups to guarantee the best protection and defense to environmental common interests.

The law enacting the Ministry of Environment as well established (art. 18 L. n. 349/1996) conditions and prerequisites that need to be respected by the organizations in order to be invested of judicial standing[18]. The conditions take in consideration the Statute of an organization and its activity, which must be widespread in the all country.

This provision has been criticized[19] because jurisprudence in the meantime proposed different requirements for standing of environmental organizations. Particularly, judges[20] referred to the strict link, *vicinitas* or continuative and solid connection of organizations with the geographical area where the damaging activity was going on or was expected to go on. In that way Courts admitted to jurisdiction organizations which were not representative in a national perspective and so did not meet the legislative prerequisites, giving case by case solutions. Local committees could be plaintiff when environmental safeguard figures as a statutory scope and they show an adequate level of representation and a solid connection with the area where the natural ecosystem is in danger. Nonetheless Courts

[18] A. Travi, *Lezioni di giustizia amministrativa*, Milano, 2012.

[19] A. Police, *Il giudice amministrativo e l'ambiente: giurisdizione oggettiva e soggettiva?, in Ambiente, attività amministrativa e codificazione*, edited by D. De Carolis, E. Ferrari, A. Police, Milano, 2006, 320.

[20] Cons. Stato, Sez. IV, 13 July 1998, n. 1088, T.A.R. Veneto, 30 October 2006, n. 3591 and Cons. Stato, Sez. VI, 23 May 2011, n. 3107.

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affirm - for the majority of the cases, even if sometimes they change their mind - local derivations of national environmental organizations do not meet the threshold of standing as the 1986 Law refers only to the national entities[21].

In some cases judges focus not only on *vicinatas* but also to previous participation in administrative proceeding. Scholars[22] made clear judicial standing and administrative proceeding standing meet different conditions so that the existence of the second is not sufficient for the existence of the first.

Finally, the Environmental Code contemplates (art. 309) that non-governmental organizations, promoting environmental protection, as individuated in Law n. 149/1986, are entitled to notify complaints and to demand authorities intervention for the safeguard of the environment.

Regarding environmental damages, art. 310 does not introduce a peculiar provision for NGOs, but also does not exclude them from standing: a Plaintiff is a legal entity who can be damaged or is entitled to participate to the administrative proceeding, even when that entity is an environmental organization.

In sum, if the legislative conditions for environmental organizations standing are clear, Courts often do not apply these simple conditions, but recalling general principles, adopt prerequisites other than those set forth in the law. In the Italian legal system this has a strong chilling effect.

[21] T.A.R. Lombardia, Sez. IV, 15 December 2008, n. 5786 (with a critic note by A. Maestroni, *La legittimazione ad agire delle articolazioni territoriali di associazioni individuate ex art. 13 L. 349/1986. Un falso problema: il caso Legambiente Lombardia Onlus*, in *Riv. giur. amb.*, 2010, 601)

[22] R. Villata, *Riflessioni in tema di partecipazione al procedimento e legittimazione processuale*, in *Dir. proc. amm.* 1992, 184. Recently, M. C. Romano, *Interessi diffusi e intervento nel procedimento amministrativo*, in *Foro amm.-C.d.S.* 2012, 1691 and, more generally, F. Gaffuri, Contributo allo studio del rapporto procedimentale, Milano 2012.

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The interest for a narrow or open judicial access of environmental organizations becomes much more interesting and actual because of the Aarhus Convention[23] implementation in Europe with the Council decision 2005/370/CE. The Convention aims at regulating access to information, public participation in decision- making in order to produce the positive effect of a social control on environmental decisions. Article 9 requires Countries, parties of the Convention, to guarantee access to justice in environmental matters[24] when plaintiff has a "sufficient interest", ambiguous formula that captured the attention of so many scholars in every Country.

By Regulation n. 1367/2006 European Union also became Party to the Convention. The Court of Justice, recalling the *Plaumann* precedent[25], affirmed only the existence of an

[23] See M. Macchia, *Global Adiministrative Review Mechianism: The Case of the Aarhus Convention*, in *Global Standards for Public Authorities*, edited by G. della Cananea and A. Sandulli, Napoli 2012, 109.

[24] Art. 9, par. 2 provides that "Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) Having a sufficient interest or, alternatively,(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention. What constitutes a sufficient interest and impairment and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above. The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures

prior to recourse to judicial review procedures, where such a requirement exists under national law.

[25] C- 25/62 Plaumann & Co v. Commission. For a critic comment to the decision and the approach of the Court in the interpretation of art. 263 TFUE see B. Marchetti, *L'impugnazione degli atti normativi da parte dei privati nell'art. 263 TFUE*, in *Riv. it. dir. pubbl. com.* 2010, 1471.

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individual and direct injury meets the threshold for standing: national or global NGOs, such as Greenpeace, have no particular and individual interests in the case and therefore do not have standing[26]. The Court does not apply the same analysis when examining national provisions, which have been banned as not in compliance with the Convention[27].

This approach places too much emphasis on Aarhus Convention provisions. Those provisions need to be studied and analyzed in that framework, which enhance environmental interests in a composite structure where judicial access represents the natural latch to lock the all system.
Article 9 is not, therefore, introducing a new popular action. The Convention, instead, stresses on the implementation of its provisions "within the framework of national legislation" and "in accordance with the requirements of national law" and in all of European Countries popular action, citizen suit is a very exceptional remedy which of course is not to be introduced by an International Convention.

We now turn to the U.S. legal system.

4. …THE AMERICAN ONE.

Standing is a central question in U.S. law order because of how it affects separation of powers and because Courts – as we've just seen happens in Italy – often manipulate conditions in order to decide the case.

[26] Critically M. Eliantonio, *Towards an ever dirtier Europe? The restrictive standing of environmental NGOs before the European Courts and the Aarhus convention* and N. De Sadeleer e C. Poncelet, *Protection Against Acts Harmful to Human Health and the Environment Adopted by the EU Institutions*, in *Cambridge Yearbook of European Legal Studies*, 2012, 177.

[27] C-321/95 P.-Greenpeace and Others v. Commission. A new approach has been expressed in the Conclusions to case C- 401/12 P, C-402/12 P and C-403/12 P, but the decision can take a different direction.

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U.S. statutory law does not provide specifically for standing. Thus, Supreme Court jurisprudence had and has a fundamental role in the definition of the threshold of standing[28]. Disclosing some final considerations, we can say that Justice Scalia[29] and conservative approach played a determinant role in narrowing judicial access of environmental organizations.

In *Association of Data Processing Service Organizations v. Camp*[30], the Supreme Court elaborates standing doctrine interpreting Article III of the U.S. Constution. The Court affirmed that "cases or controversies" limitation would be satisfied only if the plaintiff would be adversely affected: The plaintiff must demonstrate an injury-in-fact traceable to the defendant and which could be likely redressable by a favorable decision.

In 1972 in *Sierra Club v. Morton*[31], for the first time, the Court found that harm to "aesthetic, environmental, or recreational" values[32] were and adequate injury for standing. In the controversy a major environmental organization, Sierra Club, took an action to prevent Walt Disney Corporation from developing a ski resort in Mineral King Valley, in the Sequoia National Park. The Court recognized Sierra Club was alleging a harm to the ecosystem which could be qualified a legal injury, nonetheless the Court denied standing

[28] See Maxwell L. Stearns, *Standing back from the forest: justiciability and social choice*, 83 *Cal. L. Rev.* 1309 (1995), Richard Pierce Jr., *Is standing law or politics?*, cit., J. H. Adler, *God, gaia, the taxpayer, and the Lorax: standing, justiciability, and separation of powers after Massuchessetts and Hein*, cit., e H. Elliott, *The functions of standing*, 61 *Stan. L. Rev*. 459 (2008).

[29] Antonin Scalia, Standing as an Essential Element of Separation of Power, 17 Suffolk L. Rev. 881 (1983).

[30] ADP Association of Data Processors v. Camp, 397 U.S. 150 (1970).

[31] 405 U.S. 727 (1972).

[32] For a highlight on the content of this decision see Shi-Ling Hsu, *The Identifiability Bias in Environmental Law*, 35 *Fla. St. U. L. Rev.* 433, 466 (2008), E. Longfellow, *A New Look at Environmental Standing*, 24 *Environs Envtl. L. & pol'y* 3, Fall 2000, 17.

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because Sierra Club had not claimed that any of its members would otherwise be affected by the development[33]. In his dissent, Justice Douglas affirmed conferring standing upon environmental objects (Mineral King's Valley) to sue for their own preservation would be the correct answer.

As in Italy, in the U.S. concern for environmental interests increased in 1970s with the institution of the E.P.A., Environmental Protection Agency and the adoption of federal statutes which protect different natural elements, such as Clean Air Act, which entitles citizen to sue private parties or the Agency as well for the violation of statutes provisions. This focus also emerges in the National Environmental Protection Act provisions, which include mandatory risk evaluation for each agency whose activity has a "significant effect" on environment.

During that time, although the Supreme Court affirmed the public concern for protecting nature, they strongly reduced the standing of organizations with the requirement of a specific injury to the plaintiff[34], consisting of an individual member of the Sierra Club being disappointed and personally unhappy of the development of the Mineral King Valley.

In 1990 in the case *Lujan v. National Wildlife Federation*[35] the Court specified the sense of the injury-in-fact, requiring the injury is "concrete and particularized, actual or imminent, not conjectural or hypothetical". The National Wildlife Federation had no standing because - as Justice Scalia wrote – even if the desire to use or observe an animal species is undeniably a cognizable interest for purpose of standing, showing that the federal decision

[33] See Jan G. Laitos, *Standing and Environmental Ham: The Double Paradox*, in *31 Va. Envtl. L. J.* 55, here 72.

[34] For an historical summery of this judicial approach see K.S. Coplan, *Direct Environmental Standing for Chartered Conservation Corporation*, in 12 *Duke Env.mental Law & Policy Forum* 183 (2001).

[35] 504 U.S. 555.

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would lead to "increase in the rate of extinction of endangered and threatened species" was not sufficient to meet the threshold of standing. The Court excluded an organizational interest in environmental problems, differentiable from the general interest, so standing is met only when members of the organization had alleged a sufficiently concrete injury.

As affirmed in *Lujan*, the injury-in-fact test focuses on a personal stake, which environmental organizations do not have. This actual, as opposed to professed, stake in the outcome means the member of the organization has to allege a "geographic proximity" and not just a "vicinity" to the area, together with a "temporal proximity". These conditions resemble the requirements specified by Italian administrative judges, but if Italian judges apply the conditions to open judicial access for organizations with no standing, U.S. courts use it to limit and narrow, once more, environmental interests access to trial. As such, standing is denied when there is not a specific outcome for the single organization.

This helps to enlight the ideological and political approach which hides in Courts' decisions. While Agency statutes recognize wide participation to environmental interests in lawmaking and adjudication proceedings, Courts restrict standing for environmental organizations, considering personal stake in the outcome rarely exists. Administrative proceedings – with a trial framework – are considered the correct and proper place for the scrutiny of those interests. Agency statutes with citizen suit do provide for a general remedy when specific provisions are violated, granting auxiliary activity when Agency or organizations are not efficient in environment protection. This evokes the 2011 introduction of special standing when Italian Antitrust Authority alleges an antitrust violation in administrative regulations, as a helpful tool for a correct implementation of law n. 287/1990 by legislator[36].

[36] See M. A. Sandulli, *Introduzione ad un dibattito sul nuovo potere di legittimazione al ricorso dell'AGCM nell'art. 21-bis L. n. 287 del 1990*, in www.federalismi.it, R. Giovagnoli, *Atti amministrativi e tutela della concorrenza. Il potere di legittimazione a ricorrere dell'AGCM nell'art. 21-bis legge n. 287/1990* in www.giustamm.it, F. Cintioli *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e*

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Citizen suit provisions could solve questions of separation of powers, raising from a wide standing opportunity, as Congressional Statutes deliberately chose to open judicial access to those interests.

In *Lujan v. Defenders* Justice Scalia offered a different construal, affirming a wide standing would represent a violation of Take Care Clause: Article II, section 3, provides the President "shall take care that the laws be faithfully executed". By that approach the Court established prudential limits in order to prevent judicial access for "abstract questions of wide public significance even though judicial intervention may be unnecessary to protect individual rights". Particularly the zone of interest test considers the party must be within the zone of interest protected by the Statute, excluding generalized grievances.

State Courts follow the approach of Supreme Court considering standing in environmental cases is not automatic and cannot be met by perfunctory allegations of harm, but requires the allegation of a true personal stake in the outcome[37].

4.1. The recent case – Law: much ado about nothing?

In some recent cases the Court seems to use a different approach, assuring new space to environmental organizations and to national States.

In 2000 in *Friends of Earth v. Laidlaw Environmental Service Inc.*[38] the plaintiff was a well established environmental organization, alleging a commercial wastewater treatment was discharging pollutants, mercury especially, in the North Tyger River. Members of

del mercato (art. 21-bis della legge n. 287 del 1990) in www.giustamm.it and S. Lucattini, *Garante della concorrenza e certezza economica: alla ricerca delle giustizie per i mercati*, in *Dir. amm.*2013, 509.

[37] Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d 297, 890 N.Y.S.2d 405, 918 N.E.2d 917, 922 (2009)

[38] 528 U.S. 167 (2000), for a critic coment see D. N. Cassuto, *The Law of Words: Standing, Environment and other Contested Terms*, in 28 Harvard Env.mental Law Rev. 79 (2004).

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organization could no longer enjoy the river because of their fears about pollution. The majority of the Court states the "relevant showing for purpose Article III standing…is not injury to the environment but injury to the plaintiff", but that "reasonable fear" about pollution is sufficient to meet the threshold of standing as it can sharpen the presentation of issues upon which the Court depends.

In the same year, in *Friends of the Earth v. Gaston Copper Recycling Corp.*[39], a Federal Court, following the precedent of the Supreme Court, affirmed that "*Threats or increased risk…constitutes cognizable harm. Threatened environmental injury is by nature probabilistic….by producing evidence that Gaston Copper is polluting Shealy's nearby water source, CLEAN (Citizens Local Environmental Action Network) has shown an increased risk to its member's downstream uses. This threatened injury is sufficient to provide injury in fact."*

Federal judges open standing conditions not to the organization but to individual members who demonstrate a personal stake in a favorable outcome, even when the personal stake lays in the reasonable fear and concern about the effects of the defendant's action on plaintiff's use and enjoyment of the environment.

In 2007 in *Massachussets v. E.P.A.*[40] the Court once again affirmed the gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which a court so largely depends for illumination. While it does not matter how many people have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented

[39] 204 F. 3d 149, 159 (4 th Circ. 2000).

[40] 549 U.S. 497 (2007).

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will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.

In the specific case – which is known as the global warming case, concerning the lack of EPA regulation in CO2 gas emissions - the Court stated even a small probability of injury is sufficient to create a case or controversy--to take a suit out of the category of the hypothetical--provided of course that the relief sought would, if granted, reduce the probability. As the harms associated with global climate change are serious and well-recognized, the majority of the Court grant standing to the State of Massachussets with a decision criticized by scholars[41].

That issue is present even in Italian legal system, because in recent years administrative Courts affirmed local authorities' standing in cases where the citizens interests where threatened by private actions, authorized by national authorities[42]. This reasoning is baffling: Administrative authorities are entitled to take care of collective interests but this does not mean injuries to those interests is an injury for the local authority as well.

In 2009 these signals for a wider conception of standing ended. In *Summers v. Earth Island*[43] the plaintiff, member of an environmental organization, alleged an harm to Sequoia

[41] Bardford Mank, *Should States Have Greater Standing Rights Than ordinary Citizens": Massachussets v. EPA'S New Standing Test for States*, 49 WM.& Mary L. Rev. 1701 (2008) and J. Gibbs Pleune, *Is Scalian Standing the Latest Sighting of the Lochner-ess monster?: using Global Warming to Explore the Myth of the Corporate Person*, 38 Envtl. L. 273 (2008).

[42] The decision is Consiglio di Stato sez. IV, 31 August 2010, n. 5898 with the comment of L. R. Perfetti e C. Clini, Class action, *interessi diffusi e legittimazione a ricorrere degli enti territoriali nella prospettiva dello statuto costituzionale del cittadino e delle autonomie locali*, in *Dir. proc. amm.* 2011, 1443, I. E. Nino, *La legittimazione ad agire degli enti territoriali a difesa degli interessi meta-individuali dei cittadini residenti*, www.giustamm.it. The book of A. Angiuli, *Interessi collettivi e tutela giurisdizionale: le azioni comunali e surrogatorie*¸ Napoli 1986 was entirely dedicated to that subject.

[43] 129 S. Ct. 1142 (2009), commented by M. Banda, 34 Harv. Envtl. L. Rev. 321 (2010).

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National Forest and the Court again stated that "general harm to the forest or the environment will not alone support standing" and denied standing as the member had failed to demonstrate his plan of going to the exact parcel of that forest to be logged.

4.2 The injury in fact as an improper condition.

As observed in the last paragraphs, the injury in fact test is a very ambiguous prerequisite which de facto leaves Court wide discretion and, at the same time, big margins of error.

The environmental cases are unique in that third parties are involved: The environmental association issues agency because of the authorization given to a Corporation or because of its inaction in regards of other Corporations activities, potentially harmful for the environment.

The presence of third parties, usually Corporations or other private entities, is the concrete reason for narrowing judicial approach to standing, especially because American legislator has not provided, differently from Italian Parliament, a legislative provision for environmental association standing.

The adversary connotation of judicial proceeding – similar to the Italian legal system – requires two subjects arguing and a concrete interest in the outcome, as judicial proceeding does not have a mere function of checking the proper application and respect of law provisions.

The ideological approach also plays an important role: If democratic judges are much more inclined to stand for legislative supremacy and a balanced judicial control, taking care of organizations' interests and their members' pleadings, conservative judges tend to deny standing both to association and individual plaintiffs. In Massachussets the focus posed in sovereignty of national State lead the majority to a favorable scrutiny of standing, with the determinant conservative support.

The very general interest in fact test leaves Court free to decide in the singular case with a peculiar solution, depending on its attitude to come to a decision. Environmental interests

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are usually intended as public rights which the President protects, as Article II states, and judicial power must not intervene and overlap Agencies' choices, as Separation of power principle explains. Courts use those principles and dose them regarding the result they are striving for.

Even the statutory citizen suit provisions do not represent an efficient remedy for environmental interests' protection as they do not guarantee compensation for damages. They are not even functional to a proper control of administrative action: Administrative action consists of the negotiated balance of different interests in the specific case and judicial authorities do not have simply to verify the violation of law provisions, but to decide if that violation causes a significant harm to the interests of plaintiffs.

5. ONWARD CHALLENGES.

In Italian law order Courts have stressed the lack of environmental advocacy associations standing and that suggestion lead Parliament to adopt specific provisions in order to open judicial access to those organizations. These legislative provisions do not modify the structure of judicial proceeding, its adversary connotation and the redressability requirement.

The subsequent judicial decisions further specified the legal conditions for organizations' standing, in somehow modifying the borders and construing in single cases a peculiar position for the association. This creative role of Courts is to stigmatize, firstly because it is not proper with the peculiar role of administrative justice in Italy and, furthermore, considering the results of the U.S. system analysis.

In U.S. legal system Courts have the last word, but jurisprudence is deeply criticized. Scholars call for Congressional involvement, in order to dictate a specific provision about environmental interests standing.

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Environmental associations well established and competent assure a great concern with nature protection: The Italian solution of legislative provisions for standing appears a good one.

In any case, the adversarial nature of judicial proceeding is not affected by legislative standing.

The provision of association standing does not exclude the distinct condition of a concrete interest in the outcome. Environmental associations are not therefore entitled of a general power of control in whatever activities interesting nature, but organizations must prove they have a reasonable interest in the favorable outcome of the case.

The protection of natural resources is a public interest conferred to administrative authorities and Courts have to intervene just in the pathological contest: Judges do not have to give advisory opinions on administrative agencies balancing interests, if that balancing is reasonable and proportional.

Third parties interests, as we said, need to be confident and entrust administrative decisions, after participated administrative proceeding has taken place.

Administrative proceedings must be the place where environmental interests are taken into consideration. Therefore the solution for a popular action is not the right choice and Aarhus Convention is not so demanding.

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ORGANIZACIÓN ADMINISTRATIVA

INFORME ANUAL - 2014 - ESPAÑA

(Junio 2014)

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Prof. Isaac MARTÍN DELGADO*

ÍNDICE

1. INTRODUCCIÓN

2. MEDIDAS LEGISLATIVAS QUE AFECTAN A LA ORGANIZACIÓN ADMINISTRATIVA

3. ALGUNAS CONSIDERACIONES ESPECÍFICAS SOBRE LA REFORMA DE LAS ADMINISTRACIONES PÚBLICAS POR VÍA DE LA IMPLEMENTACIÓN DE LA ADMINISTRACIÓN ELECTRÓNICA

4. JURISPRUDENCIA CONSTITUCIONAL: LOS RECURSOS CONTRA LA LEY 57/2003, DE 16 DE DICIEMBRE, DE MEDIDAS PARA LA MODERNIZACIÓN DEL GOBIERNO LOCAL

5.BIBLIOGRAFÍA

1. INTRODUCCIÓN

Son numerosas y ciertamente relevantes las reformas que afectan a la organización administrativa impulsadas en el año 2013, fruto de la plasmación de los anuncios realizados por el Gobierno a finales de 2011 y principios de 2012 en el contexto de la crisis económica y de las exigencias impuestas por las Instituciones europeas.

El eje de la mayor parte de ellas ha sido el Informe de la Comisión para la Reforma de las Administraciones Públicas, un ambicioso proyecto de reforma estructural de la Administración española.

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La Comisión para la Reforma de las Administraciones Públicas fue creada por Acuerdo del Consejo de Ministros el 26 de octubre de 2012. Adscrita al Ministerio de Hacienda y Administraciones Públicas, su Presidencia corresponde al Subsecretario de la Presidencia. Está organizada internamente en cuatro Subcomisiones –Duplicidades Administrativas, Simplificación Administrativa, Gestión de Servicios Comunes y Administración Institucional–, que realizaron su trabajo durante poco más de 6 meses, tras los cuales presentó el 21 de junio de 2013 un Informe que integra un total de 217 propuestas (no pocas de las cuales son simples indicaciones a las Comunidades Autónomas, por carecer el Estado de competencia sobre la materia) que buscan eliminar duplicidades, simplificar procedimientos, mejorar la gestión de servicios y medios y racionalizar la Administración, en particular la institucional.

Partiendo del constante aumento del gasto público en los últimos años, y teniendo en cuenta la considerable disminución de ingresos, lo que ha generado un importante déficit estructural en el conjunto de las Administraciones Públicas, el Informe CORA propone una reforma estructural de la Administración Pública española en clave eminentemente económica –no en vano, el principal marco legislativo de la misma es la Ley Orgánica 2/2012, de 27 de abril, de Estabilidad Presupuestaria y Sostenibilidad Financiera– que conduzca a la reducción del déficit y al aumento de la eficacia y la eficiencia en la gestión de la cosa pública.

De este modo, junto a toda una serie de concretas medidas con forma de Planes, decisiones administrativas y Acuerdos del Consejo de Ministros que han conducido a la supresión de diversas sociedades mercantiles estatales, a la eliminación y reorganización de diferentes organismos públicos y a la reducción de altos cargos de la Administración General del Estado, se han aprobado varias normas que suponen novedades de calado.

2. MEDIDAS LEGISLATIVAS QUE AFECTAN A LA ORGANIZACIÓN ADMINISTRATIVA

El Informe CORA, como ha sido anticipado, incluye importantes medidas que afectan a la organización administrativa del conjunto del Estado. Muchas de ellas se refieren a estructuras y decisiones de gestión interna de los Ministerios, de los organismos públicos a ellos adscritos y de las sociedades públicas por ellos participadas, que se han traducido en cambios de estructura orgánica, en medidas de planificación conjunta, en la creación de plataformas electrónicas para la gestión centralizada, en la incorporación de medios electrónicos a la actuación administrativa y en medidas en materia de gestión de personal. En esta Crónica se dará cuenta de las adoptadas por norma con rango de Ley.

Son dos las Leyes que destacan por su relevancia para el Derecho Administrativo, en general, y para la Administración Pública en particular.

La **Ley 19/2013, de 9 de diciembre, de Transparencia, Acceso a la Información Pública y Buen Gobierno**, regula dos cuestiones relacionadas pero no necesariamente conectadas, como son la de la transparencia y el buen gobierno. En relación con esta última cuestión, eleva el rango normativo de toda una serie de principios relativos a la ética en la gestión pública y prevé un amplio catálogo de infracciones y sanciones. Respecto de la transparencia, incorpora una serie de obligaciones de publicidad activa (que afectan básicamente a información económica, jurídica y organizativa), establece el procedimiento para el ejercicio del derecho de acceso a la información pública, fija

los límites a unas y otro y crea el Consejo de Transparencia y Buen Gobierno como órgano independiente encargado de velar por el cumplimiento de las exigencias contenidas en la norma.

La **Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local**, norma ciertamente contestada y discutida, procede a clarificar competencias municipales para evitar duplicidades entre niveles organizativos en aplicación del principio "una Administración una competencia" y a racionalizar la estructura organizativa de la Administración Local, todo ello en el contexto de la estabilidad presupuestaria y con el objetivo de hacer valer los principios de eficiencia, estabilidad y sostenibilidad financiera. Refuerza, además, el papel de las Diputaciones Provinciales como nivel administrativo de coordinación de servicios municipales y busca favorecer la iniciativa económica privada mediante la limitación del uso de la técnica autorizatoria.

No menos importante está llamada a ser la **Ley 10/2013, de 9 de diciembre, de Garantía de la Unidad de Mercado**, que tiene por objeto establecer los principios y normas básicas que garanticen la unidad de mercado consagrada en el art. 139 CE, para lo cual opta por reforzar la cooperación entre el Estado, las Comunidades Autónomas y los Entes Locales, por la creación de un Consejo para la Unidad de Mercado encargado del seguimiento de la aplicación de la norma y por profundizar en la línea ya avanzada por las medidas legislativas adoptadas en nuestro país en transposición de la Directiva de Servicios, mediante la opción por la comunicación previa y la declaración responsable en detrimento de la autorización.

En el contexto de la crisis económica, se han impulsado diferentes medidas de cooperación entre Administraciones. Es el caso del **Real Decreto-Ley 4/2013, de 22 de febrero, de medidas de apoyo al emprendedor y de estímulo del crecimiento y de la creación de empleo**, que establece una nueva fase del conocido Plan de Pago a Proveedores, un mecanismo de financiación en beneficio de entidades locales y Comunidades Autónomas para hacer frente a los pagos adeudados a sus proveedores, creado a través del Real Decreto-Ley 4/2012, de 24 de febrero. Una tercera fase de este mecanismo ha sido establecida por medio del Real Decreto-Ley 8/2013, de 28 de junio, de medidas urgentes contra la morosidad de las administraciones públicas y de apoyo a las entidades locales con problemas financieros. Por su parte, **la Ley 25/2013, de 27 de diciembre, de impulso de la factura electrónica y creación del Registro Contable de Facturas en el Sector Público** apuesta por el control informatizado y sistematizado de las facturas a través de la creación obligatoria en cada nivel territorial de puntos generales de entrada de facturas electrónicas, lo que permitirá un mejor seguimiento de la morosidad y una más fácil aplicación de los mecanismos de reacción previstos en la Ley Orgánica de Estabilidad Presupuestaria y Sostenibilidad Financiera.

En relación con la creación de estructuras organizativas, destaca especialmente la **Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia**, que fusiona en un solo organismo de Derecho Público diferentes organismos supervisores –algunos de los cuales muy poco tienen que ver entre sí–, como son la Comisión Nacional de la Energía, la Comisión del Mercado de las Telecomunicaciones, la Comisión Nacional de la Competencia, el Comité de Regulación Ferroviaria, la Comisión Nacional del Sector Postal, la Comisión de Regulación Económica Aeroportuaria y el Consejo Estatal de Medios Audiovisuales. A la nueva Comisión Nacional de los Mercados y la Competencia se le encomienda la función de garantizar, preservar y promover el correcto funcionamiento del mercado, así

como la transparencia y la existencia de una competencia efectiva en todos los mercados y sectores productivos en beneficio de los consumidores y usuarios.

En la línea opuesta, en el sentido de constitución de nuevos órganos, la **Ley Orgánica 6/2013, de 14 de noviembre,** procede a la creación de la **Autoridad Independiente de Responsabilidad Fiscal**, organismo de Derecho Público cuya función principal consiste en velar por el estricto cumplimiento de los principios de estabilidad presupuestaria y sostenibilidad financiera a través tanto de la evaluación del ciclo presupuestario y del endeudamiento público, como del análisis de las previsiones económicas. Además, en el contexto de la liberalización del sector ferroviario, por medio del **Real Decreto-Ley 15/2013, de 13 de diciembre**, se ha procedido a la reestructuración de la entidad pública empresarial **ADIF** (Administrador de Infraestructuras Ferroviarias) a través de la creación de una nueva entidad dedicada especialmente a la actividad de construcción y administración de infraestructuras de alta velocidad: ADIF-Alta Velocidad.

Finalmente, en el ámbito autonómico, destacan la **Ley 7/2013, de 27 de diciembre, de Ordenación, Servicios y Gobierno del Territorio de la Comunidad de Castilla y León**, que busca impulsar un nuevo modelo de ordenación y gobierno del territorio, con especial incidencia en el ámbito local, a través de la coordinación de la planificación sectorial de los servicios autonómicos y locales, y de la introducción de medidas de coordinación entre entidades locales menores y sus municipios y de fusión de municipios; y la **Ley 4/2013, de 19 de junio, por la que se modifica la organización y el funcionamiento de las instituciones propias de la Comunidad de Castilla y León**, que procede a adscribir presupuestariamente a las Cortes Regionales y a centralizar en ellas las funciones de nombramientos y de aprobación de sus Reglamentos de Organización y Funcionamiento del Consejo Económico y Social y del Consejo Consultivo de Castilla y León.

Para concluir, especial mención merece la **Ley 4/2013, de 21 de mayo, de Gobierno Abierto de Extremadura**, con la que se busca introducir en esta Comunidad Autónoma el modelo organizativo que implica el *Open Government*, basado en la transparencia, la participación y la colaboración, a través de una regulación conjunta de las obligaciones de transparencia y ejercicio del derecho de acceso, la reutilización de la información pública y la participación ciudadana. Además, incorpora medidas de racionalización y simplificación de la actuación administrativa y procede a crear un Portal de la Transparencia y Participación Ciudadana como punto de acceso general a la información y canal de participación.

3. ALGUNAS CONSIDERACIONES ESPECÍFICAS SOBRE LA REFORMA DE LAS ADMINISTRACIONES PÚBLICAS POR VÍA DE LA IMPLEMENTACIÓN DE LA ADMINISTRACIÓN ELECTRÓNICA

Son muchas las páginas que se han escrito sobre el importante papel que las Tecnologías de la Información y la Comunicación están llamadas a cumplir en la reforma de la Administración Pública. De hecho, el propio concepto de Administración electrónica pone de manifiesto que, en lo relativo al uso de los medios electrónicos en la organización y procedimiento administrativos, tan importante es la transición de la Administración en papel a la Administración electrónica como la realización de cambios organizativos y las nuevas actitudes con el fin de mejorar el diseño de las políticas públicas.

La realidad, sin embargo, evidencia que, hasta el momento, se han centrado muchos esfuerzos en la incorporación de las TIC al ámbito de las Administraciones Públicas y muy pocos a la innovación administrativa en sentido estricto.

No ha de despreciarse el importante avance conseguido en los últimos años desde la perspectiva de la implantación de las nuevas tecnologías en los procesos administrativos, ni tampoco las recientes iniciativas que se están llevando a cabo, tales como la Ley de Transparencia, Acceso a la Información y Buen Gobierno o las experiencias en materia de contratación pública. No en vano, España se sitúa en el número 9 del ranking mundial (y el número 5 en Europa) en cuanto al desarrollo de la Administración electrónica[1].

Sin embargo, puede afirmarse que, en términos generales, todo ello supone modernizar la Administración, pero no innovarla.

El Informe CORA vuelve a insistir en esta idea al afirmar que "la reforma de la Administración parte, consecuentemente, de la necesidad de mejorar su eficacia (…). Entraña una Administración basada en los conceptos de transparencia, accesibilidad y capacidad de respuesta a las nuevas ideas y demandas de los ciudadanos. Una Administración al servicio de los ciudadanos. En definitiva, no sólo se trata de mejorar la eficiencia sino también de cambiar el enfoque de la Administración. Con innovaciones como la Administración electrónica no sólo se persigue hacer lo mismo a través de Internet, sino también usar Internet para hacer cosas nuevas"[2].

No obstante, con independencia del hecho de que la propia elaboración del Informe y de los informes complementarios que han realizado los distintos Ministerios como base para el mismo deba ser valorada muy positivamente, basta una lectura exhaustiva de sus contenidos para comprender que, en lo relativo a la aplicación de las TIC, las propuestas planteadas no van más allá de poner en práctica lo que ya resulta obligatorio en virtud de lo previsto en la Ley 11/2007, de 22 de junio, de Acceso Electrónico de los Ciudadanos a los Servicios Públicos (en adelante, LAE) y de realizar acciones puntuales tales como crear ventanillas únicas sectoriales, conectar bases de datos y registros públicos estatales y autonómicos y reutilizar aplicaciones.

Tras el impulso provocado por la entrada en vigor de la LAE, la falta de exigibilidad de los derechos en ellas contenidos para las Comunidades Autónomas y Entes Locales en los casos en los que para la implementación de las herramientas necesarias para su ejercicio no existan disponibilidades presupuestarias, la crisis económica y la falta de voluntad política, entre otras razones, pronto pusieron de manifiesto que existía el riesgo de incumplimiento de las obligaciones previstas en la norma, riesgo que se ha materializado en la mayor parte de los entes locales, en algunas Comunidades Autónomas y también en el ámbito de la Administración General del Estado. En 2013, seis años después de la entrada en vigor de la LAE, aún no se ha llegado a los objetivos en ella planteados, tal y como ponen de manifiesto los últimos informes del OBSAE.

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[1] Véase el Informe "eReadiness" de la Organización de las Naciones Unidas y los diferentes Informes que periódicamente publica el Observatorio de la Administración electrónica: http://administracionelectronica.gob.es/pae_Home/pae_OBSAE/pae_Informes.html (Última fecha de consulta: 22/6/2014).

[2] Véase la pág. 35 del Informe, disponible en http://www.seap.minhap.gob.es/dms/es/areas/reforma_aapp/INFORME-LIBRO/INFORME%20LIBRO.PDF (Última fecha de consulta: 19/6/2014)

No es necesario insistir demasiado en que la definitiva implantación de la Administración electrónica es una demanda ciudadana y supone un importante ahorro de costes. En el propio Informe se habla del interés de los ciudadanos por el uso de los medios electrónicos en sus relaciones con la Administración[3] y se cuantifica el ahorro en 75 € por cada solicitud que se presenta por medios electrónicos respecto de las que se hacen en papel (80-5€).

Sin embargo, salvo tímidos movimientos, inconstantes e inconexos, no puede hablarse hoy en día de una apuesta decidida por la definitiva implantación de la Administración electrónica como medio para la reforma estructural de las Administraciones Públicas y la innovación administrativa.

El Informe no es una excepción en relación con la afirmación anterior. En él se contienen algunas ideas sugerentes, más programáticas que prácticas; muchos concretos proyectos de desarrollo de aplicaciones y telematización de procedimientos –ya exigibles desde la entrada en vigor de la LAE–; y algunos propósitos de intenciones que no pueden plasmarse en la realidad si no es con la colaboración de Comunidades Autónomas y entes locales.

Toda innovación en la Administración Pública ha de partir del Derecho, en perfecto equilibrio con la tecnología, al que corresponde el papel de regular el uso de las herramientas tecnológicas sin obstáculos innecesarios pero manteniendo el respeto de los derechos de los administrados en sus relaciones jurídico-administrativas. Por esta razón, tomando como referencia la idea reflejada en el Informe en el sentido de que resulta necesario dotar a nuestro Derecho Administrativo de sistematicidad, coherencia y uniformidad, debe valorarse muy positivamente la propuesta de elaborar dos disposiciones legales que tengan por objeto, respectivamente, el régimen jurídico de las Administraciones Públicas y las relaciones de los ciudadanos con las Administraciones (incluidas las mantenidas por medios electrónicos). Nada anticipa, sin embargo, el Informe sobre sus contenidos.

La desconexión entre el proceso de simplificación administrativa y el impulso de la Administración electrónica es una realidad, que destaca oportunamente el Informe. A pesar de lo previsto en el art. 34 LAE, en virtud del cual la aplicación de los medios electrónicos a la gestión de los procedimientos irá precedida de un rediseño funcional del procedimiento y de la simplificación del mismo, lo cierto es que no se ha aprovechado la oportunidad de la implantación de las TIC en el procedimiento administrativo para suprimir documentación, reducir plazos, racionalizar cargas y aumentar la participación y la transparencia.

A ello, sin duda alguna, ha contribuido la ausencia de carácter básico del citado precepto, pero también la circunstancia de que las diferentes Administraciones han procedido a desarrollar las aplicaciones y sistemas necesarios para permitir la gestión electrónica del procedimiento administrativo tal y como éste está pensado para la actuación presencial, sin una planificación general y sin un rediseño de los procedimientos.

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[3] En el Informe se explica que en las sugerencias recogidas en el buzón electrónico que se habilitó para que los ciudadanos pudieran presentar propuestas sobre la reforma de las Administraciones Públicas quedó patente la petición de "mucha más Administración electrónica". Una Administración descontextualizada socialmente es una Administración que no responderá al papel que está llamado a cumplir.

Desde el punto de vista normativo, también puede encontrarse una explicación a esta realidad en el hecho de que la LAE es una norma específicamente dedicada a regular el uso de los medios electrónicos en la organización y el procedimiento administrativos, desconectada de la LPC. Es, por ello, ciertamente interesante la propuesta que plantea el Informe de integrar normativamente la regulación de la tramitación electrónica con la del procedimiento administrativo común[4].

A partir de ahí, sin embargo, el resto de propuestas que se ofrecen en el apartado del Informe dedicado a la Administración electrónica no son sino concreción de obligaciones ya previstas en la LAE y mejora de herramientas ya implementadas.

Efectivamente, la mayor parte de las medidas planteadas pueden conectarse con exigencias legales contenidas en la LAE[5]. Es el caso de la puesta en funcionamiento del Registro Electrónico de Apoderamientos (REA), o de la telematización de trámites concretos como la emisión de documentos sanitarios, la petición de cita previa del Servicio Público de Empleo Estatal, la solicitud de informe electrónico de estar al corriente del pago de las cuotas a la Seguridad Social, la cita previa electrónica en las Jefaturas de Tráfico, o la tramitación electrónica de nacimientos y defunciones desde los centros sanitarios, por destacar algunos ejemplos que aparecen en el Informe. Resulta muy ilustrativa, a este respecto, la afirmación de que "es conveniente seguir impulsando la sustitución de trámites convencionales por electrónicos desde el punto de vista del aumento de la eficacia y eficiencia de las AA.PP., de la mejor del servicio al ciudadano y del ahorro de costes financieros y medioambientales derivados de la supresión del «papel» en los procesos administrativos". Si se pone en relación esta afirmación con lo dispuesto en los dos primeros apartados de la Disposición Final Tercera de la LAE, que establece que "*1. Desde la fecha de entrada en vigor de la presente Ley, los derechos reconocidos en el artículo 6 de la presente ley podrán ser ejercidos en relación con los procedimientos y actuaciones adaptados a lo dispuesto en la misma, sin perjuicio de lo señalado en los siguientes apartados. A estos efectos, cada Administración Pública hará pública y mantendrá actualizada la relación de dichos procedimientos y actuaciones. 2. En el ámbito de la Administración General del Estado y los organismos públicos vinculados o dependientes de ésta, los derechos reconocidos en el artículo 6 de la presente ley podrán ser ejercidos en relación con la totalidad de los procedimientos y actuaciones de su competencia a partir del 31 de diciembre de 2009. A tal fin, el Consejo de Ministros establecerá y hará público un calendario de adaptación gradual de aquellos procedimientos y actuaciones que lo requieran*.", queda perfectamente justificada la idea sostenida en estas líneas de que el Informe aporta poco más –y nada menos, puesto que en sí mismo ello es relevante– que un impulso del cumplimiento de la LAE.

El resto de propuestas constituyen potenciación y mejora de herramientas ya implementadas. Es lo que se pretende con la mejora de la usabilidad del portal y la sede

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[4] Así lo hace en la pág. 144. También la integración, ya materializada, en un único centro directivo las competencias en materia de simplificación administrativa, atención al ciudadano e impulso de la administración electrónica mediante la creación de la Dirección General de Modernización Administrativa, Procedimientos e Impulso de la Administración Electrónica.

[5] No en vano, como puede leerse en el propio Informe, en materia de simplificación administrativa se han integrado los proyectos en curso de la Dirección General de Modernización Administrativa, Procedimientos en Impulso de la Administración Electrónica del Ministerio de Hacienda y Administraciones Públicas, que tienen por objeto precisamente ir desarrollando las previsiones de la LAE, vigente –y exigible en sus contenidos preceptivos– desde el año 2007.

electrónica de la Agencia Estatal de la Administración Tributaria, el incremento de las actuaciones administrativas automatizadas, el uso de los certificados electrónicos de empleado público o la receta electrónica interoperable. Especial atención merece en relación con este aspecto la propuesta de establecer un Punto de Acceso General a todas las Administraciones Públicas que afecte a todas sus actividades, a su organización y funcionamiento y a los servicios y trámites más relevantes. Esta propuesta se presenta como una herramienta que permitirá al ciudadano acceder desde un único lugar a la información de las distintas Administraciones Públicas, aparte de orientarle en sus relaciones con ellas, iniciar actuaciones administrativas, conocer el estado de tramitación de éstas o conocer los servicios que las Administraciones ponen a su disposición. Todas estas funciones se están desarrollando ya, desde hace varios años, por desde la dirección electrónica www.060.es, punto de acceso general. Es cierto que resulta conveniente mejorar la web y darla a conocer para que sea más utilizada, pero del informe no se deduce que el nuevo punto de acceso vaya a aportar un gran valor adicional. También ha de ser destacada la idea de crear un Tablón Edictal Electrónico Único para toda la Administración General del Estado, algo que ayudará a cumplir la función a la que está llamada esta herramienta de dar a conocer a sus destinatarios decisiones administrativas que no le han podido ser notificadas personalmente o respecto de las que corresponde la publicidad general.

Debe valorarse positivamente la exigencia de unificación de estructuras electrónicas dentro de la misma Administración e, incluso, de todas las Administraciones Públicas españolas (lo cual no se podrá hacer sino únicamente por vía de convenio). La exigibilidad de múltiples tipos de firma electrónica, la existencia de plataformas diferentes con los mismos contenidos, la proliferación tablones edictales electrónicos, por señalar tres ejemplos, en poco ayuda a facilitar el acceso a la Administración electrónica.

Uno de los aspectos que puede resultar definitivo en la mejora de la eficiencia y eficacia del gasto público en el ámbito de implementación de la Administración electrónica es la reutilización por parte de las diferentes unidades TIC de las distintas Administraciones Públicas españolas de las tecnologías, desarrollos y servicios por ellas creados. Aunque se trata de una posibilidad prevista y deseada por el art. art. 45 LAE, según el cual las Administraciones titulares de los derechos de propiedad intelectual de aplicaciones, desarrolladas por sus servicios o cuyo desarrollo haya sido objeto de contratación, podrán ponerlas a disposición de cualquier otra Administración sin contraprestación y sin la necesidad de convenio, la aplicación práctica de la misma es más bien reducida.

Efectivamente, la mayor parte de las Administraciones Españolas han optado por desarrollar –normalmente, por vía de contratación con empresas privadas– sus propias aplicaciones pensando en su estructura particular. Como reconoce el informe, el modelo organizativo se ha desarrollado "en isla", incluso dentro de la propia Administración General del Estado. Por esta razón, la definición de un catálogo de servicios comunes de administración electrónica de provisión centralizada y la creación de la figura del CIO (Chief Information Officer) como máximo responsable de la política del gobierno en materia de tecnologías de la información y las comunicaciones para la AGE pueden aportar novedades significativas.

Sin duda alguna, el hecho de reiterar la necesidad de llevar a cabo lo que resulta exigible por Ley desde hace ya más de cinco años debe ser valorado positivamente, pues permite poner de manifiesto las carencias del sistema, reconocer los errores cometidos y hacer el propósito de cambiar la situación.

Sin embargo, no se prevén medios concretos en la mayor parte de los casos, más allá de lo que ya resulta exigible. A todo ello ha de añadirse la circunstancia de que no pocos de los cambios que se proponen no son competencia de la Administración General del Estado, sino de las Comunidades Autónomas, con lo que las propuestas quedan en meras invitaciones. Por señalar algunos ejemplos, es el caso de la utilización por las Comunidades Autónomas de los servicios de certificación electrónica ofrecidos por la Administración General del Estado o la compartición de las plataformas de gestión de centros docentes actualmente existentes.

La palabra "reforma" se define en el Diccionario de la RAE como "aquello que se propone, proyecta o ejecuta como innovación o mejora en algo". La innovación en la Administración consiste en algo más que aplicar la LAE, crear ventanillas únicas sectoriales, conectar bases de datos y registros públicos estatales y autonómicos o crear nuevas plataformas electrónicas, aplicaciones y sistemas informáticos. Por esta razón, y a pesar de lo que se sostiene en el mismo, el Informe no presenta un proyecto de reforma estructural de las Administraciones Públicas en lo que se refiere al paso de la Administración tradicional a la Administración electrónica. Se trata más bien de una planificación conjunta por Ministerios de iniciativas para implementar la Administración electrónica en cumplimiento de la LAE, de una auditoría interna de la Administración General del Estado que afecta en ciertos aspectos a la Administración autonómica y a la Administración local para perfeccionar diferentes aspectos organizativos, de una Planificación estratégica que permitirá avanzar en el camino hacia la modernización administrativa. Bienvenidas sean todas ellas.

4. JURISPRUDENCIA CONSTITUCIONAL: LOS RECURSOS CONTRA LA LEY 57/2003, DE 16 DE DICIEMBRE, DE MEDIDAS PARA LA MODERNIZACIÓN DEL GOBIERNO LOCAL

El Tribunal Constitucional ha resuelto en tres sentencias los diferentes recursos que habían presentado contra la Ley 57/2003, de 16 de diciembre, de medidas para la modernización del Gobierno Local el Parlamento de Cataluña, y los Gobiernos de Aragón y de Cataluña. Son las Sentencias 103/2013, de 25 de abril, 143/2013, de 11 de julio, y 161/2013, de 26 de septiembre.

El objeto de impugnación era la Disposición Final Primera de la norma, que declaraba básicos diferentes artículos de la misma, por considerar que con ello se estaba vulnerando el reparto competencial entre Estado y Comunidades Autónomas en diversas materias.

El Tribunal Constitucional, tras recordar la jurisprudencia constitucional relativa a la competencia sobre régimen local, en virtud de la cual corresponde al Estado la fijación de los principios o criterios básicos en materia de organización y competencia de general aplicación en todo el Estado, y se entiende que la legislación básica integra, en todo caso, los principios relativos a los aspectos institucionales –organizativos y funcionales– y a las competencias locales, quedando en manos de las Comunidades Autónomas la legislación de desarrollo, declara la constitucionalidad de la concepción del reparto competencial de la Ley, con una importante excepción.

Efectivamente, en la Sentencia 103/2013, considera que el art. 126.2 de la citada Ley, en virtud del cual "[*e*]*l Alcalde podrá nombrar como miembros de la Junta de Gobierno Local a personas que no ostenten la condición de concejales, siempre que su número no*

supere un tercio de sus miembros, excluido el Alcalde", es inconstitucional y nulo por ser contrario a la plasmación del principio democrático que opera en el art. 140 CE.

En la intención del Legislador estaba modificar el diseño de gobierno de los municipios de gran población con la finalidad de que las competencias administrativas del Pleno municipal pasaran a la Junta de Gobierno Local, emulando así el modelo estatal Cortes Generales-Gobierno. Sin embargo, considera el Tribunal Constitucional que el principio democrático y el principio representativo están profundamente enraizados en el ámbito local, constituyendo el fundamento de la autonomía local, hasta el punto de que el art. 140 CE atribuye tanto el gobierno como la administración municipal al Alcalde y los concejales que, además, han de ser democráticamente elegidos. Estas competencias podrán ser ejercidas tanto individualmente como a través de órganos colegiados, lo cual habrá de ser determinado por el Legislador básico. Sin embargo, en todo caso debe éste respetar el plus de legitimidad democrática que el citado precepto otorga al gobierno municipal, de tal modo que la opción por la profesionalización que pretendía introducir la Ley impugnada resulta contraria a la Constitución. La declaración de nulidad del precepto, sin embargo, no tiene efectos frente a las situaciones consolidadas. La sentencia contiene un voto particular firmado por dos Magistrados en el que discrepan de la declaración de inconstitucionalidad por considerar que resulta contradictorio entender que constituye vulneración de la autonomía municipal un modelo admitido para el nivel autonómico y estatal, dado que ni todos los consejeros autonómicos ni los ministros del Gobierno son diputados regionales o nacionales.

5. BIBLIOGRAFÍA SELECCIONADA

A continuación se presenta un listado de bibliografía seleccionada en función de los temas y normas incorporados a esta Crónica. Carece de ánimo de exhaustividad.

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(Septembre 2013)

Marie-Pierre LAPEYRE[1]

INDEX

1. LA QUESTION PRIORITAIRE DE CONSTITUTIONNALITE EN MATIERE DE POLICE
2. EXERCICE DES POUVOIRS DE POLICE ADMINISTRATIVE
2.1 Illégalité du procédé contractuel
2.2 Une nouvelle autorité de police administrative: le Président de l'EPCI à fiscalité propre
2.3 Mesures de police administrative / sanction administrative
2.4 Concours des pouvoirs de police
3. LEGALITE DE L'ACTE DE POLICE ADMINISTRATIVE : CONTROLE DE PROPORTIONNALITE

L'apport des années 2011-2013 en matière de police administrative tient surtout à la jurisprudence. Si traditionnellement la police administrative renvoie à ses éléments constitutifs, il n'y a eu en la matière qu'une précision tant au but de sécurité publique. Par sécurité publique, il faut au moins entendre sécurité d'intérêt collectif. En effet, « la construction de cet ouvrage ne présentant pas d'intérêt collectif ne peut être regardée comme concourant à la préservation de la sécurité publique au sens des dispositions précitées de l'article L. 2212-2 du code général des collectivités territoriales »[2].

[1] AATER – Institut Maurice Hauriou - Université Toulouse 1 Capitole

[2] CAA Lyon 3 mai 2012, Commune de La Clusaz, req. n° 11LY00157, La commune n'est obligée de prendre à sa charge que les travaux de sécurité d'intérêt collectif, AJDA 2012 p. 1608

Sera présenté principalement le bilan contentieux de ces années, au travers de rubriques classiques. Au titre de la législation, on doit toutefois mentionner la loi n° 2010-1563 du 16 décembre 2010 de réforme des collectivités territoriales[3] en tant qu'elle consacre une nouvelle autorité de police : le président de l'EPCI à fiscalité propre.

1. LA QUESTION PRIORITAIRE DE CONSTITUTIONNALITE EN MATIERE DE POLICE

Le mécanisme de la question prioritaire de constitutionnalité a été l'occasion de préciser certains points concernant le régime de la police administrative[4].

- **Police des armes**

Le Conseil constitutionnel a déclaré conforme à la Constitution l'article L. 2336-5 du code de la défense. Cet article institue, pour prévenir des atteintes à l'ordre public, une procédure de dessaisissement obligatoire des armes soumises à un régime d'autorisation ou de déclaration. Le Conseil constitutionnel a estimé « que, par les dispositions contestées, le législateur a entendu assurer la prévention des atteintes à l'ordre public, qui constitue un objectif de valeur constitutionnelle ; que le "dessaisissement" ne peut être ordonné par le préfet que pour des raisons d'ordre public ou de sécurité des personnes »[5].

- **Cellule de dégrisement**

Le Conseil constitutionnel a jugé que le placement en cellule de dégrisement *(Article L. 3341-1 du code de la santé publique)* est une mesure de police administrative conforme à la Constitution, sous réserve que le temps qui y est passé soit pris en compte dans la durée de la garde à vue. L'article L. 3341-1 prévoit qu'une « personne trouvée en état d'ivresse dans les lieux publics est, par mesure de police, conduite à ses frais dans le local de police ou de gendarmerie le plus voisin ou dans une chambre de sûreté, pour y être retenue jusqu'à ce qu'elle ait recouvré la raison ».

Pour le Conseil constitutionnel, « la conduite dans un local de police ou de gendarmerie d'une personne trouvée en état d'ivresse sur la voie publique et le placement de celle-ci dans ce local ou en chambre de sûreté jusqu'à ce qu'elle ait recouvré la raison sont des mesures relevant de la police administrative dont l'objet est de prévenir les atteintes à l'ordre public et de protéger la personne dont il s'agit ; que ces dispositions permettent aux agents de la police et de la gendarmerie nationales, seuls investis de cette mission de

[3] JORF n°0292 du 17 décembre 2010 page 22146

[4] Pour un panorama des décisions QPC intéressant les polices de l'urbanisme et de l'environnement, voir Chronique Pierre de Montalivet, Question prioritaire de constitutionnalité et droit administratif, Droit administratif n°12, Décembre 2012, chron. 8

[5] Cons. Const. 17 janvier 2012, M. Gallix, décision n° 2011-209 QPC

sécurité publique, d'opérer un tel placement après avoir constaté par eux-mêmes l'état d'ivresse qui est un fait matériel se manifestant dans le comportement de la personne »[6].

2. EXERCICE DES POUVOIRS DE POLICE ADMINISTRATIVE

Le juge administratif apporta des précisions quant à l'interdiction classique du recours au procédé contractuel en matière de police (2.1). Au titre de l'exercice des pouvoirs de police, l'accent doit être mis sur la loi du 16 décembre 2010 de réforme des collectivités territoriales qui instaure une nouvelle autorité de police administrative : le président de l'EPCI à fiscalité propre (2.2). L'apport jurisprudentiel de ces dernières années est venu préciser les contours entre mesure de police et sanction administrative (2.3). Enfin, et surtout, la jurisprudence a foisonné s'agissant des concours des pouvoirs de police (2.4).

2.1 Illégalité du procédé contractuel

Il est courant de présenter le couple police administrative/ contrat comme antinomique. En effet, depuis le classique arrêt Ville de Castelnaudary[7], le juge administratif a posé un principe d'interdiction du procédé contractuel en matière de police[8]. Néanmoins, la jurisprudence permet depuis longtemps certaines délégations conventionnelles[9], notamment d'activités matérielles de police. Le Conseil d'Etat est venu préciser la question de l'imputation de l'obligation de réparer un dommage causé par une activité de police matériellement déléguée à une personne privée. Il considère qu' « eu égard à l'objet du contrat administratif passé à cet effet entre l'État et la société, contrat qui, associant une personne privée à la mise en œuvre d'une opération décidée dans le cadre de pouvoirs de police, devait être exécuté sous le contrôle et la responsabilité de l'administration, […] il appartenait à l'État de réparer les dommages subis par M. A. du fait des fautes commises par les préposés de la société CTH, sans subordonner cette responsabilité à l'impossibilité pour l'intéressé d'obtenir de cette société la réparation de ces dommages »[10]. Ainsi, « le présent arrêt reconnaît que la délégation par contrat de l'activité

[6] Cons. const. 8 juin 2012, M. Mikaël D., n° 2012-253 QPC, Veille Séverine Brondel, Le placement en cellule de dégrisement est une mesure de police administrative, AJDA 18 juin 2012, p 1136

[7] CE, ass, 17 juin 1932, Lebon, p. 595

[8] Pour un exemple récent : CAA Bordeaux, 5 février 2013, n° 11BX01160, Denoits, Conclusions Guillaume de La Taille, Le maire exerce seul ses pouvoirs de police sur les sonneries de cloches, La Semaine Juridique Administrations et Collectivités territoriales n° 21, 20 Mai 2013, 2146

[9] Jacques Petit, Nouvelles d'une antinomie : contrat et police, Mélanges Jacques Moreau, Économica, 2003, p. 345

[10] CE 10 oct. 2011, Ministre de l'alimentation, de l'agriculture et de la pêche c. Jonnet, req. n° 337062 ; Rémi Grand, L'Etat est responsable de la mauvaise exécution d'une mesure de police par une personne privée, AJDA 2011 p. 1985

matérielle de police par l'État n'empêche nullement que reste imputée à ce dernier l'obligation de réparer les dommages causés par la personne privée cocontractante »[11].

L'interdiction de recourir au contrat en matière de police n'a toutefois pas une valeur constitutionnelle. Le Conseil d'Etat l'a rappelé dans un arrêt refusant de transmettre une question prioritaire de constitutionnalité, considérant que « ni l'article 12 de la Déclaration des droits de l'homme et du citoyen du 26 août 1789 ni aucun autre principe constitutionnel n'exige [...] que les missions de police administrative comportant l'exercice de prérogatives de puissance publique ne soient confiées par des personnes publiques qu'à des fonctionnaires ou à des agents liés à elles par des contrats de droit public »[12].

2.2. Une nouvelle autorité de police administrative: le Président de l'EPCI à fiscalité propre

La loi *n° 2010-1563* du 16 décembre 2010 de réforme des collectivités territoriales *(JORF n°0292 du 17 décembre 2010 page 22146)* introduit pour la première fois un transfert *de plein droit* de certains pouvoirs de police administrative spéciale des maires au président de l'EPCI à fiscalité propre dans les domaines de l'assainissement, l'élimination des déchets et la réalisation d'aires d'accueil ou de terrains de passage des gens du voyage *(Art. L. 5211-9-2 CGCT)*. Cette loi « favorise ainsi l'émergence d'une nouvelle autorité de police administrative »[13]. Si la loi n° 2004-809 du 13 août 2004 relative aux libertés et responsabilités locales *(JORF n°190 du 17 août 2004 page 14545)* instaurait déjà un transfert facultatif du pouvoir de police du maire à l'EPCI dans certains domaines, ce dispositif est resté dans les faits lettre morte. Désormais, dans les trois domaines concernés par le transfert obligatoire, celui-ci devient automatique, sauf refus expresse des maires, à compter du 1er décembre 2011. En effet, une possibilité est laissée à chaque maire de refuser le transfert de plein droit de ses pouvoirs de police, et choisir de conserver en partie ou totalement les domaines fixés par la loi du 16 décembre 2010. Une difficulté se fait jour, le refus de transfert ne concernant que le territoire de la commune du maire réfractaire, cela est « susceptible de générer un périmètre communautaire à géométrie variable pour l'exercice de ces pouvoirs par le président d'EPCI »[14]. Conscient de cette complexification de l'articulation des pouvoirs de police, la loi prévoit la possibilité, pour le président de l'EPCI, de renoncer dans les six mois suivants son élection, à ses pouvoirs de police

[11] Benoît Delaunay, *Attribution par contrat d'une activité de police à une personne privée et responsabilité publique*, RFDA 2012 p. 481

[12] CE, 4 avr. 2012, SNIASS, req. n° 350952

[13] Laurence Martin, *Le président de l'EPCI à fiscalité propre, une autorité de police administrative en devenir*, AJDA 2012, p. 135

[14] Laurence Martin, *op. cit*, AJDA 2012, p. 138

transférés. Sans compter que « ce transfert de pouvoirs de police spéciale ne dépossède […] en aucune manière le maire de son pouvoir de police générale »[15]. Sur le territoire communal, la répartition des pouvoirs de police générale et spéciale devra désormais s'articuler autour de trois autorités, le maire, le préfet et le président de l'EPCI. Si aucun contentieux n'est encore pendant à notre connaissance, le flou laissé par le législateur devrait permettre au juge de définir les contours de ce nouvel enchevêtrement des pouvoirs de police.

2.3 Mesures de police administrative / sanction administrative

Plusieurs arrêts et avis sont venus préciser ces dernières années les contours de la distinction entre sanction administrative et mesure de police.

- **Police des débits de boissons**

Etait en cause la police des débits de boissons, plus particulièrement l'article L. 3332-15 du Code de la santé publique (CSP) qui dispose : « 1. La fermeture des débits de boissons et des restaurants peut être ordonnée par le représentant de l'État dans le département pour une durée n'excédant pas six mois, à la suite d'infractions aux lois et règlements relatifs à ces établissements (...) / 2. En cas d'atteinte à l'ordre public, à la santé, à la tranquillité ou à la moralité publiques, la fermeture peut être ordonnée par le représentant de l'État dans le département pour une durée n'excédant pas deux mois (...) / 3. Lorsque la fermeture est motivée par des actes criminels ou délictueux prévus par les dispositions pénales en vigueur, à l'exception des infractions visées au 1, la fermeture peut être prononcée pour six mois. Dans ce cas, la fermeture entraîne l'annulation du permis d'exploitation visé à l'article L. 3332-1. / 4. Les crimes et délits ou les atteintes à l'ordre public pouvant justifier les fermetures prévues au 2 et au 3 doivent être en relation avec la fréquentation de l'établissement ou ses conditions d'exploitation (...) ».

- Par un arrêté, le préfet de police avait, sur le fondement des dispositions des 3 et 4 de l'article L. 3332-15 du CSP, ordonné la fermeture pour une durée de six mois de l'établissement "Le Madison" au motif que "ce débit de boissons était régulièrement utilisé comme un lieu de rencontre et de rabattage de la clientèle en vue de relations sexuelles tarifées dans les hôtels proches". Pour le Conseil d'Etat, « la fermeture de ce débit a pour objet de prévenir la continuation ou le retour de désordres liés au fonctionnement de l'établissement, indépendamment de toute responsabilité de l'exploitant ; […] une telle

[15] Efthymia Lekkou, *Les nouveaux pouvoirs de police spéciale des présidents d'EPCI*, La Semaine Juridique Administrations et Collectivités territoriales n°31, 29 Juillet 2013, 2227

mesure doit être regardée en conséquence, non comme une sanction présentant le caractère d'une punition, mais comme une mesure de police »[16].

- Le 6 février 2013, le Conseil d'Etat s'est prononcé dans un avis contentieux, sur la nature des mesures de fermeture administrative des débits de boissons. Si depuis la réforme de 2003 *(Loi n°2003-239 du 18 mars 2003 pour la sécurité intérieure)*, elles constituaient tantôt des sanctions administratives, tantôt des mesures de police, elles seront désormais « toujours » qualifiées de mesures de police. Sans doute par souci de pragmatisme, la Haute-juridiction estime que « les mesures de fermeture de débits de boissons ordonnées par le préfet sur le fondement de ces dispositions ont toujours pour objet de prévenir la continuation ou le retour de désordres liés au fonctionnement de l'établissement, indépendamment de toute responsabilité de l'exploitant. Qu'elles soient fondées sur les dispositions du 1, du 2 ou du 3 de l'article L. 3332-15 du Code de la santé publique, de telles mesures doivent être regardées non comme des sanctions présentant le caractère de punitions mais comme des mesures de police »[17].

- **Discipline militaire**

Un militaire conteste son arrêt définitif de vol sur tous types d'aéronefs devant le Conseil d'État qui relève que la décision litigieuse n'a pas été prise dans le cadre disciplinaire mais au motif « qu'elle était nécessaire pour prévenir un trouble à l'ordre public lié à la sécurité des biens et des personnes »[18].

- **Droit pénitentiaire**

Pour les juges du Palais-Royal, le refus de délivrer un permis de rendre visite à une personne détenue « ne constitue pas une sanction ayant le caractère de punition, mais une mesure de police administrative tendant à assurer le maintien de l'ordre public et de la sécurité au sein de l'établissement pénitentiaire ou, le cas échéant, la prévention des infractions » *(CE, 20 fév. 2013, M. T., req. n° 364081, Veille Diane Poupeau, AJDA 2013, p. 444).*

[16] CE, 10 octobre 2012, n°345903, SARL Le Madison, Les Dames Dol et Laurent sont de retour ! Veille par Charles-André Dubreuil, La Semaine Juridique Administrations et Collectivités territoriales n° 42, 22 Octobre 2012, act. 703 – Voir également : CE, 9 mai 2012, n° 356977, Sté SOTREF et Meillon : JurisData n° 2012-010500

[17] CE, avis, n° 363532, 6 févr. 2013, Pesteil : JurisData n° 2013-001738, Sylvain Merenne, Débits de boissons et excès de pouvoir, La Semaine Juridique Administrations et Collectivités territoriales n° 22, 27 Mai 2013, 2148

[18] CE, 19 déc. 2012, n° 357475, Cyril Chabrier : JurisData n° 2012-029246, Veille par Mathieu Touzeil-Divina, Sanction disciplinaire ou mesure de police ?, La Semaine Juridique Administrations et Collectivités territoriales n° 1, 7 Janvier 2013, act. 20

2.4 *Concours des pouvoirs de police*

Si la jurisprudence a donné quelques exemples de concours de pouvoirs de police spéciale (1), l'actualité principale a été la concurrence entre les pouvoirs de police générale et spéciale (2)

a. CONCOURS DE POUVOIRS DE POLICE SPECIALE

- **Police des débits de boissons**

Par un arrêt du 24 avril 2012, le Conseil d'Etat précise la combinaison possible des différentes législations applicables aux restaurants et débits de boissons, « un préfet peut prendre une mesure de fermeture d'un établissement à la fois, d'une part, sur le fondement du code rural et du code de la consommation et, d'autre part, sur celui du code de la santé publique »[19].

- **Police des déchets**

Selon le Conseil d'Etat, « si un maire est compétent pour la police des déchets, le préfet peut intervenir en cas de carence et au titre des déchets issus d'une installation classée »[20]. En effet, il considère « que le détenteur de déchets de nature à porter atteinte à l'environnement a l'obligation d'en assurer l'élimination dans des conditions propres à éviter une telle atteinte ; que l'autorité investie des pouvoirs de police municipale doit prendre les mesures nécessaires pour assurer l'élimination des déchets dont l'abandon, le dépôt ou le traitement présentent des dangers pour l'environnement ; qu'en cas de carence de l'autorité municipale dans l'exercice des pouvoirs de police qui lui sont conférés au titre de la police des déchets, le préfet doit prendre sur le fondement de ces dispositions, à l'égard du producteur ou du détenteur des déchets ».

b. CONCOURS DE POUVOIRS DE POLICE GENERALE ET SPECIALE

Ces dernières années ont été marquées par le feuilleton des élus locaux s'opposant à l'implantation des antennes relais et à la culture d'OGM sur le territoire de leurs communes.

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[19] CE, 24 avril 2012, Ministre de l'agriculture et de la pêche c/ SARL L'Escale, req. n°328033, conclusions de Jean-Philippe Thiellay, Textes applicables à la mise en œuvre de polices spéciales pour la fermeture d'un restaurant, AJDA 2012 p. 1417

[20] CE, 23 novembre 2011, Ministre de l'Ecologie, de l'Energie, du Développement durable et de l'Aménagement du territoire, req. n° 325334 ; Frédéric Scanvic, Les sols pollués sont des déchets : compétence du préfet en cas de carence du maire, AJ Collectivités Territoriales 2012, p. 101

- **Antennes relais :**

Episode 1 : Par trois arrêts d'Assemblée rendues le 26 octobre 2011[21], la Haute-juridiction a jugé illégaux des arrêtés municipaux réglementant l'implantation d'antennes relais sur le territoire communal. Selon le Conseil d'Etat, la police générale du maire ne peut entrer en concurrence avec la police spéciale des communications électroniques confiées par la loi à l'Etat. En outre, le principe de précaution ne peut permettre aux maires d'excéder son champ de compétence et d'intervenir en dehors de ses domaines d'attributions.

En effet, le Conseil d'Etat considère que « le législateur a organisé de manière complète une police spéciale des communications électroniques confiée à l'Etat ; qu'afin d'assurer, sur l'ensemble du territoire national et conformément au droit de l'Union européenne, d'une part, un niveau élevé et uniforme de protection de la santé publique contre les effets des ondes électromagnétiques émises par les réseaux de communications électroniques, qui sont identiques sur tout le territoire, d'autre part, un fonctionnement optimal de ces réseaux notamment par une couverture complète de ce territoire, le législateur a confié aux seules autorités qu'il a désignées, c'est-à-dire au ministre chargé des communications électroniques, à l'ARCEP et à l'ANFR, le soin de déterminer, de manière complète, les modalités d'implantation des stations radioélectriques sur l'ensemble du territoire ainsi que les mesures de protection du public contre les effets des ondes qu'elles émettent ; que les pouvoirs de police spéciale ainsi attribués aux autorités nationales, qui reposent sur un niveau d'expertise et peuvent être assortis de garanties indisponibles au plan local[22], sont conférés à chacune de ces autorités, notamment pour veiller, dans le cadre de leurs compétences respectives, à la limitation de l'exposition du public aux champs électromagnétiques et à la protection de la santé publique ; que, dans ces conditions, si le législateur a par ailleurs prévu que le maire serait informé, à sa demande, de l'état des installations radioélectriques exploitées sur le territoire de la commune, et si les articles L. 2212-1 et L. 2212-2 du code général des collectivités territoriales habilitent le maire à prendre les mesures de police générale nécessaires au bon ordre, à la sûreté, à la sécurité et à la salubrité publiques, celui-ci ne saurait, sans porter atteinte aux pouvoirs de police spéciale conférés aux autorités de l'Etat, adopter sur le territoire de la commune, une réglementation relative à l'implantation des antennes relais de téléphonie mobile et destinée à protéger le public contre les effets des ondes émises par ces antennes ».

[21] CE, ass. 26 octobre 2011, Commune de Saint-Denis, req. n°326492 ; Commune des Pennes-Mirabeau, req. n°329904; Société française de radiotéléphonie, req. n°341768

[22] Voir la même logique s'agissant des logements insalubres : CE, 14 novembre 2011, Ministre du Travail c/ Commune de Rodez, req. n°341956, JurisData n°2011-025266 ; Yvon Goutal et Philippe Peynet, Le préfet ne peut imposer au maire d'assumer la première visite des logements insalubres, La Semaine Juridique Administrations et Collectivités territoriales n°5, 6 février 2012, comm. 2039

S'agissant de l'invocation du principe de précaution, l'assemblée du contentieux a jugé que celui-ci, « s'il est applicable à toute autorité publique dans ses domaines d'attributions, ne saurait avoir ni pour objet ni pour effet de permettre à une autorité publique d'excéder son champ de compétence et d'intervenir en dehors de ses domaines d'attributions ».

Si dans ses conclusions, le rapporteur public rappelait la ligne jurisprudentielle dominante, à savoir que « l'existence d'une police spéciale exclut l'intervention du maire pour prendre des mesures de police générale ayant un but identique à celui de la police spéciale » *(Conclusions Xavier de Lesquen)*, la doctrine était partagée sur les pouvoirs résiduels de la police locale.

En effet, « les décisions rendues par le Conseil d'Etat le 26 octobre 2011 ne statuent […] pas sur d'éventuelles décisions individuelles qui pourraient être prises par le maire à propos d'une antenne particulière, en cas de dysfonctionnement grave ou de circonstances exceptionnelles justifiant une intervention d'urgence »[23].

Pour certains, « en cas d'urgence et de risques avérés pour les administrés, le maire serait susceptible d'exercer son pouvoir de police générale »[24]. Il est vrai que le communiqué de presse du Conseil d'Etat évoquait « l'éventualité de décisions individuelles de police municipale que les maires pouvaient prendre, notamment en cas d'urgence, concernant une antenne relais déterminée, au regard de circonstances locales exceptionnelles ».

D'aucuns soulignaient que les trois arrêts restaient « muets sur les cas de péril imminent et d'inaction des autorités de police spéciale », sans compter que « l'existence d'une police spéciale des communications électroniques confiée exclusivement aux autorités étatiques ne devrait pas tenir en échec l'exercice par les maires de leurs nombreux pouvoirs de police spéciale : police de l'affichage, des sites et monuments, de l'esthétique, de la gestion du domaine mais aussi et surtout, police de l'urbanisme »[25].

<u>Episode 2 :</u> Le Conseil d'Etat a semblé faire ressurgir l'exception tenant aux circonstances locales[26] dans un arrêt du 30 janvier 2012. Cette décision précise qu'un maire doit se fonder sur des éléments circonstanciés pour s'opposer, au nom du principe de

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[23] Chronique générale de jurisprudence, Jacques-Henri Stahl et Xavier Domino, Antennes de téléphonie mobile : quand une police spéciale d'Etat évince la police municipale, AJDA 2011, p. 2219, spéc. p. 2223

[24] Didier Del Prete et Jean-Victor Borel, *Que peut faire le maire en matière d'implantation d'antennes-relais ?*, La Semaine Juridique Edition Générale n° 3, 16 Janvier 2012, note 60

[25] Hélène Hoepffner et Laetitia Janicot, *Police locale versus police spéciale : l'exclusivité de la police spéciale des communications électroniques*, RDP septembre 2012, n°5, p. 1245

[26] Voir en ce sens : Yves Jégouzo, *L'imprévisible principe de précaution*, AJDA 2012, p. 233

précaution, à l'implantation d'une antenne relais[27]. Si le Conseil d'Etat admet l'application du principe constitutionnel de précaution au droit de l'urbanisme depuis qu'est tombé le principe de l'indépendance des législations[28], restait pourtant le problème de l'exclusivité de la police spéciale. Or la Haute-juridiction considéra « que s'il appartient, à l'autorité administrative compétente de prendre en compte le principe de précaution lorsqu'elle se prononce sur l'octroi d'une autorisation délivrée en application de la législation sur l'urbanisme, les dispositions de l'article 5 de la Charte de l'environnement ne permettent pas, indépendamment des procédures d'évaluation des risques et des mesures provisoires et proportionnées susceptibles, le cas échéant, d'être mises en œuvre par les autres autorités publiques dans leur domaine de compétence, de refuser légalement la délivrance d'une autorisation d'urbanisme en l'absence d'éléments circonstanciés faisant apparaître, en l'état des connaissances scientifiques, des risques, même incertains, de nature à justifier un tel refus ».

Episode 3 : Le Tribunal des conflits est venu apporter une précision quant à la compétence juridictionnelle des deux ordres de juridiction en matière d'antennes relais[29]. Le juge des conflits considère que « l'action portée devant le juge judiciaire, quel qu'en soit le fondement, aux fins d'obtenir l'interruption de l'émission, l'interdiction de l'implantation, l'enlèvement ou le déplacement d'une station radioélectrique régulièrement autorisée et implantée sur une propriété privée ou sur le domaine public, au motif que son fonctionnement serait susceptible de compromettre la santé des personnes vivant dans le voisinage ou de provoquer des brouillages implique, en raison de son objet même, une immixtion dans l'exercice de la police spéciale dévolue aux autorités publiques compétentes en la matière ; que, nonobstant le fait que les titulaires d'autorisations soient des personnes morales de droit privé et ne soient pas chargés d'une mission de service public, le principe de la séparation des pouvoirs s'oppose à ce que le juge judiciaire, auquel il serait ainsi demandé de contrôler les conditions d'utilisation des fréquences radioélectriques au regard des nécessités d'éviter les brouillages préjudiciables et de protéger la santé publique et, partant, de substituer, à cet égard, sa propre appréciation à celle que l'autorité administrative a portée sur les mêmes risques ainsi que, le cas échéant, de priver d'effet les autorisations que celle-ci a délivrées, soit compétent pour connaître d'une telle action ». Selon le Tribunal des conflits, en revanche, « le juge judiciaire reste compétent, sous réserve d'une éventuelle question préjudicielle, pour connaître des litiges opposant un opérateur de communications électroniques à des usagers ou à des tiers, d'une part, aux fins

[27] CE, 30 janvier 2012, Société Orange France, req. n° 344992, Rémi Grand, *Le maire et les antennes relais, nouvel épisode*, AJDA 2012, p.183

[28] CE, 19 juillet 2010, Association du quartier les Hauts de Choiseul, req. n°328687, AJDA 2010, p. 1453

[29] T. confl., 14 mai 2012, n° C3844, n° C3846, n° C3848, n° C3850, n° C3852, n° C3854 : JurisData n° 2012-010164 ; JurisData n° 2012-010165 ; JurisData n° 2012-010166 ; JurisData n° 2012-010169 ; JurisData n° 2012-010170 ; JurisData n° 2012-010172 ; Jean-Marc Février, Compétence du juge administratif en matière de contentieux des installations radioélectriques, Droit Administratif n° 8, Août 2012, comm. 78

d'indemnisation des dommages causés par l'implantation ou le fonctionnement d'une station radioélectrique qui n'a pas le caractère d'un ouvrage public, d'autre part aux fins de faire cesser les troubles anormaux de voisinage liés à une implantation irrégulière ou un fonctionnement non conforme aux prescriptions administratives ou à la preuve de nuisances et inconvénients anormaux autres que ceux afférents à la protection de la santé publique et aux brouillages préjudiciables ». Ainsi donc, « les intérêts non pris en compte par la police spéciale [pourront] être appréciés par le juge judiciaire au soutien d'une réparation en nature»[30].

Episode 4 : Par trois arrêts rendus le 17 octobre 2012[31], la Cour de cassation a mis en œuvre la solution retenue par le Tribunal des conflits. Dans une première décision[32], elle estime le juge judiciaire compétent pour juger de la demande en réparation du préjudice physique et moral ainsi que du trouble de jouissance qu'une personne, alléguant de son électro-hypersensibilité, imputait à l'installation d'antennes-relais dans son quartier, tout en sollicitant de faire procéder au blindage de son appartement pour la protéger des ondes. Dans les autres décisions, elle ne lui permet pas en revanche de se prononcer sur une demande tendant à ce qu'il soit interdit de procéder à l'installation d'une antenne-relais par crainte que le champ électromagnétique soit de nature à perturber un implant dont la requérante était porteuse[33] ou à obtenir la démolition d'un pylône servant d'antenne de radiotéléphonie mobile pour faire cesser le trouble anormal de voisinage dont il serait à l'origine[34]. Le partage des compétences et donc clair, « indemnitaire, il est permis au juge judiciaire d'en décider ; en nature, il est empêché de la prononcer pour ne pas priver d'effet l'autorisation que l'autorité administrative a délivrée »[35].

Episode 5 : Si le Conseil d'Etat a appliqué le principe d'exclusivité de la police spéciale des communications électroniques dans un arrêt du 26 décembre 2012[36], il est venu mettre un coup d'arrêt à la possibilité pour le maire de prendre une décision individuelle en

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[30] Mireille Bacache, Antennes relais et compétence juridictionnelle, La Semaine Juridique Edition Générale n° 28, 9 Juillet 2012, 820). Cette répartition de compétences pourra s'avérer problématique puisque « la jurisprudence judiciaire est plus favorable à l'application du principe de précaution pour interdire l'implantation de l'antenne relais » (Mireille Bacache)

[31] Cass. 1re civ., 17 oct. 2012, n° 10-26.854 : JurisData n° 2012-023371. – Cass. 1re civ., 17 oct. 2012, n° 11-19.259 : JurisData n° 2012-023401. – Cass. 1re civ., 17 oct. 2012, n° 11-14.553 : Jurisdata n° 2012-023579 ; François Guy Trébulle, Compétence en matière d'antennes-relais : mise en œuvre de la décision du Tribunal des conflits par la Cour de cassation, La Semaine Juridique Edition Générale n° 1, 7 Janvier 2013, 14

[32] Cass. 1re civ., 17 oct. 2012, n° 10-26.854

[33] Cass. 1re civ., 17 oct. 2012, n° 11-19.259

[34] Cass. 1re civ., 17 oct. 2012, n° 11-14.553

[35] Grégoire Loiseau, Antennes-relais : le juge judiciaire compétent mais pas trop, Communication Commerce électronique n° 12, Décembre 2012, comm. 133 ; voir son commentaire pour les conséquences de cette répartition sur le principe de précaution)

[36] CE, 26 décembre 2012, Commune de Saint-Pierre d'Irube, req. n° 352117

la matière, quand bien même celle-ci serait justifiée par un péril imminent ou des circonstances locales particulières[37].

Le Conseil d'Etat considère « que, pour juger que le maire de la commune de Saint-Pierre d'Irube n'était pas compétent pour prendre la décision du 4 juillet 2008 […], la cour administrative d'appel de Bordeaux a estimé, d'une part, que les dispositions des articles L. 2112-1 et L. 2112-2 du code général des collectivités territoriales n'autorisaient pas le maire, en l'absence de péril imminent ou de circonstances exceptionnelles propres à la commune, à s'immiscer dans l'exercice de la police spéciale que le II de l'article L. 32-1 du code des postes et des communications électroniques attribue au ministre chargé des télécommunications, d'autre part, que les dispositions de l'article 5 de la Charte de l'environnement ne permettaient pas de déroger à ces règles de compétence en l'absence de péril imminent ou de circonstances locales particulières ; que, cependant, compte tenu de l'existence d'une police spéciale des communications électroniques organisée de manière complète et confiée à l'Etat, le maire de la commune de Saint-Pierre d'Irube n'était, en tout état de cause, pas compétent pour prendre la décision du 4 juillet 2008 par laquelle, empiétant sur la police spéciale conférée aux autorités de l'Etat ».

Il restera à voir comment s'articulera cette dernière décision avec celle du 30 janvier 2012 qui permet l'intervention du maire au titre de son pouvoir de police locale d'urbanisme.

- **OGM**

Par une décision Commune de Valence[38], la Haute-juridiction a jugé illégal un arrêté municipal se fondant sur le principe de précaution pour interdire, sur le territoire d'une commune, la culture en plein champ de plantes génétiquement modifiées, alors que le ministre a délivré une autorisation de dissémination volontaire. S'inspirant du raisonnement développé dans les arrêts rendus en matière d'antennes relais le 26 octobre 2011, le Conseil d'Etat considère que « le législateur a organisé une police spéciale de la dissémination volontaire d'organismes génétiquement modifiés, confiée à l'Etat, dont l'objet est, conformément au droit de l'Union européenne, de prévenir les atteintes à l'environnement et à la santé publique pouvant résulter de l'introduction intentionnelle de tels organismes dans l'environnement ; que les autorités nationales ayant en charge cette police ont pour mission d'apprécier, au cas par cas [...] s'il y a lieu d'autoriser la dissémination d'organismes génétiquement modifiés par leur culture en plein champ ; que, s'il appartient au maire, responsable de l'ordre public sur le territoire de sa commune, de prendre les mesures de

[37] Agathe Van Lang, Police municipale et antennes relais : l'incompatibilité se confirme, AJDA 2013 p. 1292

[38] CE 24 septembre 2012, Commune de Valence, req. n° 342990 ; Conclusions Fabienne Lambolez, Un maire peut-il interdire la culture de plantes génétiquement modifiées ?, Bulletin juridique des Collectivités Locales, n°11/12 2012, p. 726 ; Diane Poupeau, Les maires ne sont pas compétents pour réglementer les OGM, AJDA 2012, p. 1764

police générale nécessaires au bon ordre, à la sûreté, à la sécurité et à la salubrité publiques, il ne saurait en aucun cas[39] s'immiscer dans l'exercice de cette police spéciale par l'édiction d'une réglementation locale ». Le juge de cassation, à l'instar de sa solution retenue quelques semaines plus tard dans l'arrêt Commune de Saint-Pierre d'Irube, semble donc avoir exclue les dérogations possibles au titre du péril imminent ou des circonstances locales particulières[40]. En effet, « l'expression « en aucun cas » constitue une prise de position négative et définitive sur le moyen du péril imminent »[41]. D'aucuns estiment que l'arrêt « ne préjuge pas de la légalité des mesures de police individuelles ou concrètes que le maire pourrait être amené à prendre au titre de ses pouvoirs de police générale. […] Mais la jurisprudence relative aux antennes de téléphonie mobile, dont l'installation nécessite une autorisation d'urbanisme, conduit à douter du fait que la haute juridiction puisse admettre la légalité de mesures de police individuelles ou concrètes en matière d'OGM. »[42].

Le feuilleton Antennes relais/OGM ne semble pas encore achevé. Ces polices spéciales étant instituées dans des domaines sensibles, « il n'est pas étonnant […] que les décisions prises à ce titre « remontent » de plus en plus au contentieux, le juge étant appelé, une fois de plus, à être l'arbitre de confrontations qui dépassent largement le droit »[43].

L'appréciation restrictive par les juridictions des pouvoirs de police des maires en ces matières conduit à doctrine à s'interroger sur l'existence, à ce jour jamais consacré par la jurisprudence, d'un principe d'exclusivité des polices spéciales[44].

3. LEGALITE DE L'ACTE DE POLICE ADMINISTRATIVE : CONTROLE DE PROPORTIONNALITE

- **Mesures proportionnées**

- La légalité des réquisitions de policiers municipaux en cas de grève : *TA Lyon, 13 décembre 2011, n° 0900665*. A la suite d'un préavis de grève, des agents de la police municipale de Lyon ont été réquisitionnés par arrêté du maire pour assurer le maintien de la

[39] Voir la même formule s'agissant de la police spéciale concernant les produits phytosanitaires : TA Lyon, 12 décembre 2012, n°1200196, Conclusions Claire Burnichon, *Les pouvoirs de police du maire face à l'utilisation de produits phytosanitaires*, AJDA 2013, p. 940

[40] contra : Michel Degoffe, *Un maire peut-il interdire la culture de plantes génétiquement modifiées ?*, Bulletin juridique des Collectivités Locales, n°11/12 2012, p. 734

[41] Agathe Van Lang, *Police municipale et antennes relais : l'incompatibilité se confirme*, AJDA 2013 p. 1292

[42] Elise Untermaier, *L'interdiction des règlements municipaux « anti-OGM » par le Conseil d'Etat*, AJDA 2012 p. 2122)

[43] Jean-Marie Pontier, *La multiplication des polices spéciales : pourquoi ?*, La Semaine Juridique Administrations et Collectivités territoriales n° 15, 16 Avril 2012, 2113

[44] Yéléna Délicat, *Le principe d'exclusivité des polices spéciales*, AJDA 2013, p.1782.

sécurité à l'occasion de la fête des Lumières. Ces arrêtés ont fait l'objet d'un recours pour excès de pouvoir, rejeté par le Tribunal administratif de Lyon au motif qu' « en décidant de recourir à la réquisition de Mme P., les décisions attaquées n'ont pas, compte tenu du caractère limité de la période de réquisition portant sur des tranches horaires précises, de la situation de l'ensemble des personnels concernés et des nécessités d'ordre public, porté au droit de grève de Mme P. une atteinte excessive ».

- La vente à emporter des boissons alcoolisées : *TA Lyon, 6 février 2013, Association des commerçants ambulants de la ville de Lyon et autres, n°1100245.* Par un arrêté du 25 novembre 2010, le maire de Lyon a interdit, dans un périmètre délimité, la vente à emporter et la consommation d'alcool sur l'espace public dans les quatre heures qui précèdent et dans les deux heures qui suivent les manifestations se déroulant au stade de Gerland. Pour le tribunal administratif de Lyon, « si le soin de réprimer les atteintes à la tranquillité publique relève au sein de la ville de Lyon, où la police est étatisée, de la compétence du préfet, le maire de Lyon a pu, à bon droit, prendre une telle décision pour prévenir les atteintes à la sécurité et à la salubrité publiques, pour assurer le bon ordre lors des rassemblements non occasionnels de personnes intervenant à l'occasion des manifestations au stade de Gerland, en particulier des matches de football, dont la fréquence est régulière, et pour réprimer les troubles de voisinage ». Pour déclarer la mesure de police nécessaire et proportionnée, il estime que « l'arrêté attaqué est fondé sur le constat, effectué par les forces de police, et relayé par la presse, d'incidents dus à l'alcool dans et autour du stade de Gerland les soirs de matches de football », ainsi, « l'interdiction attaquée, qui ne porte que sur une tranche horaire déterminée […] ne s'applique qu'à certains des produits vendus par les commerces intéressés, en particulier les boissons alcoolisées, et […] concerne un périmètre qui n'apparaît pas disproportionné au regard de la nécessité du maintien de l'ordre public aux alentours du stade ». Le tribunal juge ainsi que la mesure « ne présente pas le caractère d'une interdiction générale et absolue », qu'elle « n'est pas non plus imprécise » et « que, compte tenu de l'objectif visé par le maire, qui ne pouvait en l'espèce être atteint par une mesure moins contraignante, des incidents déjà constatés, et de la spécificité de la vente à emporter d'alcool et des risques inhérents de troubles à l'ordre public qu'elle comporte en permettant la consommation d'alcool sur la voie publique, ladite mesure apparaît nécessaire et proportionnée ». Le caractère proportionné de la mesure doit donc être apprécié « au regard des éléments caractérisant l'existence d'une situation particulière d'atteinte à l'ordre public »[45].

- Légalité d'une suspension d'une association de supporters : *CE, 9 novembre 2011, Association Butte Paillade 91, req. n°347359.* Le Conseil d'Etat valide une mesure de suspension par décret d'une association de supporters pour une durée de quatre mois. Il

[45] La vente à emporter des boissons alcoolisées réglementée par l'autorité municipale, Conclusions de Claire Burnichon, AJDA 2013, p. 1700

considère que cette suspension « ne constitue pas une mesure excessive et disproportionnée au regard des risques pour l'ordre public que présentent les agissements de certains des membres de l'association à la veille de la finale de la coupe de la Ligue »[46].

- **Mesures disproportionnées**

- Débits de boissons : *CE, 24 avril 2012, Ministre de l'agriculture et de la pêche c/ SARL L'Escale, req. n°328033*. Les dispositions du code rural et du code de la consommation « permettent au préfet de prononcer la fermeture d'un établissement présentant ou susceptible de présenter une menace pour la santé publique afin qu'il soit mis en conformité avec les réglementations que ces dispositions mentionnent ; […] en principe, une telle décision intervient pour que soient réalisées les mesures correctives ordonnées par l'administration et prévoit la réouverture de l'établissement lorsque les services compétents auront constaté sa mise en conformité ». Ainsi, pour les juges du Palais-Royal, présente un caractère disproportionnée la fermeture d'un établissement ni « précédée ni accompagnée d'une injonction de prendre des mesures destinées à corriger les manquements constatés dans l'établissement, de sorte que les conditions de la levée de la fermeture, prononcée sans terme fixe, n'étaient pas définies ».

- Propagande électorale : *CE, 11 juin 2012, Commune de l'Etang Salé, req. n° 360024*. Un maire a d'abord interdit par arrêté sur le territoire de sa commune, en vue de préserver la tranquillité publique, « la circulation de tout véhicule équipé de haut-parleurs ou de porte-voix diffusant des publicités, des propagandes ou tout message de quelque nature que ce soit », puis a restreint cette interdiction à certaines utilisations des véhicules ainsi équipés, notamment celles répondant à des fins de propagande électorale. Un candidat aux élections législatives avait obtenu du juge du référé-liberté la suspension de cet arrêté. Appelé à se prononcer, le juge des référés du Conseil d'Etat confirma qu'un maire « ne peut interdire l'utilisation de véhicules équipés de hauts parleurs à des fins de propagande électorale sans porter une atteinte grave et manifestement illégale aux libertés de circulation et d'expression »[47]. Le Conseil d'Etat considéra que « compte tenu du caractère général de la prohibition de toute propagande électorale au moyen de véhicules équipés de hauts parleurs ou de porte-voix, édictée par le maire de l'Etang Salé en vue de préserver la tranquillité publique, mais sans aucune distinction selon l'heure de la journée et alors que l'utilisation à certaines autres fins de véhicules ainsi équipés demeurait permise, le premier juge a pu, sans méconnaître les dispositions de l'article L. 521-2 du code de justice administrative, juger que le maire avait porté une atteinte grave et manifestement illégale à l'exercice des libertés dont M. Robert se prévalait en sa qualité de candidat à l'élection du député de la circonscription dans laquelle se situe cette commune ».

[46] Marie Cresp, *Après la dissolution, la suspension des associations de supporters*, AJDA 2012, p. 655

[47] Veille Diane Poupeau, AJDA 2012, p. 1190

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IL MERITO AMMINISTRATIVO

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Dott. Paolo COTZA

INDICE

1. LEGITTIMITA' E MERITO NEL DIBATTITO TRADIZIONALE

1.1 Introduzione

1.2.1 Implicazioni del dato "positivo"…

1.2.2 …e remore tradizionali

1.3"Legittimità-giustizia" degli atti come condizione di buona amministrazione e "vizio di merito" quale momento "causale" dell'invalidità

1.4 Indeterminatezza "in positivo" del merito. Risoluzione dell'interesse pubblico nell'ordinamento; potenziamento dell'eccesso di potere…

1.5 …parziale assorbimento del merito nell'ambito di una discrezionalità "esternalizzata"

1.6 Attuale "stato dell'arte" e prime prospettive di un discorso "interdisciplinare"

2. CONTRIBUTO EPISTEMOLOGICO E "MEZZI" ATTI A CONFERIRE RILIEVO GIURIDICO AL MERITO AMMINISTRATIVO. RELATIVE IMPLICAZIONI

2.1 Limiti attuali di una logica del risultato applicata al merito amministrativo

2.2 Apporto epistemologico e contenuto-valore autonomi del merito amministrativo

2.3.1 Mezzi atti ad accertare "il modo di effettuazione del principio di opportunità" nonché, diretti a "rendere quest'ultimo efficiente". Introduzione…

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2.3.2 …Tipologia

1. LEGITTIMITA' E MERITO NEL DIBATTITO TRADIZIONALE

1.1 Introduzione

Nonostante una lunga ed autorevole tradizione di studi, complice un "parco" contributo di diritto positivo, l'intera parabola del "merito amministrativo" risulta contraddistinta tanto da "fragilità teorica" quanto da "aleatorietà applicativa"[1].

In effetti, intorno a quella formula si sono registrate accese dispute dottrinali: innanzitutto, sul suo risolversi integralmente in concetti giuridici (a loro volta dibattuti) quale quello di discrezionalità (così amministrativa che tecnica), in quanto entrambi riferibili all'ambito dell'"insindacabile in legittimità"[2]; sì da occupare un'area dalle dimensioni variamente modulate ad opera della legislazione. Altrimenti: complice la contrapposizione delle ottiche poste a base della libertà/doverosità del momento discrezionale; stante altresì l'equivocità di concetti sostanziali non del tutto sovrapponibili ("opportunità", "convenienza", "buona amministrazione"); si è ritenuto scientificamente più corretto d'interrogarsi sul suo modo d'essere nel quadro dei rapporti fra decisione amministrativa e diritto (se, pur connotando un'attività giuridicamente rilevante, il merito implichi giuridicità o meno della relativa disciplina[3]).

[1]Sul tema, può rinviarsi a A. ROMANO TASSONE, *Sulle vicende del concetto di "merito"*, in *Dir. amm.*, 2008, p. 517 s.

[2]A favore, V. OTTAVIANO, *Studi sul merito degli atti amministrativi*, in *Annuario di diritto comparato e di studi legislativi*, III serie, 1948, XXII, p. 311; ID., *Merito* (diritto amministrativo), in *Nov.mo Dig. it.*, X, Torino, 1968, p. 575.

[3]Così e per la negativa, M. S. GIANNINI, *Problemi relativi al merito amministrativo e problemi connessi*, in *Stato e diritto*, 1941, p. 439 (ora in *Scritti giuridici*, Milano, 2000, II, p. 347 s.), in polemica con C. MORTATI, *Note sul*

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Pare sintomatica, del persistere di siffatte criticità, la circostanza (tratta dal dato globale di esperienza giuridica) d'imbattersi ancora in un risalente "luogo comune" che tende a risolvere quell'idea (sul piano logico prima che giuridico) secondo (un rapporto diadico di) "non-legittimità". In altri termini, ci si troverebbe al cospetto di un processo decisionale inerente all'attività amministrativa (in senso lato -traducentesi o meno in "atti di produzione giuridica"-), corrispondentemente al quale è riservato all'autorità (in vista del perseguimento degli interessi affidati alle sue cure) un "margine di valutazione" non governato da regole giuridiche (sia, essa prerogativa, "oggettivabile" -mediante altre regole, quali quelle tecniche- o meno -ponderazione degli interessi in causa-)[4].

Non si rivela soddisfacente, onde lumeggiare il problema, lo storico riferimento di diritto processuale ad una pronuncia "aggiuntiva" (per cui il giudice sarebbe abilitato a posporre ogni questione di merito a quelle di legittimità e praticamente a non pronunziarsi sulle prime qualora il provvedimento fosse impugnato altresì per un motivo di legittimità reputato fondato[5]): se non nei limiti in cui autorizza a riconoscervi (più o meno consapevolmente) una giustapposizione (anziché una contrapposizione) con la legittimità. Si può solo rilevare (di là dal variegato ventaglio di significati annessivi da quel lessico tecnico) che allo sforzo dell'interprete (di "sistemazione e chiarimento" delle travagliate relazioni fra attività amministrativa -per l'appunto- e giurisdizione) restano pochi margini, fintantoché egli operi secondo un'impostazione pandettistica, ligia ai rigidi schemi della separazione di poteri, cui ricondurre -quando recepite- le istanze di giustizia provenienti

potere discrezionale, Roma, 1936; ID., *Ancora sul merito amministrativo*, in *Stato dir.*, 1941; ID., *Discrezionalità*, in *Nov.mo Dig. it.*, V, Torino, 1960, p. 1099 s.

[4]A. M. SANDULLI, *Manuale di diritto amministrativo*, Napoli, 1989, pp. 595-596. Cfr. pure: Cons. Stato, sez. IV, 20 ottobre 1964 n. 1036, in *Cons. St.*, 1964, pp. 1684-1685; sez. IV, 3 giugno 1964 n. 690, in *Cons. St.*, 1964, p. 1108 s.

[5]M. S. GIANNINI, *La giustizia amministrativa*, Roma, 1963, p. 171. P. VIRGA, *La tutela giurisdizionale nei confronti della pubblica amministrazione*, Milano, 1966.

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dalla società: si perviene inesorabilmente all'esito d'insindacabilità di quell'ambito; al più (sotto il condizionamento del "diritto comune"), esaurendo la giurisdizione amministrativa, speciale nei termini formalistici di una questione di ampiezza di (soli) poteri decisori. Ma, anche nel momento in cui si avverte che alcun dato costituzionale dispone quella "riserva di amministrazione"; resta da spiegare in cosa consista il substrato sostanziale della correlazione, fra la prerogativa "ulteriore" ed il carattere di "cognizione" della medesima, ormai resa espressamente dal vigente dato "positivo" (art. 7, co. VI, ed art. 134, D.Lgs 2 luglio 2010 n. 104).

1.2.1 Implicazioni del dato "positivo"...

Il menzionato episodio normativo è destinato a segnare profondamente la parabola del(l'elaborazione dogmatica sul) merito amministrativo, giacché:

- di là dal sottrarlo definitivamente alla condizione di "attrattiva" per i soli cultori della scienza dell'amministrazione;

- pur superando la tesi secondo la quale il rilievo giuridico del merito è legato alla previsione (di diritto positivo) di "mezzi" -istituti-, nella disponibilità dei soli organi competenti dei "pubblici poteri", atti ad accertare "il modo di effettuazione" del principio di opportunità - buona amministrazione (quale limite conformativo di matrice logica, tipico dell'azione dei "pubblici poteri" -"bontà intrinseca"- e distinto da quello di "specialità") nonché, "diretti a rendere quest'ultimo efficiente";

- pare decretarne un progressivo definirsi quale tipo di sindacato (controllo/giudizio) sull'attività, piuttosto che "componente" (se non "elemento costitutivo") dell'atto, come pure avrebbe voluto certo dibattito specialistico storicamente dispiegatosi a partire dal punto di vista del (tipo di) "disvalore", in parallelo alla coeva concezione di "legalità amministrativa".

Ne consegue il delinearsi di un costante condizionamento, secondo le scansioni efficacemente rese dalla logica delle "coppie d'opposti", per via della travagliata vicenda evolutiva dell'ambito dell'azione dei "pubblici poteri" coperto dalla legittimità; con

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particolare riguardo alla versione "sostanziale" di quest'ultima che, nella "scala" dei tipi di sindacato, rappresenta quello più prossimo al riscontro di merito, condividendone un carattere "intensificato", sì da segnare il superamento del (pseudo-)principio di "riserva" a favore di quello di "preferenza" di amministrazione.

Tale vicenda, peraltro, rileva sotto due versanti:

- innanzitutto, perché, mentre l'originario binomio "(sindacato di) legittimità" – "(sindacato di) merito" tendenzialmente veniva avvertito come del tipo A/B (secondo "estremi polarizzanti"), il binomio "legittimità" – "merito", tende invece a porsi come del tipo A/non-A (ossia "a terzo escluso");

-con la conseguenza di "mettere in crisi" il merito, nella misura in cui il processo di definizione dell'interesse pubblico concreto, da parte dell'amministrazione, viene smarrendo il suo carattere imponderabile, per acquisire le "cadenze oggettive ed impersonali" che lo rendono sempre più intimamente conoscibile dal giudice;

-laddove, se si conviene che è venuto meno (per assorbimento) il solo ambito "materiale" ed oggettivo di attività dell'amministrazione che un tempo si reputava proprio e caratteristico del concetto di "merito"; resta comunque rilevante una sua ricostruzione concettuale, onde cogliere le diverse tecniche e modalità di un sindacato altrimenti riconducibile alla legittimità;

- in secondo luogo, perché la legittimità, nonostante sia inconcepibile come dissociata dallo scopo di cura degli interessi generali, non implica un "obbligo giuridico, istituzionale"; piuttosto, modalità onde vada concretamente ad esercitarsi il potere[6];

- ma ciò determina uno spostamento, rispetto all'asse della "legalità obiettiva", con ripercussioni interessanti sull'opera di "riabilitazione" del "merito" che non paiono del tutto

[6]E. CASETTA, *Attività e atto amministrativo*, in *Riv. trim. dir. pubbl.*, 1957, p. 293 s., segn. p. 300.

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sondate, in ragione di certo deficit dogmatico; mentre, potrebbero tornar utili proprio alla luce dell'attuale assetto normativo, di matrice processuale.

In tale scenario, il menzionato dato "positivo" di novità fornisce l'occasione per dedicare al merito amministrativo una riflessione "attualizzata" anche sul piano scientifico; stavolta, ripromettendosi: sia la revisione, su base contenutistico-funzionale, di un suo (pur residuo) "rilievo giuridico"; sia, in prospettiva, la complementare delineazione di un quadro unitario che consenta di ricondurre la giurisdizione estesa al merito (anche al di là di quanto attualmente ammesso dal "dato positivo") ad un potere di cognizione corrispondente alla nozione "sostanziale". L'obiettivo così dichiarato (ad un tempo, di sistemazione delle conoscenze, per approdare ad un allargamento della prospettiva giuridica) implica, però, una duplice operazione: l'annettere, alla locuzione "merito amministrativo", compiutezza di determinazione "in positivo"; quindi, il collaudarne l'autonomia funzionale.

Solo a quelle condizioni dogmatiche, potrebbe qualificarsi come d'interesse, per il giurista, ove termini il tradizionale sindacato di legittimità ed inizi (eventualmente) lo spazio riservato al "merito".

1.2.2 ...e remore tradizionali

Ciononostante, si deve far i conti con certa vischiosità di approdi, la quale si spiega tenuto conto che:

- per un verso, il rapporto fra l'atto ed il diritto obiettivo risulta molto più "intenso e avvolgente" nell'"emisfero pubblicistico" (in genere), di quanto non avvenga (in forza del principio di autonomia) in quello "privatistico" dal quale (teoria del negozio giuridico), pure, il "merito" risulta mutuato; la legittimità rappresentando il titolo principale (se non l'unico) di giustificazione (giuridica e politica) delle "decisioni di apparato";

- per altro verso, l'ascesa stessa del "merito" alla ribalta della sistematica del diritto amministrativo si suol ricondurre ad un'"inversione di metodo" doppiamente regressiva;

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la "favorevole sponda" è prestata, per l'occasione, da un argomento tratto dalle contingenze dello strumentario legislativo, nel momento in cui, con gli storici interventi normativi in punto di giurisdizione amministrativa (a partire dalla Legge Crispi), il termine "merito" si fa portato della scelta "politica" di conferire, *ratione materiae*, poteri ulteriori al competente giudice "speciale"; sì da pervenire ad una costruzione diadica del sindacato giurisdizionale sugli atti amministrativi ("di legittimità / di merito") corrispondentemente alla quale l'atto legittimo può essere "eliminato" o "disconosciuto" «*come se fosse illegittimo*»;

- la coeva speculazione non era in grado di render conto univocamente delle implicazioni, in punto di cognizione, di quell'"approdo" politico: limitandosi a prenderne atto a fronte del principio di riparto dei poteri dello Stato; con conseguente radicamento del tendenziale divieto, per i giudici amministrativi, di procedere a valutazioni avulse da quelle di "obiettiva legalità" dell'atto;

- in disparte la circostanza per cui l'analogia fra decisioni, giurisdizionale ed amministrativa (possibile sul piano degli effetti materiali), non implica alcuna identità di caratteri; per quel che maggiormente giova all'indagine specialistica, si registra l'affermarsi (all'attenzione degli interpreti), dapprima, di una (pur scarna) casistica di diritto sostanziale in corrispondenza della quale la circostanza per cui le scelte amministrative non fossero comunque valutabili in termini d'illegittimità, non ha precluso di configurare come (non semplicemente inopportune, bensì) viziate decisioni amministrative palesemente ed intrinsecamente arbitrarie; al punto da prefigurare l'enucleazione di una (dibattuta) categoria concettuale di vizi ("di merito", per l'appunto) distinta rispetto a quelli di legittimità (anzi, tanto eterogenea da risultare inconciliabile), ma comunque in grado di rendere l'atto invalido;

- ulteriore passaggio sarà quindi rappresentato dall'affermarsi della tesi di una eterogenea composizione (a seconda dell'orientamento, sotto forma di "elementi costitutivi") dell'atto amministrativo;

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- per altro verso ancora, il limite epistemologico a lungo patito dall'interprete, col "trattare" le disposizioni normative come se fossero improntate al solo schema "ipotetico-casuistico" (autosufficiente rispetto al momento applicativo), ha favorito il radicarsi di una concezione formalistica della legalità amministrativa; a discapito delle potenzialità di altra, di stampo teleologico, pure andata sviluppandosi sotto la presente esperienza statuale.

Ne è conseguito che, complice un modo di essere (o d'intendere) il sindacato giurisdizional-amministrativo complementare a quella anacronistica condizione della legalità, risulta incompiuto il discorso relativo ad una valutazione sull'agire amministrativo in ragione del "risultato" economico-sociale; il primo appiattito com'è sul modello "compositivo" di un conflitto originato (in genere) da un esercizio non ragionevole del potere (discrezionalità / eccesso di potere).

1.3 "Legittimità-giustizia" degli atti come condizione di buona amministrazione e "vizio di merito" quale momento "causale" dell'invalidità

Da tempo si è rilevato come, persino agli albori della giurisdizione amministrativa, «*la legittimità del provvedimento "non si potesse esaminare sempre e in modo assoluto indipendentemente dalla 'giustizia' e quindi dal 'merito' dei provvedimenti". Il ricorso all'idea di giustizia, il riferimento ai principi che debbono regolare e regolano l'attività delle autorità amministrative, furono il mezzo tecnico del quale la giurisprudenza si servì per giungere a valutare, oltre che la conformità dell'atto al modello legale, la "legittimità intrinseca" dei provvedimenti. In un parere reso dall'Adunanza generale del Consiglio di Stato in data 15 novembre 1884 si può leggere una completa esposizione dei principi che hanno guidato la giurisprudenza a ritenere compreso nella propria competenza di legittimità anche "il riesame di quelle questioni sostanziali che si riferiscono alla 'giustizia' dei provvedimenti, essendo questa la 'condizione' di ogni buona amministrazione", a verificare che vi fossero stati o meno errori nell'apprezzamento del fatto, a portare l'esame sui criteri e sui motivi dai quali le autorità erano state guidate nell'esercizio dei poteri a loro attribuiti*». Dunque, «*la legittimità del provvedimento non si*

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valuta -o, quanto meno, non si valuta solo- rispetto allo schema normativo dell'atto, ma ha riguardo all'insieme di circostanze e di atti che individuano il potere e determinano il modo d'essere della funzione così come si atteggia nel procedimento»[7].

Se in ciò si conviene, accanto a quella di conformità dell'atto al modello legale, si deve ammettere altra accezione, intrinseca e complementare alla prima, di legittimità: corrispondente all'idea di giustizia.

Sennonché, sussistono forti perplessità circa il valore tecnico del sintagma "vizi di merito" eppertanto, sulla possibilità di configurare l'inopportunità come stato viziato del provvedimento: a partire dall'osservazione per cui, onde affermare la rilevanza dell'invalidità sul piano dell'ordinamento generale, occorre che il vizio sia "obiettivamente accertabile".

E', infatti, indimostrato se esistano autonome norme o regole generali (elementi obiettivi di riferimento) in forza delle quali stabilire quando un atto sia opportuno o meno[8]; senza contare la contraddizione che s'integrerebbe per via di una situazione di doverosità in termini generali cui corrisponderebbero "mezzi", per farla valere, dal carattere frammentario se non eccezionali. D'altronde, dovrebbe trattarsi di norme "a contenuto indeterminato" che produrrebbero i propri effetti giuridici mediante l'integrazione di contenuti che attingono alle valutazioni di fatto, dalla legge affidate all'apprezzamento discrezionale della pubblica amministrazione; laddove, si è obiettato che le norme d'azione

[7]A. PIRAS, *Invalidità c*) Diritto amministrativo, in *Enc. dir.*, XXII, Milano, 1972, p. 598 s., segn. pp. 606-607. Cons. Stato, sez. riun., 15 novembre 1884, in *Giur. it.*, vol. 37, 1885, pt. III, col. 118 s.

Cfr. pure R. TOMMASINI, *Invalidità b*) Diritto privato, in *Enc. dir.*, XXII, Milano, 1972, p. 575 s., segn. p. 590 e nt. 102; D. U. GALETTA, *I procedimenti di riesame*, in *La disciplina generale dell'azione amministrativa* (a cura di V. Cerulli Irelli), Napoli, 2006, p. 393.

[8]Cfr. A. PIRAS, *Invalidità*…, p. 610; V. M. ROMANELLI, *L'annullamento degli atti amministrativi*, Milano, 1939, p. 79 s.; OTTAVIANO, *Studi sul merito*…, p. 308 s.; CASETTA, *Attività*…, p. 302.

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non possono che essere giuridiche eppertanto, a contenuto determinato[9]. Tant'è che gli isolati episodi normativi, da taluni addotti onde suffragare la tesi dell'annullabilità d'ufficio per "vizi di merito", rivelano una semplice contrarietà ai fini di quelle disposizioni che (di volta in volta) li contemplano: sì da integrare un vizio di legittimità, posto che gli scopi delle norme (per quanto la rilevazione ed interpretazione possano essere poco agevoli) fanno pur sempre parte di queste ultime[10].

A ben vedere, dunque, il primo esito di quel moto "regressivo" poteva al più giustificarsi, a partire dalla percezione (in termini di particolare disvalore) di determinate infrazioni al principio di buona amministrazione, facendo leva sul loro trasmodare (specie per via di aberrazioni dell'*iter* logico) in eccesso di potere[11].

Non altrettanto si sarebbe potuto concludere per il passaggio ulteriore. Quest'ultimo, infatti, ha integrato una autentica forzatura per la teoria generale dell'atto amministrativo, dal momento che la nozione di merito amministrativo riguarda non l'atto, bensì l'attività discrezionale che lo precede, preordinata com'è alla sua adozione (*rectius*, quella parte di essa che, non conformata da norme giuridiche di azione, pertiene alle scelte di "politica amministrativa", da attuarsi in relazione all'adozione ed al contenuto dell'atto stesso); cosicché anche l'oggetto del relativo sindacato giurisdizionale concerne propriamente quell'attività; mentre l'atto (in quanto risultante di una certa attività, compiuta in certo modo) sarebbe esclusivamente il parametro di riferimento cui ricorrerebbe il giudice di merito nell'esercizio di un sindacato diretto a rinnovare l'attività amministrativa già svolta,

[9]Cfr. CASETTA, *Attività...*, p. 327.

[10]E. CANNADA BARTOLI, *Annullabilità e annullamento* -b) *Diritto amministrativo-*, in *Enc. dir.*, II, Milano, 1958, p. 484 s., segn. p. 490.

[11]A . M. SANDULLI, *Manuale*…, p. 596; OTTAVIANO, *Merito* (diritto amministrativo)…, p. 577.

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onde apprezzare la bontà delle scelte discrezionali compiute dalla pubblica amministrazione[12].

Sta di fatto che l'accennata "inversione di metodo" preluderà a quel tornante di svolta che verrà definitivamente imboccato dalla teoria dell'invalidità e che condurrà da una qualificazione di quell'idea *quoad effectum* (mutuata dalla dogmatica civilistica del negozio giuridico) alla centralità riconosciuta al suo momento "causale"[13]. Da qui, la questione relativa al contenuto "in positivo" da riconoscere al "merito" (per l'appunto, secondo l'ottica del "vizio dell'atto"). Da qui, parimenti, uno "stato d'incertezza" al punto che si è andata affermando una nozione d'invalidità "sganciata": non solo da quella risalente ("*quoad effectum*"); ma anche dalla "natura" dei "vizi" dell'atto. L'accento, stavolta, cade sull'"anomalia" di atti giuridici, idonei a produrre effetti, ma solo di provvisori, ammessa in nome del principio della "conservazione dei valori giuridici".

1.4 Indeterminatezza "in positivo" del merito. Risoluzione dell'interesse pubblico nell'ordinamento; potenziamento dell'eccesso di potere…

Gli è che ogni disamina sulla vicenda del merito amministrativo deve ricondursi entro l'alveo degli sviluppi impressi alla nozione di legittimità ed attraverso di essa, in una prospettiva di tutela, all'interesse legittimo.

Se infatti quest'ultimo, in quanto qualificazione dell'aspirazione individuale, subordinata alla legittimità nell'esercizio del potere pubblico, può garantire solo entro i limiti in cui quel potere è "considerato" dall'ordinamento;

[12]A. PIRAS, *Invalidità c*) Diritto amministrativo…, p. 601.

[13]A. DE VALLES, *La validità degli atti amministrativi*, Roma, 1916 (ristampa anastatica, Padova, 1986).

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-se l'intensità di quella garanzia dipende dalla nozione accolta di legittimità *id est*, dalla "misura" in cui l'interesse pubblico si risolve nell'ordinamento (l'interesse legittimo non potendo definirsi "che in relazione all'interesse pubblico siffattamente risolto");

-in quest'ottica, è agevole intuire quanto si sia rivelato gravido d'implicazioni l'affermarsi dei principi d'imparzialità e buon andamento[14].

Da ciò, il perfezionarsi del dibattito sull'illegittimità, quale (asserito) "precipitato" pubblicistico (vizio tipico) dell'idea d'invalidità, conformemente al diffuso convincimento che nel nostro ordinamento vige un "canone generale di ragionevolezza" e che il potere amministrativo si legittimi (quantomeno, anche) in base al suo esercizio razionale poiché la discrezionalità non è arbitrio[15]. Da ciò, la duplice riconducibilità di quel concetto: alla "non conformità alle leggi" (nel senso di non corrispondenza formale dell'atto amministrativo allo schema legale[16]); ad un'accezione più pregnante (peraltro trasversale rispetto al menzionato avvicendamento statuale), di tipo sostanziale[17].

[14]Nel senso dell'essenzialità della prospettiva di giustizia per la comprensione del diritto amministrativo, E. CANNADA BARTOLI, *Interesse* (diritto amm.), in *Enc. dir.*, XXII, Milano, 1972, p. 9 s., segn. p. 18.

[15]Su tali conquiste cfr. rispettivamente: F. LEVI, *L'attività conoscitiva della pubblica amministrazione*, Milano, 1965, p. 514; C. MORTATI, *La volontà e la causa nell'atto amministrativo e nella legge*, Roma, 1935 (ora in *Raccolta di scritti*, Milano, 1972, III, p. 533); G. MARONGIU, *Funzione amministrativa*, in *Enc. giur.*, XIV, Roma, 1989, p. 6.

[16]Sulle vicende storiche del rapporto fra legittimità e legalità, F. BASSI, *"Conformità" alle leggi e "legittimità" dell'atto amministrativo*, in *Il principio di legalità nel diritto amministrativo che cambia* (atti del LIII convegno di studi di scienza dell'amministrazione -Villa Monastero, 20-22 settembre 2007-), Milano 2008, p. 61 s.

[17]Sulla teorizzazione del distinguo fra illegittimità, formale e sostanziale, può rinviarsi oltreché allo scritto nanti cit. di F. Bassi, al celebre studio di SANTI ROMANO – M. D'AMELIO, *I contatti giurisdizionali della Corte di Cassazione e del Consiglio di Stato*, in *Riv. dir. pubbl.*, 1929 (riprodotto in SANTI ROMANO, *Scritti minori*, Milano, 1950, II, p. 275 s.). Cfr. pure, in linea: R. RESTA, *La giustizia amministrativa*, Bari, 1950, p. 74; G. SALEMI, *La giustizia amministrativa*, Padova, 1958, p. 95.

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Da ciò, parimenti, un (pur non lineare) arricchimento del sindacato giurisdizionale sul piano del risultato[18]. Così, avuto riguardo agli sviluppi impressi, dalla concezione di "legittimità allargata", al sindacato sull'eccesso di potere (specie da parte della giurisprudenza ed a far data dall'insegnamento del Ranelletti dapprima e benvenutiano poi[19]): per l'appunto, conducendo il giudizio di legittimità, dalla soglia della conformità/difformità al/dal modello legale (proprio del vizio di violazione di legge), alla dignità di un sindacato sul corretto e ragionevole esercizio del potere discrezionale o svolgimento della funzione (secondo le concezioni più avanzate e condivise) cioè (in definitiva), al rango di misura della devianza dell'atto dal fine (perseguimento dell'interesse) pubblico[20].

[18]A. ROMANO, *I caratteri della giurisdizione amministrativa e la loro evoluzione*, in *Dir. proc. amm.*, 1994, p. 635 s., segn. p. 695 s. Il solco è ancora quello tracciato da: A. AMORTH, *Il merito degli atti amministrativi*, Milano, 1939, ora in *Scritti giuridici*, I, Milano, 1999, p. 370 s. (ove si ravvisa, nel principio di opportunità, «una misura dell'azione rispetto al suo risultato»; altresì rilevando «l'incidenza delle così dette regole di buona amministrazione non sulla scelta stessa dell'azione …dominata piuttosto dall'arte politica e dall'intuito, dall'avvedutezza del funzionario, bensì sul suo contenuto, nel senso della sua più appropriata adeguatezza al risultato»); M. S. GIANNINI, *L'interpretazione dell'atto amministrativo e la teoria giuridica generale dell'interpretazione*, Milano, 1939 (che attrae il risultato, se non sul piano della legittimità, in un ambito ad essa molto prossimo, individuando lo scopo giuridico di un atto esclusivamente nella "modificazione giuridica del mondo esteriore").

[19]O. RANELLETTI, *Lezioni di diritto amministrativo -La giurisdizione amministrativa-*, Napoli, 1924, pp. 1-44, 121 s.; F. BENVENUTI, *Eccesso di potere amministrativo per vizio della funzione*, in *Rass. dir. pubbl.*, 1950, I, p. 1 s.; ID., *Funzione amministrativa, procedimento, processo*, in *Riv. trim. dir. pubbl.*, 1952, p. 118. Cfr. pure P. GASPARRI, *Eccesso di potere* (diritto amministrativo), in *Enc. dir.*, XIV, Milano, 1965, p. 124 s.; G. DE CESARE, *Problematica dell'eccesso di potere amministrativo*, Padova, 1973; A. AZZENA, *Natura e limiti dell'eccesso di potere*, Milano, 1976, segn. p. 16 s.

[20]O. RANELLETTI, *Nota* a Cass., sez. un., 25 gennaio 1928 n. 402, in *Foro amm.*, 1928, II, coll. 68-72. Cfr. pure: ROMANO TASSONE, *Tra diversità*…, p. 1123; G. CORSO, *Validità* (diritto amministrativo), in *Enc. dir.*, XLVI, Milano, 1993, p. 85 s., segn. p. 91 s. In tal senso, si conserva attuale la ricostruzione operata da F. ROVELLI, *Lo sviamento di potere*, in *Raccolta di scritti di diritto pubblico in onore di G. Vacchelli*, Milano, 1938, p. 449 s., segn. p. 459; ciò anche per merito della sua recente "riscoperta" ad opera di A. TRAVI, *Un intervento di Francesco Rovelli sull'eccesso di potere*, in *Dir. pubbl.*, 2000, p. 462 s.

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In tale contesto è stata elaborata una "nozione moderna" di interesse pubblico, come non appartenente più all'amministrazione, bensì all'intero corpo sociale: correlato ad un superamento definitivo dell'interpretazione ritualistica della legalità, sì da farne emergere (per l'appunto) gli aspetti sostanziali[21]; risultante, nella sede procedimentale, «*dalla comparazione ponderata di tutti gli interessi coinvolti nell'esercizio del potere*»[22]. D'altronde, proprio un raffronto tra ordinamenti nazionali fornisce l'abbrivo per siffatto indirizzamento: da quel ramo d'indagine non potendosi fare a meno di constatare che la valutazione di preminenza fra i "requisiti" dell'atto (legittimità ed interesse pubblico alla sua affermazione-conservazione) perde definitivamente quella stabilità minima che le poteva conferire una parvenza "ontologica" all'interno di ciascun ordinamento: posto che, s'attaglia, di volta in volta, all'uno od all'altro degli stessi requisiti[23].

1.5 ...parziale assorbimento del merito nell'ambito di una discrezionalità "esternalizzata"

Il carattere recessivo della cognizione di merito, come giudizio sull'opportunità, procede di pari passo con l'accentuarsi della natura giurisdizionale della cognizione del giudice amministrativo. Se, infatti, il sindacato sull'opportunità amministrativa di un provvedimento non è ancorabile a regole giuridiche, non può tradursi in un giudizio in senso giurisdizionale; alpiù, ergendosi ad accertamento amministrativo. Pertanto, accade che: mentre la figura dell'eccesso di potere assurge a sintesi dei modi di sussumibilità della discrezionalità amministrativa nel giudizio di legittimità, dal punto di vista della garanzia

[21]E. CANNADA BARTOLI, *Interesse*…, p. 9.

[22]In questi termini si esprime D. U. GALETTA, *Violazione di norme sul procedimento amministrativo e annullabilità del provvedimento*, Milano, 2003, pp. 7-8 (salvo sviluppare, in corso d'opera, le criticità del tema).

[23]D. DE PRETIS, *"Illegittimità comunitaria" dell'atto amministrativo definitivo, certezza del diritto e potere di riesame*, in *Giorn. dir. amm.*, 2004, p. 725 s., segn. pp. 728-730.

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(con particolare riguardo alla ragionevolezza della comparazione degli interessi in giuoco e dei suoi esiti); il merito resta relegato nella condizione di criterio istruttorio e di decisione (ma non di giudizio). Più esattamente, il merito-opportunità si configura come criterio di percezione dell'utilità, della bontà del provvedimento rispetto alla condizione di fatto; sì da imporre una rilevazione del fatto (non dal punto di vista della compresenza d'interessi diversi ed opposti, bensì) come mediato dal provvedimento e rapportato quindi al potere esercitato[24].

1.6 Attuale "stato dell'arte" e prime prospettive di un discorso "interdisciplinare"

In progresso di tempo, il connotato funzionale dell'eccesso di potere è stato esteso, onde colmare il dislivello tra la "nozione positiva" e quella "teoricamente possibile" di "legittimità", ad opera della giurisprudenza[25].

Il punto è che il vizio di eccesso di potere è stato oggetto di "appesantimenti" e "confusioni concettuali": ci si trova, pur sempre, al cospetto di una trattazione "di origine empirica, e anche con destinazione empirica"; tale, nella sua stessa struttura logico-giuridica. Tali condizionamenti si apprezzano (nella giusta misura) sol valutando il "significato profondo" della legittimità in confronto col processo; ma, per quel maggiormente rileva in tale fase di trattazione, quella figura si è risolta in una potente

[24]G. BERTI, *Momenti della trasformazione della giustizia amministrativa*, in *Riv. trim. dir. pubbl.*, 1972, p. 1861 s., segn. p. 1888 s.

[25]*Ex multiis*, cfr.: T.A.R. Lazio, Roma, sez. I, 8 luglio 2013 n. 6672, in *Foro amm. -T.A.R-.*, 2013, pp. 2326-2327 (nel senso del superamento dell'equazione concettuale fra merito-opportunità e discrezionalità tecnica, quest'ultima suscettiva di controllo giurisdizionale nei casi in cui il vizio valutativo trasmodi in illogicità); T.A.R. Marche, sez. I, 22 giugno 2012 n. 444, in *Foro amm. -T.A.R.-*, 2012, pp. 1918-1919 (circa l'integrarsi di un apprezzamento di merito, con riguardo alle scelte effettuate dall'amministrazione pubblica nell'adozione degli strumenti urbanistici, salvo che non siano inficiate da errori di fatto o da abnormi illogicità); T.A.R. Toscana, sez. II, 5 febbraio 2010 n. 188, in *Foro amm. -T.A.R-.*, 2010, pp. 417-418 (in linea, stavolta in tema di giudizio medico-legale sull'idoneità fisica e psichica alla conduzione dei veicoli a motore).

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remora al cammino che resta da percorrere: non sarebbe utile a tal fine, perché «*costituisce quasi sempre un mezzo indiretto per l'accertamento di vizi che …direttamente rientrerebbero comunque, o potrebbero giustificatamente rientrare, nell'ambito della legittimità come figure di violazione di legge*»[26].

Non per caso, specie dal momento in cui la L. n. 241/1990 ha solennemente affermato che i principi di economicità ed efficacia sono criteri dell'azione amministrativa (art. 1), a dispetto di una generalizzata sottovalutazione di quel precetto, non sono mancate voci dottrinali che hanno inteso coglierne rilevanti implicazioni.

Per un verso, si è infatti riconosciuta, a quell'affermazione legislativa, una più spiccata e diretta forza innovatrice: avrebbe fornito una sistemazione definitiva alla materia, poiché, in base ad essa, i criteri normativi dell'efficienza e dell'economicità traducono nell'attività amministrativa quel principio di buon andamento, vanamente interpretato come utile ai soli fini dell'organizzazione delle pubbliche amministrazioni[27].

Per altro verso, si è osservato che «*oggi il cosiddetto vizio di merito, altro non è se non la violazione di quei principi di economicità e di efficienza che ormai costituiscono …principi costituzionali dell'agire amministrativo*», "positivizzati" nella legge generale sul procedimento e sull'attività amministrativi: per cui, ci si troverebbe dinanzi ad "una categoria specifica di vizi di legittimità". Di conseguenza, si è ridimensionato, nel suo ruolo e nella sua utilità, lo sforzo compiuto dalla pratica che "ha contrabbandato, fino ad oggi, i vizi di merito come vizi di eccesso di potere", e ci si è domandati «*se la violazione dei*

[26]F. G. SCOCA, *Profili sostanziali del merito amministrativo*, in *Nuova rass.*, 1981, p. 1376 s., segn. p. 1381.

[27]A partire da CASETTA, *Attività…*, p. 302. Cfr. pure: B. CAVALLO, *Provvedimenti e atti amministrativi*, in *Trattato di diritto amministrativo* (a cura di G. Santaniello), Padova, 1993, III, p. 327; P. M. VIPIANA, *Gli atti amministrativi: vizi di legittimità e di merito, cause di nullità ed irregolarità*, Padova, 2003, pp. 366-368 («Anche in tal modo si giunge alla conseguenza, estremamente rilevante, di includere l'inopportunità, e quindi i vizi di merito, nella più ampia categoria dell'invalidità dell'atto amministrativo»).

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principi di efficienza e di economicità in un atto amministrativo, non debba essere sindacata con la stessa ampiezza con cui è consentito il sindacato dei vizi di legittimità tradizionali quando ciò comporti una violazione diretta, personale e attuale di un interesse del cittadino»[28].

Come può constatarsi, tale dibattito (non per caso "volontaristico"), se riferito al discorso sul merito amministrativo, tradisce la medesima debolezza argomentativa, non giovando (più di quanto ha fatto la stessa affermazione costituzionale del principio di buon andamento) ad una "riabilitazione" di quella figura (restituendole un contenuto ed un rilievo giuridico, autonomi). Da qui, la scelta di "rivisitazione" sperimentale, di quel discorso, sul piano dogmatico e con l'ausilio epistemologico; in prospettiva, onde verificarne la compatibilità con l'attuale sistema di giustizia amministrativa (per cui si rinvia ad una prossima, complementare pubblicazione sul medesimo sito web).

2. CONTRIBUTO EPISTEMOLOGICO E "MEZZI" ATTI A CONFERIRE RILIEVO GIURIDICO AL MERITO AMMINISTRATIVO. RELATIVE IMPLICAZIONI

2.1 Limiti attuali di una logica del risultato applicata al merito amministrativo

Da quanto esposto nel cap. prec., risulta che:

- inteso il merito (quale processo decisionale "a base soggettiva" -nel significato tradizionale-) in un rapporto "a terzo escluso" con la legalità-legittimità;

- «*è inevitabile che il concetto stesso di "merito" tenda a vacillare ed infine a dissolversi, sia per quanto attiene alla riduzione del suo ambito applicativo, sia -e soprattutto- per quanto riguarda l'individuazione della sua essenza, che diviene sempre più ardua ed incerta, man mano che il processo di definizione dell'interesse pubblico concreto*

[28]F. BENVENUTI, *Disegno dell'amministrazione italiana*, Padova, 1996, p. 207 s.

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da parte dell'amministrazione vien perdendo il suo carattere imponderabile e in qualche misura misterioso, per acquisire le cadenze oggettive ed impersonali che lo rendono sempre più intimamente conoscibile dal giudice»[29].

In effetti, sempre sul piano logico, nulla osterebbe ad escludere il merito-opportunità dal novero stesso delle "componenti" dall'ordinamento richieste per la validità giuridica dell'atto amministrativo (entro un più ampio ambito di "legalità"); così avallando una soluzione di politica legislativa non spintasi oltre la soglia del "limite finalistico" (scopo) imposto dal diritto: per cui non possono incontrare "legittimazione" (solo) quelle determinazioni che esorbitino da un retto esercizio della funzione amministrativa, integrando il vizio (di legittimità) tipico dell'"eccesso di potere". Non per caso la "crisi" del merito si perfeziona semplicemente in concomitanza di un'"esternalizzazione" della discrezionalità, sul piano dell'ordinamento generale (all'insegna dell'eccesso di potere); senza particolari ripercussioni sul dato globale di esperienza giuridica, eccezion fatta per certo dibattito dottrinale ed il radicamento (fra i "pratici") di anacronistici schemi mentali col correlato "strascico" terminologico.

Dunque, onde giungere comunque alla conclusione di un autonomo spazio contenutistico riservabile al "merito amministrativo", con implicazioni sull'atteggiarsi del suo rilievo giuridico, occorrerebbe:

- di escluderne la coincidenza con un obiettivo di conservazione e tutela dell'ordinamento giuridico (nel qual caso, infatti, non si riuscirebbe ad identificarne la distinzione con la legalità-legittimità); in quest'ottica, non potrebbe essere più (assimilato o comunque) ricondotto ad un controllo di "proporzione" tra contenuti dell'atto e risultato;

- di poter correlare a quella locuzione una duplice previsione di "mezzi" (istituti) di diritto positivo: atti ad accertare "il modo di effettuazione del principio di opportunità"

[29]A. ROMANO TASSONE, *Sulle vicende*…, pp. 528 s., segn. pp. 530-533.

nonché, diretti a rendere quest'ultimo efficiente; salvo puntualizzare che il controllo o giudizio di opportunità non impone la sola verifica se l'ordinamento predisponga istituti in forza dei quali assicurare limiti positivi nella deliberazione dell'atto, al di fuori della fattispecie normativa di quest'ultimo; altresì, occorrendo che s'individuino dei parametri mediante i quali quell'accertamento va compiuto, dal momento che «*qualunque controllo o giudizio implica una misura, un criterio, un canone in base a cui esso diventa significante, ossia obiettivo*»[30].

Il pregio di tale "approccio", non si esaurisce nel superamento di quello, lungamente diffuso fra gli operatori del diritto, che non è stato in grado di andare oltre una determinazione "in negativo" (distinzione dalla legittimità e corrispondente insindacabilità). Va, infatti, riconosciuto di essersi così spinti oltre la pur corretta connessione fra "merito amministrativo" e valutazione discrezionale; a significare: non solo che il merito, quale misura della corrispondenza ad un risultato, rientra nella parte dell'attività amministrativa riconducibile all'esercizio di quel potere; altresì, risultando meglio definita l'interferenza fra i concetti di "merito dell'atto amministrativo", "attività discrezionale", "sindacabilità giudiziale".

Inoltre, attraverso l'orientamento testé esposto, si è in grado di offrire soddisfacente collocazione sistematica, oltreché al principio di buon andamento (ed alla sua ambivalenza), a quello di "equità". Quest'ultimo, a seconda delle circostanze, potendo: ricondursi al buon andamento stesso e, per esso, alla legittimità (nella sua accezione squisitamente programmatica)[31]; altrimenti, condividere la medesima area del "merito", da

[30]E. CASETTA, *Attività e atto amministrativo*, in *Riv. trim. dir. pubbl.*, 1957, p. 293 s., segn. pp. 324-325.

[31]A. C. JEMOLO, *L'interesse come presupposto dell'annullamento di atti illegittimi -licenziamento in via eventuale-* (nota a sent. Cons. Stato, sez. V, 21 febbraio 1931), in *Foro it.*, 1931, III, col. 113, segn. col. 114; G. ZANOBINI, *Corso di diritto amministrativo*, I, Milano, 1936, p. 257; F. CAMMEO, *L'equità nel diritto amministrativo*, in *Annuario della regia università di Bologna*, 1924, p. 16; F. MERUSI, *Sull'equità della pubblica amministrazione e del giudice amministrativo*, in *L'equità* (atti del convegno del Centro nazionale di prevenzione di difesa sociale - Lecce, 9-11 settembre 1973), Milano, 1974, p. 83; ID., *L'equità nel diritto amministrativo secondo Cammeo: alla*

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quest'ultimo distinguendosi per essere rivolta, più che ad un profilo "utilitario" (esaurentesi nell'ambito della stessa organizzazione, benché proiettato comunque verso l'interesse generale), al rapporto fra l'amministrazione pubblica ed i cittadini.

Sennonché, il superamento della coincidenza con un obiettivo di conservazione e tutela dell'ordinamento giuridico, implica di riempire di contenuti il vuoto fra la "nozione positiva" e quella "teoricamente possibile" di "legalità". All'uopo, v'è necessità di far leva su di uno schema normativo di tipo alternativo che consenta di superare quella tradizionale "invarianza" del sindacato, per cui: fintanto che il primo risulti pur sempre articolato in base a "conformità-prevedibilità", piuttosto che sul "risultato" in senso pieno, il giudizio (benché imperniato sull'interesse pubblico) opera sulla scorta di "situazioni sintomatiche" che rivelano le resistenze di un "approccio" casuistico. Laddove, il pieno esplicarsi di una logica del risultato non può che prendere le mosse da un modello della giuridicità che sia in grado di emanciparsi da una artificiosa sistemazione "a priori". Solo a queste condizioni è collaudabile sul piano (non meramente empirico, ma) del sistema la possibilità di ritagliare un autonomo spazio contenutistico al "merito amministrativo" con implicazioni sull'atteggiarsi del suo rilievo giuridico (dei mezzi che lo sostanziano).

All'uopo, diviene indispensabile di ricorrere, innanzitutto, al piano di analisi filosofico-scientifico.

2.2 Apporto epistemologico e contenuto-valore autonomi del merito amministrativo

ricerca dei fondamenti primi della legalità sostanziale, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, n. 22, Milano, 1993, p. 413.

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A patto di convenire che la strategia decisionale a base dell'azione amministrativa (nel senso benvenutiano del termine[32]) riflette la "multipolarità" della disciplina di riferimento; ogniqualvolta quest'ultima si attesti, sul nesso condizionale "se …allora", con riduzione dell'esperienza di regolazione entro strutture "rigide", si determinerà un sacrificio della "materialità" (del momento assiologico-reale). Si tratta, infatti, di una concezione della giuridicità disposta: al ridimensionamento del ruolo degli interessi, in nome di un'idea di ordine incentrata sulla certezza-prevedibilità (sull'orizzonte del passato); piuttosto che a "dominare e permeare la fluida materia della vita sociale", assecondandola nell'inevitabile opera di semplificazione della complessità dei conflitti[33].

Laddove, lungo l'"orizzonte del futuro" ("consequenzialista", come nel caso di "tipi" provvedimentali "ad efficacia durevole" -*rectius*, che si riferiscono a fattispecie dotate di dimensione temporale-), la strategia decisionale a base dell'azione non potrà che valutarsi in funzione della diversa forma di "autonomizzazione" dell'ordinamento.

In tale contesto, all'esercizio di un potere tendenzialmente discrezionale, quale quello amministrativo, corrisponderà (in costanza di effetti della fattispecie precettiva di base): anziché il "contatto istantaneo", regolato con riguardo a conseguenze prevedibili; il "rapporto" fra i portatori degli interessi (pubblici e privati), quale retto da uno "statuto" sensibile agli effetti concreti. L'indicata prospettiva: per un verso, pone in risalto il limite

[32]F. BENVENUTI, *Disegno dell'Amministrazione Italiana (linee positive e prospettive)*, Padova, 1996, p. 177, ove, nel classificare l'attività in relazione agli scopi particolari che con essa si perseguono, si preferisce ricorrere all'espressione "azione amministrativa"; ID., *Appunti di diritto amministrativo -pt. gen.-*, Padova, 1955.

[33]Secondo quanto propugnato invece da E. BETTI, *Interpretazione della legge e degli atti giuridici (teoria generale e dogmatica)*, II ed. riveduta e ampliata da G. Crifò, Milano, 1971, p. 103. Sempre nell'ottica della teoria generale, A. FALZEA, *Forma e sostanza nel sistema culturale del diritto*, in *Ricerche di teoria generale del diritto e di dogmatica giuridica*. – I. *Teoria generale del diritto*, Milano, 1999, segn. p. 184 s., pone l'accento sulla necessità, in una visione non formale del diritto, di dotarsi «di un sistema normativo rispettabile…, in quanto non straripante in dimensioni di pratica inconoscibilità e non pregiudicato nella sua pratica attuabilità da vizi di disarticolazione, contingenza, ambiguità».

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della teorica dell'eccesso di potere che (per l'appunto), mediante l'enucleazione di situazioni sintomatiche, costringe il sindacato di quel potere entro i più angusti spazi dell'orizzonte del passato (ipotetico-casuistico); per l'altro, contribuisce a far assurgere il "risultato" (*rectius*, un interesse pubblico, concreto), quale esito di un'attività di gestione, da criterio di valutazione dell'attività[34], a parametro del sindacato del giudice amministrativo e del correlato giudizio sulla validità (o meno) di un atto amministrativo[35]. Quanto conosce un significativo suggello già in alcuni interventi normativi (artt. 20 e 20*bis*, L. n. 59/1997 ss.mm.ii. -in tema di semplificazione-, art. 1, L. n. 241/1990 -circa il dovere di non aggravare il procedimento amministrativo-, etc.) di apertura alla "cultura del risultato" con riferimento all'esito provvedimentale (di un procedimento)[36]; ad esso estendendo principi generali dell'ordinamento quali quelli di efficienza (economicità ed efficacia), sì da riempire di ulteriori contenuti l'idea di legalità amministrativa[37].

[34]F. G. SCOCA, *Attività amministrativa*, in *Enc. dir.* - Aggiorn., VI, Milano, 2002, p. 75 s., segn. p. 100.

[35]A. ROMANO TASSONE, *Sulla formula "amministrazione per risultati"*, in *Scritti in onore di E. Casetta*, Napoli, 2001, I, p. 818 s., segn. p. 819; M. CAMMELLI, *Amministrazione di risultato*, in *Annuario AIPDA 2002*, Milano, 2003, p. 107 s., segn. p. 115; G. CORSO, *Amministrazione di risultati*, relazione in *Innovazioni del diritto amministrativo e riforma dell'amministrazione* (convegno AIPDA, tenutosi in Roma il 22 marzo 2002), pubbl. in *Annuario AIPDA 2002*, Milano, 2003, p. 127; R. FERRARA, *Introduzione al diritto amministrativo: le pubbliche amministrazioni nell'era della globalizzazione*, Bari, 2002, p. 151.

[36]Sul tema: ROMANO TASSONE, *Sulla formula*…, p. 818; F. G. SCOCA, *Attività amministrativa*…, p. 100 s.

[37]Secondo quanto preconizzato già in F. LEVI, *Legittimità* (diritto amministrativo), in *Enc. dir.*, XXIV, Milano, 1974, p. 135 s., segn. p. 136. Cfr. pure F. BENVENUTI, *Inefficienza e caducazione degli atti amministrativi*, in *Giur. compl. Cass.*, 1950, p. 914. Circa il progressivo ingresso dei criteri dell'efficienza e del risultato sul sindacato del giudice amministrativo: P. CARNEVALE, *L'esame asettico delle pronunce giurisdizionali per il miglioramento produttivo e una maggiore efficienza della pubblica amministrazione*, in *T.A.R.*, 1999, II, p. 385; RI. CHIEPPA, *Giustizia amministrativa, efficienza e pubblica amministrazione*, in *Foro amm.*, 1996, p. 2500. Sulla nuova accezione di legalità e la conseguente difficoltà a ricondurre il principio ad unità: L. IANNOTTA, *Principio di legalità ed amministrazione di risultato*, in *Amministrazione e legalità. Fonti normative e ordinamenti* (atti del convegno di Macerata, 21-22 maggio 1999), a cura di C. Pinelli, Milano, 2000, p. 37 s.; M. R. SPASIANO, *Funzione*

La conseguenza è che il "tipo" di "riesame" eventualmente adottato dipende (non dalla "natura" del vizio -legittimità/merito-, né dall'insorgenza del medesimo -originario/sopravvenuto-, bensì) dal profilo teleologico-funzionale che (nella concreta circostanza) si è inteso preservare.

A tal punto, il discorso dogmatico necessita di essere completato avendo riguardo ai già denunciati limiti di una moderna nozione di legalità amministrativa che si basi sul solo dato "volontaristico" (sia pur costituzionale) inerente all'interesse pubblico. All'uopo, può risultar utile partire dalle seguenti connessioni: «*seppure nella prassi e nella dottrina si parli di potere discrezionale, in realtà l'ordinamento amministrativo non conosce "norme in bianco". L'Amministrazione agisce sempre in attuazione dei precetti e perciò non ha la capacità di porne di nuovi. La sfera discrezionale appartiene solo al momento interpretativo della norma, da cui estrae tutti i possibili contenuti precettivi e ciò in presenza di norme a carattere sintetico di cui l'Amministrazione svela (o discerne) la possibile estensione. Non diversamente da quanto avviene per l'analogia che pure appartiene (sebbene con diversa funzione) al campo dell'ermeneutica*»[38].

Se, dunque, la strategia decisionale a base dell'azione amministrativa riflette la "multipolarità" della disciplina di riferimento; se alla discrezionalità corrisponde il "rapporto" fra i portatori degli interessi (pubblici e privati), quale retto da uno "statuto" sensibile agli effetti concreti; giacché quella sfera appartiene al momento interpretativo della norma; quest'ultimo, in corrispondenza del conferimento di un potere discrezionale, non potrà ridursi ad un'operazione previa ed autonoma rispetto al momento applicativo (come tale, improntata "a priori" al risalente dato valorativo-formalistico di un "medesimo interesse" originario-primario).

amministrativa e legalità di risultato, Torino, 2003; A. TRAVI, *Giurisprudenza amministrativa e principio di legalità*, in *Dir. pubbl.*, 1995, p. 93.

[38]F. BENVENUTI, *Disegno*…, pp. 195-196 s.

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Tendenzialmente, gli studi di ermeneutica (giuridica) e sull'attività conoscitiva della pubblica amministrazione (tenuto conto del progressivo "complessificarsi" dei compiti assegnatile) non disconoscono una "distinzione logica", tra i due profili operazionali (sono infatti, giudizi diversi, su tale piano reciprocamente escludentisi, quelli per cui un medesimo fenomeno possa venir tanto "valutato" -riferito ad un criterio di valore- quanto "qualificato" -assunto in una categoria-)[39]. Segno della consapevolezza di evitare qualunque elusione della problematicità connaturata al processo di comprensione: sia al livello propriamente ermeneutico, sia al (correlato) livello di concezione del potere (compreso quello discrezionale) e dei suoi limiti (libertà dell'azione amministrativa e tutela dei diritti dei cittadini)[40].

Peraltro, il rilievo sostanziale dell'interesse pubblico (come concreto), spinge a favore di uno schema (non lineare -sul presupposto di un significato oggettivo, preesistente cui l'interprete avrebbe accesso-, bensì) circolare[41]; per via di un "dialogo coerente", nella

[39]Così R. GUASTINI, *L'interpretazione dei documenti normativi*, Milano, 2004, p. 13, ove si prospetta una distinzione per oggetti: l'interpretazione riguardando testi; l'applicazione, norme in senso stretto ("intese come il contenuto di significato dei testi normativi").

[40]Come noto, al contributo di M. S. GIANNINI si deve sia l'emancipazione della discrezionalità dalle manifestazioni dell'attività interpretativa (*L'interpretazione dell'atto amministrativo e la teoria giuridica generale dell'interpretazione*, Milano, 1939), sia l'aver chiarito che l'attività amministrativa (anche quando si presenti con le fattezze della discrezionalità) resta (sostanzialmente cura d'interessi, ma formalmente e) "fondamentalmente un'attuazione di legge" (*Il potere discrezionale della pubblica amministrazione*, Milano, 1939, pp. 13-14, 22).

[41]Nel primo senso: M. S. GIANNINI, *L'interpretazione…* (di cui dà conto F. G. SCOCA, *La discrezionalità nel pensiero di Giannini e nella dottrina successiva*, in *Riv. trim. dir. pubbl.* 2000, p. 1045 s., segn. pp. 1046 e 1053 s.); G. TARELLO, *L'interpretazione della legge*, in *Trattato di diritto civile e commerciale* (dir. da Cicu-Messineo), Milano, 1980. Respinge recisamente l'assunto di un significato oggettivo, preesistente che l'interprete sarebbe chiamato a svelare, E. CASETTA, *Riflessioni in tema di discrezionalità amministrativa, attività vincolata e interpretazione*, in *Dir. econ*., 1998, p. 503 s., segn. p. 505. Resta il fatto che la norma non può artificiosamente dissociarsi dal contesto in cui trova applicazione (D. U. GALETTA, *Violazione di norme sul procedimento amministrativo e annullabilità del provvedimento*, Milano, 2003, p. 95). All'uopo, per i relativi riferimenti, sia consentito di rinviare a P. COTZA, *Potere autoritativo e modelli consensuali nel diritto dell'amministrazione*

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consapevolezza del reciproco condizionamento (anche in termini di "precomprensione" del giurista[42]). D'altronde, che l'interpretazione delle disposizioni normative sia finalizzata alla loro applicazione ad una realtà delimitata e circoscritta, trova conferma nell'art. 12 delle "preleggi" al cod. civ. (rubricato "interpretazione della legge") ove così si esordisce: «*nell'applicare la legge…*».

Gli è infatti che resta comune il fondamento della comprensione nel processo applicativo: esso si traduce in quel "nesso dialettico" (moto circolare) che dal "diritto" (*quaestio juris*) conduce al "fatto" (*quaestio facti*) per tornare al primo. In altri termini, ogni giudizio (quale esso sia) è prospettabile non come un *quid* a sé stante, bensì come il risultato di un'attività (non solo sotto un aspetto statico, ma anche in una visuale dinamica): considerando la comprensione come un momento "essenziale ed ineliminabile" nella complessa operazione di applicazione della legge ad un caso concreto.

A tal punto, tirando le somme del duplice discorso relativo tanto ai distinti "orizzonti" dell'ordinamento giuridico (ipotetico-casuistico e consequenzialista) quanto al nesso dialettico fra interpretazione ed applicazione delle disposizioni normative, possono

pubblica (contributo metodologico), Napoli, 2007, par. 1.6. Sulla difficoltà ad operare una separazione fra valutazioni dell'interesse pubblico e completamento od integrazione della norma da applicare: M. LIPARI, *I principi generali dell'istruttoria nel processo amministrativo dopo la legge 205/2000 (le trasformazioni del giudizio e gli indirizzi della giurisprudenza)*, in *Dir. proc. amm.*, 2003, p. 55 s., segn. p. 106 s.; nonché P. M. VIPIANA, *Gli atti amministrativi: vizi di legittimità e di merito, cause di nullità ed irregolarità*, Padova, 2003, p. 293 s.

[42]Alla filosofia ermeneutica ed all'ermeneutica generale, spintesi al di là dell'obiettivo metodologico di costituirsi in sapere scientifico, si devono: tanto la scoperta che le condizioni ontologiche del comprendere non sono tutte riconducibili nell'ambito di un "procedimento" o di un metodo, quanto la ritrascrizione del circolo ermeneutico (non più fra "parti" e "tutto", bensì) tra la "precomprensione" (anticipazione precognitiva) che l'interprete (l'"esserci") già possiede del senso della "cosa" (nella circostanza, il testo normativo) e quest'ultima (all'uopo, può rinviarsi, rispettivamente: a M. HEIDEGGER, *Essere e tempo*, tr. it. Torino, 1969; nonché a F. SCHLEIERMACHER, *Etica ed ermeneutica*, tr. it. Napoli, 1985 e H. G. GADAMER, *Verità e metodo*, tr. it. Milano, 1988 -sul cui pensiero si sofferma G. ZACCARIA, *Ermeneutica e giurisprudenza -i fondamenti filosofici nella teoria di Hans Georg Gadamer*-, Milano, 1984-).

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formularsi le prime conclusioni. Così, se alla dicotomia strategica, "delle regole / della funzione" (quale riflettente, per l'appunto, l'orizzonte normativo di riferimento), può sovrapporsi quella fra accertamento / discrezionalità; ne consegue che quest'ultima sia da intendersi anche come decisione concreta eppertanto, risultato; accezione, quest'ultima, "dominante" per un preciso ordine di ragioni nonché, per via delle relative implicazioni.

Venendo, per il momento alle implicazioni, avuto riguardo all'esame dell'*iter* di formazione dell'atto amministrativo, discrezionale; solo aderendo allo schema logico-circolare di comprensione-applicazione, si è in grado di apprezzare che il giudizio valutativo e concreto, logicamente non anticipa la determinazione volitiva, ma con essa s'identifica, progressivamente definendosi. Altrimenti, nell'ottica della teoria logicistica della decisione (che la equipara ad un sillogisma pratico), la duplicazione delle fasi (posizione della regola del caso concreto e determinazione della susseguente decisione) si rivela non solo una inutile complicazione[43], ma (quel che è peggio) un'aberrazione del processo.

Così, se si accetta l'insegnamento secondo cui la discrezionalità (come giudizio pratico) discende da una comparazione e ponderazione quali-quantitativa degli interessi (pubblici e privati) immanenti in un dato contesto sociale[44]; alla luce di quanto esposto sul piano

[43]B. CROCE, *Filosofia della pratica: economica ed etica*, Bari, 1923, segn. pp. 27-28. Il pensiero crociano è stato criticato per la riduzione di quella giuridica ad attività genericamente pratica (*op. ult. cit.*, p. 147 s.), trascurando sia la fondazione della riflessione storica, sia il rilievo dato alla realtà dell'esecuzione della legge (*ivi*, p. 328; ma cfr. pure, ID., *La storia come pensiero e come azione*, Bari, 1965) su cui (per contro) insiste la dottrina che ha assimilato quella lezione. Per la rilevanza del pensiero crociano sui problemi di storia e scienza del diritto, G. CASSANDRO, *Storia e diritto -un'indagine metodologica-*, in *Riv. st. dir. it.*, 1966, p. 5 s. Cfr. pure: P. CALAMANDREI, *Il giudice e lo storico*, ora in *Studi sul processo civile*, V, Padova, 1947, p. 41; LUIGI (GINO) GORLA, *L'interpretazione del diritto*, Milano, 1941, ove coerentemente se ne fa seguire la rivalutazione dei casi concreti e l'approfondimento (filologico potrebbe definirsi) dei testi legislativi, giurisprudenziali e dottrinali; M. S. GIANNINI, *Diritto amministrativo*, I, Milano, 1970, p. 41.

[44]M. S. GIANNINI, *Il potere discrezionale*…, p. 74.

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ermeneutico, va rettamente intesa la sintesi che di seguito prospetta l'identificazione dell'apprezzamento discrezionale (come attività intellettiva antecedente al momento di formulazione definitiva della volontà) con una fissazione del valore dell'interesse essenziale (o primario) in funzione di quelli secondari[45]. Risponde al vero che, specie nelle disposizioni in cui la scelta del comportamento satisfattivo venga rimessa ad un organo dell'apparato precostituito per la tutela dell'interesse considerato, quest'ultimo (assunto quale canone di comportamento) venga sempre identificato in maniera oltremodo generica, mediante un inevitabile procedimento di tipizzazione. Del pari, l'identificazione di quell'interesse "canonico" avviene ad un livello di notevole astrazione, in quanto il medesimo è considerato isolatamente rispetto ad ogni altro interesse. Cionondimeno, il dato globale di esperienza dimostra che non esiste alcun interesse, individuato da qualche disposizione normativa, che, nel contesto dell'agire concreto, non si trovi variamente connesso ad altri (i quali ultimi, a loro volta, anche in mancanza di una previsione normativa, non possono non essere ponderati da chi è tenuto ad operare la scelta)[46]. E', allora intuitivo (e plausibile) che «*fissare il rilievo e l'importanza di un interesse entro o di fronte una costellazione di altri interessi non è opera di ragione, anche se soggettiva: è già optare per un valore piuttosto che per un altro, equivale già alla scelta e cioè in ultima analisi alla volizione*»[47]. Dunque, «*non ha proprio alcun senso pretendere, come talora s'è fatto, che l'interesse pubblico individuato dalla norma come essenziale, costituisca il fine immutabile e predeterminato, un limite o un vincolo, esterno o interno che sia, dell'attività discrezionale*»[48]. Laddove, la sola considerazione del processo ermeneutico-applicativo, secondo uno schema "circolare" (trovando favorevole sponda epistemologica nell'apporto del "razionalismo critico" al problema della "calcolabilità" delle conseguenze della

[45]M. S. GIANNINI, *op. ult. cit.*, p. 77.

[46]M. S. GIANNINI, *Lezioni di diritto amministrativo*, Milano, 1950, p. 97.

[47]F. LEVI, *L'attività conoscitiva*…, p. 220 s., segn. pp. 226-227.

[48]A. PIRAS, *Discrezionalità amministrativa*, in *Enc. dir.*, XIII, Milano, 1964, p. 65 s., segn. p. 77.

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decisione), può garantire al "farsi" dell'atto una riconducibilità al dato globale di esperienza, con corrispondente massimizzazione delle adesioni da parte degli "interessati"[49].

Se non che, il limite epistemologico evidentemente derivante dall'incapacità (sottoforma di precomprensione) a "sdoganarsi" dai condizionamenti della tradizione, trasfusi in un'idea predefinita d'interesse pubblico ("ufficiale-primario"), penalizza quel discorso nei suoi possibili sviluppi. Quando il riesame consista in una rinnovazione degli apprezzamenti posti in essere dall'amministrazione "in primo grado", la circostanza di muoversi sull'orizzonte normativo "rivolto al futuro" (delle conseguenze sul contesto d'interessi -qualificati- non originario, ma presente al momento in cui è stata operata la rivalutazione) non può significare necessariamente coincidenza coll'ambito della "non-legittimità" e che quindi l'unico strumento di "ritiro" utilizzabile sia la revoca. Si tratterà, piuttosto, di verificare: se quel riesame si risolva (o meno) in un giudizio di contraddizione con l'interesse pubblico come concretamente evolutosi; od, altrimenti, in una valutazione (è da verificare fino a che punto "oggettivabile" eppertanto, istituzionalizzabile) di "miglioramento", alla luce di un concetto "medio" di opportunità sopra il quale non c'è "vizio". Con quel che ne consegue: sia sulla "natura" del riscontro di "merito", tendente a presentarsi non già come "altro" rispetto alla "legittimità", ma semplicemente come un'intensificazione del sindacato in cui quest'ultima si estrinseca; sia in termini di coerenza col dato costituzionale che vieta esclusioni o limitazioni, a particolari mezzi d'impugnazione, quando si verta in materia di tutela giurisdizionale contro gli atti della pubblica amministrazione; sia in ordine alla modulazione degli effetti del "ritiro" (non più costretta entro il radicale dualismo retroattività/irretroattività); sia a proposito dei profili funzionali degli istituti di autotutela (nel loro reciproco rapporto; nonché, in relazione alle figure di esercizio consensuale del pubblico potere); sia in punto di responsabilità

[49]F. LEVI, *L'attività conoscitiva*…, pp. 227-228. Sul ruolo della scienza nel far convergere "legge" ed "azione", nonché sull'apporto del "razionalismo critico" in ordine al problema della "calcolabilità" delle conseguenze, sia consentito di rinviare a P. COTZA, *Potere autoritativo*…, parr. 1.2.1. e 1.4. (*ivi*, testo corrispondente a nt. 188).

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(professionale, politica, etc.) da accertarsi a cura di organi competenti (sovraordinato gerarchico, di vigilanza, etc.).

A tal punto, facendo leva sul discorso dogmatico nanti condotto che non conosce controindicazioni nelle potenzialità funzionali che la Costituzione repubblicana consente di annettere al principio di buon andamento, sarebbe possibile "isolare" un contenuto autonomo del merito amministrativo, corrispondente al "grado" di utilità-adeguatezza dell'atto al risultato *id est*, al raggiungimento dei fini pubblici (generici e specifici) che gli sono intrinseci. Salvo interrogarsi sul valore di quella condizione: di tipo meramente amministrativo ovvero giuridico.

In tale prospettiva, il carattere soggettivo del processo decisionale non sarebbe più connotato del merito amministrativo che, come forma di sindacato, potrebbe disporre sia di regole extra-giuridiche, sia del principio di ragionevolezza.

2.3.1 Mezzi atti ad accertare "il modo di effettuazione del principio di opportunità" nonché, diretti a "rendere quest'ultimo efficiente". Introduzione…

Un discorso "epistemologicamente orientato" si ridurrebbe ad un puro (quanto vacuo) esercizio dogmatico se non fosse corredato dal riscontro di una coerente previsione di diritto positivo attestante l'esistenza di "mezzi": atti ad accertare il "modo di effettuazione" del principio di opportunità nonché, diretti a renderlo efficiente; idonei a sorreggere la connotazione funzionale proposta onde restituire autonoma dignità giuridica al merito amministrativo in un contesto di "legittimità allargata" quale quello attuale (proprio di uno Stato "interventista" che ha dismesso i panni di un'organizzazione accentrata).

Ebbene, nonostante l'abolizione (operata con D.Lgs n. 40/1993) del controllo di merito sugli atti amministrativi regionali (peraltro, già configurato come facoltativo nella stesura dell'art. 125 Cost. allora vigente) abbia comportato un significativo ridimensionamento dei mezzi presupponenti una valutazione di opportunità delle scelte altrui (ricorsi amministrativi, approvazioni, autorizzazioni, omologazioni); è dato comunque di

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rinvenirne, nell'ordinamento generale, di ulteriori in grado di rispondere ad un'istanza funzionale di buon andamento in termini essenzialmente "migliorativi".

2.3.2 …Tipologia

Si tratta, in parte, d'istituti chiamati ad assolvere un più ampio novero di scopi. E' il caso dei "pareri"; parimenti, può concludersi a proposito della motivazione "in senso stretto", ad indicare: non le enunciazioni premesse ad un determinato provvedimento, onde affermarne la fondatezza in punto di legittimità (profilo in relazione al quale sarebbe preferibile usare il termine "giustificazione"); bensì, la dimostrazione che un dato contenuto è di una certa utilità rispetto all'interesse generale[50]. Ma è la "revoca" a rappresentare il mezzo "di punta" offerto dal sistema: dal momento che assolve, in via esclusiva, al compito funzionale "migliorativo" che si è ritenuto di annettere al merito amministrativo nell'attuale contesto di esperienza giuridica.

Così, si ponga la possibilità di distinguere fra: una "contrarietà all'interesse pubblico non sostenibile" (*rectius*, invalidità) dell'atto amministrativo (una volta che la si apprezzi); una "contrarietà all'interesse pubblico, sostenibile" (non integrante invalidità) dell'atto medesimo, in quanto in posizione mediana fra l'atto (legittimo o, ancorché illegittimo formalmente) conforme all'interesse pubblico (eppertanto, non annullabile) e l'atto (illegittimo, ma altresì) non rispondente all'interesse pubblico (eppertanto, da annullare). Che la sola "contrarietà sostenibile" rientri nel campo d'applicazione della revoca può tornar utile onde "piegare", alle esigenze di una ricostruzione interpretativa coerente, il dato normativo di riferimento, laddove (evidentemente legato alla tradizionale partizione fra vizi, di legittimità e di merito-opportunità): annette senz'altro, all'istituto della revoca, la "contrarietà dell'atto amministrativo [che ne è oggetto] all'interesse pubblico" (art. 21-*quinquies*, cc. I-*bis* e I-*ter*, L. n. 241/1990). Altrettanto può concludersi dal momento che la

[50]T.A.R. Lazio, Roma, sez. I*ter*, 4 marzo 2011 n. 1997, in *Foro amm. -T.A.R.*-, 2011, pp. 820-821 (in caso di provvedimento di trasferimento per "incompatibilità ambientale").

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disciplina "positiva" prevede che la revocabilità del provvedimento amministrativo sia connessa a: "sopravvenuti motivi di pubblico interesse", un "mutamento della situazione di fatto", una "nuova valutazione dell'interesse pubblico originario". Infatti, quel che rileva è che la valutazione dell'amministrazione sia improntata al miglioramento di un interesse pubblico già ragionevolmente perseguito "in combinato disposto" con gli altri (privati) dotati di qualificazione: poco importa che quell'iniziativa (all'insegna del miglioramento) prenda spunto, o meno, da sopravvenienze (d'interesse e/o di fatto). Da ciò, la centralità della figura dell'annullamento nel sistema degli atti di "ritiro" in autotutela: rispetto a quella, la revoca rappresentando un *quid pluris*, destinata com'è ad (eventualmente) operare solo quando non vi sia una condizione d'invalidità (per illegittimità di matrice formale o sostanziale).

In ultimo, non minore conforto, alla prospettazione testé avanzata, deriva dalla circostanza per cui il Legislatore contempla l'esercizio di un "recesso unilaterale – revoca" verso gli accordi aventi ad oggetto il potere pubblico (*ex art.* 11, c. IV, L. n. 241/1990) che, pur suscettivi di annullamento d'ufficio, sono alternativi alla sola revoca. Infatti, rispetto a quest'ultima, quegli accordi potrebbero vedersi riconosciuto uno specifico spazio di giustificazione ogniqualvolta l'obiettivo di miglioramento, nel perseguire l'interesse pubblico, venga spinto di là dalla soglia di equilibrio con la tutela degli interessi qualificati del privato (proprio per via del consenso di quest'ultimo). Salvo puntualizzare che l'eventuale "recesso" da parte dell'amministrazione tornerebbe ad essere sottoposto al più rigido regime dei medesimi istituti di autotutela (non potendo escludersene l'assoggettabilità, oltreché ad annullamento officioso, a revoca, secondo il criterio distintivo introdotto nel presente studio e salvo indennizzo).

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LE POUVOIR ADMINISTRATIF

EN APPRÉCIATION ULTRA-LÉGALE

(“MERITO AMMINISTRATIVO”)

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Dr. Paolo COTZA

TABLE DES MATIÈRES

1. LÉGALITÉ ET POUVOIR ADMINISTRATIF EN APPRÉCIATION ULTRA-LÉGALE DANS LE DÉBAT TRADITIONNEL

1.1 Introduction

1.2.1 Implications de droit positif ...

1.2.2 ...et hésitations traditionnelles

1.3 “Légalité-justice” des actes comme condition d’une bonne administration et vice “en appréciation ultra-légale” tel que moment “causal” de l’invalidité

1.4 Indétermination en termes positifs du pouvoir administratif en appréciation ultra-légale. Résolution de l’intérêt public dans le système juridique ; renforcement de l’excès de pouvoir…

1.5 ...absorption partielle du pouvoir administratif en appréciation ultra-légale dans le domain d’un pouvoir discrétionnaire “externalisé”

1.6 “Etat de l’art” actuel et premières perspectives d’un discours “interdisciplinaire”

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2. APPORT ÉPISTÉMOLOGIQUE ET "MOYENS" APPROPRIÉS À APPORTER UN RELIEF JURIDIQUE AU POUVOIR ADMINISTRATIF EN APPRÉCIATION ULTRA-LÉGALE. IMPLICATIONS

2.1 Limites actuelles d'une logique du résultat appliquée au pouvoir administratif en appréciation ultra-légale

2.2 Apport épistémologique et contenu-valeur autonomes du pouvoir administratif en appréciation ultra-légale

2.3.1 Moyens appropriés pour assurer "la façon d'exécution du principe d'opportunité", ainsi que pour "rendre celui-ci efficace". Introduction...

2.3.2 Typologie...

1. LÉGALITÉ ET POUVOIR ADMINISTRATIF EN APPRÉCIATION ULTRA-LÉGALE DANS LE DÉBAT TRADITIONNEL

1.1 Introduction

Malgré une longue et influente tradition d'études, avec la complicité d'un "parc" apport de droit positif, la parabole toute entiére du "pouvoir administratif en appréciation ultra-légale" se caractérise autant par une "fragilité théorique" que par un "caractère aléatoire d'application"[1].

[1]Sur le sujet, on peut reporter à A. ROMANO TASSONE, *Sulle vicende del concetto di "merito"*, *Dir. amm.*, 2008, p. 517 s.

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En fait, autour de cette formule ont été enregistrées des querelles doctrinales animées : avant tout, sur sa résolution entière dans des concepts juridiques (à leur tour controversés) tel que celui de pouvoir discrétionnaire (aussi bien technique qu'admnistratif), car tous les deux peuvent se rapporter au domaine de l'"indéniable en légalité"[2] ; de manière à occuper une zone de la dimension diversement modulée par la législation. Sinon : grâce au contraste des points de vue à la base de la liberté, ou du devoir, du profil discrétionnaire ; aussi en raison de l'ambiguïté de concepts substantiels qui ne se chevauchent pas entièrement ("opportunité", "convenance", "bonne administration") ; il a été jugé plus correct scientifiquement de s'interroger sur sa façon d'être dans le contexte des relations entre le droit et la décision administrative (si le pouvoir administratif en appréciation ultra-légale, tout en connotant une activité juridiquement de relief, implique la légalité ou non de la discipline connexe[3]).

Le fait (donné par l'expérience juridique) de tomber dans un cliché (qui tend à résoudre cette idée -logiquement avant le juridique- en conformité avec un rapport -dyadique- de "non-légalité") semble symptomatique de la persistance de ces problèmes. En d'autres termes, on serait en présence d'un processus décisionnel lié à l'activité administrative (dans le sens le plus large -qui se traduit ou non en "actes de production juridique"-), en correspondance avec lequel est réservé à l'autorité (en vue de la poursuite des intérêts qui sont confiés à ses soins) une "marge d'appréciation" non sumise à des règles juridiques

[2]En faveur, V. OTTAVIANO, *Studi sul merito degli atti amministrativi*, *Annuario di diritto comparato e di studi legislativi*, serie III, 1948, XXII, p. 311 ; ID., *Merito* (diritto amministrativo), *Nov.mo Dig. it.*, X, Torino, 1968, p. 575.

[3]Ainsi et pour la négative, M. S. GIANNINI, *Problemi relativi al merito amministrativo e problemi connessi*, *Stato e diritto*, 1941, p. 439 (maintenant *Scritti giuridici*, Milano, 2000, II, p. 347 s.), en désaccord avec C. MORTATI, *Note sul potere discrezionale*, Roma, 1936 ; ID., *Ancora sul merito amministrativo*, *Stato e diritto*, 1941 ; ID., *Discrezionalità*, *Nov.mo Dig. it.*, V, Torino, 1960, p. 1099 s.

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(prérogative "objectivable" -par d'autres règles, comme ces techniques- ou non -pondération des intérêts en cause-)[4].

La référence historique de droit procédural à un arrêt "supplémentaire" (pour laquelle le juge aurait permis de reporter toute question de pouvoir administratif en appréciation ultra-légale a celles de légalité et pratiquement de ne pas se prononcer sur les premières si la décision était aussi contestée par une exception de légalité réputé fondé[5]) n'est pas satisfaisante afin de clarifier le problème : sinon dans la mesure où cela leur permet de reconnaître (consciemment ou inconsciemment) une juxtaposition (plutôt qu'un contraste) avec la légalité. On ne peut détecter seulement (au-delà de la diversité des significations reliées à ce vocabulaire technique) qu'à l'effort de l'interprète (d'"ordre et de clarification" des relations tourmentées entre l'activité administrative -précisément- et la juridiction), il reste peu de marge, tant qu'il fonctionne selon un critère pandectist, respectueuse des schémas rigides de la séparation des pouvoirs, auxquels ramener -quand elles sont mises en œuvre- les exigences de justice venant de la société : on parvien inexorablement au résultat d'incontestabilité dans ce domaine ; tout au plus (sous le conditionnement de "droit commun") avec l'épuisement de la juridiction administrative, spéciale, en termes formalistes d'une question d'amplitude des pouvoirs de décision (seulement). Mais, même lorsqu'on constate qu'aucune des données constitutionnelles ne dispose de cette "réserve d'administration", il reste à expliquer en quoi consiste le substrat substantiel de la corrélation, entre la prérogative ultérieure et le caractère de "connaissance" de la même, désormais rendue expressément par la donnée courant de droit positif (art. 7, comma VI, et art. 134, Décret-loi du 2 Juillet 2010 n. 104).

[4]A. M. SANDULLI, *Manuale di diritto amministrativo*, Napoli, 1989, p. 595-596. Cf. aussi : Cons. Etat, sect. IV, 20 Octobre 1964 n. 1036, *Consiglio di Stato*, 1964, p. 1684-1685, sect. IV, 3 Juin 1964 n. 690, *Consiglio di Stato*, 1964, p. 1108 s.

[5]M. S. GIANNINI, *La giustizia amministrativa*, Roma, 1963, p. 171 ; P. VIRGA, *La tutela giurisdizionale nei confronti della pubblica amministrazione*, Milano, 1966.

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1.2.1 Implications de droit positif ...

L'épisode normatif mentionné vise à marquer une parabole profonde (du traitement dogmatique) sur le pouvoir administratif en appréciation ultra-légale, puisque :

- non seulement il le soustre definitivement à la condition d'"attraction" exclusivement pour les experts de la science de l'administration ;

- bien que dépassant l'argumentum selon lequel la portée juridique du pouvoir administratif en appréciation ultra-légale est liée à l'attendu (de droit positif) de "moyens" - institutions- dans la disponibilité des seuls organes compétents des "pouvoirs publics", capables de déterminer "la façon d'appliquer" du principe d'opportunité - bonne administration (en tant que limite "conformative" de nature logique, typique de l'action des "pouvoirs publics" -"bonté intrinsèque"- et distinct de celui de "spécialité") et "orientés à rendre efficace ce dernier " ;

- mais il semble qu'il en décrète une définition progressive comme type de contrôle/arrêt sur l'activité, plutôt que "composant" (sinon élément "constituant") de l'acte, aussi bien qu'il aurait souhaité un débat spécialisé qui s'est historiquement développé du point de vue du (type de) "non - valeur", en parallèle à la conception contemporaine de "légalité administrative".

Il s'ensuit le départ d'un conditionnement constant, selon les analyses efficacement rendues par la logique des "couples d'opposés" à cause de l'histoire troublée de l'évolution du domaine des "pouvoirs publics" couvert par la légalité ; en particulier par rapport à la version "substantielle" à cette dernière qui, dans l'"échelle" des types de contrôle, est le plus proche du contrôle du pouvoir administratif en appréciation ultra-légale, car il en partage le caractère "intensifié", afin de marquer le passage du (pseudo-)principe de "réserve" au profit de celui de "préférence" d'administration.

Cette vicissitude par ailleurs relève de deux fronts :

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- d'abord, parce que, tandis que le binôme originaire "(contrôle de) légalité" / "(contrôle) ultra-légale" principalement a été perçu comme du type A/B (selon "extrêmes polarisants"), le binôme "légalité" - "ultra-légalité" tend à agir comme un type A/non-A (c'est-à-dire "au tiers exclu") ;

avec le résultat de "miner" le pouvoir administratif en appréciation ultra-légale, dans la mesure où le processus de définition de l'intérêt public concret, par l'administration, est en train de perdre son caractères impondérable, pour acquérir les "cadences objectives et impersonnelles" ce qui permet au juge de le connaître toujours mieu ;

tandis que, s'il est convenu que le seul domaine "matériel" et objectif de l'activité de l'administration, qui autrefois était considéré comme convenable et caractéristique de la notion de "pouvoir administratif en appréciation ultra-légale", a échoué (par absorption) ; une reconstruction conceptuelle, afin de comprendre les différentes techniques et les méthodes d'un contrôle autrement attribuable à la légalité, reste toujours importante ;

- ensuite, parce que la légalité, tout en étant inconcevable séparée de l'objectif de soin des intérêts généraux, ne signifie pas une "obligation juridique, institutionnelle" ; mais plutôt un mode dont va concretement s'exercer le pouvoir[6] ;

mais cela conduit à un décalage par rapport à l'axe de la "légalité objective", avec des implications intéressantes sur l'œuvre de "réhabilitation" du "pouvoir administratif en appréciation ultra-légale" qui ne semblent pas complètement explorées, en raison d'un certains déficit dogmatique ; tandis qu'elles pourraient être utiles à la lumière du cadre réglementaire actuel, ayant nature de procès.

Dans un tel cadre, la nouveauté de droit positif mentionnée donne l'occasion de consacrer au pouvoir administratif en appréciation ultra-légale, une réflexion actualisée aussi sur les aspects scientifiques ; en fait, promettant : soit, la révision sur la base du

[6]E. CASETTA, *Attività e atto amministrativo*, *Riv. trim. dir. pubbl.*, 1957, p. 293 s., p. 300.

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contenu et de la fonction de sa "valeur juridique" (bien que résiduelle) ; soit, en perspective, la conception complémentaire d'un cadre unifié qui permet de ramener la juridiction élargie au pouvoir administratif en appréciation ultra-légale (même au-delà de ce qui est actuellement permis par les "données positives") à une puissance de connaissance correspondant à la notion "substantielle". L'objectif ainsi déclaré (en son temps, d'aménagement des connaissances, pour parvenir à un élargissement du point de vue juridique) implique, cependant, une double opération : l'annexion, à l'expression "pouvoir administratif en appréciation ultra-légale", d'une exhaustivité de détermination "en positif" ; par conséquent, l'essai de son autonomie fonctionnelle.

Seulement à ces conditions dogmatiques, on pourrait qualifier admissible à titre d'intérêt, pour le juriste, où se termine le contrôle traditionnel de légalité et commence (éventuellement) le domaine réservé au "pouvoir administratif en appréciation ultra-légale".

1.2.2 ...et hésitations traditionnelles

Toutefois, on doit tenir compte d'une certaine viscosité de résultats, ce qui peut s'expliquer en considérant que :

- d'une part, la relation entre l'acte et le droit objectif est beaucoup plus "intense et enveloppante" dans l'"hémisphère publiciste" (en général) que dans le cas (en vertu du principe d'autonomie) de celui de droit "privé" à partir duquel (théorie de l'acte juridique), ainsi, le "pouvoir administratif en appréciation ultra-légale" est emprunté, la légalité représentant le titre principal (sinon le seul) de justification (juridique et politique) des "décisions d'appareil" ;

- d'autre part, l'ascension même du "pouvoir administratif en appréciation ultra-légale" à l'avant-garde de la systématique du droit administratif est habituellement ramenée à une "inversion de méthode" doublement régressive ;

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le point d'appui a été prêté pour l'occasion, par un argument fondé sur les circonstances des instruments legislatifs, lorsque, avec d'interventions normatives, historiques, au point de juridiction administrative (à partir de la Loi Crispi), la locution "pouvoir administratif en appréciation ultra-légale" devient résultat du choix "politique" consistant à donner, *ratione materiae*, des pouvoirs supplémentaires au juge "spécial", compétent ; de manière à parvenir à une construction dyadique du contrôle juridictionnel des actes administratifs ("de légalité / ultra-légale") en correspondance à laquelle l'acte légal peut être "éliminé" ou "méconnu" «*comme s'il s'agissait d'illégal*» ;

la spéculation contemporaine n'était pas en mesure de tenir compte, de manière univoque, des implications, au point de la connaissance, de cet "accostage" politique : en se limitant à prendre acte par rapport au principe de la séparation des pouvoirs de l'Etat ; avec enracinement conséquent de la tendancielle interdiction, pour les juges administratifs, à procéder à des évaluations étrangères à celles de "légalité objective" de l'acte ;

outre le fait que l'analogie entre les décisions, judiciaire et administrative (possible en termes d'effets matériels), n'implique pas l'identité de caractères ; pour ce qui profite le plus à l'étude spécialisée, on enregistre l'affirmation (à l'attention des interprètes), d'abord, d'une (bien maigre) casuistique de droit substantiel où le fait que les choix administratifs n'étaient pas évalués en termes d'illégalité, n'a pas empêché de configurer comme (pas seulement inopportunes, mais) erronées des décisions administratives manifestement et essentiellement arbitraires ; au point de préfigurer l'énucléation d'une catégorie conceptuelle (controversée) de vices ("en appréciation ultra-légale", tout à fait) distincte de celle de légalité (en effet, si hétérogène comme inconciliable), mais encore en mesure de vicier l'acte ;

l'étape supplémentaire sera alors représentée par l'émergence de la thèse d'une composition hétérogène (en fonction de l'orientation, sous forme d'"éléments constitutifs") de l'acte administratif ;

- d'autre part encore, la limite épistémologique longtemps subie par l'interprète, en traitant les dispositions normatives comme si elles étaient guidées uniquement par le

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schéma "hypothétique-casuistique" (indépendamment du moment de l'application), a favorisé la racine d'une conception formaliste de la légalité administrative ; au détriment des potentialités de l'autre, de moule téléologique, qui s'est également développée sous l'expérience présente de l'Etat.

En conséquence : avec la complicité d'une façon d'être (ou de comprendre) le contrôle juridictionnel-administratif, complémentaire à cette condition anachronique de la légalité ; le discours, concernant une évaluation sur l'action administrative en raison du "résultat" économico-sociale, est inachevé ; le premier, applati comme il est sur le modèle de la "composition" d'un conflit originè (en général) d'un exercice non raisonnable du pouvoir (discrétionnaire / excès de pouvoir).

1.3 "Légalité-justice" des actes comme condition d'une bonne administration et vice "en appréciation ultra-légale" tel que moment "causal" de l'invalidité

Depuis longtemps il a été reconnu comme, même à l'aube de la juridiction administrative, «*la légalité de la décision "qu'il n'est pas possible d'examiner toujours et absolument indépendamment de la 'justice' et de l''appréciation ultra-légale' des décisions". L'utilisation de l'idée de justice, la référence aux principes qui devraient réglementer et réglementent l'activité des autorités administratives, ont été les moyens techniques dont la jurisprudence s'est servie pour venir évaluer, ainsi que le respect de l'acte en ce qui concerne le modèle légal, la "légalité intrinsèque" des décisions. Dans un avis rendu par l'Assemblée Générale du Conseil d'Etat le 15 Novembre 1884, on peut lire une explication complète des principes qui ont guidé la jurisprudence à envisager d'inclure dans sa propre compétence de légalité aussi "l'examen des questions substantielles qui se rapportent à la 'justice' des décisions, ce qui est la 'condition' d'une bonne administration", à veiller à ce qu'il y avait ou non des erreurs dans le jugement du fait, à mener l'examen sur les critères et les raisons par lesquelles les autorités ont été guidées dans l'exercice des pouvoirs qui leur sont conférés*». Donc, «*la légalité de la décision ne s'estime pas -ou, au moins, ne s'estime pas seulement- à l'égard du schéma normatif de*

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l'acte, mais a l'égard à toutes les circonstances et les actes qui permettent d'identifier la puissance et de déterminer la façon de la fonction comme elle se pose dans la procédure»[7].

S'il y a accord sur ce qui précède, à côté de celle de conformité de l'acte au modèle juridique, il faut admettre un autre sens, intrinsèque et complémentaire du premier, de légalité : correspondant à l'idée de justice.

Sauf qu'il y a de sérieux doutes sur la valeur technique de l'expression "vices en appréciation ultra-légale" ; donc, sur la possibilité de configurer l'inadéquation comme état vicié de la décision : à partir de l'observation pour laquelle, pour faire valoir l'importance de l'invalidité sur le plan du système juridique, générale, il faut que le vice soit "objectivement vérifiable".

Et en fait, il reste à prouver s'il existe des normes indépendantes ou des règles générales (éléments objectifs de référence) en vertu dequels déterminer quand une décision est appropriée ou non[8] ; sans parler de la contradiction qui résulterait en raison d'une situation de devoir en termes généraux à laquelle correspondraient des "moyens" pour faire des réclamations, de caractère fragmentaire si non exceptionnel. D'ailleurs, il devrait s'agir de règles "à contenu indéterminé" qui produiraient des effets juridiques à travers l'intégration de contenus qui s'appuient sur les évaluations de fait, confiées par la loi à

[7]A. PIRAS, *Invalidità c*) Diritto amministrativo, *Enc. dir.*, XXII, Milano, 1972, p. 598 s., part. pp. 606-607. Cons. Etat, sect. reun., le 15 Novembre 1884, *Giur. it.*, vol. 37, 1885, pt. III, col. 118 s.

Cf. aussi R. TOMMASINI, *Invalidità b*) Diritto privato, *Enc. dir.*, XXII, Milano, 1972, p. 575 s., part. p. 590 et nt. 102 ; D. U. GALETTA, *I procedimenti di riesame*, *La disciplina generale dell'azione amministrativa* (dir. par V. Cerulli Irelli), Napoli, 2006, p. 393.

[8]Cf. A. PIRAS, *Invalidità….*, p. 610 ; V. M. ROMANELLI, *L'annullamento degli atti amministrativi*, Milano, 1939, p. 79 s. ; OTTAVIANO, *Studi sul merito…*, p. 308 s. ; CASETTA, *Attività…*, p. 302.

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l'appréciation discrétionnaire de l'administration publique ; où il a été affirmé que les normes d'action ne peuvent être que juridiques, donc à contenu déterminé[9]. Tant et si bien que les incidents réglementaires isolés, avancés par certains personnes afin de soutenir le point de vue de l'annullabilité *ex officio* pour "vices en appréciation ultra-légale", révèlent une simple contrariété aux fins de ces dispositions qui (à chaque fois) les contemplent : si d'intégrer un vice de légalité, étant donné que les objectifs de la réglementation (pour autant que la détection et l'interprétation ne peut pas être facile) font toujours partie de celle-ci[10].

A regarder de plus près, donc, le premier résultat de ce mouvement "régressif" tout au plus pourrait se justifier, à partir de la perception (en termes de particulière non-valeur) de certaines infractions au principe de bonne administration, en s'appuyant sur leur transmutation (notamment en raison d'aberrations du raisonnement) en excès de pouvoir[11].

Pas autant, on aurait pu conclure l'étape ultérieure. Cette dernière, en effet, a été forcé pour la théorie générale de l'acte administratif, car la notion de pouvoir administratif en appréciation ultra-légale ne concerne pas l'acte, mais plutôt l'activité discrétionnaire qui le précède, préétablie à son adoption (ou plutôt, la partie qui, non influencée par des règles juridiques d'action, concerne les choix de "politique administrative", à mettre en œuvre en ce qui concerne l'adoption et le contenu de l'acte lui-même) ; de sorte que l'objet aussi du contrôle judiciaire concerne exactement cette activité ; tandis que l'acte (en tant que résultant d'une certaine activité, réalisée d'une certaine manière) serait exclusivement la référence qu'utiliserait le juge du pouvoir administratif en appréciation ultra-légale dans

[9]Cf. CASETTA, *Attività….*, p. 327.

[10]E. CANNADA BARTOLI, *Annullabilità e annullamento* -b) *Diritto amministrativo*, *Enc. dir.*, II, Milano, 1958, p. 484 s., part. p. 490.

[11]A. M. SANDULLI, *Manuale…*, p. 596 ; OTTAVIANO, *Merito* (diritto amministrativo)..., p. 577.

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l'exercice d'un contrôle destiné à la rénovation de l'activité administrative déjà réalisée, afin d'apprécier la bonté des choix discrétionnaires pris par l'administration publique[12].

Le fait est que l'"inversion de méthode" mentionnée annoncera ce virage qui sera définitivement engagé par la théorie de l'invalidité, ce qui mènera d'une qualification de cette idée *quoad effectum* (empruntée à la dogmatique de droit civil de l'acte juridique) à la position centrale reconnue à son profil "causal"[13]. De là, le problème du contenu "en positif " de reconnaître au "pouvoir administratif en appréciation ultra-légale" (précisément, du point de vue du "vice de l'acte"). De là, aussi, un "état d'incertitude", au point qu'il s'est affirmée une notion d'invalidité "décrochée" : pas seulement à partir de celle remontante ("*quoad effectum*"), mais aussi par la "nature" des "vices" de l'acte. L'accent cette fois, est mis sur l'"anomalie" d'actes juridiques, qui sont aptes à produire des effets, mais seulement temporaires, autorisée en vertu du principe de "conservation des valeurs juridiques".

1.4 Indétermination en termes positifs du pouvoir administratif en appréciation ultra-légale. Résolution de l'intérêt public dans le système juridique ; renforcement de l'excès de pouvoir…

Le fait est que toute discussion sur la question du pouvoir administratif en appréciation ultra-légale doit être ramenée dans le lit des développements imprimés à la notion de légalité, et à travers celle-ci, dans une perspective de tutelle, à l'intérêt légitime.

En fait, si celui-ci, comme qualification à l'aspiration individuelle, subordonnée à la légalité dans l'exercice du pouvoir public, ne peut garantir qu'à l'intérieur des limites dans lesquelles ce pouvoir est "considéré" par la loi ;

[12]A. PIRAS, *Invalidità* c) Diritto amministrativo..., p. 601.

[13]A. DE VALLES, *La validità degli atti amministrativi*, Roma, 1916 (réimpression, Padova, 1986).

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si l'intensité de cette garantie dépend de la notion acceptée de légalité *id est*, de la "mesure" dont l'intérêt public se résout dans la loi (l'intérêt légitime ne peuvant être défini que "par rapport à l'intérêt public tellement résolu") ;

dans cette optique, il est facile de comprendre combien l'affirmation des principes d'impartialité et d'efficacité s'est avéré être lourde de conséquences[14].

De là, le perfectionnement du débat sur l'illégalité, tel que (prétendu) "précipité" de droit public (vice typique) de l'idée d'invalidité, conformément à la croyance répandue que dans notre système est en vigueur une "règle générale de bon sens" et que le pouvoir administratif est légitime (du moins, même) sur la base de son exercice rationnel parce que le pouvoir discrétionnaire n'est pas l'abus[15]. De là, la double reconduibilité de ce concept : à la "non-conformité aux lois" (dans le sens de la non-correspondance formelle de l'acte administratif au schéma légal[16]), à une acception chargée de sens (d'ailleurs, transversale envers la mentionnée succession de formes d'Etat), de type substantiel[17].

[14]Dans le sens de l'essentialité de la perspective de la justice pour la compréhension du droit administratif, E. CANNADA BARTOLI, *Interesse* (diritto amm.), *Enc. dir.*, XXII, Milano, 1972, p. 9 s., part. p. 18.

[15]Sur ces réalisations cfr. respectivement : F. LEVI, *L'attività conoscitiva della pubblica amministrazione*, Milano, 1965, p. 514 ; C. MORTATI, *La volontà e la causa nell'atto amministrativo e nella legge*, Roma, 1935 (maintenant *Raccolta di scritti*, Milano, 1972, III, p. 533) ; G. MARONGIU, *Funzione amministrativa*, *Enc. giur.*, XIV, Roma, 1989, p. 6.

[16]Sur les événements historiques de la relation entre les types de la légalité, F. BASSI, *"Conformità" alle leggi e "legittimità" dell'atto amministrativo*, *Il principio di legalità nel diritto amministrativo che cambia* (LIII actes de la convention d'études de la science de l'administration -Villa Monastero, 20-22 Septembre 2007-), Milano, 2008, p. 61 s.

[17]Sur la théorie de la distinction entre l'illégalité, formelle et substantielle, on peut renvoyer en plus à l'écrit de F. Bassi avant cité, au célèbre étude de SANTI ROMANO - M. D'AMELIO, *I contatti giurisdizionali della Corte di Cassazione e del Consiglio di Stato*, *Riv. dir. pubbl.*, 1929 (reproduit en SANTI ROMANO, *Scritti minori*, Milano,

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Ainsi, de même, un (bien que non-linéaire) enrichissement du contrôle judiciaire en termes de résultat[18]. Ainsi, eu égard à l'évolution imprimée, par la notion de "légalité étendue", au contrôle sur l'excès de pouvoir (en particulier de la partie de la jurisprudence et avec effet à partir de l'enseignement de Ranelletti d'abord, benvenutiano ensuite[19]) : précisément, conduisant le jugement de la légalité, du seuil de la conformité ou non au modèle juridique (propre du vice de violation de la loi), à la dignité d'un contrôle sur l'exercice correct et raisonnable de pouvoir discrétionnaire ou sur le déroulement de la fonction (selon les conceptions les plus avancées et partagées) c'est-à-dire (en définitive), au rang de mesure de la déviance de l'acte de l'utilité (poursuite de l'intérêt) public[20].

1950, II, p. 275 et suiv.). Cf. aussi, en général : R. RESTA, *La giustizia amministrativa*, Bari, 1950, p. 74 ; G. SALEMI, *La giustizia amministrativa*, Padova, 1958, p. 95.

[18]A. ROMANO, *I caratteri della giurisdizione amministrativa e la loro evoluzione*, *Dir. proc. amm.*, 1994, p . 635 s., part. p. 695 s. Le sillon est toujours celui tracé par A. AMORTH, *Il merito degli atti amministrativi*, Milano, 1939 et maintenant *Scritti giuridici*, I, Milano, 1999, p. 370 s. (où on reconnaît, dans le principe d'opportunité, «une mesure de l'action par rapport à son résultat» ; notant aussi «l'incidence des soi-disant règles de bonne administration non sur le choix même de l'action ...dominé par l'art politique et l'intuition, par la perspicacité du fonctionnaire, mais sur son contenu, dans le sens de son adéquation la plus appropriée à l'issue») ; M. S. GIANNINI, *L'interpretazione dell'atto amministrativo e la teoria giuridica generale dell'interpretazione*, Milano, 1939 (qui attire le résultat, si ce n'est en termes de légalité, dans une zone très proche, en reconnaisant le but juridique d'un acte exclusivement dans la "modification juridique du monde extérieur").

[19]O. RANELLETTI, *Lezioni di diritto amministrativo -La giurisdizione amministrativa-*, Napoli, 1924, pp. 1-44, 121 s. ; F. BENVENUTI, *Eccesso di potere amministrativo per vizio della funzione*, *Rass. dir. pubbl.*, 1950, p. 1 s. ; ID., *Funzione amministrativa, procedimento, processo*, *Riv. trim. dir. pubbl.*, 1952, p. 118. Cf. aussi P. GASPARRI, *Eccesso di potere* (diritto amministrativo), *Enc. dir.*, XIV, Milano, 1965, p. 124 s. ; G. DE CESARE, *Problematica dell'eccesso di potere amministrativo*, Padova, 1973 ; A. AZZENA, *Natura e limiti dell'eccesso di potere*, Milano, 1976, part. p. 16 s.

[20]O. RANELLETTI, *Nota* à Cass., sect. un., 25 Janvier 1928 n. 402, *Foro amm.*, 1928, II, coll. 68-72. Cf. aussi : ROMANO TASSONE, *Tra diversità…*, p. 1123 ; G. CORSO, *Validità* (diritto amministrativo), *Enc. dir.*, XLVI, Milano, 1993, p. 85 s., part. p. 91 s. En ce sens, est préservé comme actuelle la reconstruction faite par F. ROVELLI, *Lo sviamento di potere*, *Raccolta di scritti di diritto pubblico in onore di G. Vacchelli*, Milano, 1938, p.

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Dans ce contexte une "notion moderne" de l'intérêt public a été élaborée, comme n'appartenant plus à l'administration, mais à l'ensemble du corps social : lié à un franchissement définitif de l'interprétation ritualiste de la légalité, de manière à faire ressortir (en fait) le point de vue substantiel[21] ; résultant, dans le siège de poursuite, «*de la comparaison pondérée de tous les intérêts en jeu dans l'exercice du pouvoir*»[22]. D'autre part, juste une comparaison entre les systèmes juridiques nationaux donne l'impulsion pour une telle orientation : de cette branche de l'enquête on ne peuvant pas s'empêcher de noter que l'évaluation de la prééminence entre les "qualités requises" de l'acte (la légalité et l'intérêt public à son affirmation-conservation) perd définitivement le minimum de stabilité qui pourrait donner un semblant "ontologique" à l'intérieur de chaque système : puisqu'il convient, de temps en temps, à l'une ou à l'autre des mêmes qualités requises[23].

1.5 ...absorption partielle du pouvoir administratif en appréciation ultra-légale dans le domain d'un pouvoir discrétionnaire "externalisé"

La nature récessive de la cognition ultra-légale, comme un jugement sur l'opportunité, va de pair avec l'accentuation de la nature juridictionnelle de la cognition du juge administratif. Si, en fait, le contrôle sur l'opportunité administrative d'une décision ne peut pas être ancré à des règles juridiques, il ne peut conduire à un jugement au sens

449 s., part. p. 459 ; ceci grâce aussi à sa "redécouverte" récente par A. TRAVI, *Un intervento di Francesco Rovelli sull'eccesso di potere*, *Dir. pubbl.*, 2000, p. 462 s.

[21]E. CANNADA BARTOLI, *Interesse..*, p. 9.

[22]En ces termes s'exprime D. U. GALETTA, *Violazione di norme sul procedimento amministrativo e annullabilità del provvedimento*, Milano, 2003, pp. 7-8 (sauf développer, en cour d'œuvre, les criticités du thème).

[23]D. DE PRETIS, *"Illegittimità comunitaria" dell'atto amministrativo definitivo, certezza del diritto e potere di riesame*, *Giorn. dir. amm.*, 2004, p. 725 s., part. pp. 728-730.

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juridictionnel ; tout au plus, il peut assumer le caractère d'un contrôle administratif. Donc, il arrive que : tandis que la figure de l'excès de pouvoir s'élève à synthèse des moyens de subsumibilité du pouvoir discrétionnaire dans le procès de légalité, du point de vue de la garantie (en particulier, en ce qui concerne le caractère raisonnable de la comparaison des intérêts en jeu et de ses résultats) ; le pouvoir administratif en appréciation ultra-légale reste relégué à l'état de critère d'instruction et de décision (mais pas de jugement). Plus précisément, le pouvoir administratif en appréciation ultra-légale - opportunité prend forme en tant que critère pour la perception de l'utilité, de la bonté de la décision par rapport à l'état de fait ; de manière à imposer une reconnaissance du fait (non du point de vue de la coexistence de intérêts différents et opposés, mais) comme interposé par la décision et ensuite comparé au pouvoir exercé[24].

1.6 "Etat de l'art" actuel et premières perspectives d'un discours "interdisciplinaire"

Avec le temps, la connotation fonctionnelle de l'excès de pouvoir a été étendue afin de combler la dénivellation entre la "notion positive" et celle "théoriquement possible" de "légalité", par la jurisprudence[25].

[24]G. BERTI, *Momenti della trasformazione della giustizia amministrativa*, *Riv. trim. dir. pubbl.*, 1972, p. 1861 s., part. p. 1888 s.

[25]*Ex multiis*, cf. : T.A.R. Lazio, Roma, sect. I, 8 Juillet 2013 n. 6672, *Foro amm. -T.A.R.-*, 2013, p. 2326-2327 (dans le sens du dépassement de l'équation conceptuelle entre pouvoir administratif en appréciation ultra-légale - opportunité et discrétionnalité technique, cette dernière susceptible de contrôle juridictionnel dans les cas dont le vice d'évaluation empiéte sur l'illogisme) ; T.A.R. Marche, sect. I, 22 Juin 2012 n. 444, *Foro amm. -T.A.R.-*, 2012, pp. 1918-1919 (à propos de la formation d'un jugement ultra-légale, en ce qui concerne les choix effectués par l'administration publique en la circonstance de l'adoption des instruments urbanistiques, à moins que les premiers ne sont pas invalidés par erreurs de fait ou par illogismes anormals) ; T.A.R. Toscana, sect. II, 5 Février 2010 n.

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Le fait est que le vice d'excès de pouvoir a été soumis à des "alourdissements" et à des "confusions conceptuelles" : il est cependant en présence d'une analyse "d'origine empirique, et aussi à destination empirique" ; telle, dans sa structure logique et juridique. Ces conditionnements sont appréciés (dans l'exacte mesure) en ne considérant que la "signification profonde" de la légalité en comparaison avec le procès ; mais, comme beaucoup plus important dans cette phase de l'analyse, cette figure a donné lieu à un puissant obstacle au chemin qui reste à faire : il ne serait pas utile à cette fin, car «*il est presque toujours un moyen indirect pour l'évaluation de vices qui …relèvent directement ...de toute façon, où ils pourraient légitimement entrer dans le domaine de la légalité comme figures de violation de la loi*»[26].

Ce n'est pas par hasard, surtout à partir du moment où la L. n. 241/1990 a solennellement affirmé que les principes d'économie et de coût-efficacité sont des critères de l'action administrative (article 1), en dépit d'une sous-estimation générale de ce précepte, il y a eu des voix doctrinales qui ont cherché à en tirer des implications importantes.

D'une part, on a en effet reconnu, à cette affirmation législative, une force innovante plus puissante et directe : elle fournirait un disposition définitive à la matière, car, selon la même, les critères normatifs de coût-efficacité et d'efficacité traduisent dans l'activité administrative ce principe de bonne administration, en vain interprété comme utile dans le seul but de l'organisation des administrations publiques[27].

188, *Foro amm. -T.A.R.-*, 2010, pp. 417-418 (conformément à l'arrêt précédent, cette fois en sujet de jugement médico-légal sur l'aptitude physique et psychique à la conduite des véhicules à moteur).

[26]F. G. SCOCA, *Profili sostanziali del merito amministrativo*, *Nuova rass.*, 1981, p. 1376 s., part. p. 1381.

[27]De CASETTA, *Attività…*, p. 302. Cf. aussi : B. CAVALLO, *Provvedimenti e atti amministrativi*, *Trattato di diritto amministrativo* (dir. par G. Santaniello), Padova, 1993, III, p. 327 ; P. M. VIPIANA, *Gli atti amministrativi : vizi di legittimità e di merito, cause di nullità ed irregolarità*, Padova, 2003, pp. 366-368 («Tout de même on arrive au

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D'autre part, on a été observé que «*aujourd'hui, le soi-disant vice en appréciation ultra-légale, n'est rien d'autre qu'une infraction aux principes d'économie et de coût-efficacité qui sont maintenant ... des principes constitutionnels du droit administratif*», "positivisés" dans la loi générale sur la procédure et sur l'activité administratives : selon laquelle, on se trouverait devant "une catégorie spécifique de vices de légalité". En conséquence, l'effort fait par la pratique, qui "a contrebandé, jusqu'au jourdhui, les vices en appréciation ultra-légale tels que des vices d'excès de pouvoir", a été réduit, dans son rôle et dans son utilité ; et on s'est demandé «*si l'infraction aux principes de coût-efficacité et d'économie dans un acte administratif, ne devrait pas être syndiquée avec la même amplitude avec laquelle est autorisé le syndicat des vices de légalité traditionnels lorsqu'il s'agit d'une atteinte directe, personnelle et actuelle d'un intérêt du citoyen*»[28].

Comme on peut le voir, ce débat (non par hasard "volontariste"), en se référant au discours sur le pouvoir administratif en appréciation ultra-légale, trahit la même faiblesse de l'argumentation, n'aidant (pas plus qu'a fait la même affirmation constitutionnelle du principe de bonne administration) à une "réhabilitation" de cette figure (en lui restituant un contenu et un relief juridique, autonomes). De là, le choix de "revisitation" expérimentale, de ce discours, sur le plan dogmatique et avec l'aide épistémologique ; en perspective, afin de vérifier sa compatibilité avec le système actuel de justice administrative (pour laquelle on renvoie à une prochaine publication complémentaire sur le même site web).

2. APPORT ÉPISTÉMOLOGIQUE ET "MOYENS" APPROPRIÉS À APPORTER UN RELIEF JURIDIQUE AU POUVOIR ADMINISTRATIF EN APPRÉCIATION ULTRA-LÉGALE. IMPLICATIONS

résultat, extrêmement considérable, d'inclure l'inadéquation, et donc les vices de pouvoir administratif en appréciation ultra-légale, dans la catégorie plus large de l'invalidité de l'acte administratif»).

[28]F. BENVENUTI, *Disegno dell'amministrazione italiana*, Padova, 1996, p. 207 s.

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2.1 Limites actuelles d'une logique du résultat appliquée au pouvoir administratif en appréciation ultra-légale

D'après ce qui a été décrit dans le chapitre précédent, il ressort que :

- Une fois compris le pouvoir administratif en appréciation ultra-légale (comme processus décisionnel "à base subjective" -dans le sens traditionnel-) dans un rapport "au tiers exclu" avec la légalité ;

- «*Il est inévitable que la notion elle-même de "pouvoir administratif en appréciation ultra-légale" tend à vaciller et enfin à se dissoudre, soit en ce qui concerne la réduction de son champ d'application, soit -et surtout-en ce qui concerne l'identification de son essence, qui est de plus en plus difficile et incertaine, au fur et à mesure que le processus de définition de l'intérêt publique, concret de la part de l'administration va perdre son caractère impondérable et dans une certaine mesure mystérieuse, pour capturer les cadences objectives et impersonnelles qui le rendent de plus en plus intimement connaissable par le juge*»[29].

En fait, toujours sur le plan logique, rien ne s'oppose à exclure le pouvoir administratif en appréciation ultra-légale - opportunité du nombre même des "composants" exigées par le système pour la validité juridique de l'acte administratif (dans un cadre plus large de la "légalité") ; avalisant ainsi une solution de politique législative non poussée au-delà du seuil de la "limite téléologique" (de but) imposée par la loi : selon laquelle (seulement) ces déterminations, qui sortent par un bon exercice de la fonction administrative, déterminant le vice (de légalité) typique de l'"excès de pouvoir", ne peuvent pas rencontrer "légitimation". Non par hasard, la "crise" du pouvoir administratif en appréciation ultra-légale se perfectionne simplement en concomitance avec un'"externalisation" du pouvoir discrétionnaire, sur le plan du système général (sous le signe de l'excès de pouvoir) ; sans

[29]A. ROMANO TASSONE, *Sulle vicende…*, p. 528 s., part. pp. 530-533.

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impact particulier sur le chiffre global de l'expérience juridique, à l'exception d'un certain débat doctrinal et de la création (entre les "pratiques") de modèles de pensée anachroniques associés à la "suite" terminologique.

Donc, afin de parvenir, de toute façon, à la conclusion de l'existence d'un espace de contenu autonome, réservable au "pouvoir administratif en appréciation ultra-légale", avec des implications sur la façon de sa signification juridique, il faudrait :

- en exclure la correspondance avec un objectif de conservation et de protection du système juridique (dans ce cas, en effet, on ne serait pas en mesure d'identifier la distinction avec la légalité) ; dans ce point de vue, on ne pourrait plus être (assimilé ou de quelque façon) renvoyé à un contrôle de "proportion" entre le contenu de l'acte et le résultat ;

- pouvoir rapporter à cette locution une double prévision de "moyens" (institutions) de droit positif : dirigés vers la vérification de "la manière à effectuation du principe d'opportunité" ainsi que, dirigés à rendre efficace ce dernier ; sauf à souligner que le contrôle ou jugement d'opportunité ne nécessite pas la seule vérification si le système prédispose des institutions qui assurent limites positives dans la délibération de l'acte, en dehors du cas normatif de ce dernier ; aussi, étant nécessaire d'identifier des paramètres par lesquels celle vérification doit être faite, car «*aucun contrôle ou jugement implique une mesure, un critère, un canon par lequel il devient signifiant, ou objectif*»[30].

La valeur de cette "approche" ne s'arrête pas au franchissement de celle, longtemps diffuse parmi les opérateurs du droit, qui n'était pas en mesure d'aller au-delà de la détermination "en négatif" (distinction de la légalité et correspondant incontestabilité). En fait, il faut reconnaître qu'on était allé ainsi au-delà de la bonne connexion entre l'"appréciation ultra-légale" et l'évaluation discrétionnaire : pour signifier non seulement

[30]E. CASETTA, *Attività e atto amministrativo*, *Riv. trim. dir. pubbl.*, 1957, p. 293 s., part. pp. 324-325.

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que le pouvoir administratif en appréciation ultra-légale, en tant que mesure de la correspondance à un résultat, rentre dans la partie de l'activité administrative rapportable à l'exercice de ce pouvoir ; aussi résultant une meilleure définition de l'interférence entre les concepts d'"appréciation ultra-légale de l'acte administratif", "activité discrétionnaire", "contrôlabilité judiciaire".

En outre, grâce à l'orientation, comme expliqué ci-dessus, on est en mesure d'offrir une disposition systématique, satisfaisante, ainsi qu'au principe de bonne administration (et à son ambivalence), à celui d'"équité". Ce dernier, selon les circonstances, pouvant : se ramener à la même bonne administration et, par elle, à la légalité (dans son acception purement programmatique[31]) ; sinon partager la même zone du "pouvoir administratif en appréciation ultra-légale", se distingant de ce dernière pour être révolte, plutôt qu'à un profil "utilitaire" (qu'on s'épuise dans la même organisation, bien que projeté dans tous les cas vers l'intérêt public), à la relation entre l'administration publique et les citoyens.

Sauf que, le dépassement de la coïncidence avec un objectif de conservation et de tutelle du système juridique, implique de remplir de contenus l'écart entre la "notion en positif" et celle "théoriquement possible" de "légalité". À cette fin, il est nécessaire de se baser sur un modèle normatif de type alternatif qui permet de dépasser cette "invariance" traditionnelle du contrôle ; c'est pourquoi : jusqu'au moment où le premier reste divisé sur la base de la "conformité-prévisibilité" plutôt que sur le "résultat" dans le plein sens du terme, le jugement (bien que centré sur l'intérêt public) fonctionne sur la base de "situations

[31] A. C. JEMOLO, *L'interesse come presupposto dell'annullamento di atti illegittimi -licenziamento in via eventuale-* (note à Cons. Etat, sect. V, 21 Février 1931), *Foro it.*, 1931, III, col. 113, part. col. 114 ; G. ZANOBINI, *Corso di diritto amministrativo*, I, Milano, 1936, p. 257 ; F. CAMMEO, *L'equità nel diritto amministrativo*, *Annuario della regia università di Bologna*, 1924, p. 16 ; F. MERUSI, *Sull'equità della pubblica amministrazione e del giudice amministrativo*, *L'equità* (actes de la conférence du Centre national pour la prévention de la défense sociale - Lecce, 9-11 Septembre 1973), Milano, 1974, p. 83 ; ID., *L'equità nel diritto amministrativo secondo Cammeo : alla ricerca dei fondamenti primi della legalità sostanziale*, *Quaderni fiorentini per la storia del pensiero giuridico moderno*, n. 22, Milano, 1993, p. 413.

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symptomatiques" qui révèlent l'endurance d'une approche "casuistique". Tandis que, le plein exercice d'une logique du résultat ne peut que commencer par un modèle juridique capable de s'affranchir d'un rangement artificiel "a priori". Ce n'est que dans ces conditions que peut être essayée sur le plan (pas seulement empirique, mais) du système, la possibilité de retailler un espace autonome de contenu au "pouvoir administratif en appréciation ultra-légale", avec des implications sur son relief juridique (des moyens qui le justifient).

À cette fin, il devient nécessaire d'avoir recours, en premier lieu, au plan de l'analyse philosophique et scientifique.

2.2 Apport épistémologique et contenu-valeur autonomes du pouvoir administratif en appréciation ultra-légale

À condition d'être d'accord que la stratégie décisionelle à base de l'action administrative (dans le sens benvenutien du terme[32]) réfléchit la "multipolarité" de la discipline de repère ; lorsque celle-ci s'accroche sur le lien conditionnel "si ...alors", avec une réduction de l'expérience de régulation au sein de structures "rigides", un sacrifice de la "matérialité" (du profil axiologique- réel) se produira. C'est, en fait, une conception de la légalité disposée : à la réduction du rôle des intérêts, au nom d'une idée d'ordre centrée sur la sécurité-prévisibilité (l'horizon du passé) ; plutôt que à "dominer et pénétrer la fluide

[32]F. BENVENUTI, *Disegno dell'amministrazione italiana (linee positive e prospettive)*, Padova, 1996, p. 177, où, dans la classification de l'activité par rapport à un usage particulier avec lequel il est poursuivi, il est préférable d'utiliser le terme "action administrative" ; ID., *Appunti di diritto amministrativo* -pt. gen.-, Padova, 1955.

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matière de la vie sociale", en la favorisant dans l'oeuvre inévitable de simplification de la complexité des conflits[33].

Tandis que, le long de l'"'horizon de l'avenir" ("conséquentialiste", comme dans le cas de "types" d'actes "à efficacité durable" -*rectius*, qui se réfèrent à des situations dotées de dimension temporelle-), la stratégie décisionnelle à la base de l'action ne pourra être évaluée que par rapport à la forme différente d'"autonomisation" de la loi.

Dans ce contexte, à l'exercice d'un pouvoir fondamentalement discrétionnaire, tel que celui administratif, correspondra (en constance d'effets de la disposition de base) plutôt que le "contact instantané", réglementé à l'égard de conséquences prévisibles ; le "rapport" entre les porteurs des intérêts (publics et privés), tel que régis par un "statut" sensible aux effets concrets. La perspective indiquée : d'une part, met l'accent sur la limite de la théorie de l'excès de pouvoir qui (précisément), par énucléation de situations symptomatiques, contraint le "contrôle" de ce pouvoir dans les espaces les plus étroits de l'horizon du passé (hypothétique-casuistic) ; et, d'autre part, contribue à élevèr le "résultat" (ou plutôt, un intérêt général, concret), tel que résultat d'une activité de gestion, de critère d'évaluation de l'activité[34], à paramètre du syndicat du juge administratif et du relatif jugement sur la validité (ou non) d'un acte administratif[35]. Ce qui connaît un sceau significatif déjà en

[33]D'après la contraire défense de E. BETTI, *Interpretazione della legge e degli atti giuridici (teoria generale e dogmatica)*, II edict. revue et augmentée par G. Crifò, Milano, 1971, p. 103. Encore une fois dans l'optique de la théorie générale, A. FALZEA, *Forma e sostanza nel sistema culturale del diritto*, *Ricerche di teoria generale del diritto e di dogmatica giuridica*. - I. *Teoria generale del diritto*, Milano, 1999, part. p. 184 s., se concentre sur la nécessité, dans une conception non formelle du droit, de se doter d'«un système de réglementation respectable…, car non-débordé en dimensions du fait d'être pratiquement inconnaissable et non-affectée dans sa pratique possibilité de réalisation par des vices de désarticulation, contingence, ambiguïté».

[34]F. G. SCOCA, *Attività amministrativa*, *Enc. dir.* - vol. de mise à jour, VI, Milano, 2002, p. 75 s., part. p. 100.

[35]A. ROMANO TASSONE, *Sulla formula "amministrazione per risultati"*, *Scritti in onore di E. Casetta*, Napoli, 2001, I, p. 818 s., part. p. 819 ; M. CAMMELLI, *Amministrazione di risultato*, *Annuario AIPDA 2002*, Milano, 2003, p. 107 s., part. p. 115 ; G. CORSO, *Amministrazione di risultati*, rapport en *Innovazioni del diritto*

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quelques-unes des contributions normatives (articles 20 et 20*bis* de la loi n. 59/1997 ss.mm.ii. -en thème de simplification-, art. 1 de la loi n. 241/1990 -à propos du devoir de ne pas aggraver les procédures administratives-, etc.) d'ouverture à la "culture du résultat" en se référant à l'issue de décision (d'une procédure)[36] ; en extendant à celui-ci des principes généraux du système juridique tels quels de coût-efficacité (economie et efficacité), de façon à remplir d'ultérieurs contenus l'idée de légalité administrative[37].

La conséquence est que le "type" de "révision" éventuellement adopté ne dépend pas (de la "nature" du vice -légalité / en appréciation ultra-légale-, ni de l'apparition du même -originaire/survenu- mais) du profil téléologique-fonctionnel qu'on a entendu préserver (dans les circonstances concrètes).

amministrativo e riforma dell'amministrazione (conférence AIPDA, qui s'est tenue à Rome le 22 Mars 2002), publ. dans *AIPDA Annuaire 2002*, Milano, 2003, p. 127 ; R. FERRARA, *Introduzione al diritto amministrativo : le pubbliche amministrazioni nell'era della globalizzazione*, Bari, 2002, p. 151.

[36]Sur même subject : ROMANO TASSONE, *Sulla formula...*, p. 818 ; F. G. SCOCA, *Attività amministrativa...*, p. 100 s.

[37]Selon ce qui a été déja prévu par F. LEVI, *Legittimità* (diritto amministrativo), *Enc. dir.*, XXIV, Milano, 1974, p. 135 s. , part. p. 136. Cf. aussi F. BENVENUTI, *Inefficienza e caducazione degli atti amministrativi*, *Giur. compl. Cass.*, 1950, p. 914. À propos de l'entrée progressive des critères de la coût-efficacité et du résultat dans le "contrôle" du juge administratif : P. CARNEVALE, *L'esame asettico delle pronunce giurisdizionali per il miglioramento produttivo e una maggiore efficienza della pubblica amministrazione*, *T.A.R.*, 1999, II, p. 385 ; RI. CHIEPPA, *Giustizia amministrativa, efficienza e pubblica amministrazione*, *Foro amm.*, 1996, p. 2500. Sur le nouveau sens de la légalité et la conséquent difficulté à ramener le principe à l'unité : L. IANNOTTA, *Principio di legalità ed amministrazione di risultato*, *Amministrazione e legalità. Fonti normative e ordinamenti* (actes de la conférence de Macerata, du 21 au 22 Mai 1999), par C. Pinelli , Milano, 2000, p. 37 s. ; M. R. SPASIANO, *Funzione amministrativa e legalità di risultato*, Torino, 2003 ; A. TRAVI, *Giurisprudenza amministrativa e principio di legalità*, *Dir. pubbl*., 1995, p. 93.

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À ce point, le discours dogmatique doit être complété à l'égard des limites déjà dénoncées d'un concept moderne de légalité administrative qui est basé uniquement sur l'élément "volontariste" (bien que constitutionnel) concernant l'intérêt public. À cette fin, il peut être utile de commencer par les connexions suivantes : «*bien que dans la pratique et la doctrine, on parle d'un pouvoir discrétionnaire, en fait, le système administratif ne connaît pas de "règles en blanc". L'Administration agit toujours à travers la mise en œuvre des préceptes et donc n'a pas la capacité d'en poser de nouveaux. La sphère du pouvoir discrétionnaire appartient seulement au moment de l'interprétation de la règle, dont sont extrait tous les contenus préceptifs possibles et ceci en présence de règles de caractère synthétique dont l'Administration révèle (ou discerne) l'extension possible. Pas autrement que par l'analogie qui appartient (mais avec des fonctions différentes) au domaine de l'herméneutique*»[38].

Si, donc, la stratégie décisionnelle à base de l'action administrative refléte la "multipolarité" de la discipline de référence ; si au pouvoir discrétionnaire correspond la "relation" entre les porteurs des intérêts (publics et privés), lequel est supporté par un "statut" sensible aux effets concrets ; puisque cette sphère appartient au moment interprétatif de la règle ; ce dernier, en correspondance de l'attribution d'un pouvoir discrétionnaire, ne peut pas être réduit à une opération préalabre et autonome par rapport au moment d'application (en tant que telle, caractérisée "a priori" par la donnée (dépassée) de valeur formaliste d'un "même intérêt" originaire-primaire).

Fondamentalement les études d'herméneutique (juridique) et sur l'activité cognitive de l'administration publique (en tenant compte de la croissante complexité de ses fonctions) ne méconnaissent pas une "distinction logique" entre les deux profils opérationnels (ceux pour lesquels le même phénomène peut être aussi bien "évalué" -se référant à un critère de valeur- que "qualifié" -engagé dans une classe- sont en fait des jugements différents qui, sur

[38]F. BENVENUTI, *Disegno...*, pp. 195-196 s.

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ce plan, s'excluent mutuellement[39]). Signe de la conscience d'éviter toute élusion de la nature problématique inhérente au processus de compréhension : tant au niveau proprement herméneutique, qu'au niveau (interdépendant) de conception du pouvoir (y compris celui discrétionnaire) et des ses limites (liberté de l'action administrative et protection des droits des citoyens)[40].

Par ailleurs, le relief substantiel de l'intérêt public (comme concret), pousse en faveur d'un schéma (non linéaire -sur l'hypothèse d'un sens objectif, préexistant, auquel l'interprète aurait accès-, mais) circulaire[41] ; en raison d'un "dialogue cohérent", dans la

[39]R. GUASTINI, *L'interpretazione dei documenti normativi*, Milano, 2004, p. 13, où on expose une distinction pour les objets : l'interprétation concernent des textes ; l'application, des règles dans le sens strict ("entendues comme le contenu signifiant des textes normatifs").

[40]Comme on le sait, à la contribution de M. S. GIANNINI il doit l'émancipation du pouvoir discrétionnaire par les manifestations d'interprétation (*L'interpretazione dell'atto amministrativo e la teoria giuridica generale dell'interpretazione*, Milano, 1939), comme l'explication selon laquelle l'activité administrative (même lorsqu'elle se présente avec les caractéristiques du povoir discrétionnaire) reste (essentiellement soin d'intérêts, mais formellement et) fondamentalement une exécution de la loi" (*Il potere discrezionale della pubblica amministrazione*, Milano, 1939, pp. 13-14, 22).

[41]Dans le premier sens : M. S. GIANNINI, *L'interpretazione…* (dont rend compte F. G. SCOCA, *La discrezionalità nel pensiero di Giannini e nella dottrina successiva*, *Riv. trim. dir. pubbl.*, 2000, p . 1045 s., part. pp. 1046 et 1053 s.) ; G. TARELLO, *L'interpretazione della legge*, *Trattato di diritto civile e commerciale* (dir. Cicu - Messineo), Milano, 1980. Rejette catégoriquement l'hypothèse d'une signification objective, préexistante que l'interprète actuel serait tenu à dévoiler, E. CASETTA, *Riflessioni in tema di discrezionalità amministrativa, attività vincolata e interpretazione*, *Dir. econ*., 1998, p. 503 s., part. p. 505. Il n'en demeure pas que la règle ne peut pas se dissocier artificiellement du contexte dans lequel elle est appliquée (D. U. GALETTA, *Violazione di norme sul procedimento amministrativo e annullabilità del provvedimento*, Milano, 2003, p. 95). Àu besoin, pour les relatives références, on peut de renvoyer à P. COTZA, *Potere autoritativo e modelli consensuali nel diritto dell'amministrazione pubblica (contributo metodologico)*, Napoli, 2007, par. 1.6. De la difficulté à établir une distinction entre les évaluations de l'intérêt public et le complètement ou l'intégration de la règle qui doit être appliquée : M. LIPARI, *I principi generali dell'istruttoria nel processo applicativo dopo la legge 205/2000 (le trasformazioni del giudizio e gli indirizzi della giurisprudenza)*, *Dir. proc. amm.*, 2003, p. 55 s., part. p. 106 s. ; nonché, P. M. VIPIANA, *Gli atti amministrativi : vizi di legittimità e di merito, cause di nullità ed irregolarità*, Padova, 2003, p. 293 s.

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prise de conscience de l'influence mutuelle (même en termes de "pré-compréhension" du juriste[42]). En effet, que l'interprétation des textes normatifs vise à les appliquer à une réalité définie et circonscrite, est confirmée par l'art. 12 des dispositiones préliminaires au cod. civil (intitulé "interprétation de la loi"), qui commence ainsi : «*dans l'application de la loi...*».

Le fait est que le fondement de la compréhension, dans le processus d'application, reste commune : il en résulte la "relation dialectique" (mouvement circulaire) qui, à partir du "droit" (*quaestio juris*), conduit à la "réalité" (*quaestio facti*) pour revenir au premier. En d'autres termes, tout jugement (quelqu'il soit) n'est pas à envisager comme un *quid* en soi, mais comme le résultat d'une activité (et pas seulement sous un aspect statique, mais aussi dans une visuelle dynamique) : considérant la compréhension comme un moment "essentiel et inévitable" dans la tâche complexe d'application de la loi à un cas spécifique.

À ce point, résumant le double discours relatif aussi bien aux "horizons" distincts du système juridique (hypothétique-casuistique et conséquentialiste) qu'à la relation dialectique entre l'interprétation et l'application des textes normatifs, on peut tirér les premières conclusions. Ainsi, si à la dichotomie stratégique "des règles / de la fonction" (telle que réfléchit, tout à fait, l'horizon normatif de référence), peut se superposer celle entre la constatation et l'évaluation discrétionnaires ; il s'ensuit que cette dernière doit être

[42]À la philosophie herméneutique et à l'herméneutique général, poussées au-delà de l'objectif méthodologique de se constituer une connaissance scientifique, on doint : aussi la découverte que les conditions ontologiques de la compréhension ne sont pas toutes rapportables dans le cadre d'un "processus" ou un méthode, que la rétranscription du cercle herméneutique (pas plus entre les "parties" et l'"ensemble", mais) entre le "pré-compréhension" (anticipation précognitive) que l'interprète (l'"y avoir") déjà posséde du sens de la "chose" (en fait, le texte normatif) et cette dernier (au besoin, on peut renvoyer, respectivement : à M. HEIDEGGER, *Sein und Zeit*, Halle -Allemagne-, 1927 ; ainsi que à F. SCHLEIERMACHER, *Hermeneutik und Kritik*, 1838 et H. G. GADAMER, *Wahrheit und Methode*, Tübingen, 1960, sur la pensée de lequel s'attarde G. ZACCARIA, *Ermeneutica e giurisprudenza -i fondamenti filosofici nella teoria di Hans Georg Gadamer-*, Milano, 1984).

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comprise aussi comme décision concrète donc, résultat ; sens, celui-ci, "dominant" pour un précis ordre de arguments et en raison de ses implications.

Venant, pour le moment, à la question des implications, à l'égard de l'examen du processus de formation de l'acte administratif, discrétionnaire ; seulement en adhérant au modèle logique-circulaire de compréhension-application, on est en mesure d'apprécier que le jugement de valeur et concret logiquement n'anticipe pas la décision volitive, mais s'identifie avec la même, se dessinant progressivement. Sinon, dans l'optique de la théorie logicistique de la décision (qui l'assimile à un syllogisme pratique), la duplication des phases (position de la règle du cas concret et détermination de la décision suivante) se révéle non seulement une complication inutile[43], mais (ce qui est pis) une aberration du processus.

Donc, si on accepte l'enseignement selon lequel le pouvoir discrétionnaire, comme jugement pratique, descend d'une comparaison et pondération quali-quantitative des intérêts (publics et privés) immanents dans un certain contexte social[44] ; à la lumière de ce qui précède sur le plan herméneutique, on doit bien comprendre la synthèse suivante qui présente l'identification de l'évaluation discrétionnaire (comme activité de l'intellect antécédente au moment de la formulation définitive de la volonté) avec une fixation de la

[43]B. CROCE, *Filosofia della pratica : economica ed etica*, Bari, 1923, part., pp. 27-28. La pensée du Croce a été critiqué pour la réduction des celle juridique à activité pratique en termes très genéraux (*oeuvre ci-dessus citée*, p. 147 s.), négligeant à la fois le fondement de la réflexion historique et le relief donné à la réalité de l'application de la loi (*ibid.*, p. 328, mais cfr. ainsi, ID., *La storia come pensiero e come azione*, Bari, 1965) sur lequel (par contre) insiste la doctrine qui a assimilé celle leçon. Pour l'importance de la pensée du Croce sur les problèmes de l'histoire et de science du droit, G. CASSANDRO, *Storia e diritto -un'indagine metodologica-*, *Riv. st. dir. it.*, 1966, p. 5 s. Cf. aussi : P. CALAMANDREI, *Il giudice e lo storico*, maintenant dans les *Etudes sur le procès civil*, V, Padova, 1947, p. 41 ; LUIGI (GINO) GORLA, *L'interpretazione del diritto*, Milano, 1941, où de façon cohérente on fait suivre la révaluation des cas concrets et l'approfondissement (philologique pourrait être défini) des textes de la législation, de la jurisprudence et de la doctrine ; M. S. GIANNINI, *Diritto amministrativo*, I, Milano, 1970, p. 41.

[44]M. S. GIANNINI, *Il potere discrezionale...*, p. 74.

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valeur de l'intérêt essentiel (ou primaire) en fonction de celles secondaires[45]. Est-il vrai que, particulièrement en ce qui concerne les dispositions dans lesquelles le choix du comportement satisfactif peut être réaffecté à un organe de l'appareil préconçu pour la protection de l'intérêt considéré (pris comme canon de comportement), ce dernier soit toujours identifié de manière extrêmement générique, à travers un processus inévitable de standardisation. Aussi bien, l'identification de cet intérêt "canonique" a lieu à un niveau de remarquable abstraction, puisque le même est considéré isolément par rapport à tous les autres intérêts. Néanmoins, l'élément global d'expérience démontre qu'il n'y a aucun intérêt, identifié par une disposition de la loi, qui, dans le contexte de l'action concrète, ne puisse être trouvé diversement connecté à d'autres (lesquels, à leur tour, même en l'absence d'une disposition de la loi, ne peuvent qu'être pondérés par ceux qui sont obligés de faire le choix)[46]. C'est alors intuitif (et plausible) que «*fixer le relief et l'importance d'un intérêt dans ou devant une constellation d'autres intérêts n'est pas œuvre de raison, même si subjective : c'est déjà opter pour une valeur plutôt que pour une autre, c'est déjà équivalent au choix, c'est-à-dire en dernière analyse à volition*»[47]. Par conséquent, «ce *n'a vraiment aucun de sens de prétendre, comme il a parfois été fait, que l'intérêt public identifié par la norme comme essentiel, constitue l'ordre immuable et prédéterminé, une limite ou contrainte, il est interne ou externe, du pouvoir discrétionnaire*»[48]. Tandis que, sur la seule considération du procès herméneutique-applicatif, selon un modèle "*circulaire*" (en trouvant une favorable bande épistémologique dans l'apport du "rationalisme critique" au problème de la "calculabilité" des conséquences de la décision), on peut garantir à la

[45]M. S. GIANNINI, œuvre ci-dessus citée, p. 77.

[46]M. S. GIANNINI, *Lezioni di diritto amministrativo*, Milano, 1950, p. 97.

[47]F. LEVI, *L'attività conoscitiva ...*, p. 220 s., part. pp. 226-227.

[48]A. PIRAS, *Discrezionalità amministrativa*, *Enc. dir.*, XIII, Milano, 1964, p. 65 s., part. p. 77.

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"fonction" une rapportabilité au élément globale d'expérience, avec une correspondante maximisation des adhésions de la part des "intéressés"[49].

Mais, la limite épistémologique évidemment résultant de l'incapacité (sous forme de pré-compréhension) à se dédouaner des conditionnements de la tradition, transfusés dans une idée prédéfinie d'intérêt public ("officiel-primaire"), pénalise ce discours dans ses possibles développements. Lorsque le réexamen consiste en un renouvellement des appréciations réalisées par l'administration "en premier degré", le fait de se déplacer le long de l'horizon normatif "tourné vers l'avenir" (des conséquences dans le contexte d'intérêts -qualifiés- non originaire, mais présent au moment de la réévaluation) ne peut pas signifier nécessairement coïncidence avec le domaine de la "non-légalité" et que, par conséquent, le seul moyen de "retrait" qu'on peut employer est la révocation. Il faudra plutôt vérifier si ce réexamen sera résolu (ou pas) dans un jugement de contradiction avec l'intérêt public comme en fait évolué ; ou autrement, dans une évaluation (il reste à vérifier dans quelle mesure elle peut être "objectivée" donc, institutionnalisé) d'"amélioration", à la lumière d'un concept "moyen" d'opportunité sur lequel il n'y a pas de "vice". Avec ce qu'il en découle : à propos de la "nature" du contrôle "ultra-légale", qui tend à se présenter non pas comme "autre" par rapport la "légalité", mais simplement comme un approfondissement du contrôle dans lequel cette dernière s'exprime ; aussi bien qu'en termes de cohérence avec la règle constitutionnelle interdisant les exclusions ou les limitations, à des moyens particuliers de recours, lorsqu'il s'agit de questions de tutelle juridictionnelle contre les actes de l'administration publique ; aussi bien en ce qui concerne la modulation des effets de "retrait" (non plus forcée dans le dualisme radical "rétroactivité / non-rétroactivité") ; aussi bien que sur les profils fonctionnels des institutions de l'auto-tutelle (dans leur relation mutuelle ; que, par rapport aux formes d'exercice consensuel du pouvoir publique)

[49]F. LEVI, *L'attività conoscitiva...*, pp. 227-228. Sur le rôle de la science dans la convergence de "loi" et "action", ainsi que sur la contribution du "rationalisme critique" par rapport au problème de la "calculabilité" des conséquences, on peut de renvoyer à P. COTZA, *Potere autoritativo...*, par. 1.2.1. et 1.4. (*ibid*., texte correspondant à nt. 188).

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; aussi bien qu'au point de la responsabilité (professionnelle, politique, etc.) que doit être vérifié par les autorités compétentes (le supérieur hiérarchique, de surveillance, etc.).

Á ce point, en s'appuyant sur le discours dogmatique avant mené qui ne connaît pas de contre-indications dans le potentiel fonctionnel que la Constitution de la République permet d'attacher au principe de la bonne administration, il serait possible d'"isoler" un contenu autonome du pouvoir administratif en appréciation ultra-légale, correspondant au "degré" d'utilité - juste proportion de l'acte au résultat, à la réalisation des fins publiques (générals et spécifiques) qui sont-lui intrinsèques. Sauf à s'interroger sur la valeur de cette condition : de type purement administratif ou juridique.

Dans cette perspective, la nature subjective du processus décisionnel ne serait plus propre au pouvoir administratif en appréciation ultra-légale qui, comme forme de contrôle, pourrait disposer soit des règles extra-légales soit du principe de bon sens.

2.3.1 Moyens appropriés pour assurer "la façon d'exécution du principe d'opportunité", ainsi que pour "rendre celui-ci efficace". Introduction...

Un discours "épistémologiquement orienté" serait réduit à un pur (autant qu'insignifiant) exercice dogmatique s'il n'était pas accompagné par la confrontation d'une disposition conforme de droit positif indiquant l'existence de "moyens" : propres à établir la "façon de rendre effectif" le principe d'opportunité et directs à le rendre efficient ; aptes à soutenir la connotation fonctionnelle proposée afin de restituer une dignité juridique autonome au pouvoir administratif en appréciation ultra-légale dans un contexte de "légalité élargie" tel que celui actuel (propre d'un Etat "interventionniste" qui s'est dépouillé des vêtements d'un organisation centralisée).

Malgré l'abolition (effectuée par le Décret-législatif no. 40/1993) du contrôle ultra-légal sur les actes administratifs régionaux (d'ailleurs, déjà configuré comme facultatif dans le texte de l'art. 125 de la Constitution alors en vigueur) a entraîné une réduction significative des moyens en supposant une évaluation d'opportunité des choix des autres

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(recours administratifs, approbations, autorisations, homologations) ; de toute façon on peut en trouver, dans le système juridique, général, d'ultérieures en mesure de répondre à une instance fonctionnelle de bonne administration en termes essentiellement "d'améliorations".

2.3.2 …Typologie

Il s'agit, en partie, d'instituts appelés à accomplir un plus large éventail de fonctions. C'est le cas des "avis" ; de même, peut être retenu en ce qui concerne la motivation "dans le sens strict", pour indiquer : non pas les énonciations précédentes une particulière disposition administrative, afin d'en affirmer le fondement sous le profil de légalité (profil par rapport auquel il serait préférable d'utiliser le terme "justification") ; plutôt, la démonstration qu'un contenu donné est d'une certaine utilité par rapport à l'intérêt général[50]. Mais c'est la "révocation" qui représente le moyen de "pointe" offert par le système : car elle accomplit, exclusivement, la tâche fonctionnelle "améliorative" qu'on a cru bon d'ajouter au pouvoir administratif en appréciation ultra-légale dans le contexte actuel d'expérience juridique.

Ainsi, se pose la possibilité de distinguer entre : une "contrariété à l'intérêt public non - soutenable" (ou plutôt, invalidité) de l'acte administratif (une fois que cette dernière a été appréciée), une "contrariété à l'intérêt public soutenable" (qui ne comporte pas d'invalidité) du même acte, puisqu'en position médiane entre l'acte (légitime ou, bien qu'illégitime formellement) conforme à l'intérêt public (donc, pas annulable) et l'acte (illégitime, mais aussi) qui ne répond pas à l'intérêt public (donc, d'annuler). Le fait que la seule "contrariété soutenable" s'inscrit dans le cadre de la révocation, peut être utile afin de "plier" l'élément normatif de référence aux exigences d'une reconstruction interprétative cohérente ; là où

[50]T.A.R. Lazio, Rome, sect. I*ter*, 4 Mars 2011 n. 1997, *Foro Amm. -T.A.R.-*, 2011, pp. 820-821 (en cas de disposition de transfert pour incompatibilité ambiante).

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(apparemment lié à la division traditionnelle entre les vices, de légalité et en appréciation ultra-légale - opportunité) : joindre sûrement, à l'institut de la révocation, "la contrariété de l'acte administratif [qui en est l'object] à l'intérêt public" (article 21-*quinquies*, cc. I-*bis* et I-*ter*, de la Loi no. 241/1990). La même chose on peut conclure du moment que la discipline "positive" prévoit que la révocabilité de l'acte administratif est liée à : des "raisons survenues d'intérêt public", un "changement de la situation de fait", une "nouvelle évaluation de l'intérêt public originaire". En effet, ce qui importe est que l'évaluation de l'administration à été caractérisée par une amélioration d'un intérêt public déjà raisonnablement poursuivi "conjointement" aux autres (privés) doués de qualification : il importe peu que cette initiative (sous le signe de l'amélioration) s'inspire ou non à des survenances (d'intérêts et / ou de fait). Par conséquent, la centralité de la figure de l'annulation dans le système des actes de "retrait" en auto-tutelle : à l'égard de celle-ci, la révocation représentant un *quid pluris*, destinée à (éventuellement) opérer sinon quand il n'y a pas de condition d'invalidité (par l'illégalité d'origine formelle ou matérielle).

Enfin, il est également encourageant, pour la perspective ici avancée, que le Législateur envisage l'exercice d'un "retrait unilatéral - révocation" à l'égard des accords relatifs au pouvoir public (*ex art.* 11, c. IV, de la Loi n. 241/1990) qui, bien que susceptibles d'annulation *ex officio*, sont alternatifs à la seule révocation. En fait, par rapport à cette dernière, on pourrait reconnaître à ces accords un domaine spécifique de justification à chaque fois que l'objectif d'amélioration, dans la poursuite de l'intérêt public, est poussé au-delà du seuil d'équilibre avec la protection des intérêts qualifiés du privé (propre en raison du consentement de ce dernier). Sauf à souligner que l'éventuel "retrait" de l'administration serait à nouveau soumis au régime le plus rigide de ces instituts d'auto-tutelle (ne peuvant pas en exclure la circonstance de l'assujettissement, ainsi qu'à l'annulation officielle, à la révocation, selon le critère de distinction introduit dans cette étude et sauf indemnisation).

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BIENS - PROPRIÉTÉS PUBLIQUES

APPORTS DES ANNÉES - 2012 - 2013 - FRANCE

(Septembre 2013)

Jean Philippe ORLANDINI[1]

INDEX :

1. L'IDENTIFICATION « DUALE » DU DOMAINE PUBLIC
1.1 L'application du CGPPP dans le temps
1.2 La confusion dans l'application des critères de la domanialité publique
2. L'UTILISATION PRIVATIVE DU DOMAINE PUBLIC
2.1 Les conditions de délivrance de l'autorisation d'occupation domaniale
2.2 Propriété et gestion des biens nécessaires au service public
2.3 Les redevances d'occupation domaniale
2.4 La fin de l'occupation privative du domaine public

Le professeur Lavialle avait commencé cette précédente chronique sur la consécration, depuis l'entrée en vigueur en 2006 du code général de la propriété des personnes publiques (CGPPP), d'une approche « propriétariste » des biens de l'administration. Sept ans plus tard, la publication de certaines parties règlementaires du code et l'analyse de la jurisprudence récente n'ont pas remis en cause de tels propos. Pourtant, l'arrivée du CGPPP n'a pas empêché la persistance de certains principes jurisprudentiels utilisés jusqu'alors. Une telle situation est source de complexité et parfois même d'incertitudes. Elle impose au juge une modulation des effets dans le temps du CGPPP qui le conduit à adpoter une démarche duale dans la définition de la domanialité publique (I). Au delà de ces difficultés et dans un contexte économique difficile, les personnes publiques ont pris pleinement conscience des ressources qu'elles peuvent tirer de l'exploitation de leurs domaines. Elles n'hésitent plus aujourd'hui à valoriser ces dépendances en octroyant des autorisations d'occupation aux personnes privées. L'expansion de l'utilisation privative du domaine semble ainsi confirmer la transition de l'approche propriétarise vers une démarche patrimoniale (II).

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1. « L'IDENTIFICATION DU DOMAINE PUBLIC »

1.1 L'application du CGPPP dans le temps

L'entrée en vigueur du CGPPP ne vaut pas déclassement des biens antérieurement incorporés au domaine public

La codification du droit des propriétés publiques par voie d'ordonnance et l'introduction du CGPPP a suscité certains doutes quand à son application dans le temps. En effet, la définition législative du domaine public de l'article L. 2111-1 du CGPPP, diffère à certains égards, en apparence minimes, de celle jurisprudentielle. C'est notamment le cas à propos du critère de l'aménagement qui traduit la volonté de retrouver sa vocation réductrice. Qu'en est-il d'un bien qui appartenait au domaine public par application des critères jurisprudentiels et qui ne répondrait plus à ceux du CGPPP ?

Conformément au principe de non rétroactivité de la loi, les juges du fond puis le Conseil d'État ont dans un premier temps, à l'occasion de litiges nés antérieurement à l'entrée du code, apprécié la domanialité publique du bien au regard des critères jurisprudentiels[2]. Puis dans un second temps, deux arrêts sont venus fixer la solution pour les litiges nés postérieurement à l'entrée en vigueur du code. La haute juridiction administrative considère que « les biens entrés dans le domaine public avant le 1er juillet 2006 sous l'empire des critères jurisprudentiels restent des dépendances du domaine public, quand bien même ils ne répondraient plus aux conditions de l'article L. 2111-1 du CGPPP, dans la mesure où aucune disposition de ce code ne vaut déclassement législatif de tels biens »[3]. Le Conseil d'État, en 2013 a confirmé clairement cette position dans l'arrêt « ATLALR », en considérant « qu'avant l'entrée en vigueur, le 1er juillet 2006, du Code général de la propriété des personnes publiques, l'appartenance d'un bien au domaine public était, sauf si ce bien était directement affecté à l'usage du public, subordonnée à la double condition que le bien ait été affecté au service public et spécialement aménagé en vue du service public auquel il était destiné (et) qu'en l'absence de toute disposition en ce sens, l'entrée en vigueur de ce code n'a pu, par elle-même, avoir pour effet d'entraîner le déclassement de dépendances qui (…) ne rempliraient pas l'une des conditions fixées depuis le 1er juillet 2006 par l'article L. 2111-1 du Code général de la propriété des personnes publiques (…) »[4].

La domanialité publique virtuelle et le critère de l'aménagement

L'arrêt « ATLALR », au delà de préciser les conditions d'application dans le temps des critères de la domanialité, mérite d'être mentionné à un autre titre. Le Conseil d'État, s'il n'y fait pas expressément

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[2] CE, sect., 28 déc. 2009, *Sté Brasserie du Théâtre*, req. n° 290937 ; *Rec.* 2009, p. 528 ; *AJDA* 2010, p. 6 ; *AJDA* 2010, p. 841, note FÉVROT (O.) ; *BJCL* 2010, p. 274, concl. OLLÉON (L.), obs. MARTIN (J.) ; *BJCP* 2010, p. 125, concl. OLLÉON (L.), obs. MAUGUÉ (C.) ; *Contrats-Marchés publ.* 2010, comm. 190, note TOUZEAU (L.) ; *Dr. adm.* 2010, comm. 22, note MELLERAY (F.) ; *JCP A* 2010, 2197, note CHAMARD-HEIM (C.) ; CAA Lyon, 29 avr. 2008, *Sté Boucherie André c/ RFF* ; *AJDA* 2008, p. 2338, note ANDREANI (J.) ; *RD imm.* 2008, p. 552, note FÉVROT (O.)

[3] CE, 3 oct. 2012, *Commune de Port-Vendres*, Req. n° 353915 ; LELEU (T.), « À propos de la domanialité publique virtuelle », *Dr. Adm.* n° 7, Juill. 2013 ; FATOME (E.), RAUNET (M.), LÉONETTI, « L'application dans le temps de la définition du domaine public posée à l'article L. 2111-1 du CGPPP », *AJDA* 2013, p. 471

[4] CE, 8 avr. 2013, *Assoc. ATLALR*, req n° 363738 ; *AJDA* 2013, p. 764 ; COSSALTER (P.), « Les habits neufs de l'Empereur ou la théorie de la domanialité publique virtuelle de la domanialité publique, Revue générale du droit *on line*, 2013, n° 7252.

référence, fonde la solution de la domanialité publique sur la théorie de la domanialité virtuelle. Cette théorie permet de soumettre un bien à la domanialité publique, bien qu'un des critères de finition, notamment celui de la réalisation des aménagements, fasse défaut[5].

Dans l'arrêt « ATLALR », les parcelles en cause avaient été acquises par l'État en vue d'être aménagées dans le cadre d'un projet de raccordement autoroutier déclaré d'utilité publique. Ce dernier ayant été modifié, les parcelles n'ont finalement jamais été aménagées. Le Conseil d'État rappelle « qu'avant l'entrée en vigueur, le 1er juillet 2006, du Code général de la propriété des personnes publiques (…) le fait de prévoir de façon certaine un tel aménagement du bien concerné impliquait que celui-ci était soumis, dès ce moment, aux principes de la domanialité publique » et considère « qu'en l'absence de toute disposition en ce sens, l'entrée en vigueur de ce code n'a pu, par elle-même, avoir pour effet d'entraîner le déclassement de dépendances qui, n'ayant encore fait l'objet d'aucun aménagement, appartenaient antérieurement au domaine public en application de la règle énoncée ci-dessus »[6]. Ainsi, l'absence de réalisation des infrastructures, « est sans incidence (…) sur leur appartenance au domaine public », car l'affectation au service public était prévue de façon certaine (par la déclaration d'utilité publique).

Par contre, si le juge maintient la domanialité publique virtuelle pour les biens soumis à la domanialité publique avant 2006, il semble la condamner pour les biens soumis à l'application du CGPPP. L'utilisation de l'adverbe « déjà » par la haute juridiction semble ainsi empêcher la réitération de la solution de l'arrêt « ATLALR » *post* CGPPP. Il convient tout de même de préciser que si le juge ne semble pas admettre, en application de l'article L. 2111-1 du CGPPP, la domanialité d'un bien n'ayant pas encore été aménagé, il reste cependant silencieux sur l'hypothèse d'un bien affecté dont l'aménagement aurait été commencé sans pour autant être terminé.

Le recours à théorie de la domanialité publique virtuelle doit s'analyser dans une perspective plus large d'interprétation de la condition d'aménagement indispensable.

On sait que le recours à l'adjectif « indispensable » en lieu et place de spécial, avait vocation à circonscrire l'application de la domanialité publique. Il n'est pas sûr que cet objectif se soit finalement réalisé sept ans après le CGPPP[7]. Le Conseil d'État en 2012 a jugé dans l'arrêt d'assemblée « Commune de Douai » que « lorsque des ouvrages nécessaires au fonctionnement du service public, et ainsi constitutifs d'aménagement indispensable à l'exécution des missions de ce service, sont établis sur la propriété d'une personne publique, ils relèvent de ce fait du régime de la domanialité publique (...) »[8]. On peut en déduire que tout bien affecté à un

[5] V. FATOME (E.) et MOREAU (J.), *AJDA* 1985, p. 620 ; CE, 6 mai 1985, *Association Eurolat, Crédit foncier de France*, req. n° 41589 ; *RFDA* 1996, p. 21, concl. GENEVOIS (B.)

[6] CE, 8 avr. 2013, *Assoc. ATLALR*, req n° 363738, *préc.*

[7] FATOME (E.), « La consistance du domaine public immobilier, sept ans après le CGPPP », *AJDA* 2013, p. 965

[8] CE, ass., 21 déc. 2012, *Commune de Douai*, req. n° 342788, Lebon ; *AJDA* 2013, p. 457, chron. DOMINO (X.) et BRETONNEAU (A.) ; CAPITANT (D.), *D.* 2013, p. 252.; *AJCT* 2013, p. 91, obs. DIDRICHE (O.) ; *RFDA* 2013, p. 25, concl. DACOSTA (B.) ; *BJCP* 2013, n° 87, concl. DACOSTA (B.) et obs. C. M. ; *Contrats Marchés publ.* 2013, n° 2, F. LLORENS et P. SOLER-COUTEAU et n° 41, note G. ECKERT ; *Dr. adm.* 2013, n° 20, note G. EVEILLARD ; FATOME (E.) et TERNEYRE (P.), « Le statut des biens des délégations de service public », *AJDA* 2013, p. 724

service public et nécessaire à son fonctionnement doit être considéré comme ayant fait l'objet d'un aménagement indispensable. La solution s'inscrit dans le prolongement des commentaires de la doctrine sur la rédaction de l'article L. 2111-1 du CGPPP[9]. Ainsi, et contrairement à ce que l'on aurait pu penser, la réalisation de l'aménagement indispensable ne doit pas avoir été totalement achevée, un simple commencement suffit à entraîner l'application de la domanialité publique.

L'arrêt « ATLALR » confirme et pousse à l'extrême une telle interprétation. Dans cette espèce les aménagements n'ont jamais été réalisés et l'affectation de ces dépendances ne s'est jamais concrétisée. Alors même qu'il ne remplirait plus l'une des conditions de l'article L. 2111-1 du CGPPP, un bien, dont l'affectation et l'aménagement à un service public avaient été prévu de façon certaine avant le 1er mars 2006 est soumis aux règles de la domanialité publique et au surplus, incorporé dans le domaine public.

La domanialité publique globale

La jurisprudence administrative récente continue de préciser l'application du code et ses rapports avec la jurisprudence antérieure. Le Conseil d'État, dans l'affaire « SCP Mercadier et Krantz »[10] « éclaire l'état du droit quant au sort de la domanialité globale, expression extrême de la domanialité publique par accession qui a déjà fait couler beaucoup d'encre »[11]. À l'occasion d'une action en responsabilité engagée contre un office notarial, le juge administratif, saisi par voie préjudicielle, a du déterminer le régime domanial des casernes de gendarmerie.

La domanialité publique globale, à quelques exceptions près[12], n'a pas été consacrée explicitement par le CGPPP. Quand à la domanialité publique par accessoire, bien que les faits soient antérieurs à l'entrée en vigueur du code, le Conseil d'État, dans l'affaire « Sté Brasserie du théâtre » avait rejeté la domanialité publique de locaux situés dans le même immeuble que le théâtre municipal et disposant de communications internes permettant d'y assurer des prestations de restauration[13]. Cette espèce avait laissé l'impression d'un durcissement jurisprudentiel, en cohérence avec la rédaction restrictive de l'article L. 2111-2 du CGPPP selon lequel « font également partie du domaine public, les biens des personnes publiques (…) qui concourant à l'utilisation d'un bien appartenant au domaine public, en constituent un accessoire indispensable ».

Dans l'arrêt « SCP Mercadier et Krantz », le juge administratif rappelle la définition du domaine public immobilier, avant de l'appliquer à la caserne. Il constate que l'immeuble, composé des différents bâtiments de la caserne, « était affecté au service public de la gendarmerie » et qu'à cet effet, chacun de ces bâtiments, disposant

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[9] BACHELIER (G.),Spécial, indispensable, global, virtuel : trop d'adjectifs pour le domaine public immobilier ?, *AJDA* 2013 p. 960 ; MAUGUE (C.), BACHELIER (G.), « Genèse et présentation du code général de la propriété des personnes publiques », *AJDA* 2006, p. 1073 et s.

[10] CE, 7 mai 2012, *SCP Mercadier et Krantz*, req. n° 342107, *AJDA* 2012, p. 979

[11] FOULQUIER (N.), « La domanialité publique globale d'une ancienne gendarmerie », *AJDA* 2013 p. 1172

[12] V. pour les ports fluviaux et maritimes (art. L. 2111-10, 4° et art. L. 2111-6, 2° du CGPPP) ainsi pour les aéroports (art. L. 2111-16 du CGPPP)

[13] CE, sect., 28 déc. 2009, *Société Brasserie du théâtre*, *préc.*

de chambres de sûreté, de bureaux, et de salles d'archives, devait être considéré comme « aménagé en vue de son affectation à ce service public ». Le juge, s'appuyant sur un des critères de la domanialité par accessoire, considère enfin que les différents logements des gendarmes ne sont pas dissociables du reste de la caserne et que par conséquent « cet immeuble appartenait dans son ensemble au domaine public de la commune ». « L'effet attractif de la domanialité publique ne joue pas au sein d'un périmètre (comme ce fut le cas pour les ports ou aéroports) mais à l'intérieur d'un même bâtiment »[14].

On remarquera tout de même une solution similaire à la jurisprudence « Brasserie du théâtre » retenue par la cour administrative d'appel de Bordeaux en décembre 2012. Le juge administratif considère en l'espèce « que, même s'ils sont situés dans un ensemble immobilier partiellement utilisé par le service public des remontées mécaniques du domaine skiable du Lys, faisant partie de la station de ski de Cauterets, les locaux exploités par la Société hôtelière Bigourdane n'ont jamais été affectés ni à l'usage direct du public ni à ce service public ; que ces locaux sont situés au niveau supérieur du bâtiment séparé construit pour accueillir l'ancienne gare d'arrivée du téléphérique ; qu'ils disposent de deux accès particuliers, depuis le rez-de-chaussée et la terrasse de cette ancienne gare, ne desservant que les locaux exploités par la Société hôtelière Bigourdane à l'exclusion de tout autre équipement propre au domaine skiable du Lys ; que ces aménagements, qui ne sont pas étroitement reliés à la gare du téléphérique et peuvent être accessibles directement depuis les pistes de ski, ne sont d'aucune utilité pour le service public des remontées mécaniques ; qu'ils ne sauraient être regardés comme un accessoire des équipements publics et ne constituent pas des dépendances du domaine public géré par la Régie municipale "Espaces Cauterets" »[15].

1.2 La confusion dans l'application des critères de la domanialité publique

L'entrée en vigueur du CGPPP, si elle est de nature à entraîner des difficultés d'application dans le temps en raison des divergences entre les solutions jurisprudentielles antérieures et celles du code, aura eu le mérite de ne pas remettre en cause les deux principaux critères de la domanialité publique immobilière que sont la propriété et l'affectation. La lecture de l'article L. 2111-1 du CGPPP confirme leurs caractères cumulatif et autonome.

Pourtant quelques arrêts récents, plus ou moins remarqués, révèlent une certaine confusion dans leur utilisation et leur application par le juge.

Le Conseil d'État, dans l'affaire « Département des Alpes-Maritimes », en tant que juge d'appel, était saisi à la suite d'une décision de la cour d'appel d'Aix-en-Provence par laquelle elle sursoit à statuer jusqu'à ce que le juge administratif se soit prononcé sur la propriété d'un mur qui avait fait l'objet de travaux confortatifs par le département à la suite d'importantes pluies[16]. La rédaction d'une telle question ne manquera pas de surprendre quand on sait que le juge judiciaire est en principe compétent pour déterminer la propriété d'un bien.

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[14] FOULQUIER (N.), « La domanialité publique globale d'une ancienne gendarmerie », *préc.*

[15] CAA Bordeaux, 20 décembre 2012, *Régie municipale « Espace Cauterets »*, n° 11BX03303, AJDA 2013, p. 830

[16] CE, 23 janv. 2012, *Département des Alpes-Maritimes*, req. n° 334360

Le Conseil d'État se réapproprie la question et considère que cette dernière ne devait « être comprise que comme renvoyant à la juridiction administrative la question de l'appartenance de ce mur au domaine public ». En l'absence de titres privés soulevant une difficulté sérieuse, le juge administratif retrouve sa compétence dans la détermination de la domanialité publique[17]. Le Conseil d'État, en l'absence de titre de propriété, constate que le mur « est nécessaire à la sécurité de la circulation sur la voie départementale » et « qu'il doit par suite être regardé comme un accessoire de (cette dernière) ». Par conséquent, en application de la théorie jurisprudentielle de l'accessoire, le juge considère que le mur appartient au domaine public. Le critère de la propriété du bien par une personne publique se déduit ainsi de son affectation. Les notions de propriété et d'affectation sont ici « indissociables, (sinon) à tout le moins enchevêtrées »[18].

Dans une autre espèce similaire, le Conseil d'État en 2013, toujours en l'absence de certitude à propos de la propos de la propriété, à fait à nouveau prévaloir la domanialité publique d'un mur de soutènement d'une voie publique[19]. En revanche, la cour administrative d'appel de Marseille dans un arrêt du 28 mai 2013, a refusé de retenir la domanialité publique d'une digue supportant une voie départementale au motif qu'aucun élément ne permet de définir avec certitude l'auteur de l'ouvrage ou le propriétaire du fond[20]. Le juriste en quête de cohérence, à la lecture de ces jurisprudences, n'éprouvera qu'un sentiment de désordre et d'incohérence.

Cette confusion se retrouve également dans une série d'arrêts rendus par le tribunal des conflits. Il convient de remarquer que le juge s'attache à déterminer les questions de compétences qui lui sont soumises. Il se place ainsi dans une position pragmatique qui conduit parfois à passer sous silence certains aspects du raisonnement et notamment l'utilisation du critère de la propriété dans la détermination de la propriété publique.

À la suite de travaux de réaménagement de la voirie et de l'assainissement, les consorts Orcières perdent un droit d'eau concédé par la commune de Rambaud qui leur permettait d'acheminer jusqu'à leur propriété le trop plein de la fontaine-lavoir communale. Ils assignent la commune devant le juge judiciaire qui se déclare incompétent au motif que l'eau qui alimente une fontaine est elle même publique et fait partie du domaine public. Le juge administratif, au fond, va pourtant considérer qu'en l'absence d'affectation, l'eau surabondante fait partie du domaine privé de la commune et relève de la compétence du juge judiciaire. Le tribunal des conflits, dans l'arrêt du 18 mars 2013, se fonde sur une jurisprudence judiciaire ancienne et constante pour annuler le jugement du tribunal administratif. Il retient finalement la compétence du juge administratif au motif « que les eaux de source ainsi captées par la commune et destinées à l'alimentation d'une fontaine publique, de même que les eaux surabondantes s'écoulant de cette fontaine, appartiennent au domaine public de la commune »[21]. Conclure à la domanialité publique de l'eau sous-entend de reconnaître aux personnes publiques, la qualité de propriétaire de ces eaux ce qui apparaît en partie contestable pour l'eau qui est

[17] CE, sect., 16 nov. 1960, *Commune Bugue, Rec.* 1960, p. 627 ; CE, 29 juin 1990, *Marquassuzaa*, req. n° 77011, *Rec.* 1990, p. 188.

[18] MELLERAY (F.), « Propriété et domanialité d'un mur », *Dr. Adm.* n° 4, Avril 2012, comm. 36.

[19] CE, 15 mai 2013, *Cne Villeneuve-les-Avignon*, req. n° 354593

[20] CAA Marseille, 28 mai 2013, *Département de l'Aude*, req. n° 11MA04426, *Dr. Adm.* n° 8, Août 2013, comm. 64, Note JM. Février

[21] T. Confl., 18 mars 2013, *MM. Orcière c/ Commune de Rambaud*, n° 3887 ; *AJDA* 2013, p. 662 ; *JCP A.* juin 2013, p. 35, Note Ch.-A. Dubreuil ; *Revue Lamy CT*, Mai 2013, Note M-C Rouault

habituellement considérée comme une *res communis.* La notion de propriété publique semble ainsi se déduire de celle de domanialité publique[22].

Dans une deuxième espèce[23], le tribunal des conflits écarte l'application de la loi du 24 juillet 1937 qui « a institué une procédure judiciaire de constatation et de réparation des dommages causés aux cultures par le gibier ». Le tribunal retient que les dégâts causés par du gibier provenant du domaine public militaire sont de la compétence du tribunal administratif au motif que ces troubles relèvent de la gestion du domaine public. Le gibier, qui est habituellement tenu pour une *res nullius*[24], est en principe une chose qui n'appartient à personne mais qui peut être appropriée.

Il semble ressortir de cet arrêt, que le simple fait pour le gibier de provenir d'une dépendance du domaine public suffise pour lui appliquer une partie du régime de la domanialité publique et en déduire la compétence du juge administratif.

2. L'UTILISATION PRIVATIVE DU DOMAINE PUBLIC

Le domaine public a en principe vocation à être utilisé soit directement par le public, soit par les services publics. Cette utilisation doit toujours être conforme à l'affectation de la dépendance. Si « l'usage collectif » implique en général le principe de gratuité, il n'exclut pas dans certains cas certaines utilisations privatives pourvu qu'elles soient également compatibles avec l'affectation.

L'utilisation privative du domaine public implique la délivrance d'un titre à l'occupant. Cette autorisation expresse est délivrée pour une durée limitée et à un caractère personnel. Ainsi, « sauf dispositions légales spéciales », le titre d'occupation n'est pas cessible[25]. Dans la même logique, la cour administrative d'appel de Bordeaux a retenu que tout avenant d'un contrat d'occupation du domaine public prévoyant la cession de ce dernier à une autre société « doit être regardé comme une nouvelle autorisation d'occupation du domaine public délivrée (à la société) aux conditions de la première convention »[26].

2.1 Les conditions de délivrance de l'autorisation d'occupation domaniale

Occupation du domaine public, liberté du commerce et de l'industrie et droit de la concurrence

La frontière entre les différents contrats publics est parfois mince. Pourtant à bien regarder les autorisations (unilatérales ou conventionnelles) d'occupation du domaine public et les délégations de service public ou les marchés publics, leurs régimes de passation sont soumis à des obligations qui varient en fonction

[22] ORLANDINI (J-Ph.), « Les eaux des fontaines publiques, une nouvelle source du domaine public », à paraître.

[23] T. Confl., 13 mai 2013, *Fédération départementale des chasseurs*, n° 3899 ; *AJDA* 2013, p. 1029

[24] Versailles, 27 sept. 1983, *Gaz.Pal*. 1984, I, p. 223

[25] CE, 31 juill. 2009, *Sté Jonathan Loisirs*, req. n° 316534, *Contrats-Marchés publ*. 2009, comm. 332, note G. Eckert

[26] CAA Bordeaux, 14 mars 2013, *École nationale supérieure des techniques industrielles et des mines d'Albi*, req. n° 11BX03091, *Contrats-Marchés publ*. 2013, comm. 147,

de leur nature. On sait que depuis 2010 et l'affaire du « stade Jean Bouin », « aucune disposition législative ou réglementaire ni aucun principe (n'impose) à une personne publique d'organiser une procédure de publicité préalable à la délivrance d'une autorisation ou à la passation d'un contrat d'occupation d'une dépendance du domaine public, ayant dans l'un ou l'autre cas pour seul objet l'occupation d'une telle dépendance (...) »[27]. Cette solution, largement critiquée par la doctrine, en raison d'une soumission croissante des contrats publics à des obligations de publicité et de mise en concurrence est pourtant régulièrement rappelée et confirmée par le Conseil d'État.

Dans un arrêt rendu le 15 mai 2013, le Conseil d'Etat a jugé que le contrat ayant pour objet notamment l'installation et l'exploitation des célèbres « colonnes Morris », dédiées à l'annonce de manifestations culturelles dans la capitale, ne constitue ni un marché public, ni une délégation de service public mais bien une convention d'occupation du domaine public et que dès lors « les moyens tirés d'une méconnaissance des règles de publicité et de mise en concurrence prévues par le code des marchés publics ne peuvent, par suite, qu'être écartés »[28].

Dans un contexte contentieux risqué, les personnes publiques n'hésitent plus aujourd'hui, à se soumettre volontairement à de telles procédures. À titre d'exemple, la SNCF met régulièrement en concurrence les contrats d'exploitation des panneaux publicitaires ou même les emplacements pour la distribution des journaux gratuits. Ces précautions n'ont pas empêché le Conseil d'État de rendre, le 23 mai 2012 son arrêt « RATP », à la suite d'un recours contentieux engagé par un concurrent évincé à la suite de la mise en concurrence des autorisations d'occupation du domaine public. La société requérante invoquait devant le juge administratif une atteinte à la liberté du commerce et de l'industrie. Le Conseil d'État ne fait pas droit à la demande et considère en effet que la décision de l'autorité compétente de délivrer ou non une autorisation d'occupation du domaine public « n'est pas susceptible, par elle-même, de porter atteinte à la liberté du commerce et de l'industrie, dont le respect implique, d'une part, que les personnes publiques n'apportent pas aux activités de production, de distribution ou de service exercées par des tiers des restrictions qui ne sont pas justifiées par l'intérêt général et proportionnées à l'objectif poursuivi et, d'autre part, qu'elles ne puissent prendre elle-même en charge une activité économique sans justifier d'un intérêt public »[29]. Ainsi, même si l'administration est soumise dans la délivrance de ses titres au respect du droit de la concurrence[30], la haute

[27] CE, sect., 3 déc. 2010, *Ville Paris et Assoc. Jean Bouin*, req. n° 338272, Rec. CE 2010, p. 472 ; *AJDA* 2010, p. 2011, note NICINSKI (S.) et GLASER (E.) ; *JCP A* 2011, 2043, note DEVÈS (Cl.) ; *JCP A* 2010, p. 926 ; *AJCT* 2011, p. 37, obs. DREYFUS (J-D.) ; *RTDE* 2011, p. 496, note KOVAR (J-Ph.) ; *Contrats-Marchés publ.* 2011, comm. 25, note ECKERT (G.) ; *Dr. adm.* 2011, comm. 17, note BRENET (F.) et MELLERAY (F.) ; *RDI* 2011, p. 162, note BRACONNIER (S.) et NOGUELLOU (R.) ; CE, 23 déc. 2011, *Association Paris Tennis*, req. n° 346860.

[28] CE, 15 mai 2013, *Ville de Paris (c./ Sté CBS Outdoor)* req. n° 364593, *AJDA* 2013, p. 1023

[29] CE, 23 mai 2012, *Régie autonome des transports parisiens (RATP)*, req. n° 348909, Lebon ; *AJDA* 2012., p. 1037, 1129, tribune BRACONNIER (S.) et p. 1146, étude LOMBARD (M.), NICINSKI (S.) et GLASER (E.) ; *RDI* 2012, p. 566, obs. FOULQUIER (N.) ; *AJCT* 2012, p. 445, obs. JUILLES (A.-S.) ; *RFDA* 2012, p. 1181, note NICINSKI (S.) *; BJCP* 2012, p. 291, concl. BOULOUIS (N.) et obs. R. S.

[30] CE, sect., 3 nov. 1997, *Sté Million et Marais*, req. n° 169907 Rec. CE 1997, p. 406, concl. J.-H. Stahl ; AJDA 1997, p. 945, chron. T.-X. Girardot et F. Raynaud ; CJEG 1997, p. 441, concl. ; RD publ. 1998, p. 256, note Y. Gaudemet ; RFDA 1997, p. 1228, concl. ; GAJA, 18e éd., n° 99 ; CE, sect., 26 mars 1999, *Sté Hertz ; Sté EDA* ; Rec. CE 1999, p. 96, concl. ; AJDA 1999, p.427, concl.et note M. Bazex ; CJEG 1999, p.264, concl. ; D. 2000, p.204, note J.-P. Markus ; RDP 1999, p. 1545, note C. Manson ; RFDA 1997, p. 977, note D. Pouyaud

juridiction refuse de faire primer les libertés économiques sur la liberté accordée aux personnes publiques gestionnaires de leurs domaines[31].

Le caractère intuitu personae des conventions d'occupation

Une société titulaire d'une convention d'occupation du domaine public ne peut céder par voie d'avenant cette autorisation à une autre société. La cour administrative d'appel de Bordeaux, considère, eu égard au caractère intuitu personae des autorisations d'occupation du domaine public, qu'un tel avenant « doit être regardé comme une nouvelle autorisation d'occupation du domaine public délivrée (à la société) aux conditions de la première convention »[32].

2.2 Propriété et gestion des biens nécessaires au service public

Le statut des biens de retour

La gestion déléguée de certains services publics implique souvent pour le concessionnaire, une utilisation privative des biens de la personne publique concédante. Le Conseil d'État, dans l'arrêt « Commune de Douai », rendu en assemblée du contentieux le 21 décembre, est venu préciser le régime de ces biens délégués et plus particulièrement de celui des biens dits « de retour »[33].

Les biens de retours sont habituellement définis comme « l'ensemble des biens nécessaires (indispensables) au fonctionnement du service (…) »[34]. Il ne faut pas les confondre avec les biens de reprise, qui sont simplement « utiles »[35] au service et qui peuvent en fin de contrat être repris par la personne publique moyennant une indemnité ni avec les biens propres utilisés par le concessionnaire, qui ne sont ni nécessaires ni indispensables au service.

Le Conseil d'État devait trancher un litige opposant la commune de Douai et la société ERDF, titulaire d'une concession de distribution d'électricité, à propos de la propriété d'immeubles de logements et de bureaux réalisés dans le cadre de cette concession. En l'occurrence, le travail d'inventaire, à défaut d'avoir été effectué par le concessionnaire a finalement été effectué par le Conseil d'État qui en a profité pour éclairer les dispositions applicables aux biens dans les délégations de service public.

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[31] BRENET (F.), « Liberté du commerce et de l'industrie et autorisation d'occupation du domaine public », *DA.* n° 11, Novembre 2012, comm. 89

[32] CAA Bordeaux, 14 mars 2013, *École nationale supérieure des techniques industrielles et des mines d'Albi*, n° 11BX03091, *Contrats et Marchés publ*. n° 5, Mai 2013, comm. 147

[33] CE, ass., 21 déc. 2012, *Commune de Douai*, req. n° 342788, Lebon ; *AJDA* 2013, p. 457, chron. DOMINO (X.) et BRETONNEAU (A.) ; CAPITANT (D.), *D.* 2013, p. 252 ; *AJCT* 2013, p. 91, obs. DIDRICHE (O.) ; *RFDA* 2013, p. 25, concl. DACOSTA (B.) ; *BJCP* 2013, n° 87, concl. DACOSTA (B.) et obs. C. M. ; *Contrats Marchés publ.* 2013, n° 2, F. LLORENS et P. SOLER-COUTEAU et n° 41, note G. ECKERT ; *Dr. adm.* 2013, n° 20, note G. EVEILLARD ; FATOME (E.) et TERNEYRE (P.), « Le statut des biens des délégations de service public », *AJDA* 2013, p. 724

[34] CE, sect. travaux publ., avis, 19 avr. 2005, n° 371234, *EDCE* 2005, p. 197

[35] RICHER (L.), *Droit des contrats administratifs*, 8e éd., LGDJ, 2012, § 1212.

La répartition de ces différents biens doit faire l'objet d'une grande attention car ils sont soumis à un régime juridique variable. Les biens de retour, en raison de leur importance appartiennent dès leur acquisition ou dès leur achèvement à la personne publique, la formule « *ab initio* » étant généralement employée.

Le Conseil d'État a dans un premier temps écarté la volonté des parties dans la détermination et la répartition de ces biens, le conduisant à exclure l'appropriation privée d'un bien affecté et indispensable au service public[36]. L'appropriation publique et leur soumission au régime de la domanialité publique apparaissent en effet comme un moyen privilégié pour garantir leur affectation à l'utilité publique. Pour autant, le Conseil Constitutionnel considère que ce moyen privilégié n'est pas exclusif pour garantir la continuité du service public[37]. Dans le prolongement de cette idée, la cour administrative d'appel de Lyon, a ainsi jugé en 2012, à propos des remontées mécaniques d'une station de ski, que « d'une part, la conclusion d'une délégation de service public des remontées mécaniques ne saurait être subordonnée au fait que la collectivité délégante se rende préalablement propriétaire des équipements nécessaires au service public et d'autre part, que le « principe » selon lequel « les biens nécessaires au fonctionnement du service public appartiennent à la collectivité concédante dès l'origine » est écarté lorsque le délégataire en est propriétaire avant la conclusion de la délégation » [38]. Ainsi, le fait pour un bien indispensable au service public, d'être déjà la propriété du cocontractant avant la conclusion d'une délégation ou alors qu'une telle installation soit soumise au régime de la copropriété[39], font échec à l'application de la théorie des biens de retour.

La problématique des biens de retour, tout comme celle des droits réels octroyés aux occupants du domaine public, s'inscrit dans une conciliation difficile entre d'une part la protection des biens qui sont affectés à l'utilité publique et d'autre part la prise en compte des garanties nécessaires au concessionnaires en cas de montages complexes et de financement privé de ces équipements. Dans ce contexte financier et jurisprudentiel incertain, le Conseil s'est attaché à développer deux points essentiels : si l'arrêt « Commune de Douai », apprécie les règles de propriété plus souplement, celles relatives à leur retour gratuit sont affirmées avec force[40].

En matière de propriété, le principe veut que les biens immobiliers nécessaires au service public (dits « de retour »), qui sont établis sur une propriété publique ou sur une propriété privée, appartiennent dès leur achèvement à la personne publique concédante.

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[36] CE 21 avr. 1997, *Ministre du budget c/ Société Sagifa*, req. n° 147602, obs. AUBY (J.-B.) et MAUGUÉ (C.), *RDI* 1997, p. 418 ; CE, sect. travaux publ., avis, 19 avr. 2005, n° 371234 : *EDCE* 2005, p. 197 ; étude SYMCHOVITZS (N.) et PROOT (Ph.), *AJDA* 2006, p. 1371 ; CE, 23 juill. 2010, *Montravers liquidateur judiciaire de la sté Neville Foster Delaunay Belleville*, req. n° 320188 ; *Dr. adm.* 2010, comm. 140, obs. BRENET (F.) ; *Contrats et Marchés publ*. 2010, comm. 350, obs. ECKERT (G.)

[37] Cons. const., déc. 26 juin 2003, n° 2003-473 DC, Loi de simplification du droit : Journal Officiel 3 Juillet 2003 ; *Rec. Cons. const.* 2003, p. 382 ; Cons. const., déc. 23 juill. 1996, n° 96-380 DC, Loi relative à France Télécom : Journal Officiel 27 Juillet 1996 ; *Rec. Cons. const*. 1996, p. 107 ; Cons. const., déc. 14 avr. 2005, n° 2005-513 DC, Loi relative aux aéroports : Journal Officiel 21 Avril 2005 ; *Rec. Cons. const*. 2005 ;

[38] CAA Lyon, 16 févr. 2012, *Sté Télépente des Gets*, req n° 10LY02315 ; *Contrats et Marchés publ*. 2012, comm. 118, obs. ECKERT (G.)

[39] CE, 9 mai 2012, *Commune d'Orcières*, req. n°340103, Comm. YOLKA (P.), *JCP A.*, n° 23, Juin 2012, act. 388

[40] ECKERT (G.), « Le Conseil d'État clarifie le régime des biens de retour », *Contrats et Marchés publ.* n°2, Févr. 2013, comm. 41

Toutefois, pour les immeubles nécessaires au service public qui sont construits sur une propriété publique, des droits réels peuvent être octroyés au profit du concessionnaire par dérogation contractuelle, à condition que la loi l'autorise (dans les limites des lois de 1988 relative aux AOT constitutives de droits réels et de 1994 relative aux beaux emphytéotiques administratifs) et en l'absence d'atteinte à la continuité du service public. Quand à ceux, également nécessaires au service public qui sont construits sur une propriété privée, ils peuvent par dérogation contractuelle être la propriété du concessionnaire ou à défaut ce dernier peut se voir octroyer des droits réels en l'absence d'atteinte à la continuité du service public.

Le sort des biens meubles n'est pas occulté par le Conseil d'État. Tous les biens mobiliers nécessaires au service public, à l'exception de ceux ayant fait l'objet d'une dérogation contractuelle, appartiennent en principe au concédant. Pourtant la consécration de la théorie des « meubles de retour » débouche sur de nombreuses incertitudes inhérentes à la définition du domaine public mobilier consacrée par le CGPPP[41].

Au terme normal du contrat, tous ces biens feront l'objet d'un retour gratuit au concessionnaire. Cependant, en cas de résiliation anticipée du contrat, ces biens feront l'objet d'un retour obligatoire contre une indemnité limitée à la valeur nette comptable inscrite au bilan en cas de durée d'amortissement des biens en cause inférieure ou égale à la durée de la convention. À l'inverse, dans les cas où la durée d'amortissement serait inférieure à la durée normale de la convention, l'indemnité serait égale à la valeur nette comptable qui résulterait de l'amortissement de ces biens sur la durée du contrat. L'arrêt précise enfin qu'il est loisible aux partie de déroger à ces principes, sans pour autant que le montant de l'indemnité excède la valeur nette comptable[42].

Cet arrêt consacre, en l'absence de dispositions légales, une place grandissante aux clauses contractuelles dans la gestion des biens publics.

Liberté de création des droits réels

Dans les mêmes perspectives, il convient de mentionner un arrêt important rendu par la Cour de cassation et qui pourtant intéressera les gestionnaires des propriétés publiques. La haute juridiction judiciaire dans l'arrêt du 31 octobre 2012 « Maison Poésie », retient qu'un droit d'usage et d'habitation accordé à une personne publique et établi dans un acte de vente ne s'éteint pas après l'expiration d'un délai de trente ans[43]. La Cour de cassation affirme pleinement la liberté de création par convention de droits réels spécifiques ou *sui generis*, en dehors de ceux prévus par la loi. Un tel apport ne manquera pas « d'intéresser l'exploitation de l'immeuble en droit privé, voir de permettre l'optimisation des propriétés relevant du domaine public »[44].

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[41] V. YOLKA (P.), « Autour de l'article L. 2112-1 du CGPPP. Un détour par les « meubles de retour », *AJDA* 2013 p. 974

[42] TA Grenoble, 27 mars 2012, *SIVU Domaine skiable Les Houches Saint-Gervais et préfet Haute-Savoie*, req., n° 1104951 et n° 1200150 ; *AJDA* 2012, p. 1863, obs. FINON (J.-F) ; *Contrats-Marchés publ*. 2012, comm. 195, obs. ECKERT (G.)

[43] Cass. Civ. 3e, 23 mai 2012, *Maison poésie*, req. n° 11-13.202, *D.* 2012. 1934, note D'AVOUT (L.), et 2128, spéc. 2138, obs. MALLET-BRICOUT (B.) ; *RTD civ.* 2012, p. 553, obs. REVET (T.) ; *JCP* 2012, p. 930, note DROSS (W.) ; *LPA* 2012, n° 213, p. 12, note BARBIÉRI (J.-J.) ; *Defrénois* 2012. 1057, obs. DANOS (F.)

[44] D'AVOUT (L.), MALLET-BRICOU (B.), « La liberté de création des droits réels aujourd'hui », Recueil Dalloz 2013, p. 53

2.3 Les redevances d'occupation domaniale

Il ressort de l'article L. 2125-1 du CGPPP que « toute occupation ou utilisation du domaine public d'une personne publique mentionnée à l'article L. 1 donne lieu au paiement d'une redevance ». Cet article du code n'est que la traduction législative d'un principe ancien et constant de la jurisprudence du conseil d'état[45]. Il conforte ainsi l'existence d'un « principe général de droit de non gratuité »[46].

La rédaction très générale de cet article n'avait pas manqué de faire réagir la doctrine en raison de difficultés pratiques inhérentes à son excessive rigidité[47]. Ces critiques théoriques se sont avérées, en pratique, être la source d'un important contentieux dont on peut mesurer l'ampleur au vu du nombre sans cesse croissant de jurisprudences rendues par les juridictions administratives.

La redevance : contrepartie de l'occupation privative du domaine public

La redevance correspond à la contrepartie financière de l'autorisation d'occupation privative du domaine. Elle traduit une logique de valorisation du domaine public qui, loin d'être nouvelle[48], semble être redécouverte par les collectivités publiques.

Dans un contexte économique difficile, les personnes publiques sont parfois tentées de pousser cette valorisation à l'extrême. C'est ainsi que le conseil municipal de la ville d'Avignon a décidé d'instituer en 2010 le paiement d'une redevance d'utilisation du domaine public pour tous les commerces pratiquant des ventes ou activités diverses au travers de vitrines ou de comptoirs ouvrant sur le domaine public, ainsi que pour tous les distributeurs automatiques bancaires installés en façade de bâtiment et accessibles directement depuis le domaine public[49]. Cette redevance, appelée « taxe trottoir » ou « taxe *kebab* » avait pour but, en l'absence d'emprise directe du commerce sur le domaine public, de sanctionner l'occupation indirecte du domaine par les clients en attente d'être servi.

Si le tribunal administratif d'Avignon a partiellement annulé la délibération pour rupture du principe d'égalité en raison des exonérations dont bénéficiaient les commerces qui assurent la vente ou la location de services culturels, il a confirmé, sur le principe, l'instauration d'une telle taxe. Les parties ont fait appel de ce jugement devant la cour administrative d'appel de Marseille qui censure finalement ce dispositif en considérant « que l'utilisation, le temps d'une transaction, de la dépendance du domaine public de la commune d'Avignon constituée par les trottoirs bordant les voies publiques de ladite commune et normalement affectée à la

[45] CE, 12 déc. 1923, *Peysson, Mollaret et Bory*, Lebon p. 826.

[46] CAA Marseille, 6 déc. 2004, *Commune de Nice*, req. n° 00MA01740, Rec. CE 2004, p. 503 ; *Contrats-Marchés publ.* 2005, comm. 165, ECKERT (G.), *JCP Adm.* 2005, 1192, note MOREAU (J.)

[47] V. MELLERAY (F.), « L'utilisation privative des palais de justice par les avocats est soumise à l'obligation de versement d'une redevance », *Dr. Adm.*, Juill. 2012, comm. 66 ; YOLKA (Ph.), « Requiem pour la gratuité », *JCP A.*, 2007, p. 170.

[48] V. pour l'admission d'un motif financier dans la gestion du domaine public CE, 2 mai 1969, *Société d'affichage Giraudy*, req. n°60932, *Lebon* p. 238.

[49] DÉLIANCOURT (S.), « L'illégalité de la « taxe trottoir » : l'utilisation momentanée du domaine public par les clients d'un commerce », *RFDA* 2012, p. 902.

circulation générale des piétons, par les clients des établissements bancaires disposant de distributeurs automatiques bancaires installés en façade de bâtiment et accessibles directement depuis ledit domaine public, ainsi que de tous les commerces pratiquant des ventes ou activités diverses au travers de vitrines ou de comptoirs ouvrant sur le même domaine, présente un caractère momentané ; qu'une telle utilisation du domaine public, non privative, ne dépasse pas le droit d'usage qui appartient à tous et ne requiert pas ainsi la délivrance par la commune d'une autorisation ; que, dès lors, s'il est constant que ladite utilisation du domaine public communal concourt à l'exercice par les établissements concernés d'une partie de leurs activités commerciales et économiques, elle ne peut toutefois donner lieu à l'assujettissement desdits établissements au paiement d'une redevance d'utilisation du domaine public »[50].

Le juge administratif, en l'absence de toute base légale et en l'absence d'utilisation physique et directe du domaine public par les commerçants, conclut à l'absence de nécessité d'autorisation et par conséquent à l'illégalité d'une telle taxe[51].

L'interprétation stricte du principe de non gratuité

Le Conseil d'État dans un arrêt du 7 mai 2012[52], a confirmé l'interprétation stricte des exceptions du CGPPP en déniant à l'ordre des avocats, malgré la dévolution de missions d'intérêt général par la loi du 31 décembre 1971[53], la qualité « d'association à but non lucratif », lui refusant ainsi la possibilité de bénéficier d'une occupation du domaine public à titre gratuit.

Pour autant, si la jurisprudence, dans la lignée du CGPPP, maintient fermement l'exigence d'une redevance pour l'occupant du domaine public, ce dernier, disposant seulement d'un droit précaire et révocable, ne peut être assimilé à un locataire. Ainsi, ni l'article 7 de la loi (...) du 6 juillet 1989 [tendant à améliorer les rapports locatifs] (qui) dispose que : « Le locataire est obligé : / a) De payer le loyer et les charges récupérables aux termes convenus (...) », ni les principes dont il s'inspire ne sauraient s'appliquer à un occupant du domaine public[54].

En outre, une société qui occupe le domaine public du port autonome de Papeete, par la pose de réseaux de canalisation et de câbles de distribution d'électricité, n'a aucun droit acquis au maintien de la gratuité de l'occupation. Le juge confirme la légalité de l'établissement de la redevance par l'établissement public affectataire alors même que la société bénéficiait jusqu'alors d'une gratuité de l'occupation[55].

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[50] CAA Marseille, 26 juin 2012, *M. Chiappinelli et autres*, req. n° 11MA01675 et n° 11MA01676, *AJDA* 2012, p. 1254 ; MELLERAY (F.), *Dr. Adm.* n°10, Oct. 2012, Comm. 82 ; DÉLIANCOURT (S.), « L'illégalité de la « taxe trottoir » : l'utilisation momentanée du domaine public par les clients d'un commerce », préc.

[51] BON (P.), Police des autres activités s'exerçant sur la voie publique, *Répertoire Dalloz*, Collectivités locales, fasc. n° 2265-1, n° 60.

[52] CE, 7 mai 2012, *Ordre des avocats au barreau de Versailles*, req. n°341110 ; Rec. CE 2012 ; MELLERAY (F.), « L'utilisation privative des palais de justice par les avocats est soumise à l'obligation de versement d'une redevance », *préc.*

[53] Loi n° 71-1130 du 31 décembre 1971, portant réforme de certaines professions judiciaires et juridiques, modifiée.

[54] CAA Lyon 29 novembre 2012, n° 11LY02228, *AJDA* 2013, p. 503.

[55] CAA Paris, 4 juin 2012, n° 11PA03964, *Sté Électricité Tahiti* ; *Contrats et Marchés publ.* n° 8, Août 2012, comm. 259.

Nature des redevances

Le Conseil d'État, dans un arrêt du 17 mai 2013, a récemment reconnu que les « péages acquittés (…) par les usagers du domaine public fluvial, qui sont dans une situation unilatérale et réglementaire, ont la nature non de taxes mais de redevances pour service rendu (…) ; qu'ainsi les litiges, relatifs à la légalité, au montant ou au recouvrement de ces péages, pouvant naître entre ces usagers et l'établissement public Voies navigables de France (…), relèvent de la compétence de la juridiction administrative »[56].

Il avait déjà retenu une position similaire dans un arrêt du 11 février 2013 où il assimile une indemnité pour occupation illégale et sans titre du domaine public fluvial à une redevance d'occupation, majorée au titre de l'infraction, qui est due à l'établissement public même en l'absence de publicité des tarifs[57].

Compétences juridictionnelles pour le contentieux des redevances d'occupation du domaine public

La redevance domaniale est « directement liée à l'occupation du domaine » et constitue un produit du domaine[58]. Le contrôle juridictionnel relève, hors texte spécial, de la compétence du juge administratif[59] qui exerce un contrôle variable : un contrôle normal sur les critères de détermination du montant de la redevance[60] et un contrôle restreint sur son montant effectif[61].

Pour autant, le juge judiciaire est seul compétent pour litiges relatifs aux titres exécutoires et commandements de payer émis par un maire, en vue du recouvrement du produit des droits de place perçus dans les halles, foires et marchés, y compris par un occupant sans titre, qui sont assimilés à des contributions indirectes[62].

Contrôle et justification du mode de calcul de la redevance

L'exigence d'une redevance en cas d'autorisation privative du domaine public, impose à la personne publique de justifier le mode de calcul de son montant[63]. Pourtant à l'inverse, la cour administrative de Marseille a retenu dans un arrêt du 25 juin 2012 « qu'aucune disposition législative ou réglementaire, ni aucun principe général du droit exigeant qu'une convention conclue entre une collectivité et une personne privée, ayant pour

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[56] CE, 17 mai 2013, *Voies navigables de France (VNF)*, req. n°356762

[57] CE, 11 févr. 2013, *Voies navigables de France (VNF)*, req. n°347475 ; *AJDA* 2013, p. 1198

[58] CE, 20 oct. 1997, *SA papeteries Étienne c/ VNF* ; *Dr. fisc.* 1998, n° 12, Comm. 229 ; GAUDEMET (Y.) *Droit administratif des biens*, 14ème éd., 2011, LGDJ, n° 479 bis.

[59] TC, 28 avril 2003, *Debaurin, Dr. Adm.*, 2003, n° 172.

[60] CE, 1er févr. 2012, *Société RTE EDF Transport*, req. n° 338665 ; *AJDA* 2012, p. 243 et 1680, note PERROUD (T.) ; *RDI* 2012, p. 408, obs. FOULQUIER (N.) ; CE, 10 févr. 1978, *Ministre de l'économie et des finances c/ Scudier*, req. n° 07652

[61] CE, 1er févr. 2012, *préc. ;* CE, 28 juill. 1999, *Compagnie financière et industrielle des autoroutes*, req. n°189412, Lebon p. 256 ; *D.* 1999, p.234 ; *RDI* 1999, p. 641, obs. LLORENS (F.)

[62] CE, 24 juin 2013, req. n°348207, *AJDA* 2013 p. 1306.

[63] CE, 1er févr. 2012, *Société RTE EDF Transport*, préc. ; CE, 21 mars 2003, *Syndicat intercommunal de la périphérie de Paris pour l'électricité et les réseaux*, req. n°189191 *; AJDA* 2003, p. 1935, note SUPRA DE BIEUSSES (P.) ; *RFDA* 2003, p. 903, note SOULIÉ (J.)

objet l'occupation de dépendances du domaine public communal en vue d'y assurer l'exécution d'un service public de l'enseignement supérieur, mentionne les modalités de calcul du montant ainsi fixé et arrête ce dernier en fonction du prix du marché locatif de Menton afin de couvrir le remboursement des investissements réalisés par la commune »[64].

La détermination du montant de la redevance a largement évolué. Si au départ l'autorité affectataire se contentait de fixer le montant de la redevance en prenant pour référentiel la superficie et la valeur locative de cette dernière, elle doit aujourd'hui concilier de nombreux objectifs dans l'optique d'une véritable gestion économique du domaine public. Il s'agit, d'une part de protéger les deniers publics en ne sous-estimant pas les recettes potentielles du bien et d'autre part de prévenir toute atteinte au droit de la concurrence.

Le calcul du tarif de la redevance ainsi que son mode de fixation figurent aujourd'hui à l'article L. 2125-3 du CGPPP qui dispose que « la redevance due pour l'occupation ou l'utilisation du domaine public tient compte des avantages de toute nature procurés au titulaire de l'autorisation ». Le montant de la redevance doit ainsi être fixé en fonction de l'avantage que l'occupant privatif est susceptible de tirer de l'occupation et en fonction de ce qu'il rapporte à la collectivité[65]. Malgré cette précision, l'absence de publicité et de mise en concurrence dans la délivrance des titres d'occupation du domaine public[66] est de nature à créer un contexte aléatoire dans la détermination du bilan économique global de l'opération[67].

Le juge administratif exerce un contrôle de plus en plus poussé en la matière. Cela se vérifie notamment par le contentieux relatif aux nombreuses conventions conclues dans le cadre de mises à disposition d'équipements sportifs aux clubs et fédérations par les différentes collectivités territoriales.

Ainsi, le tribunal administratif de Paris a annulé la convention établie entre la ville de Paris et la fédération française de tennis qui prévoyait l'occupation, la modernisation et l'extension du stade de Roland-Garros, pour insuffisance du montant de la redevance. Il ressort du jugement que, la durée excessive (99 ans), l'absence de revalorisation et l'importance des équipements concédés sont tels que la ville de Paris assume un risque « inhabituel dans le cadre d'une convention d'occupation domaniale ne prévoyant ni la délégation d'un service public ni la concession de travaux publics »[68]. Au surplus, le juge, pour fonder cette annulation s'est fondé sur la nature de l'usage qui allait être fait de ces infrastructures, à savoir un usage presque exclusivement commercial et dépourvu de toute obligation/activité de service public.

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[64] CAA Marseille, 25 juin 2012, req. n°10MA00114 ; UBAUD-BERGERON (M.), « Convention d'occupation du domaine public en vue d'une mission de service public : la redevance ne doit pas nécessairement correspondre au prix du marché locatif », *Contrats et marchés publics* n° 8, Aout 2012, comm. 260

[65] CE, 11 oct. 2004, req. n°254236 ; Rec. CE 2004, p. 602 ; V. égal. CE, 16 mai 2011, *Commune de Moulins*, req. n° 317675 ; *AJDA* 2011, p. 1848. note N. Ach ; *AJCT* 2011, p. 527, obs. DUTRIEUX (D.)

[66] CE, sect., 3 déc. 2010, *Ville Paris et Assoc. Jean Bouin*, préc.

[67] BRACONNIER (S.), « Concession du stade Roland-Garros - absence de mise en concurrence et bilan économique global », *AJDA* 2013, p. 1166

[68] TA Paris, 28 février 2013, req. n° 1200787/7 ; MELLERAY (F.), « La délicate fixation du montant de la redevance due pour l'occupation privative du domaine public », *AJDA* 2013 ; BRACONNIER (S.), « Concession du stade Roland-Garros - absence de mise en concurrence et bilan économique global », préc.

Retenant une position similaire, la cour administrative d'appel de Lyon a confirmé l'annulation, par le tribunal administratif de Grenoble, de la convention mettant à disposition d'une société sportive professionnelle de foot, le stade de l'agglomération. Le mode de calcul de la redevance, qui comprenait une part fixe visant à compenser une partie des charges de la collectivité et une part variable, établie en fonction des matchs supplémentaires et de la fréquentation, qui ne tient compte en réalité que des recettes de billetterie, ne permet pas d'établir « que le montant de la redevance aurait été établi en considération des avantages de toute nature procurés à la société »[69].

La cour administrative d'appel de Marseille, dans un arrêt du 6 novembre 2012, après avoir admis le recours d'un contribuable de la ville, s'est livrée à une analyse poussée d'une convention concédée à une association d'un village en vue de l'organisation hebdomadaire de marchés aux puces, a finalement refusé d'annuler la convention litigieuse au vu du temps réduit d'occupation et des charges pesant sur l'association[70]. Cette solution, rendue dans le sens contraire des conclusions du rapporteur public, annule le jugement du tribunal administratif de Nîmes qui avait considéré que le montant de la redevance (1000€) était manifestement disproportionné et sous évalué[71].

Le juge administratif considère que le montant d'une convention fixé en fonction d'un montant uniforme de la redevance, destiné à compenser les charges de la commune dues « à la diminution de la durée de vie des voies et trottoirs résultant de leur fragilisation par les travaux répétés d'entretien et de réparation (des) réseaux souterrains et par les fuites d'effluents », ne permet pas de tenir compte des avantages de toute nature procurés au titulaire de l'autorisation et doit dès lors être annulée[72]. Si le juge censure le montant d'une redevance fixé de façon uniforme, le Conseil d'État estime qu'une redevance qui comprend une part fixe garantissant un montant de 9 050 000 € par an et une part variable entre 41 % à 55 % du chiffre d'affaires réalisé par la société cocontractante, ne peut être regardée comme un prix payé par la personne publique à son contractant. Par conséquent, une telle rémunération, en l'absence de renonciation de la personne publique à percevoir des redevances inférieures à celles normalement attendues du concessionnaire, a le caractère d'une redevance d'occupation du domaine public et non celui d'un prix dans le cadre d'un marché public[73].

Enfin, il convient de remarquer le jugement du tribunal administratif de Paris du 6 novembre 2012[74] et l'arrêt de la cour d'appel de Paris du 7 février 2013[75] qui s'inscrivent dans la saga « RATP » relative au

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[69] CAA Lyon, 28 février 2013, req. n°12LY00820, Lebon ; V. égal. pour analyse MELLERAY (F.), « L'utilisation privative du domaine public », *AJDA* 2013, p. 992

[70] CAA Marseille, 6 novembre 2012, req. n°10MA03152

[71] DELIANCOURT (S.), « Le contrôle juridictionnel porté sur le montant des redevances d'occupation du domaine public », *AJDA* 2013, p. 691

[72] CAA Lyon, 13 déc. 2012, req. n° 12LY01167, Lebon ; Concl. VINET (C.), « Détermination des bases de calcul d'une redevance d'occupation du domaine public », *JCP A* n° 23, 2013, 2165.

[73] CE, 15 mai 2013, req. n° 364593, *AJDA* 2013, p. 1023

[74] TA Paris, 6 novembre 2012, *RATP c/ Société 20 minutes Fr.*, req. n°1014667, V. concl. REULAND (N.), « Comment fixer le montant de la redevance pour occupation du DP », *AJDA* 2013, p. 1340

[75] CAA Paris, 7 févr. 2013, *RATP c/ Société 20 minutes Fr*, Req. n°10PA05686 et 11PA02805 ; BOUL (M.), « L'arrêt RATP et les «infrastructures essentielles» : pas de droit à la paresse dans les stations parisiennes », *LPA*, Juill. 2013 n° 144, p. 11

contentieux concernant la distribution de journaux gratuits dans le métro. Ce contentieux est particulièrement révélateur de l'analyse du juge et de la conciliation entre respect du droit de la concurrence et liberté des autorités affectataires dans le choix de la délivrance de l'autorisation d'occupation privative[76]. Ainsi et malgré les conclusions contraires, en application des principes généraux de la domanialité publique, et de la procédure de mise en concurrence, « la personne publique peut fixer le montant d'une redevance d'occupation du domaine public en prévoyant un montant minimal de redevance correspondant au montant fixé à la suite d'enchères dans le cadre d'une précédente convention ». Il convient de retenir deux points essentiels dans cette solution. Le juge administratif admet que « les entreprises concurrentes sont les mieux à même de déterminer les avantages de toute nature que l'autorisation est susceptible de leur conférer et, en les chiffrant, de fournir une fourchette de prix que la personne publique peut utiliser pour fixer la redevance ». D'une part il consacre l'équivalence et la « fusion entre le prix proposé et le montant de la redevance »[77] et d'autre part il confirme la possibilité d'instituer une procédure d'enchère en cas d'utilisation privative du domaine public[78].

Occupation privative et domaine public mobilier

L'élaboration du CGPPP a été l'occasion pour le législateur d'autonomiser la définition du domaine public mobilier. Pour autant, l'article L. 2121-1 du CGPPP témoigne d'un certain rééquilibrage qui compense la prévalence traditionnelle de l'approche immobilière dans l'étude du droit administratif des biens[79]. On observe dans la jurisprudence récente que le Conseil d'État a atténué le particularisme des biens mobiliers qui appartiennent au domaine public, en soumettant leurs usages privatifs à un régime similaire à celui applicable aux biens immobiliers. La valorisation les biens du domaine public semble indifférente à la nature du bien, ce qui favorise une certaine banalisation dans l'utilisation du domaine public mobilier[80].

Le juge administratif a eu à trancher deux espèces relatives à des photographies de biens du domaine public. Dans un premier temps, le tribunal administratif d'Orléans dans l'affaire *« Société des brasseries Kronenbourg* », a retenu que le fait de photographier le château de Chambord n'était pas constitutif d'une occupation du domaine public et qu'il ne donnait par conséquent lieu à aucune autorisation ni redevance au motif que « l'image de la chose ne saurait être assimilée ni à la chose elle-même, ni aux droits attachés à la propriété de cette chose »[81]. Dans une deuxième espèce remarquée, le Conseil d'État n'a pas suivi le même raisonnement. Dans son arrêt « Commune de Tours », la haute juridiction occulte le statut et la nature de l'image pour considérer que « la prise de vue d'œuvres relevant des collections d'un musée à des fins de commercialisation des reproductions photographiques ainsi obtenues doit être regardée comme une utilisation

[76] CE, 23 mai 2012, *Régie autonome des transports parisiens (RATP)*, préc.

[77] REULAND (N.), « Comment fixer le montant de la redevance pour occupation du DP », préc.

[78] V. pour l'attribution des fréquences hertziennes art. L. 42-2 du code des postes et télécommunications

[79] LAVIALLE (C.), « La condition et la fonction des meubles en droit administratif des biens », *RFDA* 2013, p. 251

[80] FOULQUIER (N.), « Les photographies du domaine public mobilier », *AJDA* 2013, p. 111

[81] TA Orléans, 6 mars 2012, req. n°1102187, *AJDA* 2012 p.1227, concl. FRANCFORT (J.) ; *D.* 2012, p. 2222, note BRUGUIÈRE (J-M.)

privative du domaine public mobilier »[82]. La soumission de ce type d'activité à une autorisation administrative, comme c'est déjà le cas pour les exploitants de fréquences hertziennes[83], permet de réguler l'usage d'un bien, tout en le valorisant à travers les ressources financières procurées à la personne publique affectataire.

2.4 La fin de l'occupation privative du domaine public

Le pouvoir de résiliation des conventions d'occupation du domaine public

Une tolérance d'occupation du domaine public dont bénéficie une société gestionnaire d'un entrepôt dans un port, ne fait pas obstacle à la perception de redevances par l'autorité gestionnaire qui dispose en outre d'un pouvoir de résiliation, l'autorisation n'étant pas assimilable à un contrat[84].

Le non paiement des redevances par une société en contrepartie de l'exploitation d'un restaurant sur le domaine public maritime, constitue, au même titre que l'existence de plaintes du voisinage ou de la réalisation d'un projet d'intérêt général, un motif de résiliation pour la personne publique qui dispose à tout moment d'un tel pouvoir[85].

Il convient de remarquer qu'en l'absence d'une obligation de publicité et de mise en concurrence pour l'octroi des autorisations et conventions d'occupation du domaine public, « la volonté de soumettre l'occupation du domaine à une (telle) procédure préalable (…) répond à un motif d'intérêt général » qui fonde l'exercice du pouvoir de résiliation par la personne publique[86].

Le juge administratif, s'il reconnaît que les personnes publiques disposent d'un pouvoir de résiliation des contrats d'occupation du domaine public, considère qu'eu égard à la nature d'intérêt général des activités de desserte en téléphonie mobile et à la lumière des dispositions contractuelles, cette résiliation est disproportionnée. Une telle illégalité est donc de nature à fonder la reprise des relations contractuelles entre la société et la personne publique[87].

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[82] CE, 29 oct. 2012, *Commune de Tours*, req. n° 341173 ; FOULQUIER (N.), « Les photographies du domaine public mobilier », *AJDA* 2013, p. 111 ; ZIANI (S.), « Image et domanialité : le reflet de l'autorité », *Dr. Adm* n° 12, déc. 2012, comm. 96 ; *AJCT* 2013, p. 153, obs. BLANC (F.) ; *BJCL* 2013, p. 54, concl. ESCAUT (N.) et obs. POUJADE (B.) ; *JCP Adm.* 2012, n° 2390, note CARPI-PETIT (S.) et n° 2391, note VOCANSON (C.) ; *JCP G*. n°5, 2013, p. 115, note POLI (J-F.).

[83] Art. 10 de la loi du 17 janv. 1989

[84] CAA Douai, 2 mai 2013, *Sté immobilière du port de Boulogne*, req. n°12DA01360, Contrats et Marchés publ. n° 7, Juill. 2013, comm. 201

[85] CAA Paris, 6 juill. 2012, *SARL Le Nautica*, req. n°11PA01242, Contrats et Marchés publics n° 10, Oct. 2012, comm. 292

[86] CAA Bordeaux, 14 mars 2013, *École nationale supérieure des techniques industrielles et des mines d'Albi*, req. n° 11BX03091, Contrats et Marchés publ. n° 5, Mai 2013, comm. 148

[87] CAA Douai, 2 mai 2013, *CROUS de l'Académie de Lille c/ Sté Orange* req. n° 12DA01577 ; Contrats et Marchés publ. n° 7, 2013, comm. 209 ; CE, 11 oct. 2012, *Sté Orange*, req. n° 351440 ; Contrats-Marchés publ. 2013, comm. 16, ECKERT (G.) ; CE, sect., 21 mars 2011, *Commune Béziers*, req. n° 304806 ; Contrats-Marchés publ. 2011, comm. 150, obs. PIETRI (J.-P.)

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BIENES Y OBRAS PÚBLICAS

INFORME ANUAL - 2013 - ESPAÑA

(Junio 2014)

Prof. Dr. Francisco LÓPEZ MENUDO

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ÍNDICE

1. **INTRODUCCIÓN**
2. **LEGISLACIÓN EN EL ÁMBITO ESTATAL**
   2.1. En materia de bienes
   2.2 En materia de obras públicas
3. **LEGISLACIÓN EN EL ÁMBITO DE LAS COMUNIDADES AUTÓNOMAS**
   3.1 En materia de bienes
   3.2 En materia de obras públicas
4. **JURISPRUDENCIA**
5. **BIBLIOGRAFÍA**

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1. INTRODUCCIÓN

En el número anterior de estas crónicas poníamos de relieve el escaso número de disposiciones recaídas en materia de bienes que fueran verdaderamente relevantes en relación con la intensa actividad normativa desplegada en todo el territorio del Estado, de la que dan buena cuenta cada año los sumarios de los distintos diarios oficiales. En el periodo ahora analizado, referido a la anualidad de 2013, siendo más bien parco en cuanto a las novedades en materia patrimonial, sin embargo está dominado por dos acontecimientos que sobresalen claramente por su importancia cualitativa: el primero de ellos en el ámbito legislativo, representado por la modificación operada sobre la Ley 22/1988, de 28 de julio, de Costas, que ha supuesto una reconsideración en profundidad de sus más variados aspectos; el segundo, en el plano de la gestión patrimonial, concretado en la aprobación de un ambicioso plan de enajenación de bienes inmuebles recogido en el *Programa para la Puesta en valor de los activos inmobiliarios del Estado.*

Por lo demás, para el ámbito del Estado y en materia de bienes, el resto de las novedades más significativas vienen referidas a diversas modificaciones puntuales y juicios de constitucionalidad tanto de la Ley General vertebradora del sistema de los bienes públicos -Ley 33/2003, de Patrimonio de las Administraciones Públicas- como de las leyes de cabecera de algunos de los subsistemas que lo integran, concretamente en materia de aguas, minas, montes y puertos. En cuanto a la normativa autonómica, damos cuenta igualmente de la aprobación de Leyes generales de patrimonio o sus modificaciones, así como de otras novedades en la normativa sectorial. Por su parte, en lo que hace a las obras públicas e infraestructuras tanto del Estado como de las Comunidades Autónomas, cabe señalar que aunque en el período considerado pueden contabilizarse un buen número de disposiciones sobre la materia, la mayoría vienen referidas a aspectos meramente organizativos, siendo excepcional encontrar alguna norma sobre la planificación de grandes infraestructuras, que es la técnica que ciertamente revela la capacidad de inversión pública a medio y largo plazo.

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2. LEGISLACIÓN EN EL ÁMBITO ESTATAL

2.1 En materia de bienes

Ley 2/2013, de 29 de mayo, de protección y uso sostenible del litoral y de modificación de la Ley 22/1988, de 28 de julio, de Costas

La simple constatación de la gran cantidad de preceptos modificados de la Ley de Costas de 1988 da una idea de la envergadura de la reforma: la Ley 2/2013 afecta nada menos que a 38 de sus artículos, las Disposiciones Transitorias Primera y Cuarta, agregándole asimismo tres Disposiciones Adicionales. Además de ello, la Ley 2/2013 contiene *un conjunto heterogéneo de disposiciones que complementan a la modificación de la Ley de Costas,* pero que formalmente no se integran en su texto, sin que se haya previsto habilitación competencial alguna que permita integrarlas en un futuro texto refundido.

Según se desprende directamente del Preámbulo, la profunda reconsideración del dominio público marítimo-terrestre que se lleva a cabo se asienta en dos pilares principales: por una parte, en la necesidad de proporcionar *seguridad jurídica estableciendo un marco en el que las relaciones jurídicas en el litoral puedan tener continuidad a largo plazo*; y por otra en el reforzamiento de los valores ambientales del dominio público marítimo terrestre, preservando su integridad *a través de reglas claras que puedan ser aplicadas*. En todo caso, lo que parece indiscutible es que la reforma está muy orientada a reglamentar la explotación económica del litoral, lo que tampoco oculta la norma, que afirma de antemano la *crucial importancia* de la *actividad turística* y los *cultivos marinos*.

Entrando en el análisis de la reforma, la primera gran novedad sobre la que cabe llamar la atención viene referida a la **delimitación del dominio público** en sus diversas manifestaciones. Así, en lo que hace a la ribera del mar, se mantiene el límite interior "hasta donde alcancen las olas en los mayores temporales conocidos", si bien queda diferido ahora al desarrollo reglamentario la concreción de los criterios técnicos conforme a los que se realizará el deslinde. En cuanto a las playas, pertenecen al dominio público las dunas *hasta donde sea necesario para garantizar la integridad de la costa y la estabilidad de las playas*, de manera que suprime la limitación reglamentaria que se refería únicamente a las

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dunas fijadas por vegetación. Por su parte, los terrenos inundados de forma artificial, sea cual fuere su cota, quedan excluidos del dominio público si antes de la inundación no lo fueran, eliminándose la limitación reglamentaria que consideraba demaniales los que estaban por debajo de la cota de la pleamar; consecuencia adicional de lo anterior es que la demanialidad deja de venir impuesta por la invasión del mar "por cualquier causa", pues ahora están expresamente excluidos los terrenos inundados artificialmente, salvo que se trate de canales navegables, que sí tendrán la consideración de demaniales. Cabe también destacar la nueva regla a tener en cuenta en los casos de existencia de paseos marítimos, cuya línea exterior delimita precisamente la línea interior de la ribera del mar, de manera que los terrenos fuera de las líneas interiores de los paseos marítimos podrán ser desafectados. Por su parte, cabe llamar la atención sobre la peculiaridad que presentan dos previsiones singulares: la primera es la que hace referencia a la exclusión del dominio público marítimo-terrestre de terrenos correspondientes a determinados núcleos de población enumerados en el Anexo de la Ley, retornado a su condición de privativos, con lo que se prevé su trasmisión por cualquiera de los negocios jurídicos permitidos por la legislación de patrimonio; la segunda, la excepción al régimen general de delimitación del dominio público para la Isla de Formentera, para la que se establecen criterios especiales en atención a *la especial configuración geomorfológica de la isla.* Como lógica consecuencia de los nuevos criterios de delimitación del dominio público, la Disposición Adicional Segunda obliga a la revisión de los deslindes ya ejecutados, pues es previsible la pérdida de la condición demanial de muchos terrenos, así como la posible integración en el demanio de otros. En cualquier caso, queda obligada la Administración a la inscripción en el Registro de la Propiedad de los bienes demaniales en un plazo de dos años según la Disposición Transitoria Cuarta.

Por otra parte, la Ley 2/2013 modifica determinados aspectos del **régimen concesional** que la norma justifica en el principio de seguridad jurídica -en este caso entendido como derecho estable- con lo que se pretende dar amparo a los negocios jurídicos en el dominio público marítimo-terrestre. Así, se amplían los plazos concesionales -antes establecidos en treinta años- hasta los setenta y cinco años, previsión que no sólo es aplicable a las nuevas concesiones, sino también a las existentes acogiéndose a las sucesivas prórrogas permitidas. Ahora bien, como en el caso de la Ley de Costas de 1988 y

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dentro del nuevo plazo máximo permitido, queda relegado al ulterior desarrollo reglamentario la duración de las concesiones en atención al distinto uso a que se destine el dominio público. Por su parte, se reconoce ahora la posibilidad de trasmisión de terrenos sujetos a régimen concesional *inter vivos*, posibilidad vetada anteriormente, a lo que se añade también en las transmisiones *mortis causa* una ampliación del plazo de uno a cuatro años para que los causahabientes manifiesten la voluntad de subrogarse en la concesión. Cabe reseñar además, el reconocimiento de la concesión a los titulares de derechos de ocupación y aprovechamientos sobre los que la Administración no hubiera podido practicar el deslinde por estar amparados por el art. 34 de la Ley Hipotecaria a la entrada en vigor de la Ley de Costas de 1988, que *pasarán a ser titulares de un derecho de ocupación y aprovechamiento del dominio público marítimo-terrestre, por treinta años, respetando los usos y aprovechamientos existentes, a cuyo efecto deberán solicitar la correspondiente concesión*, titulares que conforme a la normativa anterior sólo tenían reconocido el derecho a la *legalización de los usos* y un derecho de preferencia para la ocupación y aprovechamiento por diez años, según el apartado segundo de la Disposición Transitoria Primera de la Ley de Costas de 1988.

En cuanto al **régimen de uso y ocupación de las playas** resulta sumamente interesante la categorización que la Ley impone para el desarrollo reglamentario en atención a su naturaleza como *playas urbanas o playas naturales*, siendo éstas últimas las contiguas a espacios protegidos o suelo rural, lo que determina respecto de ellas que se imponga un nivel de protección alto y se restrinjan las ocupaciones. En cuanto a las *playas urbanas*, la Ley prevé expresamente la posibilidad de autorizar la celebración de aquellos eventos de interés general con repercusión turística que cumplan los requisitos que se establezcan, garantizándose en todo caso el mantenimiento del tramo de playa en el estado anterior a la ocupación.

Finalmente, es necesario hacer mención de otras novedades que incorpora la Ley 2/2013, algunas de ellas necesarias en orden a la correcta articulación de la reconsideración del modelo. En primer lugar, se reconocen las *urbanizaciones marítimo- terrestres*, consideradas como *núcleos residenciales en tierra firme dotados de un sistema viario navegable, construido a partir de la inundación artificial de terrenos privados*, que deberán

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contar necesariamente con el soporte de un instrumento de planeamiento urbanístico. Para ellas, como excepción a la regla general de la Ley 2/2013 de excluir de la demanialidad los terrenos inundados artificialmente, se establece la condición demanial de los canales navegables, conservando el carácter privado *los terrenos colindantes a la vivienda y retranqueados respecto del canal navegable que se destinen a estacionamiento náutico individual y privado.* En segundo lugar, se eleva a rango legal la anterior previsión reglamentaria sobre la posibilidad a los titulares de terrenos amenazados por la invasión del mar o las arenas de las playas de realizar obras de defensa. También se permite ahora -a diferencia del estricto régimen anterior que únicamente permitía las obras de *higiene, ornato y conservación*- la realización de obras de mejora, reparación, consolidación y modernización, tanto a los titulares de concesiones, como a las ubicadas en la servidumbre de protección. En tercer lugar, se amplían los supuestos de reducción de la zona de servidumbre de protección de 100 a 20 metros en los casos de núcleos que aunque formalmente no estén calificados como *de facto* cuenten con una consideración similar por contar con los servicios básicos y estar consolidada en parte la edificación. Por último, se reconoce al Estado la posibilidad de suspender los actos y acuerdos de las entidades locales contrarios *que afecten a la integridad del dominio público marítimo terrestre o de la servidumbre de protección* o que supongan una infracción manifiesta de las obras, instalaciones y actividades prohibidas en esta servidumbre.

Programa para la Puesta en valor de los activos inmobiliarios del Estado.

En el seno de las medidas de racionalización de la Administración que se contemplan el Informe de la Comisión para la Reforma de las Administraciones Públicas (CORA) aprobado por el Gobierno el 21 de junio de 2013, se recoge como una de las estrategias específicas encaminada a incrementar los ingresos públicos la enajenación ordenada de patrimonio inmobiliario bajo la denominación *Programa para la Puesta en valor de los activos inmobiliarios del Estado*, que ya había sido decidido con anterioridad en el Pleno de la Comisión de Coordinación Financiera de Actuaciones Inmobiliarias y Patrimoniales en su reunión de 8 de abril de 2013. El citado Informe CORA propone como objetivos en esta materia (i) identificar las operaciones significativas de enajenación o explotación; (ii) movilizar y poner en valor las fincas rústicas del Estado, mediante su

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enajenación o cesión para explotación de terrenos a agricultores, Ayuntamientos y Comunidades Autónomas; (iii) agilizar el proceso de enajenaciones y (iv) estudiar fórmulas para incorporar asistencia técnica especializada.

El Programa integra en un único documento las estrategias de movilización inmobiliaria para los ejercicios 2013, 2014 y 2015, identificando un total de 15.135 inmuebles enajenables, estructurados en planes que corresponden cada uno de los siguientes centros gestores: Dirección General del Patrimonio del Estado, Instituto de Vivienda, Infraestructura y Equipamiento de la Defensa, Gerencia de Infraestructuras y Equipamiento de la Seguridad, Administrador de Infraestructuras Ferroviarias, Tesorería General de la Seguridad Social y Sociedades del Grupo SEPI (Correos y SEPIDES).

El plan de enajenaciones de cada Centro gestor se estructura en torno a una memoria introductoria en la que se describe la composición general de su patrimonio y se exponen los condicionantes legales para su gestión y se exponen las grandes líneas que informan las estrategias de puesta en valor de los bienes innecesarios. La memoria se completa con unos anexos en los que se recogen, singularmente identificados y agrupados por tipologías homogéneas, los bienes que se prevé enajenar.

Previsiones relativas al régimen general de los bienes públicos.

En el período considerado, varias disposiciones han venido a modificar puntualmente la **Ley 33/2003, de 3 de noviembre, del Patrimonio de las Administraciones Públicas (LPAP).** La primera de ellas, la **Ley 8/2013, de 26 de junio, de rehabilitación, regeneración y renovación urbanas** en su Disposición Final Sexta Disposición Final Sexta ha eliminado la referencia a la *fianza* que el artículo 137.6 LPAP establecía como única manera de prestar la garantía para para participar en los procedimientos de enajenación, generalizándose ahora con la nueva redacción la prestación de la garantía por cualquier modalidad prevista en la normativa de contratación. Además, se rebaja su cuantía a un 5 por ciento pudiéndose establecer excepcionalmente en un 10 por ciento, siendo así que antes estaba establecida en un 25 por ciento de manera general. También la Ley 8/2013 modifica la Disposición Adicional Décima de la LPAP, referida al

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régimen jurídico de la Sociedad Estatal de Gestión Inmobiliaria de Patrimonio (SEGIPSA), con una doble finalidad: por un lado, se le concede habilitación para que actúe como medio propio de todos los poderes adjudicadores vinculados a la Administración General del Estado y como instrumento especializado en la gestión patrimonial de la Administración General del Estado y las entidades que, teniendo la condición de poder adjudicador pertenezcan al Sector Público Estatal; de otro lado, se facilita el acceso de los interesados a los procedimientos de enajenación, flexibilizando las condiciones existentes. Por su parte, la **Ley 22/2013, de 23 de diciembre, de Presupuestos Generales del Estado para 2014** añadió la Disposición Adicional Novena a la LPAP, como complemento para facilitar el cumplimiento del programa de movilización de los activos inmobiliarios citados en el apartado anterior. Se trata de una previsión encaminada a permitir la retribución a los terceros que se encarguen de la venta, administración o puesta en explotación de bienes patrimoniales, por referencia a un porcentaje o comisión, pudiendo practicarse la liquidación que deba practicarse para su ingreso en el Tesoro Público por el importe neto que corresponda, una vez deducida la comisión.

Es necesario reseñar igualmente las modificaciones con incidencia en el régimen general pero que se encuentran *extramuros* de la LPAP, contenidas tanto en la **Ley 24/2013, de 26 de diciembre, del Sector Eléctrico** (LSE 2013) y **Ley 20/2013, de 9 de diciembre, de garantía de la unidad de mercado** (LGUM). En cuanto a la LSE 2013, el art. 56.2 extiende los clásicos efectos de la declaración de utilidad pública de las infraestructuras energéticas más allá de la necesidad de ocupación de los terrenos, especificando que además, supondrá *el derecho a que le sea otorgada la oportuna autorización, en los términos que en la declaración de utilidad pública se determinen, para el establecimiento, paso u ocupación de la instalación eléctrica sobre terrenos de dominio, uso o servicio público o patrimoniales del Estado, o de las Comunidades Autónomas, o de uso público, propios o comunales de la provincia o municipio, obras y servicios de los mismos y zonas de servidumbre pública*. Por su parte, el art. 58 LSE 2013 prohíbe el paso de las instalaciones de alta tensión sobre propiedades particulares si fuera posible su trazado *sobre terrenos de dominio, uso o servicio público o patrimoniales del Estado, Comunidades Autónomas, de las provincias o los municipios*. La Disposición Adicional Segunda LSE 2013 viene referido a la posibilidad de autorización por el Consejo de

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Ministros podrá autorizar *el tendido aéreo de líneas eléctricas de alta tensión en el dominio público marítimo-terrestre, siempre que no se localicen en tramos de costa que constituyan playa u otros ámbitos de especial protección.*

En lo que hace a la citada LGUM, reconociendo por adelantado y de manera general que la autorización es el medio de intervención que más limita el acceso a una actividad económica y su ejercicio, sin embargo declara expresamente el sometimiento a intervención administrativa previa (técnica autorizatoria o concesional) cuando sea necesario para garantizar la concurrencia competitiva, como son los casos de: a) existencia de limitación del número de operadores en el mercado por la escasez de recursos naturales; b) el uso del dominio público; c) la prestación de servicios públicos sometidos a tarifas reguladas cuya prestación necesita la utilización del dominio público; (iv) concesiones demaniales. También es importante resaltar la importante excepción que contiene la del *principio de eficacia nacional de los medios de intervención administrativa* -conforme al cual se declara de manera general la validez para todo el territorio del Estado cualquier acto, disposición y medios de intervención de cualquier autoridad competente relacionadas con el libre acceso y ejercicio de la actividad económica-, estableciendo el art. 20.4 LGUM como excepción al citado principio determinadas actuaciones relacionadas con la ocupación del dominio público, con las concesiones demaniales, o cuando el número de operadores económicos en un lugar del territorio sea limitado en función de la existencia de servicios públicos sometidos a tarifas reguladas.

Previsiones relativas al régimen jurídico a distintas categorías de bienes públicos.

En materia de **Aguas**, cabe comenzar señalando las dos modificaciones operadas en otros tantos preceptos del RDL 1/2001, de 20 de julio, por el que se aprueba el texto refundido de la Ley de Aguas (TRLA). La primera de ellas vino de la mano de la mano de la **Ley 21/2013, de 9 de diciembre, de evaluación ambiental**, que en su Disposición Final Cuarta da una nueva redacción al artículo 72 TRLA, para atribuir a la Dirección General del Agua la competencia para resolver sobre la cesión de derechos al uso privativo de las aguas que implique el uso de infraestructuras que interconectan territorios de distintos

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Planes Hidrológicos de cuenca -competencia antes conferida al Ministerio de Medio Ambiente en general- eliminándose la imposición relativa a que tal posibilidad estuviera expresamente recogida en Plan Hidrológico Nacional o las leyes singulares reguladoras de cada trasvase. La segunda, de menor importancia, se establece en la **Ley 22/2013, de 23 de diciembre, de Presupuestos Generales del Estado para el año 2014** que revisó, de conformidad con lo previsto en el párrafo segundo 113.3 TRLA, la cuantía por control de canon de vertidos. Por su parte, el **RDL 7/2013 de 28 de junio de medidas urgentes de naturaleza tributaria, presupuestaria y de fomento de la investigación, el desarrollo y la innovación**, derogó expresamente el artículo 121 bis TRLA, que regulaba la imputación de responsabilidad de las demarcaciones hidrográficas por incumplimiento de la normativa Europea. Tal derogación se hacía necesaria para eliminar los procedimientos específicos sectoriales de exigencia de este tipo de procedimientos de responsabilidad, toda vez que la Ley Orgánica 2/2012, de 27 de abril, de Estabilidad Presupuestaria y Sostenibilidad Financiera, ya lo regulaba con carácter general en su disposición adicional, estableciendo que las Administraciones Públicas y cualesquiera otras entidades integrantes del sector público que, en el ejercicio de sus competencias, incumplieran obligaciones derivadas de normas del derecho de la Unión Europea, dando lugar a que el Reino de España sea sancionado por las instituciones europeas, asumirán, en la parte que les sea imputable, las responsabilidades que se devenguen de tal incumplimiento. Asimismo, dispone que corresponde al Consejo de Ministros declarar la responsabilidad por dicho incumplimiento y acordar, en su caso, la compensación o retención que corresponda.

También en el plano normativo y en materia de Aguas, cabe resaltar la importante aprobación del **RD 670/2013**, por el que se modifica el Reglamento del Dominio Público Hidráulico, aprobado por el RD 849/1986, en materia de registro de aguas y criterios de valoración de daños al dominio público hidráulico. Conforme con su denominación, el RD acomete en primer lugar una importante reforma en las normas de organización y funcionamiento del Registro de Aguas, incorporando los avances tecnológicos basados en la administración electrónica, la simplificación administrativa y la disminución de cargas a los ciudadanos para garantizar un mejor servicio y cumplimiento de los fines de interés general que se atribuyen a las Administraciones públicas. A tal efecto, se establecen unas normas de funcionamiento del registro comunes a las distintas

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demarcaciones hidrográficas con la creación de la nueva Oficina del Registro de Aguas, a quien corresponde su custodia y gestión, y se desarrolla la Base central de datos, ahora denominada Base Central del Agua, como instrumento que se nutre de la información contenida en los mencionados registros, ofrece una visión del conjunto de la utilización de las aguas en todo el territorio español. En segundo lugar, el RD 670/2013, regula los criterios que determinan la gravedad de las infracciones en materia de dominio público hidráulico, estableciendo una primera categorización en función de si se ha visto o no afectada la calidad del agua, y aportando reglas que permiten un mayor grado de objetivación de la sanción.

En lo que hace a los aspectos meramente organizativos y otros que afectan a la planificación, como en ocasiones anteriores dejamos reseñadas las novedades por vía de simple enumeración: RD 296/2013, de 26 de abril, establece la composición, estructura y funcionamiento del **Consejo del Agua de la Demarcación Hidrográfica de Melilla**; RD 295/2013, de 26 de abril, establece la composición, estructura y funcionamiento del **Consejo del Agua de la Demarcación Hidrográfica de Ceuta**; RD 255/2013, de 12 de abril, establece la composición, estructura y funcionamiento del **Consejo del Agua de la Demarcación Hidrográfica del Júcar** y modifica diversas normas relativas al ámbito y constitución de dicha demarcación hidrográfica y de la Confederación Hidrográfica del Júcar; RD 285/2013, de 19 de abril, aprueba el **Plan Hidrológico de la parte española de la Demarcación Hidrológica del Miño-Sil**; RD 355/2013, de 17 de mayo, aprueba el **Plan Hidrológico de la Demarcación Hidrográfica del Guadalquivir**; RD 354/2013, de 17 de mayo Aprueba el **Plan Hidrológico de la parte española de la Demarcación Hidrográfica del Guadiana**; RD 478/2013, de 21 de junio, aprueba el **Plan Hidrológico de la parte española de la Demarcación Hidrográfica del Duero**; RD 400/2013, de 7 de junio, aprueba el **Plan Hidrológico de la Demarcación Hidrográfica del Cantábrico Oriental**; RD 399/2013, de 7 de junio, aprueba el **Plan Hidrológico de la Demarcación Hidrográfica del Cantábrico Occidental**; RD 740/2013, de 30 de septiembre, aprueba el **Plan Hidrológico de la Demarcación Hidrográfica de Melilla**, RD 739/2013, de 30 de septiembre, aprueba el **Plan Hidrológico de la Demarcación Hidrográfica de Ceuta**.

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En materia de **Puertos**, son meramente reseñables las modificaciones introducidas por La **Ley Orgánica 9/2013, de 20 de diciembre, de control de la deuda comercial en el sector público**, en su Disposición final segunda modificó los artículos 166, 177, 178, 181, 190 y 214 del Texto Refundido de la Ley de Puertos del Estado y de la Marina Mercante aprobado por RDL Legislativo 2/2011, de 5 de septiembre (TRLPEMM), relativos (i) a la estructura de costes de las Autoridades Portuarias para garantizar el principio de autosuficiencia económico-financiera; (ii) los valores de los terrenos y las aguas del puerto; (iii) y diversas previsiones relativas al cálculo de la tasas por aprovechamientos del dominio público y servicios portuarios.

2.2 En materia de obras públicas

En noviembre de 2013 el Ministerio de Fomento hizo público el documento para la presentación institucional y participación pública del *Plan de Infraestructuras, Transporte y Vivienda PITVI (2012-2024)*. Ya en el número correspondiente a 2012 de las presentes crónicas, dábamos cuenta de la intención del Gobierno de acometer la elaboración de un plan de infraestructuras que sustituyese al actual Plan Estratégico de Infraestructuras y Transportes 2005-2020 (PEITT), adaptándolo a las nuevas circunstancias y tendencias del deteriorado escenario económico. Realmente es difícil extraer conclusiones precisas del documento hecho público ahora, dada su generalidad y escasa concreción de las actuaciones, no obstante lo cual, damos cuenta de los datos que resultan del mismo.

En cuanto a los propósitos del PITVI, se declaran los siguientes cinco objetivos: (i) mejorar la eficiencia del sistema global de transporte; (ii) contribuir al desarrollo equilibrado de la economía; (iii) promover una movilidad sostenible; (iv) reforzar la cohesión territorial y social de todo el Estado; y (v) favorecer la intermodalidad para mejorar la integración funcional del sistema de transporte. Para ello, se proponen tres grandes programas de actuación: Programa de regulación, control y supervisión; Programa de gestión y prestación de servicios; y Programa de actuación inversora. Cada uno de estos programas se desarrolla en varios subprogramas y líneas de actuación estratégica.

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En lo que hace a los parámetros financieros, el documento reconoce la importancia de la inversión pública en infraestructuras como elemento dinamizador de la economía y el aumento de la productividad, lo que no obstante no impide reconocer que las restricciones presupuestarias como consecuencia de las obligaciones de cumplimiento de objetivos de déficit público imponen una revisión, priorización y selección de las inversiones. Ello unido al alto grado de incertidumbre económica, determina que el Plan contemple tres escenarios de inversión futuros, que en definitiva suponen una horquilla de inversión de entre 119.720 millones de euros en el escenario desfavorable y 144.826 millones de euros en el escenario optimista. Con pocas diferencias entre escenarios, a las políticas de transporte se destina algo más del 90% de estos recursos, repartiéndose el resto entre las de vivienda, y otras actuaciones, de carácter transversal o no imputables directamente a estos sectores. En lo que hace a las fuentes de financiación, vagamente señala el documento que se apuesta por la diversificación de las fuentes de inversión *que impulse proyectos eficientes y rentables por sí mismos*. Sí parece claro el mayor peso que ahora adquiere la aportación privada en la financiación, que supondrá en torno a un 16 por ciento del volumen, poniendo de manifiesto un cambio de paradigma que, según el propio documento, *se traduce en que las Administraciones Públicas evolucionan de ser un proveedor directo a ser un comprador y regulador de servicios, con el objetivo no de realizar una serie de obras o prestar una serie de servicios directamente, sino de garantizar que éstos sean ejecutados y prestados en las mejores condiciones posibles.*

Al margen de lo anterior, es preciso citar por su evidente incidencia sobre las infraestructuras públicas, determinadas medidas contempladas en el **RD 233/2013, de 5 de abril, por el que se regula el Plan Estatal de fomento del alquiler de viviendas, la rehabilitación edificatoria, y la regeneración y renovación urbanas, 2013-2016**. Entre los diversos programas que contempla la norma, resultan de interés las medidas encaminadas a subvencionar actuaciones de rehabilitación y la regeneración y renovación urbanas, como las obras de urbanización o reurbanización de espacios públicos y, en su caso, de edificación en sustitución de edificios demolidos, dentro de ámbitos de actuación previamente delimitados. Estas obras se realizarán con la finalidad de mejorar los tejidos residenciales, y recuperar funcionalmente conjuntos históricos, centros urbanos, barrios degradados y núcleos rurales.

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3. LEGISLACIÓN EN EL ÁMBITO DE LAS COMUNDIADES AUTÓNOMAS

3.1 En materia de bienes

Previsiones relativas al régimen general de los bienes públicos.

Por **Decreto-Legislativo 4/2013, de 17 de diciembre, del Gobierno de Aragón**, se aprobó el Texto Refundido de la Ley del Patrimonio de Aragón. Es curioso que la refundición no venga impuesta en este caso por una lenta e inevitable obsolescencia de la norma, sino más bien por la importancia cualitativa de tres modificaciones llevadas a cabo en poco tiempo, pues la Ley 5/2011, de 10 de marzo, de Patrimonio de Aragón contaba con apenas tres años de vigencia hasta que la refundición se ha hecho necesaria. Las sucesivas modificaciones de Ley de Patrimonio en gran medida estaban condicionadas por las necesidades de racionalización del gasto público y el sector público empresarial, de las que ya dimos cuenta en números anteriores, por lo que basta ahora su cita y remisión a lo allí expuesto: Decreto-Ley 1/2011, de 29 de noviembre y Ley 4/2012, de 26 de abril, ambas normas sobre medidas urgentes de racionalización del sector público empresarial y Ley 2/2012, de 23 de febrero, relativa a la regulación del patrimonio empresarial.

Por su parte, el **Decreto Ley 1/2013, de 1 de marzo,** modifica la Ley 14/2003, de 10 de abril, de Patrimonio de la Generalitat Valenciana, que también en este caso está directamente relacionada con la necesidades de obtención de ingresos públicos en aras al cumplimiento del objetivo de estabilidad presupuestaria. Las modificaciones que se llevan a cabo pueden resumirse del siguiente modo: a) se flexibiliza del procedimiento de adjudicación directa en los aprovechamientos y explotaciones de bienes, en los supuestos en los que por sus peculiaridades, la limitación de la demanda, la urgencia resultante de acontecimientos imprevisibles o la singularidad de la operación, proceda acudir a esta figura jurídica; b) se amplia hasta 30 años el plazo máximo para la explotación directa de bienes; y c) se contempla la posibilidad de subastar al alza o a la baja en la enajenación de los bienes inmuebles que no se consideren necesarios para el adecuado desarrollo de las funciones de servicio público propias de esta Administración.

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Previsiones relativas al régimen jurídico a distintas categorías de bienes públicos.

En materia de **carreteras**, en la Comunidad Autónoma de Galicia se ha aprobado la Ley 8/2013, de 28 de junio, de Carreteras, derogando la anterior norma de 1994. Según se deduce directamente del preámbulo de la norma, la nueva regulación viene impuesta por los avances técnicos en el campo de la ingeniería de carreteras, la necesidad de recurrir a innovadores instrumentos para financiar la ejecución de las infraestructuras, los cambios en la estructura organizativa de la Comunidad, así por la necesidad de completar el régimen vigente, sin necesidad de recurrir supletoriamente al Reglamento Estatal en la materia y la adaptación a la normativa sectorial en contratación pública, ordenación del territorio, urbanismo y evaluación ambiental.

Por otra parte, diversas normas autonómicas han venido referidas al aprovechamiento del subsuelo, tanto en materias que se refieren propiamente a las **minas,** como en lo que se refiere a los **hidrocarburos.**

En primer lugar, **por Decreto-Ley 9/2013, de 17 de diciembre, de la Junta de Andalucía** se articulan los procedimientos necesarios para la reapertura de la Mina de Aznalcóllar, que en sus cuatro artículos: (i) declara de utilidad pública e interés social los derechos e intereses patrimoniales derivados de determinados permisos de investigación; (ii) formula una reserva a favor de la Comunidad Autónoma de la actividad extractiva en el área que se determina; (iii) fija los efectos temporales de la reserva; y (iv) convoca un concurso público *internacional* para la explotación de la mina. Desde luego que esta parca regulación contrasta con el extenso preámbulo de la norma, muy volcado en justificar el título competencial autonómico, que llega a incluir una desabrida crítica a la pasividad del Estado fundada en que *la tardanza estatal en aprobar una norma legal básica en materia de minas hace que se mantenga vigente una legislación estatal inadaptada al régimen constitucional de distribución de competencias de la vigencia de la Ley de Minas de 1973.*

En segundo lugar, en lo que hace a las normas autonómicas en materia de **hidrocarburos**, dos normas del período han venido a prohibir en similares términos y en el

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ámbito de sus respectivos territorios, la técnica conocida, *técnica de fractura hidráulica como técnica de investicación y extracción de gas no convencional*, conocida como "fracking". Se trata de la **Ley de Cantabria 1/2013, de 15 de abril, y Ley Foral de Navarra 30/2013**, de 15 de octubre, que con apoyo fundamental en los títulos competenciales sobre medio ambiente y ordenación del territorio y con justificación en el principio de precaución por los desconocidos efectos perjudiciales que contra la naturaleza y los recursos de la Comunidad Autónoma tendría la citada técnica, establecen la prohibición del "fracking" el ámbito de sus respectivos territorios.

En cuanto a los **montes,** cabe dar cuenta del **Decreto 58/2013, de 3 de mayo**, por el que se aprueba el Plan de Acción Territorial Forestal de la Comunidad Valenciana, así como del **Decreto 13/2013, de 26 de febrero,** por el que se regula el procedimiento administrativo para la realización de determinados aprovechamientos forestales y otras actividades en la Comunidad Autónoma de Extremadura.

3.2 En materia de obras públicas

En lo que hace al desarrollo de nuevas infraestructuras, cabe destacar **la Ley Ley 3/2013, de 20 de mayo, de impulso y ordenación de infraestructuras de telecomunicaciones de Galicia**. La Ley tiene por objeto el impulso y la ordenación de las infraestructuras de telecomunicaciones en la Comunidad Autónoma, estableciendo el marco y las condiciones que permitan su despliegue y desarrollo de una manera ordenada, eficiente y respetuosa con el medio ambiente, el paisaje, el entorno y el patrimonio cultural. En cuanto a su estructura, se desarrolla a lo largo de seis títulos, bajo los siguientes rótulos: "Disposiciones generales"; "Principios rectores de la intervención de las Administraciones públicas de Galicia para el fomento y la ordenación de las infraestructuras de telecomunicaciones y las redes públicas de comunicaciones electrónicas"; "Instrumentos de ordenación y de planificación de las infraestructuras de telecomunicaciones"; "Normas de protección del entorno, el paisaje, el medio ambiente y el patrimonio cultural; "Régimen jurídico de la inspección, infracciones y sanciones en materia de fomento y ordenación de las telecomunicaciones en Galicia"; y a "Consejo Asesor para las Telecomunicaciones y el Desarrollo Digital de Galicia". Por su parte, también en materia de infraestructuras es

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preciso dejar reseñada la aprobación en la Comunidad Aragonesa **del Decreto 190**/2013, de 17 de diciembre, por el que se aprueba el Plan especial de carreteras 2013-14, como instrumento de planificación de este sector del dominio público en el marco de la planificación económica y territorial de la Comunidad Autónoma.

4. JURISPRUDENCIA

Varios pronunciamientos constitucionales referidos a Leyes estructurales del sistema patrimonial público en el periodo considerado, todos ellos desestimatorios de las pretensiones de las CCAA recurrentes y sobre cuestiones sobre las que el TC tiene ya una asentada *ratio decidendi*.

En primer lugar, la **STC 94/2013**, de 23 de abril desestima el recurso interpuesto por Interpuesto por el Gobierno de Aragón en relación con la constitucionalidad de los siguientes artículos de la **Ley 33/2003, de 3 de noviembre, del Patrimonio de las Administraciones Públicas (LPAP)**: art. 139 ("Aportación a juntas de compensación"), art. 189 ("Comunicación de actuaciones urbanísticas"), art. 190 ("Ejecución del planeamiento"), art. 191 ("Régimen urbanístico de los inmuebles desafectados") y la Disposición adicional decimonovena ("Gestión del Patrimonio de la Vivienda"). Lo que en definitiva viene a plantearse por la Comunidad Autónoma es la falta de encaje de las materias tratadas en tales artículos con el título competencial esgrimido por el Estado -bases del régimen jurídico de las administraciones Públicas- cuando realmente la materia urbanística corresponde en exclusiva a las CCAA. Al respecto, recuerda el TC que el art. 149.1.18 CE habilita al Estado para dictar la normativa básica común a todas las Administraciones públicas en materia de régimen patrimonial, por lo que, desde una perspectiva general, no cabe formular objeciones a la delimitación competencial de la disposición recurrida. En lo relativo a la posible incidencia de esa regulación básica en ámbitos materiales sectoriales de competencia autonómica, recuerda también su ya asentada doctrina en la que se afirma que la titularidad pública de un bien no habilita *per se* para el ejercicio de competencias sustantivas que resulten ajenas al ámbito de competencias constitucionalmente delimitado. Por tanto, la propiedad pública de un bien es separable del ejercicio de aquellas competencias que lo tienen como soporte natural o físico: la titularidad

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de un bien no otorga competencias, y las facultades inherentes al dominio sobre un bien sólo pueden ser legalmente utilizadas en atención a los fines públicos que justifican su propiedad pública y respetando siempre el orden constitucional de competencias. Por ello, si bien es cierto que la regulación del régimen patrimonial de los bienes públicos es susceptible de afectar al ámbito material urbanístico, ello que no determina automáticamente la inconstitucionalidad de los preceptos correspondientes, siempre que no estemos ante normas urbanísticas en sentido propio o ante el ejercicio competencias urbanísticas de carácter sustantivo.

En materia de **aguas,** por STC 104/2013, de 25 de abril, se dirime el recurso interpuesto por Interpuesto por el Gobierno de la Generalidad de Cataluña en relación con determinados preceptos del **RDL 1/2001, de 20 de julio, por el que se aprueba el texto refundido de la Ley de Aguas (TRLA).** El primero de ellos es la adición de un nuevo apartado 2 al artículo 127, en relación con el contenido del informe previo que las entidades locales han de emitir con ocasión de la construcción de obras hidráulicas, del que según su redacción, las entidades locales afectadas se limitaran a informar sobre aspectos relacionados con el planeamiento urbanístico. La Generalidad de Cataluña cuestiona que el informe municipal al que el precepto hace referencia haya de limitarse exclusivamente a aspectos relacionados con el planeamiento urbanístico, lo que resultaría excluyente del resto de competencias municipales y contrario al principio de autonomía local de los arts. 137 y 140 CE. En ese contexto, lo que se plantea es un problema relativo al carácter de la intervención municipal respecto a obras de infraestructura promovidas por otra Administración Pública, razón por la que el TC recuerda la doctrina que ya tiene declarada y que afirma que *del reconocimiento de la autonomía municipal no puede colegirse que la intervención del municipio en los casos de ejecución de obras que deben realizarse en su término tenga que traducirse, sin excepción alguna, en el otorgamiento de la correspondiente licencia urbanística*, *pues cuando existan razones que así lo justifiquen, es admisible que la intervención municipal se articule por medio de otros procedimientos adecuados para garantizar el respeto a los planes de ordenación urbanística*. La segunda cuestión sometida a debate por la Generalidad en su impugnación se refiere al nuevo apartado 5 del art. 16 bis TRLA según el cual: "El Gobierno, por real decreto, oídas las Comunidades Autónomas, fijará el ámbito territorial de cada demarcación hidrográfica que

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será coincidente con el de su plan hidrológico". Al parecer de la Generalidad, la determinación del ámbito territorial de las demarcaciones hidrográficas en el caso de las aguas intracomunitarias ha de corresponder a las Comunidades Autónomas competentes. Planteada la controversia en tales términos ha de entenderse resuelta por la doctrina de la STC 149/2012, de 5 de julio, FJ 7, en el que ya se dejó sentado que el precepto se limita a habilitar al Gobierno para configurar demarcaciones hidrográficas que –conforme al criterio adoptado por el legislador de seguir considerando noción central la cuenca hidrográfica– son de competencia estatal, esto es, las demarcaciones hidrográficas de carácter intercomunitario.

Finalmente, en materia de **montes,** las SSTC 84/2013, de 11 de abril y 97/2013, de 23 de abril desestiman los recursos interpuestos por el Consejo de Gobierno de La Rioja y el Consejo de Gobierno de Castilla y León respectivamente, en relación con los 50.1 y 54 bis, de la **Ley de Montes** en la redacción dada por la Ley 10/2006, de 28 de abril. La nueva redacción del art. 50.1 establece un régimen de prohibición para el cambio de uso forestal al menos durante 30 años de los terrenos incendiados, lo que al parecer de los recurrentes un exceso en la regulación de lo básico; mientras que el nuevo art. 54 bis limita la circulación de los vehículos a motor por pistas forestales situadas fuera de la red de carreteras, con lo que el Estado estaría fijando aspectos propios de las materias de turismo y ocio que corresponden a las CCAA. Gira, por tanto el recurso en torno a dos cuestiones fundamentales: el mantenimiento y restauración de los terrenos incendiados y el denominado uso social del monte. Interesa destacar del razonamiento vertido por el TC cuando se trata de deslindar materias competenciales altamente imbricadas, como las que se concitan en el asunto, en relación con lo cual afirma que *en materias como la ordenación del territorio, el urbanismo, el medio ambiente y la ordenación de los recursos forestales existen profundas interacciones. Para determinar cuál es la materia y, por tanto, el título competencial de referencia es necesario atender tanto a la finalidad como al contenido de la norma o, dicho de otra forma, a las técnicas legislativas utilizadas para alcanzar dicha finalidad"*, de lo que concluye el TC que *resulta el título competencial más específico y, por ello, prevalente, el que atribuye al Estado la competencia exclusiva en materia de legislación básica sobre montes y aprovechamientos forestales"*. Con tal razonamiento, del

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análisis concreto de la cuestión controvertida resulta finalmente la desestimación del recurso interpuesto por las CCAA.

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RESPONSABILITÀ DA ATTO LECITO E PRINCIPIO DI COMPENSAZIONE

(Ottobre 2014)

Elisa SCOTTI

INDICE

1. INTRODUZIONE

2. LE PRINCIPALI IPOTESI DI RESPONSABILITÀ PER ATTO LECITO PREVISTE DALLA LEGGE

2.1 Premessa

2.2 Espropriazione

2.3 Danni derivanti dall'esecuzione di opere pubbliche

2.4 Autotutela

2.5 Danni da vaccinazioni obbligatorie

2.6 Ingiusta detenzione ed errore giudiziario

3. LA RESPONSABILITÀ DA ATTO LECITO COME PRINCIPIO GENERALE OPERANTE PER LE LESIONI DI DIRITTI FONDAMENTALI

3.1. Premessa

3.2 L'affermazione del principio

3.3 Il modus operandi

4. LA NATURA GIURIDICA DELLA RESPONSABILITA' DA ATTO LECITO

4.1 Premessa

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4.2 Natura pubblicistica
4.3 La responsabilità da atto lecito come responsabilità di diritto comune
4.4 La riparazione del danno
5. IL PRINCIPIO DI COMPENSAZIONE

1. INTRODUZIONE

Il problema della responsabilità da atto lecito dell'Amministrazione (altrimenti esplorato, secondo una scelta non solo di nomenclatura, come problema dell'indennità e del principio indennitario nel diritto amministrativo) concerne le ipotesi in cui quest'ultima, nel legittimo svolgimento della propria attività e, dunque, nel perseguimento di interessi generali, arrechi danni a singoli individui o collettività che, a fronte del generale beneficio derivante dall'agire pubblico, risultino gravati dei relativi oneri.

Se, nell'ordinamento italiano, per alcune di tali situazioni - come espropriazioni, vaccinazioni obbligatorie, revoca di provvedimenti – sussistono specifiche norme che pongono in capo all'Amministrazione il dovere di riparare i danni in tal modo arrecati, non si riscontra, invece, una regola generale né esiste un regime giuridico uniforme. E ciò lascia insoluto il problema, teorico e pratico, concernente il se tale dovere sussista laddove la legge non lo preveda espressamente e quale ne sia la disciplina.

A tale problema non sembrano aver dato, sino ad oggi, risposte univoche né la giurisprudenza né la dottrina.

Effettivamente, come si vedrà, in giurisprudenza si sono di recente avute notevoli aperture, anche grazie all'influenza delle corti europee, ma ciò ha riguardato solo ipotesi specifiche, senza toccare la questione nei suoi termini generali. Per parte sua la dottrina ha

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attribuito una considerazione solo marginale al tema: pochi sono gli studi ad esso dedicati, generalmente non trattato nei manuali di diritto amministrativo[1].

Tale esito può ricondursi ad una pluralità di ragioni, tra cui, al fondo, la generale visione dei rapporti tra cittadino e amministrazione, caratterizzati, secondo le tesi tutt'ora dominanti (ma non indiscusse), dalla prevalenza degli interessi generali sui diritti individuali, destinati ad *affievolirsi* ad *interessi legittimi* di fronte al potere pubblico e a perdere, così, la loro essenza di diritti (cd. teoria della degradazione)[2].

Tale lettura ha innanzitutto condizionato la preliminare e più generale questione della responsabilità da atto *illecito* dell'Amministrazione impedendone, sino alla fine degli anni novanta, l'applicazione ad un'importante parte della sua attività, quella incidente sui cd. interessi pretensivi[3]. Ed ancor oggi, nonostante, sotto la spinta del diritto europeo, il

[1] Attestano invece una più recente inversione di tendenza i manuali di G. CORSO, *Manuale di diritto amministrativo*, Torino, 2006 e G. FALCON, *Lezioni di diritto amministrativo*, Padova, 2013; per i più recenti studi che esprimono la medesima tendenza si rinvia al par. 3.

[2] Per le diverse visioni del rapporto tra potere pubblico e diritto soggettivo ALB. ROMANO, *Amministrazione, principio di legalità e ordinamenti giuridici*, in *Dir. amm.*, 1999, 111 ss; F. G. SCOCA, *Contributo alla figura dell'interesse legittimo*, Milano, 1990; L. FERRARA, *Situazioni soggettive nei confronti della pubblica amministrazione*, in *Diz. dir. pubbl.* diretto da S. CASSESE, Milano, 2006; A. ROMANO TASSONE, *Situazioni giuridiche soggettive*, in *Enc. dir.*, 1998, *ad vocem.*

[3] E cioè gli interessi ad ottenere provvedimenti favorevoli dall'amministrazione, quali il permesso di costruire, le autorizzazioni commerciali, l'aggiudicazione di una gara pubblica. A tali interessi si contrappongono, nella sistematica italiana, gli interessi oppositivi, a conservare integra la propria sfera giuridica rispetto all'esercizio di poteri *lato sensu* ablativi, quali quelli di espropriazione. Mentre agli interessi legittimi pretensivi, secondo le ricostruzioni prevalenti, non corrisponderebbero diritti soggettivi (e per questo, a lungo, sono stati ritenuti non meritevoli di tutela risarcitoria, riservata, nei rapporti con la P.A., solo alla lesione di diritti soggettivi), gli interessi oppositivi poggerebbero su diritti soggettivi, presentandosi come diritti affievoliti nella relazione con il potere pubblico (F. G. SCOCA, *Contributo alla figura dell'interesse legittimo*, cit.; ma per una differente lettura v. ALB. ROMANO, *Amministrazione, principio di legalità e ordinamenti giuridici*, cit. e ID., *Potere amministrativo e situazioni giuridiche soggettive*, in AA.VV, *Interesse pubblico tra politica e amministrazione*, a cura di A.

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principio di responsabilità si sia affermato anche in tali ambiti[4], l'idea della prevalenza dell'interesse generale su quello individuale (complice peraltro la congiuntura economica) induce la giurisprudenza ad orientamenti generalmente restrittivi, tesi a creare una vera e propria "rete di contenimento" della responsabilità[5].

I medesimi ostacoli teorici e pratici hanno impedito, *a fortiori*, di riferire il principio di responsabilità all'attività *lato sensu* lecita, cioè conforme al diritto, dell'amministrazione.

Non è un caso se il più aperto e sentito dibattito sul tema, teso all'affermazione della responsabilità da atto lecito dello Stato, si riscontra nelle trattazioni di inizio Novecento, quando ancora non si era affermata la teoria della degradazione dei diritti a meri interessi di fronte al potere pubblico. Ammettendosi infatti, in quel contesto culturale,

CONTIERI, F. FRANCARIO, M. IMMORDINO, A. ZITO, vol. II, Napoli, 2010, 405 ss., che rappresenta entrambe le ipotesi in termini di diretta relazione tra diritti e poteri pubblici, pur senza negare, tra le specificità del sistema italiano, la rilevanza in entrambi i casi dell'interesse legittimo quale strumento concettuale di rappresentazione della *diversa* e *ulteriore* tutela del diritto rispetto al potere, azionabile nel procedimento e nel processo amministrativo).

[4] L'impulso al cambiamento è provenuto dal diritto comunitario che ha introdotto la prima ipotesi di responsabilità per lesione di interessi legittimi pretensivi con la Direttiva n. 89/665/CEE del 21.12.1989 (recepita nel nostro ordinamento dall'art. 13 l. n. 142/92); questa ha disposto che gli Stati membri, nell'ipotesi di violazione delle norme comunitarie in materia di appalti, prevedano la possibilità di "accordare un risarcimento danni alle persone lese" (art. 2 n. 1). Fuori dall'ambito degli appalti la responsabilità dell'Amministrazione per lesione di interessi legittimi pretensivi è stata poi generalizzata con una assai nota pronuncia della Cassazione a Sezioni Unite, la n. 500/1999.

[5] Sul punto si rinvia ai Reports 2011 in materia di responsabilità nel diritto italiano M. CAFAGNO, M. FAZIO, *La responsabilità della pubblica amministrazione da provvedimento,* P. CHIRULLI, *Responsabilità da comportamento;* G. FALCON, F. CORTESE, *La responsabilità civile dell'amministrazione: giurisdizione e processo,* tutti nella pertinente sezione di questo Network.

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la convivenza tra poteri pubblici e diritti individuali, emergeva la necessità di riparare i danni ad essi arrecati, pur se causati nel legittimo perseguimento dell'interesse generale[6].

Fu l'affermarsi, di lì a poco, della teoria della degradazione che condusse a negare tale necessità e ad escludere, a monte, la stessa possibilità di configurare una vera e propria responsabilità dell'Amministrazione per atto lecito: le specifiche previsioni di indennizzo venivano, così, relegate al campo delle ipotesi tassative ed eccezionali.

Questa posizione, per lungo tempo dominante, è oggi oggetto di un ripensamento e di un dibattito, innanzitutto dottrinario.

Diversi fattori, giuridici e non giuridici, hanno determinato la riapertura della questione.

Sul piano giuridico la spinta più forte al cambiamento deriva dall'influenza, sul diritto interno, della CEDU e dell'ordinamento dell'UE che rafforza la tutela dei diritti di fronte al potere pubblico (e di fronte allo stesso legislatore) e che torna a sollecitare una visione dei rapporti tra Amministrazione e cittadino in cui i poteri pubblici convivono con i diritti dei singoli, non annientati ma anzi rafforzati, nel sistema italiano, dall'interesse legittimo[7].

A ciò corrisponde, sul piano extragiuridico, una sempre maggiore e diffusa consapevolezza del necessario rispetto di tali diritti che si manifesta, su un piano di fatto, nell'opposizione ad attuare decisioni pubbliche che li pregiudicano, generando disuguaglianze inaccettabili[8]. Si pensi alla localizzazione di opere pubbliche nocive o

[6] Per tutti, Santi ROMANO, *Principii di diritto amministrativo*, Milano, terza ed., 1912 (ma analogamente le precedenti ed. del 1906 e del 1901); sul punto v. *amplius* par. 3.1.

[7] Sul punto v. gli scritti di ALB. ROMANO, cit.

[8] Sul punto, in generale, S. CASSESE, *Teoria e pratica dell'eguaglianza*, in *Giorn. dir. amm.*, 2000, 1156 ss.; con riguardo all'urbanistica, P. STELLA RICHTER, *Natura ed efficacia dei piani regolatori*, in *Giust.Civ.*, 1964, I, 1971;

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rischiose, quali discariche, centrali energetiche o reti di trasporto. Sempre più frequentemente i soggetti svantaggiati da simili opere ne impediscono la realizzazione attraverso blocchi e proteste e talvolta l'Amministrazione per attuarle ricorre, in alternativa alla *manu militari,* alla concessione di misure tese a ristorare i danni patiti.

Per tali vie la questione della responsabilità da atto lecito torna, con un rinnovato interesse e con una rinnovata attualità, all'attenzione della dottrina e della giurisprudenza italiana, dando luogo ad una rivisitazione degli orientamenti sino ad oggi prevalsi.

Emerge così l'esigenza di chiarire le coordinate di fondo dell'istituto, che riguardano i seguenti interrogativi: la responsabilità da atto lecito dello Stato è un principio generale o sussiste solo nelle ipotesi tipiche? La responsabilità da atto lecito è vera responsabilità governata dalla regola dell'integrale riparazione del danno subito ovvero è una misura di solidarietà pubblica? Esiste un principio di compensazione quale misura di proporzionalità dell'azione amministrativa che impone all'Amministrazione di distribuire con equilibrio vantaggi e svantaggi derivanti dalla sua azione?

L'analisi che segue illustrerà brevemente lo stato della legislazione, della giurisprudenza e della dottrina italiana sulla questione, nelle declinazioni ora indicate.

In questo report non si affronterà il tema della responsabilità da atto lecito *delle istituzioni europee*.

E' tuttavia importante sottolineare come sia il Tribunale di prima istanza sia la Corte di Giustizia si siano pronunciati sulla questione, il primo affermando la seconda negando l'esistenza di un principio generale di responsabilità da atto lecito[9].

e, in relazione ai poteri emergenziali, R. CAVALLO PERIN, *Il diritto amministrativo dell'emergenza per fattori esterni all'amministrazione pubblica*, in *Dir. amm.*, 2005, 777 ss

[9] Trib., Grande Sezione, *Fiamm c. Consiglio d'Europa e altri*, 14 dicembre 2005, T-69/00.

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Tuttavia, di là da tale negazione, con riferimento ad un caso di danni da atto legislativo, la Corte ha riconosciuto che, in generale, la responsabilità da atto lecito può ricorrere allorché il legislatore espressamente la preveda, evidenziando «*l'ampio potere di valutazione discrezionale di cui eventualmente dispone il legislatore comunitario per accertare se, al momento dell'adozione di un dato atto normativo, la presa in considerazione di taluni effetti dannosi derivanti da tale adozione giustifichi la previsione di talune forme di risarcimento*»[10].

Inoltre, la Corte, sia pur incidentalmente, sembra aver affermato l'esistenza del principio generale di responsabilità per le lesioni dei diritti fondamentali, nel loro nucleo essenziale. Al riguardo ha innanzitutto ribadito la sua «*costante giurisprudenza*» secondo cui «*i diritti fondamentali fanno integralmente parte dei principi generali di cui la Corte assicura il rispetto*».

E «*quanto al diritto di proprietà e alla libertà di esercizio delle attività professionali*» ha poi richiamato i loro limiti intrinseci derivanti dall'interesse generale, ricordando che «*non costituiscono tuttavia prerogative assolute, ma vanno considerati alla luce della loro funzione sociale. In questo modo … se possono essere apportate restrizioni all'applicazione del diritto di proprietà e al libero esercizio di un'attività professionale, in particolare nell'ambito di un'organizzazione comune di mercato, ciò avviene a condizione che tali restrizioni rispondano effettivamente ad obiettivi di interesse generale perseguiti dalla Comunità e non costituiscano, rispetto allo scopo perseguito, un intervento sproporzionato ed inaccettabile, tale da ledere la sostanza stessa dei diritti così garantiti*»[11].

[10] Corte Giust., Grande Sezione, *Fiamm e Fedon c. Consiglio d'Europa e altri*, 9 settembre 2008, C-120/06 e C-121/06, § 181.

[11] Corte Giust., Grande Sezione, *Fiamm e Fedon c. Consiglio d'Europa e altri*, 9 settembre 2008, C-120/06 e C-121/06.

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Dalla particolare rilevanza di tali diritti la Corte ha derivato però anche l'importante conclusione secondo cui «*un atto normativo comunitario la cui applicazione determina restrizioni del diritto di proprietà e del libero esercizio di un'attività professionale che causerebbero un danno sproporzionale e inaccettabile alla sostanza stessa di tali diritti, per l'appunto nel caso in cui eventualmente non fosse stato previsto un risarcimento che possa evitare o attenuare tale danno, potrebbe far sorgere la responsabilità extracontrattuale della Comunità*».

E' questa una presa di posizione assai importante, attenta al bilanciamento tra opposte istanze, individuali e generali ma anche alla natura e alla portata delle posizioni coinvolte: essa àncora infatti la possibilità di configurare la responsabilità da atto lecito alla compressione di un diritto fondamentale in misura eccedente i suoi limiti intrinseci e rimette invece alla discrezionalità delle istituzioni la decisione in ordine alla compensazione dei danni derivanti da limiti interni al diritto, in quanto coerenti con la sua funzione sociale.

Questa linea di distinzione tracciata dalla Corte sembra costituire una valida prospettiva per esaminare la questione nel nostro diritto interno. Pertanto, nel prosieguo del presente contributo si considereranno innanzitutto i casi di azioni lecite da cui derivano danni a diritti fondamentali nel loro nucleo essenziale: per essi si tenterà di prospettare, sulla scia delle indicazioni della Corte, l'operatività di un principio generale di responsabilità da atto lecito (par. 2,3,4). Si tenterà poi di ipotizzare, per le lesioni "minori" dei medesimi diritti, riconducibili alla loro funzione sociale, un principio di compensazione, fondato sul principio di proporzionalità che governa l'esercizio dei poteri discrezionali (par. 5).

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2. LE PRINCIPALI IPOTESI DI RESPONSABILITÀ PER ATTO LECITO PREVISTE DALLA LEGGE

2.1. Premessa

Molteplici sono le ipotesi di responsabilità per atto lecito tipizzate dalla legge italiana. Di esse, in questo paragrafo, si illustreranno le principali che riguardano l'indennizzo a fronte di provvedimenti ablativi di beni patrimoniali; l'indennità per i danni derivanti dall'esecuzione di opere pubbliche; le indennità di autotutela; la riparazione dei danni da vaccinazioni obbligatorie; la riparazione dell'ingiusta detenzione e dell'errore giudiziario.

2.2. Espropriazione

La tipica e più risalente ipotesi di responsabilità per atto lecito è costituita dall'espropriazione per pubblica utilità. La sua disciplina è delineata innanzitutto a livello costituzionale, dall'art. 42, comma 3 Cost. e dall'art. 1, Prot. I, della Convenzione europea dei diritto dell'uomo, come interpretato dalla relativa Corte[12]: entrambe le norme pongono, a presidio del proprietario espropriato, la garanzia indennitaria.

La regola è poi ribadita, a livello legislativo, dal d.p.r. 8 giugno 2001 n. 327 (Testo unico in materia di espropriazione per pubblica utilità) che, sul punto, si pone in linea di continuità con le precedenti previsioni: la regola indennitaria era già posta espressamente dalla l. 25 giugno 1865, n. 2359, art. 39 (che rifletteva l'identico principio posto dall'art. 29 dello Statuto Albertino del 1848) [13] ed è stata poi confermata, sul piano

[12] C.edu, *Lithgow c. Regno Unito*, 7.3.1986 (§ 120).

[13] Si noti peraltro che le origini della garanzia sono da collocarsi, secondo le prevalenti letture, nel diritto romano; P. BONFANTE, *Corso di diritto Romano.* II, Milano, 1966.

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diacronico, dalle molteplici successive norme che nel corso tempo hanno ridefinito variamente i criteri per la determinazione delle indennità di esproprio[14].

Nonostante la chiarezza del principio, controverso ne è l'ambito operativo e, a monte, non chiara è la stessa nozione di espropriazione. Si discute, in particolare, se vi rientrino solo i fatti formalmente ablativi della proprietà o anche le cd. espropriazioni di fatto, privative o limitative di facoltà comprese nel contenuto essenziale del diritto. Secondo una linea di tendenza espansiva, la nostra Corte costituzionale ha sposato criteri definitori ampi e sostanziali e ha ricondotto alla nozione di espropriazione (e alla connessa garanzia indennitaria) ogni limitazione singolare di facoltà rientranti nel contenuto essenziale del diritto di proprietà – come l'imposizione di vincoli di inedificabilità assoluta a tempo indeterminato (o comunque ultraquinquennali)[15] -.

Per converso, l'ambito dell'espropriazione risulta limitato dalla nozione di *conformazione* della proprietà. Non ogni vincolo ha infatti carattere espropriativo ed è soggetto alla relativa disciplina ma occorre distinguere tra vincoli espropriativi e vincoli conformativi della proprietà tesi, cioè, a definire il regime giuridico di un'intera categoria di beni (quali i vincoli ambientali, storico-artistici[16] e quelli espressione di poteri regolatori della proprietà, tra cui i discussi vincoli urbanistici derivanti dalla zonizzazione del territorio o dalla destinazione di aree a verde attrezzato, a parco, a zona agricola di pregio, a

[14] La sequenza di tali norme verrà illustrata più oltre in questo medesimo paragrafo.

[15] Per tutte, C. Cost. n. 55/68.

[16] Si v. le Corte Cost. n. 56/68 e n. 106/76 (sul carattere non espropriativo dei vincoli paesistici); n. 417/1995 (sulle limitazioni imposte al godimento di beni ambientali geologici o ecologici); n. 202/74, (riguardo ai limiti relativi ai beni storico-artistici); n. 219/74 (per i divieti di caccia di animali selvatici); n. 529/95 e n. 419/96 (sulla dichiarazione della pubblicità di tutte le acque superficiali e sotterranee). Il principio è ribadito da Corte cost. n. 179/99 secondo cui «*non sono indennizzabili i vincoli posti a carico di intere categorie di beni, e tra questi i vincoli urbanistici di tipo conformativo, e i vincoli paesistici*».

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parcheggi[17]). Secondo i prevalenti ma non incontestati orientamenti solo i vincoli espropriativi sono indennizzabili mentre non lo sarebbero i vincoli conformativi. Il fondamento di tale discrimine è rintracciato nella nostra Costituzione che, da un lato, disciplina l'espropriazione (art. 42, terzo comma, Cost.) e, dall'altro, prevede che la legge possa imporre limiti alla proprietà al fine di assicurarne la funzione sociale, ponendo l'obbligo di corrispondere un indennizzo per il sacrificio imposto solo con riferimento all'espropriazione (art. 42, secondo comma, Cost.).

A fronte di tali tendenze restrittive dell'ambito della garanzia indennitaria, si rinvengono a livello europeo opposte tendenze espansive: stando agli orientamenti della Corte europea dei diritti dell'uomo, la nozione di "*bene"* sottoposto alla garanzia dell'art. 1 Prot. I, comprende qualsiasi interesse patrimoniale oggetto di un diritto o anche solo di una legittima aspettativa: al diritto di proprietà si affianca l'avviamento commerciale[18], il credito[19], e la legittima aspettativa[20] riguardante ad es. la semplice domanda di registrazione di un marchio commerciale[21], o la legittima aspettativa di conservazione, anche ove fondata su una situazione di mero fatto ed antigiuridica, se negligentemente tollerata delle Autorità di uno Stato, quale l'interesse patrimoniale del proprietario di una baracca costruita in

[17] Sul punto, F. SAITTA, *Espropriazione per pubblica utilità*, Report 2011, nella pertinente sezione di questo Network.

[18] C.edu, *Affaire Iatridis c. Grèce*, 25 marzo 1999, § 54.

[19] C.edu, *Nicola Silvestri c. Italie*, 9 giugno 2009, § 70.

[20] C.edu, *Plalam Spa c. Italie*, 18 maggio 2010, § 36; *Grande Chambre*, *Kopecky* v. *Slovacchia*, 28 settembre 2004, § 52; *Dragon c. France*, 28 settembre 2004, § 68.

[21] C.edu, *Grande Chambre*, *Anheuser-Busch Inc. c. Portugal*, 17 gennaio 2007, § 78.

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modo abusivo in prossimità di una discarica[22] o l'interesse dell'acquirente dell'opera d'arte acquistata in violazione delle norme sulla prelazione storico-artistica[23].

E' dunque alla luce di tale giurisprudenza della Corte europea che si completa la definizione dell'ambito oggettivo di operatività della tutela indennitaria, che giunge a coprire, nel suo complesso, l'integrità del patrimonio dell'individuo rispetto ad ingerenze privative da parte dello Stato.

Nella prospettiva della CEDU deve poi definirsi anche la concreta portata della garanzia riparatoria, che deriva dal criterio di quantificazione degli indennizzi. Muovendo dal valore venale posto dall'art.39, l. n. 2359/1865, il nostro legislatore ha infatti elaborato, nel tempo, criteri, generali e speciali, intesi per lo più ad abbattere l'ammontare dell'indennizzo. Tale abbattimento, che ha condotto ad indennizzi molto al di sotto del valore di mercato, è stato ritenuto, in una prima fase, costituzionalmente legittimo dalla nostra Corte[24]; la quale, con la sentenza n. 283/1993, ha affermato che «*l'indennità di*

[22] C.edu, *Oneryildiz c. Turquie*, 17 gennaio 2007, confermata da *Grande Chambre*, *Oneryildiz c. Turquie*, 30 novembre 2004; C.edu, *Hamer c. Belgique*, 27 novembre 2007.

[23] Si fa riferimento al noto caso Van Gogh (C.edu, *Grande Chambre*, *Beyeler c. Italie*, 5 gennaio 2000, n. 33202) in cui, nonostante la violazione delle norme sulla prelazione da parte del privato, si è ritenuto contrario al principio del legittimo affidamento il ritardato esercizio dei poteri di prelazione da parte dello Stato e si è accordata la prevalenza alla legittima aspettativa dell'acquirente. Sulla originalità del percorso seguito dalla Corte europea, privo di riscontri testuali nella Convenzione (che non tutela *aliunde* alcun altro diritto patrimoniale) e sganciato dalle tradizioni costituzionali degli Stati membri, v. M.L. PADELLETTI, *La tutela della proprietà nella Convenzione europea dei diritti dell'uomo*, Milano, 2003, 60 ss..

[24] Si eccettuano le l. n. 865/1971 («Legge sulla casa») e n. 10/1977 («Norme per l'edificabilità dei suoli»), che, sulla base della qualificazione del titolo edilizio come "concessione", hanno tentato di ricondurre l'indennità di esproprio al valore agricolo e hanno condotto alla nota sentenza n. 5/1980 con cui la Corte costituzionale ha censurato l'estensione del criterio del valore agricolo alle aree con vocazione edilizia incluse nella perimetrazione urbana, ritenendo lo *ius edificandi* compreso nel diritto di proprietà e necessario far riferimento, per la determinazione dell'indennità, «*al valore del bene in relazione alle sue caratteristiche essenziali, fatte palesi dalla potenziale utilizzazione economica di esso, secondo legge*».

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espropriazione non garantisce all'espropriato il diritto ad un'indennità esattamente commisurata al valore venale del bene», benché «*l'indennità stessa non può essere (in negativo) meramente simbolica od irrisoria, ma deve essere (in positivo) congrua, seria, adeguata*»; e ha rimesso al legislatore, nella sua discrezionalità, « *il coordinamento e bilanciamento con il pubblico interesse, peraltro tenendo anche conto delle esigenze della finanza pubblica* »[25].

I parametri adottati dal nostro legislatore sono apparsi invece in contrasto con l'art.1 Prot.1 CEDU e, in particolare, con il criterio dell'integrale riparazione del pregiudizio effettivamente subito, delineato dalla Corte europea nell'interpretazione di tale norma. A seguito delle plurime condanne riportate dallo Stato italiano[26], la Corte costituzionale, con la sentenza 348/2007, ha quindi rivisto le proprie posizioni dichiarando l'illegittimità dell'art. 37 del d.p.r. n. 327/2001 (norma identica a quella dichiarata costituzionalmente legittima nel 1993) in quanto «*prevede un'indennità oscillante, nella pratica, tra il 50 ed il 30 per cento del valore di mercato del bene*» e in quanto non presenta il «*ragionevole legame*» con il valore venale, prescritto dalla giurisprudenza della Corte di Strasburgo.

Il criterio dell'indennità di esproprio è stato così riscritto, per le aree edificabili, dalla l. n. 244/2007 (Legge finanziaria 2008), art. 2 co. 89. Il nuovo testo dell'art. 37 prevede che «*1. L'indennità di espropriazione di un'area edificabile è determinata nella misura pari al valore venale del bene. Quando l'espropriazione è finalizzata ad attuare*

[25] Per precedenti sentenze espressive di tale visioni di fondo si v. C. cost., n. 216/91, in cui si è affermato che «*purché l'indennizzo non divenga apparente o simbolico, esistono ampi margini di discrezionalità legislativa, dato che il valore effettivo del bene viene in rilievo non quale misura, ma come criterio di riferimento per la determinazione dell'indennizzo. Il legislatore, pertanto, legittimamente può contemperare il criterio del valore venale con meccanismi conformativi dell'indennizzo a diverso criterio, purché l'ammontare così determinabile non scenda sotto il livello di congruità*».

[26] C.edu, I, *Scordino c. Italia*, 29 luglio 2004, confermata da C.edu, Grande Chambre, 29 marzo 2006.

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interventi di riforma economico-sociale, l'indennità è ridotta del venticinque per cento. 2. Nei casi in cui è stato concluso l'accordo di cessione, o quando esso non è stato concluso per fatto non imputabile all'espropriato ovvero perché a questi è stata offerta un'indennità provvisoria che, attualizzata, risulta inferiore agli otto decimi di quella determinata in via definitiva, l'indennità è aumentata del dieci per cento».

Ma la Corte costituzionale è andata poi oltre le condanne della Corte europea e, facendo proprio il criterio della riparazione integrale del pregiudizio, della valutazione in concreto dello stesso e della considerazione dell'uso del bene, ha dichiarato, con sentenza n. 181/2011, l'incostituzionalità del criterio dell'indennità di esproprio per le aree agricole determinato nella misura pari al «*valore agricolo medio corrispondente al tipo di coltura effettivamente praticato*» (art. 40, d.p.r. n. 327/2001). Con tale sentenza la Corte costituzionale ha rigettato il metodo tabellare di determinazione dell'indennità che «*prescinde dall'area oggetto del procedimento espropriativo ignorando ogni dato valutativo inerente ai requisiti specifici del bene*» e «*ha carattere inevitabilmente astratto che elude il "ragionevole legame" con il valore di mercato, prescritto dalla giurisprudenza della Corte di Strasburgo e coerente, del resto, con il "serio ristoro" richiesto dalla giurisprudenza consolidata di questa Corte*».

2.3. Danni derivanti dall'esecuzione di opere pubbliche

Accanto all'esproprio, tra le più risalenti ipotesi di responsabilità da atto lecito si colloca la riparazione dei danni causati a privati non espropriati nell'esecuzione di opere pubbliche. L'ipotesi è oggi prevista dall'art.44 d. lgs. n. 325/2001 (t.u. delle disposizioni in

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materia di espropriazione per pubblica utilità), che ha il suo precedente nell'identica previsione contenuta nell'art. 46 della l. 25 maggio 1865, n. 2359[27].

Viene qui in rilievo la cd. espropriazione di valore larvata, di cui la giurisprudenza ha individuato i presupposti generali: un'attività lecita della P.A. (che altrimenti si rientrerebbe nella sfera della responsabilità per fatto illecito); l'imposizione di una servitù o la produzione di un danno che si concreti nella apprezzabile perdita o diminuzione del diritto; il nesso di causalità tra l'esecuzione dell'opera pubblica ed il danno[28].

Il più controverso di tali presupposti riguarda il danno e i suoi caratteri, a definire il confine tra pregiudizi non indennizzabili e addossati, sulla base del principio di solidarietà, al privato proprietario, e pregiudizi, viceversa, indennizzabili. Si è così ritenuto necessario, per l'indennizzabilità, non un qualsivoglia nocumento ma una sensibile compressione delle obiettive possibilità di utilizzazione del bene, da valutarsi in concreto avendo riguardo alla tipologia di bene, alla destinazione della zona e al suo utilizzo effettivo; non, dunque, una semplice diminuzione del valore di uso o di scambio delle proprietà ma *"l'annullamento e/o la notevole menomazione di qualcuna delle facoltà costituenti il nucleo essenziale del diritto dominicale"*[29].

Con questi limiti la giurisprudenza ha fatto varia applicazione dell'indennità in questione, ritenendo indennizzabili un'ampia tipologia di danni permanenti alle proprietà immobiliari: i rumori e le esalazioni derivanti da svincoli e opere stradali[30], la perdita di

[27] Ai sensi dell'art.44, d.lgs. n. 325/2001, *"E' dovuta una indennità al proprietario del fondo che, dalla esecuzione dell'opera pubblica o di pubblica utilità, sia gravato da una servitù o subisca una permanente diminuzione di valore per la perdita o la ridotta possibilità di esercizio del diritto di proprietà".*

[28] Cass. civ., sez. I, 14 dicembre 2007, n. 26261

[29] Cass. civ., sez. un., 11 giugno 2003, n. 9341

[30] Cass. civ., sez. III, 2 aprile 2001, n. 4790

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luce, immissioni, vibrazioni derivanti dalla costruzione di un viadotto autostradale[31]; la svalutazione dell'immobile sottostante, l'impossibilità di effettuare sopraelevazioni, il pericolo derivante dalla caduta di oggetti o veicoli causati dalla costruzione di un viadotto[32]; gli ostacoli all'accesso alla via pubblica[33]; il pregiudizio all'irrigazione di un fondo agricolo[34]; la limitata accessibilità ai fabbricati e la ridotta commerciabilità degli appartamenti[35]; la sopraggiunta interclusione del fondo[36]; le ingerenze nella colonna di spazio sovrastante il fondo idonee a recare pregiudizio, derivanti dalla costruzione di viadotti stradali[37]; l'invasione dello spazio aereo in verticale del fabbricato con diminuzione del valore dell'immobile[38]; la riduzione della capacità abitativa[39].

Per converso, in quest'ottica, non sono apparsi indennizzabili i pregiudizi meramente transitori, di scarsa rilevanza, diffusi, che non superino la normale tollerabilità o che ineriscano a quelle utilità marginali quali l'insolazione, l'areazione, l'ampiezza della veduta panoramica o la maggiore difficoltà di accesso alla pubblica via o altri vantaggi

[31] Cass. civ., sez. II, 9 marzo 1988, n. 2366

[32] Cass. civ., sez. I, 25 settembre 1990, n. 9693

[33] Cass. civ., 24 dicembre 1990, n. 12146

[34] Cass. civ., sez.I, 22 gennaio 1993, n. 778

[35] Cass. civ., 12 dicembre 1996 n. 11080

[36] Cass. civ., sez. I, 24 aprile 1997, n. 3614

[37] Cass. civ., 2sez. un., 6 febbraio 1999, n. 104

[38] Cass. civ., sez. un., 11 giugno 2003, n. 934

[39] Cass. civ., n. 12146/1990

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preesistenti e amenità che di per sé non incidono sul contenuto essenziale del diritto di proprietà e sempreché non generino una perdita apprezzabile di valore[40].

2.4. Autotutela

Ulteriori ipotesi di indennizzo dei danni subiti dai privati a causa di attività lecite dell'Amministrazione si rinvengono a proposito dei provvedimenti di autotutela.

Il quadro è frammentario: manca, al riguardo, una norma generale e si riscontrano invece specifiche previsioni. Esse riguardano, in particolare, il recesso dagli accordi, la revoca dei provvedimenti amministrativi, l'annullamento dei provvedimenti incidenti su rapporti contrattuali o convenzionali. Nessuna tutela indennitaria è invece prevista per le conseguenze pregiudizievoli dell'annullamento d'ufficio di provvedimenti che non incidono su assetti consensuali.

Se si eccettuano gli indennizzi per il recesso previsti dal diritto dei contratti della pubblica amministrazione sin dall'ottocento[41], si tratta di previsioni relativamente recenti introdotte, nella loro *ratio* prevalente, a tutela del legittimo affidamento del privato. Esse appaiono peraltro profondamente innovative: e non solo del diritto positivo ma anche delle posizioni della giurisprudenza che, in mancanza di espresse previsioni, non è autonomamente giunta ad affermare il principio indennitario[42], ma si è limitata ad

[40] Cass. civ. sez. I, Sent., 03-07-2013, n. 16619

[41] Si v. l'art. 345 dell'allegato F della l. n. 2248/1865 e ora l'art. 134, d.lgs. n. 163/2006, Codice dei contratti pubblici ai sensi del quale *"La stazione appaltante ha il diritto di recedere in qualunque tempo dal contratto previo il pagamento dei lavori eseguiti e del valore dei materiali utili esistenti in cantiere, oltre al decimo dell'importo delle opere non eseguite".*

[42] Cons. Stato, sez. V, 01/08/2001, n.4184.

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affermare, a garanzia del privato rispetto all'esercizio dei poteri di autotutela, un particolare onere motivazionale. Si è così ritenuto, secondo i consolidati orientamenti, che la motivazione dei provvedimenti di autotutela debba evidenziare sia la sussistenza di un interesse pubblico specifico, concreto ed attuale, alla cessazione degli effetti del provvedimento sia la prevalenza di tale interesse sul contrapposto interesse del privato alla conservazione del provvedimento[43].

Da tempo l'introduzione dell'obbligo di indennizzo era stata invece sollecitata dalla dottrina, facendo leva sia sulla natura sostanzialmente ablatoria degli atti di autotutela (e in particolar modo della revoca) sia sul principio del legittimo affidamento[44].

In questo quadro, il nostro legislatore ha proceduto in modo episodico.

Le prime norme hanno riguardato l'autotutela incidente sugli accordi. Innanzitutto, con l'approvazione della legge generale sul procedimento amministrativo (l. 8 agosto 1990, n. 241) è stata introdotta la regola dell'indennizzo in caso di recesso dagli accordi conclusi dall'Amministrazione nel corso del procedimento al fine di sostituire con l'accordo il provvedimento o di determinarne convenzionalmente il contenuto discrezionale[45]. Alla l. 30 dicembre 2004 n. 311 (finanziaria 2005) risale poi la previsione dell'indennizzo per

[43] Cons. Stato, sez. VI, 12/05/1998, n.692.

[44] Per tutti, F. MERUSI, *Buona fede e affidamento nel diritto pubblico, dagli anni trenta all'alternanza*, Milano, Giuffrè, 2001; ma già v. ID., *L'affidamento del cittadino*, Milano, Giuffrè, 1970; e, più di recente M. IMMORDINO, *Revoca degli atti amministrativi e tutela dell'affidamento*, Torino, 2009; L. GIANI, *Funzione amministrative e obblighi di correttezza. Profili di tutela del privato*, Napoli, 2005.

[45] Tali accordi sono regolati dall'art. 11 della l. n.241/1990 che al comma 4 prevede che *"Per sopravvenuti motivi di pubblico interesse l'amministrazione recede unilateralmente dall'accordo, salvo l'obbligo di provvedere alla liquidazione di un indennizzo in relazione agli eventuali pregiudizi verificatisi in danno del privato".*

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l'ipotesi di annullamento d'ufficio di provvedimenti incidenti su rapporti contrattuali o convenzionali[46].

Con riferimento agli atti unilaterali l'estensione della regola indennitaria è avvenuta successivamente, in occasione delle più ampie modifiche apportate alla legge generale sul procedimento amministrativo (l. n.241/90) dalla l. 11 febbraio 2005 n. 15[47], e ha riguardato solo quella particolare tipologia di atti di autotutela costituita dai provvedimenti di revoca[48].

Analoga previsione non è stata invece riferita all'annullamento di ufficio di provvedimenti non incidenti su assetti convenzionali, che costituisce un'ipotesi di ritiro dell'atto ad oggi non coperta dalla garanzia indennitaria. Per essa vale solo, ove ne sussistano i presupposti, la garanzia della responsabilità per fatto illecito fondata, nel nostro sistema, sulla colpa dell'Amministrazione anche in relazione alla lesione del legittimo affidamento.

[46] Dispone l'art. 1 comma 136 l. n. 311 del 2004: *"Al fine di conseguire risparmi o minori oneri finanziari per le amministrazioni pubbliche, può sempre essere disposto l'annullamento di ufficio di provvedimenti amministrativi illegittimi, anche se l'esecuzione degli stessi sia ancora in corso. L'annullamento di cui al primo periodo di provvedimenti incidenti su rapporti contrattuali o convenzionali con privati deve tenere indenni i privati stessi dall'eventuale pregiudizio patrimoniale derivante, e comunque non può essere adottato oltre tre anni dall'acquisizione di efficacia del provvedimento, anche se la relativa esecuzione sia perdurante*".

[47] Tale legge ha introdotto in seno alla 241/90, agli art. 21 bis ss, la disciplina generale del provvedimento amministrativo comprensiva anche dei poteri di autotutela.

[48] Dispone l'art. 21-*quinquies* l. n. 241/90, introdotto dall'art. 14 l. n. 15/2005: "*Per sopravvenuti motivi di pubblico interesse ovvero nel caso di mutamento della situazione di fatto o di nuova valutazione dell'interesse pubblico originario, il provvedimento amministrativo ad efficacia durevole può essere revocato da parte dell'organo che lo ha emanato ovvero da altro organo previsto dalla legge. La revoca determina la inidoneità del provvedimento revocato a produrre ulteriori effetti. Se la revoca comporta pregiudizi in danno dei soggetti direttamente interessati, l'amministrazione ha l'obbligo di provvedere al loro indennizzo".*

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Peraltro il legislatore, nelle ipotesi in cui ha previsto l'indennizzabilità dei pregiudizi derivanti dalla rimozione del provvedimento, sembrerebbe aver posto una regola molto ampia, priva di condizioni e limiti. Ciononostante, la giurisprudenza tende a subordinare l'indennizzo alla lesione del legittimo affidamento; in particolare, per la revoca, ritiene necessaria la titolarità di una posizione soggettiva «consolidata» in capo all'interessato ed esclude l'indennizzo ad es. nel caso di decorso di un breve lasso di tempo tra provvedimento favorevole e sua revoca[49] o laddove il destinatario della revoca abbia, con il proprio comportamento, concorso a determinare le condizioni della revoca[50].

Solo per la revoca incidente su rapporti negoziali il legislatore ha delineato precisi presupposti: in tal caso l'indennizzo, oltre ad esser limitato *"al solo danno emergente", "tiene conto sia dell'eventuale conoscenza o conoscibilità da parte dei contraenti della contrarietà dell'atto amministrativo oggetto di revoca all'interesse pubblico, sia dell'eventuale concorso dei contraenti o di altri soggetti all'erronea valutazione della compatibilità di tale atto con l'interesse pubblico"*[51].

2.5. Danni da vaccinazioni obbligatorie

Nel campo dei diritti non patrimoniali, la riparazione dei danni derivanti da vaccinazioni obbligatorie costituisce la principale ipotesi di responsabilità per atto lecito. E ciò soprattutto per le modalità con cui è stata affermata, che le conferiscono un valore paradigmatico.

[49] TAR Lazio, Roma, Sez. II *quater*, 30 maggio 2008, n. 5317.

[50] Cons. Stato, Sez. V, 17 settembre 2008, n. 4424.

[51] Art. 21 *quinquies*, comma 1-*bis*, l. n. 241/90, introdotto dall'art. 13 comma 8-*duodevicies* d.l. 31 gennaio 2007, n.7

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Prevista da una legge (l. 25 febbraio 1992, n. 210, *Indennizzo a favore dei soggetti danneggiati da complicanze di tipo irreversibile a causa di vaccinazioni obbligatorie, trasfusioni*), la sua genesi si riconduce ad un intervento della Corte costituzionale che, con sentenza 22 giugno 1990 n. 307, ha dichiarato l'illegittimità costituzionale della l. 4 febbraio 1966 n. 51 nella parte in cui non prevedeva un'equa indennità a favore dei soggetti che avessero subito gravi compromissioni della salute a causa della vaccinazione antipoliomelitica ivi prevista come obbligatoria. A tale conclusione la Corte è giunta attraverso un percorso innovativo volto a superare la mancata previsione costituzionale di una garanzia indennitaria per i danni derivanti da trattamenti sanitari obbligatori (la sola garanzia espressamente prevista dalla nostra Costituzione è la riserva di legge[52]). Nella chiave di lettura proposta dalla Corte è infatti il principio di solidarietà (art. 2 Cost.) ad imporre il riconoscimento al danneggiato di un'indennità tesa a riparare la lesione subita: sarebbe infatti contrario ai doveri di solidarietà se la collettività si disinteressasse del sacrificio sopportato dal singolo per l'interesse generale senza compensarlo adeguatamente.

Secondo il medesimo paradigma argomentativo, con successive pronunce, la Corte ha esteso il dovere di riparare le lesioni gravi della salute anche alle ipotesi di vaccinazioni non obbligatorie ma solo raccomandate dall'autorità sanitaria[53]: ha così dichiarato l'illegittimità costituzionale dell'art. 1, comma 1, della legge n. 210/1992, nella parte in cui non prevedeva l'erogazione dell'indennizzo in relazione a danni causati dai vaccini contro l'epatite b e contro il morbillo, rosolia e parotite, tutti non obbligatori ma oggetto di campagne di incentivazione da parte dello Stato[54].

[52] Ai sensi dell'art. 32, comma 2 Cost. *"Nessuno può essere obbligato a un determinato trattamento sanitario se non per disposizione di legge"*.

[53] C. cost. n. 27/1998 e n. 107/2012.

[54]Ai sensi dell'art. 2, l. n. 210/1992 l'indennizzo consiste in un assegno non reversibile determinato secondo i parametri tabellari delle pensioni privilegiate per il settore pubblico, di cui alla tab. B, della l. 177/1976 (*Collegamento delle pensioni del settore pubblico alla dinamica delle retribuzioni. Miglioramento del trattamento*

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Si noti che nel porre il principio di solidarietà a fondamento della garanzia indennitaria, la Corte ha riconosciuto al legislatore un'ampia discrezionalità nella quantificazione della misura riparatoria nel limite della sua *non irrisorietà*[55], generando, sul punto, una presa di distanza di una parte della dottrina per le sottocompensazioni in tal modo legittimate ed ormai non più ammesse, come si è visto, neppure nella sfera dei diritti patrimoniali[56]

In ogni caso, a prescindere dal problema della quantificazione dell'indennizzo, importanti sono le ricadute di tale giurisprudenza costituzionale. Sul piano applicativo, proprio con riferimento ai danni causati da vaccinazioni incentivate dalle autorità pubbliche, la giurisprudenza ha fatto riferimento, a presidio del diritto alla salute, ad un *generale principio indennitario operante a prescindere da espresse previsioni normative*. Stando ad un minoritario orientamento tale principio sarebbe di applicazione diretta; e ciò in controtendenza rispetto alle posizioni prevalenti che affermano, invece, la necessità di sollevare la questione di legittimità costituzionale della legge che non prevede forme di tutela indennitaria[57].

Sul piano teorico, come si vedrà[58], tali orientamenti hanno offerto un rinnovato fondamento alle tesi del carattere non tipico ma generale della responsabilità da atto lecito

di quiescenza del personale statale e degli iscritti alle casse pensioni degli istituti di previdenza), integrati dall'indennità integrativa speciale di cui alla l. 324/1959 (*Miglioramenti economici al personale statale in attività ed in quiescenza*). È invece previsto un assegno *una tantum* se dall'evento derivi la morte del danneggiato.

[55] C. cost. n.107/2011.

[56] Sul punto v. *amplius* par. 4.4.

[57] Tribunale di Ancona 21 dicembre 2010 n. 214.

[58] Si v. il par. 3.

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dell'Amministrazione, a fronte del sacrificio imposto a diritti fondamentali di rilevo costituzionale.

2.6. Ingiusta detenzione ed errore giudiziario

Ulteriori ipotesi di responsabilità per atto lecito nel campo dei diritti non patrimoniali sono previste a proposito dell'errore giudiziario e dell'ingiusta detenzione.

Si tratta di ipotesi di responsabilità dello Stato originate da provvedimenti giurisdizionali e, dunque, peculiari, rispetto a quelle, sopra esaminate, derivanti da provvedimenti amministrativi, ma comunque emblematiche del sistema italiano di garanzia dei diritti fondamentali lesi nel legittimo esercizio del potere pubblico, *lato sensu* inteso.

Esse trovano fondamento nell'art. 24, co. 4, Cost., che rimette alla legge di determinare «*le condizioni e i modi per la riparazione degli errori giudiziari*».

La riparazione dell'errore giudiziario costituisce l'ipotesi più risalente. Già prevista dall'abrogato Codice Rocco è oggi disciplinata dall'art. 647 c.p.p. che attribuisce a colui che sia stato prima condannato e poi prosciolto in sede di revisione, il diritto ad una riparazione «*commisurata alla durata dell'eventuale espiazione della pena o internamento e alle conseguenze personali e familiari derivanti dalla condanna*».

La riparazione dell'ingiusta detenzione, disciplinata dagli artt. 314 ss. c.p.p., è stata invece introdotta nel nostro ordinamento solo di recente, con l'approvazione, nel 1988, del nuovo codice di procedura penale. Essa ha riferimento ai casi di custodia cautelare subita illegittimamente e consiste nel diritto ad un'«*equa riparazione*», per il quale è tuttavia posto un limite massimo, di circa cinquecentomila euro[59].

[59] L'importo, originariamente limitato a cento milioni di lire è stato innalzato dalla l. 479/99 a 516.456,90 euro.

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La legittimità di tali discipline - protette, sino a tempi non lontani, dai restrittivi orientamenti della nostra giurisprudenza costituzionale[60] - deve oggi rapportarsi all'art. 5 CEDU che, nel sancire il *diritto alla libertà e alla sicurezza*, prevede casi e presupposti per la privazione della libertà e, come disposizione di chiusura, prevede che «*Ogni persona vittima di arresto o di detenzione in violazione di una delle disposizioni del presente articolo ha diritto ad una riparazione*».

L'applicazione di tale norma ha determinato vari interventi della Corte europea nei confronti dello Stato italiano, che hanno riguardato innanzitutto l'ambito operativo della riparazione. Così si è ravvisata la violazione dell'art.5 nella mancata previsione di una riparazione per l'illegittimo trattenimento dello straniero in un centro di accoglienza temporanea in attesa di espulsione[61], o in un centro per immigrati[62]; per il superamento dei termini di durata massima della custodia cautelare[63]; per il ritardato riconoscimento dell'indulto[64].

Sulla scorta della giurisprudenza europea, anche la Corte costituzionale ha mutato il proprio approccio e ha più volte esteso l'ambito applicativo della riparazione per

[60] Emblematica al risguardo è ad es. la posizione in passato assunta dalla Corte costituzionale a proposito della mancata previsione di una riparazione per il cittadino ingiustamente sottoposto a misure cautelari (come si è visto l'art. 344 c.p.p. che la prevede è stato introdotto nel 1988). La Corte infatti, ha ritenuto legittima tale scelta del legislatore, pur riconoscendo nell'art. 24, co. 4, Cost. un «*principio di altissimo valore etico e sociale che rappresenta un coerente sviluppo del dettame generale volto alla tutela dei diritti inviolabili dell'uomo*» (Corte Cost., n. 1/1969).

[61] C.edu, *Zeciri c.Italia*, 4 agosto 2005.

[62] C.edu, *Seferovic c. Italia*, 1 dicembre 2009.

[63] C.edu, *Picaro c. Italia*, 9 giugno 2005; C.edu, *Luberti c. Italia*, 23 febbraio 1984.

[64] C.edu, *Pilla c. Italia*, 2 marzo 2006.

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l'ingiusta detenzione e per l'errore giudiziario[65]. E una parte della dottrina e della giurisprudenza ha proposto di interpretare l'art. 314 c.c.p. alla luce dell'art. 5 Cedu, al fine di colmare il divario esistente tra le due norme. Gli orientamenti prevalenti[66], rimangono tuttavia radicati nel ritenere necessario l'intervento additivo della Corte costituzionale[67].

Il medesimo problema di non coerenza della disciplina nazionale con la CEDU sembra oggi riguardare il tetto massimo previsto per la riparazione dell'ingiusta detenzione[68] (che non sussiste invece per la riparazione dell'errore giudiziario[69]). Secondo la C.edu va infatti risarcito ogni tipo di pregiudizio, materiale o morale, che la vittima non avrebbe subìto ove non vi fosse stata la violazione dell'art.5 Cedu; e i giudici nazionali, sul punto, non devono interpretare in maniera rigorosa l'onere della prova, tenendo conto, in concreto, di tutte le circostanze rilevanti quali le condizioni della detenzione, l'impatto sulla

[65] C. cost., n. 301/1996, con riferimento all'erroneo ordine di esecuzione (sul punto v. C.edu, 8 dicembre 2003, *Pezone c. Italia*); C. cost., n. 109/1999 sull'arresto in flagranza e sul fermo dell'indiziato; C. Cost. n. 219/2008 sul necessario proscioglimento dalle imputazioni nel merito per l'ottenimento dell'equa riparazione.

[66] Su questi orientamenti v. M. GIALUZ, *Commento all'art. 5*, in *Commentario breve alla Convenzione Europea dei diritti dell'uomo*, cit., 171.

[67] In proposito sembra opportuno ricordare che con le sentenze n.348 e n.349/07 la Corte costituzionale ha riconosciuto alla Cedu il rango di norma *"sub-costituzionale"*, cioè subordinata alla Costituzione, ma sovraordinata alla legge (e dunque parametro interposto di costituzionalità) ai sensi dell'art. 117, primo comma, Cost. (*"La potestà legislativa è esercitata dallo Stato e dalle Regioni nel rispetto della Costituzione, nonchè dei vincoli derivanti dall'ordinamento comunitario e dagli obblighi internazionali").*

[68] Sul punto v. E. TURCO, *La riparazione per ingiusta detenzione dopo la recente riforma: profili sistematici e prospettive evolutive*, in *Cass. Pen.*, 2002, 3255.

[69] In tema di errore giudiziario le condanne si assestano su somme tendenzialmente elevate, generando un opposto problema di contenimento ed evidenziando l'irragionevolezza del limite posto alla riparazione dell'ingiusta detenzione. Sul punto si v. da ultimo, Cass. Pen., Sez. III, 12 novembre 2010, n. 40094.

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salute, la professione la vita sociale e familiare del danneggiato[70]. La questione, con riferimento alla normativa italiana, è peraltro, ad oggi, impregiudicata.

3. LA RESPONSABILITÀ DA ATTO LECITO COME PRINCIPIO GENERALE OPERANTE PER LE LESIONI DI DIRITTI FONDAMENTALI

3.1. Premessa

A fronte delle molteplici ipotesi tipiche di responsabilità da atto lecito, questione ricorrente è se sussista o meno un principio generale applicabile fuori dai casi contemplati dalla legge. Il problema riguarda soprattutto le lesioni della sfera non patrimoniale degli individui poiché, come si è visto, per le lesioni della sfera patrimoniale (proprietà *in primis*) tra le previsioni nazionali e l'art. 1 Prot. I CEDU, interpretato alla luce della giurisprudenza della C.edu, vi è una copertura indennitaria pressoché integrale.

Come si mostrerà in questo paragrafo, secondo l'esito di un dibattito avviatosi già alla fine dell'Ottocento e di un più recente percorso giurisprudenziale, tende oggi a ritrovare un suo spazio la tesi che la responsabilità da atto lecito costituisca un principio generale del nostro ordinamento laddove, nell'ambito del legittimo perseguimento di fini pubblici, sia leso un diritto fondamentale costituzionalmente tutelato.

Circa l'operatività di tale principio, secondo le tesi prevalenti, di maggior rigore, si ritiene necessario sollevare la questione di legittimità costituzionale della legge che non prevede la riparazione del diritto pur lecitamente leso; secondo gli orientamenti di maggiore apertura invece il giudice potrebbe condannare l'Amministrazione a riparare il diritto leso

[70] C.edu, *Grande Chambre, Hood c. Regno unito*, 18 febbraio 1999; C.edu, *S.B.C. c. Regno unito*, 19 giugno 2001; C.edu, *Danev. C. Bulgaria*, 2 settembre 2010. *Amplius*, M. GIALUZ, *Commento all'art. 5*, in *Commentario breve*, cit., 172.

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applicando direttamente il principio, a prescindere dal giudizio di costituzionalità della legge.

3.2. L'affermazione del principio

Che la responsabilità da atto lecito dello Stato costituisca una regola generale è stato sostenuto dalla dottrina italiana tra la fine dell'Ottocento e l'inizio del Novecento. L'idea, che incontrava i percorsi di una parte della dottrina europea, in particolar modo tedesca[71], era supportata da un'esigenza pratica di effettività di tutela: e cioè dalla difficoltà di applicare, in concreto, la pur affermata responsabilità dell'Amministrazione, muovendo dalla disciplina civilistica del fatto illecito, fondata sulla colpa: l'impossibilità di sindacare la discrezionalità (anche solo tecnica) dell'Amministrazione si traduceva infatti nell'impossibilità di accertarne la colpa[72].

In risposta a questo problema la dottrina veniva tracciando le linee di una generale responsabilità dell'Amministrazione avente una base diversa dalla colpa ed estesa anche agli atti leciti[73]. La tesi implicava che ad ogni sacrificio speciale imposto all'individuo

[71] Sono in proposito chiare ed esplicite (nei richiami degli stessi Autori) le influenze sugli sviluppi della nostra dottrina le teorie sulla responsabilità di O. MAYER, *Deutsches Verwaltungsrecht*, Leipzig, 1895; contengono espliciti riferimenti all'A. i lavori del Vacchelli, Cammeo, Orlando, Santi Romano, Forti, così come, in senso critico, del Salemi, Rocco e Miele.

[72] Sul punto v. G. CHIRONI, *La colpa nel diritto civile odierno, colpa extracontrattuale*, Torino, 1903, II ed., 481 ss.

[73] SANTI ROMANO, *Principii di diritto amministrativo,* cit.; ID., *Responsabilità dello Stato e riparazione alle vittime degli errori giudiziari,* in *La legge*, 1903, ed ora in *Scritti minori*, II, Milano, 1990, 179 ss.; E. ORLANDO, *Saggio di una nuova teorica sul fondamento della responsabilità civile a proposito della responsabilità diretta dello Stato,* in *Arch. dir. pubbl.,* vol. III, 1893, 356; G. VACCHELLI, *La responsabilità civile della pubblica amministrazione e il diritto comune,* Milano, 1902; F. CAMMEO, *L'azione del cittadino contro la pubblica amministrazione,* in *Giur. it.,* 1905, IV, 24 ss e in part. 99-100 e 107-109.

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corrispondesse la responsabilità dell'Amministrazione: e ciò, secondo alcuni, in base a «*principi di giustizia distributiva e di giustizia riparativa*»[74] e, secondo altri, in virtù della sopravvivenza del diritto nel conflitto con il potere pubblico, sicché «*l'ente pubblico che, facendo uso di un suo potere, impone a un diritto individuale un particolare sacrificio, che non è compreso nei limiti normali di esso … deve risarcirlo con una proporzionata indennità*»[75].

Di qui l'idea di una responsabilità (anche da atto lecito) non limitata ai casi contemplati dalla legge, tra cui la fondamentale ipotesi dell'espropriazione per pubblica utilità, ritenuta paradigmatica ed espressiva di un principio generale.

Tale modello unitario di responsabilità, comprendente il lecito e l'illecito, fu immediatamente rigettato dalla dottrina e dalla giurisprudenza dominanti, come modello privo di un riscontro nel diritto positivo. La responsabilità dell'Amministrazione si è così articolata, nel sistema italiano, in un doppio binario: un primo, riguardante la responsabilità dell'Amministrazione per fatto illecito, fondata sulla colpa e disciplinata dalle generali previsioni del codice civile; un secondo, relativo alle eccezionali e disomogenee ipotesi di responsabilità per fatto lecito contemplate dalla legge e privo di una regola di carattere generale.

In questo quadro, la dottrina ha più volte tentato di affermare un principio generale di responsabilità da atto lecito. Il percorso per lo più seguito è stato quello di desumerlo dalle diverse figure tipiche previste dalla legge. In particolare il riferimento è stato alla disciplina dell'espropriazione per pubblica utilità e a quella concernente la riparazione dei

[74] G. VACCHELLI, *La responsabilità civile della pubblica amministrazione e il diritto comune*, cit., 200.

[75] SANTI ROMANO, *Il diritto pubblico italiano*, Milano, 1988 (ed. postuma, ma databile al 1914, con successive aggiunte e interpolazioni; sul punto v., in quel volume, la *Premessa* di Alberto ROMANO).

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danni derivanti dall'esecuzione di opere pubbliche a proprietari non espropriati[76], facendo leva su interpretazioni estensive di tali norme[77].

Tale proposta ricostruttiva, tuttavia, è stata a lungo limitata a condotte dannose legate alla realizzazione di opere pubbliche o, comunque, alla lesione di interessi patrimoniali, senza giungere a offrire una risposta ai pregiudizi concernenti le lesioni dei diritti della persona.

L'estensione del principio di responsabilità per atto lecito dannoso ai pregiudizi di carattere personale si deve al già menzionato intervento della Corte Costituzionale, la quale, con la sent. n. 307/1990 in tema di danni alla salute derivanti da vaccinazioni obbligatorie, ha ritenuto il trattamento sanitario obbligatorio compatibile con la tutela individuale della salute solo ove correlato ad un'indennità tesa alla riparazione degli eventuali pregiudizi arrecati[78]. A tale conclusione la Corte è giunta richiamandosi al principio costituzionale di solidarietà sociale, che non tollera l'imposizione autoritativa di sacrifici di diritti fondamentali, quali la salute, senza che sorga in capo alla collettività il dovere di riparare tale sacrificio.

Sulla base di questa giurisprudenza la dottrina ha avviato un percorso di revisione degli orientamenti tradizionali, volto ad estendere la tutela indennitaria fuori dai casi espressamente contemplati dalla legge, laddove vi sia la compressione a titolo individuale

[76] Si v., *supra*, par. 2.2. e 2.3.

[77] R. ALESSI, *Responsabilità da atti legittimi*, in *Noviss. dig. it.*, vol. XV, Torino, 1968, 627 ss.

[78] Si v., *supra*, par. 2.4.

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di un diritto fondamentale costituzionalmente protetto, sia esso di carattere patrimoniale o personale[79].

In tali casi si tende oggi a riconoscere che la riparazione del danno sia costituzionalmente dovuta e non rimessa ad una scelta discrezionale del legislatore, trovando fondamento secondo alcuni, nel principio di solidarietà sociale[80] e, secondo altri, nel principio di effettività dei diritti fondamentali, oggi riconosciuti e protetti anche a livello sovranazionale, e nella fondamentale esigenza di tutela che tale riconoscimento postula[81].

3.3. *Il modus operandi*

Se la dottrina e la giurisprudenza prevalenti riconoscono oggi l'operatività di un generale principio indennitario, dubbio è invece, come si è visto[82], il *modus operandi* del principio.

[79] Sul punto si v. R. BIFULCO, *La responsabilità dello Stato per atti legislativi*, Padova, 1999, che coglie il problema dal punto di vista del danno generato dal legislatore, in una attualissima prospettazione della responsabilità di quest'ultimo estesa sia al fatto lecito che al fatto illecito.

[80] G. MANFREDI, *Indennità e principio indennitario in diritto amministrativo*, Torino, 2003; A. CRISMANI, *Le indennità nel diritto amministrativo*, cit.; P. TROIANO, *La cd. responsabilità della p.a. per atti leciti*, in *Quad. Cons. St.*, 2004, 189 ss.

[81] G. CORSO, *La responsabilità della pubblica amministrazione da attività lecita*, cit.; R.CARANTA, *Danni da vaccinazione e responsabilità dello Stato*, in *Resp. civ. e prev.*, 1998, 6, 1352; E. SCOTTI, *Liceità legittimità e responsabilità dell'amministrazione,* Napoli, 2013.

[82] Si v., i diversi orientamenti in tema di vaccinazioni obbligatorie (par. 2.5) e di ingiusta detenzione (par. 2.6).

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In giurisprudenza, stando agli orientamenti maggioritari, al principio non è riconosciuta immediata precettività sicché rimane ferma l'idea della tipicità delle ipotesi di responsabilità da atto lecito: in questi termini il principio dovrà essere fatto valere nell'ambito del giudizio di legittimità costituzionale della legge che consente l'imposizione del sacrificio senza prevedere una garanzia riparatoria[83].

Nelle applicazioni di maggiore apertura, che esprimono un più intenso legame tra garanzia indennitaria e tutela dei diritti fondamentali, la responsabilità da atto lecito è invece estesa oltre le ipotesi tipiche in via interpretativa. Si fa riferimento alle pronunce dei giudici di merito che hanno interpretato estensivamente le pronunce della Corte costituzionale in materia di vaccinazioni incentivate, riconoscendo il diritto all'indennizzo, ex art. 1, l. n. 210/ 1992, a fronte di danni derivanti da vaccinazioni incentivate ma diverse da quelle specificamente oggetto delle pronunce della Corte costituzionale[84].

4. LA NATURA GIURIDICA DELLA RESPONSABILITÀ DA ATTO LECITO

4.1. *Premessa*

Dubbia è la natura giuridica del dovere dell'Amministrazione di riparare i danni arrecati lecitamente ai diritti dei singoli.

[83] Così, in materia di vaccinazioni incentivate, Tribunale di Ancona 21 dicembre 2010 n. 214 (ordinanza di rimessione alla Corte costituzionale, da cui è poi derivata la sent. n. 107/2012, che ha sancito l'illegittimità costituzionale della legge n. 210/1992 per la mancata previsione dell'indennizzo in relazione ai danni causati da taluni vaccini non obbligatori); in materia di ingiusta detenzione v. M. GIALUZ, *Commento all'art. 5*, cit.

[84] Trib. Milano, 13 dicembre 2007, Corte App. Campobasso, 12 giugno 2006, Corte App. Sassari, 5 agosto 2004.

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Due sono le impostazioni in campo: secondo una prima e prevalente lettura tale dovere avrebbe natura pubblicistica e deriverebbe dal principio di solidarietà sociale; stando invece ad una diversa lettura avrebbe natura di vera e propria responsabilità e si fonderebbe sul principio di effettività dei diritti fondamentali.

La questione non ha una rilevanza meramente teorica ma da essa discendono importanti ricadute applicative. La principale concerne l'ammontare della riparazione e, in particolare, se essa debba coprire l'effettivo pregiudizio o se possa limitarsi ad un ristoro discrezionalmente deciso, nel suo *quantum*, dal legislatore o dall'Amministrazione.

4.2. Natura pubblicistica

Secondo una prima tesi l'atto amministrativo legittimo non potrebbe far nascere una vera e propria responsabilità. E ciò, innanzitutto, per il necessario collegamento – riaffermato - tra responsabilità e colpa; e, inoltre, per la mancanza di danni giuridicamente rilevanti nell'ipotesi di legittimo esercizio di poteri pubblici: la massima *qui suo jure utitur neminem laedit* viene in tal modo applicata al diritto pubblico.

Sullo sfondo teorico v'è la già citata teoria della degradazione del diritto soggettivo di fronte al potere pubblico, teoria ancora largamente diffusa nella giuspubblicistica italiana.

Per la cd. responsabilità da atto lecito si afferma così il concetto di *sacrificio* come concetto distinto da *violazione* e si radica l'obbligo indennitario non nello stretto diritto ma, secondo le più risalenti letture, "*nell'equità e nel principio di giustizia distributiva",* visti come canoni etici o, stando alle visioni più recenti, inaugurate dalle menzionate sentenze della Corte Costituzionale in materia di vaccinazioni obbligatorie, nel principio di solidarietà sociale discrezionalmente interpretabile dal legislatore.

Tale orientamento, ad oggi prevalente, nega così la possibilità di *formare un'unica categoria di* responsabilità estesa al lecito e all'illecito e ribadisce la contrapposizione tra

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responsabilità civile della p.a., regolata dal diritto privato, e principio indennitario, regolato dal diritto pubblico[85].

4.3. La responsabilità da atto lecito come responsabilità di diritto comune

Secondo una diversa impostazione i danni generati a diritti fondamentali nell'esercizio legittimo di funzioni pubbliche darebbero luogo ad una vera e propria responsabilità da cui, come si vedrà, deriva un dovere di integrale riparazione del danno, non suscettibile di identificarsi in una misura di solidarietà discrezionalmente determinabile dal legislatore[86].

E' questa un'impostazione che supera la prospettiva dell'affievolimento dei diritti e che, anzi, pone l'accento proprio sul rifiuto dell'idea che, di fronte al potere pubblico, pur legittimamente esercitato, il diritto fondamentale, affievolendo, possa essere compresso senza che sorga un dovere di effettiva riparazione.

Vari sono i fattori che deporrebbero in questo senso.

Innanzitutto v'è la diffusa rivisitazione della responsabilità civile che reca con sé la dequotazione della colpa quale criterio generale di imputazione della responsabilità in favore di una crescente importanza del criterio del rischio[87], anche nell'ambito di una lettura

[85] R. ALESSI, *Responsabilità da atti legittimi*, cit.; P. TROIANO, *La cd. responsabilità della p.a. per atti leciti*, in *Quad. Cons. St.*, 2004, 189 ss.; A. CRISMANI, *Le indennità nel diritto amministrativo*, cit.

[86] R. CARANTA, *Danni da vaccinazione e responsabilità dello Stato*, cit.; E. SCOTTI, *Liceità legittimità e responsabilità dell'amministrazione,* cit.

[87] P. TRIMARCHI, *Rischio e responsabilità oggettiva*, Milano, 1961.

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solidaristica della responsabilità[88]. A tale lettura si affianca la tendenza a superare la tradizionale partizione tra lecito e illecito[89].

Un ulteriore fattore è costituito dal ruolo svolto della Cedu e dell'Unione europea che oggi rafforza, anche rispetto alle stesse Costituzioni nazionali, la tutela dei diritti nei confronti del potere pubblico (di qualsiasi natura esso sia: legislativo, amministrativo e giurisdizionale) e che favorisce l'emergere di nuovi parametri di liceità e di legittimità dell'azione pubblica, tra cui i principi di correttezza, buona fede e di tutela del legittimo affidamento[90].

Secondo questa lettura, anche in presenza di una *legittima* compressione di diritti fondamentali nascerebbe un obbligo di risarcire pienamente i danni causati ai singoli, secondo le regole di diritto comune[91] e cioè, secondo il principio dell'integrale riparazione del danno, temperato alla luce del canone solidaristico che costituisce, secondo le prevalenti letture, il fondamento della responsabilità civile nel sistema italiano.

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[88] S. RODOTÀ, *Il problema della responsabilità civile*, Milano, 1964. Per un'originale combinazione di rischie, solidarietà e uguaglianza quale fondamento della responsabilità dell'Amministrazione alternativa alla colpa, v. ALB. ROMANO, *Giurisdizione amministrativa e limiti della giurisdizione ordinaria*, Milano, 1975, 282 ss. spec. 290,

[89] P. PERLINGIERI, *La responsabilità civile tra indennizzo e risarcimento*, in *Rass. dir. civ.*, 2004, 1061; V. SCALISI, *Ingiustizia del danno e analitica della responsabilità civile*, in *Riv. dir. civ.*, 2004, 1, I, 42; ma v. già Salv. ROMANO, *Trasporto di cortesia*, in *Riv. dir. civ.*, 1960, I, 485, ora in *Scritti minori*, Milano, 1980, II, 905.

[90] ALB. ROMANO, *Conclusioni. Autoritarietà, consenso e ordinamento generale*, in *L'atto autoritativo. Convergenze e divergenze tra ordinamenti. Atti del convegno annuale dell'AIPDA, Bari, 30 settembre-1 ottobre 2011*, Milano, 2012.

[91] Per la sottolineatura dell'importanza di tali regole v., da ultimo, V. CERULLI IRELLI, *Amministrazione pubblica e diritto privato*, Torino, 2011

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Si noti che, con riguardo ai diritti fondamentali e, in particolare, alla salute, il giudice ordinario (competente nel nostro ordinamento per la tutela dei diritti rispetto alla pubblica amministrazione, salvo le specifiche ipotesi di giurisdizione esclusiva del giudice amministrativo previste in determinate materie dalla legge) ha a lungo ritenuto illecita ogni compressione del diritto da parte dell'Amministrazione, a nulla rilevando le ragioni di interesse pubblico né la legittimità dell'azione amministrativa. Il diritto fondamentale è parso, cioè, indegradabile e ogni azione amministrativa dannosa, ad es. relativa alla localizzazione di opere pubbliche nocive (quali discariche pericolose, elettrodotti, antenne), è parsa illecita e pertanto suscettibile di essere inibita e fonte di un obbligo risarcitorio[92].

Le più recenti linee tendono verso un superamento di tale indirizzo giurisprudenziale, in favore dell'idea che gli stessi diritti fondamentali siano bilanciabili (anche nel loro nucleo essenziale[93]) con contrapposti interessi pubblici.

Tale mutamento appare del resto stimolato e rafforzato dallo spostamento della giurisdizione dal giudice ordinario al giudice amministrativo in importanti materie caratterizzate dall'incidenza dell'azione pubblica su diritti fondamentali: ciò è avvenuto in

[92] L'orientamento risale a due note sentenze della Cassazione civile: Cass., sez. un., 9 marzo 1979, n. 1463 (in materia di localizzazione di centrali nucleari) e Cass., sez. un., 6 ottobre 1979, n. 5172 (riguardante la realizzazione di opere destinate alla depurazione di acque luride già convogliate nel Golfo di Napoli). Per una più recente applicazione, Cass.Civ., sez. un., 8 novembre 2006, n. 23735 (in una controversia volta all'inibizione della messa in esercizio di elettrodotto autorizzato con decreto ministeriale).

[93] Si v., in proposito, C.cost. n. 85/2013 che, con riguardo al caso ILVA di Taranto (e cioè ad un impianto siderurgico altamente inquinante), ha ammesso il *"bilanciamento tra diritti fondamentali tutelati dalla Costituzione, in particolare alla salute (art. 32 Cost.), da cui deriva il diritto all'ambiente salubre, e al lavoro (art. 4 Cost.), da cui deriva l'interesse costituzionalmente rilevante al mantenimento dei livelli occupazionali ed il dovere delle istituzioni pubbliche di spiegare ogni sforzo in tal senso".*

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materia di rifiuti[94], di localizzazione di impianti di energia[95], di situazioni di emergenza[96], di emergenza rifiuti in Campania[97].

E' questa un'evoluzione densa di implicazioni critiche, non suscettibili di essere esaminate in questa sede[98]. E' tuttavia chiaro che il superamento della tesi dell'incomprimibilità del diritto fondamentale da parte del potere pubblico e dell'illiceità della sua violazione ripropone, con rinnovata centralità, il problema della responsabilità da atto lecito dell'amministrazione e quello, soprattutto, dell'effettiva riparazione del diritto individuale sacrificato in vista di interessi generali.

[94] Così Cass., sez. un., 28 dicembre 2007 n. 27187; 29 aprile 2009, n. 9956; 5 marzo 2010, n. 5290 («*appartiene alla giurisdizione del g.a. la controversia che investe il potere dell'Amministrazione relativo all'organizzazione ed alle modalità di attuazione dello smaltimento dei rifiuti urbani*» pur a fronte di «*domande risarcitorie, eventualmente proposte in via autonoma, pur se con esse si invochi la tutela di diritti fondamentali, come quello alla salute*»). Nello stesso senso, da ultimo, Cass., sez. un.,.

[95] Si v. l'art. 1, comma 552, l. n. 311/2005 (finanziaria 2005) e l'art. 41, l. n. 99/2009; sulla legittimità di tale spostamento di giurisdizione v. C. cost. n. 140/2007.

[96] Si v. l'art. 3, comma 2-*bis*, d.l. n. 245/2005, conv. con mod. con l. n. 21/2006 (ma ora si v. l'art. 133, lett. *p*, del codice del processo amministrativo).

[97]Si v. il d.l. n. 90/2008 conv. con l. n. 123/2008 (ma ora si v. l'art. 133, lett. *p*, del codice del processo amministrativo), su cui v. C. cost. n. 35/2010.

[98] Sul punto sia consentito rinviare a E. SCOTTI, *La localizzazione di opere pubbliche nocive tra responsabilità da atto lecito e principio di compensazione*, in *Scritti in onore di Paolo Stella Richter*, Napoli, 2013.

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4.4. La riparazione del danno

La principale conseguenza pratica della questione concernente la natura giuridica della responsabilità da atto lecito attiene al regime giuridico del dovere riparatorio e, in particolare, alla quantificazione del ristoro dovuto.

Come si è visto, il negare che possa porsi un problema di responsabilità e il riferimento ad un dovere indennitario di natura pubblicistica fondato sul principio solidaristico ha consentito di giustificare la discrezionalità del legislatore nell'individuazione dell'ammontare degli indennizzi e di sganciarli dalla necessaria correlazione con il danno. La Corte Costituzionale ha così riconosciuto che il legislatore può discrezionalmente determinare l'entità della misura riparatoria (indennità) nei limiti della *non irrisorietà*. *Solidarietà* vale così *discrezionalità* del legislatore nel definire il contenuto della garanzia e, in particolare, l'ampiezza e la misura della garanzia.

Si è, per tale via, riconosciuta la legittimità di indennizzi non idonei a riparare l'intero pregiudizio subito, e ciò è avvenuto in materia di espropriazioni, vaccinazioni obbligatorie, ingiusta detenzione[99]. In tutti questi casi si è consentito di bilanciare la garanzia di diritti fondamentali con altri interessi, tra cui il contenimento della spesa pubblica[100].

Come si è visto, con riferimento alla proprietà e, più in generale, alla sfera patrimoniale, quest'ordine argomentativo è stato superato grazie all'intervento della Corte europea dei diritti dell'uomo che ha affermato la necessaria correlazione tra misura riparatoria e pregiudizio effettivamente subito. Esso permane invece con riferimento ai pregiudizi riguardanti i diritti posti al vertice della gerarchia costituzionale dei valori, e, cioè, i diritti non patrimoniali della persona.

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[99] V. supra par.2.

[100] Si v., da ultimo, C.cost. n.107/2012 su un caso di danni gravissimi alla salute derivanti da vaccinazioni incentivate dal Servizio Sanitario.

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Sicché ci troviamo oggi nella paradossale situazione per cui i danni alla proprietà e al patrimonio devono essere integralmente ristorati mentre, per i danni ad interessi non patrimoniali, sussiste la possibilità di un risarcimento non commisurato al danno subito ma ad un canone solidaristico, discrezionalmente interpretabile dal legislatore o dall'Amministrazione.

Proprio in risposta a tale incongruenza altra parte della dottrina ha formulato la tesi, sopra esaminata, secondo cui tutti i diritti fondamentali compressi nell'ambito dell'azione amministrativa legittima farebbero nascere una vera e propria responsabilità da atto lecito e, con essa, un obbligo di piena riparazione.

Alla luce di tale condivisibile impostazione dovrebbero essere considerate illegittime le norme che determinano indennizzi non corrispondenti al danno patito, come accade ad es. nelle ipotesi di danni da vaccinazioni obbligatorie o da ingiusta detenzione.

E dovrebbe pertanto rivedersi, come è accaduto per l'indennità di esproprio in seguito all'intervento della Corte europea, l'orientamento della Corte Costituzionale che, in materia di diritti fondamentali non patrimoniali, rimette al legislatore di determinare discrezionalmente l'entità dell'indennizzo con il solo limite della sua non irrisorietà.

5. IL PRINCIPIO DI COMPENSAZIONE

Come si è visto, la responsabilità da atto lecito dell'Amministrazione, presuppone, secondo la unanime visione di dottrina e giurisprudenza, una grave e seria lesione del diritto fondamentale, nella sua essenza.

Laddove il sacrificio imposto al singolo per il perseguimento di interessi generali non raggiunga tale soglia, il problema di riequilibrio della sfera individuale lesa dall'azione amministrativa si pone in termini diversi.

Oltre il suo nucleo essenziale il diritto fondamentale vive infatti in un regime ordinario di possibile bilanciamento rispetto agli opposti interessi pubblici e la sua tutela si

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fonda innanzitutto sull'applicazione dei principi procedimentali e sostanziali che garantiscono la correttezza del bilanciamento. E su questo piano tale tutela tendenzialmente si esaurisce.

Ma anche a fronte di un corretto bilanciamento tra gli opposti interessi, non di rado il sacrificio di posizioni individuali rispetto a quelle generali lascia un percettibile senso di ingiustizia e genera connessi conflitti istituzionali e sociali (si pensi alla localizzazione di una discarica o di un impianto a rischio di incidente rilevante) [101].

Vengono qui in rilievo i degradi economici, ambientali, sociali o l'esposizione a rischi, o i vari sacrifici imposti dai poteri emergenziali[102].

In questi contesti affiora un'esigenza compensativa che tende, nel nostro ordinamento, a giuridicizzarsi in termini di *principio di compensazione*, ascrivibile, stando ad una tesi recentemente proposta, tra i principi che regolano l'azione amministrativa[103].

Compaiono infatti nelle leggi, sempre più di frequente, previsioni di possibili compensazioni dei danni generati alle collettività locali, le quali assumono disparate connotazioni: di ripristino o mitigazione ambientale, di organizzazione di servizi pubblici, di

[101] Come recentemente segnalato, «*a fine 2009, sono almeno 283 le opere pubbliche oggetto di contestazione, quasi un centinaio in più rispetto a quelle censite nel 2005. La stragrande maggioranza di esse afferisce al settore elettrico e, all'interno di questo, con ben 133 casi, agli impianti per la produzione di energia. Più della metà - ma solo per il maggior numero di progetti presentati - è rilevata nelle regioni del Nord, mentre le altre si distribuiscono equamente tra quelle del Centro e del Sud. L'opposizione è espressa per lo più da movimenti di cittadini (il 40,7%) e da enti territoriali (31,4%), in particolare comuni (23,8%). Alla base, vi sono principalmente ragioni legate all'impatto ambientale (26,1%) e alle carenze procedimentali, soprattutto nel coinvolgimento degli interessati (17,9%)*» (A. TONETTI, *Localizzazione e consenso nel programma di rilancio del nucleare in Italia*, in *Giorn. dir. amm.*, 2011, 5).

[102] Sul punto si v. le osservazioni di R. CAVALLO PERIN, *Il diritto amministrativo dell'emergenza per fattori esterni all'amministrazione pubblica*, cit., 777 ss.

[103] Per tale tesi sia consentito il rinvio a E. SCOTTI, *Liceità legittimità e responsabilità dell'amministrazione,* cit.

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benefici per le comunità locali (borse di studio, opportunità di lavoro, assicurazioni sanitarie, ecc.) e, laddove ammessi e accettabili, di contributi economici.

Nella sua componente ambientale e collettiva la compensazione tende innanzitutto a tradursi nel ripristino, per quanto possibile, dell'ambiente degradato. Così, a questo fine, il d.l. n. 90/2008, nell'ambito dell'emergenza per i rifiuti nella Regione Campania ha previsto lo stanziamento di un fondo per le misure compensative[104]. Misure compensative sono poi previste in materia energetica[105], anche nel settore delle rinnovabili[106], del nucleare[107], del gas[108]. Ancora, misure compensative sono contemplate in relazione alle infrastrutture

[104] Per tali interventi di compensazione ambientale e bonifica, concordati prima in sede di accordo di programma tra le parti e poi dotati di una provvista finanziaria e di una copertura di legge, v., gli artt. 9, co. 7 e 11 del d.l. 90/2008.

[105] Si v. l'art. 1, comma 4, lett. *f*), della legge n. 239/2004 (*Riordino del settore energetico, nonché delega al Governo per il riassetto delle disposizioni vigenti in materia di energia*), il quale dispone che: «*Lo Stato e le regioni, al fine di assicurare su tutto il territorio nazionale i livelli essenziali delle prestazioni concernenti l'energia nelle sue varie forme e in condizioni di omogeneità sia con riguardo alle modalità di fruizione sia con riguardo ai criteri di formazione delle tariffe e al conseguente impatto sulla formazione dei prezzi garantiscono*: [...] *f) l'adeguato equilibrio territoriale nella localizzazione delle infrastrutture energetiche, nei limiti consentiti dalle caratteristiche fisiche e geografiche delle singole regioni, prevedendo eventuali misure di compensazione e di riequilibrio ambientale e territoriale qualora esigenze connesse agli indirizzi strategici nazionali richiedano concentrazioni territoriali di attività, impianti e infrastrutture ad elevato impatto territoriale*».

[106] Le misure compensative, in prima battuta escluse dalla legge nel settore delle energie rinnovabili (e, in particolare, dall'art. 1, comma 4, lett. *f*, della legge n. 239/2004), sono state reinserite per mano della Corte costituzionale che ha dichiarato l'illegittimità dell'esclusione (C. cost., n. 383/2005).

[107] Sul punto si v. sia l'art. 4 del d.l. n. 314/2003, per il deposito nucleare; sia il d.lgs. n.31/2010 che, sino all'abrogazione referendaria, prevedeva sia un'articolata disciplina delle compensazioni sia delle tecniche consensuali e partecipative per la risoluzione del conflitto sociale e istituzionale, su cui si v. A. TONETTI, *Localizzazione e consenso nel programma di rilancio del nucleare in Italia*, cit.

[108] Si v. l'art. 2, c. 558 - 560, l. n. 244/2007, per i siti di stoccaggio del gas.

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strategiche nazionali[109]. Più in generale si riferiscono alle misure compensative come elementi necessari dello studio d'impatto ambientale e del rapporto ambientale la disciplina rispettivamente della valutazione d'impatto ambientale, della valutazione d'impatto strategica[110] e della valutazione di incidenza ai sensi della cd. direttiva habitat[111]. Quest'ultima in particolare è particolarmente eloquente in ordine alla funzione del principio di compensazione laddove prevede che «*qualora, nonostante conclusioni negative della valutazione dell'incidenza sul sito e in mancanza di soluzioni alternative, un piano o progetto debba essere realizzato per motivi imperativi di rilevante interesse pubblico, inclusi motivi di natura sociale o economica, lo Stato membro adotta ogni misura compensativa necessaria per garantire che la coerenza globale di Natura 2000 sia tutelata. Lo Stato membro informa la Commissione delle misure compensative adottate*»[112].

Le misure compensative hanno cioè la funzione di ristabilire un equilibrio violato, consentendo così un'azione altrimenti illegittima: si prevede cioè che «*l'eventuale esito*

[109] E cioè alle opere di cui alla legge obiettivo per le quali si prevede che il progetto evidenzi, anche «*con apposito adeguato elaborato cartografico, le aree impegnate, le relative eventuali fasce di rispetto e le occorrenti misure di salvaguardia, dovrà inoltre indicare ed evidenziare anche le caratteristiche prestazionali, le specifiche funzionali ed i limiti di spesa dell'infrastruttura da realizzare, ivi compreso il limite di spesa per le eventuali opere e misure compensative dell'impatto territoriale e sociale comunque non superiori al 5 per cento dell'intero costo dell'opera e dovrà includere le infrastrutture ed opere connesse, necessarie alla realizzazione; dalla percentuale predetta sono esclusi gli oneri di mitigazione di impatto ambientale individuati nell'ambito della procedura di v.i.a.*» (così l'art. 3, co. 3, d. lgs. n. 190/2002, come modificato dall'art. 2, d. lgs. n. 189/2005 ed ora confluito nell'art. 165, c. 3 d.lgs. n. 163/2006).

[110] Si v. sul punto la dir. 85/337/CEE, art. 5 e dir. 2001/42/CE, art. 5 in combinato con il relativo all.1.

[111] Si tratta della dir. 92/43/CEE relativa alla conservazione degli habitat naturali e seminaturali e della flora e della fauna selvatiche.

[112] Così l'art. 6, par. 4, dir. 92/43/CEE.

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negativo della valutazione di incidenza, in assenza di soluzioni alternative, possa essere superato mediante la previsione di misure compensative»[113].

Anche l'urbanistica, da sempre considerata terreno di un'insuperabile disuguaglianza[114], data dalle scelte pianificatorie, si apre oggi ad una più radicale attuazione del principio di proporzionalità attraverso l'affinarsi della tecniche perequative e il loro volgersi ad una duplice ed equa distribuzione: che riguarda, da un lato, la parità di trattamento tra i proprietari, nella distribuzione dei diritti edificatori nascenti dalla pianificazione e degli oneri derivanti dalla realizzazione delle dotazioni territoriali; e che, dall'altro, secondo le più recenti esperienze, assume le forme di una perequazione diffusa tra tutti i membri della collettività, attuata attraverso il prelievo di una parte della cd. rendita fondiaria, vale a dire della plus-valenza occasionata dalle scelte pianificatorie, e nella sua destinazione in favore del pubblico (attraverso la realizzazione di opere o servizi pubblici o l'acquisizione delle relative aree)[115].

[113] TAR Molise, sez. I, n. 52/2011. Sul punto v. TAR Lombardia, sez. III, n. 765/2011, che riconduce all'affidamento la previsione di compensazioni disposte dall'Autorità per l'energia elettrica e il gas in favore dei venditori cui erano state imposte determinate misure (eliminazione della cd. *soglia di invarianza* con incidenza su contratti pendenti) per contenere i prezzi nei confronti degli utenti. La legittimità di tali misure è stata infatti fondata sia sui possibili limiti all'attività economica in funzione di esigenze di utilità sociali sia alla previsione «*di strumenti compensativi diretti proprio ad evitare che gli oneri derivanti da tale eliminazione possano restare a carico degli operatori della filiera, sicché le misure compensative rappresentano uno strumento idoneo a salvaguardare l'affidamento degli operatori … il meccanismo compensativo previsto … serve proprio ad impedire che il venditore grossista possa sopportare definitivamente gli oneri correlati alla eliminazione della soglia di invarianza*».

[114] Per tutti, P. STELLA RICHTER, *Profili funzionali dell'urbanistica*, Milano, 1984.

[115] ID., *La perequazione urbanistica*, in *Riv. giur. ed.*, 2005, 169 ss.

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Di là dalle discussioni e dagli ampi problemi generati da simili modelli perequativi[116], la giurisprudenza ne ha di recente riconosciuto la legittimità, valorizzando non solo la potestà pianificatoria comunale ma anche la possibilità di ricorrere a strumenti privatistici e consensuali per il perseguimento dell'interesse pubblico ad una più completa ed equilibrata gestione del territorio[117]. Anche l'urbanistica (quasi più che l'ambiente in senso stretto) si appresta così a divenire strumento di sviluppo sostenibile (nei suoi tre pilastri economico, sociale e ambientale) e ad accogliere, quale risvolto della proporzionalità delle scelte pianificatorie, un principio compensativo, soprattutto degli svantaggi imposti ad alcune zone in vista del vantaggio generale.

Nuove forme compensative affiorano poi nella prassi. La quale riguarda svariati settori, tra cui il settore delle ordinanze contingibili e urgenti, che possono determinare la temporanea compressione di tutti i diritti costituzionalmente garantiti[118], il settore dell'esecuzione di lavori pubblici e il settore della realizzazione di grandi opere pubbliche.

Qui il principio di piena responsabilità da atto lecito, riguardante le lesioni dell'essenza del diritto, in relazione a compressioni di grado minore, cede il campo ad un principio compensativo, di matrice pubblicistica, sviluppo ulteriore di principi generali, quali l'uguaglianza, la correttezza, la proporzionalità, il non abuso, il rispetto dell'altrui

[116] Su cui A. BARTOLINI, *Perequazione urbanistica*, report 2011, in questo Network.

[117] Il riferimento è al Cons. St., sez. IV, n. 4545/2010.

[118] Sul punto si v. quanto osservato da R. CAVALLO PERIN, che segnala la questione, ricordando come «*il potere di ordinanza di necessità ed urgenza in materia di riserve relative di legge è ricordato anzitutto come potere pubblico che sottrae a taluni, in via temporanea e d'eccezione, beni che l'ordinamento protegge con la definizione dei diritti soggettivi, ed è naturale in tali casi considerare che il sacrificio del singolo a favore della collettività sia compensato con il pagamento da parte dell'amministrazione di un congruo indennizzo*» (*Il diritto amministrativo dell'emergenza per fattori esterni all'amministrazione pubblica*, cit., 777).

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affidamento, che stemperano l'autoritatività e danno un nuovo volto di civiltà giuridica all'Amministrazione[119].

E in tale risvolto, imprescindibile è il richiamo alla solidarietà che, pur in assenza di un vero e proprio danno ingiusto, impone di compensare il sacrificio individuale corrispondente a un vantaggio collettivo: sarebbe infatti contrario ai doveri costituzionali di solidarietà se la collettività si disinteressasse degli svantaggi sopportati da alcuni nell'interesse di tutti. Così come, per converso, sarebbe contrario ai medesimi doveri se la medesima collettività, correttamente compensata, si opponesse strenuamente alla realizzazione di un'opera che, pur degradando in certa misura l'ambiente e la sua salubrità, fosse necessaria al perseguimento di interessi generali correttamente ponderati nell'ambito di procedimenti aperti e ispirati alla ricerca del consenso e dell'equilibrio tra le diverse istanze.

[119] Per la rappresentazione del quale ALB. ROMANO, *Conclusioni. Autoritarietà, consenso e ordinamento generale*, cit.

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STATE LIABILITY FOR LAWFUL ACTS AND THE PRINCIPLE OF COMPENSATION

(October 2014)

Elisa SCOTTI

SUMMARY

1. INTRODUCTION

2. THE MAIN CASES PROVIDED FOR BY LAW

2.1 Introduction

2.2 Expropriation

2.3 Losses caused by public works

2.4 Self-protection

2.5 Injuries caused by obligatory vaccinations

2.6 Miscarriage of justice and false detention

3. STATE LIABILITY FOR LAWFUL ACTS AS A GENERAL PRINCIPLE CONCERNING THE INFRINGEMENT OF FUNDAMENTAL RIGHTS

3.1. Introduction

3.2 Origin of the principle

3.3 Modus operandi

4. THE LEGAL NATURE OF LIABILITY FOR LAWFUL ACTS

4.1 Introduction

4.2 Of a Public Law nature

4.3 As regulated by Civil Law

4.4. Compensation for loss

5. 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 few[1].

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 textbooks[2].

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.

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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 expectations[4]. Only thanks to European Law, the principle of liability has emerged in these areas[5]; 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. SCOCA, *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. SCOCA, *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. FRANCARIO, 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.

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(considering also the limits of public-sector-budget) leads case law to restrictive guidelines[6].

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 interests[7].

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.

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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 inequalities[8] 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.

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Justice examined the question. While the EGC confirmed the existence of a general principle of liability for lawful acts[9] of European institution the ECJ denied it[10].

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.

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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 Court[13]: both regulations entitle the expropriated owner to compensation.

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

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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 compensation[14].

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 restrictions[15]. 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 ones[16]. 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 parks[17]. 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.

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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-up[18], credit[19]. It also includes legitimate expectation[20] such as the registration for a trademark[21], 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 landfill[22] or a buyer of a work of art purchased in violation of the law of pre-emption of art history[23].

[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.

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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 Constitution[24]. 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*».

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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 State[26], 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 property[27]. 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.

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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 2359[28].

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 damage[29].

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.

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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-works[31]; loss of natural light, fumes, and vibrations caused by construction of motorway viaducts[32]; devaluation of the underlying property, inability to carry out extensions, risk of falling objects or construction vehicles[33]; obstructions to public access[34]; damage to irrigation of agricultural land[35]; limited access to buildings and associated market value reduction[36]; interference of the dominating space as a result of the construction of motorway viaducts[37]; invasion of air space with reduced property value[38]; reduction in living space[39].

[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.

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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 value[40].

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 century[41], 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".*

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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 measures[42]. 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 ones[43].

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 expectations[44].

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 procedure[45]. 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".*

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provided for compensation in the case of *ex officio* annulment of decisions that affect contracts[46].

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 interest[48]. 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".*

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period of time occurs between the measure and its revocations[49] 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.

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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 vaccinations[52], 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 rights[54].

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.

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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 compensation[55].

In terms of theories, as we will see[56], 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.

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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 Euros[57].

The legitimacy of these disciplines - protected, up until recently, by the strict guidelines given by our Constitutional Court[58] - 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 deportation[59], 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.

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immigration centre[60]; because of exceeding the maximum time permitted to be held in pre-trial detention[61], and delaying in recognition of indult[62].

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 justice[63]. 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 trends[64] however remain rooted in considering the judgment of the Constitutional Court necessary[65].

[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, *Pezone 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").*

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In the same way, the maximum limit for compensation provided for false detention[66] seems to be inconsistent with the ECHR (note that such a limit does not apply for compensation for miscarriage of justice cases[67]). 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'article 5*, [Comments on article 5], in *Commentario breve* [Brief Commentary] cit., 172.

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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 one[69], 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 fault[70].

In response to this problem, the Doctrine suggested a general principle for State liability, not fault-based and extended both to unlawful and lawful acts[71]. 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* [Fualt 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

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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.

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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 works[74].

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 caused[75], 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 not[76].

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.

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perspective, the prevailing trend derives such duty from the principle of social solidarity[77]; 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 level[78].

3.3. *Modus operandi*

If the prevailing doctrine and case law recognise a general principle of compensation, as we have seen[79], 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 guarantee[80].

[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

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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 judgments[81].

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'article 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.

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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 powers[82].

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 Law [83].

[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.

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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 legislature[84].

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 liability[85] 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 arises[87].

[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.

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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 expectations[88].

According to this perspective, even if lawfully caused, the sacrifice of fundamental rights gives rise to a duty to compensate, regulated by Civil Law[89].

It is important to note that, with regards to fundamental rights and in particular to health, the Civil Court[90] 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".*

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inhibition[91]. 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).

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fundamental rights: as happened in locations for landfills[92] or power plants[93]; in emergency situations [94], and in the waste emergency in the Campania region[95].

This evolution has many implications, that cannot be examined here[96]. 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*.

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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 imprisonment[97]. In all of these cases the Court allowed fundamental rights to be balanced with other interests, one of which includes public sector budget[98].

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.

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In light of this approach, that seems to meet the position of the European Court of Justice[99], 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.

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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 facilities[101]. This relates to the environmental, economic, and social degradation and to the risk exposure or to the various sacrifices imposed by emergency powers[102].

In these contexts a need for "compensation" or "indemnity"or "equalisation" (in a very broad sense) emerges. It tends to became 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 discretion[103].

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 compensation[104].

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[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.

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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 measures[105]. Compensatory measures are also provided for the energy sector[106], including renewable[107], nuclear[108], and gas sectors[109]. 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.

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for strategic national infrastructures[110]. In general the law provides "compensatory measures" as necessary elements for environmental impact assessments and for strategic environmental assessments[111]; and for environmental implications assessments, pursuant to the Habitats Directive[112]. 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.

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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 inequality[115], 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.

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creates[117], case law has recently recognised its legitimacy, emphasising both planning powers and the consensual ways to achieve a more balanced land management[118]. 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 rights[119]), the execution of public works and in particular, of strategic ones, the agricultural policy[120].

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

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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 Society[121].

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.

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