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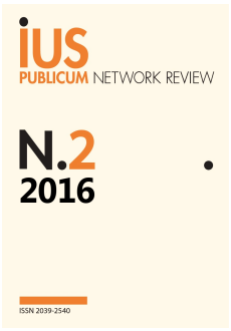

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THE BELGIAN CONSTITUTIONAL COURT AND THE ADMINISTRATIVE LOOP: A DIFFICULT UNDERSTANDING

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1. INTRODUCTION

1. In the Netherlands, the task of the administrative courts has shifted during the past decades from merely upholding the objective law towards providing a final dispute resolution.[2] This evolution was induced by the criticism that the administrative courts, whose primary aim was to review the legality of authority decisions, only established how the authority should not have decided, without indicating how it should have decided or should decide in the future. Hence, upon the annulment of an authority decision by the administrative court, neither the authority nor the private parties knew how the dispute had to be settled and remediation had to be offered. This often resulted in endless proceedings, with new decisions being taken by the authority and being attacked again by the private party concerned, who was still not satisfied.[3]

In order to remedy this lack of judicial protection, the central point of focus of the Dutch administrative judicial procedural law has shifted towards the protection of the subjective rights of the litigants and the final resolution of disputes. This evolution finds its reflection in additional powers granted to the administrative courts, such as the possibility to ignore a defect ('*een gebrek passeren*'), to maintain certain legal effects of an annulled

[2] For a more elaborated analysis of this evolution and of the implications on the competences of the administrative courts in the Netherlands, see amongst others J.C.A. DE POORTER and K.J. DE GRAAF, *Doel en functie van de bestuursrechtspraak: een blik op de toekomst*, The Hague, Council of State, 2011, 260 p.; L.M. KOENRAAD and J.L. VERBEEK, "Finaliseren doe je zo! De rol van de bestuursrechter bij het vaststellen van feiten na de constatering dat het bestreden besluit een gebrek kent", *NJB* 2006, no. 30, p. 69-80; A.R. NEERHOF, "Van effectieve bestuursrechters en geschillen die voorbijgaan...? De bevoegdheden van de bestuursrechter om geschillen definitief op te lossen", *JBplus* 1999, no. 2, p. 71- 87.

[3] The new primary function of administrative courts is reflected in the Act of 4 June 1992 holding the general rules of administrative law ('*Algemene wet bestuursrecht*').

decision ('*gedektverklaring*'), to decide instead of the authority by substituting the annulled decision by the judgment ('*zelf in de zaak voorzien*') and to order the authority to take a new decision. In 2010, the administrative loop was added to the Dutch administrative courts' toolbox as an additional instrument to achieve a final dispute resolution.[4]

2. Inspired by this evolution in the Netherlands and confronted with similar criticism on the cumbersome and inefficient administrative procedures, the Belgian legislators also intended to achieve a shift in the task of the administrative courts by attributing additional tools to the administrative courts with the aim to increase suitability, efficiency and expediency of administrative judicial procedures. One of these new tools is the administrative loop, which has in the meanwhile been well received and implemented in the Netherlands.

In Belgium, however, this new instrument – which was given a considerably more limited scope – has given rise to fundamental objections from the perspective of the rule of law and fundamental (procedural) rights. These objections amounted in proceedings before the Belgian Constitutional Court, that agreed with some of the arguments of the applicants and annulled the Flemish and federal statutes introducing the administrative loop up to three times.

3. This contribution clarifies the annulled Flemish and federal administrative loop and analyses the rulings of the Constitutional Court. Furthermore, it assesses whether the latest version of the administrative loop, which was introduced by the Flemish legislator

[4] Act of 14 December 2009 completing the General act on administrative law with a regulation for the remediation of defects in a decision during the proceedings before the administrative court. This act entered into force on 1 January 2010. See amongst others B.J. VAN ETTEKOVEN and A.P. KLAP, "De bestuurlijke lus als rechterlijke (k)lus", *AA* 2010, p. 235-244; L.M. KOENRAAD, "De toekomst van de bestuurlijke lus", *AA* 2010, p. 235-240; J.E.M. POLAK, "Effectieve geschillenbeslechting: bestuurlijke lus en andere instrumenten", *NTB* 2011/1-2, p. 2-9; R. ORTLEP, "Bestuurlijke lus: terugkomen op een in een tussenuitspraak neergelegde bindende eindbeslissing", *JBplus* 2012, p. 219-234.

taking into account these rulings, succeeds in meeting the fundamental objections of the Constitutional Court.

II. THE FLEMISH ADMINISTRATIVE LOOP

1. THE FLEMISH LEGISLATION

1.1. The Council for Permit Disputes

4. In Belgium, the administrative loop was firstly introduced by the Flemish legislator as a new tool for the Council for Permit Disputes ('*Raad voor Vergunningsbetwistingen*').

5. The Council for Permit Disputes, being an administrative court on urban planning, adjudicates by means of judgments on actions for annulment of permit decisions, validation decisions and registration decisions. As a rule, the Council for Permit Disputes annuls a contested decision when it is unlawful, meaning when it is contrary to regulations, urban provisions or principles of good government. It may also order the suspension of its enforcement.[5] From the outset, the Council has had an additional tool at his disposal that aims to achieve a final dispute resolution: a right of injunction, allowing it to oblige the authority to take a new decision within a certain time period, whereby it can give well-

[5] Previously Articles 4.8.3(1)(1) and 4.8.13 of the Flemish Town and Country Code; currently Articles 35 and 40 of the decree on the organisation and the procedure of certain Flemish administrative courts.

defined instructions with regard to that new decision (both on the procedure as on the substance).[6]

6. By decree of 6 July 2012[7], the Flemish legislator added two new instruments to the Council for Permit Disputes' toolbox:: the mediation[8] and the so-called "administrative loop"[9].

This initial administrative loop is defined as "offering the authority granting the permits at every stage of the procedure by interlocutory judgment the possibility to remedy, or arrange to have remedied, a defect in the contested decision within the time period that the Council determines".[10] The introduction of this new tool is justified in order "to prevent

[6] Previously Article 4.8.3(1)(2) of the Flemish Town and Country Code; currently Article 37 of the decree on the organisation and the procedure of certain Flemish administrative courts.

[7] Decree of 6 July 2012 amending various provisions of the Flemish Town and Country Code, with regard to the Council for Permit Disputes (published in the Belgian Official Journal on 24 August 2012). The decree entered into force on 1 September 2012 (see Article 60 of the administrative act of 13 July 2012 of the Flemish government on the procedure before the Council for Permit Disputes).

[8] Previously Article 4.8.5 of the Flemish Town and Country Code; currently Article 42 of the decree on the organisation and the procedure of certain Flemish administrative courts. The mediation falls outside the scope of this contribution.

[9] See amongst others the following contributions about this first version of the administrative loop in the Flemish Town and Country Planning Code: H. BORTELS, "De bestuurlijke lus: aanzet naar een meer oplossingsgerichte bestuursrechter?", *TBP* 2013/5, p. 305-316; S. BOULLART, "De bestuurlijke lus en de bemiddeling als instrumenten tot oplossing van bestuursgeschillen", in X, *Actualia rechtsbescherming tegen de overheid*, Antwerp, Intersentia, 2014, p. 47-80.

[10] Article 4.8.4(1) of the Flemish Town and Country Planning Code.

unnecessary new procedures, to gain time and to increase and expedite legal certainty"[11], thus offering an efficient and final dispute resolution.

The administrative loop, as introduced by the decree of 6 July 2012 in Article 4.8.4 of the Flemish Town and Country Planning Code, can only be applied if certain conditions have been fulfilled:

(i) interested parties, namely who could bring an action before the Council for Permit Disputes against the contested decision, must not be disproportionately prejudiced by the application of the administrative loop;

(ii) the irregularity in the contested decision must be remediable; it follows from the parliamentary proceedings that the loop shall essentially apply to remedy formal defects, such as the failure to state reasons, to ask for an obligatory opinion, to answer to raised objections or to take given advice into consideration[12];

(iii) the result of remedying the irregularity must be that "the decision can be maintained"; hence, the decision must remain unchanged in substance;

(iv) the Council for Permit Disputes must investigate all grounds before proposing to use the administrative loop; there is no use in applying the administrative loop if the decision must be annulled on other grounds.

The Council for Permit Disputes may propose the application of the administrative loop by interlocutory decision "at any stage of the procedure", and thus even before the parties have been able to debate the issue. Only after the authority concerned has used the opportunity to remedy the irregularity, can parties make their comments known.

[11] *Parl. Doc.*, Flemish Parliament, 2011-2011, no. 1509/1, p. 9.

[12] *Parl. Doc.*, Flemish Parl0iament, 2011-2011, no. 1509/1, p. 4 and no. 1509/3, p. 3.

If the reported irregularity is fully remedied by the application of the administrative loop, the remedy will apply with retroactive effect and the Council for Permit Disputes will dismiss the appeal. Following the general rule, this entails that the applicant - being the losing party - would be condemned to pay the procedural costs[13]. The legislator, however, inserted an exception to this rule: in case the administrative loop has been used successfully, "the Council *can* charge the costs to the authority granting the permits".

7. This Flemish version of the administrative loop, which finds its origin in the Dutch administrative procedural law, differs in many respects from the Dutch loop.[14]

A substantial difference is that the contested decision has to be maintained when applying the Flemish administrative loop. Hence, unlike under the Dutch legislation, remedying the irregularity can never lead to a new decision with a potentially altered substance. In case the authority, following the implementation of the interlocutory decision (for example by taking ignored objections or lacking advice into consideration), finds that the contested decision cannot be upheld but must be altered in substance, the irregularity cannot be remedied during the proceedings and the contested decision will be annulled.

Another important difference with the Dutch loop relates to the final judgment of the administrative court after the administrative loop has been used successfully. Whilst the Dutch administrative court can find the appeal well-founded and annul the contested (and remedied) decision with maintenance of the effects thereof, the Flemish Council can only

[13] It relates to the cause list fee ('*rolrecht*') and, eventually, the witness expenses ('*getuigengeld*').

[14] For a comparison between the Dutch administrative loop and the initial Flemish loop, see H. BORTELS, *l.c.*, p. 305-316 and CH.W. BACKES, E.M.J. HARDY, A.M.L. JANSEN, S. POLLEUNIS, R. TIMMERMANS, M.A. POORTINGA and E. VERSLUIS, *Evaluatie Bestuurlijke Lus Awb en internationale rechtsvergelijking*. The Hague, Ministry of Security and Justice, 2014, p. 117-127.

dismiss the appeal. Hence, regardless of the fact that the applicant justly argued that the contested decision was irregular, the appeal will be declared unfounded.

Due to these peculiarities, the Flemish administrative loop has a very limited scope, as it can only be used to remedy irregularities which had no impact on the substance of the decision.[15] Moreover, a much more criticisable consequence is that the Flemish loop only seems to serve the interests of the administrative authorities, who are given the opportunity by the administrative court to rectify defects, with the sole aim to anticipate a potential annulment of the contested decision instead of improving that decision.

1.2. The Flemish Administrative Courts

8. By decree of 4 April 2014[16], the Flemish legislator harmonised the organisation and the procedure of the existing Flemish administrative courts. This involved the aforementioned Council for Permit Disputes, as well as the Environmental Enforcement

[15] Between its entry into force on 1 September 2012 and its annulment by judgment no. 74/2014 of 8 May 2014, the administrative loop was used only twice by the Council for Permit Disputes, be it unsuccessfully due to the retroactive annulment of the administrative loop. In both cases, the irregularity concerned a defect in the formal reasoning of the contested decision. In seven other judgments which were pronounced before the annulment judgment no. 74/2014, the Council rejected the request for application of the administrative loop. In five of these judgments, the Council considered that the established irregularity was not remediable. See B. VANHEUSDEN, "De moeizame start van de bestuurlijke lus: wie durft er nog te lussen?", in J. ACKAERT and others., *Liber Amicorum Anne Mie Draye*, Antwerp, Intersentia, 2015, p. 183-184.

[16] Decree of 4 April 2014 on the organisation and the procedure of certain Flemish administrative courts (published in the *Belgian Official Journal* on 1 October 2014).

Council ('*Milieuhandhavingscollege*')[17] and the Council for Election Disputes ('*Raad voor Verkiezingsbetwistingen*'). Since its entry into force[18], the decree jointly regulates the competences and procedures of these administrative courts.

9. The decree on the Flemish administrative courts provides these courts with several tools, besides the competence to annul decisions, in order to allow them to reach a final settlement of the dispute between the authority and the private party.[19] These tools are again inspired by the Dutch administrative procedural law.

Hence, the right of injunction and the application of the administrative loop have been reintroduced before the Council for Permit Disputes and have been extended to the Environmental Enforcement Council.[20] New is that both courts can connect a lump sum to the injunction.[21] In addition, both courts have the authority to temporarily or definitively maintain certain effects of the annulled decision when exceptional reasons justify an impairment of the legal principle.[22] Furthermore, the Council for Permit Disputes has the authority to use mediation, to suspend the enforcement of a decision and to order interim injunction relief.[23] Finally, the Environmental Enforcement Council can, when annulling a

[17] The Environmental Enforcement Council is an administrative court that adjudicates by means of judgments on appeals against the decisions of the regional authority on the imposition of an alternative or exclusive administrative fine, and on the deprivation of the benefits.

[18] The decree entered into force, partly on 1 November 2014, partly on 1 January 2015 (see Articles 36 and 37 of the administrative act of 16 May 2014 of the Flemish government).

[19] *Parl. Doc.*, Chamber, 2013-2014, no. 2383/1, p. 11-12.

[20] Articles 34 and 37 of the decree on the organisation and the procedure of certain Flemish administrative courts.

[21] Article 40 of the decree on the organisation and the procedure of certain Flemish administrative courts.

[22] Article 36 of the decree on the organisation and the procedure of certain Flemish administrative courts.

[23] Articles 40 to 43 of the decree on the organisation and the procedure of certain Flemish administrative courts.

contested decision, decide instead of the authorities on the amount of the imposed administrative fine and on the deprivation of the benefits.[24]

10. The Articles 33(2) and 34 of the decree on the Flemish administrative courts, concerning the administrative loop, were almost completely copied from the previous legislation in the Flemish Town and Country Planning Code.[25] Hence, reference can be made to what is mentioned above.

2. THE JUDGMENTS NO. 74/2014 OF 8 MAY 2014 AND NO. 152/2015 OF 29 OCTOBER 2014 OF THE CONSTITUTIONAL COURT

11. Following the appeal of several individuals and non-profit associations, the Constitutional Court was brought to decide on the constitutionality of the Flemish administrative loop. The applicants argued that the contested provisions violated several constitutional rights and principles, such as the principle of the rule of law and fundamental procedural rights.

[24] Article 44 of the decree on the organisation and the procedure of certain Flemish administrative courts.

[25] At the time of the adoption of the decree on the Flemish administrative courts, the case on the administrative loop, as laid down in the Flemish Town and Country Planning Code, was indeed still pending before the Constitutional Court.

In its judgments no. 74/2014 of 8 May 2014 and no. 152/2015 of 29 October 2014 (the first judgment relating to the initial administrative loop in the Flemish Town and Country Planning Code, the second judgment relating to the almost identical loop in the decree on the Flemish administrative courts), the Constitutional Court agrees with four fundamental objections raised against the administrative loop, as regulated in the Flemish legislation, and hence annuls the contested provisions.[26]/[27]

2.1. Infringement of the principles of judicial independence and impartiality and of separation of powers

[26] See amongst others the following comments on these judgments: F. Belleflamme and J. Bourtembourg, "Requiem pour la boucle?", *J.T.* 2014, p. 480-483; S. BOULLART, "De bestuurlijke lus bij de Raad voor Vergunningsbetwistingen vernietigd. Wat met de bestuurlijk lus bij de Raad van State?", *RABG* 2014, p. 1383-1388; F. EGGERMONT, "De bestuurlijke lus ... een dode mus", *RW* 2014-15, no. 20, p. 784-789; P. LEFRANC, "De bestuurlijke lus van de Raad voor Vergunningsbetwistingen opgedoekt", *T.M.R.* 2014/5, p. 440-447; S. LUST and S. BOULLART, "De bestuurlijke lus bij de Raad voor Vergunningsbetwistingen vernietigd. Wat met de bestuurlijke lus bij de Raad van State?", *RABG* 2014, no. 20, p. 1383-1388; D. RENDERS, "La boucle administrative ne serait-elle pas bouclée?", *J.T.* 2014, p. 1201-1205; A.S. VANDAELE, "Grondwettelijk Hof 8 mei 2014, nr. 74/2014: de vernietiging van de bestuurlijke lus bij de RVVB als voorbode voor de vernietiging van de bestuurlijke lus bij de RVS?", *CDPK* 2014, no. 3, p. 428-439; T. VANDROMME, "Bestuurlijke lus Raad voor Vergunningsbetwistingen sneuvelt bij Grondwettelijk Hof", *Juristenkrant* 2014, no. 290, p. 1 and 4

[27] For an analysis of the Dutch administrative loop in the light of the fundamental objections of the Belgian Constitutional Court, see CH.W. BACKES and A.M.L. JANSEN, note under judgment no. 74/2014 of the Belgian Constitutional Court, *AB Rechtspraak Bestuursrecht* 2014, no. 44, p. 2571-2577; CH.W. BACKES, E.M.J. HARDY, A.M.L. JANSEN, S. POLLEUNIS, R. TIMMERMANS, M.A. POORTINGA and E. VERSLUIS, *Evaluatie Bestuurlijke Lus Awb en internationale rechtsvergelijking*. The Hague, Ministry of Security and Justice, 2014, p. 122-127.

12. The Court judges that the contested provisions infringe the principles of judicial independence and impartiality, as well as the principle of separation of powers[28], which it deems fundamental to the rule of law.[29]

The principles of judicial independence and impartiality are violated as the administrative court, by suggesting the use of the administrative loop, already reveals its position on the outcome of the lawsuit. Such an interlocutory decision implies that the court is of the opinion that the contested decision is irregular, that this irregularity is remediable and that the contested decision can be upheld if remedied. However, the interlocutory decision is not binding regarding these issues, as it is only a preliminary judgment by the administrative court. This is, according to the Constitutional Court, unacceptable in the light of the principle of impartiality.

The violation of the principle of separation of powers can be deduced more subtly from the reasoning of the Constitutional Court. The Court emphasizes that the administrative court cannot substitute its assessment for the discretionary power of assessment of the administrative authority. Establishing the substance of a discretionary decision, more particularly when remedying an irregularity, is a matter for the administrative authorities rather than for the courts. The Court seems to be of the opinion that the administrative court, when suggesting the use of the administrative loop which should nevertheless lead to the same decision, interferes with the substance of the discretionary decision. Whilst it is a matter for the authority to decide whether the remediation of the irregularity has an impact on the substance of the contested decision, the authority is clearly encouraged by the administrative court to maintain the contested decision; only under this condition the administrative loop can be used successfully. Such

[28] The infringement of the separation of powers is not explicitly stated by the Court, but can clearly be deducted from its reasoning in the judgments concerned.

[29] Judgment no. 74/2014, B.7.1-B.7.4 and judgment no. 152/2015, B.12.1-B.12.4.

an interference by the administrative court with the discretionary power of the administrative authorities is deemed incompatible with the fundamental principle of separation of powers.

2.2. Infringement of the rights of defence, the right to adversarial proceedings and the right of access to court

13. The Constitutional Court judges moreover that the contested provisions infringe the rights of defence, the right to adversarial proceedings and the right of access to court in two ways.[30]

The first problem lies in the fact that the contested provisions do not guarantee an adversarial debate on the opportunity to use the administrative loop. By virtue of these provisions, the parties can only give their opinion after the administrative loop has been applied. The Court is of the opinion that the administrative court, by giving the opportunity to apply the administrative loop, adduces a fact that serves to influence the settlement of a dispute. Pursuant to the case law of the European Court of Human Rights, the right to adversarial proceedings means that the parties should be able to debate on this new fact. However, this is not guaranteed by the contested provisions.[31]

[30] Judgment no. 74/2014, B.8.1-B.8.5 and judgment no. 152/2015, B.13.1-B.13.5.

[31] The Court is of the opinion that the mere judgment of the administrative court that interested parties cannot be prejudiced in a disproportionate way by the application of the administrative loop, does not suffice. It is indeed a matter for the parties, and not for the administrative court, to assess whether a new fact requires observations or not.

The Constitutional Court finds a second infringement of the aforementioned principles in the fact that the contested provisions do not offer interested parties the possibility to appeal against a decision that was taken by applying the administrative loop. The Court holds that the right of access to court is not guaranteed with respect to such decisions, which is not commensurate with the objective pursued by the Flemish legislator to streamline and speed up the settlement of administrative disputes.

2.3. Infringement of the formal obligation to state reasons

14. The Constitutional Court also finds an infringement by the contested provisions of the formal obligation to state reasons.[32]

The Act of 29 July 1991 on the formal reasoning of administrative acts generalizes the obligation to formally state the reasons for all administrative acts of individual scope. The formal reasoning of these acts is considered a subjective right. An individual is thus given additional guarantees against arbitrary administrative acts of individual scope. The Court reads in the aforementioned Act of 29 July 1991 the right of the addressee of the act, as well as any other party, to take immediate cognizance of the reasons justifying the decision by mention of these reasons in the act proper. This right strengthens the judicial control of administrative acts of individual scope and the observance of the principle of equality of arms.

The Constitutional Court judges that the contested provisions impair this right by allowing the authority to rectify an individual administrative act, which is not formally reasoned, by supplying the reasons after the application of the administrative loop. The

[32] Judgment no. 74/2014, B.9.1-B.9.5 and judgment no. 152/2015, B.14.1-B.14.7.

Court is of the opinion that the formal obligation to state reasons, which is meant to enable the individual to assess whether there are grounds for lodging the available appeals, would be pointless if the individuals only learn the reasons on which the decision is based after having lodged an appeal.[33]

15. In its judgment no. 74/2014, the Constitutional Court also finds an infringement of Article 6(9) of the Aarhus Convention on access to information, public participation in decision-making and access to court in environmental matters.[34] This provision requires explicitly that the text of the administrative decision, insofar it falls within the scope of the Treaty, is made accessible to the public "along with the reasons and the considerations on which the decision is based".

2.4. Infringement of the right of access to court by the provisions on the procedural costs

16. Finally, the Constitutional Court judges that the provisions with regard to the settlement of the procedural costs when the administrative loop has been applied, infringe in a discriminatory manner the right of access to court.[35]

[33] The Constitutional Court also judges that the contested provisions, by reducing the protection that is offered to the litigants by the formal obligation to state reasons, violate the federal competence with regard to the formal motivation.

[34] Judgment no. 74/2014, B.9.5.

[35] Judgment no. 74/2014, B.12.1-B.12.4 and judgment no. 152/2015, B.18.1-B.18.4.

In case the administrative court finds a contested decision irregular and no application is made of the administrative loop, the court will annul the irregular decision. Following the general rule on the settlement of the procedural costs, the authority that took the annulled decision – being the losing party – will be condemned to pay the procedural costs.

However, when the administrative loop has been applied and the irregularity remedied, the administrative court will dismiss the appeal. Consequently, the applicant is considered the losing party. The contested provisions provide the option – not obligation – for the administrative court to deviate from the general rule on the settlement of the procedural costs and condemn the 'winning' public authority to pay the procedural costs. According to the Constitutional Court, the fact that the contested provisions do not exclude the possibility that the applicant is condemned to pay the procedural costs, impairs the right of equal access to court without any reasonable justification.

2.5. Conclusion

17. Given the established infringements of the principle of the rule of law and of fundamental procedural rights, the Constitutional Court decides to annul the administrative loop as laid down in the contested Flemish provisions.

It is important to note that these unconstitutionalities are all linked to the peculiarities of this Flemish administrative loop, which are distinct from the Dutch loop. The annulled Flemish loop can only be applied when the contested and remedied decision is maintained. In case of a successful remediation, the administrative court must dismiss the appeal, without the interested parties being offered a possibility of appeal against the remedied decision.

18. Notwithstanding these fundamental objections, the Constitutional Court explicitly emphasizes that "the legislator's efforts to arrive at an effective and definitive dispute settlement should be applauded".[36] This can be seen as an incitement to the Flemish legislator to reintroduce the administrative loop, be it with respect of the aforementioned fundamental constitutional rights and principles.

III. THE FEDERAL ADMINISTRATIVE LOOP

1. THE FEDERAL LEGISLATION

19. Before the Flemish version of the administrative loop was declared unconstitutional by the Constitutional Court, the federal legislator introduced its own version of the administrative loop with the Administrative Litigation Section of the Council of State.[37]/[38]

[36] Judgment no. 74/2014, B.14.

[37] See amongst others the following contributions about the federal administrative loop: A. CAMBIER, A. PATERNOSTRE and T. CAMBIER, "Les accessoires de l'arrêt d'annulation et la boucle administrative", in F. VISEUR and J. PHILIPPART, *La justice administrative*, Brussels, Larcier, 2015, p. 233-335 ; P. LEFRANC, "Ceci n'est pas une boucle administrative", in M. VAN DAMME, *De hervorming van de Raad van State*, Bruges, die Keure, 2014, p. 51-94; L. LOSSEAU, "L'introduction de la boucle administrative au sein des lois coordonnées sur le Conseil d'Etat", *Ann. dr. Louvain* 2013, p. 523-580.

[38] For a comparison between the federal administrative loop and the Dutch administrative loop, see CH.W. BACKES, E.M.J. HARDY, A.M.L. JANSEN, S. POLLEUNIS, R. TIMMERMANS, M.A. POORTINGA and E. VERSLUIS, *Evaluatie Bestuurlijke Lus Awb en internationale rechtsvergelijking*. The Hague, Ministry of Security and Justice, 2014, p. 127-133.

20. The Administrative Litigation Section of the Council of State is an administrative court that adjudicates by means of judgments on annulment actions for infringement of substantive forms or forms prescribed under pain of nullity, excess or misuse of power, instituted against acts and regulations.[39]

As a rule, the Administrative Litigation Section annuls a contested administrative act if it is unlawful. It may also order the suspension of its enforcement, as well as interim injunction relief (‘*voorlopige maatregelen*’).[40]

21. The Act of 20 January 2014 reforming the jurisdiction, procedural rules and organization of the Council of State[41] provides the Administrative Litigation Section with additional instruments or streamlines the existing instruments in order to make the settlement of administrative disputes more effective. Given the far-reaching and sometimes undesirable consequences of an annulment decision, the legislator wanted to refine the competences of the Administrative Litigation Section of the Council of State, so that it can differentiate as to the appropriate measure according to the established illegality.[42] Hence, the requirement of an interest in the ground, as this emerges from the established case law of the Administrative Litigation Section, has been embedded in the law. This requirement entails that an irregularity will not give rise to annulment if it did not have an impact on the scope of the decision taken, did not deprive the parties concerned of a guarantee or did not have the effect of influencing the authority of the originator of the act.[43] Furthermore, the

[39] See Article 14(1)(1) of the coordinated acts on the Council of State. The existence of the Council of State is laid down in Article 160 of the Constitution.

[40] See articles 14 and 17 of the coordinated acts on the Council of State.

[41] Published in the *Belgian Official Journal* on 3 February 2014

[42] *Parl. Doc.*, Senate, 2012-2013, no. 5-2277/1, p. 2-3.

[43] Article 14(1)(2) of the coordinated acts on the Council of State, as inserted by Article 2(3) of the Act of 20 January 2014.

right of the Administrative Litigation Section to maintain the effects of annulled regulations has been extended to those of annulled individual acts.[44]

Another new instrument is the administrative loop, which was introduced in Article 38 of the coordinated acts on the Council of State and defined as "ordering the respondent by interlocutory judgment to remedy, or arrange to have remedied, a defect in the contested act or contested regulation".[45] The introduction of this new instrument was justified very briefly during the parliamentary proceedings. The legislator referred to the administrative loop in the Dutch and Flemish legislation, and stated that "*[t]he Council of State is now authorized to propose the respondent, in the context of a lawsuit of which it is seized, to make use of the possibility to remedy a reported irregularity during the course of the proceedings in order to avoid annulment"*.[46]

22. Clearly the federal legislator, when introducing this new instrument, was more inspired by the Flemish version of the administrative loop than by the Dutch version.[47]/[48]

[44] Article 14*ter* of the coordinated acts on the Council of State, as amended by Article 2(3) of the Act of 20 January 2014.

[45] Between its entry into force on 1 March 2014 and its annulment by judgment no. 103/2015 of 16 July 2015, the Administrative Litigation Section of the Council of State had to rule twice on the substance of a request for application of the administrative loop. In both cases, the Council of State judged that the established irregularity was not remediable. See B. VANHEUSDEN, *l.c.*, p. 203.

[46] *Parl. Doc.*, Senate, 2012-2013, no. 5-2277/1, p. 2-3.

[47] This was explicitly stated by the legislator during the parliamentary proceedings: see *Parl. Doc.*, Senate, 2012-2013, no. 5-2277/1, p. 28.

[48] The unconstitutionality of the federal administrative loop, taking into account the findings of the Constitutional Court in its judgments nos. 74/2014 and 152/2015, was already put forward in the following contributions: F. Belleflamme and J. Bourtembourg, *l.c.*, p. 480-483; S. BOULLART, *l.c.*, p. 1383-1388; F. EGGERMONT, *l.c.*, p. 440-447; P. LEFRANC, "Heeft de bestuurlijke lus nog een toekomst in de Raad van State?", in B. GOOSSENS, Y. LOIX and F. SEBREGHTS, *Tussen algemeen en belang en toegewijde zorg. Liber amicorum Hugo Sebreghts*,

Following the example of the initial Flemish loop, the federal loop can only be applied if the irregularity is remediable. Article 38 of the coordinated acts explicitly provides that this is not the case if the authority involved in the procedure does not have the power to remedy the defect. Additionally, the irregularity must be remediable within a reasonable time period (three months as a rule).

Furthermore, the result of remedying the irregularity must also be that the contested administrative act remains unchanged in substance. The parliamentary proceedings clarify that satisfying these two conditions entails that the federal administrative loop can only be applied to remedy irregularities that occurred at the end of the administrative procedure, being defects of little significance. Hence, the administrative loop cannot be applied to remedy a lacking or irregular impact study or hearing, since the observance of these formalities may alter the contested decision in substance,[49] nor can the application of the loop give rise to new arguments. Yet the legislator considers the failure to state reasons remediable, as long as the reasons were mentioned in the administrative file. Another example of a remediable defect is the problem of missing or illegible signatures.[50]

Another condition for the application of the federal administrative loop is that it should lead to the final settlement of the pending lawsuit. Hence, just as imposed on the Flemish administrative authorities, the Administrative Litigation Section of the Council of State must investigate whether any other grounds are well-founded before proposing to use the administrative loop.

Antwerp, Intersentia, 2014, p. 205-213; S. LUST and S. BOULLART, *l.c.*, p. 1383-1388; D. RENDERS, *l.c.*, p. 1205-1211; A.S. VANDAELE, *l.c.*, p. 428-439.

[49] It was also noted that an impact study cannot be performed in the required short period of time.

[50] *Parl. Doc.*, Senate, 2012-2013, no. 5-2277/1, p. 29.

Finally, following the example of the Flemish loop, the successful application of the federal administrative loop will have retroactive effect, and the Administrative Litigation Section will have to dismiss the appeal.

23. While the main features of the Flemish and the federal administrative loop are the same, the federal legislator did depart in certain aspects from the (later on) annulled Flemish loop.

The Administrative Litigation Section *orders* the respondent authority – and does not merely give it the possibility – to apply the administrative loop. This mandatory force of the application of the administrative loop seems however meaningless, given that Article 38 of the coordinated acts explicitly provides that the administrative loop cannot be applied if the respondent authority refuses.[51]

Furthermore, the federal administrative loop cannot, like the Flemish loop, be used "at every stage of the procedure". By contrast, it is explicitly provided that the loop can only be used after the parties have had the opportunity to make their comments known.

Unlike the annulled Flemish legislation, Article 38 of the coordinated acts on the Council of State does not include the condition that the interested parties must not be disproportionately harmed by the application of the administrative loop. The federal legislator considered it unjustified to take the interests of third parties into consideration when deciding to apply the administrative loop, as these same third parties did not appeal against the contested decision, which must remain unchanged in substance upon application of the administrative loop.[52]

[51] The condition of consent was introduced by the legislator in order to guarantee that the application of the administrative loop is meaningful and can be successfully applied (*Parl. Doc.*, Senate, 2012-2013, no. 5-2277/1, p. 28).

[52] *Parl. Doc.*, Senate, 2012-2013, no. 5-2277/1, p. 29.

Finally, unlike the Flemish administrative loop, the federal loop can result in a new act or regulation, in which case the appeal will be extended to include that act or regulation. However, according to the conditions mentioned above, this new decision must have the same substance as the contested decision. Furthermore, the fact that the remedy would involve passing a new act or regulation does not have an impact on the final judgment of the Council of State, which will dismiss the appeal if the defect has been fully remedied, without the possibility for interested third parties to lodge an appeal against this new act or regulation.

2. THE JUDGMENT NO. 103/2015 OF 16 JULY 2015 OF THE CONSTITUTIONAL COURT

24. Given the similarity of the federal and the Flemish administrative loop's main features, it did not come as a surprise that the Constitutional Court – deciding on an appeal introduced by several individuals, non-profit associations and bar associations against this federal legislation – also declared the federal version of the administrative loop unconstitutional on nearly identical grounds.[53]

25. Indeed, as under the annulled Flemish legislation, the result of the application of the federal administrative loop must be that the contested act remains unchanged in

[53] See amongst others the following comments on this judgment: C. DE WOLF, "De bestuurlijke lus is dood, lang leve de bestuurlijke lus", *TOO* 2015, no. 4, p. 467-475; J. GOOSSENS, "Grondwettelijk Hof vernietigt bestuurlijke lus bij Raad van State. Overige bepalingen grondwettig", *Juristenkrant* 16 september 2015, no. 313, p. 9; M. Uyttendaele, "Sauver la boucle administrative fédérale", *A.P.* 2014, p. 398-406 ; B. VANHEUSDEN, *l.c.*, p. 202-204; J. VANHOENACKER, "Over de bestuurlijke lus en het Verdrag van Aarhus", *M.E.R.* 2015, p. 323-326.

substance. Consequently, the same fundamental problem arises. The Council of State, when ordering the use of the administrative loop, reveals its position on the outcome of the lawsuit and interferes with the discretionary decision by the administrative authority. Hence, for the same reasons and in the same words as in the judgment nos. 74/2014 and 152/2015, the Constitutional Court judges that the contested federal provision infringes the principles of judicial independence and impartiality and of separation of powers.[54]

26. With regard to the rights of defence, the right to adversarial proceedings and the right of access to court, the contested federal provision remedied one of the problematic aspects under the annulled Flemish legislation, by explicitly providing that the administrative loop can only be applied after the parties have had the opportunity to make their comments known. Hence, the contested provision safeguards the right to adversarial proceedings, which the Constitutional Court confirmed.[55]

However, as under the Flemish legislation, the contested federal provision does not offer interested parties the opportunity to appeal against a decision that was taken with application of the administrative loop. The federal provision does not even contain the condition that the interested parties must not be disproportionately prejudiced by the application of the administrative loop. For this reason, the Constitutional Court judges that also the federal provision impairs the right of access to court.[56]

27. Finally, as under the annulled Flemish provisions, the failure to state reasons is considered a remediable defect. Whilst the parliamentary proceedings of the federal provision clarify that the use of the administrative loop cannot lead to new arguments, it did allow that the failure to state reasons is remedied, as long as these reasons were mentioned

[54] Judgment no. 103/2015, B.11.1-B.11.4.

[55] Judgment no. 103/2015, B.12.3.

[56] Judgment no. 103/2015, B.12.4-B.12.5.

in the administrative file. Hence, the contested federal provision allows that the authority only notifies the reasons on which the decision is based after an appeal has been lodged. This impairs the right of the addressee of the act and of all interested parties to take immediate cognizance of the reasons justifying the decision. For this reason, the Constitutional Court judges that the contested federal provision, in the same way as the annulled Flemish provisions, infringes the formal obligation to state reasons, as enshrined in the Act of 29 July 1991 and in Article 6(9) of the Aarhus Convention.[57]/[58]

28. Although the Constitutional Court once more applauds the legislator's efforts to arrive at an effective and definitive dispute settlement, it annuls the contested federal provision given the aforementioned infringements of the rule of law and the fundamental procedural rules.[59]

IV. THE FLEMISH ADMINISTRATIVE LOOP REVISITED

29. By decree of 3 July 2015[60], the Flemish legislator accepted the invitation of the Constitutional Court to makeover the administrative loop, as laid down in the Articles 33(2)

[57] Judgment no. 103/2015, B.13.1-B.13.4.

[58] In the judgment no. 103/2015, the Constitutional Court did not rule on the settlement of the procedural costs in case application is made of the administrative loop.

[59] Judgment no. 103/2015, B.15.

[60] Decree of 3 July 2015 amending Article 4.8.19 of the Flemish Town and Country Planning Code and the decree of 4 April 2014 on the organisation and the procedure of certain Flemish administrative courts (published in the Belgian Official Journal on 16 July 2015). The Articles 5 and 6 of that decree, which reintroduce the

and 34 of the decree on the Flemish administrative courts and later on annulled by judgment no. 152/2015.[61] The new version of the administrative loop differs on several - essential - aspects from the original one, in which way the legislator aimed to meet the objections of the Constitutional Court in the aforementioned judgments.[62]

30. In order to remedy the infringement of the principles of judicial independence and impartiality and of separation of powers, the new provision stipulates that the administrative court can only suggest the use of the administrative loop if it "establishes that it must annul the contested decision by reason of illegality".

In this way, the legislator ensures that the administrative court does not – as in the annulled provisions – merely reveal its position on the outcome of the lawsuit when initiating the administrative loop, without taking a final and binding decision. On the contrary, the initiation of the administrative loop now presupposes that the administrative court in the interlocutory judgment decides in a final way – after the parties were able to debate on it – on all legal issues which arise with regard to the contested decision. More specifically, the administrative court must decide that the contested decision is irregular, that this irregularity – which is deemed to be reparable – will lead to the annulment of the contested decision, and, if necessary, that all other means against the contested decision are unfounded. In this way, the new version of the administrative loop does not entail a preliminary judgment by the administrative court with regard to the contested decision, but

administrative loop, entered into force on 1 January 2016 (see Article 17(1) of the administrative act of 2 October 2015 of the Flemish Government).

[61] See about this new version of the administrative loop: G. VERHELST, "Raad voor Vergunningsbetwistingen en Milieuhandhavingscollege krijgen bestuurlijke lus 2.0", *RW* 2015-16, no. 24, p. 923-939; X., "Bestuurlijke lus bij Milieuhandhavingscollege en Raad voor Vergunningsbetwistingen", *NjW* 2015, no. 327, p. 582-583;

[62] The parliamentary proceedings clarify extensively in which way the new provisions meet the objections of the Constitutional Court (see *Parl. Doc.*, Flemish Parliament, 2014-2015, no. 354/1, p. 3-22).

only binding decisions. Consequently, the principle of impartiality seems to be complied with.

More importantly, it is no longer required that the result of remedying the irregularity must be that the decision is maintained. By contrast, the new provision lays down that the application of the administrative loop must result in a new decision, the so-called "remedying decision". This remedying decision must not have the same substance as the contested decision. It is left to the discretionary power of assessment of the administrative authority to decide whether the remedying of the irregularity has an impact on the substance of the contested decision. In this way, the separation of powers between the judicial and the executive powers seems to be fully observed.

31. By virtue of this new provision, the appeal will be extended to include the remedying decision, so that the court can assess whether the established irregularity has been fully remedied, and whether it is free from newly alleged irregularities. If this is not the case, the court must annul both the contested decision and the remedying decision, unless it decides to apply the administrative loop once more. If, on the other hand, the court considers that the established irregularity has been fully remedied and that the remedying decision is not affected by newly alleged irregularities, the court will dismiss the appeal against the remedying decision. Also in that case, the court must – by virtue of the new Article 34 of the decree on the Flemish administrative courts – annul the contested (initial) decision, though it can decide to maintain certain effects thereof.

Hence, the application of the administrative loop will always lead to the annulment of the contested (initial) decision, which has indeed been found irregular in the interlocutory decision. In this way, the administrative loop no longer only seems to serve the interests of the authority, which must be applauded from the perspective of the principle of separation of powers.

32. In order to remedy the established infringements of the rights of defence, the right to adversarial proceedings and the right of access to court, the Flemish legislator obeyed to the requirement of the constitutional court to organize an adversarial debate on

the application of the administrative loop. Hence, the new Article 34(2) and (3) of the decree on the Flemish administrative courts explicitly provides that the administrative loop can only be applied after all parties have had the opportunity to make known there point of view about the use of that instrument, both written and orally. In case the parties have not already discussed this issue in their written submissions, the administrative court will by interlocutory judgment give them the opportunity to do so within a delay of 30 days. In addition, the administrative court will always organize a hearing about the application of the administrative loop, unless the parties waive this right. It is only after this hearing that the administrative court will decide by interlocutory judgment on the application of the administrative loop.[63]/[64]

Furthermore, the Flemish legislator remedied the established infringement of the right of access to court, by offering the interested parties the opportunity to appeal against the remedying decision. This decision must be published in accordance with the applicable rules upon notification of the final judgment of the administrative court that establishes the full remediation of the irregularity and dismisses the appeal against the remedying decision.[65]

[63] In this interlocutory judgment, the administrative court will also establish the timeframe within which the remedying decision must be taken. This deadline can be prolonged only once, and maximum for the duration of the initial time limit.

[64] After the administrative loop has been applied by the authority, the parties will also be given the opportunity to make known their opinion on the remedying decision, both written and orally (article 34(5) of the decree on the Flemish administrative courts).

[65] The obligation of publication and the possibility of appeal against the remedying decision, as laid down in the new Article 34(8) and (9) of the decree on Flemish administrative courts, only apply in the proceedings before the Council for Permit Disputes and not in the proceedings before the Environmental Enforcement Council. This is justified by the fact that the latter concerns two-party disputes between an authority that imposed an administrative fine and the addressee of that decision, which were already informed by the remedying decision and given the opportunity to debate on the legality thereof.

33. With regard to the established infringement of the formal obligation to state reasons, it must be noted that the parliamentary proceedings clarify that the failure to state reasons is again considered to be an irregularity that can be remedied by application of the administrative loop. However, given the specific features of the new loop, the remediation of this irregularity does no longer seem to raise objections from a constitutional point of view.

Indeed, the remediation does not take place within the initial (unreasoned) decision, so that the reasons are not merely added to the decision later on. By contrast, a new decision must be taken, which must remedy the established infringement of the formal obligation to state reasons and thus contain the required reasons. This remedying decision will be notified to the parties to the proceedings, which will have the opportunity to debate on the legality of this decision. Furthermore, in case the administrative court establishes the full remediation of the irregularity and upholds the remedying decision, the latter will be published in conformity with the applicable rules and the interested parties will have the opportunity to appeal against this decision before the administrative court.[66] In this way, the right of all interested parties to take immediate cognizance of the reasons of the decision by mentioning these reasons in the act proper seems to be observed.

34. Finally, the new Article 33(2) of the decree on the Flemish administrative courts provides that when the administrative loop has been applied, the administrative court *must* order the respondent authority to pay the procedural costs. By excluding the applicant being charged with the procedural costs, the Flemish legislator meets the objections found by the Constitutional Court with regard to the right of equal access to court.

[66] As explained in the previous footnote, this is only the case in proceedings before the Council for Permit Dispute.

V. CONCLUSION

35. As in the Netherlands, the introduction of the administrative loop in the Belgian administrative procedural law forms part of an overall evolution in the task of the administrative court from merely upholding of the objective law towards providing an efficient and final dispute resolution. Whilst this evolution is well received and seems to be successful in the Netherlands, there is much less academic and political support in Belgium for a more active role of the administrative court.

36. This lack of support might explain why the administrative loop was given a very limited scope in the initial Flemish legislation. Indeed, the administrative loop could only be applied if the decision, upon remediation of the irregularity, could be maintained. Hence, when the administrative court decided to suggest the use of the administrative loop, without this issue being the subject of an adversarial debate, it was predetermined that the result of the administrative loop should be that the decision remained unchanged in substance. In case of a successful remediation, the court would dismiss the appeal, without the interested parties being offered a possibility of appeal against the remedied decision.

It is exactly this limited scope of the Flemish administrative loop that resulted in fundamental objections from the perspective of the rule of law and fundamental procedural rights.

37. The federal legislator seemed to go further, by accepting that the application of the administrative loop could result in a new act or decision. However, he also provided that the contested decision must remain unchanged in substance and that, upon a successful application of the administrative loop, the appeal must be dismissed. Hence, the federal loop finally had the same limited scope as the initial Flemish loop. Furthermore, whilst the federal legislation did provide for on adversarial debate before the administrative court could order the application of the administrative loop, it did not guarantee the right of access to court with regard to the decision that was taken upon application of the administrative loop.

38. Given these fundamental constitutional obstacles, the Constitutional Court decided up to three times to annul the similar Flemish and federal legislation. Nonetheless, it explicitly encouraged the legislator in its efforts to arrive at an effective final dispute settlement.

It seems that the Flemish legislator, by decree of 3 July 2015, succeeded in its efforts to meet the objections of the Constitutional Court by thoroughly amending the system of the administrative loop. The main difference with the initial legislation is that the application of the administrative loop will now always entail a new decision which, depending on the assessment from the authority when remedying the irregularity, can have another substance than the original decision. This remedying decision will be published and appealable by third parties after the court found that the irregularity has been fully remedied. In addition, the application of the administrative loop will always result in the annulment of the contested decision.

39. As could be expected, an appeal has been introduced before the Constitutional Court against the newest version of the administrative loop.

With regard to the chances of success of this appeal, it is relevant to note that the Legislative Section of the Council of State in its advisory opinion assessed that the objections of the Constitutional Court have been remedied.[67] The Legislative Section even explicitly applauds the fact that a new decision can be adopted and be the subject of debate pending the proceedings.[68] It considers this to be a strengthening of the rights of all

[67] Advisory opinion no. 57.080/3 of 12 March 2015 of the Legislative Section of the Council of State, *Parl. Doc.*, Flemish Parliament, 2014-2015, no. 354/1, p. 63-78.

[68] The Legislative Section emphasizes however that the following conditions must be fulfilled: the new decision is properly published, the parties in the proceedings can debate on it and third interested parties can appeal against it. It considers these conditions to be fulfilled in the new legislation.

interested parties and to be in line with the legislator's aim to increase the efficiency and expediency of administrative judicial procedures.[69]

While the Legislative Section seems to support this new version of the administrative loop, it does not appear that this tool will soon be reintroduced before the Administrative Litigation Section of the same Council of State. In an answer to a Parliamentary question on the intentions of the federal Minister of Home Affairs to reintroduce the administrative loop before the Administrative Litigation Section of the Council of State, the Minister briefly answered that there is a willingness to repair the loop, but that "the matter is extremely complicated".[70] Given the fact that the Flemish legislator already seems to have succeeded in its efforts to develop a constitutional new loop, this answer of the Minister can only be interpreted as a lack of interest in a reintroduction of the federal loop. Or maybe the federal legislator prefers to await the application of this new instrument by the Flemish administrative courts, which is possible since 1 January 2016.

[69] *Parl. Doc.*, Flemish Parliament, 2014-2015, no. 354/1, p. 73.

[70] *Hand. (Parliamentary activities)*, Chamber, 2015-2016, 28 October 2015, no. 54 COM 261, p. 28.

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THE FOUNDATION AND CRISIS OF THE AUTONOMOUS STATE IN SPAIN

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1. INTRODUCTION

Spain, in 1978, was the most centralist State of Europe and now it is one of the most decentralized. The Autonomous State in Spain has been a good framework to devolve the power, at least for 20 years, but now it is going through a two-fold crisis. The first consists of the serious structural defects of the autonomic system - numerous jurisdiction conflicts, scarce utility of the Senate, precariousness of the funding system…, among others. These defects require constitutional reforms and "rationalizing" the State, most probably in a federal sense. The second crisis arises from the need to set up a special position for Catalonia, the Basque Country and, perhaps, for others Autonomous Communities. This claim has been used by nationalist parties of these Autonomous Communities (ACs) in order to defend their argument in favour of independence from Spain. This position was a minority opinion in the past but it has grown significantly in four/five years, especially with respect to issues related to language, funding and other special circumstances encapsulated in the slogan "Catalonia is a nation"

In my opinion these two crises have different causes yet there is a relationship between them, because a segment of the Catalan population will reject separation from Spain if they foresee a reasonable constitutional reform, and in contrast they could vote for the separatist parties if the major Spanish parties do not announce any such changes.

Actually, there are also other crises. The social effects of the severe economic crisis have been felt in recent years due to the cuts in education, healthcare and social services. This economic crisis has been particular noted in the unemployment rate that remains very high especially among youth. But another crisis has also emerged – a "democratic" crisis. This is evident in the criticism of the functioning of representative institutions, the traditional parties, the monarchy and especially the corruption of politicians. This democratic and participatory approach has strengthened some political parties such as "Ciudadanos" (Citizens) and it has caused the emergence of new parties like

"Podemos" (We can). It is about the quality of democracy but of course it will also influence the immediate future of autonomy.

The difference between the decentralization in Spain and in the UK is obvious, despite the old idea of parallelism between Scotland-UK and Catalonia-Spain, but there are also common elements for reflection and discussion, for example, in the plurality of nations and their consequences. Another common element rests on the position of the regions in the European Union and the conditions of the new states (independence is no longer what it was), because some regions are much stronger than some states, but they are not in the European Council.

2. FOUNDATION AND EVOLUTION OF THE AUTONOMOUS STATE

Centralism, together with authoritarianism, has been a traditional feature of the modern State in Spain, unaffected by constitutional changes, although in short liberal periods of our history there were also attempts at decentralization, especially in the First Republic (1873) and the Second Republic (1931-1936). After this period, Francoism returned to extreme centralism and so it was logical to think that the first democratic elections in 1977 would bring some form of autonomy.

This phase of "transition to democracy" led to the establishment of an interim form of self-governing regions, which was based on an Assembly and a Government of limited power until the Constitution was passed in 1978. Despite the limited powers, this provisional autonomy, based on the provincial local institutions, was very useful for dialogue with the central government on the territorial organization, which was achieved without excessive conflict. The Constitution established two different degrees of power among regions, at least for the first five years after the adoption of the Statute of

Autonomy. But the Constitution barely set the procedures for organizing the Autonomous Communities (ACs), its institutions and some general principles, leaving the future development of the Autonomous State wide open.

The doubts raised about the development of the ACs were resolved in the Autonomic Pacts of 1981, made by Suarez, the President of the Government (Democratic Center Party, in Spanish, UCD) and Felipe González, the leader of PSOE (in English, the Spanish Socialist Workers' Party), the main opposition party. The process of decentralization evolved quickly, and in 1983 all the ACs Statutes were approved, the general laws of the State were reformed and all ACs held elections, thereby forming the 17 regional parliaments and governments involved.

Moreover, many Sentences of the Constitutional Court (CC) facilitated the operation of the system; and also the fact that the PSOE obtained a broad parliamentary majority consolidated the democracy, by giving the government stability for a long period (Felipe González, 1982-1996). These governments renovated and modernized institutions, with important reforms in the Army, health, education, etc. In 1986 Spain became part of the European Union, then called the EEC, and economic and political momentum favored the new democratic and social State. The persistence of ETA terrorism in the Basque Country appeared as the worst scourge, once the army was no longer a danger to the democracy. The monarchy of King Juan Carlos followed the European Parliamentary model and its role in the early years, which were the most difficult, contributed to the mutual benefit of the democracy and the monarchy.

Different level of competencies in the first period

In the early nineties, the ACs with the lesser degree of self-government called for the broadening of their powers, as allowed by the Constitution, and the "Second autonomic pacts" (with the PSOE in government at the time, and the PP, in English, the Popular Party, in opposition) conducted a substantial equalization of the power of all of the ACs, under the criticism of the nationalist parties. In recent years several financing reforms and a major reform of Senate rules, trying to improve the autonomic system have been performed. In 1996 the PP won the elections and formed the government, after negotiating with the nationalist parties. In the elections of 2000 the PP obtained an absolute majority and then problems began between Aznar's government and some ACs.

Around the year 2000 the decentralization of the State foreseen by the Constitution is considered to have been fulfilled, because the transfer of services in education and health

was completed in all ACs, and this involved a high number of civil servants and a large quantity of financial resources.

Also, at the turn of the century some structural problems of the autonomous State appeared. The most well-known was the limited functions of the Senate, which has a similar composition to the Congress of Deputies but without power and with a weak relationship with ACs, even though the Constitution qualifies it as "House of territorial representation." In 1994 a reform of the Rules of the Senate was done to try to strengthen the relationship between this House and the CAs, but the change did not achieved its objectives and so the Senate itself voted for the necessity of a constitutional reform. However, twenty years later the reform has not yet taken place.

Another criticism extended among politicians and experts is the excessive State intervention in the powers shared with the CCAA, in very important matters (education, health, environment, general economy ...). These excesses generated continuous conflicts posed by ACs before the Constitutional Court (CC). This received so many appeals that it became saturated and dictated sentences long overdue (7 years or more).

The most important problem was that the Basque Nationalist Party (BNP) and nationalist Catalan party (Convergence and Union, C&U) launched harsh criticism of the autonomic system ("Barcelona Declaration", 1998) and in the following years tried to change the Autonomous State by the reform of the Statutes of Autonomy. From 2003, the BNP (while the terrorist activity of ETA continued) tried, unsuccessfully to pass several reforms to establish a kind of confederation or Free State with Spain. Afterwards Catalonia approved an ambitious bill of the reform of the Statute of Autonomy that was trimmed back by the Spanish Parliament (2006) and partially annulled by the CC in a controversial judgement (31/2010). As a reaction, several Nationalist Parties launched a referendum on the future of Catalonia, including the option for independence, partly inspired by the Quebec and Scottish examples.

3. INSTITUTIONS AND STATUTE OF AUTONOMY

In relative parallelism with the institutions of the State drawn by the Constitution, each Autonomous Community (AC) has a President, a Parliament and a Government of its own.

Each AC chooses a Parliament composed of a varying number of deputies, according to the population (Catalonia, 135; La Rioja, 33), and they all have legislative power and the faculty to elect the President of the AC, who is also the head of the government. The institutions of the ACs, especially the President and the Government have worked quite well in most cases, and Parliaments have not achieved more because of democratic weaknesses in the political system itself, so they do not require constitutional reforms, but better representation of citizens and more efficacy in their roles.

The importance of political autonomy can be seen in the fact that the institutions (Parliament and government, mainly) respond only to the electorate itself, without any hierarchical dependence on state government. The ACs have major legislative power, exclusive from or concurrent with the state, in areas such as urban planning, education, health, etc. In these cases and others the ACs exercise also the executive function, because they decide on the organization of the administration of major public services. So, the administrative and budgetary apparatuses which depend on the ACs are significant, especially since 2001 when all education and health services were transferred to the ACs, because the staff and financial resources in these sectors is considerable.

There is, moreover, a Superior Court in every AC, which has an ambiguous position between the State and the AC. There are also other autonomous institutions (Ombudsman, financial control, advisory council, etc.), that each AC organizes freely. Every administration depends on and is directed by the corresponding Government.

The Statute of Autonomy of each AC is the highest Law of the Community, like a regional Constitution, which regulates its institutions and competencies, contains some

general rules, and in the latest reforms, also introduces the rights that correspond to citizens, beyond those that are common to all Spaniards.

Historically, the Statute had an even higher significance because its approval meant the creation of the AC itself and the implementation of the institutions and the exercise of powers. The Statute of Autonomy could follow two different procedures for its approval. The first, which corresponded to the ACs with greater desire for autonomy (Catalonia, Basque Country, Galicia and Andalusia) involved the drafting of a proposal by the members of the Spanish Parliament elected in the region itself (deputies and senators from each of the regions), and this was followed by a joint discussion by a delegation of these parliamentarians and the Constitutional Commission of the Congress of Deputies. The resulting text was subjected to a referendum of the people of the region. The rest of the draft statutes were prepared similarly but were approved directly by the Spanish Parliament (called Cortes Generales) and they were did not submitted to referendum.

The most specific trend of the Statute is the drawing up of competencies of the AC, by mandate of the Constitution. The devolution process is not regulated in the Constitution but in the Statute of each AC, according to the "disposal principle" (principio dispositivo). That is to say, every AC choses the competencies that corresponds to them, with ratification by the State. From these functions the Statute are considered to have a quasi-constitutional nature, always subjected to the Constitution, but their protection in face of State Law depends on the Constitutional Court. This Court uses the corresponding norms of the Constitution and the Statute of Autonomy to define the competencies, and this criterium is called "bloc of constitutionality".

4. THE SENATE AND THE NECESSITY OF REFORMING

The current Senate, because of its composition, is a duplicate of the Congress of Deputies, and because its functions is totally subordinate to them. At first glance the composition seems different, because it is mixed: There are 208 senators elected by a majoritarian electoral systems (four per province), who represent the major parties in the respective provinces. There is a minority of Senators (about 60) appointed by the Parliaments of the ACs, and therefore elected also by parties of these Parliaments. Despite this kind of Senator is distributed into general parliamentary groups of the political parties. So, the Senate has a composition more or less equivalent to the Congress of Deputies.

On the other hand, the Senate has much less power than the Congress. The appointment and the end of the Government depend on Congress (the Senate can only raise parliamentary questions), and the position of the Senate in legislative function is subordinate to the Congress. So, really the Senate is a rather useless body. But the main reason for reforming the Senate is not so much its limited usefulness as the need for an institution involving the ACs, such as a Senate or a Council of the Austria or Germany.

This idea of orienting the Senate toward the Autonomous Communities was so clear that already in 1994 a reform of Senate Rules was made to enhance its functions regarding the ACs, and soon afterwards the Senate voted unanimously to undertake a reform of the Constitution, but this was postponed and was never taken up again. In 2004, the Zapatero government included the Senate among the future reforms of the Constitution, but this aim failed. Today, no one denies the need to reform the Senate and alternatives include moving towards a parliamentary chamber, either elected by the citizens of the ACs (as in the US), or appointed by regional parliaments (as in Austria), or transforming the Senate into a kind of Federal Council (like the German Bundesrat).

In other occasions I have defended this last proposal, inspired by the German experience, because it allows a significant participation of the ACs in three major functions of the State. First, they would participate in passing laws affecting ACs, which would

decrease the current number of conflicts. They would also help shape intergovernmental relations between the ACs which are currently very weak. Federal Senate would also lead the participation of the ACs in the creation of European Union legislation. All in all, this kind of Federal Council would give the ACs much more power and would integrate them better in the ensemble of State.

In terms of the composition, the federal Senate would consist of representatives of the governments of the ACs, so that each CA had three representatives or votes at least and one more for every million inhabitants. Certainly a Senate or Council of the ACs, as proposed here, would be very different from the Congress, which is direct and general representation of citizens, whereas the Senate legitimacy would derive from the role of the ACs in the State. This composition and functioning would have great advantages, because the members of the regional governments are experts in each topic they address, and their participation would improve the implementation of these laws.

5. THE DISTRIBUTION OF POWERS

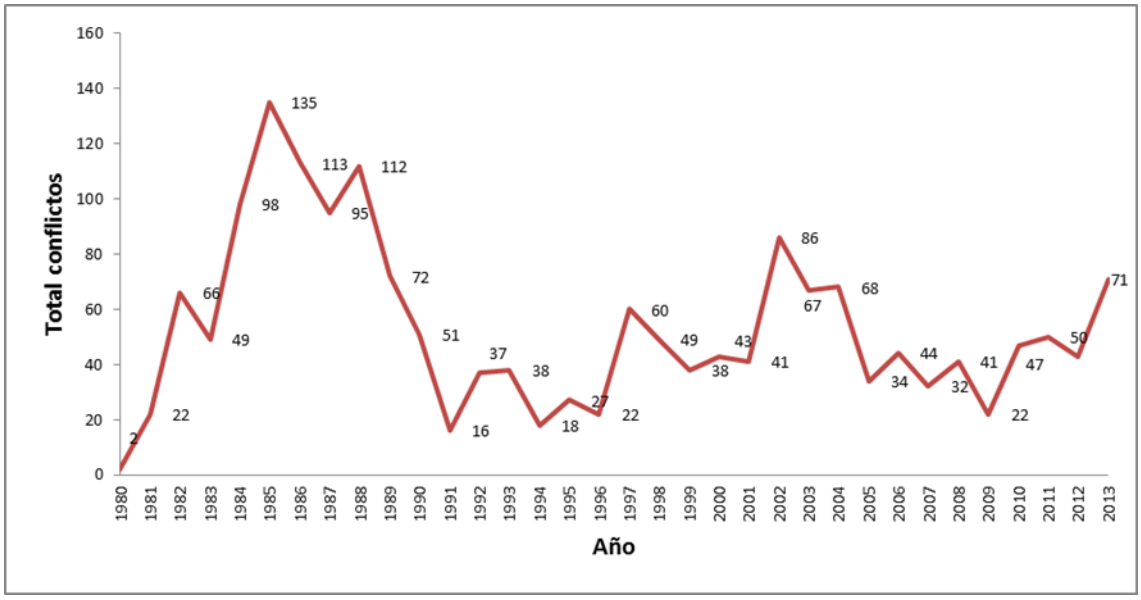
The distribution of powers was born in Spain burdened by the doubts of the constituent Parliament about the autonomic system. Namely the alternative was a partial autonomy granted to a few ACs or to its extension to the whole territory, and in this case, between an equivalent power of the ACs or a double level of self-government. Within maximum and minimum margins, the option was solved by each individual AC and was reflected in its own Statute of Autonomy. Thus, the powers and responsibilities of each AC could be different depending on both the Constitution and the Statute of the AC. Initially there were two different levels of power, the highest corresponded to 7 ACs, determined through complicated negotiation theoretically for those showing a greater interest in self-government (Catalonia, the Basque Country, Galicia, Andalusia, Navarra, the Canary

Islands and Community of Valencia). The other ten ACs had similar institutions but less legislative faculties. In any case, these ACs demanded equality and this was achieved in 1992, by “autonomics pacts” signed by the PSOE and the PP.

In the distribution of competencies there are different categories. On the one hand, there is the traditional kind of exclusive powers of the State (armed forces, for example), and the exclusive power of the ACs (urban planning or tourism, for example), including so-called "exclusive double competencies" (State-ACs) according to the length of the subject (mater), such as roads, railways and public works. In every case, exclusiveness means that all faculties (law, regulation and implementation) correspond solely to the State or to the ACs. On the other hand, there are also the categories of “concurrent” and “shared” powers. In the category of concurrent, the Constitution attributes the "basic law" to the State and confers legislation of development and implementation to the ACs, such as education and health. There are also some areas of shared competence between the legislation of the State and execution belonging to the ACs, as in labor law.

These different kinds of powers are barely defined in the Constitution and, moreover, there are only a few general clauses comparable to federal prevalence in Germany, for resolving contradictions between laws. Hence, the Constitutional Court is required to intervene continually in order to rule on conflicts between the State and ACs.

In addition, a lot of conflicts have occurred because in fact the distribution of powers in Spain the most important category is given to the concurrent powers affecting general economy, education, health and environment. In this case, the State and the ACs have legislatives competences, the first only on the basic law and the ACs on the development of law and implementation. The profiles are ambiguous, because the basic law is different in every subject and at every political conjuncture.



The huge number of conflicts between the state and the ACs has given excessive importance to the Constitutional Court. The worst consequence of this is that the judgments of the Constitutional Court are not able to prevent new conflicts on the same subject and the amount of appeals generate delays of CC decision delays of 7 and 8 years from when the conflict occurred. The volume of conflicts and the delay of sentences of the CC is a serious problem, which affects the core of the system.

6. THE CONSTITUTIONAL COURT

The disputes between organs of the State may be more frequent in the federal and regional systems, and different formulas have been developed for solving these conflicts. In modern federalism the judicial solution has emerged as the main mechanism, which can be

arranged through the ordinary Courts US) or through a specific Constitutional Court (Kelsen, Austria, Germany).

The Spanish Constitution of 1978 has clearly followed the German model, calling on the CC to resolve disputes that may pit the state against the ACs, or the ACs against one another, without prejudice in selecting mechanisms that respond to other logic, such as political negotiation, appeals to the ordinary courts and the unilateral imposition of the State, which is foreseen for very serious situations in Article 155 of the Constitution, copying the German mechanism of federal coercion. As in the other countries mentioned above, the Spanish Constitutional Court also has jurisdiction in various fields, such as the protection of Human Rights and the general review of Acts of Parliament and delegated legislation of the Government.

Specifically, the "conflicts of competencies" brought before the CC are disputes between the State and one AC, or between several ACs, discussing the jurisdiction to pass an Act or a regulation because the author of the claim believes that the other (AC or State) does not have the competence to act. The procedure changes slightly depending on whether the object of conflict is an Act or a regulation, but in both cases the CC resolves the issue as a conflict of competences. The function of the CC is to analyse the Constitution and the Statute of the AC and decide whether the author of the work had jurisdiction to rule or whether, on the contrary, it has exceeded its powers and has invaded the prerogatives of the appellant. Therefore it is said that the essence of conflict of competences is the potestatis vindicatio. The advantages of the jurisdictional formula to solving conflicts, and more precisely of attributing the solution to the CC, are that the Court's decision must be based exclusively in legal criteria, and this is intended to make the conflict purely judicial. Although it may have had a political origin, it is resolved by the Court with legal criteria.

In this regard, the Spanish Constitution seems to have faithfully followed the federal model of the German system, but instead we have had very different results, as it is possible to see in various aspects.

First, the volume of conflicts between the State and the Autonomous Communities exceeds all expectations. Its number can be set at approximately 50 conflicts per year, which are resolved through several different procedures. Since its foundation in 1981, the CC has issued, more or less, 1.100 judgments deciding conflicts between the State and the Autonomous Communities. This number represents an annual average of 30 sentences or so, a number whose magnitude can be fully appreciated when compared to the annual average in Germany, where the Federal Constitutional Court usually resolves one or two conflicts per year.

The accumulation of unresolved conflicts has led to a very serious delay in the processing of sentences, which has reached approximately 7-8 years in the last decade. The responsibility for this delay is not attributable only to the CC, although it has relegated this problem to a position of lesser importance, giving preference to other issues. Nor is it exclusively the responsibility of the CC, because this high number represents appeals and conflicts posed by state and regional governments, by deputies and senators (50 signatures), and even by judges. Occasionally the parties involved benefit from these postponements in rulings, and the delay in judgment encourages irresponsibility on the part of politicians. Government officials may adopt unconstitutional decisions knowing that the judgment will take eight years (two normal legislatures), and normally will not affect them. Various reforms of the Organic Law of the CC in 2000 and 2007 have tried to reduce the problem, and they are positive, but so far a solution has not yet been reached, because the root of the problem is closely linked to the system of division of competences itself. Also we must remember that in Spain the Senate does not represent the ACs, unlike the Bundesrat in Germany, and the basic laws are decided solely by the State.

Moreover, the large number of judgments devalues the doctrine of the CC, because even for the experts it is difficult to know the criteria of competencies in force. This volume of conflicts, the delay of sentences and the diversity of judicial solutions have generated the loss of authority of the Court.

In consequence the governments do not pay attention the doctrine of the CC, even in cases where good constitutional theory has been applied. For example, the SCCS

13/1992 prohibits granting spending power to the State, but the State has persisted giving grants, and the ACs continues presenting claims to the CC. Out of curiosity, I counted the number of sentences on this subject in 2012, twenty years after the leading sentence, and I found 9 statements on subsidies which continue to trouble the State and the Autonomous Communities, with very similar content, based on the cited ruling.

The Constitutional Court is a fragile institution that has enormous power based only on its prestige. The CC can override laws passed by parliament and regulations made by governments, but it lacks the democratic legitimacy of elections and it will not be able to impose its decisions without authority, if it is starved of prestige.

As is generally accepted, the prestige of the CC is essential to fulfil its peacekeeping role, and now its reputation is weak. In the early years of democracy, the members of the CC were professors or judges with enormous prestige, whereas now the situation is relatively mediocre. The main reason lies in the quota system that the parties use to divide appointments (system called lotizazione in Italy). Although the Constitution requires a qualified majority for the election of magistrates, the political parties share the number (quota), and every party appoints judges with a certain political affinity, without taking into account their capacity. The consequence is a loss of quality in terms of the magistrates and poor professionalism in the Court.

Moreover, the improvement of some jurisprudential lines is not easy if the political parties do not make major institutional reforms, especially to correct the distribution of competencies and the lack of representation of the ACs in the Senate, for example.

There is another additional general reform specific to the CC and connected to the conflicts of competences: the possible participation of the ACs in the appointment of judges. The provisions in place in Canada (three judges must be from Quebec) or Belgium (distribution according to linguistic communities) do not seem ideal, because the judges appointed by a territory or community may see their decisions questioned given that they are part of the conflict. Germany's solution is to permit the Länder to elect half of the magistrates through the Bundesrat. This line could be simple to apply in Spain if the

constitutional reform of the Senate progressed. In any case, reserving all the appointments of the constitutional judges for the Congress and a federal Senate could be a good solution.

The possibility of reforming the Constitution can be approached in several ways. The first would change the structure of powers, incorporating formulas that do not generate as many conflicts and modify the system of appointment of judges to the CC, excluding the "quota" method of political parties to elect judges (the Italian lottizacione) because it leads to ignorant and partisan Courts.

7. WEAKNESS OF THE INTERGOVERNMENTAL RELATIONS

In all federal systems, in recent decades, the change from dual federalism to cooperative federalism has occurred, with the generalization of partnerships between governments of the federate states, or Länder, and between those States and the Federation. This transformation has been more or less pronounced depending on the country, but it is a general feature that translates into institutions profound changes in the federal system. Surely this new orientation could become excessive, generating criticism like that of Darnstadt, who ridicules the excess of cooperation in Germany, but we must be aware that it reflects the process of economic integration and, ultimately, globalization.

In Spain the 1978 Constitution did not at all foresee relations between governments as a basis for solving the problems that extend beyond separate ACs, except the mention of a possibility of the agreement between ACs in art. 145.2 SC in order to establish their control. In the same manner, the ACs ignore the usefulness of horizontal cooperation.

The Constitutional Court (CC) was the first to point out that cooperation is an essential trait of any compound state, including the Spanish autonomic system and found no

need for a specific rule to authorize partnerships, because they derive from the nature of the State or, in any case, from the principle of autonomy of Article 2 EC (the first, SCC 18/1982).

The legislation and the Administration began timidly introducing techniques of intergovernmental collaboration. The legislation created sectoral conferences where the respective Minister and representatives of the AACC meet periodically. Subsequently, Law 30/1992 systematized the regulation of different techniques, including joint programs and other possibilities, and therefore greatly favored this practice, although this led to the undue prominence of the central government.

The compacts or agreements (convenios) signed between the central Government and the Executives of every AC is the most utilized instrument (more than 1.000 per year before the economic crisis, now half) and frequently they possess a similar content for several ACs. Horizontal agreements between ACs are much less, probably due to political and ideological reasons.

The Sectoral Ministers' Conferences are the meeting of one minister of central government with the autonomic ministers ("consejeros", counsellors) of the same administrative sector. Regulated by the Act 30/1992, the position of the central minister is decisive because he convenes and chairs the meetings and controls the secretariat o the Conference. Once again, there are no horizontal Conferences, as exists in Germany or Switzerland. On the other hand, there are some Conferences working well (about 10) and others functioning very irregularly, depending on the mood of the central minister, because of his decisive position. There is also the bilateral cooperation, mainly between executives, but their functioning is very heterogeneous. As the number of constitutional conflicts was so high, in 2000 a Commission has been created (outlined in article 33.2 Act of CC) to bargain the content of each possible legal conflict, in order to avoid going to the CC. This is a paradox: one instrument of cooperation of the governments to diminish conflicts between Acts passed by Parliaments.

In 2005, after many recommendations of experts, President Zapatero convened the Conference of Presidents of the ACs, that has a long experience in Austria, Germany and more recently in Switzerland. Afterwards the standard of meeting has been one per year, and Rajoy government has continued the norm, but the efficacy of this organ remains far from its equivalents of European federalisms.

The road traveled since 1978 has been remarkable but still has defects (the virtual absence of cooperation between regions, the minimal power of common institutions, etc.), and improvement surely requires constitutional reform that legitimizes and strengthens partnerships, especially in the form of a general body of participation, such as the Conference of Presidents or a federal Senate.

8. THE AUTONOMOUS FINANCING

In Spain the idea that autonomy must include a system for financing the decentralized institutions is deeply rooted, because the exercise of power requires sufficient financial means. In contrast, the Spanish Constitution on this point merely mentions some general principles, that are too generic to regulate such a complex matter. It made sense in 1978, because nobody knew the ACs that would be created, nor the power they could have, but it's very different 35 years later. As in all other areas, the Constitution should contain the main principles and rules for this sector and the problem is –once again- the lack of constitutional reform.

As the Constitution lacks adequate standards, the Organic Law on Financing of the Autonomous Communities (well-known LOFCA in Spanish), which was adopted in 1980, after the first Statutes of Autonomy were enacted, replaced the role of the Constitution, establishing the rules for the income and expenses of the ACs. In fact, the

first approach of LOFCA only regulated the autonomy of expenditure, which also governed by the narrow principle of "effective cost" of the transferred services. The resources that the ACs needed for education, roads, etc. were received as grants or transfers.

In these decades, LOFCA has been revised several times, virtually every five years. This reform has had advantages and disadvantages. The worst problem is that the revision of LOFCA implies a crisis within the whole system, for lack of constitutional norms, and further, the reforms have been made throught opaque negotiations and amid mutual accusations between the ACs of lack of solidarity. However, the reforms have enabled a range of almost total freedom of expenditure, with autonomy in revenue reaching approximately 65% of economic resources through taxes transferred by the State and other shared taxes, like 50% of the Income Tax and VAT.

There is an important joint negotiating body, which includes the State Minister of Finance and other government representatives of the regional governments. It is called the Council of Fiscal and Financial Policy and it works fairly well, although the State predominates. This has been exacerbated in recent years by the economic crisis and the control resulting from involvement in the European Union, which has even led to the amendment of article 135 of the Constitution, to ensure fiscal stability.

The regions of the Basque Country and Navarre have special tax and financial status, as distinguishing factors, and the Canary Islands also have some peculiarities. The diversity of problems in such a complex system has been studied recently in the book coordinated by Sandra Leon.

9. THE AUTONOMOUS COMMUNITIES AND THE EUROPEAN UNION

Spain had applied for membership in the European Economic Community (EEC) in the sixties but it had been rejected for the lack of democracy posed by the Franco regime. When the democracy began and the Constitution was adopted, in 1978, it foresaw a specific pathway to facilitate the entry in the EEC preventing need for constitutional reform. This shortcut has allowed the changes brought about by the reform of European treaties – including those as important as Maastricht and Lisbon- without amending the Constitution.

Spain joined the EEC on January 1, 1986 but one must remember that before and after there was and has been expansion and strengthening of the EEC. From the initial 6 States, it grew to 15 in 1994, 25 in 2004, and to 28 in 2013. Also the consolidation of institutions was progressive from the creation of the EEC with the Treaty of Rome, through the major reforms of the Treaties: Single European Act (1987), Maastricht (1993) and Lisbon (2007), among others.

From its origin, the EEC was a union of States, and remains it so, but while the position of the regions was negligible in the early stages, but it has grown in importance little by little. The involvement of regions in the European Union (EU) may be described at three levels: downward, upward and direct representation.

Downswing phase is the application of Community law by the States themselves, which they do according to their own rules, so that the EU does not come into internal execution (principle of institutional autonomy), according to established doctrine from the International Fruit Company Judgment (1971). In Spain this means that the State or the ACs intervenes depending of the type of competencies involving Community law (STC 115/1991 consolidates this doctrine).

The ascending phase refers to the participation of the ACs in the development of Community rules because, as was shown first by the German Länder, they are weakened by

the centralization implied in the continued expansion of community law. After several attempts, following the German experience, the ACs participate in European institutions through the Spanish State delegation and can participate in the activities of the Joint Conference on Issues Related to the European Union, which was created in 2004.

Initially the regions were passive subjects of some European policies, but the Maastricht Treaty created the Committee of the Regions, although it only had advisory powers which it shared with local authorities. These limitations have prompted the search for new ways to strengthen regions such as the Network of Regions with Legislative Powers, the empowerment of representative offices in Brussels and the extension of cross-border cooperation policies.

10. THE "DIFFERENTIAL FACTS" AND THE FEDERALISM IN VARYING DEGREES

The problems in the current crisis of the autonomic system are not limited to the areas of self-government that has just been discussed, common to all ACs, but extends to the very conception of the State, because some ACs consider themselves as nations, and criticize to the autonomous system for denying a specific position. This is clearly reflected in the positions taken by the nationalist parties in Catalonia and the Basque Country, but also in other ACs, to varying degrees. The constituent power of 1978 articulated this national plurality assigning to Spain the concept of nation and allowing some ACs to assume the idea of "nationality" or "region" in its Statute, but denying that the distinction of nationality-region has consequences in general competences or financing. The consideration of some ACs as nationality meant progress in recognizing the complex territorial reality of Spain, but has not been enough for the nationalist positions of Catalonia and the Basque Country, which are pushing for their recognition as nations, especially after

the suppression of two categories of competences, made by the 1992 autonomic agreements.

Different official languages

Instead the Constitution did recognize the peculiar character of some regions, stemming from a more or less remote history. The clearest example is the use of the languages other than Spanish, (Catalan, Basque and Galician). The Constitution also refers to the specific Civil Law of some regions (Navarra, Catalonia, Aragon ...) or to the traditional financing system (the "economic concert" in the Basque Country and "economic convention" in Navarra), and has also allowed the creation of a regional police force in the Basque Country, Catalonia and Navarre, as well as territorial entities in the Basque Country, the Canary and Balearic Islands. These features of some ACs are usually known

as "differential facts" and are mostly reflected in the ACs expressing a greater willingness to self-government.

Each of these “facts” or factors and their differential regulation is established by the related Statute. For example, co-official language in the territory of the ACs affects the education, the media and the relations with the administration and justice. In my book there are some maps showing the extent of the differential of the ACs, that in summary are as follows.

Basque Country: language, police, provincial institutions and economic concert.

Catalonia: language, civil law and police.

Galicia: language and civil law.

Navarra: economic convention, civil law and police.

Canary Islands: island councils and special tax regime.

Balearic Islands: language, island councils, civil law.

Valencian Community: language.

Aragon, civil law.

As can be seen at first glance, the dimension of differential facts varies from region to region, but the intensity and political significance of each element in every specific AC is even more decisive. Even the same differential fact, such as the language, plays a very different institutional and political role in Catalonia, the Basque Country and Galicia, and it is even more different in others, such as the Valencian Community or the Balearic Islands.

Therefore it is difficult to make a dual classification of the ACs, from the differential facts point of view, and they are rather ordered in a graduated scale. Catalonia and the Basque Country probably express more desire toward the self-government,

followed by Galicia, the Canary Islands, Aragon and Navarra, but as well as Andalusia, which has improved its autonomy in recent decades.

The main issue now is to set the political balance of the ACs with strong nationalist parties (especially Catalonia and the Basque Country) and the rest of the ACs, and this depend in part on the constitutional idea of nations. In fact, the Canadian "theory of clarity" can help to decide the future of these ACs. If there is an absolute approach to the idea of nation, so that to each nation or nationality corresponds one State, the future of Spain could result in secessions of several territories. If instead the option is for the compatibility of nations with the nationalities and regions in the same State, the continuity of the State will be possible, after a considerable reform of the Constitution.

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A POST-MODERN ADMINISTRATIVE LAW?

Margherita RAMAJOLI

INDEX

1. INTRODUCTION

In recent times, the world of the law has begun to express an interest in the paradigm of post-modernity[1].

This paradigm has been used in various legal disciplines such as philosophy of law, history of law, constitutional law, civil law, criminal law and procedural law[2].

[1] On postmodernism as a heuristic or spiritual category cfr. U. Eco, Postille to Il nome della rosa, Milan, 1983, 528.

[2] Cfr. G. MINDA, *Postmodern Legal Movements. Law and Jurisprudence at Century's End*, New York, 1995. *Teorie postmoderne del diritto*, 2001, Bologna, 408 ff.

There is essentially one reason for this interest on the part of legal culture in the post-modern paradigm. The role it assigns to the state is fundamental: if modernity is characterised by the hegemony of the state as centre of power and as centre of law, postmodernism seeks to free itself from the "regulatory and dominating action of the state"[3].

The main post-modern theories of law are born in the United States. Think of the *Law and Economics* -considered by most as a post-modern movement[4]-, the so-called CLS (*Critical legal studies*), the feminist legal theory, the *Law and Literature* movement and the theory of racial difference (*Critical race theory*)[5].

In Italy initially two branches of the law have reflected on the concept of postmodernism: legal interpretivism and the history of law.

Legal interpretivism has a pre-legal basis that is philosophical in the widest sense. The so-called "philosophical preliminary question" has conditioned the constructive models of modern legal science. According to the paradigm of modernity: 1) each state regulatory system was designed as complete; 2) case law was not considered a source of law; 3) and lawyers were deprived of responsibility and creativity[6].

Instead the post-modern paradigm marks a new way of operating in legal thinking; the novelty lies in abandoning "*la mistica di ogni ontologismo"* (the mystique of each

[3] B. DE SOUSA SANTOS, *Toward a New Common Sense. Law, Science and Politics in the Paradigmatic Transition*, New York/London, 1995; cfr. also P. GROSSI, *Mitologie giuridiche della modernità*, Milan, 2007, III ed.

[4] N. MERCURO and S. G. MEDEMA, *Economics and the Law: From Posner to PostModernism and Beyond*, Princeton University Press, 2006, II ed.

[5] G. MINDA, *Teorie postmoderne del diritto*, cit., 141 ff.; D. KENNEDY, *Comportamenti strategici nell'interpretazione del diritto*, in J. DERRIDA and G. VATTIMO (editors), *Diritto, giustizia e interpretazione*, Rome-Bari, 1998, 249 ff.

[6] R. ORESTANO, *Del "post-moderno", della scientia iuris e di altro*, in *Foro it.*, 1982, V, pp. 8-9 of the extract.

ontology), "*gli ordinati sistemi sostanzialistici*" (the ordered substantialist systems) e "*un mondo di essenze*" (a world of essences)[7].

The history of law has also approached postmodernism because the historical level offers the most appropriate perspective to signal certain phenomena, such as the overcoming of the legal monopoly of the state and the overcoming of law itself as the only source for a legal system[8].

But gradually the post-modern category started to exert a fascination for all the other branches of law.

The exception to this, however, has been administrative law. Administrative law has never taken on the post-modern paradigm and, as a result, has not drawn from it any useful indications for reflecting on the contemporary.

This is the point of departure. In light of this we will attempt to demonstrate that administrative law is truly a world apart: in some respects administrative law is still pre-modern (paragraph 2); in other respects it is seeking a permanent ongoing modernisation that it never achieves (paragraph 3); and in others it is constitutively post-modern (paragraph 4).

2. PRE-MODERNITY AND ADMINISTRATIVE LAW

[7] R. ORESTANO, *Del "post-moderno"*, cit., 11, 13. But cfr. also D. KENNEDY, *A critique of Adjudication (fin de siècle)*, Harvard Univ. Press, 1997, 346 ff., spec. 348 ff.

[8] P. GROSSI, *Novecento giuridico: un secolo post-moderno*, in *Introduzione al Novecento giuridico*, Roma-Bari, 2012, 3 ff.; ID., *Il diritto in Italia, oggi, tra modernità e post-modernità*, in *www.associazionedeicostituzionalisti.it.*; ID., *Sulla odierna "incertezza" del diritto*, in *Giust.civ.*, 2014, 921 ff.

The expression "post-modern" is a slippery one and very diverse meanings have been attributed to it.

The term post-modern was originally used in 1934, in the context of poetic experimentation and referring to Latin American poetry, by the Spanish critic Federico de Onis, in his Antología de la poesía española e hispanoamericana. 1882-1932. Later it was used in a historical context by Arnold Toynbee, in his monumental work A Study of History (12 vols., 1934-1961)[9]. Since the 1950s, the term post-modern spread and was applied in various cultural fields, such as, for example, fiction, cinema and architecture[10].

In any case, postmodernism cannot be understood as a synonym of contemporary. With its prefix "-post", the term post-modern contains a sense of "afterwardness" and therefore also contains the sense of a contrast to the modern. The term post-modern, as has been acutely noted, "houses the enemy within its walls" insofar as it evokes precisely what it would like to overcome, namely modernism; consequently there are as many interpretations of the post-modern as there are of the modern[11].

Between modernity and post-modernity there is not only a temporal division, but also profoundly ideological and existential.

[9] For these references cfr. P. PELLEGRINO, *Introduzione alla cultura del postmodernismo giuridico*, Roma, 2012, 13.

[10] Cfr. G. CIANCI (editor), *Modernismo/Modernismi. Dall'avanguardia storica agli anni trenta e oltre*, Milano, 1989; F. CASETTI, *L'occhio del Novecento. Cinema, esperienza, modernità*, Milano, 2005; C. JENKCS, *Storia del Post-modernismo*, Milano, 2014.

[11] J. HASSAN, *The question of postmodernismus*, in *Performing Arts Journal*, 16, vol. VI, no. 1, 1981, Italian translation in VARIOUS AUTHORS., *Postmoderno e letteratura: percorsi e visioni della critica in America*, Milano, 1984, 109; U. MATTEI and A. DI ROBILANT, *International style e postmoderno nell'architettura giuridica della nuova Europa*, in *Riv.crit.dir.priv*., 2001, 90, nt. 9.

This fissure stems from antithetical visions of humanity, society, reality and science.

According to the philosopher Lyotard, who coined the term post-modern, the paradigm of modernity is characterised: by the desire to build systems, theories, all-absorbing interpretations; by the project to explain the world through the application of uniform principles; by confidence in rationality, objectivity, the positive value of science and technological intervention and all the other ideas of the Enlightenment[12].

Instead, the post-modern condition is characterised by abandoning the pretence of founding a unique sense of the world starting from metaphysical, ideological or religious principles, and by opening up to precariousness.

"Nella cultura postmoderna ... la grande narrazione ha perso credibilità ... la crisi del sapere scientifico, i cui sintomi si sono moltiplicati dalla fine del XIX secolo, non nasce da una proliferazione casuale delle discipline scientifiche che sarebbe a sua volta effetto del progresso delle tecniche e dell'espansione del capitalismo. Essa è il prodotto dell'erosione interna del principio di legittimazione" (In post-modern culture ... the grand narrative has lost its credibility ... the crisis of scientific knowledge, the symptoms of which have mushroomed since the late-nineteenth century, is not born from a random proliferation of scientific disciplines that would in turn be affected by the advancement of the techniques and expansion of capitalism. It is the product of the internal erosion of the principle of legitimacy)[13].

In Italy these ideas spread and develop thanks to Vattimo, who elaborates the notion of "pensiero debole" to describe the abandonment of the powerful legitimacies. "Il pensiero debole" (weak thought) is "una metafora" (a metaphor) and "un paradosso" (a paradox), "è un modo di dire provvisorio, forse anche contraddittorio" (it is a provisional, perhaps even

[12] M. HORKHEIMER and T.W. ADORNO, *Dialettica dell'Illuminismo*, Italian translation, Torino, 1971, III ed.

[13] J.-F. LYOTARD, *La condition postmoderne*, Paris, 1979, Italian translation *La condizione postmoderna. Rapporto sul sapere*, Milano, 1981, 69-72).

contradictory way of saying), "ma segna un percorso, indica un senso di percorrenza: è una via che si biforca rispetto alla ragione-dominio comunque ritradotta e camuffata" (but it marks a path, it indicates a direction: it is a road that forks in relation to reason-domain which is retranslated and disguised), "un equilibrio difficile tra la contemplazione inabissante del negativo e la cancellazione di ogni origine, la ritraduzione di tutto nelle pratiche, nei giochi, nelle tecniche localmente valide" (a difficult balance between the endless contemplation of the negative and the cancellation of every origin, the retranslation of everything in locally valid practices, games and techniques)[14].

Not all the authors who have dealt with this cultural paradigm have used the specific term post-modern; for example, Anthony Giddens uses the term "late modernity"[15]. Ulrich Beck "reflexive modernity"[16], Marc Augé "supermodernity"[17], but, also in the opinion of Zygmunt Bauman, postmodernism remains the preferable definition[18].

In the specific legal field, there are various concrete manifestations that can be traced to the modernity's paradigm. Of these, the best known and most important is codification[19].

[14] G. VATTIMO, *Filosofia al presente*, Milano, 1990, 10-11.

[15] A. GIDDENS, *Le conseguenze della modernità*, Bologna, 1994.

[16] U. BECK, *La società del rischio: verso una seconda modernità* (1986), Roma, 2000.

[17] M. AUGE, *Non-lieux. Introduction à l'anthropologie de la surmodernité*, Parigi, 1992.

[18] Z. BAUMAN, *Il disagio della postmodernità*, Milano, 2002.

[19] P. CAPPELLINI, *Il codice eterno. La Forma-Codice e i suoi destinatari: morfologie e metamorfosi di un paradigma della modernità*, in *Codici. Una riflessione di fine millennio*, Milano, 2002, 11 ff., 14, 51, 53, 65; R. SACCO, *I codici civili dell'ultimo cinquantennio*, in *Riv.dir.civ.*, 1993, 311 ff.; G. TARELLO, *Storia della cultura giuridica moderna. Assolutismo e codificazione del diritto*, Bologna, 1976, 10, 20, 35.

In my opinion, codification includes every other manifestation of the paradigm of modernity: from the exclusive control of law by the state to the fulfilment of a systematic ideal. According to Reimann and Arbor, "the classical understanding of law ... displayed six characteristic features and expressed itself in the ideal of codification"; the six characteristics in question being "national uniformity, systematic structure, clear demarcations, authoritative rules, autonomous law and law as decision-making by rules"[20].

Codification embodies the essence of legal modernity. Codification stakes a claim to order, universality, objectivity, rationality and certainty. According to codification the interpretation model is a discovery of a pre-existing meaning and "la logica della fattispecie" dominates[21].

Codification represents a critique to the degeneration of the law, too flattened on the peculiarities of the case. The technical form of codification has the scope to reduce complexity, strengthening institutions and personifying the core values of a certain topic[22].

In this respect, according to me, Administrative law is placed before true legal modernity because it has not gone through a true process of codification[23].

Administrative law lacked the perspective of codification, in the sense that never there was a clear and general recognition of the need to put full order in a highly irrational

[20]M. REIMANN and A. ARBOR, *The American Advantage in Global Lawyering*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 78, no. 1 (2014), 1 ff., spec. 6 ff.

[21] P. GROSSI, *Novecento giuridico: un secolo post-moderno*, in *Introduzione al Novecento giuridico*, Roma-Bari, 2012, 3 ff.; ID., *Il diritto in Italia, oggi, tra modernità e pos-modernità*, in *www.associazionedeicostituzionalisti.it*.

[22] G. TARELLO, *Storia della cultura giuridica moderna*, cit., 29; P. CAPPELLINI, *Il codice eterno*, cit., 21 ss.

[23] M. RAMAJOLI, *A proposito di condificazione e modernizzazione del diritto amministrativo*, in *Riv.trim.dir.pubbl*., 2016, 347 ff.

positive reality. In this perspective, Administrative law lacked a fundamental experience of modernity[24].

The only general administrative law was adopted in 1990 (law no. 241/90). It contains provisions on administrative procedure and its framework is diametrically opposed to the spirit of codification. The law states general principles -such as proportionality, legitimate expectation, impartiality- that administrative authorities and courts have to apply in the singular cases.

The numerous sectoral Administrative law codes (dealing with the environment, cultural heritage, expropriation, public contracts and so on) cannot properly be considered codes in the traditional sense, insofar as they are more comparable to simple consolidations.

According to the Consiglio di Stato, Adunanza generale, parere 25 ottobre 2004, n. 10548, in Giorn.dir.amm., 2005, 73 ss., Sectoral codes can be clearly distinguished from the classic codes, because they are aimed at the realisation of "micro-sistemi legislativi, dotati di una razionalità più debole … incentrati su logiche di settore, di matrice non esclusivamente giuridica" (legislative micro-systems, equipped with a weaker rationality … focusing on sectoral logics, of a not exclusively legal matrix)[25].

[24] About the lack of a General Part in Administrative Law see also M. RAMAJOLI, *L'esigenza sistematica nel diritto amministrativo attuale*, in *Riv.trim.dir.pubbl.*, 2010, 347 ss.

[25] Consiglio di Stato, Adunanza generale, parere 25 ottobre 2004, n. 10548, in *Giorn.dir.amm.*, 2005, 73 ff.; on this theme cfr. B.G. MATTARELLA, *La codificazione del diritto: riflessioni sull'esperienza francese contemporanea*, in *Riv.trim.dir.pubbl.*, 1993, 1035 ff.; ID., *Codificazione e Stato di diritto*, in *Riv.trim.dir.proc.civ.*, 1998, 365 ff.; ID., *La codificazione in senso dinamico*, in *Riv.dir.dir.pubbl.*, 2001, 709 ff., and the bibliography cited therein. For the distinction between codification and consolidation cf. M. E. VIORA, *Consolidazioni e codificazioni. Contributo alla storia della codificazione*, Torino, 1967, 2-42.

Also the recent Code of Administrative Procedure isn't a traditional code. It is not a closed and exclusive system, but one, which responds to a different logic, because it is not assigned a role intended to fill every gap in the legislation.

The Code of Administrative Procedure is the only code of procedure that begins in its opening articles with general principles (the principle of effectiveness of protection and the principle of due process), and the principles are "norme senza fattispecie" [26].

They are the result of elaboration in case law and, in a circular process, case law directly decides disputes by resorting to the general principles it created itself.

The principles have been used by case law to introduce new rules (for example, certain rules on territorial jurisdiction), or even new types of action (above all, the action of "adempimento").

Administrative law therefore has lacked a fundamental part of the experience of modernity, it has been missing a code and the systematic construction of a general part of the law. Therefore, by this logic, Administrative law is still pre-modern, as far as I'm concerned.

3. MODERNISATION AND ADMINISTRATIVE LAW

[26] Cfr. A. PAJNO, *La giustizia amministrativa all'appuntamento con la codificazione*, in *Dir.proc.amm.*, 2010, 118 ff.; L. TORCHIA, *Il nuovo Codice del processo amministrativo. I principi generali*, in *Giorn.dir.amm.*, 2010, 1117 ff.; on the phenomenon of the case-law creation of trial rules cf. M. RAMAJOLI, *Giudice competente nel caso d'impugnazione di più atti connessi*, in *Dir.proc.amm.*, 2011, 733 ff.

However Administrative law is not at all satisfied with the pre-modern condition in which it finds itself: it is forever in search of a modernity that it is unable to attain [27].

The aspiration to modernity – that is, modernisation – is particularly evident in the current legislative production of substantial Administrative law.

The most recent legislation uses the idea of the modernisation of the Public Administration as a kind of mantra. This means that modernisation is a hope, an optative, a stretching towards a goal that has still to be achieved.

The reform of the Public Administration, i.e. the complex Law no. 124 of 2015 (known as the Madia Law) and its related delegated legislative decrees, was presented by the Government as a means to modernise and strengthen the competitiveness of the country.

The reform is driven by savings and efficiency criteria. Beneath it lies the image of the Public Administration and Administrative law as scourges to be liberated from, a plague for both businesses and individuals.

The high level of regulatory and bureaucratic costs, together with the low quality of services and administrative performance, are supposedly factors in the decline of Italian competitiveness.

But this is not a new idea. It had already appeared in the reforms of the 1990s, especially in so-called Bassanini reforms (in particular in Law no. 59 of 15 March 1997, and Law no. 127 of 15 May 1997).

[27] On this theme cfr. S. CASSESE, *New paths for administrative law: A manifesto*, in *I.CON*, 2012, 603 ff., with a powerful emphasis on the European and global dimension of current Administrative law.

These too aimed at introducing a series of measures in order to reduce and simplify administrative rules and procedures, again with a view to achieving greater efficiency and lower public spending.

But those reforms were all abandoned or died a death and so they are constantly proposed or taken up again.

In numerous other occasions, the legislator tried to realize his aspiration to modernize administrative action, although not expressly use the term "public administration reform".

However, observing these concrete reforms or attempted reforms or failed reforms records, the impression is a series of contradictory phenomena: as we talk about the sunset of unilateral administrative power, on the one hand, contractual solutions, (such as the new agreements between administration and private bodies provided by art. 11 of law no. 241/90) are not used and, on the other hand, new models of simplification (as new article 19 of law no. 241/90) generate many issues asking for turning back to the previous authoritative models.

Moreover, the legislator strengthens the procedural rights and guarantees of public participation in order to support administrative accountability and the rule of law, but at the same time the legislator adopts provisions, according to which the infringement of procedural rules does not always lead to the unlawfulness of the adopted administrative act.

The above seems to suggest that the relationship between citizens and government can never be modernised and the ultimate reason, deeper than this, is typically post-modern.

In my opinion, looking to the relation between State, public administration and Administrative law, an ambivalence is evident: a minimal State is required, but at the same time also an innovative State, the government is perceived as an authority, but at the same time also as guarantee, Administrative law is depicted as eccentric, but also as protective special rights. The ongoing relation, therefore, cannot be reduced to a single ordering point of view.

4. POST-MODERN CONDITION AND ADMINISTRATIVE LAW

The post-modern paradigm rejects the unity and different forms of artificially imposed orders. It emphasises the ambiguous and contradictory part of rationality, it positions itself critically in terms of science and technology, and proposes a concept of knowledge without those foundations which are at the base of the modern era's project [28].

It represents therefore a "pensiero debole" (weak thinking) that abandons the powerful legitimacies, certainties, absolute values and "una fondazione unica, ultima, normativa" (a unique, final, normative foundation)[29].

As exemplified by Hassan's famous table, the dialectic between modernity and postmodernism is played out by a series of opposed pairs: purpose/play; design/chance; transcendence/immanence; universal/special; eternity/transience; continuity/discontinuity; definiteness/indefiniteness; creation/decreation; totalisation/deconstruction; centering/dispersal; genre/text; art object/happening; signified/signifier; master code/idiolect; root/rhizome; depth/surface; narrative/anti-narrative; Grande Histoire/Petit Histoire; type/mutant; strong identity/role playing; paranoia/schizophrenia; origin/difference; cause/track[30].

[28] P. SIMONETTI, *Postmoderno/Postmodernismi*, in *Status Quaestionis*, 2011, 127 ff., 138.

[29] G. VATTIMO, *Le avventure della differenza*, Milano, 1988, 8.

[30] I. HASSAN, *The Dismemberment of Orpheus: Toward a Postmodern Literature*, University of Wisconsin Press, 1982, 1 ff.

Gilles Deleuze and Félix Guattari have used, as an icon of postmodernism, the image of the rhizome, the stem of perennial herbaceous plants, which bears leaves and is divided into internodes. Therefore typical of postmodernism is a diffusive, latticed structure, with no beginning or end, no internal hierarchies, and which has infinite possibilities for expansion[31].

Transported into the legal field, the post-modern paradigm involves the denial of objective truth (or law) and an ambivalence of values[32].

In this respect, Administrative law is constitutionally post-modern: a duplicity of ordering viewpoints is intrinsic to the structure of Administrative law. These ordering viewpoints prevent any settling on a final and exclusive foundation that has a claim to absoluteness.

These two views are, on the one hand, the idea of the public interest as a higher dimension, from a qualitative point of view, than the interests of the individual; and, on the other, the idea that the rule of law should impose the guarantee of the interests of individuals as individuals, even if this goes against the public interest.

Both perspectives aspire to govern the Administrative law's logic and in every era and in some form there has been an unresolved tension between public and individual interests[33].

For this reason Administrative law is not only constitutionally post-modern, but Administrative law also needs to be conceived of with post-modern categories in the philosophical sense.

[31] G. DELEUZE and F. GUATTARI, *Mille plateaux*, Parigi, 1980, Italian translation *Millepiani*, Roma, 1987, 645.

[32] M. REIMANN and A. ARBOR, *The American Advantage*, cit., 32 ff.

[33] M. RAMAJOLI, *L'esigenza sistematica*, cit., 384 ff.

A technical detail: the categories referred to in the text belong to the heuristic dimension of postmodernism[34] and should not be understood in a historical sense. In the field of historiography, for Administrative law too it would be more productive to refer to the distinction between modern and contemporary, following the basic division of human history into ancient, medieval, modern and contemporary[35].

So, Administrative law is post-modern and needs to be conceived of with heuristic post-modern categories.

Administrative law cannot be reduced to a single ordering point of view and for this reason constantly it calls into question the interpreter's responsibility.

Every day it has to propose new balances in the relationship between citizens and Public Administration[36].

This highlights the legal science's central role, as well as the political sense – in a wider setting – of legal scholar's activity[37].

Very often Administrative law's scholars fall into a typically modern temptation: they make absolute and radicalise one side of the relationship between citizens and Public Administration, and deny any dignity to the other side of the relationship.

[34] Cfr. footnote 1.

[35] On which cfr. T. DETTI and G. GOZZINI, *Storia contemporanea: l'Ottocento*, Milano, 2000, 1-2.

[36] R. ORESTANO, *Del "post-moderno"*, cit., 11 ff.

[37] G. TARELLO, *Storia della cultura giuridica moderna*, cit., 15 ff.

Actually post-modern paradigm's best legacy is the overthrow of the traditional conceptual hierarchies. This overthrow is functional not to create new hierarchies, but to show the impossibility of any hierarchy's existence [38].

The only way “per sottrarsi alla dicotomia" (to escape the dichotomy) is to “uscire dalla linea" (step out of line). As the post-modern paradigm teaches, we must not choose between "disordine o costruzione" (disorder or construction), but choose "disordine e costruzione" (disorder and construction) at the same time [39].

6. WEB SITES

www.feugiat.it - Etiam eu velit

www.imperdiet.it - Morbi sapien eros

www.eleifend.it - Quisque vel nulla nisl

www.pharetra.it - Cras est odio

www.accumsan.it - Camera dei deputati

www.fringilla.it - Nam ac dui nisl

www.tristique.it - Ut lobortis consectetur

www.tincidunt.it - Fusce iaculis facilisis mollis

[38] G. VATTIMO, *Fare giustizia del diritto*, in *Diritto, giustizia e interpretazione*, cit., 280, and J. DERRIDA, *Force de loi*, partial translation in *Diritto, giustizia e interpretazione*, cit., 16 (complete translation Torino, 2003, cit.).

[39] G. GIORELLO, *Prefazione*, to M. CERUTI, *La fine dell'onniscienza*, Roma, 2014, 8.

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CORRUPTION IN PUBLIC PROCUREMENT: IMPROVING GOVERNMENTS' ABILITY TO MANAGE THE RISKS OF CORRUPTION

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ABSTRACT

To an increasing extent, governments demand that their vendors establish sophisticated risk management systems to contain the risks of corruption. The resulting corporate compliance systems have grown more sophisticated, and remarkably uniform, around the world. Ironically, however, governments' own risk management systems have serious gaps, and too often governments fail to coordinate their own risk management systems with their contractors' parallel efforts. Drawing on examples from the United States and Europe, this paper will argue that governments should mitigate these inherent asymmetries in their management of corruption risk, in part by learning lessons from the compliance systems they require of their contractors, and more broadly by better integrating public risk management efforts with those of the private sector.

1. INTRODUCTION

Governments must manage a wide range of corruption risks in procurement, to ensure that public funds are spent as intended and the procurement process itself maintains its competitive integrity. As part of that public risk management, more and more public institutions are requiring that their vendors institute corporate compliance systems to mitigate corruption risk. Those corporate compliance systems are advancing rapidly around the world, and are remarkably uniform across jurisdictions. At the same time, however, governments' own risk management systems remain fragmented and immature, often ill-suited to address common corruption risks in procurement.

To address these problems, this paper proceeds in four parts. Part II discusses why governments manage corruption risk in procurement, to ensure sound performance, maintain legitimacy and bolster vendors' confidence in the integrity of the procurement process itself[2]. Part III describes how governments require their vendors to manage corruption risk, often as part of a broader effort, across the economy, to institute corporate compliance systems. Drawing on those corporate compliance models, Part IV asks whether governments could use those same corporate compliance strategies -- the strategies governments demand of their own contractors -- to reduce corruption risks. That, in turn, suggests specific steps that governments might take, drawing on corporate compliance models to address recurring corruption risks in public procurement. Part V, the conclusion, offers closing reflections on a possible way forward, recognizing that risk management in corruption is a vitally important, rapidly developing field.

[2] *See, e.g.*, Phoebe Bolton, *The Public Procurement System in South Africa: Main Characteristics*, 37 Pub. Cont. L.J. 781, 792 (2008) ("Corruption is harmful to the procurement process because it lessens the confidence that honest contractors and the public at large have in the Government. It leads to the slackening of competition for public contracts and lessens the Government's ability to obtain the best value for its money.").

2. WHY GOVERNMENTS MANAGE CORRUPTION RISKS IN PROCUREMENT

Governments and public institutions manage corruption risk[3] for at least three reasons[4]:

- Performance risk: Corruption almost always results in poor performance -- projects compromised or delayed because officials who select contractors, or monitor their performance, have been corrupted.

- Reputational risk: Corruption threatens the legitimacy of any government and its leaders; regardless of performance risk, therefore, governments typically work aggressively to contain the reputational risk caused by corruption in procurement.

- Fiduciary risk: When governments are entrusted with public funds for procurement, by taxpayers or others, the governments owe a fiduciary obligation

[3] *See generally* Gabriella M. Racca & Christopher R. Yukins, "Steps for Integrity in Public Contracts" *in Integrity and Efficiency in Sustainable Public Contracts* (Bruylant 2014) (Gabriella M. Racca & Christopher R. Yukins, eds.).

[4] *See, e.g.*, Christopher R. Yukins, *Cross-Debarment: A Stakeholder Analysis*, 45 Geo. Wash. Int'l L. Rev. 219, 226 (2013) (discussing types of risk); Antoinette Calleja, *Procurement Beyond Award: On the Integration of Governance Principles When Executing Public Private Partnerships*, 8 Eur. Proc. & Pub. Priv. Part. L. Rev. 294, 297-98 (2013) ("Corruption in public procurement can become manifest in various forms, for instance by giving or offering bribes, through fraud, collusion and manipulation. Corruption can for instance give way to unnecessary projects being procured, poor quality work, and unjustified requests for variation orders leading to unjustified expenses or expensive work being made. Notwithstanding the fact that corruption erodes public trust, corruption costs the public purse significant amounts. The European Commission estimates a yearly loss. The value lost to corruption in public procurement is estimated at 20-25% of the public contracts' value").

to ensure that the funds are properly spent. If corruption diverts those funds, there is a fiduciary risk, even if that diversion presents no performance or reputational risks[5].

Historically, governments have managed these risks in procurement largely through internal measures and enforcement actions against corrupt contractors. Since the 1990s, however, governments have increasingly relied on contractors to assist in mitigating corruption risks in procurement, by requiring that their vendors institute corporate compliance systems[6].

These compliance requirements largely took shape outside public procurement. Thus, for example, in 1991 criminal sentencing guidelines prepared by the U.S. Sentencing Commission became effective, which promised reduced sentences if corporations and other organizations -- in public procurement markets or otherwise -- instituted compliance systems consistent with the guidelines[7]. The U.S. Sentencing Commission guidelines helped set a benchmark for the corporate compliance requirements that were imposed on U.S. federal contractors in 2008[8], and then on corporations in general under the UK Bribery

[5] *See, e.g.*, Tina Sóreide, Linda Gröning & Rasmus Wandall, *An Efficient Anticorruption Sanctions Regime? The Case of the World Bank*, 16 Chi. J. Int'l L. 523, 529 (2016) (discussing fiduciary risk in diversion of World Bank funding from intended purposes).

[6] Harsh Pathak, *Corruption and Compliance: Preventive Legislations and Policies in International Business Projects*, 3.2 Tribuna Juridica 136 (Dec. 2013) (discussing rise in international anti-corruption efforts).

[7] *See, e.g.*, Paula J. Desio, *Introduction to Organizational Sentencing and the U.S. Sentencing Commission*, 39 Wake Forest L. Rev. 559 (2004).

[8] 73 Fed. Reg. 67064 (2008); *see, e.g.*, Joseph D. West, Diana G. Richard, Karen L. Manos, Christyne K. Brennan, Joseph A. Barsalona, Philip Koos & Richard J. Meene, *Contractor Business Ethics Compliance Program and Disclosure Requirements*, 09-5 Briefing Papers 1 (Thomson Reuters 2009).

Act of 2010[9]. In 2014, the European Union adopted these same standards -- styled "self-cleaning" standards[10] -- in its procurement directives. Under Article 57 of the current EU procurement directive 2014/24/EU[11], for example, a contractor that has been excluded from

[9] *See, e.g.,* Jacqueline L. Bonneau, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 Colum. J. Transnat'l L. 365 (2011).

[10] *See, e.g.,* Roman Majtan, *The Self-Cleaning Dilemma: Reconciling Competing Objectives of Procurement Processes*, 45 Geo. Wash. Int'l L. Rev. 291 (2013).

[11] Paragraph 6 of Article 57, Directive 2014/24/EU, provides regarding self-cleaning (with emphasis added):

> 6. Any economic operator that is [excluded] in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.
>
> *For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.*
>
> The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.
>
> An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

procurement opportunities because of past corruption may "self-clean" so that it can be considered, again, for future awards[12].

Nor have the corporate compliance standards been limited to the United States and the European Union. Brazil[13] and Mexico[14] have adopted requirements for corporate compliance, for example, as part of broader anti-corruption laws. International institutions such as the UN Office of Drugs and Crime (UNODC), the World Bank[15] and the Organisation for Economic Co-operation and Development (OECD)[16], among many others,

[12] *See, e.g.,* Hans-Joachim Priess, *The Rules on Exclusion and Self-Cleaning Under the 2014 Public Procurement Directive*, 2014 Pub. Proc. L. Rev. 112; Brenda Swick, Hans-Joachim Priess & Christopher Yukins, *International Procurement Developments in 2015: Structural Reforms to International Procurement Laws*, 2016 Gov't Con. Year in Rev. Briefs 3 (Thomson Reuters 2016).

[13] *See, e.g.,* Lindsay B. Arrieta, Note, *Taking the Jeitinho Out of Brazilian Procurement: The Impact of Brazil's Anti-Bribery Law*, 44 Pub. Cont. L.J. 157, 173 (2014).

[14] Allie Showalter Robinson, *Developments in Anti-Corruption Law in Mexico: Ley Federal Anticorrupción En Contrataciones públicas*, 19 L. & Bus. Rev. Am. 81, 89 (2013) ("An additional component of the LFACP is focused on encouraging companies and individuals to create 'policies and procedures for self-regulation, internal controls, and ethics programs in order to promote and develop a compliance culture within their organizations.'").

[15] *See, e.g.,* Sope Williams, *The Debarment of Corrupt Contractors from World Bank-Financed Contracts*, 36 Pub. Cont. L.J. 277, 299 (2007); Stuart H. Deming, *Anti-Corruption Policies: Eligibility and Debarment Practices at the World Bank and Regional Development Banks*, 44 Int'l Law. 871, 885 (2010) ("an effective compliance program has the added benefit of enhancing an entity's ability to secure, either directly or indirectly, opportunities with multilateral lending institutions").

[16] *See, e.g.,* OECD, UNODC & World Bank, *Anti-Corruption Ethics and Compliance Handbook for Business* (2013) (setting forth standards for corporate compliance systems), *available at* http://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf.

have also endorsed very similar corporate compliance standards[17], which are discussed in greater detail below.

Before turning to the corporate compliance standards, it is important to emphasize what they are not: requiring that corporations, and most specifically contractors, institute compliance measures does not mean that a government has abdicated its own duty to fight corruption. Governments instead require compliance measures because they recognize that corporations can be effective allies in the fight against corruption, and that corporations' own compliance efforts, even if driven solely by self-interest, can be harnessed in the public interest. Put another way, governments do not require contractors to institute compliance measures because governments blindly trust contractors, but because governments recognize that thoughtful contractors may well institute anti-corruption measures anyway, as a means of reducing their own risks. In this light, governments' corporate compliance requirements are arguably simply a means of shaping and directing private contractors' own efforts to identify, and contain, corruption risks in public procurement markets.

[17] In joint guidance issued on enforcement of the Foreign Corrupt Practices Act, the U.S. Department of Justice and the U.S. Securities and Exchange Commission outlined common requirements for compliance systems, from many nations and international organizations. That guidance by the U.S. government confirms the harmonization, internationally, of standards for compliance systems, standards which are discussed in more detail below. *See* U.S. Department of Justice & U.S. Securities and Exchange Commission, *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 57-65 (2012, revised 2015), *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

3. HOW GOVERNMENTS REQUIRE VENDORS TO MANAGE CORRUPTION RISK: COMMON CORPORATE COMPLIANCE REQUIREMENTS

As noted, the compliance systems required of contractors are remarkably uniform around the world[18], although the descriptions of those requirements may vary from jurisdiction to jurisdiction:

1. *Code of Conduct:* A corporation's compliance system will be built around a code of conduct[19], which employees are expected to review and understand. The code of conduct, which typically also includes a plain statement of the firm's values and ethics, provides the baseline for compliance efforts.

2. *Knowledgeable Leadership:* It is vitally important that the firm's leadership, including its chief executives and its governing board, understand, endorse and help implement the firm's compliance efforts[20]. As is discussed below, a firm's

[18] *See, e.g.*, U.S. Department of Justice & U.S. Securities & Exchange Commission, *supra* note 17, at 63 ("There is also an emerging international consensus on compliance best practices, and a number of inter-governmental and non-governmental organizations have issued guidance regarding best practices for compliance.").

[19] The U.S. Sentencing Commission's guidelines for organizations state that, in establishing an effective ethics and compliance system, the "organization shall establish standards and procedures to prevent and detect criminal conduct." U.S. Sentencing Commission, *Sentencing Guidelines Manual* §8B2.1 (2015), *available at* http://www.ussc.gov/guidelines-manual/2015/2015-chapter-8. Per the accompanying explanatory notes, the "formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization's standards and procedures, depend on the size of the organization." *Id.*

[20] Section 8B2.1 of the U.S. Sentencing Commission guidelines, *supra* note 19, states at paragraph (b)(2):

compliance system is in many ways a formal mechanism for moving information "up" inside the company, to senior decision makers who are best positioned to assess the legal, performance and reputational risks posed. Unless senior leadership is integrally involved in compliance efforts, therefore, the compliance system will likely fail.

3. *Regular Training*: Because a compliance system is built on a body of rules, those rules must be regularly conveyed to those inside the firm, and, as appropriate, to agents and others working for the firm[21]. Training also affords an opportunity to convey the ethical principles that guide the firm; while less concrete than rules, those principles help fill gaps when employees encounter problems (new forms of corruption, for example) that are not, strictly speaking, addressed by existing rules.

(2) (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

(B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

(C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

[21] *See, e.g.*, U.S. Department of Justice & U.S. Securities and Exchange Commission, *supra* note 17, at 59 ("Compliance policies cannot work unless effectively communicated throughout a company.").

4. *Excluding Risky Personnel:* A firm is only as sound as its employees, and so corporate compliance requirements typically demand that firms screen for, and exclude, prospective employees that pose corruption risks for the company, based (for example) on past convictions or misconduct[22].

5. *Internal Discipline:* To ensure that its compliance system is effective, a firm must discipline those who breach the rules, and applaud those who comply[23]. This

[22] The rule governing contractor compliance systems in the U.S. federal procurement system calls for, regarding the need to exclude risky personnel: "Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct." 48 C.F.R. § 52.203-13(c)(2)(1)(B), FAR 52.203-13(c)(2)(1)(B). The U.S. Sentencing Commission guidelines state: "The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program." U.S. Sentencing Commission, *supra* note 19, §8B2.1(b)(3).

[23] The UK Ministry of Justice guidance implementing the UK Bribery Act states that senior managers should communicate the following in supporting an ethics and compliance policy:

- a commitment to carry out business fairly, honestly and openly
- a commitment to zero tolerance towards bribery
- the consequences of breaching the policy for employees and managers
- for other associated persons the consequences of breaching contractual provisions relating to bribery prevention (this could include a reference to avoiding doing business with others who do not commit to doing business without bribery as a 'best practice' objective)

UK Ministry of Justice, *The Bribery Act 2010: Guidance About Procedures Which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing (Section 9 of the Bribery Act 2010)*, at 23 (2011), *available at* http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

means, in practice, disciplining employees who violate anti-corruption rules *and* their supervisors, if the supervisors' lax oversight contributed to the problem.

6. *Internal Reporting Mechanisms:* As noted, a compliance system is in many ways an information transmission system -- a means to ensure that rules and standards are understood down through the ranks, and a mechanism (such as a "hotline") so that information on corruption can be passed up through channels.

7. *Auditing and Review:* A sound compliance system requires regular review and auditing, either internally or by outsiders, to ensure that the system is identifying and addressing corruption risks that arise, and to make recommendations for improvement[24].

[24] The contract clause on contractor compliance systems in the U.S. federal government requires, 48 C.F.R. 52.203-13(c)(2)(ii)(C), FAR 52.203-13(c)(2)(ii)(C):

> (C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of business ethics and conduct and the special requirements of Government contracting, including—
>
> (1) Monitoring and auditing to detect criminal conduct;
>
> (2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and
>
> (3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.

8. *Adjusting to Risk*: The compliance program should be adjusted to risks[25]. This may mean strengthening the program to address new risks if, for example, the firm is entering new markets with more acute risks of corruption.

What is probably most remarkable about these elements is that they are largely the same, the world over. As the U.S. Securities & Exchange Commission (SEC) and the U.S. Department of Justice recognized in their joint guidance under the Foreign Corrupt Practices Act, compliance system requirements are generally uniform in jurisdictions around the world[26]. This uniformity reflects ongoing communication and cooperation between jurisdictions and enforcement officials, and is driven in part by multinational firms' expressed preference for uniform standards which will allow those firms to reduce transaction costs by establishing uniform worldwide compliance systems[27].

For governments, contractors' compliance system present a dual opportunity. First, governments can benefit from compliance systems directly, because they reduce corruption risk and result in information on corrupt behavior that may be provided, on a voluntary or mandatory basis, to government enforcement officials. Second (and less obviously), corporate compliance systems provide a sort of benchmark or measure, which governments can use to assess their own anti-corruption efforts[28]. International experience

[25] The UK Ministry of Justice guidance on effective compliance systems, *supra* note 23, states, at 25: "The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented."

[26] See the discussion *supra* note 17.

[27] *See generally* Brian C. Harms, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption*, 33 Cornell Int'l L.J. 159, 175 (2000) (discussing efforts by the International Chamber of Commerce to encourage business codes of conduct).

[28] *See, e.g.*, Louis de Koker & Kayne Harwood, *Supplier Integrity Due Diligence in Public Procurement: Limiting the Criminal Risk to Australia*, 37 Sydney L. Rev. 217, 218 (2015) (article compares "the customer due diligence

shows, however, that governments have not fully understood, or drawn upon, the lessons that corporate compliance systems can provide.

4. ASSESSING GOVERNMENTS' OWN RISK MANAGEMENT SYSTEMS

Although governments now regularly require companies to institute compliance systems, outlined above, governments too seldom draw lessons from those compliance systems. Element by element, these corporate compliance systems bear lessons -- important lessons -- for governments that are seek to reduce the risks of corruption in procurement.

4.A. Codes of Conduct

Governments understand, of course, that (much like companies) they need to reduce risk in procurement by instituting codes of ethics to guide their employees' conduct; indeed, the UN Convention Against Corruption (UNCAC) explicitly calls for such guidance in its article on procurement[29]. What governments often fail to do, however, is

('CDD') measures that banks are required to implement to prevent money laundering and terrorism financing with the general supplier due diligence practices and processes of Australian government agencies").

[29] UNCAC Art. 9(e) ("Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements."); *see, e.g.*, Christopher R. Yukins, *Integrating Integrity and Procurement: The United Nations*

what corporations already do: integrate their codes of conduct with their trading partners, and (if possible) harmonize codes of conduct across borders to reduce costs and enhance enforcement.

4.A.I. Integrating Codes of Conduct with Trading Partners

Governments, like their contractors, should ensure that their codes of conduct are better integrated with their trading partners' codes and compliance systems. Governments require this of their contractors: the UK Ministry of Justice, for example, specifically calls for contractors to coordinate their compliance efforts, as appropriate, with "associated" persons[30], and contractors regularly work to integrate their suppliers into their compliance systems[31].

Unlike their contractors, however, governments do relatively little to coordinate their codes of conduct -- their laws and regulations on ethical conduct -- with their suppliers. In the U.S. federal system, for example, the government does not provide its contractors with specific guidance on how to ensure that their employees comply with federal anti-corruption laws. Instead, contractors are expected to derive codes of conduct that "mirror" the federal rules. Thus, for instance, because federal ethics rules generally bar

Convention Against Corruption and the Uncitral Model Procurement Law, 36 Pub. Cont. L.J. 307, 310 (2007) (discussing procurement elements of UNCAC).

[30] The UK Ministry of Justice guidance, *supra* note 23, at 16, explains that liability under the UK Bribery Act could extend to a firm's subcontractors, as "associated persons," "to the extent that they are performing services for or on behalf of a commercial organisation."

[31] Training under compliance systems required by the Federal Acquisition Regulation is to be provided to "the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors." 48 C.F.R. § 52.203-13(c)(1)(ii), FAR 52.203-13(c)(1)(ii).

gifts worth over $20[32], contractors are expected to develop ethics systems that reflect that limit. The federal government's procurement rules do not say so, however; contractor codes are instead expected to incorporate and reflect the federal ethics rules. This gap in cooperation favors the large, well-established contractors which understand how to structure their compliance rules (an anti-competitive problem[33]), and it makes it less likely that contractors will implement effective compliance systems (a corruption risk).

The solution, it seems, is to integrate the government and contractor compliance codes. This is normal in the private sector, where firms in a supply chain often must compare and reconcile their compliance codes. One possible way forward would be for governments to publish proposed compliance codes for their contractors; the codes could mirror the government'' special requirements, and could serve as a starting point for contractors' own codes. In the United States federal system, the government regularly provides draft language of this type in other areas where contractors need to integrate their operations with the government's; it would not be out of the ordinary for the government to provide guiding models for ethics codes, to help integrate the public and private efforts in anti-corruption[34].

[32] 5 C.F.R. § 2635.204(a); Office of Government Ethics, *Employee Standards of Conduct*, https://www.oge.gov/web/oge.nsf/Employee%20Standards%20of%20Conduct.

[33] *See, e.g.*, Christopher R. Yukins, *Mandatory Disclosure: A Case Study in How Anti-Corruption Measures Can Affect Competition in Defense Markets* (2015), paper presented at the conference *"Ethical Dilemmas in the Global Defense Industry,"* Center for Ethics and the Rule of Law, University of Pennsylvania Law School, Apr. 16, 2015 (publication forthcoming).

[34] The state of Connecticut, for example, publishes a guide on state ethics codes for contractors. *See* Connecticut Office of State Ethics, *Guide to the Code of Ethics For Current or Potential State Contractors*, at 6 (2007), *available at* http://www.ct.gov/ethics/lib/ethics/guides/contractors_guide_final07.pdf. This is a good example of a public guide that simplifies, and harmonizes, contractors' efforts to adapt to a government's ethics requirements.

4.A.II. Making Codes of Conduct More Uniform Across Borders

Another area of needed improvement is *uniformity* in government ethics codes[35]. In the United States, for example, ethics codes can vary wildly from jurisdiction to jurisdiction. In Connecticut, it is illegal to provide gifts of over $10 to a state employee[36]; in the federal government, the limit is $20, and in Hawaii a state employee must report any gift over $200[37]. This confusing welter of rules makes compliance by the private sector very expensive, and, at the extreme, can discourage enforcement by public agencies that recognize the somewhat arbitrary nature of bizarrely divergent rules.

The solution, again, is to look to corporate compliance in the private sector, which stresses *uniformity* to reduce implementation costs and enhance internal compliance. Multinational corporations regularly build compliance systems that span borders, which need to be understood and complied with in many jurisdictions and cultures. Multinational firms are able to maintain this consistency in compliance strategies in part because different nations, as they adopted compliance requirements internally, drew from international models and standards for compliance -- in no small part because multinational corporations and international organizations[38] themselves urged a consistent set of compliance standards.

[35] *Cf.* Alexandra R. Harrington, *Conflicting Trends: Lessons from Current Evaluative Mechanisms in International and Regional Anti-Corruption Systems Regarding Conflicts of Interest*, 4 Geo. Mason J. Int'l Com. L. 186, 191 (2013) (discussing variances in ethics codes).

[36] Conn. Gen. Stat. § 1-79 (e) (16); *see* Connecticut Office of State Ethics, *supra* note 34, at 6.

[37] Hawaii Rev. Stat. §84-11.5.

[38] *See, e.g.*, UN Office of Drugs & Crime, *An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide* (2013), *available at* https://www.unodc.org/documents/corruption/Publications/2013/13-84498_Ebook.pdf.

Taking a page from the compliance story, governments could adopt more uniform ethics standards for their procurement officials. Efforts to harmonize ethics rules for procurement need not fail simply because of local differences in norms and criminal laws[39]. In both public procurement systems and private corporations, it is common to develop a separate, stricter set of ethics rules for those involved in procurement[40], because of the more acute risks posed in procurement. Where it is not possible to conform local ethics rules to international norms, therefore, it may be easier to draft and adopt ethics rules specifically for procurement which more closely follow broadly accepted international practices -- which, in turn, will mean that vendors entering that procurement market will encounter more familiar and workable ethics rules. Taken together, these efforts to harmonize ethics rules in procurement across borders could reduce compliance costs and enhance enforcement, and thus make it easier to manage the corruption risks inherent in every procurement system.

4.B. Knowledgeable Leadership: Vertical Integration in Risk Management

Another important lesson for governments from private compliance efforts is that it is essential to move information on corruption "vertically," quickly and efficiently. A sound compliance system typically ensures that a company's senior leadership learns of corruption failures quickly and efficiently, so that the firm's leaders can assess the risk and order remedial action. That is not always true, however, of public anti-corruption systems.

[39] *See, e.g.*, Thomas Kelley, *Corruption As Institution Among Small Businesses in Africa*, 24 Fla. J. Int'l L. 1, 6 (2012) ("Corruption is so engrained in the culture of Nigerien society, including its business sector, that at present it supplies the logic and the rules that most businessmen live by."); Eleanor M. Fox & Deborah Healey, *When the State Harms Competition-the Role for Competition Law*, 79 Antitrust L.J. 769, 785 (2014) (discussing diverging anti-corruption laws).

[40] *See, e.g.*, UN Office of Drugs & Crime, *supra* note 38, at 39 (detailing policies for particular risk areas).

Under the European Union's current procurement directive 2014/24/EU, for example, Article 57 provides that individual agencies are to assess vendors for possible exclusion, based on past corrupt actions. Unlike the World Bank[41], Nigeria[42], the United States[43] and other countries, the European directive does not contemplate a debarment process, through which a more senior official would assess a vendor for exclusion across a procurement system; instead, the European directive describes a much more fragmented and decentralized process, one in which corruption (and its performance and reputational risks) will be assessed by relatively low-level officials, again and again. Probably no sound corporate compliance system would assess corruption risks in this *ad hoc*, highly decentralized way; nor, optimally, should a public procurement system. A better approach would be to ensure that information on corruption risks[44] moved smoothly to a more senior level of government, where a broader exclusion decision -- a debarment, if appropriate -- could be made.

4.C. Integrating Training with Private Counterparts

Another area of possible improvement in managing corruption risk in public procurement lies in *training*. Through training, an enterprise works to ensure that applicable

[41] *See, e.g.*, Sope Williams, *supra* note 15.

[42] *See* Sope Williams-Elegbe, *The Reform and Regulation of Public Procurement in Nigeria*, 41 Pub. Cont. L.J. 339, 357 (2012) (Nigerian Bureau of Public Procurement holds authority list disqualified suppliers and service providers).

[43] *See* 48 C.F.R. Subpart 9.4, FAR Subpart 9.4.

[44] *Cf.* Courtney Hostetler, *Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects*, 14 Yale Hum. Rts. & Dev. L.J. 231 (2011) (discussing methods for better sharing information on procurement corruption in World Bank projects).

laws and corporate policies are understood, and will be followed. Corporate compliance training is not, it should be emphasized, limited to a corporation's own employees; firms often extend training to other companies in their supply chains, either on their own initiative or because of a legal requirement[45]. In California, for example, all major retailers and manufacturers (those with worldwide sales over US$100 million) must make efforts to eradicate slavery and human trafficking from their direct supply chains[46]. This means extending compliance training in anti-slavery and human trafficking laws beyond employees, to include supply chain partners. As a practical matter, this allows retailers and manufacturers to integrate their anti-corruption efforts with others in their supply chains. Governments could do the same, and include private sector suppliers in their anti-corruption training, so that both public and private officials can understand, together, the legal and ethical obligations they share.

4.D. Excluding Risky Personnel: Identifying and Clarifying Risk

The discussion above focused on broader institutional lessons that governments might learn from corporate compliance systems. The lessons may carry to the more granular level, as well -- governments may be able to learn strategies from private compliance systems for excluding "risky" personnel, prone to corruption. Under the Federal Acquisition Regulation, for example, vendors are required to make "[r]easonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business

[45] *See, e.g., supra* note 31 and accompanying text.

[46] California Civil Code § 1714.43.

ethics and conduct."[47] The question, then, is whether public procurement systems can take a similar approach, to exclude vendors run by individuals who pose special corruption risks.

This question -- how to exclude contractors run by executives who have shown themselves to be untrustworthy in the past -- is a recurring headache for contracting authorities. It is more common for anti-corruption enforcement efforts to focus first on corporations, and individual managers, executives, or board members may not be targeted; even if they are, it may be difficult for contracting officials to gather information on those enforcement efforts. While the focus is changing in the U.S. federal enforcement regime, and new emphasis is being put on holding senior individuals accountable[48], it can still be difficult for procurement officials to gather information efficiently on senior personnel who may pose corruption risk.

The risk mitigation solution, it seems, is one typically used in the private sector: to identify caches of relevant data, and to make that information more readily available. One way to do that would be to clarify the bases for debarment or exclusion in publicly available databases. In the United States, for example, debarment officials must have clearly established grounds for debarring an individual. Those bases for debarment are not, however, set forth in the excluded person's listing on www.sam.gov, the public repository; nor is the list of excluded parties readily searchable by a simple name search[49]. This means

[47] 48 C.F.R. § 52.203-13(c)(2)(ii)(B), FAR 52.203-13(c)(2)(ii)(B).

[48] Memorandum from Deputy Attorney General Sally Quillian Yates, U.S. Department of Justice, Sept. 15, 2015, https://www.justice.gov/dag/file/769036/download.

[49] An example helps to illustrate the problem. According to the U.S. Department of Justice, on July 2, 2014, a U.S. federal district judge sentenced Vernon J. Smith III, age 61, of Edgewater, Maryland, to 42 months in prison, followed by three years of supervised release, for conspiring to defraud the United States, including fraud involving federal contracts. *See* U.S. Department of Justice, *Edgewater, Maryland Man Sentenced To 42 Months In Prison For Defrauding SBA And IRS Of More Than $7 Million* (July 2, 2014), *available at* https://www.justice.gov/usao-md/pr/edgewater-maryland-man-sentenced-42-months-prison-defrauding-sba-and-irs-more-7-million. While the Justice Department's press release on the conviction and sentencing is readily

that information on persons found guilty of corrupt behavior, while compiled in the U.S. government, is not readily available for risk mitigation efforts outside the enforcement agencies themselves.

4.E. Integrating Contractors Into a Public Disciplinary Regime

The next step in public risk mitigation looks to bridge the gap between public and private compliance systems. Traditionally, public and private anti-corruption compliance regimes stood largely separate. Thus, for example, while conscientious contractors in the U.S. federal system honored the gift limit of $20, if a contractor ignored those ethics limits -- if, for example, a "bad" contractor regularly gave federal officials gifts worth over $20 -- the disciplinary punishment fell largely on the federal officials, not the contractor, unless the contractor was criminally prosecuted for bribery, was found non-responsible (non-qualified)[50], or was debarred -- all of which were severe measures, and therefore unlikely. There was, in other words, no *direct* means of extending the federal compliance regime's disciplinary regime to its contractors. This limited the effectiveness of the federal compliance regime. More broadly, it reflected a blind spot common in government compliance regimes: the government can discipline its employees for ethical infractions, but has difficulty disciplining outsiders to enforce its ethics rules.

available on an Internet search of the defendant's name, the *exclusion* record, buried in the federal government's database at www.sam.gov, is available only on a specific name search *within* the database. In other words, there would be no way for a German contracting official to know that the Mr. Smith was excluded for corruption unless the contracting official knew (as U.S. contracting officials know) to search for Mr. Vernon's name in the federal database. And even once a contracting official located Mr. Smith's debarment record in www.sam.gov, there would be no substantive information there on the *bases* for debarment -- nothing in the public database states why, exactly, Mr. Smith has been indefinitely excluded from federal contracting.

[50] *See* John Bryan Warnock, *Principled or Practical Responsibility: Sixty Years of Discussion*, 41 Pub. Cont. L.J. 881 (2012) (discussing U.S. federal process for determining non-responsibility).

This gap between public and private regimes was eased in the U.S. federal system when the Federal Acquisition Regulation was amended to require that when contracting officials assess an offeror's *past performance* -- an essential element of U.S. award evaluations -- the contracting officials must take into consideration the vendor's history of integrity and business ethics[51]. This means, in practice, that any vendor likely to seek a future award (any vendor, really) has a strong incentive to conform, among other thing, to federal ethics rules, or risk receiving a poor past performance evaluation and lose future awards. The gap between public and private compliance regimes was narrowed, therefore, by making compliance an evaluation factor for future contract awards; by doing so, the federal government helped reduce the risk of corruption in procurement.

4.F. Encouraging Reports of Corruption

Another weakness in public compliance regimes lies in failing to fully incentivize potential whistleblowers who could disclose corruption. This contrasts with the private sector, which is often required to establish effective channels for communication, such as "hotlines," as part of a corporate compliance system[52]. In the public sector, in contrast, reporting tends to be much more *ad hoc*, and potential whistleblowers (both inside and outside the government) often have little incentive to risk reporting misconduct.

[51] 48 C.F.R. § 42.1501(a), FAR 42.1501(a). For a discussion of how past performance was incorporated into the federal procurement system during the Clinton administration, see, for example, Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 656-57 (2001).

[52] *See, e.g.*, 48 C.F.R. § 52.203-13(c)(2)(ii), FAR 52.203-13(c)(2)(ii) ("At a minimum, the Contractor's internal control system shall provide for . . . [a]n internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.").

To ease this problem, policymakers in the U.S. federal system have instituted both protections and incentives for whistleblowers. Under the False Claims Act, for example, whistleblowers are protected from retaliation, and they may receive a share (up to 30 percent) of the federal government's ultimate fraud recovery (which, with penalties, can amount to many millions of dollars)[53]. These protections and incentives in effect make whistleblowers an integral part of the federal compliance regime, and help to narrow the government's exposure to corruption risk.

4.G. Auditing and Review by Civil Society

Another way to narrow corruption risk in public procurement is to encourage active oversight by civil society. The United States here provides an adverse counterexample; in the U.S. procurement system, audit and oversight is left largely to government officials (inspectors general, government auditors and the Comptroller General, for example)[54], and civil society has little (if any) formal role in reviewing anti-corruption measures in the federal procurement system. That is not, however, necessarily the best approach. In many nations, civil society plays formal, legally recognized role in

[53] *See, e.g.,* U.S. Department of Justice, *The False Claims Act: A Primer*, https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf; John T. Nicolaou, Survey, *Whistle While You Work: How the False Claims Act Amendments Protect Internal Whistleblowers*, 2011 Colum. Bus. L. Rev. 531 (2011).

[54] *See, e.g.*, Major Timothy M. Cox, *Promoting Integrity from Without: A Call for the Military to Conduct Outside, Independent Investigations of Alleged Procurement Integrity Act Violations*, 66 A.F. L. Rev. 225, 238 (2010) (discussing U.S. agency oversight); *see also* Frank Anechiarico & James B. Jacobs, *Purging Corruption from Public Contracting: The "Solutions" Are Now Part of the Problem*, 40 N.Y.L. Sch. L. Rev. 143, 144 (1995) (discussing New York City's procurement system, and noting that the "dilemma is that in trying to corruption-proof public contracting, corruption controllers mire the process in red tape, undermining the government's capacity to carry out essential goals and, ironically, creating new opportunities for corruption and fraud").

monitoring procurement[55]. Government agencies' reluctance to make their procurement processes transparent is part of the reason that civil society is excluded, and it is important to recognize that this reluctance can be caused, in part, by government officials' fear of embarrassment. A better course may be to recognize that civil society review can be highly beneficial in stemming corruption in procurement, and to weigh, honestly and openly, the costs and benefits of allowing more transparent review by members of civil society[56].

4.H. Adjusting Public Compliance Systems to New Risks

Another possible improvement in public anti-corruption compliance systems would be to make it easier for governments to adjust to new corruption risks. Public compliance systems tend to be inflexible, and when a government encounters new corruption risks (as, for example, the U.S. government encountered in Afghanistan), the system's failure to adjust can lead to serious corruption failures[57]. To remedy this problem, it is important to recognize that anti-corruption compliance is, at its heart, an attempt to

[55] *See, e.g.*, Myrish T. Cadapan-Antonio, *Participation of Civil Society in Public Procurement: Case Studies from the Philippines*, 36 Pub. Cont. L.J. 629 (2007); Sabina Panth, *Three Examples of Procurement Monitoring by Civil Society* (May 5, 2010) (blog entry), http://blogs.worldbank.org/publicsphere/three-examples-procurement-monitoring-civil-society; Bruce Zagaris & Shaila Lakhani Ohri, *The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas, 30 Law & Pol'y Int'l Bus. 53, 80 (1999)* ("the World Bank has permitted NGOs and concerned citizens to become more involved in the monitoring of its financing projects").

[56] *Cf.* Anne Janet DeAses, Note, *Developing Countries: Increasing Transparency and Other Methods of Eliminating Corruption in the Public Procurement Process*, 34 Pub. Cont. L.J. 553, 562 (2005)(discussing UN proposals for international monitoring body to stem corruption in procurement).

[57] *See, e.g.*, Major Marlin D. Paschal, *Getting Beyond "Good Enough" in Contingency Contracting by Using Public Procurement Law As A Force to Fight Corruption*, 213 Mil. L. Rev. 65 (2012).

mitigate the severe agency problems that can distort outcomes in any procurement system[58]. While the principal (the government) may seek optimal outcomes, the self-interest of agents (the contracting officials and the contractors themselves) can distort those outcomes[59]. Those distortions are amplified by corruption, and traditional mitigation strategies -- monitoring and sanctioning mechanisms[60] -- may fail under extreme and adverse circumstances, such as a war zone where corruption is endemic. The answer, it seems, is not merely to rely on traditional anti-corruption strategies, but to recognize that if the goal is to optimize public outcomes, the problem must be addressed in a unique social and political context[61], which may present other, non-traditional means of mitigating the risks, and distortions, of corruption.[62] Drawing on examples from the private sector, which has

[58] *See* Annika Engelbert, Nina Reit & Laurence Westen, *Procurement Methods in Kenya - A Step Towards Transparency?*, 7 Eur. Proc. & Pub. Priv. Part. L. Rev. 162 (2012) ("Public procurement is vulnerable to corruptive acts because it deals with asymmetrical buyer-seller relationships, important contract amounts, and complex and hence often nontransparent procedures.").

[59] *See, e.g.*, Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, 40 Pub. Cont. L.J. 63 (2010); James Jurich, *International Approaches to Conflicts of Interest in Public Procurement: A Comparative Review*, 7 Eur. Proc. & Pub. Priv. Part. L. Rev. 242, 244 (2012); Gabriella M. Racca & Roberto Cavallo Perin, *Material Amendments of Public Contracts During Their Terms: From Violations of Competition to Symptoms of Corruption*, 8 Eur. Proc. & Pub. Priv. Part. L. Rev. 279, 293 (2013) ("Whenever delivered quality is shattered by opportunistic behaviour at the execution stage, transparency and non-discrimination principles are betrayed, since an incorrect execution undermines the competition principle put in place among competing bidders in the selection phase.").

[60] *See, e.g.*, Christopher R. Yukins, *supra* note 59, at 81.

[61] *See, e.g.*, Sope Williams-Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures* 9 (Hart 2012); Andrea Dahms, Nicolas Mitchell, Foreign Corrupt Practices Act, 44 Am. Crim. L. Rev. 605, 627 (2007) (noting that the World Bank and the International Monetary Fund "are also trying to control fraud and corruption by evaluating corruption levels when designing development assistance strategies and implementing anti-corruption projects.").

[62] See, for example, this discussion of how local circumstances have shaped responses to corruption in procurement in Italy:

been very versatile in developing new strategies in response to new corruption risks, governments may benefit by taking a broader view of possible solutions to new risks of corruption.

5. CONCLUSION

As this brief essay reflects, government anti-corruption compliance systems can draw many lessons from the private compliance regimes that the governments themselves helped establish. Public and private compliance systems are not always aligned of course; the victim compensation which is emerging as part of the "self-cleaning" required of European private contractors[63], for example, is an area where public and private interests

> In particular, given the dissimilarity of constrictions affecting the action of contracting authorities, it is clear that a local regulation may help the contracting authorities to respond better to the structural factors of their own geographical area. For example, while in some regions of the south the presence of criminal associations makes the risk of corruption the main constraint to the effective functioning of the procurement system, in some regions of the centre and the north the high levels of association between firms would suggest that here the main risk is collusion between them. Economic theory illustrates how, in the face of these two types of risk, the optimal structure of the public procurement system should be completely different. However, local regulations can have heavily distorting effects on competition in the award of public contracts and hence come to increase the costs for contracting authorities and cause a deterioration in the allocation of resources.
>
> Balancing these elements of the trade-off is a complex task, but . . . the choice of the Italian parliament (made necessary also by EU Law requirements) has been quite clear: to grant Regions and other local authorities a certain flexibility to adapt to the needs of their local territories, but making sure this does not translate into a limitation of competition.

Francesco Decarolis & Cristina Giorgiantonio, *Local Public Procurement Regulations: The Case of Italy*, 43 Int'l Rev. L. & Econ. 209, 215 (2015).

[63] *See* European Directive 2014/24/EU, Art. 57(6) ("the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct").

are more likely to collide. In general, however, lessons learned from private corporate compliance systems are likely to prove quite useful, as governments work to manage the risks of corruption in procurement.

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BUILDING BRIDGES: TOWARDS COHESION THROUGH THE EUROPEAN UNIVERSITY SYSTEM

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SUMMARY

INTRODUCTION

[1] Specifically Antonia Baraggia wrote paragraph 2, Monica Delsignore the Introduction, paragraph 1 and 5, Luca Galli paragraph 3 and Beatrice Rabai paragraph 4. The article collects the work of a panel presented at the Annual Conference of ICON Society on "Borders, Otherness, and Public Law", which took place in Berlin, on June 17-19, 2016.

Today the University suggests the idea of an oasis of intellectual discovery or of learning laboratories that are welcoming and inclusive without borders. Nevertheless, Universities have only begun to base admission on "merit" during the last 50 years. For most of their histories, as paragraph one will explain, they were exclusive, based on high-class and elite provenience. The exclusionary of the past left space to the inclusionary of the present ensuring that each individual will have equal standing as a member of the university community.

In the United States there is an open debate about the role of University in forming a common identity. Justice Sonia Sotomayor[2] has written the recipe for a robust college and students community "*depends not only on the diversity itself but on promoting a sense of belonging among those who formerly would have been considered and felt themselves outsiders*".

The article will develop those suggestions in the European context, where the University plays a fundamental role and does have an integrative mission, aiming at spreading a culture of legality and engaged citizenship, claiming the importance of such basic values as freedom, justice and respect for the human being, which are rooted in the democracy. The article especially considers how much the administration and the law are allowed to intervene in the functioning of Universities to reach those goals of cohesion and international orientation without diminishing research autonomy and independence of academic world. The analysis will be take in consideration the European law and its constraints.

Notwithstanding the absence of any specific reference to education in the Rome treaty, the freedom of movement of workers had enabled the European institutions to consider jointly "general educational, apprenticeship and vocational training course" and the European

[2] In the book *My Beloved World*, Knopf, 2014.

judgements have a considerable impact on these matters, as the second paragraph will explain.

Specifically, in the idea of students mobility, the Erasmus Programme helps the "foreigner" student to lose his negative meaning as "stranger or enemy", starting to be evaluated as a positive resource of human, social and scientific progress for the whole hosting community. The third paragraph will reason on those implications.

Furthermore, the Union citizenship[3] refers to the possibility of studying within the territory of the Community without limitation of borders and discrimination based on nationality. The Luxembourg Court has contributed to the area of education, removing discriminatory university fees or obstacles to freedom of movement in situation borderline between working and learning activities. This concerns a progressive wider right of mobility for study purpose, which consists in obligations of removing those obstacles based on nationality impending its effective exercise.

In such an international context the ideals of university – its search for knowledge and truth unrestrained by utilitarian urges and demands – are bedrocks[4]. Appropriate public law

[3] See S. O' LEARY, *The evolving concept of community citizenship*, Kluwer 1996, especially 188.

[44] A. T. KRONMAN, *Education's End, Why our Colleges and Universities Have Given Up on the Meaning of Life,* 2007, Yale University Press, 79.

instruments[5] can transform boundaries and national diversity from a limit into a starting point for this international development of University and democracy[6].

1. THE UNIVERSITY AS A SOCIETY

Today, in most European Countries, the University is not conceived as a society.

Nevertheless a different perspective can suggest inspiring new starting points in order to rethink Universities and their role in the European research area, as provided in article 179 TFEU.

Furthermore, this different approach responds to the many who look at universities as mere transmitters of accumulated knowledge and expertise or as centers where students are trained to acquire vocations[7]. These definitions fail to describe the proper role of the University.

Looking at Member States, we can see that, because of their collective character and social meaning, the University can claim to belong to the concept of "education", which is

[5] Recently the OFT (Office of Fair Trading) in England embarked a Call for Information in order to gain better understanding of how choice and competition were working in the higher education sector. For interesting remarks seek K. STEPHENSON and L. H. GLODKOWSKI, *An effective regulatory framework for higher education: background and developments*, in *Ed. L. J.* (2015), 137.

[6] G. FALLIS, *Multiversities, Ideas and Democracy*, 2007, forcibly argues that, in the contemporary world multiversities need to be concetuaplized in a new way, that is, not just as a place of teaching and research, but also as fundamental institutions of democracy.

[7] M. DIXON (*Legal education: where next?* in *The Conveyancer and property law*, 2015, Editorial) uses remarkable words, writing about "critics with megaphones telling us that universities are not producing graduates fit for the workplace".

traditionally an area of public interest[8]. The form of supervision or direction carried out from the State is justified in the light of the wider public interest in the effectiveness of the educational service as a whole[9]. The educational system is considered in ideal connection to a presumed collective identity, which the public authority may wish to enhance or even force[10].

The result is the idea of University as a public institution, supplying a service. In such a view, the group, referring to all members with whatever role in the system, does not assume any relevance. Indeed, what could matter are just individual positions, rights or expectations of distinguished members: the freedom of teaching and research, for the academics[11], and the right of education, for the students[12].

The society perspective, instead, helps in conceiving the University as a group, a cohesive community with a common vision and a sense of belonging where diversity is valued.

[8] C. S. BREMBECK, *Social factors of education,* in C. S. BREMBECK and J. VAIZEY, *Social and Economic Aspects of Education, The New enciclopeodia Britannica,* (1987), vol. 18, 101.

[9] C. L. GLENN, *State and Schools: an historical view* and *Teaching of values in Schools*, in *Balancing Freedom, Autonomy, and Accountability in Education*, C. L. GLENN, I. DE GROOF (eds), WLP 2012, Vol.1, 3 and 239.

[10] See A. MARRA, R, MOSCATI, *Ministries and Bureaucrats with particular reference to the Humboldtian-Napoleonic systems,* forthcoming in *Encyclopedia of International Higher Education Systems and Institutions,* edited by P. NUNOTEXEIRA JUNG-CHEOL SHIN.

[11] The analysis of the different academic recruitment models in Europe can be found in *Il reclutamento universitario in Europa The academic recruitment in Europe,* edited by R. CAVALLO PERIN, G. M. RACCA, C. BARBATI, Napoli 2016.

[12] See in this perspective U. POTOTSCHNIG, *L'Università come società*, in *Riv. giur. scuola* 1976, 269 and in *Scritti scelti*, Padova 1999, 817.

In this way University would be one of the "series of organizations and societies, thriving and flourishing with an actual power, which may pursue the most diverse objectives, but share a common feature: that is to group the individuals …", as Santi Romano[13] taught.

There is a society whenever the members of a social body share a particular identity, or a purpose to achieve, which distinguishes them from subjects placed outside the body, and when such a body adopts effective rules that are not attributable to any of its members (or any multiplicity thereof) but rather to the body itself, as a separate entity. The distinction between the members and the entity is important, since the latter purports to achieve permanence despite the potential changes in its means, its interests, its composition and its rules. Every society is governed by law and arranged into a legal order, insofar as the law sets the societal values and objectives, and prevents recourse to force and arbitrariness. This social order does not depend on norms only: it presupposes, and is based upon, an organization, a structure. Law ensures the unity of the structure and its persistence, and is not limited to legal rules.

The idea of University as a society harkens back to the original concept of the medieval universities understood both as *studium generalis* (which means an open place of learning) and as *universitas studiorum*, namely as a corporation for those managing teaching and research[14].

In order to construct university as a society, four elements are essential[15]: first, the origin of the community; second, the rules of the group as expression of its autonomy, third the

[13] A. SANDULLI, *Santi Romano and the Perception of the Public Complexity*, in *Italian Journal of Public Law* (2009), vol. 1, 1, specifically 20.

[14] In that sense U. POTOTSCHNIG, *L'Università come società*, cit., 819.

[15] See U. POTOTSCHING, cit.

freedom of University as a social organization, and, finally, the natural and peculiar tasks of this society.

Starting from the origin, certainly the University is not the mere consequence of an authoritative law imposed by the State. The interests and concerns of the participants are relevant. If the University represents a social group, it responds to collective and shared issues and addresses specific needs, so regions, counties, municipalities or similar bodies do have a role in the life of the University.

Because they are situated within communities, these institutions are in the best position to carry out and highlight the demands of University members as they came up in the cultural and social context.

The second constituent refers to the rules each University applies to the members of the community. The redaction of the University statute and regulations expresses the autonomy of this peculiar society: regulations need to take into account the peculiar needs and specific concerns about the organization, teaching and financial resources[16], which can be very different from one community to the other.

[16] Those are empirically simplified by ESTERMANN and NOKKALA in the following categories: organisational autonomy, concerning the ability "to establish their structures and governing bodies, and to define the modalities of its leadership model"; financial autonomy, both in terms of "procedural framework of public funding" and "universities' financial capacity"; academic autonomy, addressing "the universities' ability to determine their own institutional strategy" and their "academic profile", including the introduction and determination of contents of degree programmes and students admissions to courses; and staffing autonomy, being this "integrally related to [its] financial and academic autonomy".

A system based on strong institutional autonomy, where most of the regulations are drafted by Universities, would offer a proper solution to dissimilar issues, emerging in each organized group[17].

Autonomy means differentiation.

The gradual massification of higher education has often been connected to democratization of higher education, in the sense that the doors of academia got open wider and that the student population was starting to be less different from the population in general. However the diversification of the student population also means a diversification of students' interests and motivations for studying[18].

The need to address such a high number of learners calls for the University to enact a robust organizational structure[19]. This structure and the regulation for its functioning are often the most evident element of cohesion, the one creating the sense of belonging to a single community but can have different impact and content regarding the specific community. Therefore the autonomy issues become even more central as Universities can express and gather very different interests.

[17] P. D. CARRINGTON, *The Many Mansions of a University*, in 17 *Am. J. Comp. L.* 331, 1969, already insisted on maximum autonomy which must be given to each research oriented unit of the American multiversity. About Multiversity see W. R. GREINER, *Speech In, For and By (?) the "Multiversity": Reflections of a Recovering President*, in 54 *Buff. L. Rev.* 863 (2006-2007) and the deep analysis of G. FALLIS, *Multiversities, Ideas and Democracy*, cit.

[18] In that sense see M. VUKASOVIC, *Institutional autonomy and academic Freedom in Light of new Conditions under which Higher Education Operates*, in *Contemporary Threats and Opportunities*, Proceedings of the Conference of the Magna Charta Observatory, 15-16 September 2011, Bologna, 173.

[19] See A. MARRA, R, MOSCATI, *Ministries and Bureaucrats with particular reference to the Humboldtian-Napoleonic systems*, cit., especially par. 4.

Richter and Birch conclude, from a wide comparative analysis, noticing the "growing number of legal rules" dealing with education, in contrast with the general trend toward deregulation in public sectors.[20] State law is directly relevant to the content of University regulation, in that it establishes the limits of their autonomy, and can even impose certain requirements as to the content of the rules they adopt, in this way undermining the autonomy and independence of the academic world.

The functioning of an educational institution is so unique, and responding to such specific dynamics, that cannot be usefully harnessed by specific rules, especially if they are fixed by somebody not aware of those dynamics. More extensively, this underpins the view that educational institutions actually operate with regard to a balance of interests, internal to the educational community, rather than in conformity with general law. That is the reason why decisions adopted therein could not be appreciated with respect to legal parameters.[21] This balance of interest has to be largely pursued through informal decisions or agreements, or reciprocal understanding between the involved parties.[22]

Furthermore States are much more conditioned in the redactions of law by a set of interventions from the outside.

The outside world - in the form of different collective subjects that take on the characteristics of users and supporters (stakeholders) - thus exerts a growing influence on

[20] I. RICHTER and I. BIRCH *Law and Education – Education and Law*, Law' in Ian Birch and Ingo Richter (eds.), *Comparative School Law* (Pergamon Press 1990) 350, 350-351.

[21] DE GROOF, cit., quotes W. A. KAPLIN and B. A. LEE, *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making* (Jossey-Bass 1995). Even though Kaplin and Lee refer to higher education contexts and to the U.S. situation, their description is arguably valid for the European area as well as for schools, where the sensation of working, studying and living in a narrow and somehow sheltered community is possibly even stronger.

universities and tends to force them to contradictory choices. Requests to provide an education that makes sense (that is, socially and professionally usable), being an institution that operates fairly, egalitarian and widely accessible require to simultaneously pursue aims of efficacy (effectiveness, practical usefulness of studies), accessibility and cost control.

In some countries the government attempts to intervene in the construction of curricula, encouraging the involvement of companies in the construction of paths and offering work experience which increase the vocational component. On the other hand, it is spreading the pressure for the introduction of external audits of the quality of performance, only partly based on peer evaluation (peer review). The distribution of resources for research tends to depend on the quality of the results previously obtained. The research activities are therefore increasingly aimed to meet the needs of those who will use the results.

The European context certainly influences national legislators. No longer can universities see themselves as only part of a national system. In Europe the Bologna process – as it will be better described in the following paragraphs - illustrates very much this reality[23]. The Bologna process was not limited to a new structure of study plans and of the corresponding academic qualifications. In many countries it has also called for a reform of university teaching methods with the incorporation of class schedules and the reduction of the duration of the courses[24].

As the borders between European States become more fluid, as monetary systems become uniform, as commerce and industry increasingly become multi-national, and as Europe is regarded as a single entity on the international stage it makes sense to develop a

[23] S. GARBEN, *The Bologna Process: From a European Law Perspective*, in *E. L. Rev.* vol. 16, no.2, March 2010, 186.

[24] Critics on this point A. DE LA OLIVA SANTOS, *La scienza giuridica e l'Università a un bivio fondamentale* A. DE LA OLIVA SANTOS, *La scienza giuridica e l'Università a un bivio fondamentale*, cit.

uniform educational system[25], a common space of research as ERA (European research area). However this fascinating idea of a community of researchers and students stands together with the last Framework program on research and innovation, the well-known Horizon 2020, which is said to be "a key component of Europe's strategy to create economic growth and to reinforce its global competitiveness". The competition for EU funding among researchers suggests an analogy to competition in the internal market[26] as the clearly stated intent of the FP is to increase Europe authority and dominance in the global context. Nevertheless Horizon 2020, with its budget of €77 billion, represents an incentive in the midst of economic crisis and, as for Italy but even other Member States, public policies are conforming much more research, by guidelines or internal directive of the quality auditing agency, to the European market goals.

Certainly universities are international, because they are "linked across all international borders through a common historical tradition and a knowledge network, communicating worldwide about research in journals, books, organizations, meetings and data files"[27]. This assumption would place them far away from an exclusively national horizon: higher education institutions should be in such a condition to adequately develop their international orientation in a way that goes beyond the specificities of the State where they have been established. This does not necessarily mean a complete independence from the central national authority, such as the ministry of education. Arguably it means that these universities enjoy enough freedom to leave aside considerations regarding exclusively national priorities, as well as European competition programs.

[25] See A. BÜCKER W. A. WOODRUFF German L.J. 575, (2008), *The Bologna Process and German legal education: developing professional competence through clinical experiences.*

[26] Critically on this point A. VON BOGDANDY and D. WESTPHAL *The legal framework for an autonomous European Research Council*, in *Eur. L. Rev.* 2004, 788.

[27] J. HOORNAERT A. OOSTERLINCK, *'Universities from the Perspective of Internationalization*' in [2005] *Int. J.Ed. Law and Policy* 244.

A reflection on the status of the university in the ERA should therefore start with their autonomy, which means, as far as it is present, freedom from external constraints in exercising its functions and, to some extent, to determine their own functions, too. It is not by accident that the concept of university autonomy is often interlinked to the one of University or academic freedom.

So we now turn to the third point.

From the early beginnings of the university in the middle Ages, down to the present century, autonomy or self-governance has been a key ingredient in the ideology of institutions of higher education. However, this autonomy is rooted in the traditional character of universities as institutes of research, elaboration and high cultural production. This activity often has taken place apart from tensions of the outer world. As a result, it seems very likely that the notion of autonomy will be seriously called into question in the post-industrial world since society tends, as it progresses in that direction, to integrate its various functions more closely; that being so, the university will no longer be able to claim that it lives confined in an ivory tower.

If the literal meaning of the concept of autonomy is self-governance, it is possible to distinguish a number of aspects where the autonomy afforded to the single academic institutions and the accountability control operated by national ministries on those institutions find a specific balance. In any case, the general paradigm is not in terms of how much the single universities are allowed to distance themselves from the direction of the national administration, but, on the contrary, in terms of how much the central administration is allowed to intervene in the functioning of universities, as separate bodies.

As for Italy, it happens that specific provisions, having constitutional rank[28], should guarantee the universities' right to autonomously define a broad range of matters regarding their own functioning, within the limits of statutory law.

It is therefore hard to effectively determine the balance between institutional freedom and ministerial constraint.

The result is typically a framework where the role of the national administration should be a supervisory rather than a directive one. Visible exceptions can be found, however, in a range of administrative procedures of qualified importance, where the preliminary or subsequent consent of the ministry is necessary, as it will be better explained in paragraph four. Furthermore recent Italian legislative developments, with the law 240/2010, widespread standardization of multiple rating criteria in the research assessment and in the general functioning of Universities[29], representing a major obstacle to the respect of freedom of science in terms of prohibition of political interference[30].

As we said, Universities are living in paradoxical times. Never before were the expectations of their contributions so high; never before were the doubts on their quality and performance so severe and widespread. As a consequence of increasing pressures on the state budgets, the allocation to universities are under strict scrutiny and budget cuts have become

[28] Art. 33 Cost.

[29] Critically S. BATTINI, *La nuova governance delle università*, in *Riv. Trim. dir. pubbl.* 2011, 359 and F. MERUSI, *Legge e autonomia nelle Università*, in *Dir. amm.* 2008, 739. Even before the last developments disapprovingly S. CASSESE, *L'autonomia delle università nel rinnovamento delle istituzioni*, in *Foro it.* 1993, V, 82.

[30] See C. PINELLI, *Autonomia universitaria , libertà della scienza e valutazione dell'attività scientifica*, in *Munus* 2011, 567 and critically on the research assessment and the power of ANVUR (an agency whose members are appointed by the Ministry) M. RAMAJOLI, *Stato valutatore, autonomia universitaria e libertà di ricerca*, in *Giorn. Dir. Amm.* 2014, 313.

a fact of life. Even more so in countries where ageing, economic crisis and bank failures have a major impact on available state finances. All the public universities [31]are increasingly intended by public law and progressively becoming instruments for the state to achieve specific policy goals.

Financial matters have been identified by the majority of national rectors conferences as the most pressing challenges faced by universities today. The impact of the economic crisis on the current state of university autonomy was universally recognised as a major challenge. In a number of countries, new regulations following austerity measures were also perceived as reducing autonomy[32]. While it was readily acknowledged that universities should be held accountable to society and towards their funders, it was stated that the introduction of overly resource- and time-intensive bureaucratic measures is also preventing universities from achieving their full potential. Rather than setting long-term targets and taking a strategic lead, some governments have displayed a growing tendency to micro-manage university affairs. Quality assurance processes also raised concern. Strict programme accreditation and, in some cases, a new legal status of quality assurance agencies were considered as limiting autonomy[33]. Furthermore, it has been remarked[34] that reforms encounter different difficulties in being implemented. In various countries, there is no clear definition of the relations between governing bodies and bureaucracy, and there is often much uncertainty about the administration's managerial competences and likewise the tasks and functions of the teaching

[31] H. VAN GINKEL, Keynote Address of the Conference, *Contemporary Threats and Opportunities*, Proceedings of the Conference of the Magna Charta Observatory, 15-16 September 2011, Bologna.

[32] See *University Autonomy in Europe II, The scorecard*, T. ESTERMANN, T. NOKKALA M. STEINEL (eds), 2011 European University Association, 65-66.

[33] Id. , 68.

[34] See A. MARRA, R, MOSCATI, *Ministries and Bureaucrats with particular reference to the Humboldtian-Napoleonic systems*, cit., par.3.

staff. Inadequate and untrained administrative structures mean that a apart of the managerial functions have fallen to the teaching staff, which is more and more called up to take on organizational and bureaucratic responsabilities, thus increasing uncertainty on roles and tasks.

Looking at University as a society change the perspective, asking national legislators and European policymakers to modify their current point of view.

As Drew Gilpin Faust (the president of Harvard) said, we should remember that universities are about a great deal more than measurable utility.

The different interest of the group members, of the University society as a whole, are not just competitive goals to be achieved.

It is to deplore the growing dominance of economic justifications for universities: universities do serve not just as a source of economic growth, but as society's critic and conscience[35]. Universities are meant to be producers not just of knowledge but also of (often inconvenient) doubts as human beings need meaning, understanding and perspective as well as jobs.

Universities can be closer to realizing their mission as independent guardians of the values of democracy.

In the Bucharest Declaration in 2004 it is stated "However important universities have become for the generation of economic wealth, they cannot be regarded simply as "factories" of science and technology, and of technical experts, within a global knowledge economy.

[35] In this sense A. DE LA OLIVA SANTOS, *La scienza giuridica e l'Università a un bivio fondamentale*, in *Riv. Trim. dir. proc. civ.* 2015, 1171.

They have key intellectual and cultural responsibilities that are more, not less, important in a knowledge-based society."

Accordingly, universities cannot be regarded as value-free institutions. The values and the ethical standards they espouse will not only have a crucial influence over academic, cultural and political development of their academics, students and staff, but also help to shape the moral contours of society-at-large and address the question of the global promotion of democracy[36].

University as a society embodies the idea it represents not just a place of teaching and research, but also a fundamental institutions of democracy and self-realization of its members.

Through Universities, society may seek selflessly and teach critically democratic values that form the basis for building bridges and instilling a common feeling, especially in the present days when private interests, affecting in the most different way in everyone's life, are becoming stronger and tougher.

2. OVERSTEPPING THE BOUNDARIES OF NATIONAL HIGHER EDUCATION SYSTEM: THE ROLE OF THE CJEU CASE LAW

[36] S. CASSESE, *A proposito di "The law of global governance" di Eyal Benvenisti. Diritto globale o "polity" globale?* in *Riv. trim. dir. pubbl*. 2014, 911 focusing on the role of global institutions as sponsors of democratic processes and institutions vis-à-vis national communities.

The CJEU case law – through an evolutionary and dynamic interpretation of the Treaties - played a prominent role in fostering the Europeanization of higher education, even within the - at least textual - "frigidity"[37] of the Treaties with regard to higher education policies.

The CJEU case law, in particular, contributed to shed light on the double-sided nature of higher education: on the one hand, higher education is a competence which falls within the autonomy of Member States, on the other it is strictly intertwined with internal market and free movement issues, and therefore it cannot be completely excluded from the scope of application of EU law. Ruling within the grey area in-between member States' autonomy and EU law, the CJEU has pushed the educational integration in Europe, even beyond its boundaries[38].

The first breach open by the CJEU in the national sphere of education systems occurred in 1974 with the landmark Casagrande[39] case. In Casagrande, an Italian citizen, who was living since his birth in Germany, asked to be admitted to the educational grants issued by the Bavarian government. However, the Bavarian law on educational grants admitted German nationals, stateless persons and aliens granted asylum only. The ECJ, in a preliminary ruling, declared the German provision in contrast with art. 12 of the Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, which affirmed that "the children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

[37] F. MANCINI defined the EU attitude toward social rights as "social frigidity", see F. MANCINI 1998, *Europe: The Case for Statehood*, ELJ, 1998, 29.

[38] S. GARBEN, *EU Higher education law*, Wolters Kluwer, 2011, 101.

[39] C-9/74 Donato Casagrande v. Landeshauptstadt Munchen 1974, ECR 773.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions".

Joseph Weiler distinguished two different phases[40] in the Court legal reasoning, corresponding to different strategies. In the first one the Court interpreted widely the provisions of the Council regulation at stake, asserting that "it follows from the provision in the second paragraph of Article 12, … that the Article is intended to encourage special efforts, to ensure that the children may take advantage on an equal footing of the education and training facilities available. It must be concluded that in providing that the children in question shall be admitted to educational courses under the same conditions as the nationals of the host State, Article 12 refers not only to rules relating to admission, but also to general measures intended to facilitate educational attendance"[41]. As J. H.H. Weiler sharply pointed out, here the Courts seems to move in an "empty jurisdictional space with no limitations on the reach of Community"[42].

Even more interesting is the second phase of the Court's reasoning, where it asserts that, "although educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training"[43].

[40] J. H.H. WEILER, *The Transformation of Europe,* in *Yale Law Journal*, vol. 100 n. 8, 1991, p. 2438.

[41] C-9/74, par. 3-4.

[42] J. H. H. WEILER, *The Transformation of Europe,* in *Yale Law Journal, cit.*, 2439.

[43] C-9/74, para. 12.

Following the logic of the *"implied powers*", the Court legitimized the EU intervention in a sphere out of the scope of application of EU law[44] producing the ultimate effect of adsorbing the national prerogatives on education into the EU legal realm[45].

If in *Casagrande* the Court opens the era of the Community's action within the realm of education, it is with the subsequent *Gravier*[46] case that higher education has been included in art. 128 of the Treaty, which provides the Community competence in the area of vocational training. In this case a French student of strip comics in Belgium was asked to pay a fee called the "minerval" (enrolment fee) which students of Belgian nationality were not required to pay.

The court ruled that "the imposition on students who are nationals of other Member States of a charge, as a condition of access to vocational training, where the same fee is not imposed on students who are nationals of the host Member State, constitutes discrimination on grounds of nationality contrary to Article 7 of the Treaty"[47].

Moreover the Court was asked to establish whether the area of "vocational training" encompasses also "a course in strip cartoon art". The Court interpreted vocational training widely so as to include an element of general education: "any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is

[44] *Contra*, S. GARBEN, *EU Higher education law*, cit., 58. According to the Author, "this approach is based on a sound logic. After all the EU is endowed with a number of functional powers to achieve certain policy objectives, such as the creation of the common market and therein the free movement of persons, which may require changes in all kind of sectors".

[45] J. H.H. WEILER, *The Transformation of Europe*, in *Yale Law Journal*, cit., p. 2440.

[46] C-293/83, Françoise Gravier v. City of Liège, 1985.

[47] Ibidem, para. 2.

vocational training, whatever the age and the level of training of the pupils or students, and even if the training programme includes an element of general education[48]".

With *Gravier* the Court expanded the scope of application of art. 128 EC, especially under the specific profile of the access to higher education, while the organization of higher education still remained within the national sphere.

However, the *Gravier* case left open several issues regarding the boundaries of the vocational training and the relationship between the latter and the notion of general education[49]. Such profiles have been further developed in the subsequent rich case law of the CJEU, specifically regarding higher education: *Commission v. Belgium*[50], *Lair v. Universitat Hannover*[51], *Brown v. Secretary of State for Scotland*[52], *Blaizot v. Univeristy of Liege*[53].

In particular, in the latter the Court clarified that also university education (in the specific case a Medicine course) could qualify as vocational training, as long as the course was intended to prepare the student for an occupation.

In this earlier case law we can clearly see the progressive attraction of higher education in the orbit of the Community law, determining a growing impact into the heart of national

[48] C-293/83, par. 30.

[49] J. FLYNN, *Gravier: suite du feuilleton*, in B. DE WITTE (a cura di), *European Community Law of Education*, Baden-Baden, 1989, p. 100.

[50] C-293/85.

[51] C-38/86.

[52] C-197/86.

[53] C- 24/86.

education systems. This is one of the most clear example of "creeping competence"[54], which cannot but led to critical concerns.

In particular, the Court's developments in "the absence of an explicit competence alarmed the Member States which were hesitant to concede any national autonomy or sovereignty in this field[55]". This concern was partially fixed after the adoption of a specific provision in the Maastricht treaty (art. 126) containing a limit transfer of educational powers to the EU and underling the national autonomy paradigm in this field: "The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity".

This provision is now art. 165 of the Treaty of Lisbon, which can be read together with art. 6 which lists education as one of the areas where the Union shall have competence to carry out actions to support coordinate and supplement the action of Member states.

Moreover, often the Court in adjudicating higher education issues relies on art. 21 TFEU on EU citizenship and on art. 18 TFEU on non-discrimination.

As it appears quite adamant, in the Treaties higher education is perceived as a complex issue involving different and competing interests.

[54] M. POLLACK, *Creeping Competence: The Expanding Agenda of the European Community,* in *Journal of Public Policy*, vol. 14, n. 2, 1994.

[55] S. GARBEN, *Confronting the Competence Conundrum - Three Proposals to Democratise the Union through an Expansion of its Legislative Powers*, www.gov.uk.

The question now is whether the CJEU "has good reasons to push further educational integration or whether it is overstepping its boundaries[56]".

I argue that while at the very beginning, even without a clear legal basis, the CJEU had good reason to push for educational integration, today where the Treaty provisions are clearer, it should exercise some restraint, in order to maintain a proper balance between the different competing issues of national autonomy and the European influence on this highly sensitive area.

The recent case law seems to confirm this approach. In the *Förster* case[57], and in particular in the *Bressol* case[58] the Court seems to be very cautious: in the latter in particular, the introduction, by decree, of a *numerus clausus* for non-residents students in some Belgian university courses was at stake, in order to prevent the massive enrolment of other nationality students.

The Court of Justice held that Articles 18 and 21 TFEU preclude national legislation, "which limits the number of non-resident students who may enrol for the first time in medical and paramedical courses at higher education establishments, unless the referring court, having assessed all the relevant evidence submitted by the competent authorities, finds that that legislation is justified in the light of the objective of protection of public health[59]"

The rationale of the Belgian provision was to prevent a shortage of health professionals on the national territory, which may have a deep impact on the protection of public health.

[56] S. GARBEN, *EU Higher education law*, cit., 101.

[57] C-158/07, Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep, 18 November 2008.

[58] C-73/08, Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française, 13 April 2010.

[59] Ibidem, para 82.

The Court seems to value such interpretation, stating that "the prevention of that risk requires that a sufficient number of graduates establish themselves in that territory in order to carry out there one of the medical or paramedical occupations covered by the decree at issue in the main proceedings[60]".

Therefore, if the Belgian legislation is in contrast with art. 18 and 21 TFEU, which preclude inequality in treatment between resident and non-resident students, in the end the CJEU leaves the national court, eventually, the task to find the justification to such legislation in the light of the protection of public health[61].

Even in this last case, the twofold dimension – national and supranational - of higher education emerges has a leitmotiv of higher education issues in the EU. Balancing these two competing paradigms would probably allow both the EU and Member States to tackle the current challenge of our education systems: as Marta Nussbaum pointed out: "Given that economic growth is so eagerly sought by all nations, especially at this time of crisis, too few questions have been posed about the direction of education, and, with it, of the world's democratic societies. With the rush to profitability in the global market, values precious for the future of democracy, especially in an era of religious and economic anxiety, are in danger of getting lost"[62].

[60] Ibidem, para. 68.

[61] "It must be determined whether the legislation is appropriate for securing the attainment of that legitimate objective and whether it goes beyond what is necessary to attain it, which it is for the national court to determine".Ibidem, para 48.

[62] M. NUSSBAUM, *Not for Profit: Why Democracy Needs the Humanities*, Princeton University Press, 2010, 6.

The tension between national and supranational prerogatives in higher education matters, so well documented by the developments within the European space, might contribute to prevent such a risk.

3. THE ERASMUS PROGRAMME

According to tradition, Jean Monnet, one of the founding fathers of current European Union who was called to build a new international reality starting from the ashes of the Second World War, said: "If I were to start again, I would start with education"[63].

It is exactly during the immediate postwar period that the comprehension of the relevance of educating youths to internationalism is rooted, so that they can become better citizens of single Nations, Europe and the whole world.

Pointing our attention to the European context, first of all we should note that the topic of education was not explicitly included in the Treaties of Rome, but it was left to the exclusive competence of the member States. Nonetheless, this did not exclude the need of a more European education, especially for university students, aiming to a complete formation of the individual, both as a student and as a person, which let him perceive the rising of a new supranational reality. Starting from this background, mobility, border crossing and

[63] K. GRIMONPREZ, *The European dimension in citizenship education: unused potential of article 165 TFUE*, in *E.L. Rev.*, 2014, 39(1), p. 3. See also A. CORBETT, *Universities and the Europe of Knowledge: Ideas, Institutions and Policy Entrepreneurship in European Union Higher Education Policy*, London, 2005, p. XI, according to whom "He [Monnet] probably never did, but it is an aphorism which makes sense, wherever it comes from".

studying abroad in a different European country were conceived as unique elements of personal growth.

During this first phase (1950s-1960s), single States and Universities were the only promoters of the international University cooperation, implementing national laws and rules or drawing up agreements to allow the execution and the recognition of the studies abroad[64].

In the following decades, if in the 1970s there was a first, informal admission of educations' themes inside the competences of the European Community[65], the real turning point was the Council decision of 15th June 1987.

Through this act, it was adopted the *European Community Action Scheme for the Mobility of University Students*, better known as *Erasmus Programme*, aiming to achieve a significant increase in the number of university students spending an integrated period of study in another Member State, to promote broad and intensive cooperation among Universities in all Member States and, as a result, to strengthen the interaction between citizens of the different Member States, thus consolidating the concept of a People's Europe[66].

The Articles 128 and 235 of the *Treaty establishing the European Economic Community* were recalled as legal basis for this new Programme. As already mentioned, these norms did

[64] See S. CORRADI, *Erasmus e Erasmus Plus. La mobilità internazionale degli studenti universitari*, Roma, 2015, pp. 21 ss. The Author enlightens the several contacts, during the 60s and 70s, between European Universities' rectors (specially Italian, French and German), expression of the Universities' autonomy, in order to allow the recognition of the studies made in foreign countries.

[65] See the *Resolution of the Council and of the Ministers of education, meeting within the Council of 9 February 1976*, which sets the first European action programme in the field of education. In particular, on the subject of higher education, this act explicates the EC willingness of encouraging the development of links between Universities and eliminating obstacles to the mobility of students, university teaching and research staff.

[66] Art. 2 of the Council decision of 15th June 1987.

not directly concerned education, but they disciplined the Council power to lay down general principles for implementing a common vocational training policy capable of contributing to the development both of the national economies and of the common market and the Council power to take the appropriate measures to attain one of the objectives of the Community, even if the Treaty had not provided the necessary powers[67].

Several criticisms were moved against the broad interpretation given to the mentioned articles in order to legitimate the intervention of the Community in the educational field[68], but this reading was definitively confirmed by the ECJ which showed to be favorable to the extension of the supranational sphere of competence, anticipating the following evolutions of the Treaties[69].

In effect, it was only through the Treaty of Maastricht (art. 126, today art. 165 TFUE) that the topic of education finally found its place in the fundamental Community laws, according to subsidiarity principle: the Member States have the responsibility for the content of teaching and the organization of education systems, while the Union should play a role of

[67] About the political reason of choosing both Articles 128 and 235 as Erasmus legal basis, see B. FEYEN and E. KRZAKLEWSKA, *The Erasmus Phenomenon – Symbol of a new European Generation?*, Frankfurt, 2013, pp. 29 ss.

[68] J. FIELD, *European Dimensions, Education, Training and the European Union*, London, 1998, p.56; J. LONBAY, *Education and Law: the Community Context*, in *E.L. Rev.*, 1989, 14, p. 368; M. MURPHY, *Covert Action? Education, Social Policy and Law in the European Union* in *J.Educ. Policy*, 2003, 18, p. 551.

[69] In this sense, Case 242/87 Commission v. Council, Judgment of May 30, 1989, which clearly upheld the legitimacy of the 15th June 1987 Council decision: "19…it must be held that the measures envisaged under the Erasmus programme do not exceed the limits of the powers conferred on the Council by Article 128 of the Treaty in the area of vocational training 37. It follows that inasmuch as the contested decision concerns not only the sphere of vocational training but also that of scientific research, the Council did not have the power to adopt it pursuant to Article 128 alone and thus was bound, before the Single European Act entered into force, to base the decision on Article 235 as well. The Commission' s first submission that the legal basis chosen was unlawful must therefore be rejected".

support, supplement and coordination. Over all, it's explicitly stated that Union action shall be aimed at encouraging mobility of students and teachers, inter alia by encouraging the academic recognition of diplomas and periods of study abroad[70].

This is how one of the most known European Programme started, a programme that, according to some people, is also the one which has revealed to be the closest to citizens, introducing concrete European experiences in family context of the several students[71].

After almost 30 years from its birth, the Erasmus Programme has allowed more than 3 million of students to cross national borders[72], also receiving grant during their studies abroad. Anyway, Erasmus has not only a didactic purpose, making the exchange of people also an exchange of knowledge.

The Programme's success has also helped to shape higher education in Europe and led to several achievements: the launch of the Bologna Process in 1999[73], which introduced comparable and compatible study degrees; the establishment of the European Credit

[70] For a critic on the unused potential of the art. 165 TFUE, due to the self-restrain of EU in education's field, see K. GRIMONPREZ, *The European dimension in citizenship education: unused potential of article 165 TFUE*, in *E.L. Rev.*, cit., p. 3 ss.

[71] See M. FENNER and S. LANZILOTTA, *Project Report. 20 Years of the Erasmus Programme*, in *Erasmus Student Network*, 2007.

[72] About Erasmus numbers: http://ec.europa.eu/education/resources/statistics_en. See also: http://ec.europa.eu/education/tools/erasmus-3-million_en, dedicated to the achievement of the 3 million students goal.

[73] For a synthetic overview on the Bologna Process, see *ex pluribus*, A. CORBETT, *Higher Education as a Form of European Integration: How Novel is the Bologna Process?*, in *ARENA Centre for European Studies Working paper*, 15, 2006.

Accumulation and Transfer System (ECTS)[74], which allows student to earn credits for their degree when studying abroad; the internationalization of higher education institutions.

Meanwhile the Programme has evolved, becoming a piece of wider programmes: during the 1990s, it became part of Socrates Programme[75] (which not only aimed at promoting cooperation and mobility in the education field, but also at strengthening the European dimension of education at all levels, enhancing the knowledge of foreign languages, encouraging the use of new technologies and promoting equality) and in 2007 it merged into the Lifelong Learning Programme[76] (still aiming at improving education and supranational mobility at all levels, so as to enable people, at any stage of their life, to take part in stimulating learning experiences, as well as developing education and training across Europe).

Last step was the creation of Erasmus + Programme[77], directed to bring together all the previous European actions in the field of education, training, youth and sport, including the international aspects of higher education[78]. The Programme should include a strong

[74] For a synthetic overview on ECTS functioning, see the *ECTS Users' Guide*, available at the following web address: http://ec.europa.eu/dgs/education_culture/repository/education/ects/users-guide/docs/year-2009/ects-users-guide-2009_en.pdf

[75] Established by Decision n. 819/1995/EC of the European Parliament and of the Council of 14 March 1995.

[76] Established by Decision n. 1720/2006/EC of the European Parliament and of the Council of 15 November 2006.

[77] Established by the Regulation EU n. 1288/2013 of the European Parliament and of the Council of 11 December 2013.

[78] Recital (1) of the Regulation EU n. 1288/2013: "…a single programme in the field of education, training, youth and sport, including the international aspects of higher education, bringing together the action programme in the field of lifelong learning ('Lifelong Learning') established by Decision No 1720/2006/EC of the European Parliament and of the Council, the Youth in Action programme ('Youth in Action') established by Decision No 1719/2006/EC of the European Parliament and of the Council, the Erasmus Mundus action programme ('Erasmus Mundus') established by Decision No 1298/ 2008/EC of the European Parliament and of the Council, the ALFA III programme

international dimension in order not only to enhance the quality of European higher education, but also to promote understanding between people and to contribute to the sustainable development of higher education in partner countries, as well as their broader socio-economic development, inter alia by stimulating ″brain circulation″ through mobility actions with partner-country nationals[79]. All this shall happen without any sacrifice for equality, so that the enlargement of the access to the Erasmus is an additional goal to accomplish[80].

In this new Programme, mobility[81] does not involve only university students, but also university staff and professors, students of all levels of school, entrepreneurs, athletes etc[82].

established by Regulation (EC) No 1905/2006 of the European Parliament and of the Council, and the Tempus and Edulink programmes, in order to ensure greater efficiency, a stronger strategic focus and synergies to be exploited between the various aspects of the single programme. In addition, sport is proposed as part of that single programme".

[79] See the Recitals (8) and (17) and the Article 4 of the Regulation.

[80] Recital (7) of the Regulation: "Pursuant to Articles 8 and 10 of the Treaty on the Functioning of the European Union (TFEU), as well as Articles 21 and 23 of the Charter of Fundamental Rights of the European Union, the Programme promotes inter alia equality between men and women and measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. There is a need to widen access for members of disadvantaged and vulnerable groups and actively to address the special learning needs of people with disabilities in the implementation of the Programme".

[81]"Learning mobility" defined by the Article 2, pt. 7), of the Regulation as "moving physically to a country other than the country of residence, in order to undertake study, training or non-formal or informal learning; it may take the form of traineeships, apprenticeships, youth exchanges, volunteering, teaching or participation in a professional development activity, and may include preparatory activities, such as training in the host language, as well as sending, hosting and follow-up activities".

[82] Article 1 of the Regulation. About the importance of the extension of Erasmus Programme to other categories than University students ("who are already very likely to feel European"), see T. KUHN, *Why educational exchange*

Moreover, the Erasmus + adds to the physical mobility (in order to undertake study, training or non-formal or informal learning), the virtual mobility, which involves a set of activities supported by information and communications technology, including e-learning, that realize or facilitate international collaborative experiences in a context of teaching and learning[83].

Explicit clues of the success and the faith in the Programme are, on the one hand, the increase of the founds addressed to it (+45%, reaching the threshold of 15 billion Euros), even in a situation of economic crisis, and, on the other, the choice to expand the spatial dimension of exchanges, opening it to extra-European countries, in order to make the Erasmus a more and more international programme[84]. For these reasons, it's clear that, today, the goal of the Erasmus is not only to create a European consciousness, but rather to allow the overcoming of social and cultural barriers and border-crossing so as to make students becoming "citizens of the world"[85].

programs miss their marks: Cross-border mobility, education and European identity, in *Journal of Common Market Studies*, 2012, pp. 994-1010.

[83] Article 2, pt. 10), of the Regulation.

[84] Article 24 of the Regulation: "Country participation 1. The Programme shall be open to the participation of the following countries (the 'Programme countries'): (a) the Member States; (b) the acceding countries, candidate countries and potential candidates benefiting from a pre-accession strategy, in accordance with the general principles and general terms and conditions for the participation of those countries in Union programmes established in the respective framework agreements, Association Council decisions or similar agreements; (c) those EFTA countries that are party to the EEA Agreement, in accordance with the provisions of that agreement; (d) the Swiss Confederation, on the basis of a bilateral agreement to be concluded with that country; (e) those countries covered by the European neighborhood policy which have concluded agreements with the Union providing for the possibility of their participation in the Union's programmes, subject to the conclusion of a bilateral agreement with the Union on the conditions of their participation in the Programme".

[85] See also the Council Recommendation of 28 June 2011 "*Youth on the move" — promoting the learning mobility of young people* 2011/C 199/01, according to which "Learning mobility, meaning transnational mobility for the purpose of acquiring new knowledge, skills and competences, is one of the fundamental ways in which young people

Along these 30 years, Public law played a primary role. First of all, we must reaffirm the influence of the Universities, which gave a fundamental contribution – as we have already enlightened – to the birth of the Erasmus Programme, recognizing the importance of students exchange and recognition of studying abroad[86].Today, every institution which want to enter in the Erasmus circuit must: ensure a cost-free attendance to the courses for foreign students (they pay taxes only to home countries Universities) and the recognition of courses and exams attended by their own students in the European Universities they have an agreement with; give all the information needed for joining the Erasmus Programme; help students in administrative duties; organize the reception and the integration of foreign students, to whom also offer the opportunity to enhance their knowledge in the local language. All these duties are described in detail in the Erasmus Charter for Higher Education (ECHE)[87], an act released by the Commission whose concession is essential for an institution to enter the Erasmus circuit, and they are reiterated in each Learning Agreement, meaning every agreement concluded by two Universities in relation to every single student doing the exchange, indicating also the courses attended and their value in ECTS.

can strengthen their future employability, as well as their intercultural awareness, personal development, creativity and active citizenship. Europeans who are mobile as young learners are more likely to be mobile as workers later in life. Learning mobility can make education and training systems and institutions more open, more European and international, more accessible and more efficient. It can also strengthen Europe's competitiveness by helping to build a knowledge-intensive society".

[86] Crystal clear, in this sense, was the orientation upheld by the General Assembly of the European Rectors Conference, in Genève, the 3-6 September 1969.

[87] To have an example of this document, see: https://ec.europa.eu/programmes/erasmus-plus/sites/erasmusplus/files/files/resources/he-charter_en.pdf. See also the *Erasmus Charter for Higher Education Annotated Guidelines* to have a more specific idea of the requirements needed to enter the Erasmus circuit: https://ec.europa.eu/programmes/erasmus-plus/sites/erasmusplus/files/files/resources/charter-annotated-guidelines_en.pdf

On a Public law perspective, we must consider also that, meanwhile the implementation of the Programme on the Union level belongs to the Commission, on a State level it falls among the competences of specific National Agencies[88], supervised by Nationals Authorities[89]. In detail, National Authorities shall designate a National Agency or National Agencies. In cases where there is more than one national agency, Member States shall establish an appropriate mechanism for the coordinated management of the implementation of the Programme at a national level, particularly with a view to ensuring coherent and cost-efficient implementation and effective contact with the Commission. The Nationals Authorities shall also monitor and supervise the management of the Programme at a national level, satisfy duties of information and consultation with the Commission, co-finance the operations of its national agency, take responsibility for the proper management of the Union funds transferred by the Commission to the national agency. On the other hand, National Agencies shall have legal personality or be part of an entity having legal personality, and be governed by the law of the Member State concerned (a ministry cannot be designated as a national agency); they shall also have adequate operational and legal means, management capacity, staff and infrastructures to fulfill their tasks satisfactorily. These tasks consist in managing specific actions of the Programme, as the one relating to learning mobility of individuals (typical assignments are: funds supply, advice and assistance to University and other institutions applying for the Erasmus Programme...).

Looking at a specific case, in Italy three national agencies have been created (Agenzia nazionale Erasmus+ INDIRE; Agenzia nazionale Erasmus+ ISFOL; Agenzia nazionale per i Giovani), one for each sector in which Erasmus + is structured (school education, higher education, adult education; education and vocational training; youth policies). About the National Authorities, they correspond with government structures in charge in the same fields (Ministry of Education, Universities, and Research; Ministry of Labor and Social Policy; The

[88] Article 28 of the Regulation EU n. 1288/2013.

[89] Article 27 of the Regulation EU n. 1288/2013.

Presidency of the Council of Ministers – Department of Youth and the National Civil Service).

Simplifying the roles of different public subject for the execution of the Erasmus Programme, the pulse function still belongs to Universities, as a consequence of their independence. They have to stipulate partnership agreements with others higher education institutions – in order to create their own mobility network – but also to apply to the European Commission for the release of ECHE, essential for the participation to the Programme. Fulfilled these requirements, Universities can apply to their National Agencies for funding, pertaining to these Agencies the managing of the resources granted by the European Commission and the National Authorities for the Organization of Mobility, the Student Mobility, the Teacher Mobility and the Introduction of the European Credit Transfer System. Finally, the National Authorities are responsible for the supervision of the implementation of the Programme at a State level and for the coordination of the national action with the European level.

From a general point of view, we must consider also the commitment of the States to take all appropriate measures to remove legal and administrative obstacles to the proper functioning of the Programme, including, where possible, measures aimed at resolving issues that give rise to difficulties in obtaining visas[90]. Among the several measures taken by the States, we can recall: the recognition of the right to access to the same services the local students can access (for instance, student accommodation); the possibility to supply grants in

[90] In this sense, Recital (12) of the Regulation EU n. 1288/2013. For and analysis of the obstacles to student mobility, see *The European Higher Education Area in 2015: Bologna process implementation report*, pp. 244 ss.

addition to the European ones; the recognition of different kinds of benefits, as reductions on public transportations[91].

In few words, public law has provided (and it is still providing) the concrete tools for the implementation of the Programme. From this point of view, it is crystal clear how University as public institutions has been fundamental for the beginning, the survival and the evolution of the Erasmus. On the other hand, it must be noted how Erasmus itself has been helping the University to evolve as a dynamic social structure, something more than a static public institution in charge of providing higher education. Also thanks to the Programme, Universities are included in a network of international connections, in which the dynamism flows from the exchanges of individuals, member of this society, allowing them to create and share a common identity on a supranational and international level.

In conclusion, we cannot deny the role of Erasmus Programme as an instrument for overcoming boundaries and connecting populations, able to reduce national distances and diversities. On the other hand, we cannot ignore the voices of who, rationally, deny the existence of an "Erasmus generation" able to change the world (the Programme has involved only the 4% of eligible students) and enlightens how European identity and openness to internationalization already characterize people who decide to live the Erasmus experience[92]. Nonetheless, according to the most recent studies, it is clear how cross-border interaction promotes collective identity both on an European perspective and on an international one,

[91] For an analysis of students' loans significance and their portability, see H. SKOVGAARD-PETERSEN, *There and back again: portability of student loans, grants and fee support in a free movement perspective*, in *E.L. Rev*, 2013, 38(6), pp. 783 ss.

[92] In this sense, *ex pluribus*, see E. SIGALAS, *Cross-border mobility and European identity: The effectiveness of intergroup contact during the ERASMUS year abroad*, in *Eur. Union Polit.*, 2010, 11(2), pp. 241 ss.; I. WILSON, *What Should We Expect of 'Erasmus Generations'*, in *JCMS*, 2011, 49(5), pp. 1113 ss.; and partially R. KING and E. RUIZ-GELICES, *International Student Migration and the European 'Year Abroad': Effects on European Identity and Subsequent Migration Behaviour*, in *Int. j. Poupl. Geogr.*, 2003, 9, pp. 229 ss.

especially after the extension due to the implementation of Erasmus + Programme[93]. Living abroad for a long term lets the student integrate and truly understand the main features of the hosting community – clear is the difference with a mere tourist who cannot really perceive them, not being included in this community –, overcoming the stereotypes and starting a constructive comparison with his own country reality.

In this way, we must recognize that Erasmus Programme is a first concrete attempt of transcultural education, in order to help the "foreigner" to lose his negative meaning as "stranger or enemy", not only for the student who meets locals and international students, but also for the hosting community, which can starts to evaluate the foreigner as a positive resource for its human, social and scientific progress.

4. UNIVERSITIES WITHOUT BORDERS?

Everybody has the right to access to a good level of education and training in order to develop his own potential and skills for an effective participation into the cultural, social and economic life of the modern world[94].

[93] In this sense, *ex pluribus*, see K. MITCHELL, *Rethinking the 'Erasmus Effect' on European Identity*, in *JCMS*, 2015, 53(2), pp. 330 ss.; ID., *Student mobility and European Identity: Erasmus Study as civic experience*, in *Journal of Contemporary European Research*, 2012, 8(4), pp. 491 ss. See also previous works as N. FLIGSTEIN, *Euroclash: The EU, European Identity, and the Future of Europe*, Oxford, 2008; D. GREEN, *The Europeans: Political Identity in an Emerging Polity*, Boulder, 2007; V. PAPATSIBA, *Making Higher Education More European through Student Mobility? Revising EU initiative in the Context of the Bologna Process*, in *Comparative Education*, 2006, 42(1), pp. 93 ss.; M. BRUTER, *Citizen of Europe? The Emergence of a Mass European Identity*, New York, 2005.

[94]See *World Declaration on Higher Education for the Twenty-First Century: Vision and Action and Framework for Priority Action for change and Development in Higher Education*, text adopted by World Conference on Higher

In this perspective, higher education has given ample proof of its viability over the centuries and of its ability to evolve in order to induce change and progress in society.

Today, higher education institutions are crucial partners in delivering the European Union's strategy to drive forward and maintain growth[95].

We should observe, however, that the process of harmonization of the national systems of higher education has not developed within the European Union legal framework[96], although the European integration process and the free movement of persons within the European Union have been a strong incentive for bringing together the educational systems of the European Union [97].

Education, convened by UNESCO held at Paris, from 5 to 9 October 1998, in which is stated that «access to education is the *sine qua non* for effective participation in the life of the modern world at all levels. Education, to be certain, is not the whole answer to every problem. But education, in its broadest sense, must be a vital part of all efforts to imagine and create new relations among people and to foster greater respect for the needs of the environment».

[95] *The Europe 2020 strategy* (European Commission, 2010a) aims to achieving «smart, sustainable and inclusive growth. The engines driving this growth are: i) knowledge and innovation, ii) a greener and more efficient use of resources and iii) higher employment combined with social and territorial cohesion».

[96] See F. NECTOUS, *European identity and the Politics of Culture in Europe*, in D. BERGHAHN, N. HEWLETT, and B. AXFORD (2000). *Unity and Diversity in the New Europe*. Oxford, Bern: Peter Land, 149, who remembers the sentence «Si c'était à refaire, je commencerais par l'éducation» said by Jean Monnet, one of the founding fathers of the European Union, toward the end of his life about his work devoted to the unification of Europe.

[97] On this theme, see M. COCCONI, *Il diritto europeo dell'istruzione. Oltre l'integrazione dei mercati*, Milano, 2006, and the bibliography cited therein.

The Treaty of Rome did not mention the education, but took only into account the vocational education, with particular reference to the problems of employment[98].

Cooperation in the field of higher education has been a proven success within the European Union in the last twenty years, starting with the Maastricht Treaty.

In particular, Community competence in the field of education is governed by article 149 of the EC Treaty (now article 165 TFEU); pursuant to paragraph four, first indent thereof, any harmonisation of Member States' laws and regulations is excluded[99].

The introduction of a competence of the European Union in the field of education has represented a complicated transition, in which attempts have been made, on the one hand, to maintain the national cultural identity and, on the other hand, to encourage the abolition of

[98]See articles 39-42,43-48, 49-55 TCE.

[99]In particular, article 149 TCE (now article 165 TFUE) provides «1. The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity. 2. Community action shall be aimed at:- developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,- encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,- promoting cooperation between educational establishments,- developing exchanges of information and experience on issues common to the education systems of the Member States,- encouraging the development of youth exchanges and of exchanges of socio educational instructors,- encouraging the development of distance education. 3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education, in particular the Council of Europe. 4. In order to contribute to the achievement of the objectives referred to in this article, the Council:- acting in accordance with the procedure referred to in article 251, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,- acting by a qualified majority on a proposal from the Commission, shall adopt recommendations».

defensive barriers, through the promotion of the transnational mobility of students and teachers.

In particular, the *«Convention on the recognition of qualifications concerning higher education in the european Region»* of 11 April 1997[100], also referred to as Lisbon Convention, and the *«Joint Declaration of Harmonisation of the Architecture of the European Higher Education System»* of 25 May 1998, so called Sorbonne declaration -which clarifies that «Europe is not only that of the Euro, of the banks and the economy: it must be a Europe of knowledge as well»- are crucial steps in the process of enhancing European cooperation in this field[101].

These papers inherit the principles laid in the *«Magna Charta Universitatum»* presented in Bologna in 1998, in which is stated that «The university is an autonomous institution at the heart of societies differently organized because of geography and historical heritage; it produces, examines, appraises and hands down culture by research and teaching» [102].

In this sense, the universities encourage mobility among teachers and students; furthermore, they consider a general policy of equivalent status, titles, examinations and award of scholarships essential to the fulfilment of their mission.

[100]The Convention on the Recognition of Qualifications concerning Higher Education in the European Region (Council of Europe) ETS No. 165 (Date signed:11th April 1997).

[101] This declaration stated first of all that the «European higher education institutions had accepted the challenge and taken the lead in constructing the European Area of Higher Education by 2010, also in the wake of the fundamental principles laid down in the Bologna Magna Charta Universitatum of 1988». On this theme, see G. HAUG, *«The Sorbonne Declaration of 25 May 1998 : What it does say, what it doesn't »*, in *Trends in Learning Structures in Higher Education* (I), 1999, 57 ff.

[102]Magna Charta Universitatum 1998, Bologna: Bologna University, avaible at *www.magna-charta.org.*

The importance of the role of Universities is confirmed by the Bologna Declaration of 19 June1999[103] and, then, by the Commission Communication of 5 February 2003[104], which claims that the creation of a Europe of knowledge is for the universities «a source of opportunity but also of major challenges. Indeed universities go about their business in an increasingly globalised environment which is constantly changing and is characterised by increasing competition to attract and retain outstanding talent, and by the emergence of new requirements for which they have to cater».

So, the aim of the harmonization of higher education systems, to be realized through freedom of establishment and recognition of diplomas and courses of study, represents certainly a determining factor in the creation of an European area of really democratic and competitive knowledge, able to attract resources and economic investments from all around the world.

However, on the basis of the subsidiarity principle, the higher education policies in Europe are essentially decided at the level of the individual Member States.

Therefore, the role of the European Union is mainly in a supporting and partly coordinating capacity.

While any harmonisation of laws and regulations of the Member States is explicitly excluded, the European Union can take action in accordance with the ordinary legislative procedure and by means of incentive measures.

[103] The Bologna process, initiated with the Bologna Declaration (1999) and assessed every 3 years in ministerial conferences, aims to introduce a more comparable, compatible and coherent system for European higher education. On this theme, see S. GARBEN, *The Bologna Process: from a European Law perspective*, cit.

[104] Communication from the Commission of 5 February 2003 - The role of the universities in the Europe of knowledge [COM(2003)] 58 final.

The main goals of Union action in the field of higher education include: supporting mobility of students and staff; fostering mutual recognition of diplomas and periods of study; promotion of cooperation between higher education institutions and the development of distance (university) education.

Member States commit themselves to attain these objectives-within the framework of their institutional competences and taking full respect of the diversity of cultures, languages, national education systems and of University autonomy-to consolidate the European area of higher education.

As a preliminary point, it should be recalled that even if European Union law doesn't detract from the power of the Member States as regards the organisation of their education systems and of vocational training , the fact remains that, when exercising that power, Member States must comply with European Union law, in particular the provisions on the freedom to move and reside within the territory of the Member States[105].

For admission to degree courses, for instance, the Member States are free to opt for an education system based on free access-without restriction on the number of students who may register-or for a system based on controlled access in which the students are selected.

However, both that the Member State chooses the first or the second of those systems (or a combination of them), the chosen system must be comply with European Union law and, in particular, with the right to move and reside freely within the territory of the member State as well as with the principle of non- discrimination on grounds of nationality[106].

[105] See, to that effect, for example, Case C-76/05 Schwarz and Gootjes-Schwarz [2007] ECR I-6849, paragraph 70, and Joined Cases C-11/06 and C-12/06 Morgan and Bucher [2007] ECR I-9161, paragraph 24.

[106] So, the article 21(1) TFUE provides that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by measures adopted to give them effect. Furthermore, the Court's case-law makes clear that every citizen of the Union

These principles are reinforced by the provisions in the European Convention on Human Rights. In particular, article 2 of Protocol No. 1 to the Convention provides as follows «no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions».

The Italian Government establishes, first with the Law no. 127/1997, then with Law no. 264/1999, the *numerus clausus* to obtain access to public or private university courses in certain areas such as dentistry and medicine[107], on the basis of two criteria: the capacity and resource potential of universities and society's need for a particular profession[108].

may rely both on article 18 TFEU, which prohibits any discrimination on grounds of nationality, in all situation falling within the scope *ratione materiae* of European Union law, both of the freedom conferred by Article 21 TFEU to move and reside within the territory of the member States. See, to that effect, Case C-148/02 Garca Avello [2003] ECR I-11613, paragraph 24; Case C-209/03 Bidar [2005] ECR I-2119, paragraphs 32 and 33; Case C-158/07 Foister [2008] ECR I-8507. Paragraphs 36 and 37. See, e.g., S. GARBEN, *The Bologna Process: from a European Law perspective*, cit., 191, who remembers «As the ECJ stated in 1974, in its landmark Casagrande judgment: 'although educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community Institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training'. Considering the close ties between higher education and the labour market, it is not surprising that internal market legislation can indeed also deal with educational matters. Especially the free movement of persons, which is one of the fundamental pillars underpinning the internal market, is interrelated with educational matters».

[107] I chose to focus my attention only on those academic courses for two main reasons: the first one connected to the need to circumscribe the research field of the present paper; the second one is referred to the relevant number of applications made by students every year for the access to those specific courses.

[108] See the famous case-law of the *European Court* of *Human Rights* (Second Section) judgment of *2 April 2013 – applications nos. 25851/09, 29284/09* and *64090/09 - Tarantino* and *Others v. Italy*), in which the Court explains that the first criterion is justified by the respondent Government on the basis of the need to ensure high quality standards in university education and a high degree of professionalism in medical and dentistry classes, namely guaranteeing a balanced ratio of students-academic staff, rational use of the available material resources and

So, to be admitted, candidates are required to pass a multiple-choice examination consisting of questions on general culture (including international geography and history), biology, chemistry, mathematics and physics.

The exam has aimed to test the candidates' aptitude for the subject matter pertaining to the faculty of their choice.

In this matter, a particular problem concerns the transfer of foreign students in Italian universities: according to Italian regulations regarding access to university studies, regardless of whether attended the first year (or the following one) in foreign university, foreign students have to pass an admission test if they want to study in Italy.

Now, the fundamental question is: have the universities the power-and duty to accommodate transfer requests from foreign students who, without being submitted to admission degree or without being placed in good position to gain access to the medical and surgical treatment of the degree programs, have called for enrollment to subsequent years at Italian universities, with the recognition of periods of study undertaken in a foreign university?

Universities do not have built-in mechanism for the recognition of periods of study undertaken in the foreign universities.

controlled access to trainee posts at public hospitals and subsequently to the labour market. Instead, the second criterion is justified by the respondent Government as corresponding to the purpose of avoiding excessive public expenditure at present and in the future, since teaching and training medical doctors and dentists implies significant expenditure for the present generation and any future saturation of the labour market would imply further expenditure, given the social charges associated with unemployment. But, in the opinion of the Court, the criteria established by the respondent Government for the *numerus clausus* system have proved groundless and even arbitrary. Institutional autonomy is a necessary condition for the individual freedom to provide for higher education and the individual right to higher education, so «the interference with the applicant's right to education is disproportionate, and Article 2 of Protocol No. 1 has been breached».

For many years, the domestic courts have stated that a *numerus clausus* and the way in which is applied in the Italian legal framework are in accordance with both the Constitutional and European Union legislation. In particular, the European directives provide for the recognition of titles and degrees based on minimum standards of studies and guarantees of a real possession of the necessary knowledge to carry out a profession. However, the European directives leave to individual State of determine the instruments, means and methods to fulfil the obligations set those directives[109].

So, the Italian Universities have the power not to accommodate transfer requests from foreign students who don't have to pass an admission test[110].

According to the judges, the opposite solution, namely the acceptance of the transfer requests in the absence of passing the admission test, would result in a real circumvention of the access mechanism.

[109]See, *ex pluribus*, TAR Abruzzo, Pescara, Sez. I, 20 January 2014, n. 48; TAR Molise, Campobasso, Sez. I, 31 January 2014, n. 62; TAR Campania, Napoli, Sez. VIII, 23 April 2014, n. 2279;TAR Emilia Romagna, Bologna, Sez. I, 17 September 2014, n. 881; Cons. Stato, Sez. VI, 3 march 2014; ID., 22 April 2014, n. 2028; ID., 30 may 2014, n. 2898; ID., 15 October 2013, n. 5015; ID., 24 may 2013, n. 2866; ID., 10 April 2012, n. 2063. In these case-law the applicants argued that the restriction applicable to admission for the courses of their choice, namely the basis for applying the *numerus clausus*, violated several constitutional rights and principles. They further contended that the existence of a professional exam aiming to assess the adequate preparation of doctors and dentist following their tertiary studies made it not necessary to restrict prior access to university. Moreover, the entrance exam is based on a multiple choice questionnaire and seems therefore only adequate to assess scholastic notions and not the real preparation of the students.

[110]In this sense, see Law 11 July 2002, No. 148 and Law 30 December 2010, No. 240, on which see, G. DELLA CANANEA-C. FRANCHINI (a cura di), *Concorrenza e merito nelle università. Problemi, prospettive e proposte*, Torino, 2009; A. SANDULLI-M. COCCONI, *Istruzione. Riforma Universitaria*, in *Libro dell'anno del diritto 2012*, in *Enc. It.*, Roma, 2012, 370-375; S. BATTINI, *La nuova governance delle Università*, cit. , 368 ss.

The Supreme Administrative Court, in Plenary session, with the ruling 28 January 2015 No. 1, has stated that the entrance exam applies to the access a first year course and not also in the case of questions of access from the foreign students to years after the first one: in these cases the regulating principle is represented entirely by the comparison of the examinations and by the recognition of the formative credits[111].

So, referring to the European Court's case-law, the ruling claims that the Member States are free to opt for an education system based on free access-without restriction on the number of students who may register-or for a system based on controlled access in which the students are selected but, when exercising that power, Member States must comply with European Union law, in particular the provisions on the freedom to move and reside within the territory of the Member States.

The European union guarantees the recognition only of the academic and professional degrees and not also of the procedures of admission, that not result harmonized.

So, the possession of the requisite of admission to an European university shall not give automatically entitlement to the transfer of the student in any other university of European union.

But a system based on controlled access in which the foreign students are selected, through an admission degree, also in the case of questions of access to years of course

[111]Cons. Stato, Ad. Plen, 28 January 2015, n. 1, in *Foro it*., 9, 2015, 446 ss. See, too, Cons. Stato, Sez. VI, 19 February 2016, n. 678; TAR Lazio, Roma, Sez. III bis, 23 February 2016, n. 2468; TAR Lombardia, Milano, Sez. III, 23 march 2016, n. 563; TAR Lazio, Roma, Sez. III bis, 10 May 2016, n. 5553; CGARS, 26 September 2016, n. 328 . For a comment, see A. CARDI, *L'autonomia universitaria tra tradizione e modernità: a proposito di due recenti pronunce del Consiglio di Stato*, in *Rass. Avv. Stato*, 2015, 4, 1-37. On the same theme, see R. CIFARELLI, *Accesso all'università e numero programmato tra ordinamento italiano, comunitario e cedu: spunti di riflessione*, in *Giur. Merito*, 2013, 1, 190 ss.; A. GANDINO, *La questione del "numero chiuso universitario": il punto di vista del giudice amministrativo*, in *Foro amm.-Tar*, 2005, 6, 2072 ss.

following the first one, is in contrast with the provisions on the freedom to move and with the principles of the Lisbon Convention.

This convention imposes the duty of the Universities to provide, in the exercise of their own regulation autonomy, the recognition of periods of study undertaken in other States members through a didactic comparison of foreign courses with those national, and the evaluation of the formative run already followed by the student.

Despite the pronunciation of the Italian Court, it appears evident that the regulation of the matter will be put to the discretional of the single universities.

In conclusion it is very important to maintain a good level of education, and preserve its own identity, but if we want to build an European identity, we must avoid attitudes of self-reference, defensive barriers, protectionist policies.

They are all factors that are likely to lead to a division of the unit, rather than a cohesion of diversity.

5. CONCLUSIVE REMARKS

The University as a place of graduate education and disinterested research motivated by pure curiosity can be a society, the home of innovative ideas and democratic values that matter to culture, economy, technology and global wellness flourishing. This new perspective ask national legislators and European policymakers to modify their current point of view.

The higher education system has experienced a transformation from elite to mass form. The massification of higher education has provided more and more access to colleges and universities, and subsequently produced a growing number of graduates and asked for a

robust organizational structure. This structure and the regulation for its functioning are often the most evident element of cohesion, the one creating the sense of belonging to a single community but can have different impact and content regarding the specific community. Therefore the autonomy issues of University become even more central. Universities can express and gather very different interests which need to be extraneous to market logic and competition policies.

The different interest of the group members, of the University society as a whole, are not just competitive goals to be achieved. For the previous illustrated reasons, it is to deplore the growing dominance of economic justifications for universities: looking at University as a society change the perspective and European institutions, especially European Research Council, need to look in this different direction.

Furthermore, the comprehension of the relevance of educating youths to internationalism needs new nourishment, as, through mobility program such as the Erasmus, students can really become better citizens of single Nations, Europe and the whole world. It is very important, though, maintaining a good level of education, and preserving national identity. This could be done just avoiding attitudes of self-reference, defensive barriers, protectionist policies, which means improving an authentic collaboration and exchange in the European research area.

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ACADEMIC CAREER IN HUNGARY[1]

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INDEX

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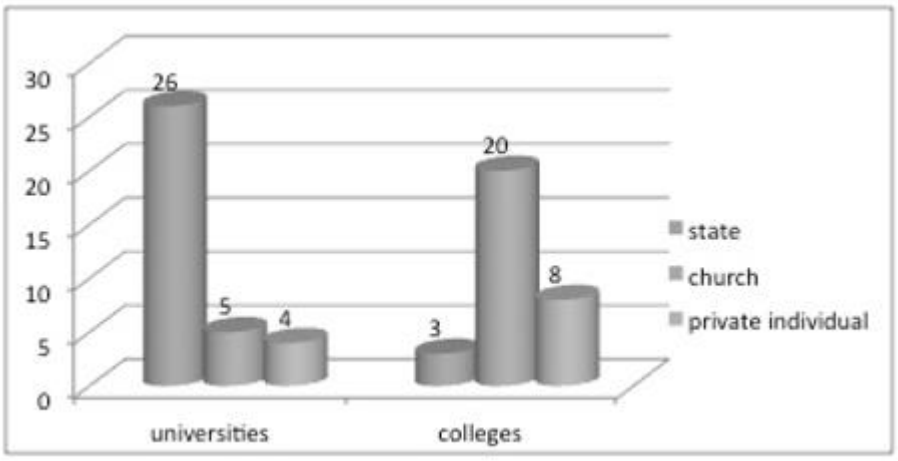
1. THE ORGANISATIONAL BASES FOR ACADEMIC CAREER

1.1. The opportunity for academic career in Hungary is basically connected to the higher education system, however, while discussing this topic, the institutions organized outside the higher education system cannot be ignored. Regarding the latter primarily those public research centres dominate those ones which are related to the Hungarian Academy of Sciences[3]. The research network of the Academy – consisting of more than 40 institutions – operates by covering all fields of disciplines, and providing their employees with career and promotion opportunities. The basis of the operation of these institutions is primarily not the utilization of the scientific research work from educational aspect but the implementation of research activity connected to state goals. The relationship of the research institutes with the higher education sphere is rather intense, especially with regard to the employees' interoperability.

1.2. Regarding the content and methods of research and teaching, the higher education institutions are independent; their operation is regulated by the Act CCIV of 2011 on higher education (hereinafter referred to as Nftv.), which equally applies to the institutions maintained by the state, the church and private individuals.

[3] In Hungary the number and significance of the research institutes outside the universities maintained by the church can be ignored; the research institutes operated by private individuals or organisations, however, concentrate on a single, narrow spectrum of science; they are not relevant regarding academic career.

Figure 1. The institutional composition according to maintainers of the Hungarian higher education 2016.



In Hungary 66 higher education institutes currently operate, whose basic tasks are education, scientific research, and creative artistic activity. Their number in the Hungarian regulation is not limited, nor is it in practice; accordingly, the establishment of an institution in line with the regulation can be initiated at any time; it is subject to adoption by Parliament. The criteria for the higher education institutional quality – among others – are the standing teaching-researching staff; these criteria are met if at least 60% of the instructors and researchers necessary for the basic activity are employed – in case of institutions not maintained by the state – or are public employees (not external lecturers) – in case of state institutions[4]. A Hungarian higher education institution can operate as a university or as a college. As for the instructor-researcher staff, the higher education institution is considered a university – in addition to meeting other requirements – if at least 60% of the instructors and researchers employed within the framework of an employment relationship, or in the status of public service employee have a doctoral degree. (This rate is 45% at the so called university of applied sciences.) Colleges in Hungary are higher

[4] Nftv. 7.§ (1) (3).

institutions of a more practice oriented type, where at least one-third of the instructors and researchers employed within the framework of an employment relationship, or in the status of public service employee shall have a doctoral degree[5]. Consequently in Hungary one of the indicators of the quality of higher education institution, and the academic career prospects therein – as it is also discussed in point 3 – are linked to the obtained doctoral degree.

2. GENERAL TERMS FOR ESTABLISHING ACADEMIC CAREER AND SPECIAL REASONS FOR ITS TERMINATION

2.1. Besides the exact legal conditions listed below the institution inviting applications may rather decide the regulations on filling in the scientific /instructor posts freely, which mostly apply to the candidate's relationship with educational, scientific and artistic fields, and to the criteria prescribed for, or expected in certain instructor-researcher scope (see point 3).

a) The general terms for employment in Hungarian higher education are that the candidate shall have a clear criminal record, not be under the scope of employment disqualification excluding activity, and shall have the degree and qualification prescribed by the higher education institution[6].

b) Regarding those working in public higher education, and in the research network of the Hungarian Academy of Sciences – apart from those mentioned previously – Hungarian citizenship is a condition, or the person employed by the institution shall be an immigrant or resident having the right to move freely and the right to reside.

[5] Nftv. 9.§.

[6] Nftv. 21.§ (5).

c) In public institutions it is also necessary that there is no prosecution against the applicant for any crime listed in the Act, or the applicant does not undergo coercive treatment due to having committed a crime therein defined[7].

2.2. The reasons for terminating, or ending an academic career – apart from the general termination of employment – are basically related to the changes that have, meanwhile, been made in the terms of creating the post. Apart from this:

a) in Hungary an instructor or a researcher can exclusively be employed until the age of seventy. Except for the master instructor, the instructor who has not obtained a doctoral degree within ten years of employment cannot be further employed[8].

b) The leader of the higher education institution can terminate the employment if the instructor has not met the requirements defined by Nftv., in the employment standards and prescribed in the appointment document[9]. This may occur in practice if the instructor, according to his/her scope, has not performed his/her duty on keeping the courses on average of an academic year.

c) In Hungary an instructor may be employed by more institutions of higher education maintained by the state, the church or private individual (parallel employment) at the same time. The instructor can only be taken into consideration regarding the operational terms of the higher education institution (institutional accreditation) exclusively in one higher education institution indicated by him/her, independent from the fact that he/she is employed by more higher education institutions at the same time. Based on the institution

[7] Act XXXIII of 1992 on the legal status of public employees amended several times (hereinafter referred to as Kjt.) 20.§ (2).

[8] Nftv. 31.§ (2).

[9] Nftv. 31.§ (5).

leader's decision the employment of the instructor who, on the basis of his/her statement, cannot be considered in the institutional accreditation procedure, can be terminated[10].

3. ACADEMIC CAREER SYSTEM – POSTS OF INSTRUCTORS AND RESEARCHERS

In the Hungarian higher education institutions the tasks related to education are carried out by those employed in the post of instructor while for individual research tasks a post of scientific researcher can be established[11]. In spite of the separation of job titles the tasks of the instructors and researchers are in fact interlocked in the scientific life, since the instructors also carry out research tasks and the researchers participate in the teaching activity. The difference in practice lies in the rate of the prescribed teaching-research activity.

3.1. The posts of instructors that can be established in the Hungarian higher education institutions – both in those maintained by the state, private individuals and the church – by providing a career prospect are the followings: assistant lecturer, senior lecturer, college, or university associate professor, college, or university professor, and a new, special category the master instructor[12]. Regarding the number of instructor posts applied by the institutions there is no quota in the Hungarian tertiary system[13]. This means that a higher education institution employs as many assistant lecturers, senior lecturers, college/university associate professors, college/university professors, and master instructors as necessary for carrying out its tasks as prescribed by the Nftv. and other regulations, and as many instructors as their remuneration is covered by the budget of the institution.

[10] Nftv. 31.§.

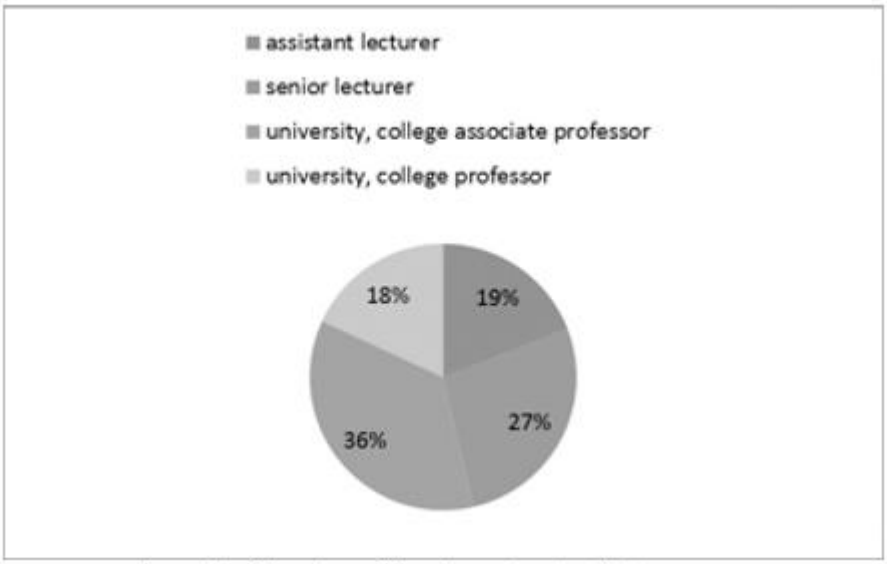
[11] Nftv. 24.§ (1).

[12] Nftv. 7. § (1).

[13] Number of instructors in the Hungarian higher education was approximately 15.000, in 2014.

Consequently the career prospects in the instructor category are rather subjective, since they depend jointly on the instructor (whether he/she has met the requirements, e.g. doctoral degree or habilitation), the economic capacity of the higher education institution (whether the increased remuneration can be covered by the budget), and on the will of the leader of the workplace/institution (whether he/she makes a proposal for the tender for that post).

Figure 2. The rate of those employed in tertiary instructor scopes 2014.



Source: www.oktatas.hu/felsooktatas/felsooktatasi_statisztikak

Certain instructor posts can be taken through tender invited and published by the institution. The application terms are determined by the higher education institution in line with the Nftv. and the institutional regulations. In Hungary having a lower level position (for a certain period) is not a condition for accessing to certain tertiary posts. Despite the fact that such situation is rare, this provides the opportunity that if for example somebody meets the requirements prescribed by the Act and institutional regulations he/she can be appointed a university associate professor without having previously been an assistant lecturer or senior lecturer in higher education. At the same time meeting the terms and requirements for a lower post/s is included in the eligibility for a higher post. According to the legal regulation a tertiary instructor is obliged to have – on academic year average – at least 8 teaching hours a week in the post of university or college professor, at least 10 teaching hours a week

in the post of senior lecturer, assistant lecturer and master instructor (lectures, seminars, practices, or consultations for the students to prepare) within his/her working time. Apart from this the instructor is obliged to do scientific research/artistic activity in at least 20% of his/her working time[14]. The rate of the teaching/research activity in case of those having the post of an instructor is 80-20%. By observing these frameworks the higher education institution can set the instructor's organisation of working time freely in its own regulation so that e.g. the employer may increase the time spent on teaching by maximum 40%, or decrease by maximum 25%.

a) The assistant lecturer is appointed by the leader of the Institution on the proposal of the senate/faculty council, the highest elected body of the higher education institution/or its faculty. If no stricter regulation is included in the employment standards of the higher education institution, the basic condition for the post of the assistant lecturer is to having started the doctoral studies[15]. General requirements for an assistant lecturer:

- thorough preparedness for the scientific/artistic discipline including the subject taught,
- publications at basic level, being able to publish also in a foreign language,
- appropriate pedagogical skills to keep in contact with the students,
- knowledge of the academic life, literature of the discipline, doing research work independently with the leading instructor's direction,
- having the pursuit to develop his/her scientific/artistic creative work original and individual in harmony with his/her instructor activity,
- participating in the professional public life of the institution. The assistant lecturer's activity is continuously viewed by the leading or assigned instructor, who gives a proposal for the appointment as senior lecturer if he/she meets the requirements for the post of senior lecturer.

b) The senior assistant is appointed by the leader of the Institution on the proposal of the senate/faculty council, the highest elected body of the higher education institution/or its

[14] Nftv. 26.§ (1) (2).

[15] Nftv. 28.§ (1) a.

faculty. If no stricter regulation is included in the employment requirements of the higher education institution the basic condition for the post of the senior lecturer – and the posts at higher level – is to obtain the doctoral degree[16]. General requirements for a senior lecturer:
- 4-5 years of higher education (teaching, research) experience,
- overall knowledge of the scientific/artistic discipline including the subject taught,
- independent participation in the academic public life, regular publication activity in domestic and international relations, also in a foreign language,
- being respected by students, having correction, analysing and evaluating skills, methodological maturity,
- systematic-organising skill in the interest of the training objectives of the higher education institution, professional cooperation attitude,
- ability to elaborate the program of the subject.

c) The basic employment terms for a college associate professor is that he/she is appropriate for leading the study, scientific and artistic work of the students, and that he/she has the necessary practical professional experience[17]. Further general employment requirements for a collage associate professor:
- higher education instructor experience of a longer period,
- continuous content and methodological update of the material of the discipline taught, and leading of such activity,
- directing participation in doctoral training, participation of habilitated associate professors in doctoral and habilitation procedures,
- organising instructor and scientific work.

d) The basic employment terms for a college professor and university associate professor is that he/she is appropriate for leading the study, scientific and artistic work of the students, of those participating in the doctoral training, and of the assistant lecturers, and to give

[16] Nftv. 28.§ (1) b.

[17] Nftv. 28.§ (2).

lectures in a foreign language, and to have the necessary experience obtained in teaching[18]. (It shall be noted that several Hungarian universities in their employment standards require a higher level of requirement for the post of university associate professor comparing to the legal regulations, namely the habilitated doctoral degree.) Since the college professor is appointed by the prime minister in Hungary, the condition for the employment of the college professor is that he/she is appointed by the prime minister or that he/she has already had been appointed. The university and college associate professor is appointed by the leader of the Institution on the proposal of the senate/faculty council, the highest elected body of the higher education institution/or its faculty. Further general criteria for college professors and university associate professors:

- a longer period, 10 years of higher education (teaching, research) experience,
- overall knowledge of the discipline including the subject taught and its creative cultivation, necessary preparedness for joining the subject group, compiling the materials of the subjects individually, and giving lectures in a foreign language at a high level,
- scientific and science-organisational activity, representing his/her discipline in the domestic and international scientific life, his/her institution, and the professional representation of the country,
- proactive and directing participation in the institution's professional public life, especially in solving teaching-organisational tasks,
- the instructor is an acknowledged master in the field of the Hungarian science/art, is an individual with his/her own works,
- has intense domestic and international professional-teaching relationship, and professional acknowledgement.

e) The basic employment terms for a university professor is that he/she is a habilitated doctor, or has an equivalent international tertiary instructor practice, and he/she is an acknowledged representative of the given field of science or art internationally who carries out outstanding scientific research, or artistic activity. Based on his/her experience gained

[18] Nftv. 28.§ (3).

in teaching, research and research-organisation he/she is appropriate for leading the study, scientific and artistic work of the students, and those participating in doctoral training, and assistant lecturers; publishes, gives seminars and lectures in a foreign language[19]. In Hungary the procedure prior to being appointed as a university professor, which sometimes may last for a year, has many participants. After the university tendering and the senate's decision, the appointment to the post of university professor is initiated by the rector at the supervisory board, or the minister responsible for higher education. Prior to this, he/she has to get the expertise of the Hungarian Accreditation Committee (hereinafter referred to as Body) – as the independent Body operating in the field of higher education and carrying out expertise tasks – in which the Body assesses – among others – the teaching, scientific and artistic results of the candidate applying for the title of university professor. If the rector's proposal and the expertise of the Body are in harmony the minister makes a proposal for the university professor appointment at the head of state[20]. Further general employment requirements for a university professor:

- has school creating teaching, scientific/artistic and professional works, has teaching and science-organisational experience, and leading skills,
- keeps regular and many-folded contact with the practical activity of his/her discipline, leads the performance of scientific tasks, participates in the work of domestic and international forums, and has professional cooperative skill,
- comparative academic literacy in his/her scientific/artistic field, ideological preparedness and giving lectures and seminars in two foreign languages, language knowledge appropriate for consultation,
- comparative academic and practical knowledge at international level of the discipline taught.

f) For the employment of the master instructor a master degree, at least ten years of professional-practical work experience and the proof of knowledge are necessary, and the

[19] Nftv. 28.§ (5).

[20] Nftv. 69. §.

person shall be appropriate for providing the students with practical training[21].nFurther general employment terms for a master instructor:

- with his/her activity he/she proves his/her knowledge of the discipline including the subject taught,
- he/she has the necessary capability for compiling the material of the subject and for teaching at a high level,
- has teaching experience in higher education or adult training.

3.2. The other direction of the Hungarian academic career is the career opportunity of scientific research. Possible research posts in higher education institutions: assistant research fellow, research fellow, senior research fellow, research advisor, and research professor[22]. The number of the researchers of these posts, similarly to the instructors, is not limited, those elaborated in point 3.1. can generally be applied to establishing and filling in the post of scientific researcher[23]. In the Hungarian higher education those employed in the post of scientific researcher spend 80% of their working time with engaging in the scientific activity of the institution, and as part of their scope participate in the higher education institution's activity related to teaching[24]. Compared to the instructors the rate of the teaching-research activity of those in the post of researcher is reversed, namely 20-80%. In case of scientific researchers the minimum working obligation is not stipulated by law as it is in case of the instructors, namely the lower limit of the obligatory teaching hours per week. Consequently the regulation on the working obligation can be freely made by the higher education institutions. The data of the scientific researchers' scientific research activity results – similarly to those working in the post of instructor – must be registered in

[21] Nftv. 28.§ (6) instructor post introduced in September 2015.

[22] Number of researchers in the Hungarian higher education was less than 2000, in 2014.

[23] Source http://www.kormany.hu/download/d/90/30000/fels%C5%91oktat%C3%A1si%20koncepci%C3%B3.pdf.

[24] Nftv. 33. §.

the database of the official registry of the Hungarian research results[25]. Everybody employed in the scientific research post is appointed by the leader of the Institution on the proposal of the senate/faculty council, the highest elected body of the higher education institution/or its faculty following the usual tender procedure in public sphere.

a) General employment terms for an assistant research fellow:

- master degree or equivalent qualification,
- legal relationship of doctoral candidate,
- individual creative research activity,
- teaching, seminar leading skills.

b) General employment requirements for a research fellow:

- doctoral degree,
- some years of successful research, teaching practice,
- foreign language knowledge at such level that he/she can take part in professional debates, can give lectures in his/her field.

c) General employment terms for a senior research fellow:

- a longer period of successful research, teaching practice,
- capability to lead the research work of the students and academic recruits,
- intense domestic and international relationship on the basis of his/her individual research practice,
- regular activity in domestic and international professional public life
- overall knowledge of his/her discipline, its creative cultivation, development,
- significant participation in elaborating the tasks of the higher education institution, in directing and controlling their implementation.

d) Employment requirements for appointing research advisors and research professors:

- school creating teaching, scientific and professional works, teaching and scientific-organisational experience and direction skills,
- overall knowledge, creative cultivation and development of his/her scientific major,

[25] www.mtmt.hu.

- regular and intense relationship with the practical field of his/her scientific/artistic discipline, directing scientific task performance, joining tender group activities,
- professional representation of his/her institution in the field of science/art,
- helping directly or indirectly the university teaching-educating work in a proactive way, participation in doctoral training and habilitation procedures.

4. ACADEMIC EVALUATION SYSTEM

The Hungarian academic evaluation system is currently trigeminal; it consists of one degree and two academic titles built thereon. The universities are exclusively entitled to carry out the procedure of doctoral degree and habilitation; the academic doctoral degree can be obtained within the framework of the Hungarian Academy of Sciences.

4.1. The only doctoral degree that can be obtained in Hungary is the Doctor of Philosophy (PhD). In public university education it is subject to, among others, the accomplishment of doctoral school studies of 6 semesters (8 semesters from 2016), passing the PhD comprehensive examination, submitting the dissertation and its defence (within the framework of degree procedure). Based on the candidate's previous scientific performance – according to the decision of the university – he/she may prepare for obtaining the degree individually (individual preparation). The doctoral degrees are awarded by the doctoral committees of the universities. In Hungary arts graduates, theologians, scientists, lawyers, engineers, economists, doctors and vets can obtain PhD. The PhD equivalent in music, fine arts, and arts and crafts is the DLA (Doctor of Liberal Arts), which is different only in its name. In the Hungarian practice the doctoral degree is the prerequisite for the posts of senior lecturers, – and at higher level – instructors, and research fellows, and for the rate of the instructors having doctoral degree among all the employed instructors as regards to the university and college quality of the higher education institution[26].

[26] See under point 1.

4.2. Habilitated doctor is the academic title following the doctoral degree. During the habilitation the instructor having a doctoral degree, by having two public lectures – in a foreign language – before the habilitation committee, and an audience usually consisting of university student testifies his/her teaching suitability, and proves the results of his/her creative scientific work carried out after having obtained the doctoral degree. The habilitation procedure can take place at the earliest within 4-5 years after having obtained PhD. It is different by disciplines within how many years habilitation takes place after having obtained PhD: in case of sciences it usually takes a shorter period of time, while in case of human sciences it takes longer. The habilitation requirements are different by disciplines and universities. The general terms for habilitation are the monographic work done after having obtained the doctoral degree and the quality and quantity of appropriate professional publications in domestic and international journals. Habilitation procedure can only be carried out in the disciplines in which the given university is entitled for doctoral training and awarding doctoral degree. The university habilitation committees of the disciplines are entitled to carry out the procedure and award the obtained habilitation.

This second element of the academic evaluation system is in practice not a necessary title for those working in the research institutes as the habilitation originally examines the quality of teaching, and there is no teaching carried out in the research institutes. The habilitated doctoral degree is the statutory condition for the post of the professor in the Hungarian higher education, but as I have mentioned previously several universities prescribe it as a criterion for the employment of the associate professor.

4.3. The doctor of the Hungarian Academy of Sciences (Doctor Academiae Scientiarum Hungaricae, DSc) is the highest level of the academic title to be obtained in the academic procedure which is subject to scientific performance. The title of the Doctoral Council of the Academy can be awarded to the person with an outstanding academic performance who:

- is a Hungarian citizen, or a foreigner whose works is proved to be related to the Hungarian science,
- has a doctoral degree, since the attainment of which at least 5 years has elapsed,

- elaborates an outstanding scientific research works acknowledged by reputable domestic and international circles of his/her discipline, which gives rise to significant resonance,
- has improved the discipline and area of expertise with considerable original scientific result following the attainment of the doctoral degree thus contributing to the further development of science,
- participates in the domestic academic public life,
- summarizes his/her scientific results in a doctoral work[27].

Only those can be the member of the Hungarian Academy of Sciences who have been awarded Doctor of the Academy title.

5. REMUNERATION OF THE ACADEMIC SPHERE

5.1. In public higher education and research institutions the instructor and researcher's salaries – as that of the public service employees – together with all other public employees – are set by law and government decree[28]. Their guaranteed salary is the minimum which the higher education institution is obliged to pay the employee of that post. The universities and colleges can only divert from this statutory minimum in a positive direction but regarding the underfinancing of the Hungarian higher education system there is hardly any example of this.

[27] Doctoral Rules of the Hungarian Academy of Sciences 1.§ (1).

[28] Annex 2 of Kjt. and Gov. decree 395/2015. (XII. 12.).

Table 1. Guaranteed salary of the lecturers and researchers in higher education 2016. (Euro/month)[29]

post	Grade 1	Grade 2	Grade 3	Grade 4
assistant lecturer	600	648	-	-
senior lecturer	810	810	861	-
associate college professor	894	942	990	-
associate professor	1135	1184	1232	1379
college professor	1217	1265	1314	1460
university professor	1623	1671	1719	-
master instructor	827	876	-	-
assistant research fellow	648	-	-	-
research fellow	810	-	-	-
senior research fellow	1135	1184	1232	-
research professor, research advisor	1623	1671	1719	-

In public institutions the posts of assistant lecturer and master instructor are divided into 2 grades, the posts of senior lecturer, associate college professor and university professor, and senior research fellow, research professor and research advisor are divided into 3 grades, the posts of associate professor and associate college professor are divided into 4 grades. The salary grade must be defined on the basis of the period the instructor and researcher spent in the higher education and research institution in the given post (except for grade 4 as in these two cases the 'grade leap' is subject to habilitation and the compliance with other terms prescribed in the university regulation). The instructors and researchers employed in public institutions, if they comply with other statutory and university terms, must be classified in higher grade[30] as follows:

[29] Gross sums effective of January 2016, calculating with the currency of 310 Ft/Eur. The sums are expected to increase by 5-5% in 2017, and 2018.

[30] Kjt.79/D §.

- in cases of university professor, college professor, research professor and research advisor after having spent five years in the given post in the previous grade,
- in cases of associate professor, associate college professor, senior research fellow and research fellow after having spent ten years in the given post in the previous grade,
- in cases of assistant lecturer and master instructor after having complied with the prescribed institutional terms.

In institutions maintained by private individuals and the church the instructors' salary is subject to negotiation, however, it is usually higher than their colleagues' salary employed in public institutions.

5.2. The work of the doctors of the Hungarian Academy of Sciences who live in Hungary is acknowledged by monthly honorarium for their scientific performance and public body engagement paid by the Academy, which those bearing the title are entitled to for life once it has been awarded. It is gross €290 per month in January 2016[31]. The president of the Academy withdraws/suspends the payment of the honorarium if the court in final judgment attributes criminal-law liability to the entitled for having committed a crime and the entitled is under imprisonment, or convictions and disqualifications[32].

6. SITUATION ASSESSMENT

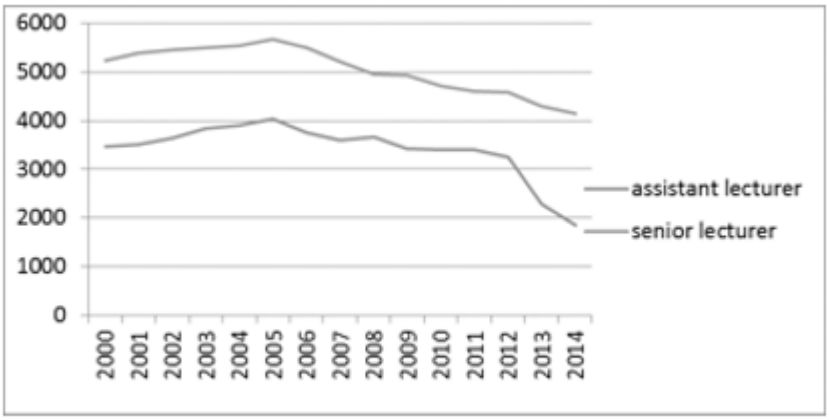
Following the public law system change the Hungarian higher education system is still struggling with numerous problems and challenges. Primarily the reason for this is that in the last 25 years the professional and political minimum consensus has failed to be established regarding the structural and operational regulation and financing of the sector. With regard to the instructor-researcher staff it is reflected in the lack of their financial and moral respect. The unpredictable working requirements which change by some years, the

[31] Gov. decree 4/1995. (I.20.) 13.§ (1).

[32] Act XL of 1994 on the Hungarian Academy of Sciences 8. § (3), 8/A. § (1)

decline in quality due to mass higher education, or the exuberant administration – besides low salaries – created a situation due to which the 'academic world' is not an attractive perspective for the young instructors and researchers. The situation has accurately been reflected in the radical decrease in the number of assistant lecturers and senior lecturers in the last 15 years, while the number of students after the initial increase today by and large equals to the data collected at the turn of the millennium.

Figure 3. Change in the number of assistant lecturers and senior lecturers between 2000 and 2014.



Source: www.oktatas.hu/felsooktatas/felsooktatasi_statisztikak

The governmental strategy of "Changing Gear in Higher Education"[33] aimed at establishing an internationally also competitive Hungarian higher education in 2015. In order to achieve this, the plan includes – among others – the elaboration of the tertiary instructors' performance appraisal, the introduction of a performance centred career system, and the creation of a competitive remuneration. In order to increase the effectiveness of the tertiary research-development-innovation role the government's objective is to increase the number of the university researchers by 50%. To lay the foundation for this it is necessary to transform the current PhD training, which they seek to achieve by extending the training

[33]www.kormany.hu/download/d/90/30000/fels%C5%91oktat%C3%A1si%20koncepci%C3% B3.pdf.

period from 3 years to 4 years, transforming the teaching-consultative nature of the training, decreasing administrative burdens, and as regards to the financing system by introducing the doctoral scholarship. As an effect of all these measures the government expects the increase in the number of those participating in the doctoral training, and obtaining the doctoral degree, which then can be the basis for the planned increase in the number of higher education researchers. Despite the strategy the amendment of Nftv. effective as of September 2015 further increases the assistant lecturers and senior lecturers' workload, which despite the remuneration of the instructors and researchers increasing by 15% further strengthens the lack of prospect in higher education, and encourages young instructors and researchers to drop out. All this – by focusing only on the situation affecting one part of the staff in higher education – causes unequivocal quality deterioration in the Hungarian higher education, thus indirectly in several fields of state and social-economic life.