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2020 PANDEMIC: EMERGENCY DECREES AND ORDINANCES

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1. THE LEGAL RULES AGAINST 2020 PANDEMIC: A *TERTIUM GENUS*

The recent institutional developments – started with the Council of Ministers deliberation of January 31, 2020 and followed through emergency decrees providing a catalogue of possible ordinances at disposal (law-decree of February 23, 2020 converted into law n. 13 of May 5, 2020 and law-decree n.19 of March 25, 2020) – seem to have brought back rules which, from the common background of declaration of state of siege, took different avenues more than one century ago, beginning with the legal scholarships after the 1908 earthquake in Calabria and Sicily.

After a few years, law-decrees were distinguished from pre-existent administrative extraordinary and urgently implementable local ordinances (*ordinanze contingibili e urgenti*), the necessity and urgency ordinances (*ordinanze di necessità e urgenza*) adopted by the Prefect or Minister of Interior (*Ministro dell'Interno*),, and the power vested with the Government of organizing emergency assistance (1919) which, was then later structured as national service of civil protection (1970).

The latter is the institutional development which was inspired by the state of siege and was turned into the emergency declaration which, in time, first legitimized public officials and amongst them Ministries of Public Works, and, as such, some Presidents of the Regions, then again the Ministries of Civil Protection, and last the President of the Council

of Ministries to act by resorting first to extraordinary resources and then by enforcing ordinances in derogation to any other rule currently in force.

2. THE NEW COMPETENCES DIVISION AMONGST ADMINISTRATIVE EMERGENCY POWER HOLDERS

In the healthcare sector (*Igiene*) and since the unification of Italy, the power of issuing extraordinary and urgently implementable ordinances (*ordinanze contingibili e urgenti*) has always been vested with the Mayor, the Prefect and the Minister of Interior. After the healthcare reform of 1978, the regional government and the Minister of Sanitation, later renamed Minister of Health, were also granted the power of issuing these ordinances. In the remaining areas of housing and public policy, extraordinary and urgently implementable ordinances (*ordinanze contingibili ed urgenti)* for public safety reasons are adopted at local level by Majors in their capacity as Government officials, and over and beyond them, by the Prefect while at national level, this power is vested with the Minster of Interior. When it comes to public order, the power of issuing administrative necessary and urgency ordinances (*ordinanze amministrative di necessità e urgenza*) is definitely vested with the State administrative bodies and is shared between the Prefect and the Minister of Interior.

When it comes to other considerations in terms of civil protection, the process starts with the nation-wide deliberation by the Council of Ministers on the state of emergency and,

according to the nature and type of circumstances, on its timespan and territorial coverage. Such deliberation also sets forth both limits and modalities on the adoption of ordinances of *civil protection* also in derogation of *any legal rule currently in force*, yet in full compliance with the general principles of public policy and EU law (articles 24, 25, legislative decree n. 1 of 2018).

These *civil protection ordinances* – specifically ground and enforced only upon prior agreement with the Regional Governments and the Autonomous Provinces concerned – are issued by the Prime Minister or – if not otherwise provided in the declaration of emergency – by the Head of the Department of Civil Protection, by delegation granted by the latter (article 5 and 25, legislative decree n. 1 of 2018).

The concept of emergency and powers so granted bridge both the national and local levels, first granting priority to orders by Majors and Presidents of Regional Governments (see law-decree n. 6 of 2020, cit. art. 1, presiding authorities), then legitimizing regional ordinances only in a second instance (pending the Prime Minister decrees and for a specific timespan only), namely in the event of a definite and proven worsening of health risks within their territory. Therefore, these ordinances are allowed only insofar they are more restrictive, but without affecting the productive activities and the ones of strategic significance for the national economy (article 3, law-decree n. 19 of 2020). Last, the extraordinary and urgently implementable ordinance (*ordinanze contigibili ed urgenti*) issued by Majors do not have

effect if against measures enforced by the President of the Council of Ministers or any other measure provided by the law-decrees.

For the duration of the emergency, the Prefect may schedule the deployment of all actions permitted by law upon agreement with all parties involved whenever needed to guarantee the effectiveness, or the congruity, of the application of the emergency measures (article 1, law-decree n. 19 of 2020, cit., Tar Calabria, 9 May 2020, n. 841).

3. LACK OF FORCE OF LAW AND ADMINISTRATIVE NATURE OF THE EMERGENCY ORDINANCES

A second merging has taken place because of the question of the effects that pools together the two types of ordinances. They both lack the force of law, despite it is commonly acknowledged that, implicitly – the necessity and urgency ordinances (*ordinanze di necessità e urgenza*) and the extraordinary and urgently implementable ordinances *(ordinanze contingibili e urgenti*) – or explicitly – the civil protection ordinances *(ordinanze di protezione civile)* –they may detach from the legal rules currently in force.

Once a clear-cut separation is made between administrative ordinances and law-decrees, and rolled back to the theories on the constituent power any further definition of necessity, – acts of facts – as source of laws, the term ordinance legally defines some judicial (articles 131, 134 Civil Procedure Code; article 21, l. 6 December 1971, n. 1034) also some administrative actions, like orders based on need and urgency and/or emergency situations.

The question which is often raised of granting to the administrative extraordinary and urgent ordinances[2] force of law has been solved by acknowledging that a law-maker is not permitted to grant (or cancel) force of law to legislative and/or administrative deeds, since such power is only vested in the Constitution, and the same goes for laws (article 70 §§ Constitution) and acts having force of law (article 76 and 77 Constitution) that according to the Constitution must be reviewed by the Constitutional Court (article 134 Constitution).

The impossibility of granting the force of law to the necessity and urgency ordinance (*ordinanze di necessità e urgenza)* as well as the extraordinary and urgently implementable ordinances (*ordinanze contingibili e urgenti*) has always forced to acknowledge their administrative nature, thereby making them subject to the limitations generally applicable to administrative acts. The ordinance, on the one hand, as the acts with the force of law, is bound to the constitutional rules, substantial (articles 13, 21, 32, 41, 42 Constitution) and procedural (see statutory reserve); on the other hand, and this is a peculiar treat, it is not able to deviate from the *principles of the legal order, even if not of constitutional rank.*

[2] See C. Cost. no.. 8/1956; no. 26/1961; no. 100/1987; no. 14/1971.

This because the ability to derogate from rules currently in force, although expressly provided, can always be tracked back when it comes to interpretation and compliance to the statutory rules of an ordinance, which more and more explicitly prevent the ordinances to deviate from the principles of the legal order, a limit which proves the downgraded status of administrative ordinances compared to law-decrees.

The legislation on the civil protection of the 70s expressly states that civil protection ordinances might be issued 'in derogation to the legislation currently in force', marking a formal difference compared to the necessity and urgency administrative ordinances whose statutory rules only provided the power of issuing 'extraordinary and urgently implementable' ordinances or 'needed acts' to put an end to or deal with a state of necessity.

The Constitutional Court, as we shall see later, by resorting to a case law by the Court of Cassation dating back to the second half of the XIX century, gives a restrictive interpretation of them, setting the limit based on the principles of legal order for both ordinances – the extraordinary and urgently implementable (*ordinanze contingibili e urgenti)*, the necessity and urgency ordinances (*ordinanze di necessità e urgenza)*, and the other emergency ones – a limit which eventually has been declared mandatory for both by a subsequent legislation (legislative decree 18 August 2000, n. 267, article 50; legislative decree 2 January 2018, n. 1, article 25).

4. THE LIMIT OF THE PROPORTIONALITY-CONGRUITY PRINCIPLE IN THE ANNULMENT FOR MISUSE OF POWER

The rule establishing the ordinance power contains provisions on the issuing authority (active subject), the conditions for the exercise of power, the scope (or reasons) of public interest and in some cases also the actions to be carried out, while definitions of the type of action and – where needed – of the passive subject, which may instead be taken from other statutory rules.

Rules herein providing the ordinance power, while in derogation to division of competences of public authorities as well as within their departments, make reference to the holder of such ordinance power all powers attributed by law to any public administration and/or authority by freeing them from all specific requirements and/or procedural liens which might be incompatible with the urgency of providing such powers and replacing them with less stringent ones, as dictated by the definitions of the actions (e.g. hygene), public interest (e.g. public health), and requirements (e.g. need and urgency, emergency) provided by the rule establishing the necessity and urgency ordinance power.

All matters causing the annulment of ordinances different from the one of misuse of power are indeed marginal: annulment due to incompetence issues is confined to the relationships among different monocratic authorities as well as the breach to the law since the ordinance can be fully enforceable only to the extent of the degree of urgency of whatever

provision. However, the misuses of power in the two types of ordinance have different grounds.

For the older extraordinary and urgently implementable ordinances (*ordinannze contingibili e urgenti)* and the necessity and urgency ordinances (*ordinanze di necessità e urgenza)*,,the misuse of power has always been fully established and based on a double test on rationale: a) proportionality-congruity of such ordinances between severity of the situation and actual limitations imposed onto the recipient*s in concreto*; b) proportionality-congruity of the breaches compared to the actual public interest which the public authority wishes to achieve through the issuance of such ordinance issued. It was enough that one of the two was non-proportionated for the success of the annulment action.

With regard to civil protection ordinances, misuse of power is equally grounded in the second test of proportionality-congruity, while for the first one proportionality is tested in comparison with the general state of emergency as set forth in the binding statement concerning the whole territory.

5. THE PROPORTIONALITY IN THE BALANCEMENT AND THE PRINCIPLES OF THE LEGAL ORDER

Misuse of power alone has seldom been enough in keeping such ordinances within the scope of administrative law both a substantially and formally. Historically, this issue was raised in some cases where powers caused severe limitations to Constitutional freedoms

which by the republican legal order were subject to a statutory absolute reserve (freedom of religion, freedom of press, right to petition to the Parliament), rights of freedoms which the Albertine Statute already protected although as infringements to the principles of the concrete legal order prevailing in a given historical period (see below). These cases originated from the strong conflicts, between State and Church at the end of the XIX century, and later upon ratification of the NATO Treaty in the early years following the proclamation of the Republic, which respectively came to an end following the rulings by the Court of Cassation of the Kingdom of Italy[3] and the Constitutional Court (n. 8/1956; 26/1961).

The peculiar structure of the rule establishing enforceability of an ordinance does not spell out an abstract determination of the power to restrict subjective rights (the paradigm is given by art. 2 t.u.p.s.: 'enforces, in situations of need and urgency, actions which are deemed indispensible in the public interest') and therefore one could have doubted that, established as such, the ordinance power of a public administration knows no limits except the aforementioned about proportionality-congruity, with the consequence that with the worsening of a threat to the public interest would justify a proportional and growing

[3] Cass. Turin, 11-7-1877; Cass., 13-5-1877, in *Riv. adm*., 1877, 479; Cass., 30-5-1888, Manelli, *ibid.*, 1888, 557.

limitation to subjective rights. The emersion of the principles of the legal order – as a second limit – to the necessity and urgency ordinance power has prevented this outcome.

A few years after the unification of the Italian State, the principles of the legal order were regarded as a general limitation to the administrative regulatory and necessity and urgency ordinance power. . 'A Major may not enforce, through his actions, measures that are not allowed by general law and legislative principles and public institutions, or which are deemed to concern or govern public interests of a higher and more general order'. The 'actions under the Major's authority shall not go beyond the scope of the administrative power'[4].

In legal order of the Italian Republic, the following need be mentioned: the procedural (statutory reserve) and substantial limits that protect subjective rights since, because they are limits for the Parliament, they are *a fortiori* so deemed to be limits for the Government. It is reaffirmed the limit of the principles of the legal order as 'living law' which judges recognize, balancing, in the concrete case, the subjective rights as granted in the Constitution. The idea – even just as *obiter dictum* – is that in those matters entailing a

[4] V. Conti, *Il sindaco nel diritto amministrativo italiano Naples*, 1875, 286-87; Carnevali, *Trattato di diritto comunale italiano*, Mantua, 1899, 1893.

statutory absolute reserve is hard to purport an ordinance based on need and urgency, while the opposite is true in the event of relative statutory reserve.

The public administration may indeed face the need of having at its own disposal movable and immovable properties or performances corresponding to different abilities that are deemed to be indispensable to deal with the emergency situations.

To comply with the requirements established by the statutory reserve on the matter of property (article 42 Constitution) for instance, combining together the rule establishing the ordinance power and article 7, l. 20 March 1865, n. 2248 All. E – or article 835 Civil Code – since both the provisions grant the public authority a general power to make use of the private property in case of need and urgency, save the compensation to the owner. In most cases, this is enough because the law establishes at the same time both the performance required (make use of a good which is property of a third party) and the evaluation about which good is of primary importance in the case, by defining each public interest as superior to the private property, insofar a compensation is ensured.

The prior determination by law of the needed performance (e.g. labor injunction) does not provide an *ex ante* exhaustive identification of subjective entitlements sacrificed in a real case, nor of the public interest protected through the ordinance each time. From the legislative provision – which makes available to the public administration any performance pursuant to the 'status, skill or craft' of the passive subject (article 258 t.u.s.) – it is impossible

to identify either which subjective legal entitlements might be involved and sacrificed either which public interests they will be sacrificed for There is a difference between requiring a six-month job of eight or sixteen hours per day: in the first case, the individual economic freedom is compromised, while in the second the very right to health or to private family life is jeopardized, with a possible violation of the maximum limits to be complied with by law (article 36, c. 2 Constitution).

The principles of the legal order have therefore reached the status of a further limit-test of the proportionality-balance. Once verified that the performance required is in compliance with the paradigm (statutory reserve: article 23 Constitution), there is still the further limit of compliance with the principles of the legal order: the primacy which the public administration assigned to certain subjective legal entitlements (right to health of the community or of some categories of citizens) and compliance with other legal entitlements which have been sacrificed (economic freedom, right to work, free circulation, right to education, etc.).

The judiciary is always entitled to evaluate the balancement between subjective rights as settled by the ordinance, according to an argumentative reasoning which, in our legal tradition, has been described as ‘reasoning according to the principles of the legal order' (Constitutional Court., n. 26/1691), therefore vesting an ordinary judge or placing under exclusive jurisdiction of the administrative judge the task of interpreting the actual boundary

between liberty and authority. It is indeed an actual balance on an actual case, therefore subject to different solutions, especially because of the possible different assessments of different needs of each case, from the moment a conflict between different subjective legal entitlements emerge, which has not been exhaustively regulated by the law-maker though general and abstract rules.

6. CONSTITUTIONALITY REVIEW AMONGST LAW-DECREES AND PRINCIPLES OF THE LEGAL ORDER IN THE RELATIONSHIP BETWEEN LEGALITY AND EFFECTIVENESS

In this context, the novelty for Italy has been the definition by the law-decree of a catalogue of possible ordinances contents (at the beginning not exhaustive, law-decree n. 6 of 2020, cit., art. 1, c. 2) which at the legislative level indicate abstract types of civil protection decrees or ordinances, that might be issued by the Prime Minister and, secondarily, by the President of the Regional Government and also by the Majors, respectively through decrees (instead of civil protection ordinances) or extraordinary and urgent ordinances, always in compliance with all the limits from the 'principle of adequacy' (sic!) or the 'principle of proportionality', both in accordance with the effective risk on the national territory or sections of it (art. 1, c. 2, law-decree n. 19 of 2020, cit.).

In the law-decrees here examined, one might find types of ordinances which set severe limitations to freedom of circulation (article 16 Constitution)[5], right of assembly, except in the event social distancing is applicable (article 15 Constitution)[6], exercise of freedom of religion (article 19 Constitution)[7], enjoyment of cultural heritage (article 9 Constitution)[8], limitation to private and family life (article 30 Constitution)[9], economic

[5] Artt. 42, 41, 23, 16, Cost.: C. Cost. n. 8/1956, n. 26/1961; n. 100/197.

[6] Closing to the public of public spaces (urban roads, parks, play areas, public gardens); limitation or prohibition of entry into specific territories (municipal, provincial, regional, or national); precautionary quarantine for those who have had close contact with infected patients; absolute quarantine of those who tested positive for the virus; limitations, reduction, suspension or suppression of transport services (automotive, rail, air, local public transport, maritime transport in inland waters), including non-scheduled ones.

[7] Limitation, suspension or prohibition of meetings or gatherings in public places, events or initiatives of any nature and of any form of meeting in public or private places (cultural, recreational, sporting, recreational, etc..) and of any type of meeting or event (conferences, conventions), except for the possibility of remote connection.

[8] With suspension of civil and religious ceremonies, limitation of any form of religious cerimonies in public or private places.

[9] With limitation, suspension or closure of museums or other institutes of culture.

freedom (article 41 Constitution)[10], right to work (article 4 Constitution)[11], discontinuation of educational provision at all levels, inclusive of university and vocational training, except for cases where social distancing is possible (article 34, 33,3 8 Constitution)[12]. Among all, prohibition to leave home except for well-ground reasons ha gained momentum.

[10] With specific prohibitions or limitations on accompanying patients to the emergency, acceptance or first aid departments; relatives and visitors to health or social healthcare facilities (hospitality and long-term care, assisted healthcare residences, hospices, rehabilitation and residential facilities for the elderly), as well as visits to penitentiaries and penitentiary institutions for minors.

[11] With limitation, suspension or closure of aggregation places (cinemas, theaters, concert halls, ballrooms, discos, game rooms, betting rooms and bingo halls, cultural and social centers) and administration activities to the public; on-site consumption of food and drink, including bars and restaurants; fairs and markets and all retail commercial activities, except for agricultural, food and basic necessities, ensuring the safety distance; with limitation or suspension of any other business or professional activities, or self-employment, without prejudice to the possibility of excluding services of public necessity and subject to the definition of security protocols and adequate individual protection tools.

[12] Excluding the physical presence of employees in public offices, without prejudice to indifferent activities and the provision of essential services primarily through the use of agile working methods; limitation or suspension of insolvency and selective procedures aimed at hiring personnel from public and private employers, unless this is done exclusively on curricular basis or remotely, without prejudice to initiating the procedures within

Anyone can see the vast series of limitations to freedom which involve areas subject to statutory absolute reserve, with limitations to rights which do not have essentially a reference to assets – which nonetheless are confirmed for requisitions of use and property [13] – therein the strong interference into the economic freedom does not even indirectly express the content nor the requisition of facilities,[14] nor of special rules on temporary obligations and constrictions – as already happened in different historical contexts – in order to have the economic production fulfilling the public or private demand of certain goods indispensable to tackle the emergency (article 836 Civil Code).

With regard to the exception of social distancing – if suitably interpreted as regards the restriction imposed on the right of assembly and maybe also implicitly of religion and enjoyment of cultural heritage – it is striking that this be indicated as a "possibility" and not,

the terms of law and the conclusion of those with evaluation of candidates already carried out and of the carrying out of procedures for the assignment of specific roles.

[13] With suspension of educational services for children, educational activities of schools of all levels, higher education institutions, including universities; as wella as training activities (masters, professional courses, universities for the elderly) including exam tests, without prejudice to the possibility of remote learning.

[14] Art. 835 of the Italian Civil Code, art. 6, d. L. n. 18 of 2020, cit.

instead, as an incompressible exercise of the right to education or to private and family life with non-free people, to whom it shall be indeed necessary to see reaffirmed as a modality of exercise of the right coessential to the heavy limitation to the liberties in emergency situations.

One can indeed see the difference, although debatable as it happens with all classifications – between the so-called negative liberties, like the right to assemble in a public space or the exercise of the freedom of religion, compared to the so-called social rights, like education or training, to which the right to private and family life versus those whose freedoms are restricted – based on emergency situations - for health or criminal reasons (prison).

If for the right to assembly – inclusive of congresses, conferences, seminars – in public, private venues and venues open to the public, it is enough to state contextually to the potential prohibition that the option of exercising such right may be exercised at a distance, this is not so for those rights whose enjoyment need a public or private granting of services both as a main scope (e.g. education, also university level: articles 34 and 35 Constitution) and as ancillary one, coupled with to the main limitation of the right to personal liberty, regardless of it being mutually agreed upon (article 32 Constitution) or by law and justified by the judicial authority (article 25 and 27 Constitution).

The systemic impact that this definition of a list of laws having a typical and non-exclusive content of ordinances that may be issued by local and national authorities goes beyond these considerations.

Through these legislative provisions, a centralized review of the ordinances is to be dealt with by the Constitutional Court, in spite this had been dealt with – in the 150 years since the unification of Italy – based on decentralization and assignment to administrative and ordinary judges, since the legislative definition traces the boundaries of competence of the Constitutional Court on the constitutionality of the balance of subjective positions which has been directly defined by acts having the force of law.

This brings a symmetric re-definition of the principles of the legal order as a constitutional and legislative continuum both for decrees issued by the Prime Minister and the law-decrees which have provided definitions for the restrictions in terms of rights, which however cannot bring to the balance that our Constitutional Court has been offering since a long time, also and above all, with reference to cases that cannot be defined as emergencies, according to the meaning herein provided, but which in emergency situations have a specific meaning, as already occurred in other times in the history of Italy.

The cases brought before the Constitutional Court are not to be characterized by an ideological conflict as they were at the end of the XIX century or in the years after the World War II but, rather those which have lead both the Government and the Parliament to consider

this institutional development as a matter of state of national emergency rather than healthcare necessity and urgency ordinances.

What is of particular significance here is not just the derogation from legislative procedural norms, which as it has been mentioned above, are subject to emergency reasons, but the need to act based on reasoning by principles to achieve a proportionality-balance between subjective rights, which certainly technology helps to re-compose, but that legal culture must take as a century-long constitutive element, according to which the settlement of interests which – not being completely set forth by law - must be defined for each single case by resorting to the principles of the legal order. This is to remind us that, besides being based on law, legitimation is inevitably ground on the effectiveness of one's actions, and this for both the administration and the judiciary.

7. CONCRETE INNOVATION IN THE GOVERNANCE AND EFFECTIVENESS OF THE REPUBLIC

The principle of effectiveness[15] characterizes any emergency law, inclusive of administrative law, which was once defined as *ultra* or *praeter legem*, according to which

[15] Subjected to art. 835 of the Italian Civil Code (except for special laws).

actions are held to be legal insofar as they are being procedurally lawful and also fully complied with, regardless of whether by conviction, institutional or cultural obedience, with the consequence that – here as much as in every other case where legal rights match with the effectiveness – every action foreseen must find a confirmation in a following action, no matter whether of the Parliament or the Judiciary.

Being a deed that occurs months after being issued, it is subject to supervening events, therefore with a different attitude in terms of balancing the conflict of interest that earlier on was settled through the ordinances issued in the first few months of emergency.

Therefore, it might be that the choice of sacrificing individual rights without a strong perception of a meaningful action by the government is no longer understood, since by and large a sharper set of smarter measures might have been perceived as possible: "3 T", doubling of hospital beds for intensive care, re-organization of schools and hospitals, special protection for the workers on their workplace and orders of product re-conversion on essential goods (art. 836 Civil Code).

In the first months of the 2020 Pandemic, sacrificing constitutional rights has been supported by the effective consistent behavior of the population, both at the local and national levels, legitimizing decrees and ordinances whose balance has been essentially grounded on the protection of the right to health, rights pertaining to individuals and public interest (article 32 Constitution).

This has given the Government time needed to inform citizens on restrictions and a better selection of both restrictions and liberties (article 16 and 19 Constitution) including those which may only partially be defined as being economic rights, such as the right to work (article 4 Constitution), and those which are not yet grouped among liberties, such as education (articles 33 and 34 Constitution).

In few months, a new balance must be found among the need to start again one's own economic activity, go back to school or university[16], wish to regain one's private, family and interpersonal life, assemble and exercise the freedom of religion or personal belief, since the radical disavowal of many of these subjective rights was no longer supported by the initial effectiveness which had occurred upon discovering the impact of a widespread disease like the 2020 Pandemic.

This effectiveness might regain strength in the event the efforts made by hospital staff and the healthcare sector in general will be coupled with those of other public administrations, trying to issue measures which, at least partially, may bring students back to

[16] P. Piovani, *Il significato del principio di effettività,* Milan 1953; voce Effettività (principio di), *Enciclopedia del diritto*, vol. XIV, 1965, 420 e s.

universities[17] and schools, starting with the kids of people already at work, re-opening, at least partially, courts and other services which are essential as well as entirely re-designing individual behaviors, methods, and policies at work and service facilities which have to be subject to in-depth analyses, better if through algorithms, of the flows which reveal specific peculiarities of different situations related to each institution.

Quality-based service provision is almost immediately achievable with a limited help (help desk, experts in call centers), while for others a short although very useful videoconferencing training programme is needed.

The on-line mode might well become part of a service or the exercise of the public function, since it is a technology which allows for an unprecedented growth in terms of quality and customization of a given service as well as of those improvements so much called for over the past few years and which can no longer be belayed in emergency situations such this one affecting us all without causing great harm to the effectiveness of our constitutional system. There is no innovation without testing the impact of a different governance based

[17] For education see d.l. April 8, 2020, n. 22.

on public function and service delivery. Therefore, the 2020 Pandemic, beside creating the problem, also provides the solution.

At the level of judicial technicalities, the Constitutional Court – based on their typical power of annulment (ex art. 136 Const.) – has since quite sometimes issued judgments of unconstitutionality whose decision of annulment has however been subjected to a deadline or a condition, or rejections on the issue of unconstitutionality coupled with a concurrent reservation for a new scrutiny in the event the alleged lack of actions by the administration can be inferred. These are decisions that are very familiar within our legal scholarship and have made clear situations which had been experienced in the past by administrative judges which finds precedents also in some interim untitled acts by the ordinary judges.

Both the XIX century developments on and the most recently experienced judicial techniques may currently actually help the Government action towards joining together innovation and good governance, that is the ability of re-engineering, especially in a state of crisis, the effectiveness of the institutional system pertaining to the Italian Republic which is more and more essential in the management of 'complex' problems, according to legal principles which can be defined to be general since they are common to all.

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CLASSIFICATION OF PUBLIC CONTRACTS IN THE CONTEXT OF NATIONAL LAWS

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1. INTRODUCTION

Variety poses formidable challenges where public contracts are concerned. How can principles common to public contracts in Europe be identified without a common definition of what a public contract is?

This question may seem unnecessary as everyone seems to have an idea of what a public contract is. However, in the absence of a specific and common definition, the classification of contracts as 'public' varies from one state to another, making any comparison difficult. In fact, the term 'public contract' is mostly used for simplicity of language. It is a convenient means of referring to contracts which, from a comparative law perspective, follow common rules. Incidentally, these rules are generally developed as a result of European Union law or international law, although they may also be established independently by each state according to its legal tradition. This problem was raised by Rozen Noguellou and Ulrich Stelkens in their work on comparative law on public contracts published in 2010. Noting the 'relative lack of research on comparative law on public contracts', the authors believe that this could be explained by 'the very subject of the study, the concept of 'public contract'', because it 'has not been universally identified'[2]. The problem therefore stems from the fact that not all states assign the same meaning to the term 'public contract'. Thus, a study of national laws within the European Union demonstrates various uses of the term 'public contract' that overlap but never coincide.

Firstly, the term 'public contract' may be used as a synonym for the concept of administrative contract. In this regard, public contracts are distinct from private law contracts, but only in systems where the summa divisio in contractual matters is expressed by drawing a distinction between public law contracts and private law contracts. 'Public contract' is understood as a concept encompassing all contracts subject to a public law legal

[2] R. NOGUELLOU and U. STELKENS, 'Introduction', in *Comparative Law on Public Contracts*, Bruylant, 2010, p. 5

regime. This use of 'public contract' as a synonym for 'administrative contract'[3] or, more broadly, 'public law contract' is sometimes found in French legal theory[4].The use of 'public contract' as a synonym for 'public law contract' is also found in other states that are familiar with the concept of administrative contract[5]. It can also be found in some publications regarding Austria, where there is a concept of administrative contract similar to the French[6]. However, the equating of 'public contract' and 'administrative contract' does not require the concept of administrative contract to tally with the French concept. Thus, some Croatian scholars use the term 'public contract' as a synonym for administrative contract. Yet the Croatian concept of administrative contract,, arising from a 2010 law, does not tally with the French concept of the same name. One need only note that, although concession contracts may be considered as administrative contracts, this is not the case for public procurement[7]. In any case, the equating of public contracts and administrative contracts has the advantage of simplicity, because it is based on the current state of affairs. The problem is that it is difficult to adopt this approach in states where the summa divisio between 'administrative contract' and 'private law contract' does not exist.

[3] It is also used in this way by Nicolas GABAYET: 'French Report', in Stéphane DE LA ROSA, Patricia VALCAREL FERNANDEZ et Romélien COLAVITTI, *Principles of public contracts in Europe*, Bruylant (to be published in 2021), part. II of the book: national studies

[4] Examples of this include the book by F. LICHÈRE (*Droit des contrats publics*, Dalloz, 3e éd., 2020) and the journal *Contrats publics* (Le Moniteur)

[5] See: R. VORNICU, 'National study: Romania', in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies, where there is a 'concept of administrative or public contract'.

[6] M. STEINER, 'Austria', in *Comparative Law on Public Contracts*, as aforementioned, pp. 383 et seq. The author compares the concept of public contract to that of administrative contract, which has existed in Austrian law for 'around 150 years'.

[7] M. TURUDIĆ, 'Croatian Report', in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies

Furthermore, in states where this summa divisio does exist, this understanding of public contracts is not always relevant and other approaches may also be used. Above all, this meaning of the term 'public contract' cannot be used for comparison purposes, if only because the concept of administrative contract does not exist in all states.

Another use of the term 'public contract' is to refer to all contracts entered into by public bodies. In France, this approach was developed by Michel Guibal and 'the Montpellier school' in the 1990s[8]. The aim was to propose a concept of public contract that goes beyond the concept of administrative contract by basing it solely on an organic definition criterion. In this regard, the concept of public contract should highlight specific rules related to the presence of a public body as a party to the contract. It has the advantage of being broad enough to be applied in different European states without the need for a summa divisio between administrative contracts and private law contracts. However, there are two drawbacks to this definition. Firstly, categories of public bodies are not necessarily the same from one European state to another, which makes comparison difficult. Secondly, and more importantly, this definition of a public contract does not include contracts entered into by private individuals acting in the public sphere. Yet it is now understood that public contracts are not limited to public bodies and include contracts entered into by certain private individuals acting in the public sphere.

Finally, the term 'public contract' may be used to refer to contracts covered by the European regulations applicable to public procurement[9] and concession contracts[10]. In fact,

[8] Cf. M. GUIBAL, 'Le dualisme des contrats passés entre personnes publiques et personnes privées', *Cahiers de droit de l'entreprise*, 1993; M. GUIBAL, *L'avant contrat*, ed. Francis Lefebvre, 2001; M. GUIBAL, 'A propos d'une incertitude: la notion de personne publique contractante', in *Environnement, Les mots du droit et les incertitudes de la modernité. Mélanges en l'honneur du Professeur Jean-Philippe COLSON*, Presses universitaires de Grenoble, 2004, p. 230.

[9] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing directive 2004/18/EC; and Directive 2014/25/EU of the European Parliament and of the Council of

this is the most common use in legal theory. In France, many authors therefore use the term 'public contract' as a synonym for the concept of 'public procurement', which includes both public procurement contracts and concession contracts[11]. Some, however, prefer to specify by referring to these contracts as 'public business contracts', implying that the concept of public contract is too broad[12].

The equating of public contracts, public procurement and concession contracts also arises from the regulations applicable in some states, in particular the Iberian Peninsula. Thus, since 2008, Portugal has had a 'Public Contracts Code'[13] whose scope of application goes beyond just contracts classified as administrative and also encompasses private law contracts covered by the European regulations applicable to public procurement and concession contracts. Similarly, the Spanish law on 'public sector contracts'[14] is intended to

26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC

[10] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts

[11] There are many examples: cf. M. KARPENSCHIF, 'Le contrat public européen', *Revue des contrats,* 2014, no. 3, p. 539; O. GUEZOU, 'Contrats publics et politique de concurrence', *RFDA* 2014, p. 632; Lucien RAPP, 'Contrats publics et politiques économiques, la porte étroite: relance et encouragements sectoriels', RFDA 2014, p. 623; M. TRYBUS, R. CARANTA and G. EDELSTAM, 'European Union Law on Public Contracts: Public Procurement and Beyond', EU Public Contract Law, Brussels, Bruylant, 2013, p. 1-12

[12] A. LOUVARIS, 'La dénomination de 'contrats publics d'affaires'', AJCA 2015, p. 152; S. BRACONNIER, 'La typologie des contrats publics d'affaires face à l'évolution du champ d'application des nouvelles directives', AJDA 2014, p. 832

[13] 'Código dos contratos públicos', http://www.base.gov.pt/mediaRep/inci/files/ccp2018/CCP-DL_111-B.pdf

[14] Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014; https://www.boe.es/buscar/act.php?id=BOE-A-2017-12902

apply to contracts entered into for a fee by public sector entities. Yet these entities are defined in accordance with the European definition of contracting authorities. The law therefore applies to public procurement and concession contracts within the meaning of European Union law, which ultimately makes sense insofar as the purpose of the law is to transpose European directives. This approach is not, however, exclusive to south-west Europe: in Denmark, for example, there is no clearly recognised concept of public contract, but the term may be used to refer to European legislation and to explain that these are contracts by which a public entity purchases works, supplies or services; to indicate that one of the contracting parties is a public body; or to refer to contracts related to an administrative policy to describe the public interest goals to be met[15]. The term 'public contract' may therefore refer to public procurement and concession contracts covered by European regulations, although these contracts are more often referred to as 'public procurement'[16]. Some authors come to the same conclusion for Slovenia. They state that, although Slovenian law does not enshrine a concept of public contract, it is used as a common term to describe public procurement and concession contracts[17].

This definition of public contracts by reference to public procurement contracts[18] has the advantage of precision. Furthermore, it facilitates comparison between European Union Member States insofar as it is based on common concepts (public procurement and

[15] S. TREUMER, 'Denmark', in *Comparative Law on Public Contracts*, as aforementioned, p. 543

[16] Cf. the report on Denmark written by C. RISVIG HAMER 'Danish Report', in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies

[17] B. FERK, P. FERK, K. HODOŠČEK, 'Slovenian Report', in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies

[18] According to language versions and translations, the concept of 'public procurement' may be translated as 'approvisionnement public', a concept that encompasses pubic procurement and concession contracts, or 'marché public'. This second translation does not, however, automatically exclude concession contracts, which are sometimes considered as a specific type of public procurement.

concession contract) arising from sectoral directives. However, the disadvantage of this use is that it limits the scope of comparison to just these categories of contract. Defined in this way, the concept of public contract has no more to offer than the concept of public procurement and continues to exclude all contracts that are neither public procurement nor concession contracts. Yet it is now understood that some of these contracts excluded from the scope of application of the 2014 directives nevertheless remain subject to the common principles arising from the Treaties[19].

The use of the term 'public contract' is therefore far from new, but none of the uses identified are fully satisfactory. Furthermore, use varies from one state to another – even from one author to another – without the term ever reaching the status of concept by being enshrined in national law. Even the Portuguese 'public contracts' code does not give a specific definition of these contracts. In fact, if there is one thing the various European states have in common, it is actually the lack of a definition of the concept of public contract!

However, national classification is not the only problem where identifying and classifying public contracts is concerned. The European Union also does not have a concept of 'public contract', which does not promote convergence towards a common concept. The only established concepts are those laid down by 'public procurement' and 'concession' directives. These are contracts entered into in writing and for a fee awarded by one or more contracting authorities for the purpose of having work carried out, purchasing supplies and/or having services provided by one or more economic operators[20]. The directives therefore apply only to 'public procurement' contracts. Incidentally, when the term 'public

[19] Consider, for example, public property occupancy agreements, in accordance with the well-known Promoimpresa case: CJEU, 14 July 2016, C-458/14 and C-67/15, *Promoimpresa*; *AJDA* 2016, p. 2176, note R. NOGUELLOU; *AJCT* 2017, p. 109, obs. O. DIDRICHE; *RTD com.* 2017. 51, obs. F. LOMBARD; *RTD eur.* 2017. 843, obs. A. ZIANS; *Contrats-Marchés publ.* 2016, comm. 291, note F. LLORENS

[20] Art. 5 of Directive 2014/23 and art. 2 of Directives 2014/24 and 2014/25

contract' appears in certain documents drawn up by the European institutions, it refers to public procurement contracts[21]. Thus, there is no European concept broad enough to include other categories of contract that work on similar principles, such as the aforementioned public property occupancy agreements.

Therefore, the question arises as to whether the variety of national approaches and the lack of a common concept constitute insurmountable obstacles to comparison. The use of different concepts actually calls into question the value of comparing legal regimes and the rigour of such an approach.

These obstacles should not, however, be a deterrent; without them, any comparison would be pointless. In fact, comparison is difficult but not impossible if the variety that characterises national approaches can be overcome. There are two possible, non-mutually exclusive solutions. The first involves overcoming the variety of national classifications through systematisation: it has its advantages but is not fully satisfactory (2). The second involves ignoring national classifications by building a common concept: this solution appears to be more satisfactory, even if its implementation is more uncertain (3).

2. BEYOND THE STATUS QUO: SYSTEMATISATION OF NATIONAL CLASSIFICATIONS

The variety of classifications does not require recognition of as many models as there are European Union Member States. It is possible to draw parallels, allowing for a partial overcoming of the variety and thereby promoting comparison. However, differentiating between states where there is a summa divisio between public law contracts

[21] This observation was made by L. FOLLIOT-LALLIOT and S. TORRICELLI to limit their field of study to public procurement contracts only. L. FOLLIOT-LALLIOT and S. TORRICELLI, 'Introduction', in *Oversight and Challenges of Public Contracts*, Bruylant, 2018, p. 2

and private law contracts, and those where is only a single category of contract, is not enough. In order to refine the systematisation, three models must be identified according to an approach focused on scale and progressivity based on the contractual summa divisio.

2.1. Model one: states where the summa divisio is expressed as a clear distinction between public law contracts and private law contracts

Model one draws the most significant conclusions from the summa divisio in contractual matters[22]. This model includes French law, but significant differences remain from one state to another.

In France, the distinction between administrative contracts and private law contracts may result from two types of classification. The first case is legal classification. It is in fact possible for a text with legislative value to classify a contract (or rather, a category of contract) as either administrative or private law. Contracts classified by law thereby avoid having their classification decided by a judge, which allows contracts that may have been classified as administrative contracts or private law contracts according to criteria established by case law to be subject to the same legal regime. In addition to legal classifications, the second case involves classification according to case law. It can therefore only take place in the absence of legal classification and is based primarily on material considerations. In fact, it is the unconscionability of the contract[23], or the link

[22] It is important not to confuse the significance attributed to summa divisio in general and that attributed to it in contractual matters, even though the two may be linked.

[23] Unconscionable clauses are now defined in accordance with case law: TC, 13 October 2014, *SA Axa France IARD*, no. 3963; BJCP no. 98/2015, p. 11, concl. F. DESPORTES; AJDA 2014, p. 2180, chron. J. LESSI and L. DUTHEILLET DE LAMOTHE; DA 2015, comm. 3, note F. BRENET; Contrats-Marchés publ. 2014, comm. 322, note G. ECKERT; RFDA 2015, p. 23, note J. MARTIN. As for unconscionable legal regimes, they are defined by traditional case law: CE, 19 January 1973, *Société d'exploitation électrique de la Rivière du Sant*, no. 82338; CJEG 1973, p. 239, concl. M. ROUGEVIN- BAVILLE; AJDA 1973, p. 358, chron. D. LÉGER and M. BOYON; Rev. Adm. 1973, p. 633, P. AMSELEK

between the contract and public service,[24] that justifies its classification as an administrative contract provided, however, that it is entered into by a public body. Nevertheless, legal classifications and classifications according to case law are generally based on the same logic. Thus, the French Public Procurement Code specifies that public procurement and concession contracts are administrative contracts, but this classification only applies when they are entered into by public bodies[25]. In any event, and even though it is not strictly speaking a classification criterion, the public interest goal of the contract is key in determining whether it can benefit from the special legal regime applicable to administrative contracts. The latter give special privileges to contracting public entities and fall within the jurisdiction of the administrative courts. The concept of administrative contract therefore offers protection to the contracting public entities and, most importantly, the goals pursued through the contract.

This understanding of the concept of administrative contract as offering protection to public bodies and the goals they pursue is found largely in the Iberian Peninsula, whether in Spain or Portugal. In both these states, it is also to some extent the public interest goal pursued that justifies the distinction between administrative contracts and private law contracts. However, both Spain and Portugal have added a new category beyond the distinction between administrative contracts and private law contracts. In Spain, this is the generic category mentioned earlier that encompasses 'public sector contracts'. Yet the creation of this category tends to make the strict distinction between administrative

[24] The public service criterion appeared early on (CE, 6 February 1903, *Terrier*, rec p. 94, concl. ROMIEU; D. 1904.3.65, concl. ;S. 1903.3.25, concl., note M. HAURIOU and CE, 4 March 1910, *Thérond*, Rec. 193, concl. PICHAT; D. 1912.3.57, concl. ;S. 1911.3.17, concl., note M. HAURIOU; RD publ. 1910.249, note Gaston JÈZE) and has been subject to many changes.

[25] French Public Procurement Code, art. L. 6

contracts and private law contracts less relevant[26]. It notes that Spanish legislators refer to specific obligations that apply when a public authority is a party to the contract but, in fact, the principles applicable to public procurement matters apply to all public sector entities, whether public bodies or private individuals. A similar problem applies in Portugal. The Public Contracts Code lays down the rules applicable to contracts that are public procurement or concession contracts within the meaning of European Union law, thereby going beyond the distinction between administrative contracts and private law contracts[27]. In fact, the gradual overstepping of the distinction between administrative (or public law) contracts and private law contracts is driven by the development of European Union law[28]. It is, however, only partial and does not prevent the maintenance of a clear distinction between administrative contracts and private law contracts, if only from the perspective of disputes. Thus, in France, the development of public procurement law and the adoption of the code of the same name has not resulted in the disappearance of the distinction: not all administrative contracts are public procurement contracts, and public procurement contracts may be administrative contracts or private law contracts. This 'French' approach is also found in other states such as Romania. Thus, the link to French law is emphasised by scholars, especially with regard to the exorbitant rules applicable to administrative contract matters[29]. In fact, the distinction has implications for the legal regime of contracts

[26] This is the conclusion, for example, of the paper written by P. VALCÁRCEL FERNÁNDEZ on the principles of public contracts in Spain: P. VALCARCEL FERNANDEZ, 'Spanish Report', in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies.

[27] Incidentally, in his report on Portugal, P. CERQUEIRA GOMES refers to the 'Código dos contratos públicos' as 'the Public Procurement Portuguese Code': P. CERQUEIRA GOMES, 'Portuguese Report', in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies.

[28] European regulations ignore this traditional division and apply regardless of the classification usually given by national law to a particular contract. Consequently, when the summa divisio is particularly marked, the transposition of European directives involves going beyond traditional divisions.

[29] See, in particular: R. VORNICU, National study: Romania', as aforementioned

considered as such, which is particularly the case for public procurement and concession contracts, even though disputes are still shared between the administrative and ordinary courts (the latter retain jurisdiction with regard to performance).

Finally, this model, which attaches particular importance to the contractual summa divisio, also exists in other states, where the consequences and scope of public law are just as important as under the French approach. The Croatian and Estonian examples can be cited in this regard. Thus, in Croatia, the concept of administrative contract exists but it is not defined as it is in French law, despite the link highlighted by Marko Turudić in his report[30]. It refers to contracts entered into by public bodies provided they are related to an administrative procedure preceding the contract and a special law classifies them as administrative contracts. It is therefore not the goal pursued but the procedure implemented that justifies the classification. Yet in the case of public procurement contracts, these criteria lead to the belief that only concession contracts are administrative contracts, even though Marko Turudić argues against this approach and believes that public procurement and public-private partnership contracts should be also considered as administrative contracts. They nevertheless remain subject to private law rules. In Estonia, the distinction between administrative contracts and private law contracts is also based on specific criteria. Apart from cases in which the nature of the contract is determined by legal provisions, it is actually the purpose of contracts entered into by public bodies that determines whether they are administrative contracts or private law contracts. Yet this criterion differs from French law. In fact, a contract shall only be classified as administrative if it transfers prerogatives of public authorities or regulates the rights of third parties to the contract[31].

Thus, although it is not possible to identify a 'French model', it should be recognised that there is a model in Europe that clearly differentiates between the concepts

[30] M. TURUDIĆ, 'Croatian Report', as aforementioned

[31] C. GINTER and Nele PARREST, 'Estonia', in *Comparative Law on Public Contracts*, as aforementioned, p. 600

of administrative contract and private law contract deriving from different legal regimes. This model is different from the second because the summa divisio exists, with no significant implications for contractual matters.

2.2. Model two: states that acknowledge the summa divisio but only partially express it in contractual matters

States that fall within this model are similar to those in the first group insofar as they are also familiar with jurisdictional dualism and the distinction between public law and private law. The difference, however, arises with regard to contractual matters. In fact, in these states, jurisdictional dualism has only limited repercussions where contracts are concerned, although a clear distinction can be drawn between unilateral administrative acts and acts of private law.

These states appear to constitute a majority within the European Union. They include Germany, Austria, the Netherlands, Belgium, the Czech Republic, Slovenia, Finland, Poland, Sweden and Italy. Beyond the summa divisio that also characterises states that fall within the first model, it is the understanding of contractual instruments that allows these states to be considered as a 'separate' group. In fact, one thing they have in common is the belief that a contract is *by nature* an act of private law. Therefore, the public or private classification of the originator of the contract does not really matter: as a matter of principle, contracts fall under private law, including when they are entered into by public bodies. However, this does not mean that there are never administrative or public law contracts in these legal systems. These contracts are in fact recognised in some of these states, although they remain relatively rare. There are two cases that justify limited exemptions from the principle of classification as private law contracts.

Firstly, certain contracts that equate to administration contracts may be classified as administrative contracts[32]. These are specific contracts for the distribution of competences between public bodies or to organise the implementation of public action in accordance with contracting procedures. Thus, in Germany, coordination contracts between public bodies, those entered into by social security bodies with social service providers and 'relationship development contracts under public law' are considered as public law contracts[33]. These are, however, exceptions to the principle: most contracts entered into by public bodies fall under private law, starting with public procurement. The same applies in Czech law: contracts are, as a matter of principle, private law contracts, but there are administrative law contracts that equate to administration contracts. In this regard, some scholars of the Czech Republic cite 'coordination contracts' and 'subordination contracts'[34]. The same approach is also found in Finland: contracts are, as a matter of principle, acts of private law, but there is a concept of administrative contract that 'includes all contracts used for the performance of administrative tasks, as well as contracts used to replace unilateral administrative decisions'[35]. Similarly, in Poland, among public contracts (defined as contracts entered into by public bodies), there are 'administrative agreements [...] used to coordinate the actions of public bodies, for the joint exercise of powers or to organise the transfer of powers', whereas other public contracts are considered as private law contracts[36]. In such cases, the classification of administrative contracts therefore remains

[32] As opposed to cooperation contracts, according to the distinction established by A.DE LAUBADÈRE, 'Administration et contrat', in *Mélanges offerts à Jean BRÈTHE DE LA GRESSAYE*, Bière, 1967, p. 453

[33] U. STELKENS and H. SCHRÖDER, 'Germany', in *Comparative Law on Public Contracts*, as aforementioned, p. 309

[34] A. HAVLOVÁ, M. RÁŽ, J. PETROVÁ, B. FIKAROVÁ, 'National Study: Czech Republic', in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies

[35] O. MÄENPÄÄ, 'Finland', in *Comparative Law on Public Contracts*, as aforementioned, p. 661

[36] M. SPYRA, 'Poland', in *Comparative Law on Public Contracts*, as aforementioned, p. 759

anecdotal and seems to result from the substitution of contracts where unilaterality typically applies.

The classification of administrative contracts in states that fall within this second model can also result from the implementation of specific criteria. In this case, the classification procedure is similar to that implemented in states that fall within the first model. The difference is that the criteria used are 'stricter' and only deviate from the principle that contracts are acts of private law in exceptional circumstances. Thus, Austrian law, like French law, believes that public bodies can enter into either administrative contracts or private law contracts. However, the principle remains that contracts are acts of private law and only contracts in which the contracting public body is acting as a 'sovereign administration' shall be considered as administrative[37].

Nevertheless, the option to classify contracts as 'administrative' or 'public law' is not routinely considered and some states that fall within this second model believe that contracts are always acts of private law. This is the case, for example, in Slovenia: some scholars clearly explain that the concepts of 'public contract' and 'administrative contract' are not defined by Slovenian law and therefore cannot be used from a comparative law perspective[38]. Similarly, Dutch law does not appear to acknowledge the existence of public law contracts. It has been highlighted that contracts are, as a matter of principle, acts of private law, regardless of whether one of the contracting parties is a public body, and regardless of whether a 'specific procedure' is implemented prior to its signing[39]. Jessy Emaus and Tom Swart came to the same conclusion in 2010: contracts remain acts of

[37] M. STEINER, 'Austria', in *Comparative Law on Public Contracts*, as aforementioned, p. 384

[38] B. FERK, P. FERK, and K. HODOŠČEK, 'Principles of Public Contracts in Slovenia', in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies

[39] S. SCHOENMAEKERS, 'Principles of Public Contracts in Europe: Report on the Netherlands', in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies

private law even when they apply certain public law rules and the term 'public contract' is therefore only used for purely explanatory purposes, to indicate the presence of a public body as a party to the contract[40]. This is also the case in Sweden, where there is no legal category of public or administrative contract[41]. This does not mean that administrative law is totally absent in these states where contracts are concerned. It may be expressed in the procedure that precedes the adoption of the contract, through certain clauses, or even by special prerogatives implemented during performance. However, even when administrative law rules apply, the contract remains an act of private law. This approach also seems to prevail in Belgium, although 'the classification of administration contracts remains a challenge'[42]. Contracts identified as 'administrative' or 'public' are in fact governed by special rules that may be considered as administrative law rules, which explains why 'the majority view is that there is a 'special' legal regime for administrative contracts and although the Civil Code remains applicable in principle to these contracts, it is only under 'suppletive ordinary law'[43]. However, strictly contractual disputes fall within the jurisdiction of the ordinary courts; administrative judges only intervene through the theory of detachable acts[44]. Therefore, contracts classified as public or administrative may in fact be better viewed as private law contracts, but partly governed by administrative law rules. The same applies in Italy, where public contracts follow 'two legal frameworks'[45]. A

[40] J. EMAUS and T SWART, 'Netherlands', in *Comparative Law on Public Contracts*, as aforementioned, p. 741 et seq.

[41] G. EDELSTAM, 'Sweden', in *Comparative Law on Public Contracts*, as aforementioned, p. 887

[42] A. L. DURVIAUX, 'Rapport sur le droit belge', in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies

[43] P. FLAMME, 'Belgium', in *Comparative Law on Public Contracts*, as aforementioned, p. 403

[44] A. L. DURVIAUX, 'Rapport sur le droit belge', as aforementioned

[45] A. MASSERA, 'Italy', in *Comparative Law on Public Contracts*, as aforementioned, p. 718

distinction must be drawn between two phases in the life of these contracts: the phase prior to their signing, which follows administrative law rules, and the phase that occurs once the contract has been signed, which falls under private law[46]. Thus, although public contracts are not actually 'public law contracts', the summa divisio is expressed through the rules applicable and the contentious jurisdiction.

Incidentally, in states that fall within this second model, the special legal regime for public contracts is often found in litigation proceedings. In Italy, when a contract is entered into by a public body, only the second phase falls under private law and the jurisdiction of the ordinary courts. Disputes relating to the contract awarding phase fall under administrative law and the jurisdiction of the administrative courts in accordance with the distinction between the protection of individual rights and the protection of legitimate interests[47]. Without claiming to be exhaustive, it can be noted that in Belgium, award procedures are often reviewed by the administrative courts through the theory of detachable acts, whereas the interpretation and performance of contracts is reviewed by the civil courts[48]. Similarly, Czech law states that disputes relating to the rules laid down in the 'public procurement act' fall within the jurisdiction of an agency responsible for competition protection whose decisions may be challenged in the administrative courts, whereas disputes between contracting parties fall within the jurisdiction of the civil courts[49]. Sometimes, the distribution of contentious jurisdiction is even more specific. Thus, in Poland, public procurement disputes are primarily a matter for a non-judicial body, but

[46] The report written by Matteo PIGNATTI comes to the same conclusion: M. Pignatti, 'The Italian legal framework on Principles in Public Contracts', in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies

[47] A. MASSERA, 'Italy', in *Comparative Law on Public Contracts*, as aforementioned, p. 718

[48] P. FLAMME, 'Belgium', in *Comparative Law on Public Contracts*, as aforementioned, p. 399 et seq.

[49] A. HAVLOVÁ, M. RÁŽ, J. PETROVÁ, B. FIKAROVÁ, 'National Study: Czech Republic'.

they may subsequently be brought before the ordinary courts[50]. However, concession disputes are divided between the administrative and ordinary courts: the administrative courts have jurisdiction for the contract award and signing phases, while the ordinary courts have jurisdiction for the performance phase.

Whether from the perspective of disputes and/or the perspective of the applicable legal regime, states that fall within this second model do not deny the summa divisio. Its implications for contractual matters are merely different to those observed for states that fall within the first model because contracts remain, in theory, acts of private law. Therefore, the existence of the summa divisio requires these states to be differentiated from those in the third group.

2.3. Model three: states where the summa divisio typically does not exist

Summa divisio and jurisdictional dualism does not exist in all European states, although this does not prevent them from creating specialist administrative courts. This approach is relatively rare, but is found notably in Denmark. In this Member State, there is no jurisdictional dualism as it is commonly understood, and contracts are considered as acts of private law, even when they are entered into by public bodies[51]. For a long time, the approach was not to develop special rules applicable to contracts entered into by public bodies, including in public procurement matters. European directives were in fact transposed 'as is' and a 'Public Procurement Act' did not exist until 2016, it being understood that the 'concessions' directive is not affected and continues to be applied as is[52]. Contracts entered into by public bodies are therefore considered as acts of private law, and only those covered by the European regulations are subject to special regulations.

[50] M. Spyra, 'Poland', in *Comparative Law on Public Contracts*, as aforementioned, especially p. 772

[51] S. TREUMER, 'Denmark', in *Comparative Law on Public Contracts*, as aforementioned, p. 543

[52] C. RISVIG HAMER, 'Danish Report', as aforementioned

These are found in litigation proceedings, with a special institution responsible for ruling on compliance with the European regulations: 'the Complaints Board for Public Procurement'[53]. The 'Danish model' is, however, an isolated case within the European Union, particularly since Brexit. In the United Kingdom, there is also not really a summa divisio or jurisdictional dualism in the civil law sense. Therefore, there is no official category of administrative or public contracts, even though, in order to apply European Union law, procurement and concession contracts are governed by specific regulations[54].

This third 'model' exists nevertheless, although it is not widely used. It completes the overview of the different national classifications of 'public' contracts, while demonstrating the magnitude of the differences in understanding that exist from one state to another.

This systematisation, sadly incomplete, allows for the identification of broad trends among the approaches taken in European Union Member States where contracts are concerned. It may facilitate comparison, particularly between states that fall within the same model, but it rapidly reaches its limits when it comes to comparing states that fall within different models. Therefore, a common concept must be developed to enable comparison.

3. ENABLING COMPARISON: BUILDING A NEW CONCEPT

Works of comparative law agree that the use of the concept of public contract is essential to enable comparison, without agreeing on its definition. In 2010, Rozen Noguellou and Ulrich Stelkens chose to use a broad definition of public contract focused on an organic criterion. The idea was 'to understand by 'public contracts' all contracts that

[53] Ibidem

[54] Cf. P. CRAIG and M. TRYBUS, 'England and Wales', in *Comparative Law on Public Contracts*, as aforementioned, p. 339 et seq.

may be entered into by all administrative bodies (state, sub-state, etc.), regardless of their purpose', while 'the term 'public contract' does not refer [...] to a legal regime'[55]. On the other hand, in 2018, Laurence Folliot-Lalliot and Simone Torricelli preferred to equate the concepts of public contract and public procurement contract in order to have a 'more clearly defined field that allows for a better understanding of the globalisation of law'[56]. However, both of these options have their limits: the first because it is not specific enough, the second because it is probably too specific. A 'third way' therefore needs to be found by choosing a relevant framework and criteria.

3.1. The need to use a European framework

It has been stated that neither national laws nor European Union law provide a definition of the concept of public contract that is sufficient to enable comparison[57]. The question therefore arises as to whether a framework is required to define this concept. In fact, it would probably be easier not to link the concept of public contract to positive law and to develop it 'outside the framework'. Firstly, because by taking an approach 'outside the framework', it is easy to export the concept to apply it in different situations, whether in the legal systems of different Member States or at European Union level. Secondly, because the use of a concept 'outside the framework' allows it to be applied beyond the single European framework, and therefore enables a more extensive comparison[58].

The problem with a definition 'outside the framework' is that it inevitably lacks precision. Thus, when authors choose to use an organic criterion that refers to 'administrative bodies', the question immediately arises as to how to define these bodies.

[55] R. NOGUELLOU and U. STELKENS, 'Introduction', as aforementioned, p. 5

[56] L. FOLLIOT-LALLIOT and S. TORRICELLI, 'Introduction', as aforementioned, p. 2

[57] Cf. developments in the introduction

[58] This is in fact the meaning of the definition adopted by R. NOGUELLOU and U. STELKENS

The lack of a framework therefore leads to a repeat of the shortcomings related to the variety of concepts: in fact, when the definition of public contract is detached from any framework, it becomes a generic category[59] that encompasses a variety of situations but can no longer seriously claim the status of concept. Furthermore, as noted by Guillaume Tusseau, '*the political, social, economic, intellectual and other contexts in which legal arrangements apply are, if not decisive, at least important factors in their configuration. Also, the idea of everlasting and perfect legal concepts seems unlikely in itself*'[60]. Therefore, the idea of defining the concept of public contract outside of any framework seems difficult to implement.

A relevant framework must therefore be found to develop a concept that enables comparison. Yet, in this regard, national frameworks are not satisfactory. The legal traditions adopted are in fact too different from each other and therefore, the concepts developed in the 27 Member States can only converge without tallying fully. The only solution is to develop a common concept used consistently in national legal systems. The European Union seems like the perfect framework for this, particularly as European concepts have already been developed in contractual matters. Initially inspired by national laws, the concepts of 'public procurement' and 'concession contract' have evolved in their definition to become autonomous concepts different from their national namesakes. The high degree of harmonisation brought about by the directives has led to the adoption of these concepts in different Member States, sometimes substituting the European definitions for the old national definitions. This evolution in the concepts of public procurement and concession contract make a similar development possible if a European concept of public

[59] Thus, S. BOYRON and A. C.L. DAVIES believe that 'the generic category of public contract may help bridge legal systems which characterise and regulate in different ways the contracts agreed to by public bodies', but they explain that at the same time, this generic category does not allow for necessary distinctions to be made between deeds that benefit from the 'contract label'. S. BOYRON and A. C.L. DAVIES, 'Accountability and public contracts', in *Comparative Law on Public Contracts, as aforementioned*, p. 209, especially pp. 210-211

[60] G. Tusseau, 'Critique d'une métanotion fonctionnelle', *RFDA* 2009, p. 641

contract is adopted. As an autonomous concept, it could be used to overlap with national concepts or to replace them.

Furthermore, the development of a European concept of 'public contract', which encompasses and goes beyond the concept of public procurement contracts, would allow for refinement of the summa divisio at the European Union level. The distinction between European public law and private law would be strengthened. It seems, in fact, that, as described by Loïc Azoulai, in European Union law as 'in all structured legal systems, there is a fundamental split between two types of legal relationships, which can be called 'public law situations' and 'private law situations'[61]. Yet the development of a European concept of public contract would foster the development of a European public contract law distinct from European private contract law. The latter is in fact commonly considered as European contract law[62], without including or taking into account the European regulations applicable to public procurement and concession contracts, or even the existence of contracts awarded by the European Union administration[63]. The development of a European concept of public contract would allow for reflection on the goals pursued by the European legislature

[61] L. AZOULAI, 'Sur un sens de la distinction droit public/droit privé dans le droit de l'Union européenne', RTDE 2010 p. 842. However, the author identifies a 'triangular structure of EU law' with a 'social' 'branch' 'alongside two public and private branches'.

[62] Existing harmonisation projects are in fact focused on private law and are not concerned with the possible existence of 'public contracts', although effective harmonisation exists for some of them (e.g. public procurement and concession contracts). Cf. La notion de contrat administratif. Droit de l'Union européenne, Bruylant, 2014. For a comprehensive overview of European contract law through an approach focused on private law, cf. N. JANSEN and R. ZIMMERMANN (ed.), *Commentaries on European Contract Laws*, Oxford University Press, 2018

[63] For more on this issue, cf. D. RITLENG, 'Les contrats de l'administration de l'Union européenne', in Jean-Bernard AUBY and Jacqueline DUTHEIL DE LA ROCHERE (ed.), *Traité de droit administratif européen*, Bruylant, 2nd ed. 2014, p. 219; M. AMILHAT, 'Les actes contractuels de l'Union', in M. BLANQUET and G. KALFLECHE (ed.), *La codification de la procédure administrative non contentieuse de l'Union européenne*, Presses de l'Université Toulouse 1 Capitole, Cahiers Jean MONNET, 4/2019, p. 191

through the regulations developed in this respect: should they allow greater powers to be granted to public bodies in order to facilitate their activities (as in the French model) or should they instead emphasise a framework for this public action in order to protect the activities of private individuals and their market freedoms? More generally, the concept of public contract would make it possible to structure European public contract law and make it easier to understand by specifying the persons who may enter into these contracts, the categories of contract that may be considered as 'public' and even the common principles that may be applicable. Finally, the strengthening of the summa divisio between public law and private law at the European Union level would contribute to broader discussions on the basis of this summa divisio: prevalence of a European public interest or European public authorities, pursuit of European public service goals, competition protection on the market, etc.

Thus, the use of the European framework to develop the concept of public contract is becoming a perfect framework, as much to ensure the use of a concept common to different Member States as to achieve the goal of building a real European public contract law. Therefore, criteria must be found to define this concept.

3.2. One option is to use two definition criteria

In order to use the concept of public contract, care must be taken not to reproduce the shortcomings of the current uses of the term 'public contract'[64]. Thus, its definition must be broad enough not to be limited only to administrative contracts or public procurement contracts. However, it should not be so broad that it risks becoming unclear. The aim of this concept is in fact to identify common principles, or even a common regime, which is impossible if it encompasses all categories of contract entered by public bodies or persons in the public sphere. Therefore, this twofold demand makes it necessary to find a happy medium by using both an organic criterion and a material definition criterion. The

[64] Cf. developments in the introduction

first is part of an expansive approach, whereas the second leads to a tightening of the definition.

Among these two criteria, the organic criterion is therefore the one that makes it possible to achieve a broad enough definition of public contract. It is in fact impossible to limit the definition of public contract only to contracts entered into by public bodies because this would set aside all contracts awarded by private individuals when acting in the public sphere. Furthermore, the definition of private individuals is not necessarily the same from one European Union Member State to another and the mere fact that a contract is entered into between private individuals should not be enough to exclude it from the classification of public contract[65]. Therefore, rather than defining public contracts as contracts entered into by public bodies, they should be considered as contracts signed by persons in the public sphere within the meaning of European Union law, whether they are public law bodies or private law bodies. The question, therefore, is how to determine which persons are in the public sphere.

In fact, European Union law already provides a definition of persons in the public sphere through the sectoral regulations applicable to public procurement and concession contracts. The concept of contracting authorities may actually result in an organic definition criterion broad enough to refer to persons in the public sphere. Because it incorporates contracting authorities, this criterion includes primarily states, 'regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law'[66]. Thus, persons in the public sphere may be public bodies as well as private individuals through the concept of public law body. This category in fact encompasses 'entities, under public law or private law, that are found in the

[65] This is the position of the Court of Justice with regard to the concept of public procurement and, more specifically, the definition of public law bodies among contracting authorities: ECJ, 13 January 2005, *Commission v Spain*, C-84/03, ECR p. I-155

[66] Art. 2 of Directive 2014/24 cf.

public sphere and have a direct or indirect link to a contracting authority by definition'[67]. Furthermore, by incorporating contracting authorities among persons in the public sphere, the organic criterion includes public companies as well as entities that 'benefit from special or exclusive rights granted by a competent authority of a Member State'[68]. Therefore, by defining persons in the public sphere as encompassing contracting authorities, it is possible to adopt a working definition of the organic criterion for defining the concept of public contract that is broad enough to go beyond national classifications. This working definition of persons in the public sphere is, incidentally, similar to the working definition of an administration, which considers that 'all bodies exercising administrative functions make up the administration'[69]. However, using the organic criterion is not enough to develop a sufficiently clear concept of public contract. It is in fact necessary to add a material criterion based on the purpose of the contract in order to maintain a certain consistency and not to encompass all contracts entered into by these entities, some of which are not 'public'.

The material criterion for the definition of the concept of public contract should therefore allow its scope to be tightened, in contrast to the organic criterion. It is, however, essential to think differently and not to adopt the material criterion used by the 'public procurement' and 'concession' directives. The material criteria adopted in these directives, combined with the organic criterion that has just been presented, in fact allow for the definition of public procurement contacts. Yet the concept of public contract is intended to encompass these contracts without being limited to them. Therefore, it is necessary to develop a material definition criterion that is broader than the one used by the sectoral

[67] S. DE LA ROSA, *Droit européen de la commande publique*, Bruylant, 2017, p. 135.

[68] There are, however, conditions, in accordance with the definition of contracting authorities given in article 4 of Directive 2014/25

[69] M. FROMONT, 'L'évolution du droit des contrats de l'administration – Différences théoriques et convergences de fait', in *Comparative Law on Public Contracts*, as aforementioned, p. 263

directives, while taking into account the goals pursued by European Union law with regard to public contracts.

It is thus possible to define as public contracts those entered into in order to meet a public interest and/or economic interest. In fact, the concept of the need for a public interest has the advantage of emphasising the public nature of these contracts, as long as the public action is aimed at meeting this public interest. In addition, the concept of economic interest allows the common approach developed at the European level to be taken into account: contracts entered into by persons in the public sphere should not distort market competition or, more specifically, hamper free movement. However, it does not matter if the needs met are those of the person in the public sphere or a third party. This would include complex distinctions that are not necessarily relevant, particularly as these distinctions do not currently exist with regard to public procurement and concession contracts. Defining public contracts as all contracts entered into by persons in the public sphere that aim to meet a public interest need and/or economic need is sufficient to establish a clear distinction from ordinary law contracts, taking into account the specific understanding of public action as developed at the European Union level.

Beyond mere systematisation, building this European concept of public contract would allow for going beyond national approaches and the formidable challenges posed by their variety. In fact, it is only through this common and autonomous concept that finding principles common to public contracts in Europe seems possible.

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THE RISK OF CORRUPTION IN URBAN PLANNING

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1. FOREWORD

The government of the territory, in Italy, is one of the sectors where crimes against the Public Administration and, especially, the crime of corruption, are most widespread. Although the literature has highlighted this phenomenon[2], the issue of corruption in the urban planning has not, for a long time, been the subject of particular attention by the institutions, unlike other sectors, such as public procurement or health care[3]. In the first version of the National Anti-Corruption Plan (N.A.P.), the government of the territory was not even expressly included among the general risk areas, and it could only be identified as a specific risk area by local authorities within the respective three-year corruption plans[4]. However, the significant importance of corruptive phenomena in this field led the Italian National Anti-Corruption Authority to include in the 2016 N.A.P. a specific section

[2] S. CASSESE, *Ipotesi sulla storia della corruzione in Italia*, in G. MELIS (ed. by), *Etica pubblica e amministrazione: per una storia della corruzione nell'Italia contemporanea*, Conference held in Naples in the 1997, Naples, 1999, 188; P. URBANI, *Urbanistica consensuale, "pregiudizio" del giudice penale e trasparenza dell'azione amministrativa,* in *Riv. Giur. Edilizia*, 2009, 2, 47 – 57, now in *Scritti scelti*, Torino, 2015, vol. II, 1169 – 1180. M. CAPPELLETTI, *La corruzione nel governo del territorio: forme, attori e decisioni nella gestione occulta del territorio,* Buccino, 2012, in particolare, 34 – 39; A. BARONE, *La prevenzione della corruzione nella "governance" del territorio,* in *Il diritto dell'economia,* 2018, 3, 571 – 595; F. SAITTA, *Governo del territorio e discrezionalità dei pianificatori*, in *Riv. Giur. Edilizia*, 2018, 6, 241.

[3] For the analysis of other sectors interested by anticorruption measures S. FOÀ, *Prevención de la corrupción en las universidades y las instituciones de investigación,* in *Ius Publicum*, 2018, 1, 1 – 15; F. APERIO BELLA, *The powers of the italian anti-corruption authority in public procurement: new tools to pursue good administration?*,in *Ius publicum*, 1/2017, 1 – 26.

[4] National Anti-Corruption Authority, 2015 update to the National Anti-Corruption Plan, Resolution n. 12, 28th of October 2015, 19. Among the general areas of risk, it includes "the measures extending the legal sphere of the recipients with direct and immediate economic effect for the recipient", including building permits that derive from the upstream urban planning regulations. See All. 2, lett. D), Presidency of the Council of Ministers, Civil Service Department, Studies and Consultancy Service Treatment of Personnel, National Anti-Corruption Plan, N.A.P., Law of 6 of November 2012 n. 190 "*Disposizioni per la prevenzione e la repressione della corruzione e dell'illegalità nella pubblica amministrazione*".

dedicated to this sector, in which the main risk factors and possible measures to combat them were clearly identified[5].

The peculiarities of administrative procedures in this field, in fact, are generally recognized as elements that make the sector a particularly fertile ground for the emergence of corrupt practices. The pervasiveness of corruptive phenomena in the field of planning, urban development and construction derives not only from general factors, such as the inadequacy of the control and sanction system and the socio-economic and cultural context, but also from the specific characteristics of the regulatory environment, such as the fragmentation of competences and the non-existence of a framework law containing the general principles of the matter.

In the context of territorial governance, the corruptive risk has been defined as transversal, since it does not depend on the general or special content, nor on the authoritative or consensual nature of the measures adopted. The damage produced by corruption in this sector affects non-renewable resources, "first and foremost the land, whose functions are as essential as they are irreplaceable for the people and the environment"[6]. In order to prevent the risk of corruption, a strategy tailored to the size and complexity of the level of planning appears to be crucial.

2. OPPORTUNITIES FOR CORRUPTION IN THE URBAN PLANNING FIELD

In Italy, the government of the territory is one of the subjects that the 2001 constitutional reform has attributed to the legislative power shared between the State and

[5] National Anti-Corruption Authority, Resolution n. 831, 3rd of August 2016, final approval of National Anti-Corruption Plan 2016 (from now onwards, N.A.P. 2016), 65 – 79.

[6] N.A.P. 2016, 65.

the Regions. It includes the urban planning and construction sectors[7]. In the light of the constitutional provision, in this matter, the State is competent for establishing the general principles, within framework laws, while the Regions must exercise their legislative powers within the latter, defining the instruments by which to achieve the objectives set at central level. However, the non-existence of a framework law containing the general principles of territorial governance has made it necessary to infer them from the existing legislation on urban planning and construction, starting from the Urban Planning Law of 17 August 1942, no. 1150, still in force today[8]. Over time, several regulations have been adopted, both by the State and the Regions, concerning urban planning as well as adjacent matters, such as, for example, the landscape, transport or construction, that overlap with the Urban Planning Law.

The lack of an organic and unitary regulatory framework contributes to increase the discretion of the competent bodies, favouring the emergence of corruptive phenomena[9]. As clarified in the N.A.P. of 2016, the "extreme complexity of the matter, which is reflected in the disorganized, lack of clarity and stratification of the regulations and the persistence of a fragmentary pre-constitutional legislation anchored to the Urban Law, 17th August, 1942, n. 1150"[10], has a negative impact on the definition of competences of the various administrations involved; identification of the contents of the planning acts adopted at the

[7] Corte Cost., Judgement 1° October 2003, n.303. On the term "government of the territory" and its implications see P. STELLA RICHTER, *Diritto urbanistico: manuale breve,* 4° ed, Milano, Giuffrè, 2016, 2 – 9.

[8] P. STELLA RICHTER, *I principi del diritto urbanistico,* 2° ed, Milano, Giuffrè, 2006, *passim*.

[9] As stated in the literature, "we are witnessing a particularly articulated and complex body of legislation, difficult to read and interpret. This is the main reason why doctrine and jurisprudence have had and still have wide interpretative space, in order to fill regulatory gaps or resolve any differences in the reading of laws". (M. CAPPELLETTI, *La corruzione nel governo del territorio: forme, attori e decisioni nella gestione occulta del territorio*, cit., 53).

[10] N.A.P. 2016, 65.

different territorial levels; procedural timing; efficient use of public resources; legal certainty and consequent confidence of citizens and businesses in the activities of public authorities.

Traditionally, urban planning has been regulated according to a top-down mechanism, where the administration of the higher territorial level (e.g. the Region) adopts the general acts, aimed at locating large infrastructures, parks and so on, as well as coordinating and directing the detailed planning adopted at municipal level. This implies a fragmentation of competences that can create difficulties in delimiting the powers of the various authorities involved and significantly complicate the process. This aspect is important from the point of view of corruption. The private sector could, in fact, try to circumvent those procedural obstacles and speed up the decision-making process by engaging in corrupted behaviour.

The general town planning (G.T.P.) is a complex act adopted by the Municipality and approved by the Region. It contains provisions regarding the location of spaces for public use, the division of the municipal territory into zones (zoning), the constraints to be respected in historical, environmental and landscape areas and the rules for the implementation of the plans[11]. The adoption of the G.T.P. is the responsibility of the Municipal Council, while its objectives and contents are defined by the political body of the Municipality. Therefore, the decisions on urban planning contain assessments with a strong

[11] Art. 7 of law 17/08/1942 - N. 1150 states that "The general zoning plan must consider the totality of the municipal territory. It must indicate essentially: 1) the network of the main roads, railways and waterways and related facilities; 2) the division into zones of the municipal territory with the specification of the areas intended for the expansion of the urban aggregate and the determination of the constraints and characteristics to be observed in each area; 3) the areas intended to form areas of public use or subject to special easements; 4) the areas to be reserved for public buildings or public use as well as works and facilities of collective or social interest; 5) the constraints to be observed in areas of historical, environmental, landscape character; 6) the rules for the implementation of the plan. On the general theme of urban planning see M.S. GIANNINI, *Pianificazione*, in *Enc. Dir*., XXXIII, Milano, Giuffrè, 1983, 629 e ss.

political value, that are difficult to submit to a preventive control of an administrative nature. Moreover, the number and indeterminacy of public and private interests involved in the decision-making processes related to urban planning make the boundaries of discretion of the decision-makers particularly wide[12].

The Municipal Council, subsequently, designates the planners in charge of drawing up the plan, who may be public officials with a specific technical expertise, or private experts, identified through public procedures. The activity carried out by the designers takes on a fundamental role in the preliminary investigation activities prior to the definition of the discipline of the individual areas of the municipal territory. Although it has a purely technical - executive character, however, it implies room for manoeuvre, to the advantage or disadvantage of private interests[13].

All these decisions are very significant in terms of the risk of corruption. The fact that the political body is primarily responsible for planning decisions creates difficulties with regard to the introduction of preventive administrative measures to control the risk of corruption. In fact, plans for the prevention of corruption are mainly imposed at the administrative level[14]. On the political side, the only measures available are those of a general nature relating to situations of conflict of interest or incompatibility. The difficulty

[12] See F. SAITTA, *Governo del territorio e discrezionalità dei pianificatori*, in *Riv. Giur. Edilizia*, 2018, 6, 241 e ss.; L. MAROTTA, *Pianificazione urbanistica e discrezionalità amministrativa*, Padova, 1988; S. COGNETTI, *La tutela delle situazioni oggettive tra procedimento e processo: le esperienze di pianificazione urbanistica in Italia e in Germania*, Napoli, 1987, 64.

[13] In the literature it has been stated that "a discretionary margin is however constituted by the possibility of modifying and altering land uses in the consolidated fabric, where speculative interests are generally minor" (M. CAPPELLETTI, *La corruzione nel governo del territorio: forme, attori e decisioni nella gestione occulta del territorio*, cit. 67).

[14] G.B. MATTARELLA, *La prevenzione della corruzione in Italia*, in *Giorn. Dir. Amm.*, 2013, 2, 124.

of applying the principle of "separation between politics and administration"[15], in fact, constitutes one of the causes of corruption in the area of government of the territory mentioned in the N.A.P. of 2016 and already identified by the doctrine among the historical sources of corruption[16]. Moreover, the proximity and frequent personal relationships between the citizens and the politicians, which characterizes especially small municipalities, seems to be a factor that facilitates the emergence of corrupt practices.

In order to guarantee transparency and participation in the decisions concerning the territory, the adopted plan is deposited in the Municipal Secretariat for thirty days, during which anyone can view it and submit observations, to which the municipal body must respond with its counter-deductions. The next step is the approval by the Region, which may introduce changes that do not involve substantial innovations to the plan, resulting from the private individuals' observations and accepted in the counter-arguments by the Municipality, or recognized as essential to ensure compliance with the regional coordination plan. Proposals for amendments must be duly substantiated and the Municipality may submit its counter-arguments. The control prior to the approval by the Region and the necessary consistency of the G.T.P. with the provisions of the higher territorial plans, together with the participatory guarantees and transparency obligations, represent important preventive instruments in terms of corruptive risk.

Corruptive phenomena may also concern implementation planning, i.e. planning that translates the general provisions contained in the G.R.P. into detailed technical and

[15] This principle has been introduced in Italian Law by the reforms adopted during the Nineties, especially by the legislative decree n. 29 of 1993. In a nutshell, it introduces a distinction between the address functions of the political bodies and the management functions of public officials.

[16] "We must return to the osmosis and symbiosis between politics and administration. The bureaucracy that sees itself excluded from the political body is pushed by an internal force to regain the lost space through corruption, which increases its power and personal income" (S. CASSESE, *Ipotesi sulla storia della corruzione in Italia*, cit. 183.

administrative provisions (detailed plan, allocation plan, plan for social housing, plan for production facilities, recovery plan, etc.). The latter often takes place using hybrid instruments, oriented towards urban regeneration and requalification, such as, for example, complex programmes of interventions[17].

Finally, particularly exposed to the corruptive phenomenon are the tools of so-called consensual urban planning, increasingly widespread in the Italian system[18]. Often, urban planning measures involve particularly complex procedures, which require significant technical and financial capabilities that require municipalities, especially smaller ones, to rely on the skills and economic resources of private individuals, with a very high probability of being captured[19]. The significant information asymmetries between public and private subjects that characterize the planning choices represent another element identified by the National Anticorruption Authority among the reasons for corruption in the

[17] Complex programmes of interventions represent institutions of both programmatic and implementation value, aimed at overcoming the model of traditional planning and rigid zoning of the territory, through the integration of different types of intervention, including works of public interest (secondary urbanization) and the possible competition of operators and public and private financial resources "for the conversion of entire parts of the municipal territory that are obsolete or degraded compared to the emerging urban development"(P. URBANI E S. CIVITARESE MATTEUCCI, *Diritto urbanistico, organizzazione e rapporti*, Torino, Giappichelli, 2000, 235).

[18] See, for example, the case of Cassazione penale sez. VI, 20 ottobre 2016, n.3606, where the crime of corruption aimed at obtaining the change in the urban destination of an area and the consequent permission to build.

[19] As stated in doctrine, "traditionally the most frequent crimes were those of bribery for an official act (granting of building permits), or of extortion for failure to ascertain an abusive work. With the intensification of the consensual aspect not only in the implementation phase of the plans, but also in the planning phase, mainly due to the financial crisis of the municipalities, opportunities for corruption have intensified" (P. URBANI, *L'urbanistica,* in F. MERLONI E L. VANDELLI (a cura di), Volume ASTRID, *La corruzione amministrativa. Cause, prevenzione e rimedi*, Passigli, 2010). See, also, P. URBANI, *Urbanistica consensuale, "pregiudizio" del giudice penale e trasparenza dell'azione amministrativa*. On the general topic of consensuality in the government of the territory and its implications on the principle of legality of the public administration, see M. DE DONNO, *Il principio di consensualità nel governo del territorio: le convenzioni urbanistiche*, in *Riv. Giur. Edilizia*, 5, 2010, 279.

government of the territory[20]. This implies the constancy of the relationships between the regulator and the regulated entities, known as one of the classic causes that favour regulatory capture[21].

On the other hand, consensual instruments are often adopted in order to simplify the relationship between the different local administrations involved in planning, as in the case of the programme agreement, an instrument that has had a strong expansion in the latest years[22], producing an important transformation of traditional forms of urban planning[23]. This tool allows to facilitate the joint action of several public administrations, such as Municipalities, Provinces, Regions, State administrations and other public subjects, involved in the definition and implementation of works or interventions[24]. It automatically produces the variation of urban planning tools and the implicit declaration of public interest and urgency of the works. The programme agreements imply, therefore, automatic changes in the provisions of the general town planning plan and should make it possible to overcome the long timeframes of the ordinary procedure for approval of a variant[25], with a shift in the weight of the government of the territory from the plan to the project[26].

[20] N.A.P. 2016, 65.

[21] On the theory regulatory capture and how the need for information from private individuals constitutes an incentive for the administrations to be captured we can see, among many others, G. STIGLER, *The economic theory of regulation*, in *Bell Journal of Economics,* 2, 1, 1971, 3–21; S. PELTZMAN, *George Stigler's contribution to the economic analysis of regulation*, in *Journal of Political Economy*, 101, 5, 1993, 818 – 832.

[22] M.S. GIANNINI, *Pianificazione*, cit. 873 – 876.

[23] See P. URBANI, *Pianificare per accordi*, in *Riv. giur. edilizia*, 4, 2005, p. 177 ss.; ID., *Dell'urbanistica consensuale*, in *Riv. giur. urb*., 2005, p. 233 ss.

[24] S. CIVITARESE MATTEUCCI, *Accordo di programma (diritto amministrativo)*, in *Enc. Dir.*, agg. III, Milano, Giuffrè, 1999, 20 – 21

[25] In this regard, it has been noted that these instruments of consensual urban planning have produced a "reversal of the relationship with the general land-use plan, in the sense that it is no longer the land-use plan that binds the

In conclusion, among the elements that seem to favour the emergence of corruption in the field of urban planning are: the absence of an organic legislative framework; the fragmentation of competences that contributes to create difficulties in defining the powers of the authorities involved in the decision-making process; the strong political value of decisions on urban planning; the involvement of private individuals in the planning and implementation phase; the proximity between the citizens and the political bodies in the smaller municipalities.

3. THE IDENTIFICATION AND ASSESSMENT OF THE RISK OF CORRUPTION

The widespread and hardly measurable nature of the corruptive phenomenon and the inadequacy of the existing repressive mechanisms[27] have led governments to develop prevention strategies that provide for the planning of anti-corruption controls, aimed at creating operating conditions within the administration that reduce the risk of corruptive behaviour. In Italy, Law no. 190, adopted on the 6th of November 2012, contains "Provisions for the prevention and repression of corruption and illegality in the public administration". The general measures of this law are aimed at developing prevention strategies at the administrative level through the preparation of the National Anti-Corruption Plan and the Three-Year Anti-Corruption Plans in public administrations[28]. The latter are aimed at introducing into the organization of public offices strategies for the identification, assessment, management and monitoring of corruption risk, which highlight both the risks arising from the environment in which the body operates and those related to

implementation phase, but it is implementation that modifies the plan as necessary" (P. STELLA RICHTER, *Diritto Urbanistico*, Milano, 2016, 71).

[26] V. MAZZARELLI, *L'urbanistica e la pianificazione territoriale*, in S. CASSESE (ed. by), *Trattato di diritto amministrativo, Parte speciale, tomo IV*, Milano, 2003, 3335 ss.

[27] See M. DE BENEDETTO, *Corruption and Controls*, in *European Journal of Law Reform*, 1, 2016.

[28] F. MERLONI, *I piani anticorruzione e i codici di comportamento*, in *Dir. Pen. e Processo*, 8, 2013, Allegato 1, 4.

the organization itself, based on the model of internal risk management of private companies [29]. The National Anti-Corruption Plan is a guidance for the administrations for the adoption or update of concrete and effective measures to prevent corruptive phenomena. The corruptive risk in this area concerns both the organisational context within the administration and the external context in which the public body operates. In the first case, it is necessary to focus attention on the effectiveness of internal controls within the Public Administration, in the second case on the effectiveness of external administrative controls on private individuals[30].

The analysis of the risk of corruption aims at determining the impact of the exercise of the public function and the possibility that the exercise of that function may be affected or distorted by interests other than the public interest[31]. The first National Anti-Corruption Plan defined the risk in the public sector as "the effect of uncertainty on the correct pursuit of the public interest and, therefore, on the institutional objective of the administration, due to the possibility that a given event may occur". The "event" is defined as "the occurrence or modification of a set of circumstances that hinder the pursuit of the institutional objective by the administration"[32]. Finally, "risk management" means "all the activities coordinated to guide and control the administration in handling the risk"[33].

[29] For the definition of internal risk management see J. BLACK, *The emergence of risk-based regulation and the new public risk management in the United Kingdom*, in *Public Law*, 2005, 515 – 516. See also J. BLACK, R. BALDWIN, *Really Responsive Risk-Based Regulation*, in *Law & Policy*, 2, 2010.

[30] See M. DE BENEDETTO, *Controlli della pubblica amministrazione sui privati: disfunzioni e rimedi*, in *Riv. Trim. Dir. Pubbl*., 2019, 3, 855. See also L. LORENZONI (2017), *I controlli pubblici sull'attività dei privati e l'effettività della regolazione*, in *Diritto pubblico*, 2017, 3, 779 – 825.

[31] See F. MERLONI, *I piani anticorruzione e i codici di comportamento*, in *Dir. pen. e processo*, 8, 2013

[32] N.A.P. All.1, Subjects, actions and measures aimed at preventing corruption, 12.

[33] Ibid., 23.

The rationale of models based on risk assessment is based on the substantial impossibility of reducing the level of risk to zero and on the awareness that interventions aimed at completely eliminating a hazard would be excessively costly, would in turn create risks and divert public authorities from other tasks. Risk analysis, therefore, tends to replace an unacceptable risk with an acceptable one, to reduce unnecessary or disproportionate interventions[34]. The risk assessment imply an upstream decision by the legislator on the level of risk considered to be bearable[35]: "the concretisation of the elastic concept of danger, which precedes any balance with other values and requirements, cannot disregard - in application of the precautionary principle - the prior determination of an acceptable risk threshold"[36]. The risk management process is aimed at identifying the activities in which the probability of breach of obligations and the impact of non-compliance on the general interest are highest. The risk is assessed based on both the type of activity and the willingness to comply of the subject to be controlled. The frequency and content of the inspection are, therefore, programmed according to a priority scale based on the classification of risks, pursuing the principle of proportionality[37].

[34] V. HEYVAERT, *Governing Climate Change: Towards a New Paradigm for Risk Regulation*, in *The Modern Law Review*, 2011, 6, 820.

[35] "The preventive risk assessment can be carried out, and exhausted at the legislative level, with the indication of the assumptions in the presence of which the consent of the administrative authority must be denied (...) In other cases the law refers to the administrative authority for risk assessment. That is, it assumes that a private activity is a source of risk (for others), but at the same time requires that the assessment must be made in practice by the administration" (G. CORSO, *La valutazione del rischio ambientale*, cit. 160 – 161).

[36] S. COGNETTI, *Principio di proporzionalità: profili di teoria generale e di analisi sistematica*, Torino, 2011, 78.

[37] For a brief illustration of the phases of the risk analysis procedure see DIPARTIMENTO DELLA FUNZIONE PUBBLICA, *Linee guida in materia di Controlli ai sensi dell'art. 14, comma 5 del decreto-legge 9 febbraio 2012, n. 5 convertito in legge 4 aprile 2012, n. 35*, 24 gennaio 2013.

In Italy, the introduction of risk management models by private individuals subject to public control has initially acquired importance for the purposes of judicial control over the legal entities' liability[38]. Subsequently, this instrument assumed an essential role in the context of "punctual checks on compliance with general obligations" by private individuals[39] and in areas where the external supervision of administrative authorities is closely linked to internal controls by corporations[40]. In these areas, risk analysis contributes to the setting of objectives and methods of intervention to limit illegal acts or dangerous events.

The recent Italian anti-corruption legislation has conceived the corruptive risk mainly as an internal element of the administrative organization, highlighting the need to develop prevention strategies aimed at creating operating conditions in the administrations that reduce the risk of corrupt behaviour by public officials, although, as highlighted by some authors, the controls on private activity also constitute a significant opportunity for corruption[41].

[38] See artt. 6 e 7 del d.lgs. 8 giugno 2001 n. 231. Pursuant to the decree, the adoption and effective implementation by private collective entities of risk management models suitable for preventing certain crimes is the means to avoid incurring administrative liability. In this field, the control over the adequacy of the organisational models adopted is subsequent and possible by the criminal judge called upon to assess the so-called organisational fault.

[39] A. MOLITERNI, *Controlli pubblici sui soggetti privati e prevenzione della corruzione*, cit. 207.

[40] "Even in traditional controls, it is not infrequent that the controller contributes to define the parameters of the control, even on a conventional basis with the recipients of its action (think of the circularity of the process of planning and strategic control or the definition of the instruments of the sector in the field of fiscal inductive control)". (M. DE BENEDETTO, *Controlli, II) Controlli amministrativi*, cit. 2)

[41] Art. 1, comma 5 of law 6 november 2012, n. 190, *Disposizioni per la prevenzione e la repressione della corruzione e dell'illegalità nella pubblica amministrazione*, provided that the central government's corruption prevention plan should provide an assessment of the different level of exposure of the offices to the risk of corruption and indicate the organisational interventions aimed at preventing the same risk. It is clear from this provision that in the field of anti-corruption, the planning of controls has been based on the internal risk

4. THE STRUCTURE AND FUNCTION OF THE THREE-YEARS CORRUPTION PREVENTION PLANS

Article 1, paragraph 5 of Law 190/2012 provides that the central government's corruption prevention plan must provide an assessment of the different level of exposure of offices to the risk of corruption in order to identify the organisational measures aimed at preventing the same risk. Paragraph 8 provides that, as part of the three-year prevention plans, the person responsible for preventing corruption shall define the appropriate procedures for selecting and training employees to operate in sectors particularly exposed to corruption and that activities at risk of corruption shall be carried out, where possible, by staff trained at the "*SNA - Scuola Nazionale dell'Amministrazione*"[42]. Paragraph 9 included, among the requirements to which the prevention plan responds, the identification of the activities in which the risk of corruption is highest and the provision of mechanisms for training, implementation and control of appropriate decisions to prevent the risk of corruption. It also provides for the rotation of appointments in the offices responsible for carrying out the activities where the risk of corruption is highest. Paragraph 16 identified a number of procedures, united by the element of attribution of utility by the administration to private parties, in which transparency must be particularly guaranteed, given the high risk of corruption, including authorisation or concession procedures and procedures for the attribution of economic advantages to public and private persons and entities[43]. Paragraph

management model, i.e. the introduction in the organization of public offices of risk identification, assessment, management and monitoring strategies on the model of those adopted by private companies, in order to reduce the risk of conduct that hinders the pursuit of the institutional aims of the administration.

[42] Art. 1 co. 11 Law n. 190 of 6 of November 2012.

[43] The procedures particularly subject to risk identified by law are a) authorization or concession; b) choice of the contractor for the assignment of works, supplies and services, also with reference to the selection method chosen in accordance with the code of public contracts relating to works, services and supplies, referred to in Legislative Decree no. 231/2001. 12 April 2006, n. 163; c) granting and disbursement of grants, contributions, subsidies, financial aids, as well as the attribution of economic advantages of any kind to public and private persons and

60 imposed the adoption of models of organisation and risk management, as part of the three-year plan for the prevention of corruption, also on the regions and autonomous provinces of Trento and Bolzano, local authorities, as well as public bodies and private law subjects subject to their control[44].

The National Anti-Corruption Plan has provided for the identification of risk areas to select the areas where to implement preventive measures. Some risk areas that are mandatory for all administrations are indicated in Annex 2 to the N.N.A., which provides a minimal list, to which are added the additional areas identified by each administration[45]. With respect to these areas, the three-year plan must then identify their characteristics, actions, and tools to prevent risk, establishing priorities for intervention through the following activities.

First of all, the mapping of the processes implemented by the Administration, i.e. the identification of the process, its phases and the responsibilities for each phase, so as to be able to catalogue all the processes managed by the reference Administration in the risk areas.

Once the processes have been mapped within the institution, it is necessary to carry out a risk assessment for each of them. To this end, it is necessary to identify the risk,

bodies; d) competitions and selective tests for the recruitment of personnel and career progression as per article 24 of the aforementioned Legislative Decree n. 150 of 2009. In this sense, see article 16 of Law no. 190 of 6 November 2012.

[44] For the latter, it is provided that "if these entities already adopt models of organisation and risk management on the basis of Legislative Decree no. 231 of 2001 in their anti-corruption prevention activities, they may focus on them, but extending their scope not only to crimes against the public administration provided for by Law no. 231 of 2001 but also to all those considered in Law no. 190 of 2012, on the active and passive side, also in relation to the type of activity carried out by the entity (instrumental companies/companies of general interest)". N.A.P., 33.

[45] Allegato1 N.A.P., Soggetti, azioni e misure finalizzati alla prevenzione della corruzione.

also thanks to consultation and comparison between the parties involved, taking into account the specificities of each administration and of each process, as well as judicial (in particular, criminal or administrative liability proceedings and decisions) or disciplinary (proceedings initiated, penalties imposed) measures that have affected the administration. The risks are then entered in a "risk register". In order to determine the overall risk level of the process, the Plan provides for an assessment of the degree of probability that the event will actually occur and the related economic, organizational and reputational impact. Subsequently, the risk weighting phase takes place, through comparison with other risks and the setting of priorities and urgency of treatment.

The third stage is the treatment of the risk, based on the priorities identified, and the provision of a scale of interventions by the prevention officer. The identification of treatment priorities is a prerequisite for the preparation of the proposed three-year corruption prevention plan.

Finally, the monitoring phase is foreseen, which involves the assessment of the level of risk following the prevention measures introduced, to verify the effectiveness of the prevention systems adopted and, therefore, the subsequent implementation of further prevention strategies.

Annex 5 of the N.N.A. has outlined some risk assessment criteria of the different procedures such as, for example, the level of discretion, the organizational impact, the external relevance, the economic impact, the complexity of the process, the reputational impact, the fractionability of the process and the controls foreseen. Annex 4, then, enumerates some additional measures to prevent the risk of corruption without any claim to completeness and without prejudice to the discretion of individual entities to define others[46].

[46] See P. COSMAI, *La mappatura e la gestione del rischio per i p.t.p.c.*, in *Azienditalia - Il Personale*, 1, 2014, 13-

In essence, the function of three-year plans is mainly to ensure the concrete implementation of the directives provided by the N.A.P. on the basis of the specifics of the context, internal and external, of the organizational structure, identifying the procedures most exposed to possible corruptive phenomena and the related measures to prevent them.

The 2015 update of the N.N.A. has provided principles and methodological indications to overcome the shortcomings found in the risk analysis and management in the three-year plans for corruption adopted since the entry into force of the anti-corruption law. The document specified the contents of the different phases of the risk management process relating, in particular, to the analysis of the context, external and internal; the identification of risk events; the identification of the level of exposure to risk of the activities and related processes; the treatment of risk based on the priorities that emerged during the assessment of risk events and the monitoring of three-year plans for corruption[47].

A recent reform of the legislation regarding the Italian public administration has imposed greater precision in the identification of the main risks and related remedies[48]. The legislative decree on the prevention of corruption, publicity and transparency, implementing the delegation contained in the aforementioned law, has provided for some amendments to Law n. 190/2012, clarifying that it is up to the N.N.A. to identify the main risks of corruption and related remedies[49] and specifying that the three-year plans for the prevention of corruption of central government, in identifying the activities where the risk

[47] National Anti-Corruption Authority, Resolution n. 12 del 28 ottobre 2015, Update 2015 al National Anti-Corruption Plan, 15 – 24.

[48] Legge 7 agosto 2015 n. 124, Deleghe al Governo in materia di riorganizzazione delle amministrazioni pubbliche.

[49] Art. 41, lett. b) D.Lgs. 25 maggio 2016, n. 97, cit.

of corruption is higher, must also consider areas other than those provided for by the N.N.A. and indicate the related measures to combat them[50].

The 2016 update of the N.N.A. has introduced a series of general provisions in order to implement recent legislative changes, international guidelines and to address the critical issues highlighted by the evaluation of the three-year plans for corruption for the period 2016 - 2018. The second part of the Plan contains a series of in-depth studies concerning, on the one hand, those exposed to the risk of corruption (small municipalities, metropolitan cities, professional bodies and colleges and educational institutions) and, on the other hand, certain thematic areas such as the protection and enhancement of cultural heritage, health, and territorial governance.

5. THE 2016 NATIONAL ANTI-CORRUPTION PLAN AND THE PROVISIONS FOR IDENTIFYING AND ASSESSING THE RISK OF CORRUPTION IN THE GOVERNMENT OF THE TERRITORY

As anticipated, the 2016 update of N.A.P. contains an entire section about the area of territorial government. After a first generic identification of the main causes of corruption in the sector – analysed in the first paragraph – it moves on to the identification of some risks inherent, mainly, to the general planning phase at municipal level and identifies the related organizational measures to prevent corruption. The N.N.A. does not consist in a rigid scheme binding on the administrations, but in a simple guideline to support the elaboration of the three-year plans, which, however, must be contextualized and adapted to the specific size and characteristics of each administration. A brief passage identifies the main risk areas in the context of regional, provincial or metropolitan territorial planning, in the environmental or landscape protection regulations that entail significant limitations on the use or transformation of the territory, as well as in the approval of specific variants that provide for cartographic changes in relation to the boundary areas.

[50] Art. 41, lett. i) D.Lgs. 25 maggio 2016, n. 97, cit.

It then moves on to the analysis of planning at municipal level. The processes taken into consideration by the N.N.A. are those of general urban planning, implementation planning and building permits.

Within the General Town Plan several risk areas are identified. First, the approval of specific variants, from which a significant economic advantage may arise for private parties, in terms of increasing the building powers or the value in use of the buildings concerned. The risks identified relate to the increased land consumption that may give an undue advantage to the beneficiaries of the measure, the possible unequal treatment between different operators and the underestimation of the higher value generated by the variant. The N.N.A. does not identify specific preventive measures but has exclusively highlighted the need to careful mapping the processes by the individual P.A. as part of their three-year plans.

Secondly, the risks associated with the methods and techniques used to draw up the plan or variants are highlighted. In particular, the risk is determined by the difficulty of objective and transparent verification of the correspondence between the technical solutions adopted and the political choices underlying them, since the public interests that are actually intended to be pursued are often not clear. Among the measures suggested by the National Anticorruption Authority is the transparency of the reasons that determine the choice to entrust the drafting of the plan to private professionals, as well as the procedures for their identification and the related costs. The assignment must comply with the public procurements' principles. Moreover, it advices agreements between small neighbouring municipalities for the drafting of their respective plans, to achieve cost savings and the acquisition of a broader vision of the territorial context, as well as the direct involvement of technical and legal municipal structures. The importance of a prior analysis on the absence of causes of incompatibility or conflict of interest for all members of the working group is also highlighted. Furthermore, a clear and explicit indication of the general objectives of the plan and the elaboration of general criteria and guidelines for the definition of the consequent planning choices, to be submitted to the participation of the local population, is requested in order to allow the verification of the coherence between territorial policy guidelines and technical solutions.

Thirdly, the risks associated with the publication phase of the plan and the collection of comments are examined. One of the main causes of corruption in this phase is linked to the information asymmetries in favour of private interest groups that can be exploited to guide and condition planning choices. Among the preventive measures, the National Anticorruption Authority has identified the disclosure and transparency of plan decisions, through the circulation of explanatory documents drawn up in non-technical language and the provision of information points for citizens; a strict control on compliance with the publication obligations under Legislative Decree no. 33/2013 by the person in charge of the procedure; an explicit attestation of the publication of the measures and the documents to be attached to the approval measure.

Finally, consideration is given to the approval phase of the plan by the local authorities at a higher level, where the main risk is to amend the plan with the acceptance of observations that are contrary to the general interests of protection and rational land use underlying the plan. The possible preventive measures consist in the prior determination and publicity of the general criteria to be followed in the preliminary investigation for the assessment of the observations; in the specific justification of the decisions to accept the observations modifying the adopted plan, with particular reference to the impact on the environmental, landscape and cultural context and in the subsequent monitoring of the acceptance or not of the observations of private individuals and their motivations. If several local authorities (region, province and metropolitan city) will take part in the process of approving the municipal plans in order to ensure consistency between the various levels of government in the area, a number of risky events are identified, mainly linked to opportunistic inertia of the authorities, superficiality in the preliminary investigation by the person responsible for the procedure and the lack of justification for accepting the municipal counterclaims. The preventive measures, in this context, are based on increasing transparency and strengthening internal control measures, including sample checks, procedural time frames and the content of the documents.

N.A.P. 2016 then goes on to examine the implementation planning phase, which involves a wide range of detailed urban planning tools, including the above-mentioned complex programmes. It should be noted that in the implementation plans the risk is higher

due to the direct proximity of the plan decisions to the economic and financial interests of the individuals concerned.

First of all, private initiative implementation plans are characterized by the presence of a private promoter who agrees on preparing an urban planning tool, in exchange to the realization of primary and secondary urbanization works and the sale of the necessary areas. Inevitably, these instruments have been identified by the National Anticorruption Authority as particularly exposed to undue pressure from particularistic interests. Among the risky events in this area is the possible inconsistency between private initiative implementation plans and the G.T.P., which results in improper land use. On this point, we suggest a greater enhancement of the prescriptive effectiveness of the G.T.P. with a clear and precise definition of the objectives to be achieved during the implementation phase. The preventive measures indicated in the N.N.A. mainly concern the increase of transparency in the procedural phase. For example, the adoption of internal guidelines, subject to publication, that regulate the procedure to be followed, specific forms of transparency and reporting, check lists to verify the requirements to be put in place, as well as the preparation of a register of meetings with the implementing parties. Regarding public initiative implementation plans, the National Anticorruption Authority limits itself to directing the attention of the administrations towards variant plans that produce a reduction in the areas subject to scaler constraints.

The N.A.P. then moves on to the analysis of urban development agreement, considered in doctrine as "the archetype of the public/private agreement in urban planning"[51]. The risk inherent in the stipulation of the agreements does not seem to be as high as that relating to the implementation plans, since the permitted volumes, the use of the areas, and so on are already indicated in the plan. The National Anticorruption Authority has attached particular importance to the convention schemes that set out the

[51] P. URBANI, *L'urbanistica,* in F. MERLONI E L. VANDELLI (a cura di), Volume ASTRID, *La corruzione amministrativa. Cause, prevenzione e rimedi*, Passigli, 2010, 1.

commitments made by the private party for the execution of the urbanisation works connected with the intervention. Administrations are urged to adopt convention schemes - of a type designed to ensure comprehensive and transparent regulation of all aspects relating to the agreement. Possible risky events relate to the calculation of urbanization charges, the identification of urbanization works, the transfer of areas necessary for primary and secondary urbanization works and the monetization of standard areas. With regard to urbanization charges, in order to prevent the risk of their inadequate measurement, it is suggested to introduce a certification that the parametric tables on which the charges are calculated have been updated, that they have been published and that the calculation has been entrusted to personnel other than those who is in charge of the investigation of the implementation plan and the convention. As far as the identification of the works, the risks are represented either by the predominant benefit of the private operator, or by the circumstance that the costs of implementation may be higher than those that the municipality would face with direct execution. Among the preventive measures proposed in the N.N.A. there is the obligation of a specific reasoning about the need to have the secondary urbanization works carried out directly by the private builder and the provision of an opinion of the person responsible for planning the public works. As regards the identification of the areas to be acquired in order to carry out the urbanization works, the risks relate to the quality and quantity of the areas and the preventive measures concern the identification of a person responsible for the acquisition of the areas, as well as the monitoring of the municipality on the timing and fulfilment of the acquisition. If, as an alternative to the sale of areas, it is envisaged that they will be monetised and a sum of money paid to the municipality instead of the sale of areas, it is suggested that general criteria for quantifying the value of the areas will be established, that checks will be introduced by collective bodies, and that payment will be made at the same time as the agreement is signed. Finally, with regard to the execution by private operators of urbanization works, reference is made to the risks associated with the execution phase of public works and the need for effective supervision, possibly entrusted to an internal technical structure set up for this purpose.

N.A.P. 2016 dedicates its last paragraphs to the control of building permits, governed by Presidential Decree 380 of 2001. In this context, the presence of centralised

technical bodies, such as the "One Stop Shop for construction" and the "One Stop Shop for production activities", the fact that the activity of issuing building permits and checks in relation to applications submitted by private individuals for liberalised activities is of a restricted nature, and the presence of unified and transparent forms are all preventive elements of corruptive risk. Nevertheless, corruption offences in this area are particularly frequent. On this point, the delicate question of the relationship between criminal judge and administrative action has fuelled the interest of the legal scholars, which have observed the significant incisiveness of the criminal courts' review of decisions taken by the administration in the construction sector[52].

6. CONCLUSIONS

The government of the territory represents an area particularly exposed to maladministration. The analysis of the main sources of risk and the consequent preventive strategies proposed by the National Anticorruption Authority in 2016 revealed that the characteristics of urban planning make this matter, in part, unsuitable for the implementation of the classic prevention mechanisms introduced in the three-year anti-corruption plans.

The risk analysis model, generally adopted for the preparation of three years plans, is based on the introduction of organizational measures within the administrations, aimed at clearly identifying the areas of responsibility of each official involved in the various procedures within the administration and to intervene preventively on the most delicate phases, through the imposition of rotation obligations, double checks systems, and so on. Such one-off measures appear to be effective in the most restricted contexts, such as in the field of building practices, where the key decision-making role is played by public officials.

[52] B. TONOLETTI, *La pubblica amministrazione sperduta nel labirinto della giustizia penale*, in *Riv. Trim. Dir. Pubbl.*, 2019, 1, 76 e ss.

On the contrary, the corruptive risk in urban planning is part of a particularly wide and difficult to control dimension, with a strong political imprint. The most important decisions in this field are taken by municipal and regional government bodies. Moreover, in the increasingly numerous cases of consensual definition of urban planning arrangements, the involvement of the private sector is a further obstacle to the introduction of preventive control systems.

Given these peculiarities, the most effective prevention measures seem to be those linked to participation and transparency.

First, the extent of the discretionary power in the preparation of acts with a general and planning content attributes central importance to the discipline of the procedural investigation and to the rules on participation[53]. The rights of participation in matters of territorial governance are provided for by the sectorial regulations, since they are not applicable to the activity of the P.A. aimed at issuing acts of general and planning content[54]. This creates a proliferation of participatory models, introduced by regional laws. The latter frequently provide for rather significant participatory instruments, such as, for example, the submission of a preliminary draft plan to the consultation of economic and social stakeholders or to the observations of the associations concerned. The possibility for a large number of actors to participate in the procedure undoubtedly constitutes a mechanism for greater awareness of public decisions and reduces opportunities for corruption.

Regarding transparency, Legislative Decree no. 33 of 2013 on publicity and transparency duties for public administrations has dedicated a specific provision to the planning and governance of the territory. It requires public administrations to publish, in

[53] See G. DELLA CANANEA, *Gli atti amministrativi generali, passim.*, in particolare 269 e ss. M. DE BENEDETTO, *Istruttoria amministrativa e ordine del mercat*o, Torino, 2008, 127 – 135; N. RANGONE, *Le programmazioni economiche. L'intervento pubblico tra piani e regole*, Bologna 2006, 170.

[54] Art. 13 legge 7 agosto 1990, n. 241.

the first place, the acts of government of the territory, including territorial plans, coordination plans, landscape plans, urban planning, general and implementation instruments, as well as their variants. In addition, it establishes that "the documentation relating to each procedure for the submission and approval of proposals for private or public initiative urban transformation as a variant of the general urban planning instrument, as well as proposals for private or public initiative urban transformation as a variant of the general urban planning instrument that involve building priorities in return for the commitment of private parties to carry out extra-charge urbanisation works or the transfer of areas or volumes for purposes of public interest are published in a special section on the website of the municipality concerned, which is continuously updated". Compliance with these publicity obligations represents an essential condition for the effectiveness and the validity of the acts[55].

In conclusion, on the one hand, the attention given by the National Anticorruption Authority to the area of government of the territory and the consequent inclusion of this area in the 2016 N.A.P. has undoubtedly constituted an important evolution, implying a greater awareness by the administrations on the need to focus their resources on the prevention of corruption in this area. On the other hand, however, the three-year plans alone and the specific measures classically foreseen in the prevention of corruption in other sectors do not seem sufficient to combat corruption within the territory government field, especially with regard to the urban planning. Therefore, the existing measures on participation and on transparency need to be strengthen to allow widespread public scrutiny of the political decisions underlying planning choices.

[55] Art. 39 decreto legislativo del 14 marzo 2013, n. 33.

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INCLUSION, COEXISTENCE, AND RESILIENCE: THE NEW FRONTIERS OF ENVIRONMENTAL LAW ENCODED IN THE GENES OF INDIGENOUS LAW

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1. INTRODUCTION

"*Another world is not only possible, she is on her way.*

On a quiet day, I can hear her breathing" (Arundhati Roy)

This article summarises the results from a research project on Indigenous Law and Methodology presented at a workshop funded by the Young CAS Program (Center for Advanced Study at the Norwegian Academy of Science and Letters) in Oslo on July 2-7 2018[1]. Continuing the conversations initiated in 2018, the authors have been reflecting on the connecting nodes in a matrix intersecting indigenous legal systems and the narratives of a new environmental cosmology that has at its core the protection of Nature rights and the consequent definition of human responsibilities[2]. The initial inspiration for the project was on the understanding of the deep contribution that Indigenous knowledge has to offer in encouraging change in law and research, as well as in enriching the understanding and the value-sets of the Western legal systems.

Indigenous knowledge, observations, cosmologies, and traditions (that, in one expression, we define as "Indigenous law") have drawn criticism for adopting 'non-scientific' and 'non-objective' methods. The way to respond to these challenges are through rejecting accounts of objectivity that rely on the universalization of models (State-oriented perspectives, colonialist approaches, and asymmetric relations of powers) and endorsing

[1] For a reference to the program and the project, see https://cas.oslo.no/in-depth/youngcas-2018-rebuilding-indigenous-law-article3268-1167.html, last visited in July 2020. All authors would like to express their gratitude to Kelly Wu for the work of proofreading of the present paper.

[2] An in-depth analysis of the conversations is developed in the book G. PAROLA-M.P. POTO (eds.), *Inclusion, Coexistence and Resilience: Key Lessons Learned from Indigenous Law and Methodology*, Ed. Multifoco, Rio de Janeiro, 2019.

alternative proposals that make room for Indigenous worldviews (by means of the "Indigenous methodology"). The Indigenous methodology, therefore, takes due account of Indigenous and local perspectives and integrates them with further relevant existing data on key issues such as human rights protection, procedural and substantive environmental rights, food safety and security, right to free movement of peoples, immigration, and gender. At the heart of the Indigenous methodological approach is a deep and abiding commitment to identifying, articulating, and applying the intellectual resources from Indigenous legal orders to the work of rebuilding Indigenous citizenries and governance.

In other words, the Indigenous methodology brings back the treasure of Indigenous law together with its teachings. In this vein, the article identifies three key lessons learned through adopting an Indigenous methodology that takes into account Indigenous perspectives, traditions, and worldviews. These key lessons connect to the values of coexistence, inclusion, and resilience and culminate in a body of knowledge that investigates, scrutinizes, and demonstrates the epistemic reliability, objectivity, and inner values of Indigenous perspectives.

The paper is divided into five sections. After this brief introduction (section 1), section 2 (Parola and Poto) examines the constituent elements drawn from the training on Indigenous law and methodology: inclusion, coexistence, and resilience. Section 3 (Porrone) refers to the need of inclusion and interaction between different legal orders (State law and Indigenous and traditional peoples' legal orders), focusing on the case study of the Belo Monte Hydroelectric Power Plant in the Xingu Basin, Brazil. This section raises the pressing question on equality, in its definition of handling identical situations in the same manner and of handling different situations in different manners. From the methodological viewpoint, this section combines grounded theory and fieldwork and offers concrete suggestions on the equal treatment of tribal communities and Indigenous groups. Thus, demonstrating the possibilities towards a more inclusive society. Section 4 (Tsiouvalas) examines the coexistence of diverse legal orders using the case of Coastal Sámi Marine Tenure. This section develops the theme on the Indigenous legal traditions of the Northern Coastal peoples in the county of Troms (Sea Sámi and traditional fishers) still kept alive and co-existing with the Norwegian system of coastal governance. Moreover, the

section encourages the reflection on past wounds and injustices and on the possibilities to revitalise ancient traditions and knowledge around the Indigenous marine tenure system, with the aim to protect nature and its peoples. Section 5 (De Gregorio) focuses on resilience with a case study on the Arctic and the local and Indigenous peoples' response to the challenges posed by climate change. This contribution reflects on the integration of Indigenous knowledge systems and modern science related to food traditions, the ability of its integration on developing a co-evolution of knowledge, and its influence in shaping resilient societies. Section 6 (Parola and Poto) reports concluding remarks on the findings.

2. KEY LESSONS DRAWN FROM THE TRAINING ON INDIGENOUS LAW AND METHODOLOGY

The workshop on Indigenous law and methodology helped open up new perspectives on possible blended methodologies that combine legal analysis, anthropology, sociology, social, and gender studies.

Three key lessons were drawn from the interdisciplinary analysis: the value of inclusion and openness between humans and non-humans, individuals, collectives, and the natural world; the value of a peaceful coexistence of legal orders and perspectives; and the scrutiny of the Indigenous world's ability to be resilient towards change.

These interconnected key lessons that emerged from the words of our contributors are also shared values in the Indigenous world.

Firstly, it is from Indigenous views that we learn the importance of inclusion. It is indeed a shared Indigenous value, the idea that human beings are active caretakers of each other and of the planet. The cooperation in the construction, maintenance, and protection of the web of life carries a sense of oneness between individuals, communities, and the natural world[3]. Indigenous cosmologies teach the importance of embracing our deep connection

[3] G. CAJETE, *Native science: Natural laws of interdependence*, Clear Light Publishers, Santa Fe, 1999.

with nature, our ancestors, and all living beings. Such profound interconnection between human beings and nature has reverberations on the legal domain as well, suggesting the idea that official legal orders have to include and be interconnected with norms that defend and protect peoples, communities, and the natural world against the violation of fundamental rights.

Secondly, the Indigenous world teaches the value of coexistence and is placed as a paramount value according to Indigenous ontologies[4]. As Indigenous societies are inclusive of human and non-human beings (animals, trees, water, fire, wind, earth, and all kinds of spirits), they also accommodate and ensure that Indigenous and non-Indigenous worlds, ontologies, and actors encounter and coexist in a peaceful and lasting relationship. The effects on the legal world enable the coexistence of diverse legal systems in an interactive manner and with a relative degree of autonomy. In the same vein, Indigenous legal systems and international and national laws on Indigenous Peoples should aim to coexist in a harmonious manner.

Therefore, inclusion and coexistence are the golden rules governing the interconnection of different legal orders, whereby these orders learn from each other the value of acceptance, comprehension and exchange, and reconciliation.

The value of resilience teaches the third lesson in facing adversity, trauma, tragedy, threats or changes. Resilience can be learned from Indigenous legal orders that have withstood the wave of marginalisation. These legal orders developed around systems of governance that are now exemplary models of mitigation and adaption in challenging times, where both societal and climate changes are threatening humans and non-humans.

[4] SOREN C. LARSEN-J.T JOHNSON, *Being Together in Place: Indigenous Coexistence in a More Than Human World*, University of Minnesota Press, Minneapolis, 2017.

The three key lessons operate at a level of law and legal systems (Indigenous and non-indigenous), bringing out new insights in the way of approaching the law, in the consolidation of methodologies, and research perspectives that innovatively enhance the interactions between Indigenous and non-Indigenous views.

Thus, the three key lessons are not only illustrative of new interactions between legal orders and cultures. The lessons also demonstrate a new participatory and inclusive research approach as the way forward to the solitary confinement of screen-based research, that too often becomes self-referential and self-destructive. Participants' observations and interactions between researchers and participants demonstrate the way towards novel approaches in legal research: research team members and communities co-create the research results, become part of the same observation process; and are immersed in the same setting and reality.

In this manner, the observer alters the observed phenomena to the very degree of their participation (the phenomenon is known as "Heisenberg observer effect"[5]. Ultimately, researchers are free from the yoke of being self-referential and can rediscover their purpose.

3. INCLUSION

Lessons on the inclusion of Indigenous law within Western legal thinking and on the need for states to adapt and welcome new concepts of justice can be drawn from Indigenous and tribal peoples' struggles around the world. These struggles have been developed from the construction of infrastructures, large-scale projects, and concessions for the exploration or exploitation of natural resources in ancestral or traditionally occupied

[5] C. MARSHALL-G.B. ROSSMAN, *Designing Qualitative Researc*, SAGE Publications, 2016.

territories[6]. Often times, Indigenous Peoples and tribal peoples engaged in negotiations are confronted with capitalistic notions and their ethics are restricted to civil and administrative law terms. The rights of Indigenous Peoples and tribal peoples are then only recognised and visible before public authorities under these limitations. This section argues that states should adapt and include new concepts of justice and to come to terms on Indigenous and tribal peoples' cosmologies for three reasons: 1) to guarantee the rights of Indigenous Peoples and tribal peoples to govern themselves within their recognised collective territories; 2) to monitor the impact of public interventions in these areas and to ensure just remedies; and 3) to embrace new forms of thinking, ancient wisdoms, and practices of care beyond monetary thinking, grounded in the strong awareness that humans and nature are two sides of a whole.

Ribeirinho is the general term used to appoint a range of denominations of the peasant groups living in the Brazilian Amazon and is a category that identifies as tribal. These sociologically diverse communities have some common features in their strong relationship with the environment and the natural resources[7]. In the Xingu Basin, *ribeirinho* groups are better known as "*beiradeiros*", literally meaning "people living in the waters"[8] or "*Povos das Águas*"[9] as they spend most of their life on the edges of the river. From a

[6] Inter-American Commission of Human Rights, *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter American Human Rights System*, OAS official records, OEA/Ser.L/V/II. Doc. 56/09, 2010.

[7] ILO Convention No. concerning Indigenous and Tribal Peoples in Independent Countries 169; Decreto Legislativo n. 143, 2002. Aprova o texto da Convenção nº 169 da Organização Internacional do Trabalho sobre os povos indígenas e tribais em países independentes (from the Brazilian Diário da Câmara dos Deputados) and Decreto n. 6040, Institui a Politica Nacional de Desenvolvimento Sustentável dos Povos e Comunidades Tradicionais (Brazilian Secretaria-Geral da Presidência da República).

[8] Translated from Portuguese by the author.

[9] E. SCHERER, *Mosaico terra-agua: a vulnerabilidade social Ribeirinha na Amazônia – Brasil*, VIII Congresso Luso-Afro-Brasileiro de Ciências Sociais Coimbra 16-17-18 de Setembro, 2004.

sociological viewpoint, the *ribeirinhos* represent a peasantry's fraction, whose livelihood is characterised by the combination of diverse activities, alternating between subsistence farming and the marketplace[10]. Production depends upon a number of variables such as the availability of the workforce, the rate of family integration, and of the development of social units. Consequently, the configuration of each community requires wide plasticity and implies a certain degree of unpredictability in the communities' everyday achievements. This living pattern undoubtably reproduces capitalistic dynamics without completely depending on them[11]. Deep roots in a complex web of social ties combines kinship and the neighbourhood by virtue of exchange and reciprocity. Yet, these people do not live in isolation. The *ribeirinhos* are rather strongly involved with the city of Altamira. Families are willing to sacrifice the group's unity or are willing to alter ways of life along the river in order to move close to the city to provide younger generations with the access to education. Temporary separations are also necessary for accessing social services and utilities such as hospitals, medical visits or the marketplace. These habits generally entails the choice of a double housing. On the one hand, there are the dwellings of forestry areas usually gathered around twenty to thirty buildings consisting of wooden stilt houses in an area sufficiently close to the river. This is for the purpose of permitting families to easily reach the water during the dry season. On the other hand, households in the urban area are settled at the edges of the city, where flooding occurs periodically in the Ambé, Altamira, and Panelas streams. The proximity to water is crucial in order to grant access to the city through the use of narrow traditional boats.

The social structure of the *ribeirinhos* depend on domestic relations of reciprocity and economic cooperation. Domestic groups do not exclusively include family members. Instead, they extend to other individuals of the same community closely connected to each

[10] S. BARBOSA MAGALHÃES-M. CARNEIRO DA CUNHA, *A expulsão de Ribeirinhos em Belo Monte. Relatório da SBPC*, SBPC, São Paulo, 2017.

[11] *Ibid.*

family *nucleus* for "moral or ritual" reasonings[12]. Hence, cooperation is not based on the neighbourhood assumption, but on knots of abstract nature and solidarity.

Since 2015, about 40.000 *ribeirinhos* were displaced by the Brazilian government due to the construction of the Belo Monte Hydroelectric Power Plant (the Former Altamira Complex), the world's third largest dam part of the *Programa de Aceleração do Crescimento do Governo Federal* (PAC). The *Plano Básico Ambiental* (PBA)[13] ruled the displacement procedure, acknowledging that social impacts caused by development projects were often based on western conceptions of territorialisation. Therefore, it was suggested to have an inclusive policy that could consider case-by-case needs beyond a strictly economic evaluation. Nevertheless, the identified forms of remedies were the following: 1) pecuniary compensation; 2) assisted re-allocation (*carta de credito*); and 3) collective urban re-settlement (*Reassentamentos Urbanos Coletivos* (RUC)).

Pecuniary compensations for tribal peoples amounted to R$ 38.853[14], while non-members received R$ 48.058. This discrepancy demonstrates that the traditional manner of occupying and using land did not have an impact on the valuation process of the possessed territories. The *ribeirinhos* did not receive specific treatments or an adequate compensation for the suffering and moral damages. The amount of money received was not even sufficient to cover the value of the original lands, especially for those who could count on a double housing before eviction.

[12] S. BARBOSA MAGALHÃES-M. CARNEIRO DA CUNHA, *A expulsão de Ribeirinhos em Belo Monte. Relatório da SBPC*, cit.

[13] NORTE ENERGIA USINA HIDROELÉTRICA DE BELO MONTE, *Relatório Belo Monte Projeto Básico Ambiental Componente Indígena: dialogo permanente com as comunidades indígenas*, 2016.

[14] In compliance with the *Termo de Autorização de Uso Sustentável* (TAUS).

Assisted re-allocation took place in 2015 in the form of *Reassentamento em Ilha Remanescente* (RIR)[15] and in the new islands born after the beginning of the dams' construction or on the edges of the Xingu River in 2016, raising conflicts among people who have been re-settled and causing troubles for the traditional means of cultivation.

The case of urban resettlement arranged the *ribeirinhos* in RUCs in Água Azul, Casa Nova, and Jatobá e São Joaquim villages near the city of Altamira. Despite the fact of being called "collective", this solution did not re-allocate each community altogether. Instead, it broke collective social relations. Dwellings did not comply with the traditional living habits of these peoples[16]. Moreover, in these sorts of stretches of small houses, it lacked an integrated public transport system connecting the RUC with the closest inhabited area (Altamira). Therefore, no direct access to social services was ensured.

As a matter of fact, displacement disregarded the dense social nets of *riberinhos*, disarticulating the traditional mechanisms of their territorial administration. The displacement reduced their capacity of acting freely in a territory by delimitating their households. In the case of RUCs, it prevented them from having a contact to the river, a principal source of income and sustenance for family members. This resulted in a shift from an economic model based on agro-extractive activities to an urban and capitalist pattern. Furthermore, it excluded many people from the resettlement process.

Even so, there are hopeful alternatives and improvements in the manner states and corporations interact with Indigenous and tribal peoples and nature are based on the principles of inclusion, respect, transparency, and openness beyond Western norms.

[15] Settlements in portion of Islands that emerged after the dams' construction.

[16] M. FERNANDES DA ROSA, *Os Atingidos de Belo Monte Experiências de sofrimento e agravos à saúde no contexto de um megaprojeto hidroelétrico na Amazônia brasileira*, PhD Thesis in Sociology, Faculdade de Economia da Universidade de Coimbra, 2016.

In the case of the *ribeirinhos*, credit can be given to the cosmo-visions of tribal peoples and to respond to the moral damages including the distress of being removed from the river; the grief from the loss of habitats, where the tribal groups used to develop their collective identity; the suffering from the destruction of the environment, towards which these peoples developed a symbiotic relation; the sense of desolation brought by the involuntary break of each family's social ties; and the discomfort of having to accept state's choices and decisions.

4. COEXISTENCE

The relationship of local and Indigenous communities to the natural world differs fundamentally from the relationship of nation-states to nature. Nevertheless, the basic concept that norms exist and that regulate the relation between human beings and the environment on which they live, is common to both conceptual understandings[17]. Rich ethnographic documentation of human uses of seascapes provides tangible examples, where Indigenous and local community-based laws and systems of tenure have extended to the sea and have helped over generations in the use and sustainable management of the marine environment. In examining the efficacy of legal regimes to govern the world's oceans and coastal regions, it has recently become clear that the rationale of ocean governance policies should be reoriented and become receptive to diverse legal orders that are complementary to each other[18]. Aiming to elaborate on the coexistence of different regimes of ocean governance between Indigenous coastal communities and contemporary legal frameworks, this section summarises the results of fieldwork conducted in Coastal Sámi communities of

[17] J. PERRIN, *'Legal Pluralism as a Method of Interpretation: A Methodological Approach to Decolonising Indigenous Peoples' Land Rights under International Law'*, in *Universitas*, 15, 26, 2017, 23-60.

[18] M. KOSKENNIEMI, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission*, A/CN.4/L.682, 2006; PAUL S. BERMAN, *A Pluralist Approach to International Law*, in *The Yale Journal of International Law*, pp. 32, 2007, 301-329.

Kvænangen fjord in Norway during the winter of 2018/2019. The background of this study is presented along with the research tools of the fieldwork and a brief summary of the main findings.

The Coastal Sámi Indigenous people have historically inhabited the coastal fjord areas of northern Norway, with the majority of them living in the geographic area of the current county of Troms and Finnmark. It is estimated that settlements in these areas date back to approximately 10,000 years ago, while the origins of the Sámi people can be traced to an era when the first distinct ethnic groups emerged in the region[19]. For hundreds of years, Norwegians and Coastal Sámi had coexisted harmoniously alongside the migrating mountain Sámi reindeer herders, who mainly used the coasts during the summertime. Traditionally, the Coastal Sámi have relied on subsistence activities such as small-scale fishing and farming[20]. Although limited evidence exists about the legal culture of the Coastal Sámi, it has been recorded that several coastal communities of the region regulated the access to resources attached to their territories from time immemorial, based on customary norms and local governance patterns[21]. The Sámi have witnessed a long forced assimilation policy for over a hundred years, the modernisation and industrialisation of the fisheries sector in the early 20th century, and from the 1980s onwards Norway's constant regulatory measures on fisheries. As a result of these events, management of the traditional Coastal Sámi livelihood of fishing in the area of the case study has decreased over a long

[19] S. PEDERSEN, *The Coastal Sámi of Norway and their rights to traditional marine livelihood*, in *Arctic Review on Law and Politics*, 3, 1, 2012, 51-80.

[20] L.I. HANSEN, *Sámi Fisheries in the Pre-modern Era: Household Sustenance and Market Relations*, in *Acta Borealia*, 23, 1, 2006, 56-80.

[21] I. BJØRKLUND, *Property in Common, Common Property or private property: Norwegian Fishery Management in a Sami Coastal Area*, in *North Atlantic Studies*, 3, 1, 1991.

period, followed by the erosion of local resource management systems[22]. In contrast, a state-centred fisheries framework has been consolidated for the last few decades across the Norwegian coast, ruling in favour of large-scale industries.

For the purposes of an extended project dealing with marine resource management in Coastal Sámi areas, fieldwork was conducted in Kvænangen fjord and in the adjacent coastal communities of Spildra and Burfjord in the winter of 2018[23]. The fieldwork comprised of participant observation in small-scale fishing in Kvænangen; assistance in fish processing and selling at a local market in Burfjord; accommodation in the coastal settlement of Dunvik; and travelling alongside the captain of a cargo ship from Burfjord to the island of Spildra. Participation in these activities demonstrated that remnants of an intracommunal marine tenure system are still used in Kvænangen fjord by the local population. Although all of the project's participants operate within state law and the state's fisheries framework, they still use a customary system of tenure to navigate in the fjord and delimit the individual fishing area for exclusive access to marine resources. According to the project's participants, this form of community-based governance of the marine space has contributed to the sustainable utilisation of the marine environment and its resources for generations. Such a perception of exclusive access to marine resources is incompatible with the state's understanding of access to marine resources, provided in the Marine Resources Act which secures equal access to all Norwegian citizens. Following the state's regulations, local fishermen cannot prevent others from fishing in the fjord. However, in their interactions with each other, they still distribute marine resources in a traditional way and acknowledge the normative value of the local tenure system.

[22] E. EYTHÓRSSON, *The Coastal Sami: a 'Pariah Caste' of the Norwegian Fisheries? A Reflection on Ethnicity and Power in Norwegian Resource Management'* (S. JENTOFT-H. MINDE-R. NILSEN eds.) *Indigenous Peoples Resource Management and Global Rights*, Delft, Eburon Publishers, 2003, 149.

[23] An extended discussion of this project was originally presented in A. TSIOUVALAS, *Mare Nullius or Mare Suum? Using Ethnography to Debate Rights to Marine Resources in Coastal Sámi Communities of Troms*, in *The Yearbook of Polar Law*, 11, 1, 2020, 245-272.

The case study from Kvænangen is an example of conflict between local legal traditions and their official state counterpart. This incompatibility could be an indicator of the divergent way as to how the local community and the Norwegian state conceive marine resource management. In the context of conflicting legal orders, legal pluralism can be a particularly valuable tool. A pluralistic ocean governance framework could harmoniously accommodate, next to state law, legal orders that stem from Indigenous conceptions of the natural world. International soft law instruments such as the *Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication*[24] and the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*[25] explicitly call for the acknowledgement of local and Indigenous forms of fisheries and tenure management. In light of these instruments, pluralism should be understood as a constitutive value of contemporary systems of ocean governance and marine resource management policies. While there are notable examples of such developments in national jurisdictions around the globe, Norway has not yet recognized local systems of customary marine tenure or Indigenous rights to saltwater fisheries.

[24] THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication*. Rome: FAO Office of Knowledge Exchange, Research and Extension, 2015.

[25] THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *Voluntary Guidelines on the responsible Governance of tenure of land, fisheries and forests in the Context of national food security*, Rome: FAO Office of Knowledge Exchange, Research and Extension, 2012.

5. RESILIENCE: STORIES FROM THE ARCTIC

5.1 Experience of Resilience from Indigenous Knowledge in the Global North

This section is based on the premise that problems such as hunger and food insecurity are not only occurring in the global South[26]. Even the Indigenous Peoples of the global North, bordering the Arctic region[27], are embedded in contexts and situations of structural poverty. As for all Indigenous Peoples in the world, their survival is closely linked to the region in which they reside, retaining its knowledge, upholding traditions, and preserving biodiversity. These elements contribute to the shaping of their own food systems, which also determines their history and identity. However, the challenges that Arctic and Sub-Arctic Indigenous Peoples have been facing over the last decades[28] are directly and invasively affecting their carefully nurtured homes in pristine territories.

Among them, some decide to leave and take refuge in urban settlements, thus leaving huge rural territories in the hands of myopic national and international policies. Others decide to stay, making climate-resilient solutions a reality. The case of the reindeer herders in Norway and Siberia is remarkable.

[26] The Food and Agriculture Organization of the United Nations and others, The State of Food Security and Nutrition in the World 2018. Building climate resilience for food security and nutrition (FAO 2018) <www.fao.org/3/ I9553EN/i9553en.pdf> accessed 20 August 2019.

[27] Sámi from the northern territories of Norway, Sweden, Finland, and the Kola Peninsula; Nenets from the Siberian Arctic; Aleut People, or "Unangan", as they use to call themselves, from Aleutian Islands in Alaska; Tungusic Peoples of Siberia; Yakuts from northeastern Siberia; Inuit or Eastern Eskimo in Alaska, Canada and Greenland; and Yupik or Western Eskimo between Siberia and Alaska. These are just some of territories home to the Indigenous populations in the Arctic.

[28] Including overexploitation of nature, oil, and gas extraction projects, commercial fishing activities, and the systematic deforestation of large parts of the Great Northern Forest by the paper industry.

Sámi and Nenets people are engaged in environmental matters on a daily basis. Temperatures are rising in Finnmark (northern part of Norway) and the Yamal-Nenets Autonomous Region of Russia. The consequent shortening of the winter season is severely threatening the survival of reindeers, altering their nutrient availability and transhumance towards colder areas. The need to safeguard an animal species, which has a high symbolic value in the eyes of Sámi and Nenets people both in terms of economic livelihood and cultural belonging has resulted in the elaboration of concrete measures to adapt to increasingly unpredictable climate circumstance. To this end, local shepherds have coupled their millennial knowledge and care for the environment with the most advanced engineering technology, thus bridging the distance between Indigenous and socio-scientific expertise. From this mixture of know-hows, the IPY EALAT (acronym for "Reindeer Herding in a Changing Climate") was born[29].

From the early 2000, this research project involves a heterogeneous team of experts -spanning from the National Aeronautics and Space Administration (NASA), the Association of World Reindeer Herders, to anthropologists, philosophers, and geographers – that assess the vulnerability of reindeer herders, and provide them with concrete responses to climate threats. The reliability and predictability of new technologies combined with the ancient Indigenous art of observing natural cycles, have identified factors capable of influencing reindeer pastures (*ealat* in Sámi language), including climate change. This has allowed herders to modify pasture patterns.

[29] N.G. MAYNARD-B.S YURCHAK-Y.A. SLEPTSOV- J.M-S. MATHIESEN, *Space technologies for enhancing the resilience and sustainability of Indigenous Reindeer Husbandry in the Russian Arctic*, Proceeding of the 31st international symposium on remote sensing of environment, global monitoring for sustainability and security, Saint Petersburg, 20–24 June 2005.

It goes without saying that the goal of IPY EALAT is ambitious and appropriate to the trying times Indigenous people are experiencing in their homelands. However, the unique aspect concerns the actors of such an initiative, where Indigenous Peoples are not under study, but rather active actors in making the right decisions.

5.2 Strenghtening Resilience: Knowledge Integration and Co-Production

The willingness to adapt and respond positively to a quickly occurring transition, the ability to promptly and creatively organize, as well as the flexibility in combining one's own customs with a science-based methodology, has enabled Indigenous communities to work out innovative methods. As a result, this would allow them to remain on their lands of origin and to become resilient. Resilience stories form part of a universe of independent initiatives that make sure that the cultural, social, and economic needs of Arctic communities are embraced. These experiences become concrete models of activism at the local level, where Indigenous communities' knowledge is highlighted, prioritized, and corroborated by science and academia.

Therefore, this section describes a higher level of resilience.

Driven by the necessity of creating a safe space, where to maintain continuity with the oldest living cultures on Earth, projects such as IPY EALAT reframe the way Indigenous landscapes are portrayed. This has marked a significant shift towards de-constructing the dichotomy between officially recognised science and non-recognised knowledge. The adoption of a comprehensive methodology to address socio-economic and environmental challenges does not remain a guiding principle, as it is followed by the translation into practice and monitoring of concrete models of inclusive participation by those most affected by food insecurity.

To conclude, resilience stories deserve to be told and stand for political symbols of transition. These easily disclose the inadequacy and limits of our current exploitation patterns and recognise the knowledge coming from the complexity and diversity of local and Indigenous systems, as a true heritage rather than folklore. For this reason, small

experiences of change coming from the custodians of biodiversity should be carefully cultivated and underpinned, such as those of Indigenous communities. It does not matter if these experiences are too small to counter the strong powers of the world-leading economies. All will listen to and witness their strengths, voices, and multitude.

6. CONCLUDING REMARKS

Exposing ourselves to the Indigenous world and reflecting upon the wounds of our beautiful planet and its human and non-human inhabitants equipped us with a long-term vision that starts from and goes beyond the horizon drawn around inclusion, coexistence, and resilience.

Human influence on natural degradation requires a shift in the understanding of our planet's treasures as exploitable resources to one that recognises the coexistence of self-regulated, comprehensive systems of physical and human components. In response to this timely need, our vision looks at a new world informed by nature's principles, mirrored, encompassed and fully developed by Indigenous worldviews. To implement the idea of fully protect nature, by recognising it as a living being, it will probably require the development of a third and new space where State and indigenous paradigms converge to support nature and to respond effectively to climate threats. A new ontology for environmental governance, one which embraces a nature-centred paradigm, rather than being state or human-centred, calls for a new legal vocabulary, based on the laws of nature (holism and interconnectedness) and translated into the principles of equality, universality and inalienability as the cornerstones of the ontology.

Holism asserts that the natural world and human beings have an identical relationship in a level of reality, in which all exist as a part of a unified and indivisible whole. This provides a very strong basis for recognizing the rights of nature and demonstrating the appropriateness of a rights-based regime that involves both nature and humans, founded on equality, universality, inalienability. First, holism affirms the idea of equality, according to which there is no individualization that can assert or establish any hierarchy, between humans and nature, or among humans. Second, the fact that nature and

individuals are in an equal relationship supports the concept of rights that apply universally, to nature and to humans. Third, the interconnectedness of humans and nature, deriving from holism, implies that both nature and human rights are inalienable: no aspect of each connected level can be extracted and alienated from one reality to the other.

These three principles could stand as the main pillars of a legal order where nature, in her human and non-human elements, is recognized as a self-regulating system, comprised of physical and human elements. The agency, legal personhood and legal standing of nature are to be fully acknowledged at international, regional and national levels, whereby completing and systematizing a process that has already been initiated and promoted by indigenous peoples towards the recognition of the inherent rights of nature[30].

This contribution has pointed out the challenges that indigenous legal orders have been facing in terms of marginalization, human and environmental degradation. It has also highlighted the lessons that we can draw from indigenous legal systems, that could help indigenous and non-indigenous peoples cooperate in finding solutions and strategies to overcome such challenges. Environmental governance has been based for too long on the assumption of supremacy of humans over nature, neglecting the knowledge of the populations that have a symbiotic relationship with the natural world. The mainstream

[30] For a thorough analysis on the steps towards the recognition of rights of nature, see M.P. POTO, *Ocean Governance Ocean Governance: by whom and for whom?* (V. DE LUCIA, A. OUDE ELFERINK, L. NGUYEN eds.), forthcoming in 2021; for the recognition of rights of nature from an indigenous perspective, see B. THOMSON, *Pachakuti: Indigenous perspectives, buen vivir, sumaq kawsay and degrowth,* in *Development* 54, 4, 2011, 448–454; N. CHASSAGNE, *Sustaining the 'Good Life': Buen Vivir as an alternative to sustainable development*, in *Community Development Journal*, 54, 3, 2019, 482–500; A.P. CUBILLO, A.L HIDALGO, J.A. DOMÍNGUEZ, *El pensamiento sobre el Buen Vivir. Entre el indigenismo, el socialismo y el postdesarrollismo,* in *Revista Del CLAD Reforma Y Democracia*, 60, 2014, 27-58; C. ARCILA CALDERÓN, A. BARRANQUERO, E. GONZÁLEZ TANCO, *From Media to Buen Vivir: Latin American Approaches to Indigenous Communication De los medios al Buen Vivir: enfoques latinoamericanos de la comunicación indígena Das Mídias ao Buen Vivir: Abordagens Latino-Americanas para a Comunicação Indígena*, in *Communication Theory*, 28, 2018, 180–201.

system, based on the sovereign right of states to treat nature as an exploitable resource, has overstayed its welcome.

Our planet needs alternative systems that place nature at the centre of attention. The challenge is to understand how and if we can reverse the pattern, based on acknowledgment of the key role played by the nature and indigenous communities in helping to deal with environmental threats, by reorganizing socio-ecological relationships.

The opening towards a model of participatory and inclusive governance marks a first step in the path towards a holistic approach, by strengthening the participation of non-state actors and by implementing a toolbox of rules that hold us all accountable for the damages caused to the environment.

The centrality of the protection of the nature marks the second step, with the revitalization of regenerative practices in indigenous and local communities who have always understood the importance of paying central attention to nature.

Awareness of the interconnectedness of all things restores value to the relationship between nature and peoples. It offers solutions to Earth pandemics, including the loss of biodiversity and climate change, by restoring this essential relationship – which modern classical science and regulatory models have not managed to do. The toolkit for a common future is already available: now it is up to us to put it to good use.

Indigenous worldviews, as deeply interconnected as they are to the natural world and natural world's observations, are essential to restructuring the new world that we as sentient beings can hear breathing on a quiet day.

"A dream you dream alone, is only a dream

A dream you dream together is reality"

(Yoko Ono)

WEBSITES

https://cas.oslo.no/in-depth/youngcas-2018-rebuilding-indigenous-law-article3268-1167.html - YoungCAS reference to the program and the project

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LES PRINCIPES DU DROIT DES CONTRATS PUBLICS EN FRANCE

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INDEX

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INTRODUCTION

À l'image du droit administratif dans son ensemble, en France, les principes du droit des contrats publics sont essentiellement issus de la jurisprudence (essentiellement celle du CONSEIL D'ETAT), synthétisée et systématisée, à compter du début du XX^{e} siècle, par la doctrine universitaire. Par comparaison, le phénomène de codification apparait comme relativement récent dans l'histoire de cette branche du droit administratif français : le premier Code des marchés publics est adopté par décret du 17 juillet 1964, et le Code de la commande publique, à la portée plus étendue, est entré en vigueur le 1er avril 2019.

Il semble néanmoins nécessaire, si l'on souhaite discerner les différentes sources du droit français des contrats publics, d'établir une distinction entre le régime général des contrats publics et celui des contrats de commande publique (marchés et concessions). Cette distinction doit être précédée d'une précision : en droit français, la plupart des contrats passés par les personnes publiques sont qualifiés de « contrats administratifs » (c'est le cas des marchés et concessions, mais aussi des contrats d'agents publics ou de nombreux contrats innomés). Cette qualification implique l'application d'un régime de droit administratif gouvernant la passation, l'exécution et le contentieux. Il est commun à tous les contrats de cette nature, et les litiges qui en découlent ressortissent à la compétence du juge administratif. Cette distinction est parfaitement connue par tout juriste français, mais son rappel devrait permettre d'établir une différence importante entre le droit français et nombre de droits européens (anglais, irlandais, belge, allemand, italien, hollandais…) quant à la spécificité du droit applicable aux contrats publics, ainsi qu'à la juridiction compétente en cas de litige.

Aux principes communs à l'ensemble des contrats administratifs (ou contrats publics)[2] se superposent des principes qui sont propres aux contrats de commande publique (marchés et concessions). C'est là qu'une distinction concernant les sources des principes semble devoir être relevée. Les principes communs à l'ensemble des contrats publics sont essentiellement d'origine jurisprudentielle, et leur codification a été particulièrement tardive : il aura fallu attendre le Titre préliminaire du Code de la commande publique de 2019 pour que ces principes (pouvoirs de résiliation et modification unilatérales, pouvoir de contrôle, imprévision…)[3] soient codifiés. À l'inverse, les marchés publics ont très tôt – depuis le Premier Empire – fait l'objet d'une réglementation écrite[4]. L'encadrement juridique des marchés publics par les règles de droit écrit a traditionnellement été, des première années du XIX[e] siècle à l'adoption de l'ordonnance n° 2015-899 du 23 juillet 2015 relative aux marchés publics (qui transpose la directive 2014/24 UE), l'apanage du pouvoir réglementaire[5], y compris lorsqu'il s'est agi, à partir de la fin des années 1960, de transposer les directives européennes. Ainsi, de 1964 à 2014, le Code des marchés publics (désormais abrogé) ne comportait qu'une seule partie – réglementaire –, alors que le Code de la commande publique (CCP) désormais en vigueur comprend une partie législative, qui

[2] Dans les développements qui suivent, on emploiera, par souci de cohésion avec le vocable choisi pour nos travaux collectifs, l'expression de « contrats publics » comme synonyme de celle de « contrats administratifs ».

[3] Au sujet de ces principes, le juge administratif emploie, depuis l'arrêt du Conseil d'État du 2 février 1983, n ° 34027, *Union des transports publics, urbains et régionaux*, l'expression de « règles générales applicables aux contrats administratifs ».

[4] Décret du 10 Brumaire An XIV (1[er] novembre 1805) et décret du 17 juillet 1806. V. sur cette question, L. RICHER, F. LICHERE, *Droit des contrats administratifs*, Paris, LGDJ, Manuel, 10[e] éd., 2016, p. 352; A. CHRISTOFLE, M. L. P. AUGER, *Traité théorique et pratique des travaux publics*, Paris, Maresq, 1889-1890 (2 vol.).

[5] Sur ce point, v. L. RICHER, « Une tradition : le caractère réglementaire des marchés publics », in *Biens public, bien commun, Mélanges en l'honneur d'Étienne Fatôme*, Paris, Dalloz, 2011, p. 411.

codifie les ordonnances de 2015 et 2016 relatives aux marchés publics et aux concessions, et une partie réglementaire, qui codifie leurs décrets d'application.

Les différentes sources des principes français des contrats publics (textuelles : constitution, loi, règlement – ces deux dernières sources étant désormais utilisées pour transposer les directives européennes en matière de commande publique ; jurisprudentielles ; doctrinales – doctrine organique et universitaire) interagissent en s'influençant mutuellement depuis plus d'un siècle. Il s'ensuit qu'un même principe peut parfaitement avoir une multitude de sources. L'enchevêtrement des sources normatives apparaît ainsi comme l'une des caractéristiques majeures des principes français des contrats publics. En raison de cet enchevêtrement, et afin de respecter l'ordre et les étapes du questionnaire commun à l'ensemble des rapports nationaux, tout en essayant d'éviter les redites, nous procéderons, dans les développements qui suivent, à un certain nombre de renvois. Ce sera principalement le cas pour une grande partie des principes textuels, qui ne sont le produit que d'une codification de principes jurisprudentiels préexistants.

Conformément à la trame commune, le rapport français abordera successivement les principes textuels (1.1) les principes jurisprudentiels (1.2), et les principes issus de la doctrine administrative (1.3).

1. LES PRINCIPES TEXTUELS

L'évocation de « principes textuels » en matière de contrats publics est une relative nouveauté en droit français. La plupart des principes juridiques applicables à cette catégorie de contrats trouvent traditionnellement leur origine dans la jurisprudence ainsi que dans la doctrine administrative. De 1964 à 2006, les versions successives du Code des marchés publics ne faisaient pas explicitement référence à des « principes », bien que certains articles aient pu, à force de réitération, acquérir tacitement ce statut (on pense par exemple à l'interdiction du paiement différé). La référence explicite à des « principes » textuels résulte principalement de la codification réalisée pour l'édiction du Code de la commande publique. Son Titre préliminaire recense les principes généraux applicables à la passation du contrat et à son exécution. Leur valeur est législative, puisqu'ils ont été codifiés par

l'ordonnance n° 2018-1074 du 26 novembre 2018 portant partie législative du code de la commande publique.

Nous ne nous limiterons pas ici aux principes explicitement présentés comme tels. Nous présenterons les règles qui, du fait de leur importance et de leur réitération dans le temps, ou du fait de leur place éminente au sein du Code de la commande publique, peuvent être qualifiées principes[6]. Ceux d'entre eux qui sont d'origine jurisprudentielle seront simplement évoqués. Les développements qui leur seront consacrés figureront dans la Partie 2, qui leur est consacrée.

En suivant l'ordre du questionnaire, on abordera successivement les principes textuels applicables à la formation (I), à l'exécution (II), et au contentieux (III) des contrats publics.

1.1 Les principes textuels applicables à la formation des contrats publics

L'essentiel des principes fondamentaux relatifs à la formation des contrats publics – à l'exception notable des principes issus du Code civil – figure au sein du Titre préliminaire du Code de la commande publique. On peut schématiquement les classer en trois catégories : un principe qui se rattache à la liberté contractuelle (alors même que la liberté contractuelle n'est pas consacrée en tant que telle), à savoir le libre choix laissé aux personnes publiques de satisfaire leurs besoins par leurs propres moyens ou par la conclusion d'un contrat (art. L. 1 CCP) ; des principes procéduraux : l'égalité de traitement des candidats, la liberté d'accès à la commande publique et la transparence des procédures (art. L. 3 CCP) ; et enfin un principe relatif au contenu du contrat. Il s'agit de l'exigence d'une limite de durée (art. L. 5 CCP).

[6] Ces différentes hypothèses ne sont pas exclusives les unes des autres.

Ces principes sont majoritairement d'origine jurisprudentielle, à l'exception de celui selon lequel les contrats de commande publique doivent avoir une durée limitée. Pour cette raison, seul ce dernier fera l'objet de développements à ce stade.

La consécration du principe de la durée limitée des contrats de commande publique est le produit de la codification de règles textuelles préexistantes, en particulier en matière de concessions. L'article 34 de l'ordonnance du 29 janvier 2016 affirmait ainsi que « les contrats de concession sont limités dans leur durée » [7]. Cette exigence provenait non seulement de la transposition de la directive 2014/23 UE (article 18), mais également du droit français antérieur. Le juge administratif déduisait l'obligation de remise en concurrence périodique issue de la loi « Sapin » [8] et du principe de transparence l'obligation de limiter de la durée des concessions[9]. L'obligation de limiter la durée des marchés publics, quant à elle, ne figure pas dans la directive 2014/24 UE. Son origine est purement interne. L'article 39 de l'ordonnance du 23 juillet 2015 relative aux marchés publics (et avant lui, selon des termes différents, l'article 12 du Code des marchés publics) imposait que « la durée d'exécution (…) [soit définie] par le marché public ». Il fallait donc enserrer son exécution dans des limites temporelles. Le Code de la commande publique met ainsi en exergue, dans son titre préliminaire, une exigence textuelle commune aux deux catégories de contrats de commande publique. L'érection de cette règle au rang de principe général ne semble donc pas incongrue s'agissant de contrats que l'Administration doit

[7] Ordonnance n° 2016-65 du 29 janvier 2016 relative aux contrats de concession, JORF n°0025 du 30 janvier 2016 texte n° 66.

[8] Loi n° 93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques, dite « Sapin » modifiée, codifiée aux articles 1411-1 et suivants du Code général des collectivités territoriales.

[9] V. en particulier CE, Ass., 8 avr. 2009, n° 271737, Compagnie générale des eaux c/ Commune d'Olivet, Rec. p. 116, concl. É. GEFFRAY; AJDA 2009. 1090, chron. S. J. LIÉBER et D. BOTTEGHI ; *ibid*. 1747, étude S. NICINSKI. Sur cette question, v. plus généralement P. TERNEYRE, « La durée des contrats », *RFDA* 2016, p. 276.

attribuer (et réattribuer) sans créer de « rente » au profit du titulaire. Elle semble même évidente si l'on songe au fait que le Code civil comprend, depuis sa révision de 2016, un article prohibant les engagements perpétuels (article 1210).

1.2 Les principes textuels applicables à l'exécution des contrats publics

Les principes textuels relatifs à l'exécution des contrats publics résultent en premier lieu, de la codification des principes jurisprudentiels que sont les « règles générales applicables aux contrats administratifs » (A), et en second lieu, de normes textuelles françaises et européennes visant à limiter la mutabilité des contrats de commande publique (B).

A. La codification des « règles générales applicables aux contrats administratifs »

L'article L. 6 du Code de la commande publique codifie la majorité des principes jurisprudentiels qui font l'originalité du régime de l'exécution des contrats publics. Il faut noter d'emblée que sur ce point, le législateur délégué précise que c'est au « titre » de leur nature administrative, que les contrats de commande publique sont soumis à l'ensemble des règles générales applicables à cette catégorie de contrats, à savoir : le pouvoir de contrôle[10] ; la théorie de l'imprévision[11] ; les pouvoirs de modification et résiliation unilatérales au profit de la personne publique contractante, ainsi que le principe du maintien de l'équation financière, qui en est le corolaire[12].

[10] Art. L. 6 CCP, 1° : « L'autorité contractante exerce un pouvoir de contrôle sur l'exécution du contrat, selon les modalités fixées par le présent code, des dispositions particulières ou le contrat ».

[11] Art. L. 6 CCP, 3° : « Lorsque survient un évènement extérieur aux parties, imprévisible et bouleversant temporairement l'équilibre du contrat, le cocontractant, qui en poursuit l'exécution, a droit à une indemnité ».

[12] Art. L. 6 CCP, 4° : « L'autorité contractante peut modifier unilatéralement le contrat dans les conditions prévues par le présent code, sans en bouleverser l'équilibre. Le cocontractant a droit à une indemnisation, sous réserve des stipulations du contrat » ; Art. L. 6 CCP, 5° : « L'autorité contractante peut résilier unilatéralement le contrat dans

Le principe de continuité du service public[13], qui n'est pas, à proprement parler, un principe relatif aux contrats publics, a été glissé au cœur des principes de l'article L. 6 CCP. Il s'agit là d'un principe général du droit public, corolaire du principe de continuité de l'État, et qui, en matière d'exécution des contrats publics, est de nature à servir de fondement à la théorie de l'imprévision ainsi qu'au pouvoir de sanction de l'Administration – en particulier s'agissant des sanctions coercitives, qui permettent à la personne publique de substituer un nouveau contractant au cocontractant défaillant. L'incidence du principe de continuité du service public sur les contrats publics n'est donc qu'indirecte.

En revanche, certaines théories jurisprudentielles que l'on classe traditionnellement parmi les règles générales applicables aux contrats administratifs sont absentes du Titre préliminaire du Code, sans que l'on ne s'explique bien pourquoi. C'est le cas de la vénérable théorie du « fait du Prince », et de la non moins vénérable théorie de la force majeure administrative. Quant aux théories des sujétions techniques imprévues et des travaux supplémentaires, leur absence est n'est en revanche pas surprenante, car elles n'ont traditionnellement vocation à s'appliquer qu'en matière de marchés de travaux. Elles n'avaient donc pas leur place dans un Titre préliminaire embrassant les deux grandes catégories de contrats de commande publique.

Avec les pouvoirs de modification et résiliation unilatérales ainsi que la théorie de l'imprévision, l'article L. 6 CCP consacre ainsi la mutabilité du contrat administratif. Mais cette mutabilité, qui s'ancre solidement dans la tradition juridique française, ne doit pas occulter un principe en sens contraire, sorte de garde-fou, protecteur de l'effet utile du droit européen applicable à la commande publique : celui de la limitation de la mutabilité des contrats.

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les conditions prévues par le présent code. Lorsque la résiliation intervient pour un motif d'intérêt général, le cocontractant a droit à une indemnisation, sous réserve des stipulations du contrat ».

[13] Art. L. 6 CCP, 2° : « Les contrats qui ont pour objet l'exécution d'un service public respectent le principe de continuité du service public ».

B. Le principe de la limitation de la mutabilité des contrats de commande publique

Le principe selon lequel la mutabilité des contrats de commande publique ne saurait remettre en cause les termes initiaux de la procédure de mise en concurrence a des sources communes à l'ensemble des États-membres de l'Union européenne. Il s'agit des jurisprudences *Pressetext*[14] et *Wall AG*[15], codifiées, avec de légers amendements, par le paquet de directives de 2014[16]. Le Code la commande publique, qui codifie, à son tour, les textes de transposition des directives, prévoit ainsi des limites aux modifications (unilatérales ou conventionnelles) des marchés publics[17] et des concessions[18], en interdisant, en particulier, les modifications « substantielles ».

[14] CJCE, 19 juin 2008, Pressetext Nachrichtenagentur GmbH, aff. C-454/06, Rec. CJCE 2008, I, p. 4401. BJCP 2008, n° 60, p. 336, obs. R. SHWARTZ ; DA 2008, n° 10, p. 38, note R. NOGUELLOU ; Contr. marchés pub. 2008, n° 8-9, p. 22, note W. ZIMMER ; AJDA 2008, p. 2008, note J. D. DREYFUS.

[15] CJUE, Grande ch., 13 avril 2010, Wall AG c/ Ville de Francfort-sur-le-Main, Frankfurter Entsorgungs – und Service (FES) GmbH, aff. C-91/08, BJCP 2010, n° 71, p. 259, obs. C. MAUGÜE ; Contr. marchés pub. 2010, n° 6, p. 32, note W. ZIMMER ; DA juil. 2010, p. 25, note R. NOGUELLOU ; Europe juin 2010, note D. SIMON.

[16] Directive 2014/24/UE du Parlement européen et du Conseil du 26 février 2014 sur la passation des marchés publics et abrogeant la directive 2004/18/CE, art. 72 ; Directive 2014/23/UE du Parlement européen et du Conseil du 26 février 2014 sur l'attribution de contrats de concession, art. 43.

[17] Art. L. 2194-1 CCP : « Un marché peut être modifié sans nouvelle procédure de mise en concurrence dans les conditions prévues par voie réglementaire, lorsque : 1° Les modifications ont été prévues dans les documents contractuels initiaux ; 2° Des travaux, fournitures ou services supplémentaires sont devenus nécessaires ; 3° Les modifications sont rendues nécessaires par des circonstances imprévues ; 4° Un nouveau titulaire se substitue au titulaire initial du marché ; 5° Les modifications ne sont pas substantielles ; 6° Les modifications sont de faible montant. Qu'elles soient apportées par voie conventionnelle ou, lorsqu'il s'agit d'un contrat administratif, par l'acheteur unilatéralement, de telles modifications ne peuvent changer la nature globale du marché ».

[18] Art. L. 3135-1 CCP (rédaction identique à celle de L. 2194-1 CCP précité).

Le principe de la limitation de la mutabilité des contrats de commande publique n'a néanmoins rien d'une nouveauté en droit français. Il y a même de sérieuses raisons de penser que le régime européen, issu de l'arrêt *Pressetext*, en est inspiré. Depuis les années 90, en effet, le pouvoir réglementaire limite les possibilités de modification des contrats dont la passation est soumise à des obligations de concurrence. Le décret n° 92-1310 du 15 décembre 1992 (qui était codifié à article 20 du Code des marchés publics), modifié par le décret du 19 décembre 2008, encadrait les modifications qualitatives et quantitatives. L'article 20 du Code des marchés publics interdisait ainsi – hors cas de sujétion technique imprévue – les avenants modifiant l'objet du contrat ou bouleversant son économie. Il semble que cette double limite qualitative/quantitative se retrouve dans la dichotomie issue des directives européennes : « modification substantielle » / « modification d'un faible montant ».

1.3 Les principes textuels applicables au contentieux des contrats publics

Il n'existe guère de principes textuels propres au contentieux des contrats publics. Dès lors qu'un contrat public est qualifié de « contrat administratif » (c'est le cas, répétons-le, pour la grande majorité des contrats publics), il constitue un acte administratif dont le contentieux ressortit à la compétence de la juridiction administrative. Il suit de là que les principes qui s'appliquent au règlement des litiges en matière de contrats publics sont les principes généraux du contentieux administratif figurant au sein du titre préliminaire du Code de justice administrative.

2. LES PRINCIPES JURISPRUDENTIELS

C'est un truisme de le dire, le juge administratif français a longtemps bénéficié, faute de textes applicables, d'une très importante marge de manœuvre pour dégager les principes qu'il jugeait nécessaires à la résolution des litiges qui lui étaient soumis. Le phénomène de codification du droit administratif, à l'œuvre depuis la fin du XX^{e} siècle, ne saurait obérer cette origine prétorienne. En la matière, le droit des contrats publics ne fait

pas exception, tant s'en faut[19]. La plupart de ses principes directeurs ont été dégagés par le juge administratif au cours des trente premières années du XX[e] siècle. Alors que certains d'entre eux ont été puisés dans le Code civil (2.1), d'autres sont des créations prétoriennes originales (2.2).

2.1 Les principes jurisprudentiels issus du droit civil des obligations

La question du rapport entre les contrats administratifs et les principes du Code civil régissant les contrats de droit privé est classique[20]. Il faut rappeler que si le droit privé « est inapplicable de plein droit à l'Administration »[21], cela ne signifie pas que cette dernière ne peut pas se voir appliquer des principes issus du droit privé. Avant d'être *administratif*, l'acte juridique particulier qu'est le « contrat administratif » est un *contrat*. Son régime obéit donc ontologiquement à un certain nombre de principes qui ne varient pas selon son caractère privé ou public. Ceux-ci figurent dans la partie du Code civil consacrée aux obligations[22].

Le juge administratif applique les articles du Code civil relatifs au régime général du contrat, soit en citant fidèlement l'article sur lequel il se fonde, soit en en extrayant

[19] Sur cette question, v. F. LLORENS, « Le droit des contrats administratifs est-il un droit essentiellement jurisprudentiel ? », *Mélanges Max Cluseau*, Presses de l'IEP de Toulouse, 1984, p. 379.

[20] J. MARTIN, *Les sources de droit privé du droit des contrats administratifs*, thèse Paris II, 2008 ; M. WALINE, « La théorie civile des obligations et la jurisprudence du Conseil d'État », *Études offertes à Léon Julliot de la Morandière*, Paris, Dalloz, 1964, p. 631 ; J. WALINE, « La théorie générale du contrat en droit civil et en droit administratif », *Le contrat au début du XXI[e] siècle, études offertes à Jacques Ghestin*, Paris, LGDJ, 2001, p. 965. V. également J. WALINE, Recherche sur l'application du droit privé par le juge administratif, thèse Paris 1962 ; B. PLESSIX, L'utilisation du droit civil dans l'élaboration du droit administratif, Paris, Éd. Panthéon-Assas, 2001.

[21] B. PLESSIX, *Droit administratif général*, Paris, LexisNexis, 2016, p. 667.

[22] Code civil, Livre III : Des différentes manières dont on acquiert la propriété, Titre III : Des sources d'obligations, Sous-titre Ier : Le contrat (articles 1101 et suivants).

simplement le substrat, qu'il applique aux contrats administratifs. Les principes issus du Code civil ainsi appliqués aux contrats administratifs concernent principalement trois aspects de leur régime : la liberté contractuelle (A), les conditions de validité (B), la soumission de leur exécution au principe de la force obligatoire (C).

A. Le principe de la liberté contractuelle des personnes publiques

La liberté contractuelle est consacrée par l'article 1102 du Code civil, qui la définit comme la liberté « de contracter ou de ne pas contracter, de choisir son cocontractant et de déterminer le contenu et la forme du contrat dans les limites fixées par la loi ». Le principe selon lequel les personnes publiques jouissent de cette liberté a été consacré par la jurisprudence constitutionnelle et administrative. Après avoir reconnu la valeur constitutionnelle de la liberté contractuelle des personnes privées, le Conseil constitutionnel a consacré celle des personnes publiques en 2006, dans une décision « Loi relative au secteur de l'énergie »[23]. En l'espèce, le Conseil fait découler la liberté contractuelle de l'article 4 de la Déclaration des droits de l'Homme et du citoyen de 1789, qui pose le principe général de liberté et de la compétence du législateur pour l'encadrer. Le législateur ne peut ainsi limiter la liberté contractuelle des personnes publiques qu'à des fins d'intérêt général, ou pour la concilier avec d'autres libertés constitutionnelles. Avant cette consécration au plus haut degré normatif, le Conseil d'État avait, lui aussi, reconnu la liberté contractuelle des personnes publiques, et ce dès 1983[24]. Il précise en 1998 qu'elle a le caractère de liberté fondamentale au sens de la procédure de référé-liberté (L. 512-2 CJA)[25].

[23] Décision n° 2006-543 DC du 30 novembre 2006.

[24] Décision précitée.

[25] Conseil d'État, Section, du 28 janvier 1998, n° 138650, Société Borg Warner.

Au vu de la définition de l'art. 1102 CC précédemment retenue, la liberté contractuelle des personnes publiques implique notamment leur liberté de choisir de contracter ou de ne pas contracter, la liberté de choisir leur cocontractant ainsi que celle de déterminer le contenu de leurs contrats. Les personnes publiques jouissent de ces différents pans de la liberté contractuelle, qui doivent être en particulier conciliés avec les principes d'égal accès à la commande publique et de transparence. Il semble nécessaire insister sur le premier volet de la liberté contractuelle, à savoir la liberté de choisir de contracter ou de ne pas contracter. Sur ce point, la liberté de l'Administration semble ne pouvoir souffrir d'aucune limite : les personnes publiques ne sont jamais obligées de contracter pour satisfaire leurs besoins.

Le principe est désormais consacré avec force, en tête du Titre préliminaire du Code de la commande publique[26]. Il découle d'une jurisprudence classique des juridictions française et européenne. Dans la décision du 29 avril 1970, *Unipain*[27], le Conseil d'État reconnaît que le Ministère de la justice peut, sans porter atteinte à la liberté du commerce et de l'industrie, fournir du pain à certains établissements pénitentiaires du Nord en s'approvisionnant auprès des boulangeries militaires de Lille, plutôt qu'en ayant recours au secteur privé. La Cour de justice des communautés européennes retient à son tour, en 2009, qu'« une autorité publique peut accomplir les tâches d'intérêt public qui lui incombent soit par ses propres moyens, soit en collaboration avec d'autres autorités publiques, sans être obligée de faire appel à des entités externes n'appartenant pas à ses services »[28]. Le Conseil d'État réaffirme cette solution et ses conséquences dans un considérant de principe des plus solennels, à l'occasion d'une décision d'Assemblée de 2011, au terme de laquelle « les

[26] Art. L. 1 CCP : « Les acheteurs et les autorités concédantes choisissent librement, pour répondre à leurs besoins, d'utiliser leurs propres moyens ou d'avoir recours à un contrat de la commande publique ».

[27] Conseil d'État, Sect., 29 avril 1970, n° 77935, Société Unipain.

[28] CJCE (Gde. chambre), 9 juin 2009, C-480/06, Commission des Communautés européennes contre République fédérale d'Allemagne.

personnes publiques ont toujours la possibilité d'accomplir les missions de service public qui leur incombent par leurs propres moyens ; qu'il leur appartient en conséquence de déterminer si la satisfaction des besoins résultant des missions qui leur sont confiées appellent le recours aux prestations et fournitures de tiers plutôt que la réalisation, par elles-mêmes, de celles-ci ; que ni la liberté du commerce et de l'industrie, ni le droit de la concurrence ne font obstacle à ce qu'elles décident d'exercer elles-mêmes, dès lors qu'elles le font exclusivement à cette fin, les activités qui découlent de la satisfaction de ces besoins, alors même que cette décision est susceptible d'affecter les activités privées de même nature »[29].

B. Les conditions de validité des contrats publics

Les principes gouvernant la validité des contrats qui figurent dans le Code civil sont appliqués aux contrats administratifs. Ainsi, pour qu'un contrat administratif soit valide, il faut, au terme du nouvel article 1128 du Code civil, qu'il réunisse « Le consentement des parties ; leur capacité de contracter ; [ainsi qu'] un contenu licite et certain ». Ce nouvel article issu de la réforme du droit des contrats de 2016 reprend partiellement, en les simplifiant, les quatre conditions qui figuraient dans l'ancien art. 1108 du même Code. Le consentement des parties et leur capacité de contracter constituaient déjà des conditions de validité, mais les conditions liées au contenu du contrat étaient au nombre de deux : « un objet certain qui forme la matière de l'engagement » et « une cause licite dans l'obligation ». Les notions de cause et d'objet ont été remplacées, en 2016, par celle de contenu du contrat. Il reste que jusqu'à cette réforme, le juge administratif sanctionnait aussi bien les vices du consentement que l'absence et l'illicéité de la cause du contrat, et ceci, sans nécessairement citer les articles du Code civil. Le plus souvent le Code

[29] Conseil d'État, Ass., 26 oct. 2011, n° 317827, Association « pour la promotion de l'image » : le décret prévoyant que les services préfectoraux peuvent photographier les demandeurs de passeports lorsque ceux-ci ne fournissent pas une photographie correspondant aux exigences réglementaires ne viole pas le principe de la liberté du commerce et de l'industrie.

civil est simplement mentionné dans les visas, et le juge administratif s'en détache pour n'en retenir que le substrat, ou autrement dit, les principes.

Il faut noter d'emblée que les cas dans lesquels le consentement d'une partie à un contrat administratif est vicié sont beaucoup plus rares qu'en matière de contrats de droit privé. Cela s'explique par l'encadrement de la procédure de passation de la plupart des contrats administratifs (en particulier les contrats de la commande publique). Il n'en reste pas moins que depuis la fin du XIX[e] siècle, le juge administratif applique la théorie des vices du consentement aux contrats administratifs. Le juge administratif admet l'erreur, le dol, et la violence (articles 1130 à 1144 du Code civil). Il prononce ainsi, au titre de l'erreur sur la personne, la nullité d'un contrat conclu par l'Administration avec un représentant d'une entreprise, alors que la personne publique souhaitait contracter avec l'entreprise elle-même[30]. De même, sur le fondement du dol, le CE prononce la nullité d'un marché pour lequel plusieurs candidats se sont entendus pour se partager la candidature à différents marchés passés par la SNCF, afin d'obtenir des prix plus élevés[31].

La théorie de la cause avait également, jusqu'à sa disparition du Code civil, été appliquée par le juge administratif pour sanctionner l'illicéité du contrat (« cause subjective » ou « cause du contrat ») ou pour vérifier si l'absence de cause (« cause objective » ou « cause de l'obligation ») justifie une résiliation unilatérale d'un contrat synallagmatique[32]. Le juge administratif a ainsi pu prononcer la nullité du contrat conclu

[30] Conseil d'État, 26 avril 1950, Domergue, Rec. p. 813.

[31] Conseil d'État, 19 déc. 2007, n° 268918, Société Campenon-Bernard. Pour de nouveaux développements de la jurisprudence relative au dol dans les contrats publics, v. Conseil d'État, 22 nov. 2019, n° 418645, SNCF Mobilités ; CE, 27 mars 2020, n° 421758, Société Lacroix Signalisation ; CE, 27 mars 2020, n° 420491, Sté Signalisation France.

[32] Sur cette question, v. F. LOMBARD, *La cause dans le contrat administratif*, Paris, Dalloz, Nouvelle bibliothèque de thèses, vol. 77, 2008 ; J. C. RICCI, F. LOMBARD, *Droit administratif des obligations*, Paris, Sirey, Université, 1[ère] éd., 2018, p. 140-143.

pour un motif illicite. Dans l'arrêt *commune d'Arzon*, il a jugé que le contrat par lequel une commune s'engageait à garantir au concessionnaire d'une criée aux poissons le monopole de la vente du poisson sur le territoire de la commune, en échange de la construction d'immeubles devant abriter la criée repose sur une cause illicite : le fait de garantir à l'opérateur le monopole de la vente de poissons viole la liberté du commerce et de l'industrie[33]. La solution est identique s'agissant du contrat par lequel une personne publique autorise l'importation de marchandises en contrepartie de la perception de 20 % du produit de leur vente[34]

Dans un contrat synallagmatique, la théorie de la cause sert (ou servait) également à vérifier que l'obligation consentie par une partie trouve une contrepartie dans l'obligation consentie par son cocontractant. Il y a peu de risques que les contrats administratifs soient dépourvus de cause *ab initio*. La règle du service fait, et son corolaire, l'interdiction faite aux personnes publiques de consentir des libéralités interdisent aux personnes publiques d'engager des sommes d'argent sans en avoir préalablement reçu la contrepartie. En revanche, le juge administratif a mis en œuvre le principe selon lequel les obligations d'un contrat doivent être « causées » pour vérifier l'équilibre de la relation contractuelle. Ainsi, dans une décision du 27 février 2015, dite « Béziers III », où le Conseil d'État avait à juger de la résiliation unilatérale d'un contrat conclu entre deux communes, la Haute-juridiction cite, parmi les motifs qui peuvent justifier la résiliation unilatérale d'un contrat conclu entre deux personnes publiques : « la disparition de sa cause »[35].

On peut se demander si, à l'avenir, le juge administratif continuera à s'appuyer sur la cause, désormais supprimée du Code civil. Il n'est pas impossible que la notion de cause survive, à l'état de principe, dans la jurisprudence administrative. Dans une décision de

[33] CE, Section, 9 juillet 1937, Commune d'Arzon, Rec. p. 680.

[34] CE, 25 nov. 1921, Sté des Savonneries Henri Olive, Rec. p. 977.

[35] Conseil d'État, 27 février 2015, n° 357028, ville de Béziers.

2008, le Conseil d'État affirme, sans la moindre référence explicite au Code civil, qu'« une convention peut être déclarée nulle lorsqu'elle dépourvue de cause ou lorsqu'elle est fondée sur une cause, qui, en raison de l'objet de cette convention ou du but poursuivi par les parties, présente un caractère illicite »[36]. Le fait d'avoir ainsi déconnecté la théorie de la cause du Code civil, pour en faire un principe général, adapté au contrôle juridictionnel des contrats administratifs pourrait permettre au juge administratif d'en faire à nouveau application, alors même que la notion a disparu du Code civil.

C. L'exécution des contrats publics régie par le principe de la force obligatoire

Puisque la notion de contrat est définie, en droit français, comme l'accord de volontés destiné à produire des effets de droit, il faut que cet accord ait les moyens de produire des effets juridiques. Ce moyen, c'est la force obligatoire : c'est elle qui permet de créer des obligations entre les parties, par l'effet de la rencontre de leurs volontés. C'est dire qu'un accord de volonté dépourvu de force obligatoire n'a pas de véritable portée contraignante et qu'il n'est donc pas un contrat. En tant qu'ils sont des contrats, il est donc parfaitement naturel que les contrats administratifs soient soumis au principe de la force obligatoire. Il n'y a dès lors rien de surprenant à ce que le juge administratif applique le principe de force obligatoire, historiquement issu de l'ancien article 1134 du Code civil (désormais 1103). Il a non seulement affirmé, à plusieurs reprises et sans citer explicitement l'ancien article 1134, que le contrat constitue « la loi des parties »[37], mais il a également fait de la règle de la force obligatoire un principe général du droit (PGD)[38].

[36] Conseil d'État, 15 févr. 2008, n° 279045, Commune de La-Londe-les-Maures.

[37] Conseil d'État, 7 mars 1902, Sieur Bellet c/ l'État, Rec., p. 182 ; Conseil d'État, 25 février 1976, n° 89776, Société Jean Leiseing et ses fils.

[38] Conseil d'État, 3 juillet 2013, n° 348099, Association des paralysés de France : « Considérant qu'aux termes de l'article 1134 du code civil : " Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites " ; que l'article L. 1221-1 du code du travail dispose : " Le contrat de travail est soumis aux règles du droit commun. Il peut être constaté dans les formes qu'il convient aux parties contractantes d'adopter " ; que le principe général du

2.2 Les principes jurisprudentiels de droit public

Outre les principes issus du Code civil qui viennent d'être évoqués, et qui constituent le socle commun du droit des contrats, le droit français des contrats publics comporte des principes proprement publicistes. Certains de ces principes ne sont pas spécifiques à la matière contractuelle et s'appliquent à l'ensemble des activités de l'Administration, mais avec une incidence particulière sur le droit des contrats publics (A). Il existe néanmoins, à côté de ces principes à portée très générale, des principes propres aux contrats publics (B).

A. Les principes généraux de droit public retentissant sur le droit des contrats publics

Trois grands principes du droit public français retentissent particulièrement sur les contrats publics : l'indisponibilité des pouvoirs et des compétences, l'interdiction faite aux personnes publiques de consentir des libéralités, et le principe de continuité de l'État.

L'indisponibilité des pouvoirs et des compétences, d'abord, qui découle de l'art. 3 de la Déclaration des droits de l'Homme et du citoyen de 1789 (principe de la souveraineté nationale) emporte trois conséquences en matière contractuelle. Il interdit, en premier lieu, à toute personne publique, de s'engager à exercer l'une de ses compétences d'une façon particulière. Il s'ensuit qu'une personne publique ne peut, par exemple, s'engager par contrat sur le sens d'une décision future. Le « pacte sur décision future », pour reprendre la formule de Jacques Moreau[39] est ainsi prohibé. Le même principe interdit, en second lieu, qu'une personne publique renonce contractuellement à exercer les pouvoirs qu'elle détient,

droit dont s'inspirent ces dispositions implique que toute modification des termes d'un contrat de travail recueille l'accord à la fois de l'employeur et du salarié ».

[39] J. MOREAU, « De l'interdiction faite à l'autorité de police d'utiliser une technique d'ordre contractuel. Contribution à l'étude des rapports entre police administrative et contrat », *AJDA* 1965, p. 3.

dans l'intérêt général, en vertu des règles générales applicables aux contrats administratifs (pouvoirs de modification et résiliation unilatérales)[40]. Ce principe limite notamment la liberté qu'ont les personnes publiques d'aménager contractuellement la mise en œuvre de leur pouvoir de résiliation unilatérale dans l'intérêt général. Si elles peuvent s'engager à accorder à leur cocontractant une indemnité pour résiliation unilatérale supérieure au montant du préjudice subi, cette indemnité ne doit pas atteindre un montant tel qu'il pourrait conduire la personne publique à renoncer à la mise en œuvre de son pouvoir. De l'indisponibilité des compétences découle, en troisième lieu, l'interdiction faite aux personnes publiques de déléguer par la voie contractuelle toute mission de souveraineté inhérente à l'État. Permettre aux personnes publiques de les déléguer reviendrait à dépouiller l'État de sa souveraineté. Le principe de l'interdiction de déléguer toute mission de souveraineté, a valeur constitutionnelle : le Conseil constitutionnel utilise ce principe comme norme de référence du contrôle de constitutionnalité dans les décisions du 29 août 2002 « Loi d'orientation et de programmation du la justice (LOPJ) » et du 26 juil. 2003, « Loi habilitant le gouvernement à simplifier le droit ». Il considère en l'espèce que le fait, pour l'État, de confier à un cocontractant une mission globale de conception, réalisation, transformation, exploitation et financement d'équipements publics ne revient pas à déléguer une mission de souveraineté. C'est ce qui explique que le titulaire du pouvoir réglementaire ne peut pas déléguer ce pouvoir par contrat, à une personne privée, tout comme le titulaire d'un pouvoir de police administrative. De même, ni le pouvoir d'organisation d'un service public, ni celui de recouvrer les recettes ou de payer les dépenses publiques ne peut être délégué.

Le principe de l'interdiction de consentir des libéralités, ensuite, s'applique exclusivement aux personnes publiques. Comme le principe de l'indisponibilité des compétences, il encadre le contenu du contrat. Les personnes publiques contractantes ne peuvent ainsi insérer des clauses qui les conduisent à payer des sommes qu'elles ne doivent pas. Par exemple, elles ne peuvent pas consentir à indemniser de façon excessive leur

[40] Conseil d'État, 6 mai 1985, n° 41589, Eurolat c/ Crédit foncier de France.

cocontractant pour résiliation unilatérale dans l'intérêt général ou pour modification unilatérale. En principe, le cocontractant est indemnisé du montant de sa perte subie et, dans une certaine mesure, de son gain manqué. Si la personne publique contractante consent au moment de la signature du contrat, à indemniser son cocontractant au-delà de ce montant, la jurisprudence interdit que l'indemnisation soit « manifestement disproportionnée » au regard du préjudice réellement subi par le cocontractant[41].

En principe de continuité de l'État, enfin, influe de façon indirecte sur le droit des contrats publics. C'est de ce principe que découle celui de continuité du service public, codifié à l'article L. 6 CCP, et qui fonde la théorie de l'imprévision.

B. Les principes spécifiques au droit des contrats publics

Ces principes sont relatifs à la passation (a) à l'exécution (b) et au contentieux des contrats publics.

a) En matière de passation

Les deux principes jurisprudentiels relatifs à la passation des contrats publics sont le principe d'égalité d'accès à la commande publique et le principe de transparence. Ils ont tous deux valeur constitutionnelle, et constituent les pendants français du principe européen de non-discrimination à raison de la nationalité (article 18 TFUE) et de son corollaire, le principe de transparence, issu de la jurisprudence *Telaustria*. Ceux deux principes ont des fondements autonomes par rapport à leurs « cousins » issus du droit de l'Union. Le Conseil Constitutionnel a ainsi un déduit un principe d'égalité d'accès à la commande publique de l'article 6 de la Déclaration des droits de l'Homme et du citoyen de 1789, qui consacre l'égalité devant la loi[42]. Comme les principes du droit de l'Union européenne, sa fonction

[41] CE, 4 mai 2011, n° 334280, Chambre de commerce et d'industrie de Nîmes, Uzès, Bagnols, Le Vigan.

[42] Conseil constitutionnel, 26 juil. 2003, « Loi habilitant le gouvernement à simplifier le droit ».

est d'interdire aux organismes adjudicateurs de favoriser les candidats à l'attribution d'un contrat de la commande publique. Il fait découler le principe constitutionnel de transparence du même article de la Déclaration des droits de l'Homme et du citoyen de 1789, ainsi que de l'article 14, dont découlent les principes de consentement à l'impôt et de protection des deniers publics[43].

b) En matière d'exécution

C'est en matière d'exécution des contrats publics que le génie du juge administratif s'est principalement exprimé, pour échafauder, au fil du temps, et de concert avec la doctrine, une théorie générale des contrats administratifs, constituée d'un ensemble de principes propres à cette catégorie de contrats. En son sein, les « règles générales applicables aux contrats administratifs » occupent une place centrale. Cette dénomination recouvre le principe de mutabilité du contrat administratif (pouvoir de résiliation unilatérale de l'Administration dans l'intérêt général, et pouvoir de modification unilatérale), ainsi que les théories de l'imprévision, de la force majeure administrative, et du fait du Prince. Les règles générales applicables aux contrats administratifs ont pour fonction commune de favoriser le traitement des aléas (administratifs, économiques, techniques…) qui pèsent sur la bonne exécution du contrat. Leur consécration est fondée sur l'objet des contrats administratifs, à savoir la contribution à la satisfaction de l'intérêt général. Il s'agit d'éviter que les aléas affectant les contrats administratifs compromettent les missions d'intérêt général pour l'exécution desquelles ils sont conclus. Par ailleurs, même si la doctrine ne les rattache pas aux règles générales applicables aux contrats administratifs, le pouvoir de contrôle et le pouvoir de sanction concourent également à la bonne exécution dans le contrat dans l'intérêt général, puisqu'ils visent à garantir la personne publique contre les manquements de son cocontractant.

[43] *Ibid.*

Le principe de mutabilité du contrat administratif est le corolaire du principe de mutabilité du service public. L'intérêt général étant évolutif et contingent, l'action administrative doit pouvoir évoluer en suivant ses évolutions. Il en va de même des contrats administratifs, passés pour contribuer à la satisfaction de l'intérêt général : ils doivent pouvoir être adaptés à son évolution, ou éventuellement disparaître, si l'intérêt général qui a déterminé la passation du contrat a disparu. Le juge administratif a par conséquent reconnu aux personnes publiques contractantes un pouvoir de résiliation unilatérale dans l'intérêt général et un pouvoir de modification unilatérale pour le même motif. Le pouvoir de résiliation unilatérale existe de plein droit, quel que soit le type de contrat, et pour tout type de contrat administratif. En 1958, dans l'arrêt Distillerie de Magnac-Laval, le Conseil d'État affirme que la personne publique contractante dispose de ce pouvoir, « en tout état de cause, en vertu des règles applicables aux contrats administratifs »[44]. Il faut néanmoins, sous peine d'engager la responsabilité contractuelle de l'Administration, que le motif d'intérêt général soit réel, et qu'il existe au moment où la personne publique prend la décision de résilier[45]. Elle ne peut pas anticiper une future évolution de l'intérêt général.

Le pouvoir de modification unilatérale dans l'intérêt général se rattache, de façon assez évidente, au principe de mutabilité du service public[46]. À la fin du XIX^{e} et au début du XX^{e} siècle, un grand nombre de nouveaux services publics (souvent municipaux) sont créés sans que les collectivités publiques qui en sont à l'origine n'aient de moyens suffisants pour réaliser les investissements coûteux qu'auraient requis leur exploitation en régie directe. Ces services (de distribution de gaz, d'éclairage public, de transports en commun) sont donc le plus souvent concédés à des entreprises privées. L'Administration fait par conséquent preuve d'une grande mansuétude à l'égard de ses providentiels

[44] Conseil d'État, Ass., 2 mai 1958, Distillerie Magnac-Laval.

[45] Conseil d'État, 27 févr. 1987, Sté TV6.

[46] Conseil d'État, 10 janv. 1902, Cie nouvelle Gaz de Deville-lès-Rouen.

concessionnaires. Ces derniers ont fréquemment profité de ce rapport de force, notamment en résistant aux demandes visant à faire évoluer le service. Dans sa note sur la décision *Compagnie française des tramways*[47], Hauriou, qui retrace l'évolution des rapports concédant/concessionnaire, évoque le « sans-gêne » dont font preuve ses derniers sans leur rapport avec le public, et la résistance qu'ils opposent aux demandes raisonnables d'amélioration. Afin de garantir la primauté de l'intérêt du service sur les intérêts des concessionnaires, le juge administratif a donc reconnu un pouvoir de modification unilatérale à la personne publique concédante. Le principe est solennellement affirmé par le Conseil d'État, à l'occasion de la décision *Union transports publics urbains et régionaux*[48].

Comme le pouvoir de résiliation unilatérale, le pouvoir de modification unilatérale n'est pas absolu. Non seulement, la modification ne doit pas être substantielle ou dénaturer l'objet du contrat, mais elle ne peut porter sur les clauses financières.

La contrepartie des pouvoirs de résiliation et modification unilatérales, est le droit du cocontractant au maintien de l'équation financière. Cela signifie qu'en cas de mise en œuvre de l'un de ces deux pouvoirs, il a droit, en principe, à l'indemnisation du préjudice subi et du gain manqué, selon une logique voisine de celle de la responsabilité contractuelle. Le droit au maintien de l'équation financière n'est rien d'autre que l'expression de la force obligatoire du contrat administratif, qui interdit que le cocontractant soit privé, contre son gré, de l'enrichissement tiré de l'exécution du contrat conforme ses stipulations initiales.

[47] M. Hauriou, note sur Conseil d'État, 10 mars 1910, n° 16178, Compagnie générale française des tramways, in M. Hauriou, *Notes d'arrêts sur décisions du Conseil d'Etat et du tribunal des conflits*, t. 3, La mémoire du droit, 2000, p. 470 et s.

[48] Décision précitée.

Le principe du maintien de l'équation financière fonde également la théorie du « fait du Prince », qui a ceci d'original qu'elle est l'unique cas de responsabilité contractuelle sans faute. Lorsque la personne publique contractante prend elle-même une mesure licite, en vertu de pouvoirs autres que ceux qu'elle détient sur le fondement du contrat ou du principe de mutabilité (par exemple un pouvoir de police), et qui alourdit les charges du cocontractant, elle a l'obligation de l'en indemniser intégralement. Il reste qu'en raison, peut-être, du caractère exceptionnel de sa mise en œuvre, le législateur délégué ne mentionne pas la théorie du fait du Prince à l'article L. 6 CCP, aux côtés des autres règles générales applicables aux contrats administratifs.

Par ailleurs, afin de garantir la continuité du service public, ou plus généralement, la continuité de l'action administrative, le juge administratif a consacré la théorie de l'imprévision. Elle vise à assurer la poursuite de l'exécution du contrat administratif lorsque son équilibre économique est bouleversé par un évènement imprévisible et extérieur aux parties. Cette théorie est apparue à l'issue de la Première guerre mondiale, qui avait provoqué une hausse considérable des prix du charbon. Cette dernière a eu pour conséquence de rendre l'exploitation du service public de l'éclairage au gaz gravement déficitaire. Les pertes des entreprises d'éclairage concessionnaires étaient tellement lourdes qu'en continuant à exploiter le service au tarif initialement convenu, elles risquaient la faillite. De nombreux « gaziers », ont donc, à l'instar de la Compagnie générale d'éclairage de Bordeaux, demandé aux communes concédantes de réviser les tarifs contractuels. Les communes se sont abritées derrière l'intangibilité des obligations contractuelles déduite du principe de la force obligatoire pour refuser ces révisions. Dans l'arrêt du « Gaz de Bordeaux »[49], le Conseil d'État décide que pour garantir la continuité du service public dans des conditions (événement imprévisible et extérieur aux parties) aboutissant au bouleversement de l'économie du contrat, le cocontractant qui continue à exécuter ses obligations aura droit à une indemnité pour le temps que dure la situation d'imprévision.

[49] Conseil d'Etat, 30 mars 1916, Compagnie générale d'éclairage de Bordeaux.

Cette indemnité n'a pas vocation à reconstituer la marge bénéficiaire initialement prévue par le cocontractant, mais simplement à lui permettre de dégager une marge suffisante pour qu'il puisse continuer à exécuter le contrat dans l'intérêt général. Si toutefois, l'équilibre du contrat devait être définitivement bouleversé, l'Administration ne serait pas tenue d'indemniser le cocontractant jusqu'à son terme. Dans pareille hypothèse, la théorie de la force majeure administrative permet la résiliation du contrat et l'indemnisation du cocontractant d'une partie du préjudice subi[50].

La théorie des sujétions techniques imprévues permet également au cocontractant de recevoir des indemnités lorsqu'il fait face à des « difficultés matérielles rencontrées lors de l'exécution du marché, présentant un caractère exceptionnel, imprévisible lors de la conclusion du contrat et dont la cause est extérieure aux parties »[51]. L'indemnisation est accordée si quatre conditions sont réunies : le cocontractant doit avoir fait face à un aléa technique ou matériel, résultant du fait d'un tiers ou d'un aléa naturel, qui devait être imprévisible, et qui a entrainé un bouleversement de l'économie du marché. La théorie des sujétions imprévues est née dans les marchés de travaux publics et continue à s'appliquer presque exclusivement dans ce domaine. Elle est souvent invoquée par les entreprises de bâtiment-travaux publics, mais elle est rarement appliquée par le juge qui retient une acception stricte de ses conditions.

La personne publique contractante s'est enfin vue reconnaître un pouvoir de contrôle de l'exécution du contrat, qui n'est habituellement pas rattaché aux règles générales applicables aux contrats administratifs. Ce pouvoir permet à la personne publique de veiller au respect par le cocontractant de ses obligations contractuelles. Si le fondement de ce pouvoir est parfois légal, il a surtout été consacré par jurisprudence. Il existe ainsi, même sans texte et dans le silence du contrat. Le Conseil d'État évoque, à ce propos, le «

[50] Conseil d'État, 9 déc. 1932, Compagnie des tramways de Cherbourg ; 14 juin 2000, Commune de Staffelfelden.

[51] Conseil d'État, 30 juill. 2003, n° 223445, Commune de Lens.

droit qui appartient au maître de l'œuvre de diriger et contrôler l'exécution du marché par l'entrepreneur »[52]. Le pouvoir de contrôle sur l'exécution contrat a une portée très large. Il s'exerce aussi bien sur les ouvrages et travaux réalisés ou sur les fournitures livrées, que sur le respect des règles de sécurité.

Par suite de l'exercice de ce pouvoir, l'Administration peut, le cas échéant, être amenée à sanctionner son cocontractant. Le pouvoir de sanction unilatérale résulte du privilège du préalable, qui l'autorise (et l'oblige) à agir unilatéralement pour imposer sa volonté aux administrés. Néanmoins, contrairement au principe qui prévaut hors de la matière contractuelle[53], elle n'est pas tenue de prononcer elle-même les sanctions. Elle a la possibilité de saisir le juge du contrat[54]. Si elle choisit la voie unilatérale, l'Administration doit, sous peine d'engager sa responsabilité, mettre en demeure le cocontractant d'exécuter ses obligations dans un délai suffisant.

c) En matière contentieuse : la loyauté des relations contractuelles

En raison de sa parenté avec le principe de bonne foi, le principe de loyauté des relations contractuelles aurait pu être classé parmi les principes issus du Code civil. Il semble néanmoins que son application en droit des contrats publics est particulièrement étroite. Il concerne principalement les actions en nullité formées par l'une des parties au contrat. Le juge administratif a dû trancher un certain nombre de litiges où il apparaissait que l'une des parties soulevait sa nullité, soit par voie d'action, pour se dégager d'une relation contractuelle qu'elle ne souhaitait pas poursuivre (en évitant ainsi d'avoir à indemniser son cocontractant pour la résiliation du contrat), soit par voie d'exception, afin d'échapper à une action en responsabilité contractuelle dirigée contre elle. Par un arrêt

[52] Conseil d'État, 22 févr. 1952, Société pour l'exploitation des procédés Ingrand.

[53] Conseil d'État, 30 mai 1913, Préfet de l'Eure.

[54] CE, 31 mai 1907, Deplanque.

Commune de Béziers, de 2009, le Conseil d'État a décidé, sur le fondement de la loyauté contractuelle, de limiter les moyens pouvant être soulevés par une partie à l'appui d'une action en nullité[55]. Les vices les plus spécifiques aux contrats administratifs, qui tiennent aux conditions de validité découlant du carcatère public du contrat – en particulier l'incompétence de la personne publique contractante – ne peuvent plus être invoqués. Les irrégularités invocables sont désormais resserrées autour des vices proprement « contractuels », en particulier ceux qui sont relatifs au consentement des parties et à l'illicéité du contenu du contrat[56]. La violation d'une règle de la procédure de passation pour les contrats soumis à l'obligation de publicité et mise en concurrence peut toujours être invoquée, mais sa prise en compte par le juge dépendra de sa gravité. On peut ainsi affirmer que les motifs d'illégalité proprement publicistes des contrats administratifs ont été marginalisés au sein du contentieux de la nullité.

3. LES PRINCIPES ISSUS DE LA DOCTRINE ADMINISTRATIVE ET DE LA DOCTRINE UNIVERSITAIRE

3.1 Le rôle de la doctrine administrative dans l'élaboration des principes du droit des contrats publics

Le rôle de la doctrine administrative dans la construction du droit français des contrats publics est peu étudié[57]. Il ne doit pourtant pas être négligé. La rédaction, par

[55] Conseil d'État, Ass., 28 déc. 2009, Commune de Béziers, Rec., p. 509.

[56] V. sur ce point Conseil d'État, 12 janvier 2011, Manoukian, BJCP 2011, n° 75, p. 121, concl. N. BOULOUIS, obs. C. MAUGÜE.

[57] V. sur ce point F. ROLIN, « Le rôle de la pratique dans la construction du droit des contrats administratifs », *À propos des contrats des personnes publiques, Mélanges en l'honneur de Laurent Richer*, Paris, LGDJ, 2013, p. 9, ainsi que X. BEZANÇON, *Essai sur les contrats de travaux et de services publics : contribution à l'histoire administrative de la délégation de mission publique*, Paris, LGDJ, Bibl. de droit public, 2001. Pour une analyse de l'apport des documents contractuels types dans le traitement des aléas auxquels font face les contrats publics, nous

l'Administration, de cahiers des charge-types est une pratique qui remonte au moins au début du XIX[e] siècle. C'est dire que ce type de document existait bien avant que les principes gouvernant l'exécution des contrats administratifs aient été consacré par la jurisprudence. Or, le contenu de certains de ces principes (notamment les pouvoirs unilatéraux) figuraient dans ces cahiers des charges. Il est ainsi permis de penser qu'ils ont contribué à inspirer la jurisprudence administrative. Cette pratique ne s'est jamais démentie, et la Direction des affaires juridiques (DAJ) du MINISTERE DE L'ÉCONOMIE, DES FINANCES ET DE L'INDUSTRIE publie des cahiers des clauses administratives générales (CCAG) qui ont pour objet de servir aux acheteurs publics à rédiger les clauses de leurs marchés. On trouve dans ces cahiers des charges-types, des modèles de clauses qui réitèrent la portée de la plupart de principes jurisprudentiels d'exécution du contrat évoqués précédemment. Il serait vain de multiplier les exemples, mais l'on peut mentionner l'article 45 du CCAG Travaux, qui prévoit que « le représentant du pouvoir adjudicateur peut mettre fin à l'exécution des prestations faisant l'objet du marché avant l'achèvement de celles-ci » consécutivement à une faute du titulaire, ou pour un motif d'intérêt général. La Mission d'appui au financement d'infrastructures (Fin. Infra.) publie également un « clausier » visant à encadrer l'exécution des marchés de partenariat.

Par ailleurs, des circulaires ministérielles rappellent périodiquement (en période de crise économique) les conditions de la mise en œuvre de la théorie de l'imprévision.

3.2 Le rôle de la doctrine universitaire

La doctrine universitaire a joué un rôle important dans l'édification d'un droit des contrats publics. Elle en a extrait les principes directeurs de la jurisprudence, et les a organisés en système à partir de la fin des années 1920. C'est à Gaston Jèze que l'on doit la notion de « contrat administratif », systématisée autour d'un régime général déduit des

nous permettons également de mentionner notre thèse, *L'aléa dans les contrats publics en droit anglais et droit français*, Paris, LGDJ, Bibl. de droit public, t. 288, 2015, p. 251-260, p. 267-280, p. 294-300, et p. 311-313.

principes issus de la jurisprudence du Conseil d'État et du TRIBUNAL DES CONFLITS, au sein d'un ouvrage en trois volumes, publié entre 1927 et 1934, *Les contrats administratifs de l'État, des départements, des communes, et des établissements publics*[58]. L'auteur insiste sur le caractère exorbitant des contrats administratifs (déduit des pouvoirs unilatéraux de l'Administration et des droits particuliers de son cocontractant), ce qui conduit à penser le contrat administratif comme une notion autonome du droit privé, à l'instar du droit administratif dans son ensemble. Au début des années 1980, la seconde édition du *Traité des contrats administratifs*[59], initiée par André de Laubadère, doit être mentionnée, car elle contribue – avec notamment les travaux de Roland Drago[60], à rappeler le carcatère *contractuel* des contrats administratifs. Le *Traité* met ainsi en exergue, de façon sans doute originale au début des années 1980, les principes issus du Code civil qui s'appliquent aux contrats administratifs.

Si la doctrine universitaire n'a plus le rôle de « défricheur » qu'elle pouvait avoir en la matière dans le premier tiers du XX[e] siècle, son intérêt pour les contrats publics semble ne jamais avoir été aussi important qu'actuellement. On peut, sans trop de risques, avancer que la doctrine universitaire française est l'une de celles qui s'intéresse le plus aux contrats publics (peut-être à l'excès ?). Chaque année, plusieurs thèses de doctorat sont ainsi consacrées aux contrats publics, et on ne compte pas moins de cinq manuels à jour en la matière[61], plusieurs encyclopédies consacrées aux contrats publics en général, ou aux

[58] G. JEZE, *Les contrats administratifs de l'État, des départements, des communes, et des établissements publics*, 3 tomes, Paris, Giard, 1927-1934.

[59] A. DE LAUBADERE, P. DELVOLVE, F. MODERNE, *Traité des contrats administratifs*, 2 tomes Paris, LGDJ, 1983-1984.

[60] R. DRAGO, « *Paradoxes sur les contrats administratifs* », *Études offertes à Jacques Flour*, 1979, p. 151 ; « Le contrat administratif aujourd'hui », *Droits* 1990, n° 12, p. 117 ; « La notion d'obligation en droit public et en droit privé », *Archives de philosophie du droit* 2000, t. XLIV, p. 43.

[61] S. BRACONNIER, *Précis du droit de la commande publique*, Le Moniteur, 2019 ; C.-A. DUBREUIL, *Droit des contrats administratifs*, Paris, PUF, Thémis, 2019 ; H. HOEPFFNER, *Droit des contrats administratifs*, Paris,

contrats de commande publique, ainsi que trois revues mensuelles entièrement dédiées aux contrats publics (sans compter les nombreux, articles, chroniques et commentaires publiés dans les revues consacrées au droit administratif)[62]. En outre, deux volumes de mélanges – en l'honneur de Michel Guibal[63] et en l'honneur de Laurent Richer[64] y sont intégralement consacrés.

Cette brève synthèse sur les principes du droit des contrats publics et leurs sources révèle l'émiettement de ces dernières : des textes de toute nature normative, la jurisprudence, la doctrine administrative, et la doctrine universitaire ont tous contribué (à proportion inégale) à l'émergence ou à la consolidation des principes du droit français des contrats publics.

Dalloz, 2019 ; L. RICHER, F. LICHERE, *Droit des contrats administratifs*, Paris, LGDJ, 2019 ; M. UBAUD-BERGERON, *Droit des contrats administratifs*, Paris, LexisNexis, 2019.

[62] *Bulletin juridique des contrats publics*, EFE ; *Contrats et marchés publics*, LexisNexis ; *Contrats publics : l'actualité de la commande et des contrats publics*, Le Moniteur.

[63] *Les contrats publics, Mélanges en l'honneur du professeur Michel Guibal* (2 tomes), Montpellier, Presses universitaires de Montpellier, 2006.

[64] *À propos des contrats des personnes publiques, Mélanges en l'honneur de Laurent Richer*, Paris, LGDJ, 2013.