iUS PUBLICUM NETWORK REVIEW

N.3

2012

ISSN 2039-2540

Issue n. 3 - 2012-ISSN 2039 2540

Index

Articles

Reports

iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

THE IMPACT OF ARTICLE 41 OF THE EU CHARTER OF FUNDAMENTAL RIGHTS ON ITALIAN ADMINISTRATIVE LAW: SOME OBSERVATIONS.

Michele TRIMARCHI

INDEX

1. INTRODUCTION

Many provisions of the EU Charter of Fundamental Rights (ECFR) are relevant for the overall system of administrative law[1]. The warning of an eminent Italian scholar that

[1] For example: art. 8, second paragraph, concerning the right of access to personal data, which also regards the data held by the administration; art. 17 concerning property and the limits of the power of eminent domain; art. 18, concerning the right of asylum; art. 36, concerning the access to services of general economic interest; art. 42, concerning the right of access to documents; art. 43 on the European Ombudsman; and, in general, the overall system of freedom, which indicates, not unlike the Italian Constitution, what the government cannot do.

anyone "who wants to know how the administration is governed in our constitution should not only read two articles, but the whole constitution"[2] is valid both for the Charter of Fundamental Rights and the European treaties[3].

Having said that, some provisions of these Acts are *expressly* related to public administration: for example, Articles 97 and 98 of the Italian Constitution and Article 41 ECFR, entitled "Right to good administration"[4]. The first two are contained in the section

[2] C. ESPOSITO, *Riforma dell'amministrazione e diritti costituzionali dei cittadini,* in Id., *La Costituzione italiana. Saggi*, Padova (1954) 248; G. CORSO, *La costituzione italiana negli studi di diritto amministrativo,* in *Riv. Dir. cost.* (1999) 120 ff.; Id., *Manuale di diritto amministrativo,* Torino (2008) 29 ff.

[3] An overview of the provisions contained in the TFEU relevant for the overall regime of administrative law is provided by P. CRAIG, *EU Administrative law. The* acquis, in *Riv. It. Dir. pubbl. com.* (2011) 329 ff.

[4] M.P. CHITI, *Il mediatore europeo e la buona amministrazione comunitaria,* in *Riv. It. Dir.Pubbl.Com* (2000) 313 ff.; F. TRIMARCHI BANFI, *Il diritto a una buona amministrazione,* in M.P. CHITI e G. GRECO (ed), *Trattato di diritto amministrativo europeo,* I, Milano (2007) 49 ff.; D. SORACE, *La buona amministrazione e la qualità della vita, nel 60° anniversario della Costituzione,* in *www. Astrid-online.it*; R. BIFULCO, *Art. 41. Diritto a una buona amministrazione,* in R. BIFULCO, M. CARTABIA, A. CELOTTO (ed.), *L'Europa dei diritti,* Bologna (2001), 284 ff.; A. ZITO, *Il "diritto a una buona amministrazione" nella carta dei diritti fondamentali dell'Unione Europea e nell'ordinamento interno,* in *Riv. It. Dir. Pubbl. Com.* (2002) 425; G. DELLA CANANEA, *I procedimenti amministrativi della Comunità Europea,* in M.P. CHITI, G. GRECO (ed.), *Trattato di diritto amministrativo europeo,* I, Milano, (1998) 230 ff.; Id., *Al di là dei confini statuali,* Bologna (2009) 91 ff.; G. DELLA CANANEA – C. FRANCHINI, *I principi dell'amministrazione europea,* Torino (2010) 86 ff., 101 ff.; E. SANNA TICCA, *Cittadino e pubblica amministrazione nel processo di integrazione europea,* Milano (2004) 330 ff.; A. SERIO, *Il principio di buona amministrazione procedurale. Contributo allo studio del buon andamento nel contesto europeo,* Napoli (2008) 1 ff.; D.U. GALETTA, *Le garanzie procedimentali dopo la legge 15/2005: considerazioni sulla compatibilità comunitaria dell'art. 21-octies L. 241/90, anche alla luce della previsione ex art. 41 CED,* in L.R. PERFETTI (ed), *Le riforme della l. 7 agosto 1990 n. 241 tra garanzia della legalità ed amministrazione di risultato,* Padova (2008) 322 ff.; L. R. PERFETTI, *Diritto ad una buona amministrazione, determinazione dell'interesse pubblico ed equità,* in *Riv. It. Dir. Pubbl. Com.* (2010) 789 ff.; S. VILLAMENA, *Mediatore europeo e ‹‹buona amministrazione›› (Profili ricostruttivi della tutela del Mediatore Europeo* attraverso *la buona amministrazione comunitaria),* in A. CONTIERI, F. FRANCARIO, M. IMMORDINO, A. ZITO (ed.), *L'interesse pubblico tra politica e amministrazione,* vol. II, Napoli (2010), 251 ff.; M. C. CAVALLARO, *Clausola di buona amministrazione e risarcimento del danno,* ivi, 649; P.P. CRAIG,

on government, the last one in the section on citizenship. The difference is not without relevance, as we shall see.

The following considerations are concerned with the impact of Article 41 on Italian administrative law, and in particular on the regulation of administrative activity.

Since the Court of Justice has always qualified "good administration" as a general principle of the European institutions' activity or as a right of the citizens[5], the "right to good administration" is usually studied simply as a right of the European citizens towards the EU institutions[6].

This approach is correct but incomplete, because, according to Article 51 ECFR, "the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity *and to the Member States only when they are implementing Union law*": therefore the "right to good administration" (Article 41) concerns not only the European institutions but also the national ones when acting as agents of the Union or where issues of Union law are involved7.

Administrative law, London, Sweet & Maxwell (1994) 18 ff., 409 ff.; S. CASSESE, *Il diritto alla buona amministrazione*, in *Studi in onore di Alberto Romano*, I, Napoli (2011) 105-113.

[5] A. SERIO, *op. cit.*, 21 ff., 126 ff.; R. BIFULCO, *op. cit.*, 285; otherwise D. U. GALETTA, *Diritto ad una buona amministrazione e ruolo del nostro giudice amministrativo dopo l'entrata in vigore del Trattato di Lisbona,* in *Dir. Amm.* (2010) 629 ff..

[6] See A. SERIO, *op. cit.*, 1 ff..

[7] C. HARLOW – R. RAWLINGS, *National administrative procedures in a European perspective: pathways to a slow convergence,* in *Italian Journal of Public Law* (2010) 220; P. CRAIG., *EU administrative law*, cit., 330; F. ASTONE, *Le amministrazioni nazionali nel processo di formazione ed attuazione del diritto comunitario,* Torino (2004) 65 ff.; D.U. GALETTA, *Diritto a una buona amministrazione,* cit.. 630.

Moreover, since Article 1 of the Italian Administrative Procedure Act (APA) (law 241/90) provides for administrative activity to be governed by the principles of European law, it must be assumed that the "right to good administration" refers to the relations between Italian citizens and national public administrations8 even when they are not acting as agents of the Union9; in fact, if the assimilation of the principles of European law by the APA also concerned the conditions attached to their application by European law itself (Article 52 ECFR), Article 1 APA would have no meaning, because the relevance of Article 41 in the relations between Italian citizens and national public administrations which act as agents of the Union derives directly from Article 52 and the supremacy of EU law.

If, therefore, Article 41 also applies to the relationship between Italian citizens and national public administrations, the question arises whether and to what extent it innovates national administrative law.

2. ARTICLE 41 ECFR AND THE ITALIAN ADMINISTRATIVE PROCEDURE ACT: A COMPARISON

As written in the explanations relating to the Charter of Fundamental Rights (2007/C 303/02), Article 41 is based on the existence of the Union as subject to the rule of

[8] D.U. GALETTA, *Diritto a una buona amministrazione,* cit.. 631 s

[9] D.U. GALETTA, *Diritto a una buona amministrazione,* cit., 637; D. SORACE, *La disciplina generale dell'azione amministrativa dopo la riforma del titolo V della Costituzione. Prime considerazioni*, in *Annuario AIPDA 2002*, Milano (2003) 31 f.

law whose characteristics were developed in the case-law which enshrined *inter alia* good administration as a general principle of law[10]. It consists of four paragraphs.

a) The first paragraph states that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by institutions;

b) The second paragraph could be considered as a specification of the first one. It states that the "right to good administration" includes: the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; the right for every person to have access to his or her file (while respecting the legitimate interest of confidentially and of professional and business secrecy); the obligation of the administration to give reasons for its decisions.

c) The third paragraph provides the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties.

d) The fourth paragraph states that every person may write to the institutions of the Union in one of the languages of the treaties and must have an answer in the same language.

The wording for that right in the first two paragraphs derives from case-law[11] and the wording regarding the obligation to provide reasons comes from Article 296 (2) of the

[10] See C.G.C.E., 31/3/1992, c-255/90 P *Burban* [1992] ECR I-2253; C. F. I., 18/9/1995, t-167/94 *Nölle* [1995] ECR II-2589; C.F.I., 9/7/ 1999 t-231/97 *New Europe Consulting and others* [1999] ECR II-2403.

For an interesting analysis of the case law on art. 41, see L.R. PERFETTI, *op. cit.* 793 ff..

[11] C.G.C.E., 15/10/1987, c. 222/86 *Heylens* [1987] ECR 4097, paragraph 15 of the grounds; C.G.C.E., 18/10/1989, c. 374/87 *Orkem* [1989] ECR 3283; C.G.C.E., 21/11/1991, c. 269/90 *TU München* [1991] ECR I-5469; C. F. I., 6/12/1994, t-450/93 *Lisrestal* [1994] ECR II-1177; C.F.I., 18/9/1995, t.167/94 *Nölle* [1995] ECR II-2589.

Treaty on the Functioning of the European Union (TFEU) (ex Article 253 TEC), which provides that "legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties"[12]. Paragraph 3 reproduces the right now guaranteed by Article 340 (2) TFEU (ex Article 288 TEC) ("in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties"); paragraph 4 reproduces the right now guaranteed by Article 20(2)(d) (right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language).

But "prior to the Charter the protection of rights was fragmented and piecemeal, thereby making it more difficult for the citizenry to understand the legal status quo"[13] and, increasing the scope of Union power, through the promulgation of some form of European bill of rights has become more pressing. The positive effect of Article 41 should be the increase of rights-based claims within judicial review actions.[14]

More generally, "the Court of Justice has read principles such as proportionality, fundamental rights, legal certainty, legitimate expectations, equality and procedural justice into the TFEU, and used them as the foundation for judicial review": on this see P. CRAIG, *EU administrative law*, cit., 331

[12] (cf. also the legal base in Article 298 of the Treaty on the Functioning of the European Union for the adoption of legislation in the interest of an open, efficient and independent European administration)

[13] P. CRAIG, *EU administrative law*, cit., 348.

[14] P, CRAIG, *EU administrative law*, cit., 350. "claimants will be able to point to a clear set of rights, which are legally binding on EU institutions and member states when they act within the sphere of EU law."

Like the entire Charter[15], Article 41 takes into account the legal experiences of the States too, with specific reference, rather than to the constitutional provisions, to the APA[16]. For this reason, almost all the principles and rules laid down by Article 41 are already known in the Italian legal system[17].

a) The Republican Constitution refers to impartiality with regard to public office organization (Article 97), but *la doctrine*[18] and case law have long since expanded the provision to administrative action, underlying that organization should precede and shape activity[19].

[15] As provided by Article 52, paragraph 6

[16] See D. SORACE, *La buona amministrazione e la qualità della vita*, cit; *contra*, A. ZITO, *op. cit.*, 43. For a comparative analysis see the "European Code of Good Administrative Behaviour", available at http://www.statskontoret.se/upload/Publikationer/2005/200504.pdf, 23ff.

[17] D. DE PRETIS, *Italian administrative law under the influence of European law*, in *Italian journal of public law*, 1 (2010), 12: "The principles and the values underpinning Italian administrative law are in line with the founding principles of the European Union (art. 6 TEU). The Italian legal system shares the values expressed in the European Convention of Human Rights (ECHR) as well. Bearing in mind the complex circuit of building of the European principles, it is natural [obvious] to mention that Italy has adhered to the common European legal systems since their origin".

[18] C. ESPOSITO, *op. cit.*, 257; U. ALLEGRETTI, *L'imparzialità amministrativa*, Padova (1965) 181 ff.; E. CANNADA BARTOLI,. *Interesse (dir. amm.)*, in *Enc. Dir., XXII*, Milano (1972) 3-6; G. CORSO, *Manuale*, cit., 360 f..

[19] D. DE PRETIS, *op. cit.*,88.

b) Equity[20] and reasonableness[21] are used by the Italian courts (not unlike the Court of Justice[22]) as the foundation for judicial review, in order to prevent discretion degrading into arbitrariness[23].

Article 41 of the Charter, however, refers not to reasonableness as a criterion of discretionary choice, but rather to qualify the time required to conclude proceedings (which must be "reasonable")[24]: it is not so much, then, a rule directed to the administration but to the national parliaments. In this sense we can say that Italian law is at the cutting edge: Article 2 APA provides terms for completing the process that balances the need for speed[25]

[20] Cf. F. MERUSI, *L'equità nel diritto amministrativo secondo Cammeo: alla ricerca dei fondamenti primi della legalità sostanziale*, in *Quaderni Fiorentini per la storia del pensiero giuridico moderno* (1993) 413 ff.; G. BOTTINO, *Equità e discrezionalità amministrativa,* Milano (2004) 124 ff.; in the European legal system, see E. SANNA TICCA, *op. cit.*, 147 f. and L. R. PERFETTI, *op. cit.*, 818 ff.;A. ZITO, *op. cit.*, 434, notes that neither the Constitution nor Law 241/1990 refer to the concept of equity. Thus, fair administration, as a right, is something new for the Italian legal system

[21] *Ex multis*, L. D'ANDREA, *Ragionevolezza e legittimazione del sistema*, Milano (2005) 25 ff., A. SANDULLI, *La proporzionalità dell'azione amministrativa,* Padova (1998) 322 f.; F. LEDDA *Potere, tecnica e sindacato giudiziario sull'amministrazione pubblica,* ora in Id., *Scritti giuridici*, Padova (2002) 231 f.; Id., *Variazioni sul tema dell'eccesso di potere, ivi*, 573 ff.; Id., *La concezione dell'atto amministrativo e dei suoi caratteri*, *ivi*, 249.

[22] P. CRAIG, *EU administrative law*, cit., 331.

[23] M. TRIMARCHI, *Dalla pluralità dei vizi di legittimità alla pluralità delle tecniche di sindacato*, in *Dir. Amm.* (2010) 993 ff.

[24] Scholars have long been aware of the importance of the timing of administrative activity. See F. LEDDA, *Il rifiuto del provvedimento amministrativo*, Torino (1964) 78 ff.; M. CLARICH, *Termine del procedimento e potere amministrativo*, Torino (1995) 27 ff.

[25] According to Article 2 l. 241/1990, state administrative proceedings must be completed within thirty days of commencing.

with the objective difficulties of the administrative matters to be resolved (and, in this sense, reference to the standard of reasonableness is clearly in *re ipsa*).

c) The Italian Administrative Procedure Act even establishes the right of citizens to be heard[26]. The interested parties have the right to be notified of the initiation of proceedings and, whether they have received such communication or not, have the right to intervene in the proceedings, presenting pleadings and documentation[27]. As in the EU legal system, a hearing is required even where no sanction is imposed "provided that there is some adverse impact, or some significant effect on the applicant's interest"[28]. The only difference is that European law provides for oral participation, that, despite the insistent pressure of scholarship, is not admitted under Italian law[29].

d) Article 3 APA provides that, with some limited exceptions, administrations are obliged to give reasoned decisions[30].

[26] On administrative procedure participation, see L.R. PERFETTI, *Procedimento amministrativo e partecipazione*, in *IusPublicum* (2011).

[27] G. CORSO, *Administrative procedures: twenty years on,* in *The Italian Journal of Public Law* (2010) 275.

[28] P. CRAIG, *EU administrative law*, cit., 335.

[29] Cf. A. ZITO, *op. cit.*, 438; L. R. PERFETTI, *Diritto ad una buona amministrazione,* cit., 798; G. DELLA CANANEA, *The Italian administrative procedure act: progresses and problems* (2011), in *IusPublicum*, 13.

[30] A. ROMANO TASSONE, *Motivazione (dir. amm.),* in *Diz. Dir. Pubbl.* edited by S. CASSESE, IV, Milano (2006) 3473 ff.; G. CORSO, *Motivazione dell'atto amministrativo,* in *Enc. Dir. Agg.*, Milano, (2001) 775 ff..

e) An entire chapter of APA is dedicated to the right of access to documents held by the public administration, and some special remedies (administrative and judicial) are provided in case it is denied.

f) The obligation for the administration to repair the damages caused to citizens is a recent but consolidated conquest of Italian administrative law[31].

3. THE IMPACT OF ARTICLE 41 ON ITALIAN ADMINISTRATIVE LAW.

Nihil sub sole novi for administrative law, then? No, for more than one reason.

a) First of all, Article 41, providing a definition of "good administration", introduces an important element of clarity in the Italian administrative law, where the expression "good administration" does not appear in any legislative text but is used in case law and by scholars with various meanings.

The Courts sometimes use the principle of "good administration" in order to strengthen the citizen's protection burdening the administration with obligations beyond those required by the Parliament Acts; at other times to reduce the citizen's protection, allowing the non-application of the provisions regarding participation when there is a need for speed[32], or, more generally, saving decisions affected by formal vitiating factors[33]. Good

[31] See an overview in G. CORSO – G. FARES, *La responsabilità della pubblica amministrazione. Casi di giurisprudenza*, Torino (2009) 1 ff..

[32] Council of State, sec. VI, December 10, 2010, n. 8704

[33] TAR Turin, sec. I, February 26, 2011, n. 216

administration is also used as a criterion for the organization of public services[34] or as a guiding principle in choosing the contractor[35]. Very often, finally, the violation of the principle of good administration is considered as an element used to detect administrative liability[36].

Nor is *La doctrine* is in agreement on what "good administration" means.

For example, is a "good" administration an efficient[37] or an impartial[38] one? Or, moreover, is an administration "good" if it observes the established rules[39]? Is an administration "good" when it adopts measures that are coherent with the results of the preliminary investigation or when it seeks the collaboration and consensus of individuals[40]? Or does "good administration" imply simplicity, transparency, subsidiarity, etc.[41]?

[34] Council of State, sec. V, February 8, 2011, n. 854

[35] TAR Trento, Trentino Alto Adige, sect. I, January 26, 2011, n.10

[36] Council of State, sec. VI, March 31, 2011, n. 1983 ; Council of State, sec. VI, January 12, 2011, n. 109; Council of State, sec. V, February 22, 2010, n. in 1083, Council of State, sect. IV, 24 December 2008, n. 6538.

[37] According to M.P. CHITI, *op. cit.*, 321, good governance occurs when the administration respects the criteria of efficiency and effectiveness;

[38] D. DE PRETIS, *op. cit.*, 88: "The concept of "good administration" in Italian administrative law includes the notion that the administrative act, besides being an instrument for the correct and faithful implementation of the law (the lawfulness of administrative action), which aims at pursuing the public interest according to criteria of efficacy, efficiency and economy (buon andamento), should be carried out in an objective and impartial way (imparzialità) in relation to the private parties involved""

[39] According to G. DELLA CANANEA, *Al di là dei confine statuali,* cit., 91 ff., the expression "good administration" has three meanings: observance of established rules, adequacy of procedures beyond those rules, coherence of the final measure with the results of the preliminary investigation

[40] E. SANNA TICCA, *op. cit.*, 336 f., notes that in the Italian legal system good administration is strongly linked to the principles of impartiality, proportionality and good performance. According to the author, a "good"

These elements are not incompatible, but the variety of meanings shows how in Italian law the concept of "good governance" is uncertain.

Nowadays, since the ECFR is binding, we can be sure about what "good administration" means, even if the list contained in Article 41 is not exhaustive[42]: it is a formula which summarizes the substantial and procedural rights of the citizens *vis-à-vis* the public bodies[43]. It is not so different from what more than a century ago was written by Oreste Ranelletti: it "must be said that the law aims primarily to implement good governance; the respect of these forms [the forms required by the administrative acts] is an element of good administration "[44].

---

administration is a "responsible" one, respectful of the principles that govern the action in order to guarantee the claims of individuals. Finally, an administration is "good", if it "does not impose its own choices, but seeks collaboration and consensus through participation of individuals."

[41] D. SORACE, *La buona amministrazione e la qualità della vita,* cit,

[42] It is widely believed that Article 41 does not reproduce all the procedural guarantees recognized by case law: see D.U. GALETTA, *Le garanzie procedimentali,* cit., 323; D. SORACE, *La buona amministrazione e la qualità della vita,* cit., 1 f.

The selection made is considered dangerous by some scholars who are against the "constitutionalization" of the right to good administration, because it involves the risk of an improper hierarchy among principles. On this see M.P. CHITI, *op. cit*., 322 f.; R. BIFULCO, *op. cit*., 286 s .

[43] P. CRAIG, *op. cit.*, 18, speaks of principles of good administration, with specific reference to Legality, procedural propriety, participation, openness, rationality, relevancy, propriety of purpose, reasonableness, legitimate expectations, legal certainty and proportionality: in this context, "good governance" is merely a summary of the whole formula of substantive principles and procedural safeguards that the administration must comply with.

[44] O. RANELLETTI, *Ancora sui concetti discretivi e sui limiti della competenza dell'autorità giudiziaria e amministrativa* (1893), in Id. *Scritti giuridici scelti*, II, *La giustizia amministrativa*, Napoli (1992) 98.

We can therefore speak of a double meaning of the "right to good administration", depending on whether the right is referred to the decision *stricto sensu* (the discretional choice) or to the procedure[45]. In the first case "good administration" indicates the rights to be heard, to access to one's files, the obligation to conclude the procedure within a reasonable time and to give reasoned decisions, etc.; in the second case, it implies the right of every person to have his or her affairs handled with fairness and impartiality.

It should also be considered that, according to Article 41, rules which in the Italian legal system are contained in ordinary acts (such as the right to be heard or the right of access and the obligation to give reasoned decisions) have been reproduced at the level of fundamental rights. This means, especially with regards to procedural rights, that these rights are nowadays considered as the founding pillars of modern supra-state democracy [46].

b) According to the traditional Italian way of thinking, APA provisions do not grant fundamental rights to individuals. When administrations act as authorities in order to manage the public interest, even if they take invalid decisions[47], the citizen's subjective rights (i.e. the right to property) "degrades" into legitimate interest[48].

[45] See F. TRIMARCHI BANFI, *op. cit.*, 49 ff.; D. SORACE, *La buona amministrazione e la qualità della vita*, cit., 2 ff..

[46] G. DELLA CANANEA, *Al di là dei confini statuali*, cit., 172 ff., *passim.*. On this see A. ROMANO TASSONE, *A proposito del c.d. ‹‹diritto globale›› (leggendo* Al di là dei confini statuali *di Giacinto della Cananea)*, in *Dir. e Proc. Amm.*, 721 ff..

[47] M. S. GIANNINI, *Discorso generale sulla giustizia amministrativa*, I, in Riv. Dir. Proc. (1964) 538; O. RANELLETTI, *Ancora sui concetti discretivi e sui limiti della competenza dell'autorità giudiziaria e amministrativa*, cit., 95 f..

[48] O. RANELLETTI, *A proposito di una questione di competenza della IV sezione del Consiglio di Stato (1892)*, in Id. *Scritti giuridici scelti, II*, cit., 75, *passim*

Legislative definitions are not binding on the interpreter[49], but, is very difficult to assume that the rights laid down by an Article which is contained in the EU Charter of Fundamental Rights, are not properly subjective rights of citizens[50] (or, if you like, rights of citizenship[51]). This, from the hermeneutic point of view[52], means that between citizens and the administration there is a legal relationship[53] made of rights and obligations[54], and denies the traditional idea according to which citizens' claims towards administrative activity are simply legitimate interests. All the provisions governing the administrative procedure establish obligations for the public administration and grant the corresponding rights to the citizens. For example, the rule that establishes a deadline for the procedure obligates the

[49] S. PUGLIATTI, *Il trasferimento della situazione soggettiva*, I, Milano (1964) 11; A. BELVEDERE, *Il problema delle definizioni nel codice civile*, Milano (1977) 161 ff.. In Italy, the case of the right of access is emblematic: though qualified with some emphasis by the Administrative Procedure Act as a "right", it has often been (and sometimes continues to be) considered by *la doctrine* and case law as a legitimate interest

[50] D. SORACE, *La buona amministrazione e la qualità della vita,* cit.,

[51] G. PASTORI, *La disciplina generale dell'azione amministrativa*, in *Annuario AIPDA 2002*, Milano (2003) 35 ss; D. SORACE, *La responsabilità risarcitoria delle pubbliche amministrazioni per lesione degli interessi legittimi dopo 10 anni*, in *Dir. Amm.* (2009) 394.

[52] Constitutional provisions typically have a hermeneutic function: see. V. CRISAFULLI, *La Costituzione e le sue disposizioni di principio,* Milano (1952); G. CORSO, *La costituzione come fonte di diritti,* in *Ragion pratica* (1998), 89.

[53] M. PROTTO, *Il rapporto amministrativo,* Milano (2008) spec. 163 ff.

[54] L. FERRARA, *Dal giudizio di ottemperanza al processo di esecuzione. La dissoluzione del concetto di interesse legittimo nel nuovo assetto della giurisdizione amministrativa*, Milano (2003) 130-134; A. ORSI BATTAGLINI, *Alla ricerca dello stato di diritto. Per una giustizia non amministrativa (Sonntagsgedanken)*, Milano (2005) 170-175; G. PASTORI, op. cit., 35; M. RENNA, *Obblighi procedimentali e responsabilità dell'amministrazione*, in *Dir. Amm.* (2005) 566 f.; G.D. COMPORTI, *Torto e contratto nella responsabilità civile delle pubbliche amministrazioni*, Torino (2003) 60 ff.; *contra* M. OCCHIENA, *Situazioni giuridiche soggettive e procedimento amministrativo*, Milano (2002) 347 ff..

public administration at issuing the decision within that time and grants to citizen's the right to have an answer in the same period, the rule that requires the motivation grants to the citizen the right to obtain a full justification of the decision, etc.[55].

In other words, power is limited by the rights of those who come into contact with power[56], and not by what the Italian scholars use to call "norme di azione", that are rules which establish standards designed primarily to regulate the functioning of public administration, taking it as an objective value[57]. This could have some consequences for the profile of judicial actions, "with an increasing number of such claims having a strong rights-based component"[58]

Some scholars think that the existence of a "status of citizenship", consisting in a series of rights towards administrative behaviour, is already implied in the Italian Constitution[59]; others that it is inscribed in the inner logic of the theory of subjective

[55] A. ROMANO TASSONE, *Situazioni giuridiche soggettive (dir. amm.)* in *Enc. Dir. Agg.* II, Milano (1998) 985

[56] F. BENVENUTI, *Il nuovo cittadino*, Venezia (1994) 75 ff.

[57] E. GUICCIARDI , *La giustizia amministrativa*, Padova (1954) 33; A. ROMANO, Giurisdizione *amministrativa e limiti della giurisdizione ordinaria*, Milano (1975) 133 ff.; Id., Commento *all'art. 26 r.d. 26 giugno 1924*, n. 105, in A. ROMANO – R. VILLATA, *Commentario breve alle leggi sulla giustizia amministrativa*, Padova (2009) 1172 f.; F. VOLPE, *Norme di relazione, norme d'azione e sistema italiano di giustizia amministrativa*, Padova (2004) 170-182; contra, see E. CAPACCIOLI, *Interessi legittimi e risarcimento dei danni*, in Id., *Diritto e processo*, Padova (1978) 111 ff.; A. ORSI BATTAGLINI, *Attività vincolata e situazioni soggettive*, in *Riv. trim. dir. proc. civ*. (1988) now in Id., *Scritti giuridici*, Milano (2007) 1232 ff..

[58] As P. CRAIG, *EU administrative law*, cit., 350, notes with regard to the Union courts judicial review.

[59] G. PASTORI, *Statuto dell'amministrazione e disciplina legislativa*, in ANNUARIO AIPDA 2004, Milano (2005) 11 ff.; cf. also A. ORSI BATTAGLINI, *Alla ricerca dello stato di diritto*, cit., 101 ff.. L. R. PERFETTI, *Diritto ad una buona amministrazione*, cit., 814 ff.; G. CORSO, *Gli studi di diritto amministrativo*, cit., 129; D. SORACE, *La buona amministrazione e la qualità della vita*, cit

situations[60]. Either way, what is certain is that Article 41 represents a solid literal argument in favour of this thesis[61].

At a constitutional level, similar observations can be made. The canons of "buon andamento" and "imparzialità" (Article 97 of the Italian Constitution) are in principle objective values[62], defending the effectiveness of administrative action, rather than giving attention to the interests and positions of private parties which come into contact with the administration. "In short, we are dealing here with the administration's duty to pursue the interests entrusted to its care, respecting certain rules of organization and action, rather than with a true private right, to be obtained by observing those rules"[63]. Or, in other words "the canons of impartiality and buon andamento maintain their primary objective valence as criteria which are not strictly linked to any specific citizen's right"[64]. Otherwise, the right to good administration draws only incidental attention to the pursuit of the public interest to the extent that it directly affects the protection of the position of individuals.

[60] L. FERRARA, *Dal giudizio di ottemperanza,* cit., spec 168-172,

[61] As noted by A. ZITO, *op. cit.,* 430-432 the European administrative law is based "in modo inequivocabile (sul)la centralità del primo (l'individuo) nei confronti della seconda (la pubblica amministrazione) nel senso che è il contenuto delle sue pretese a riverberarsi sulle modalità di svolgimento della funzione amministrativa e non il contrario"; see also L. R. PERFETTI, *Diritto ad una buona amministrazione*, 813 ss, and E. SANNA TICCA, *op. cit.,* 153 f., 334, who observes that Article 41 ECFR builds the administrative relationship on citizen's rights and not on administrative behaviour. A citizen's claims "sono fonti di obblighi nel rapporto che si instaura tra amministrazione e cittadino ai fini della soluzione di un problema amministrativo…le pretese rappresentano il contenuto sostanziale dello statuto del cittadino comunitario e nazionale nel suo rapporto con l'amministrazione" (141 f.)

[62] See M. SPASIANO, *Il principio di buon andamento: dal metagiuridico alla logica del risultato in senso giuridico*, in *Ius Publicum* (2011), 11 ff.

[63] D. DE PRETIS, *op. cit.*,87.

[64] D. DE PRETIS, *op. cit.*,87.

c) According to Article 6 TFUE, the ECFR has the same value as the Treaties[65]. As the European Treaties have in Italy the same value as the fundamental principles which are contained in the first part of the Constitution, the "right to good administration" gains the legal status of a constitutional (and fundamental) right too. This has at least two practical consequences.

The first consequence is the "constitutionalization" of the procedural due process of law in Italy[66]. Any Italian Act that would unreasonably[67] restrict the exercise of the rights granted by the APA may be dis-applied by the national court or declared illegal by the Constitutional Court, for violation of Articles 11 and 117 of the Constitution. 1. More exactly, according to Article 52 ECFR, first paragraph, limitations on the exercise of the rights and freedoms recognised by the Charter are legitimate if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others; and, however, they are subject to the principle of proportionality and must respect the essence of those rights and freedoms.

The second consequence regards the direct application of Article 41. According to Article 13 of the Italian APA, some rules concerning participation (such as the right to be heard and the duty to give a reasoned decision) do not apply to planning and rule-making procedures. These limitations seem to be illegitimate, because the criteria established by Article 52 ECFR for restricting the exercise of the rights and freedoms recognised by the Charter do not appear to be respected: the right to be heard and the duty to give a reasoned decision concern the essence of the right to good administration, and the restrictions

[65] See P. CRAIG, *EU administrative law*, cit., 349.

[66] On this see G. DELLA CANANEA, *The Italian administrative procedure act*, cit., 7 ff.

[67] On this see L.R. PEFETTI, *Il diritto ad una buona amministrazione,* cit., 803 f.: in the European perspective the possibility of a reasonable restriction of a procedural rights does not call into question the nature of the individual subjective right, unlike in Italy.

provided by Article 13 APA are in contrast with the principles of proportionality and reasonableness since participation plays an essential role in wide-ranging decisions, which normally involve many discretionary choices concerning "not only the technical means of implementing a policy, but also the priorities to be accorded to relevant and competing interests". While waiting for the Italian law to be amended, it must be assumed that national courts may, case by case, not apply Article 13 APA, directly applying Article 41 to planning and rule making procedure.

4. IS ARTICLE 21 OCTIES L.241/1990 (APA) IN CONFLICT WITH ARTICLE 41 ECFR ?

All the rights mentioned in Article 41 were already granted by the Italian procedure act. But is the Italian law able to guarantee the right to good administration to be effective?

As said, "if there have been problems, they did not involve compatibility between principles linked to the two systems, national and European, but rather the different value or degree of effectiveness given to the same principle or basically similar principles, in the two systems"[68].

The question arises because one of the recent amendments of the Italian Administrative Procedure Act aims at preventing the annulment of the administrative acts for the infringement of formal requirements (art. 21 *octies*, second paragraph): "a measure that is adopted in breach of rules governing procedure or the form of instruments shall not be voidable if, by virtue of the fettered nature of the measure, it is evident that the provision

[68] D. DE PRETIS, *cit.*, 12; see also D.U. GALETTA, *La giurisprudenza della Corte di Giustizia in materia di autonomia procedurale degli Stati Membri*, in *Ius Publicum* (2011) 9 ff.

it contains could not have been other than those actually adopted. In any event, an administrative measure shall not be voidable on the grounds of failure to communicate the commencement of a procedure if the authority shows at trial that the content of the measure could not have been other than that actually adopted".

According to some scholar, this rule reflects "a cultural shift, the idea that procedural constraints are only obstacles to a well-intentioned decision maker" or the idea that "the individual interest of that party claiming a procedural due process right may not be weighed against the collective interest that the administrative decision maximes"[69]. Since due process of law is a (European) constitutional value, quashing an administrative measure only on formal grounds could not be considered unjustified or excessive by the national Parliament.

In a similar perspective, it has been argued that Article 21 *octies* APA, second paragraph, conflicts with Article 41[70]: the infringement of formal requirements could no longer be considered by our administrative Courts as irrelevant for the voidability of measures[71].

This idea does not seem to be persuasive for at least three reasons.

a) First, Article 41 makes no provisions regarding the penalty for infringing the right to good administration. Thus, discretion is left to national parliaments in this regard.

[69] G. DELLA CANANEA, *The Italian administrative procedure act*, cit.,15.

[70] D.U. GALETTA, *Diritto ad una buona amministrazione*, cit., 633 ff.; ma già Id., *Le garanzie procedurali*, cit.,333 f.: M.C. CAVALLARO, *op. cit.*, 655, shows what seems a paradox. If "good administration" means "efficient administration", not every breach of a formal rule should cause the invalidity of the measure; while, considering the "right to good administration" in the perspective of the individual's protection, Article 21 octies APA, second paragraph, seems to be an illegal rule.

[71] D.U. GALETTA, *op. ult. cit.*, 634 f.

The matter, at most, could regard whether their choices are effective and reasonable, but the infringement does not need to cause the voidability of the measure.

b) Moreover, all the main European legal systems contain the rule that not every infringement leads to the invalidity of the measure[72].

Section 46 of the *Verwaltungsverfahrensgesetz*, establishes that: "*die Aufhebung eines Verwaltungsaktes, der nicht nach § 44 nichtig ist, kann nicht allein deshalb beansprucht werden, weil er unter Verletzung von Vorschriften über das Verfahren, die Form oder die örtliche Zuständigkeit zustande gekommen ist, wenn offensichtlich ist, dass die Verletzung die Entscheidung in der Sache nicht beeinflusst hat.*"[73]

In Spain the *Ley 30/1992, de 26 de Noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común* states that "*el defecto de forma sólo determinará la anulabilidad cuando el acto carezca de los requisitos formales indispensables para alcanzar su fin o dé lugar a la indefensión de los*

[72] S. CIVITARESE MATTEUCCI, *La forma presa sul serio. Formalismo pratico, azione amministrativa e illegalità utile,* Torino (2006) 287 ss; W. GASPARRI, *Violazione delle regole formali tra invalidità degli atti e responsabilità risarcitoria. Una comparazione,* in *Dir. Pubbl.* (2007) 721 ff.; P. LAZZARA, *Procedimento e semplificazione. Il riparto dei compiti istruttori tra principio ed auto responsabilità privata,* Philos-Roma, (2005) 61 ff..

[73] The norm "history" and the various opinions on its opportunity are now clearly summarized by E. SCHMIDT-AßMANN, *L'illegittimità degli atti amministrativi per vizi di forma del procedimento e la tutela del cittadino,* in *Dir.Amm.*,2011, 471 ff. Generally, German administrative law focuses on the result of administrative action and, for this reason, procedures have the function to reach the legally correct result. But in the last year "a scholarly discussion is evolving on whether German Administrative Law should shift its attention from substantive justice to procedural justice, giving more weight to the instrumental as well as the non-instrumental justification of administrative procedures": M. FEHLING, *Comparative administrative law and administrative procedure,* in *IusPublicum* (2011), *6*

interesados" (Article 63.2). And "*la jurisprudencia tiende a refundir los dos motivos de anulabilidad, identificàndolos en ambos casos con la indefensiòn*"[74]

In France there is no similar written rule, but "*conscient qu'un formalisme excessif paralyserait l'action de l'administration, le juge fait prevue de pragmatisme et admet que l'omission de certaines formalitès, don't le caractère n'apparaît que comme* accessoire (*plus prècisèment << non* substantiel *>>), n'entraîne pas l'annulation de l'acte"*[75]. The criterion of the "incidence sur la dècision à prendre et *sur les garanties don't bènèficient les destinataires*" is used by case law and *la doctrine* in order to recognize a formal breach and distinguish it from a substantial one[76].

And, overall, the ECJ itself does not annul if is proved that, in the absence of irregularities, the proceeding could not lead to a different result[77].

[74] J. BERMEJO VERA, *Derecho administrativo basico*, Zaragoza (1995) 284 f. See STS 6/6/1991: "la invalidez que viene originada por infracciones formales, bien sean èstas las constitutivas de numida de pleno derecho (...9 ya se trate, con mayor razòn, de las determinates de la anulabilidad (...) requieren junto a la constataciòn de la existencia de la infracciòn procedi mal o formal, el requisito esencial y finalista de que mediante ellas se haya causado indefensiòn a los interesados, excluyendo en consecuencia la de quello que tubiera permanecido identico y de quello otros en que no quepa cabla de indefensiòn para el interesado.

[75] J. MORAND DEVILLER, *Droit administratif*, Paris (2011) 645.

[76] Only the *illègalitès externes (incompetence* and *vice de forme et vice de procedure*) and not the *illègalitès internes* (*Dètournement de pouvoir*, *violation directe de la règle de droit* and *contrôle des motifs de l'acte*), can be formal.

[77] C.G.C.E., 10/71989, c. 30/78, *Distillery Company Limited*, in *Racc.*, 1980, 2229; C.G.C.E., 11/11/1987, c. 259/85, *Francia/Commissione*; C.G.C.E., 21/3/1990, c. 142/87, *Belgio/Commissione*; Trib. U.E., V sec., 8/7/2004, *TEchnische Glaswerke*, c. T-198/01, in *Foro amm., C.D.S.*, 2004, 1878.

c) The remedy of the voidability of the measure can sometimes be substituted by the remedy of the administration's liability. This is not in contrast with Article 41 because what is necessary is the existence of a sanction against the infringement.

Even when the measure is not voidable (pursuant to art. 21 *octies* APA, second paragraph), public administration should be considered liable: if the infringement results in damage for the citizen, the administration has to compensate him or her[78]. This is because in the Italian legal system, invalidity and liability are not interdependent[79]: a measure could be damaging but not voidable or voidable but not damaging.

[78] D. SORACE, *op. ult. cit.*, 393 f.; G.D. COMPORTI, *op. cit.*, 70 f..

V. A ROMANO TASSONE, *I problemi di un problema. Spunti in tema si risarcibilità degli interessi legittimi*, in *Dir. Amm.* (1997) 61 ff.; A. ROMEO, *Ancora in tema di responsabilità della pubblica amministrazione: dalla ‹‹spettanza del provvedimento›› alla ‹‹spettanza del comportamento››?,* in *Foro Amm. C.D.S.*, 165; G.M. RACCA, *Gli elementi della responsabilità della pubblica amministrazione e la sua natura giuridica*, in R. GAROFOLI, G.M. RACCA, M. DE PALMA, *Responsabilità della pubblica amministrazione e risarcimento del danno innanzi al giudice amministrativo,* Milano (2003) 179-194; cf. G. AVANZINI, *Responsabilità civile e procedimento amministrativo,* Padova (2007) 235 ff.. In giurisprudenza v. Caff., sez. I, 10-1-2003, n. 157, in *Foro it.*, (2003) I, 78, con nota di F. Fracchia.

[79] A. ROMANO TASSONE, *La responsabilità della p.a. tra provvedimento e comportamento (a proposito di un libro recente),* in *Dir. Amm.* (2004) 209 ff.; L. FERRARA, *La partecipazione tra ‹‹ illegittimità ›› e ‹‹illegalità ››. Considerazioni sulla disciplina dell'annullamento non pronunciabile,* in *Dir. Amm.* (2008) 108: "nell'ambito della contrarietà a una norma deve, in definitiva, distinguersi il caso in cui essa ridonda in una invalidità, la quale giustifica una misura che colpisca l'atto, da quello in cui la medesima contrarietà non rileva sul piano attizio"; v. altresì G. FALCON, *La responsabilità dell'amministrazione e il potere amministrativo,* in *Dir. Proc. Amm.* (2009) 249: "se l'amministrazione procede in modo irregolare o scorretto – senza che tale irregolarità o scorrettezza abbia a che fare con la *direzione* del potere, con il possibile *risultato decisorio* – essa non lede in particolare l'interesse legittimo, ma lede allo stesso modo le situazioni di tutti coloro che partecipano, in quanto connesse alla loro partecipazione. Ciò non significa, come è ovvio, che da tale lesione non possa derivare una responsabilità per comportamento illecito, ma tale responsabilità non avrà – a mio avviso – a che fare con la lesione degli interesse legittimi"

A problem can arise if the infringement of a procedural rule does not determine a "danno ingiusto"[80], required by Article 2043 of the Civil Code in order to consider a subject liable[81], because in this case the administration would remain immune from any penalty. The matter can be overcome by stressing the punitive function of the administration's liability[82], which can be affirmed also when the administrative behaviour does not cause real damage[83].

In this regard we should not overlook that the threat of liability enforces the right to good administration probably more than the voidability of the measure, causing the administration's interest in avoiding making breaches of rules[84].

5. CONCLUSIONS

In conclusion, we can say that all rights guaranteed by Article 41 ECFR were already guaranteed by some provisions contained in the Italian constitution and APA. In this sense, the right to good administration is not new for the national legal system.

[80] For example, when the infringement of Article 7 APA does not have any consequence, because the interested parties could not influence the decision.

[81] F. CINTIOLI, *I danni risarcibili nella giurisdizione di legittimità: presupposti e condizioni. (L'alternativa tra provvedimento e attività amministrativa)*, in www.GiustAmm.it

[82] On liability functions see, *ex multis*, P. TRIMARCHI, *Causalità e danno*, Milano (1967) 53 ff., 133 ff., 157 ff.; M. BARCELLONA, *Danno risarcibile e funzione della responsabilità,* Milano (1972) 30 ff.; P.G. MONATERI, *La responsabilità civile*, in *Trattato di diritto civile* diretto da R. SACCO, Torino (1998)19 ff.

[83] A. ROMANO TASSONE, *Vizi*, cit.

[84] G. NAPOLITANO, *Il danno da ritardo della pubblica amministrazione: il fondamento della responsabilità e le forme di tutela*, in *AA.VV., Verso un'amministrazione responsabile,* Milano (2005) 243.

However, since the Charter has become binding on a par with the European treaties, and since the principles of European administrative law are binding for all national administrative actions, Article 41 is not without relevance to the Italian administrative law.

The first point regards the meaning of good administration. In the Italian tradition, thus is an uncertain formula, used by scholars and case law in several ways; the European Charter shows, instead, that the expression "good administration" is simply a way to summarize the substantial and procedural rights of the citizens *vis-à-vis* the public bodies.

In this perspective, the most important consequence of the impact of Article 41 ECFR over the national legal system is a cultural shift, and more precisely a different position of the individuals *vis-à-vis* the administrative power. In fact, according to the Italian tradition, citizens' claims against administrative activity are simply legitimate interests, only indirectly guaranteed by rules which establish standards designed primarily to regulate the functioning of public administration, taking it as an objective value. According to the European approach (which should now be the national one too), meanwhile, power is limited by the rights of those who come into contact with power, with the consequence that an individual's interests are more relevant in the relationship between citizens and the administration.

Another effect of Article 41 ECFR is the "constitutionalization" of the procedural due process of law in Italy, where rights such as the right of citizens to be heard, the right to have reasoned decisions are provided by APA, which is an ordinary and not a constitutional law.

Italian administrative law does not seem to be entirely consistent with the growing importance of the procedural due process of law. For example, Article 13 APA provides that the right to be heard or the obligation to give reasoned decisions does not apply to rule-making and planning procedures: it is argued that these exclusions are illegal because they are not subject to the principle of proportionality, and fail to respect the conditions established by Article 52 ECFR.

Instead, it is argued, despite the opinion of some scholars, that Article 21 *octies* APA, which aims to prevent the annulment of administrative acts for the infringement of formal requirements, does not conflict with the right to good administration, since Article 41 does not require the measure to be deemed void if it fails to respect the right to good administration. For this reason, it does not seem to conflict with the principle of proportionality if the national law identifies some infringement of formal rules that could not imply the measure's annulment.

iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

L'ACTUALITE DU DROIT ADMINISTRATIF EN FRANCE EN 2009/2011

MORCEAUX CHOISIS

Prof. Aude ROUYERE[1]

INDEX

L'exercice du bilan s'avère toujours délicat, la liberté qu'il confère n'ayant d'égal que la frustration qu'il engendre. Mais nous allons tout de même essayer de nous y livrer.

En précisant d'emblée que des choix ont été effectués et donc des pans importants de la matière ignorés. Et après avoir rappelé quelques-unes des contraintes et des limites qui pèsent sur sa réalisation.

[1] Professeur à l'Université Montesquieu Bordeaux IV, CERDARE (Centre d'Etude et de Recherche sur le Droit Administratif et la Réforme de l'Etat).

Identifier et choisir les éléments qui constituent les traits remarquables de la discipline n'est pas une opération neutre. Elle dépend étroitement de l'observateur et plus précisément de ses points de vue et de son intérêt pour quelques-unes des questions qui ont émergé d'une production d'arrêts et de textes conséquente.

La sélection effectuée ne procède pas de l'ambition d'embrasser la somme des évènements qui ont marqué la vie du droit administratif depuis deux ans, ni même d'opérer une rétrospective synthétique. L'objectif est moins ambitieux et peut-être plus périlleux. Il s'agit de relever, durant cette période, certains « évènements » révélateurs des traits de la discipline soit dans la constance, soit dans l'inconstance. L'entreprise est évidemment marquée d'une irréductible subjectivité. Les éléments sélectionnés s'inscrivant dans un certain imaginaire de la matière nourri d'observations mais aussi des réflexions qu'elle suggère.

Il serait évidemment intéressant de rendre compte, non seulement des mouvements du droit positif, mais aussi des analyses qui les ont accompagnés. Le discours doctrinal offre par un jeu de miroir une autre vision du droit administratif et par là même en constitue aussi la substance. Mais il n'a pas semblé possible d'exploiter utilement cette source sur une période aussi brève.

De même, les réformes législatives intéressant le droit administratif n'ont pas encore livré toute leur mesure et appellent un temps de mise en œuvre avant que puissent être évalués leurs effets.

Ce bilan est donc consacré principalement aux évolutions jurisprudentielles et dans une moindre mesure à quelques dispositifs législatifs.

Le choix des thèmes abordés a été guidé par le souci de favoriser une observation comparative et celui de resserrer le propos même si cela implique de délaisser des questions -telles que le droit des contrats- qui ont pourtant suscité des jurisprudences fort intéressantes.

Cette analyse est organisée selon une double approche permettant d'envisager l'état du droit puis celui du contentieux. Il serait artificiel de prétendre dégager une ligne suffisamment nette caractérisant ces deux axes. Mais si l'on s'en tient à l'esquisse d'une tendance, c'est celle d'une sophistication des normes et des procédés juridiques qui semble s'imposer. Elle se manifeste par la complexification assumée du droit administratif (1) et l'autonomie raisonnée du juge administratif (2).

1. LA COMPLEXIFICATION ASSUMEE DU DROIT ADMINISTRATIF

Le droit administratif est entré, depuis une vingtaine d'années, dans un processus de transformation qui se manifeste par une mise en question de ses catégories en particulier institutionnelles et un approfondissement des acquis normatifs.

1.1 Diversification des catégories institutionnelles

L'attachement des juristes aux catégories, cette sorte de conservatisme ou de fidélité aux constructions qui ont fait le droit administratif et en signent l'identité, est bien connu. Les faiseurs de systèmes, les artisans de notions, les gardiens de ces constructions sont à l'œuvre parmi nous. Et pourtant, l'on perçoit depuis ces dernières années comme une forme d'impertinence à l'égard des repères classiques du droit administratif. Les figures institutionnelles évoluent à la faveur d'un mouvement de rationalisation et d'innovation.

1-Rationalisation

L'entreprise de rationalisation vise, pour la période récente, des modèles institutionnels qui, en raison de leur succès, ont vu leur régime juridique perdre en cohérence.

Le phénomène n'est pas nouveau. Il est même, dans certains cas, inhérent à la notion qui fonde la catégorie. Ainsi le Conseil d'Etat a-t-il conduit, à nouveau, un travail de réflexion critique sur l'établissement public en 2009. La pertinence et la fonctionnalité du procédé institutionnel sont confirmées mais sa rationalisation est, encore et toujours, préconisée. Il est recommandé une « clarification de ses règles de création » et des

aménagements des règles régissant son organisation et son fonctionnement dans le but de «leur conférer plus de souplesse». La conclusion de ce rapport est à la fois mesurée et ambitieuse. L'avenir de l'établissement public en tant que «formule d'organisation de l'action publique» est présenté comme « à la fois prometteur et préoccupant » et appelant des modifications d'ordre juridique et des changements dans les pratiques administratives.

Mérite aussi d'être mentionnée, la consécration en mai 2011[2] d'un régime juridique, en principe général, des groupements d'intérêt publics (GIP), catégorie de personnes publiques spécialisées distincte de celle des établissements publics. Le modèle du GIP est parfaitement représentatif du caractère embarrassant des audaces institutionnelles administratives. La formule du GIP créée en 1982[3] pour offrir aux organismes de recherche un cadre de regroupement associant des structures publiques et privées a été reprise par de nombreuses lois dans des domaines variés. Son succès s'explique par la souplesse du procédé conjuguée à son maintien dans un cadre de droit public.

La multiplication des GIP s'est faite sans cadre textuel général de référence, de telle sorte que chaque GIP relève d'un régime juridique tiré de la loi qui le crée, laquelle s'inspire du modèle initial, complété par des solutions jurisprudentielles. La nécessité reconnue depuis longtemps d'un régime juridique unifié des GIP semblait avoir enfin été entendue avec la loi de 2011 qui leur consacre un chapitre II composé de 24 articles relatifs à leur statut. Le résultat a été d'emblée jugé décevant par la doctrine qui peine à voir dans ces dispositions le statut général que l'on attendait. La loi semble en poser l'existence tout en organisant ensuite, de différentes manières, des voies de soustraction à ce régime de droit commun et ce, au point de lui faire perdre cette qualité.

[2] Loi n° 2011-525 du 17 mai 2011 de simplification et d'amélioration de la qualité du droit.

[3] Loi 82-610 du 15 juillet 1982

Il ne saurait être question d'entrer dans les détails de cette réforme mais seulement de comprendre les raisons qui ont finalement ramené à la baisse l'ambition du projet. La constitution légale d'une nouvelle catégorie de personne publique, caractérisée par des éléments singuliers la distinguant nettement des établissements publics est un défi. Le législateur hésite à fixer un modèle institutionnel qui emprunte au droit privé ses avantages sans pour autant renoncer au cadre du droit public. Entre lois spécifiques et repères jurisprudentiels, le régime juridique du GIP relève d'une gamme de variations qui en font le principal attrait. La loi de 2011 a, en dépit du projet qu'elle affiche, renoncé à l'homogénéiser par un dispositif fermé.

2- Innovation

Les innovations institutionnelles marquantes de ces deux dernières années sont le fruit d'un pragmatisme qui n'abandonne pas pour autant les préoccupations du droit public.

Ainsi, l'attribution de la personnalité juridique à plusieurs autorités administratives indépendantes dénommées alors autorités publiques indépendantes. Emancipation logique ou véritable innovation ? Les deux à la fois, sans doute.

Récemment se sont vues octroyer cette qualité, l'Autorité de régulation des activités ferroviaires[4] ou encore la Haute autorité pour la diffusion des œuvres et la protection des droits sur Internet[5]. Ces attributions faisant suite à celles opérées, par exemple, en faveur de l'Autorité des marchés financiers, de la Commission de contrôle des assurances des mutuelles et des institutions de prévoyance (CCAMIP) devenue ensuite Autorité de contrôle des assurances et des mutuelles (ACAM) puis absorbée par l'Autorité de Contrôle Prudentiel ou encore la Haute autorité de santé.

[4] ARAF, loi du 8 décembre 2009 relative à l'organisation et à la régulation des transports ferroviaires et portant diverses dispositions relatives aux transports.

[5] HADOPI, loi du 12 juin 2009 favorisant la diffusion et la protection de la création sur Internet

Nouvelle catégorie de personnes publiques spécialisées, les autorités publiques indépendantes s'inscrivent dans ce mouvement de redécoupage de catégories centrales du droit administratif. L'on constate que si les autorités dites indépendantes sont maintenues dans une position quelque peu ambiguë par rapport à l'exécutif et aux autorités juridictionnelles[6], le choix d'attribuer à certaines d'entre elles la personnalité juridique semble assez simple. Il s'agit concrètement de poser leur capacité d'imputation et donc la possibilité d'engager leur responsabilité civile[7].

La question du statut des autorités administratives indépendante a été soulevée, sous un autre angle, à l'occasion du projet d'inscription dans la Constitution du Défenseur des droits. Les incertitudes relatives à leur place parmi les pouvoirs publics n'ont pas été levées, bien au contraire, à cette occasion. Le choix opéré par la loi constitutionnelle du 23 juillet 2008[8] d'insérer dans la Constitution un article XI bis relatif au Défenseur des droits élude la question plus qu'il ne la résout. En plaçant prudemment cette autorité entre un Titre XI relatif au Conseil économique, social et environnemental et un Titre XII consacré aux collectivités territoriales, le pouvoir constituant choisit un positionnement relativement neutre en ce qu'il ne renferme aucune réelle signification.

Et la précision apportée par la loi organique du 29 mars 2011[9] qui y voit une autorité constitutionnelle indépendante ne livre pas davantage d'éclaircissement. Tout au

[6] Cf infra

[7] Cf CE Assemblée générale - Avis du 8 septembre 2005 relatif à la CCAMIP n° 371.558 : « Dès lors que la capacité juridique lui a ainsi été attribuée, il appartient à cette commission, en vertu du principe général selon lequel nul n'est responsable que de son fait, auquel ni la nature des missions confiées à la commission, ni les modalités selon lesquelles elle les exerce n'impliquent de déroger, d'assumer les conséquences des actions en responsabilité qui pourraient être engagées contre elle à l'occasion des fautes commises dans l'exercice de ces missions. »

[8] Loi n° 2008-724 de modernisation des institutions de la Ve République

[9] Loi organique n° 2011-333 du 29 mars 2011 relative au Défenseur des droits

plus s'agit-il, selon le Conseil constitutionnel, d'une « autorité administrative dont l'indépendance trouve son fondement dans la Constitution »[10]. Et le Conseil ajoute, décourageant ainsi toute velléité d'y lire autre chose, que « cette disposition n'a pas pour effet de faire figurer le Défenseur des droits au nombre des pouvoirs publics constitutionnels ».

Tout cela donc, c'est-à-dire un ancrage dans le texte constitutionnel qui offre à l'autorité une garantie de stabilité. Mais seulement cela aussi, puisqu'il n'est pas question de conférer aux autorités constitutionnelles indépendantes un statut affectant la définition et l'organisation des pouvoirs.

Innovation encore avec la loi du 28 mai 2010 relative aux sociétés publiques locales[11]. Le mobile de cette création est de doter les collectivités locales d'un outil de gestion publique performant et permettant d'échapper aux règles de mise en concurrence. Comme le précise en effet la circulaire de 2011, il s'agit -avec la société publique locale d'aménagement créée en 2006- de leur offrir un modèle « permettant de recourir à une société commerciale sans publicité ni mise en concurrence préalables dès lors que certaines conditions sont remplies ». Les sociétés publiques locales sont donc vouées à intervenir pour le compte de leurs actionnaires dans le cadre de prestations intégrées désignées par les termes de quasi-régies ou « in house »[12].

[10] Déc 2011-626 DC du 29 mars 2011

[11] Loi n° 2010-559 du 28 mai 2010 pour le développement des sociétés publiques locales complétée par la circulaire du 29 avril 2011

[12] Cf art L.1531-1 du Code général des collectivités territoriales

La création des sociétés publiques locales était attendue car elle s'inscrit dans une démarche déjà largement mise en place par la jurisprudence européenne[13].

Mais le procédé suscite tout de même l'étonnement dans la mesure où la société publique locale place entre les mains des collectivités territoriales une structure de droit privé à un moment où la formule la plus prisée est celle d'un partenariat avec des opérateurs purement privés invités à s'engager sur le terrain de l'action publique. L'audace ne se loge donc pas seulement dans des partenariats de plus en plus poussés mais aussi, et toujours, dans le maniement des outils de droit privé par les personnes publiques.

Petite réforme et vraie désillusion enfin, avec la loi du 16 décembre 2010[14]. Sans procéder à l'examen en détail de son contenu, il convient d'évoquer deux questions qui ont retenu l'attention en exhumant de vieilles questions.

Tout d'abord la création de la métropole, entité qui avait alimenté force débats et attentes, et qui apparaît dans la loi sous la forme, somme toute modeste, d'un « établissement public de coopération intercommunale regroupant plusieurs communes d'un seul tenant et sans enclave et qui s'associent au sein d'un espace de solidarité pour élaborer et conduire ensemble un projet d'aménagement et de développement économique, écologique, éducatif, culturel et social de leur territoire afin d'en améliorer la compétitivité et la cohésion»[15].

[13] Voir notamment CJCE 18 novembre 1999 Teckal C-107/98, CJCE 11 mai 2006 Carbotermo C-340/04, CJCE 13 octobre 2005 Parking Brixen GmbH C-458/03, CJCE 19 avril 2007 Asemfo C-295/05.

[14] Loi n° 2010-1563 du 16 décembre 2010 de réforme des collectivités territoriales.

[15] Art. L. 5217-1 du code général des collectivités territoriales, voir aussi le pôle métropolitain art .L. 5731-1 du même code.

Puis la position adoptée par le Conseil constitutionnel à propos de cette même loi[16] en ce qui concerne la clause générale de compétence. Le Conseil y affirme à propos de l'article 48 de la loi du 10 août 1871 précisant que le conseil général délibère « sur tous les objets d'intérêt départemental dont il est saisi, soit par une proposition du préfet, soit sur l'initiative d'un de ses membres » que « ces dispositions n'ont eu ni pour objet ni pour effet de créer une «clause générale» rendant le département compétent pour traiter de toute affaire ayant un lien avec son territoire; que, par suite, elle ne saurait avoir donné naissance à un principe fondamental reconnu par les lois de la République garantissant une telle compétence; ».

Voilà ainsi sobrement et fermement clôt un débat qui a opposé les partisans d'une clause générale de compétence établie sur un critère territorial à ceux qui en restent à une simple compétence d'attribution non incompatible avec les principes constitutionnels relatifs aux collectivités territoriales dont celui de libre administration[17].

1.2 Approfondissement des droits

L'approfondissement des droits est favorisé par la poursuite du mouvement d'ouverture du prétoire. Il résulte aussi de l'adaptation de leur contenu normatif à l'évolution du contexte dans lequel ils sont invoqués.

1-Ouverture du prétoire.

La jurisprudence récente offre deux illustrations différentes de cette conception plus extensive de l'acte administratif susceptible de faire l'objet d'un recours pour excès de pouvoir.

[16] Décision n° 2010-618 DC du 09 décembre 2010.

[17] Cf J-M. Pontier, Requiem pour une clause générale de compétence, La semaine juridique. Administrations et collectivités territoriales, 2011, n° 2, p. 47-55.

Le statut des détenus est l'objet, depuis quelques années, d'une construction jurisprudentielle importante relayée par le législateur. Elle comporte notamment une série de décisions admettant le recours contre des mesures adoptées dans l'espace intérieur des prisons et qui affectent la situation du détenu de manière caractérisée[18].

Le Conseil d'Etat confirme cette ligne jurisprudentielle. Il a ainsi jugé en 2010[19] que la décision portant sur l'organisation des visites aux détenus est un acte faisant grief, dans la mesure où «par sa nature, cette décision (…) affecte directement le maintien des liens des détenus avec leur environnement extérieur; que compte tenu de ses effets possibles sur la situation des détenus, et notamment sur leur vie privée et familiale, qui revêt le caractère d'un droit fondamental, elle est insusceptible d'être regardée comme une mesure d'ordre intérieur et constitue toujours un acte de nature à faire grief ».

De même la Haute Juridiction a considéré que l'affectation d'un détenu en régime différencié « portes fermées » est susceptible de recours[20].

La teneur de la norme peut être également un obstacle à la recevabilité du recours. Le problème a été soulevé à propos d'une recommandation de la Haute autorité de santé

[18] CE Ass 17 février 1995 Marie req 97754, CE 14 décembre 2007 Garde des sceaux, ministre de la justice c/ Boussouar req 290730, décision dans laquelle est désignée comme telle toute mesure qui «eu égard à sa nature et à l'importance de ses effets sur la situation des détenus (…) constitue un acte administratif susceptible de faire l'objet d'un recours pour excès de pouvoir et non une mesure d'ordre intérieur», voir aussi CE 30 juillet 2003 Garde des sceaux, ministre de la justice c/ Remli, req 252712, CE Ass14 décembre 2007 Planchenault req 290420.

[19] CE 26 nov 2010 Bompard req 329564.

[20] 28 mars 2011 Garde des Sceaux req 316977 : « qu'ainsi, par sa nature et par ses effets sur ses conditions de détention, notamment au regard de l'objectif de réinsertion sociale, la décision par laquelle un détenu est placé en régime différencié pour être affecté à un secteur dit portes fermées, alors même qu'elle n'affecte pas ses droits d'accès à une formation professionnelle, à un travail rémunéré, aux activités physiques et sportives et à la promenade, constitue une décision susceptible de faire l'objet d'un recours pour excès de pouvoir »

(HAS)[21]. Si la portée décisoire de la recommandation est discutable, son autorité l'est moins et le Conseil en déduit que « eu égard à l'obligation déontologique, incombant aux professionnels de santé en vertu des dispositions du code de la santé publique qui leur sont applicables, d'assurer au patient des soins fondés sur les données acquises de la science, telles qu'elles ressortent notamment de ces recommandations de bonnes pratiques, ces dernières doivent être regardées comme des décisions faisant grief susceptibles de faire l'objet d'un recours pour excès de pouvoir ».

La solution n'était pas évidente. En effet, l'on peut voir dans ces recommandations de simples documents d'information non dotés d'un effet contraignant. Et la jurisprudence du Conseil d'Etat confirme d'ailleurs cette analyse notamment vis-à-vis des recommandations de la HAS[22]. Néanmoins, c'est sur l'invitation du rapporteur public que le Conseil jugera que cette recommandation est un acte faisant grief. A l'appui de cette conception de la recommandation, C.Landais souligne « le fait qu'il s'agisse de santé publique et de risque déontologique pour les professionnels de santé » et donc l'intérêt que soit ouvert le prétoire. Le Conseil avait déjà retenu cette approche, quelques mois auparavant, dans un arrêt acceptant de recevoir un recours dirigé contre une délibération du Conseil national de l'ordre des médecins adoptant un rapport contenant des recommandations de déontologie médicale[23].

2- Pragmatisme normatif.

Le pouvoir normatif du juge -envisagé ici au sens large- n'est plus un tabou théorique depuis longtemps. Il est même la garantie d'une adaptabilité de la règle au renouvellement de la conception des droits. Quelques exemples témoignent des vertus de ce

[21] CE 16 mars 2011 Association FORMINDEP req 334396, concl C. Landais AJDA 2011.13026

[22] CE 12 octobre 2009, Société Glaxosmithkline Biologicals req 322784

[23] CE 17 novembre 2010 Syndicat français des ostéopathes, req 332771, AJDA 2011.295

pragmatisme normatif. Ils sont relatifs à la portée du principe d'égalité et à la conception de différents droits et libertés.

-Le principe d'égalité consiste en un mécanisme mais ne comporte pas de contenu en lui-même. Sa portée et ses conséquences matérielles dépendent donc des données qui en sont l'objet. Deux affaires récentes ont donné au juge l'occasion d'aborder la notion délicate de discrimination, résultante concrète du raisonnement construit à partir du principe d'égalité.

Commençons par un arrêt de 2009[24] qui doit sa célébrité, tant à la reconnaissance de l'invocabilité d'une directive non transposée à l'appui d'un recours dirigé contre un acte administratif individuel (cf infra), qu'à la question de l'établissement d'une discrimination. Concernant cette dernière, l'intérêt de la décision réside dans le raisonnement qu'y livre le Conseil d'Etat en matière de preuve d'une discrimination. Il y énonce une sorte de méthode d'établissement de la preuve qui mérite d'être restituée dans son intégralité: « Considérant toutefois que, de manière générale, il appartient au juge administratif, dans la conduite de la procédure inquisitoire, de demander aux parties de lui fournir tous les éléments d'appréciation de nature à établir sa conviction; que cette responsabilité doit, dès lors qu'il est soutenu qu'une mesure a pu être empreinte de discrimination, s'exercer en tenant compte des difficultés propres à l'administration de la preuve en ce domaine et des exigences qui s'attachent aux principes à valeur constitutionnelle des droits de la défense et de l'égalité de traitement des personnes; que, s'il appartient au requérant qui s'estime lésé par une telle mesure de soumettre au juge des éléments de fait susceptibles de faire présumer une atteinte à ce dernier principe, il incombe au défendeur de produire tous ceux permettant d'établir que la décision attaquée repose sur des éléments objectifs étrangers à toute discrimination; que la conviction du juge, à qui il revient d'apprécier si la décision contestée devant lui a été ou non prise pour des motifs entachés de discrimination, se détermine au vu de ces

[24] CE Ass 30 oct 2009 Perreux req 298348.

échanges contradictoires; qu'en cas de doute, il lui appartient de compléter ces échanges en ordonnant toute mesure d'instruction utile ».

Peut-être moins spectaculaire que le revirement de jurisprudence relatif aux directives, cet aspect de l'arrêt justifiera sans doute des analyses plus complètes sur l'administration de la preuve et les mesures d'instruction en contentieux administratif. On doit ajouter que le Conseil d'Etat a, par la suite, fait application de cette méthode d'identification d'une discrimination et retenu dans un arrêt de 2011[25] une présomption de discrimination non renversée par le défendeur.

Il convient de citer aussi cet arrêt de 2010[26] traitant d'une discrimination sous l'angle du contentieux indemnitaire. Le Conseil d'Etat retient la responsabilité sans faute de l'Etat pour rupture de l'égalité devant les charges publiques du fait des difficultés d'accès aux tribunaux d'un avocat handicapé. L'arrêt accorde réparation en considérant le préjudice moral dont se prévaut la requérante en raison des troubles de toute nature que lui causent les conditions d'exercice de sa profession comme présentant un caractère grave et spécial dont la charge excède celle qu'il incombe normalement à l'intéressée de supporter. Peut-on soutenir que l'aménagement spécifique des locaux judiciaires en faveur des personnes affectées d'une mobilité réduite relève d'une « discrimination positive »? On ne le pense pas sauf à adopter de cette notion -à laquelle on préfère celle d'inégalité compensatrice- une conception extensive incluant des types de dispositifs très différents.

- Quelques décisions rendues dans des domaines très divers ont marqué l'actualité jurisprudentielle en raison de la manière dont sont conçues les droits et libertés dont elles traitent.

[25] CE 10 janvier 2011 Lévèque req 325268

[26] CE Ass 22 octobre 2010 Bleirach req 301572

Liberté de réunion et préservation de l'ordre public.

Par une ordonnance rendue en matière de référé liberté (CE ord 7 mars 2011 ENS req 347171), le Conseil a jugé qu'en interdisant la mise à disposition d'une salle au collectif Palestine ENS, la directrice de l'école « qui a pris en compte à la fois la liberté de réunion et la prévention des risques de troubles à l'ordre public et de contre-manifestations » n'a pas «porté une atteinte grave et manifestement illégale à la liberté de réunion des élèves ».

Outre le contrôle très classique qui est exercé sur la balance faite entre l'exercice d'une liberté et la prévention de l'ordre public, cette décision souligne qu'un établissement d'enseignement supérieur doit garantir aussi « l'indépendance intellectuelle et scientifique de l'établissement, dans une perspective d'expression du pluralisme des opinions ». Cette qualité, plus que liberté, est donc inhérente à la nature de l'établissement impliqué et présentée comme destinée à servir le pluralisme des opinions, notion qui n'est pas sans rappeler l'objectif de valeur constitutionnelle du pluralisme des courants de pensées et d'opinions.

Droits fondamentaux de la personne.

La cour administrative de Douai a retenu la responsabilité de l'Etat pour faute du fait de mauvaises conditions de détention[27], la Cour ayant estimé que les requérants « avaient été détenus dans des conditions n'assurant pas le respect de la dignité inhérente à la personne humaine, en méconnaissance de l'article D. 189 précité du code de procédure pénale; qu'une telle atteinte au respect de la dignité inhérente à la personne humaine entraîne, par elle-même, un préjudice moral par nature et à ce titre indemnisable ».

Il faut ajouter, par ailleurs, qu'une loi de 2009 portant sur le service et le régime pénitentiaire consacre une série de dispositions à la condition de la personne détenue dont

[27] CAA Douai 12 nov 2009 req 09DA00782

ses différents droits et devoirs et pose un principe de responsabilité, même en l'absence de faute, de l'Etat en cas de décès lié à la violence entre détenus[28].

Libertés fondamentales et préservation de l'ordre public.

L'affaire dite du voile intégral illustre fort bien, non sans une ambiguïté savamment entretenue, l'évolution de la conception des droits.

Rappelons tout d'abord que le Conseil d'Etat, dans son « Étude relative aux possibilités juridiques d'interdiction du port du voile intégral » de 2010, s'est prononcé contre une interdiction totale. Le Conseil souligne qu' « une interdiction générale du port du voile intégral en tant que tel ou de tout mode de dissimulation du visage dans l'ensemble de l'espace public serait exposée à de sérieux risques au regard de la constitution et de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales » et ajoute que « dans ces conditions, seule la sécurité publique, composante de l'ordre public, et l'exigence de lutte contre la fraude pourraient fonder une interdiction, mais uniquement dans des circonstances particulières de temps et de lieux ».

La loi du 11 octobre 2010 (n° 2010-1192) interdisant la dissimulation du visage dans l'espace public, prévoit dans son article 1 que « Nul ne peut, dans l'espace public, porter une tenue destinée à dissimuler son visage » et précise dans son article 2 que « I. — Pour l'application de l'article 1er, l'espace public est constitué des voies publiques ainsi que des lieux ouverts au public ou affectés à un service public. II. — L'interdiction prévue à l'article 1er ne s'applique pas si la tenue est prescrite ou autorisée par des dispositions législatives ou réglementaires, si elle est justifiée par des raisons de santé ou des motifs professionnels, ou si elle s'inscrit dans le cadre de pratiques sportives, de fêtes ou de manifestations artistiques ou traditionnelles. »

[28] article 44 de la loi n° 2009-1436 du 24 novembre 2009 pénitentiaire

La prohibition est donc formulée de manière générale et sans aucune allusion au voile religieux qui est à l'origine de cette disposition.

Le Conseil constitutionnel, lui, ne manquera pas de réintroduire cette question dans son analyse (déc 2010-613 DC du 7 octobre 2010) en jugeant que « eu égard aux objectifs qu'il s'est assignés et compte tenu de la nature de la peine instituée en cas de méconnaissance de la règle fixée par lui, le législateur a adopté des dispositions qui assurent, entre la sauvegarde de l'ordre public et la garantie des droits constitutionnellement protégés, une conciliation qui n'est pas manifestement disproportionnée ; que, toutefois, l'interdiction de dissimuler son visage dans l'espace public ne saurait, sans porter une atteinte excessive à l'article 10 de la Déclaration de 1789, restreindre l'exercice de la liberté religieuse dans les lieux de culte ouverts au public ; que, sous cette réserve, les articles 1er à 3 de la loi déférée ne sont pas contraires à la Constitution ; ».

Principe de séparation des Eglises et de l'Etat tel que posé par la loi du 9 décembre 1905.

A l'occasion de cinq arrêts d'Assemblée du 19 juillet 2011, le Conseil d'Etat a précisé, dans un contexte renouvelé, l'intervention des collectivités territoriales dans des projets intéressant les cultes[29].

Commençons par les deux premières affaires relatives, pour la première[30] à l'acquisition d'un orgue par une commune en vue de l'installer dans l'église de cette dernière, et pour la seconde[31] à l'attribution par la commune de Lyon à une fondation d'une subvention destinée à un ascenseur installé dans une basilique. Sous réserve de certaines

[29] Cf notamment, Le sacré et le local, X.Domino et A. Bretonneau, AJDA 2011.1667

[30] CE Ass 19 juillet 2011 Commune de Trélazé req 308544

[31] CE Ass 19 juillet 2011 Fédération de la libre pensée et de l'action sociale du Rhône req 308817

conditions précisément énoncées, le Conseil ne censure pas ces interventions des communes qui relèvent des liens nécessairement entretenus entre les collectivités et les cultes.

Les trois affaires suivantes visent des cas dans lesquels des collectivités territoriales apportent un concours fondé sur l'intérêt local facilitant l'exercice d'un culte. Il s'agit de l'encadrement des pratiques d'abattage rituel[32], de la construction d'une salle qui sera ensuite mise à la disposition d'une association cultuelle[33] et de la conclusion d'un bail emphytéotique avec une organisation cultuelle[34]. Là encore, et dans le cadre propre à chaque hypothèse, le juge administratif ménage un espace à ces actions publiques intéressant à des titres divers l'exercice des cultes. Le Conseil d'Etat est resté, dans chacune de ces espèces, « pleinement fidèle à la loi du 9 décembre 1905, dont il fournit une interprétation adaptée aux questions et aux besoins du temps et robuste d'un point de vue tant constitutionnel que conventionnel » [35].

Libertés des personnes publiques.

Libertés des collectivités territoriales plus précisément, rappelée à l'occasion de deux questions prioritaires de constitutionnalité.

La première[36] posée par un département était relative à la conformité aux droits et libertés que la Constitution garantit de l'article L. 2224-11-5 du code général des

[32] CE Ass 19 juillet 2011 Communauté urbaine du Mans-Le Mans Métropole, req 309161

[33] CE Ass 19 juillet 2011 Commune de Montpellier, req 313518

[34] (BEA cultuel, CE Ass 19 juillet 2011 Mme Vayssière req 320796

[35] X.Domino et A.Bretonneau, op cit supra

[36] décision 2011-146 QPC du 08 juillet 2011 - Département des Landes

collectivités territoriales interdisant que les aides publiques aux communes et groupements des collectivités territoriales compétents en matière d'eau potable ou d'assainissement soient modulées en fonction du mode de gestion du service.

Le Conseil constitutionnel a jugé que la disposition attaquée restreignait la libre administration des collectivités territoriales, en l'espèce des départements, au point de méconnaître les articles 72 et 72-2 de la Constitution.

La seconde[37], posée aussi par un département était relative à la conformité aux droits et libertés que la Constitution garantit de l'article L. 313-5 du code de l'éducation qui vise les centres publics d'orientation scolaire et professionnelle. Le département de Haute-Savoie soutenait que cet article contraignait les collectivités territoriales à financer les dépenses de fonctionnement et d'investissement relatives aux centres d'information et d'orientation qui ont été créés à leur demande, tant que ceux-ci n'ont pas été, soit transformés en service d'État, soit supprimés, alors que la création, la gestion et la suppression de ces centres relèvent de la compétence de l'État. Selon le département requérant, l'article L. 313-5 méconnaissait donc tant le principe de la libre administration des collectivités territoriales que celui de la libre disposition de leurs ressources.

Le Conseil constitutionnel a jugé que, si la collectivité territoriale à l'initiative de laquelle le centre a été créé demande à ne plus assumer la charge correspondant à l'entretien d'un centre supplémentaire dont l'État n'a pas décidé la transformation en service d'État, l'article L. 313-5 a pour conséquence nécessaire d'obliger la collectivité et l'État à organiser sa fermeture. Dès lors, sous cette réserve, cet article est conforme à la Constitution.

[37] Décision n° 2011-149 QPC du 13 juillet 2011- Département de la Haute-Savoie

2. L'AUTONOMIE RAISONNEE DU JUGE ADMINISTRATIF.

Le juge administratif poursuit fermement le développement de son office tout en affichant très nettement sa volonté d'ouverture.

2.1 Développement de son office par le juge

Cette tendance se manifeste par le renforcement du contrôle exercé et la levée de bornes que le juge imposait à son office.

1-Renforcement du contrôle.

Plus ou moins nettement exprimée, l'intensification du contrôle de légalité s'apprécie surtout à partir des données de chaque affaire.

Commençons par cet arrêt relatif à une mesure disciplinaire frappant un militaire pour manquement à son devoir de réserve[38]. Le Conseil annule la décision prononçant la sanction de radiation des cadres, jugeant cette dernière « manifestement disproportionnée ». En d'autres termes, l'examen du contenu de la sanction conduit le juge à relever son caractère inadéquat en raison de son caractère évidemment excessif[39].

L'on peut y déceler le signe qu'a été opéré ici un examen plus poussé que celui de l'erreur manifeste d'appréciation que le juge exerçait déjà sur les conséquences de la qualification juridique. En effet, ce contrôle, situé au-delà de celui qui s'en tient à la seule qualification des juridique des faits, restait toutefois présenté comme un contrôle restreint sur le degré de gravité de la sanction disciplinaire infligée à un fonctionnaire[40]. Les

[38] CE 12 janvier 2011 Matelly req 338461

[39] Voir également CE sect 1 février 2006 Touzard, req 271676

[40] CE Sect 9 juin 1978 Lebon req 05911

éléments de l'affaire jugée en 2011 laissent penser que le juge a exercé un contrôle moins retenu de la sanction même si la mesure des degrés du contrôle de l'erreur manifeste et de la disproportion reste bien délicate à effectuer. Et ce, d'autant plus lorsqu'il s'agit de comparer une décision dans laquelle l'erreur manifeste n'est finalement pas établie et une autre retenant que la sanction est manifestement disproportionnée.

Plus net est le renforcement du contrôle -de restreint à normal c'est-à-dire entier- exercé par le juge administratif en 2010[41] sur les motifs d'un décret du Président de la République révoquant un maire ou des adjoints en application de l'article L. 2122-16 du code général des collectivités territoriales[42].

L'on retiendra aussi cet arrêt de 2010[43] dans lequel le juge de l'excès de pouvoir exerce un contrôle normal sur la sanction prononcée par la Fédération française d'athlétisme en cas de faits constatés de dopage.

2-Amplitude du contrôle

Le juge débride son office donnant ainsi de l'amplitude à l'examen juridictionnel qu'il lui appartient de mettre en œuvre pour traiter le régler le litige qui lui est soumis. Le développement du contrôle de conventionalité, le traitement d'une question prioritaire de constitutionnalité soulevé devant le juge des référé ou encore le contrôle des conditions d'invocabilité de la règle internationale donnent la mesure de cette extension par le juge de son office.

[41] CE 20 mars 2010 Dalongeville req 328843

[42] à comparer avec CE Ass 27 février 1981 Wahnapo req 14361 dans lequel le Conseil relève à propos d'une décision identique l'absence d'erreur manifeste d'appréciation

[43] CE 2 mars 2010 Fédération française d'athlétisme req 324439

- Le refus du juge administratif de procéder à l'exercice du contrôle de conventionalité de la loi postérieure au traité procédait du constat de sa propre incompétence et non d'une limite tenant à son office. C'est bien, en revanche, l'office du juge qui est en cause lorsque cette question est soulevée devant le Tribunal des conflits ou devant le juge des référés.

Le Tribunal des Conflits a accepté de procéder à un contrôle de conventionalité de la loi dans une décision de 2010[44] qui pose en termes très clairs les éléments qui délimitent son office et l'hypothèse dans laquelle s'y insère l'examen de la loi au regard d'une règle supranationale : « Considérant qu'en principe, il n'appartient pas au Tribunal des conflits, dont la mission est limitée à la détermination de l'ordre de juridiction compétent, de se substituer aux juridictions de cet ordre pour se prononcer sur le bien-fondé des prétentions des parties ; qu'en revanche, il lui incombe de se prononcer sur un moyen tiré de la méconnaissance des stipulations d'un traité lorsque, pour désigner l'ordre de juridiction compétent, il serait amené à faire application d'une loi qui serait contraire à ces stipulations ». Les données de l'espèce ajoutent à l'intérêt de cette affaire. Le texte invoqué est l'article 6 de la CEDH en ce qu'il s'oppose à toute « ingérence du pouvoir législatif dans l'administration de la justice afin d'influer sur le dénouement judiciaire des litiges (…) notamment par l'adoption d'une disposition législative conférant une portée rétroactive à la qualification en contrats administratifs de contrats relevant du droit privé ».

Quelques mois auparavant en juin 2010[45] dans une affaire qui a surtout retenu l'attention par la manière dont elle pose l'articulation entre question prioritaire de constitutionnalité et procédure d'urgence (cf infra), le Conseil d'Etat a, en tant que juge des référés, opéré une avancée remarquable sur le terrain du contrôle de conventionalité de la

[44] TC 13 décembre 2010 Sté Green Yellow C 3800

[45] CE 16 juin 2010 Mme Diakité 340250, note O. Le Bot, AJDA 2010.1662

loi. On sait que le juge considère ce dernier comme extérieur à son office[46] et qu'il n'a pas varié en la matière sauf par l'introduction de quelques nuances résidant dans la possibilité de tirer les conséquences de l'inconventionnalité d'une norme de droit interne qui aurait déjà été mise en évidence par le juge du fond ou par la Cour de justice[47].

Cette restriction de l'office du juge des référés a évidemment suscité des objections fondées sur la jurisprudence communautaire et sur la possibilité concrète pour le juge de mettre en œuvre ce contrôle y compris dans le cadre particulier d'une procédure d'urgence.

Dans sa décision de 2010, le Conseil rappelle cette réserve -« Considérant qu'un moyen tiré de l'incompatibilité de dispositions législatives avec les règles du droit de l'Union européenne n'est de nature à être retenu, eu égard à son office, par le juge des référés saisi sur le fondement de l'article L. 521-2 du code de justice administrative »- et l'assortit immédiatement d'une exception visant le cas «de méconnaissance manifeste des exigences qui découlent du droit de l'Union » qui vient s'ajouter aux tempéraments précédemment mentionnés et relatifs à une inconventionalité déjà établie par un autre juge.

Il convient de souligner le lien évident qui unit cette levée des limites pesant sur l'office du juge des référés avec deux décisions majeures sur lesquelles nous reviendrons ultérieurement. Celle du Conseil constitutionnel du 12 mai 2010[48] qui préserve la faculté et même le devoir qui pèse sur tout juge saisi d'un litige dans lequel est invoquée

[46] CE 30 décembre 2002 Ministre de l'Aménagement du territoire et de l'Environnement c/ Carminati req 240430

[47] CE, 8 nov. 2002, Tiscali, n° 250813, CE 9 décembre 2005 Allouache req 287777: « Considérant toutefois, qu'eu égard à l'office du juge des référés, un moyen tiré de la contrariété de la loi à des engagements internationaux n'est pas, en l'absence d'une décision juridictionnelle ayant statué en ce sens, rendue soit par le juge saisi au principal, soit par le juge compétent à titre préjudiciel, susceptible d'être pris en considération »

[48] Déc 2010-605DC du 12 mai 2010 rendue à propos de la loi n° 2010-476 du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne

l'incompatibilité d'une loi avec le droit de l'Union européenne de faire ce qui est nécessaire pour empêcher que des dispositions législatives qui feraient obstacle à la pleine efficacité des normes de l'Union soient appliquées dans le litige. Et celle du Conseil d'Etat[49] qui rappelle le devoir du juge national d'écarter la loi nationale contraire afin d'assurer la protection juridictionnelle effective des droits tirés du droit de l'Union, y compris par la voie d'une procédure d'urgence.

- Une autre illustration, et non des moindres, de l'évidente audace avec laquelle le juge débride son office y compris lorsque les contraintes pratiques semblent s'y opposer nous est livré par cette même décision à propos de la question prioritaire de constitutionnalité. En effet, dans cette ordonnance, le juge des référés étend aussi l'office du juge du référé-liberté au regard d'une question prioritaire de constitutionnalité. Les modalités de traitement d'une telle question sont très précisément posées: « une question prioritaire de constitutionnalité peut être soulevée devant le juge administratif des référés statuant, en première instance ou en appel, sur le fondement de l'article L. 521-2 de ce dernier code ; que le juge des référés peut en toute hypothèse, y compris lorsqu'une question prioritaire de constitutionnalité est soulevée devant lui, rejeter une requête qui lui est soumise pour défaut d'urgence ; que, lorsqu'il est saisi d'une telle question, il peut prendre toutes les mesures provisoires ou conservatoires nécessaires et, compte tenu tant de l'urgence que du délai qui lui est imparti pour statuer, faire usage, lorsqu'il estime que les conditions posées par l'article L. 521-2 du code de justice administrative sont remplies, de l'ensemble des pouvoirs que cet article lui confère ; qu'enfin il appartient au juge des référés de première instance d'apprécier si les conditions de transmission d'une question prioritaire de constitutionnalité au Conseil d'Etat sont remplies et au juge des référés du Conseil d'Etat, lorsqu'il est lui-même saisi d'une telle question, de se prononcer sur un renvoi de la question au Conseil constitutionnel ».

[49] CE 14 mai 2010 Rujovic req 312305

La solution n'était pas évidente compte tenu du délai de 48 heures donné au juge pour statuer en matière de référé liberté.

L'articulation des différentes voies de droit s'opère ainsi sans heurt en contentieux administratif (cf infra). Le juge œuvrant en ce sens avec une assez bonne volonté même si -ou parce que- cela l'amène à étendre son office pour ménager une place à chacune d'entre elles.

- Le contrôle de l'invocabilité des règles internationales comportait jusqu'à quelques décisions récentes, des limites qui bornaient l'office du juge pour de bonnes raisons qui sont devenues difficilement défendables juridiquement.

Commençons par l'arrêt Perreux de 2009[50] dans lequel le Conseil d'Etat abandonne la solution contenue dans l'arrêt Cohn-Bendit de 1978.

Cette dernière, toujours maintenue formellement, était déjà largement entamée par une jurisprudence de neutralisation et de contournement. De telle sorte qu'il ne restait alors qu'un élément de divergence de jurisprudence entre le Conseil d'Etat et la Cour de Luxembourg, à savoir celui de « l'effet vertical ascendant des directives ». M. Guyomar concluant sur cette affaire, invita le Conseil à assumer pleinement son « office de juge communautaire» et à admettre que « la question de la justiciabilité des directives ne doit plus être posée seulement en termes de distribution des pouvoirs mais aussi d'allocations des droits ».

Le Conseil a suivi et très explicitement procédé au revirement de jurisprudence attendu: « tout justiciable peut se prévaloir, à l'appui d'un recours dirigé contre un acte administratif non réglementaire, des dispositions précises et inconditionnelles d'une directive, lorsque l'Etat n'a pas pris, dans les délais impartis par celle-ci, les mesures de transposition nécessaires ».

[50] CE Ass 30 oct 2009 Perreux req 298348, conclusions de M.Guyomar, RFDA 2009.1125

Il complétera ensuite cette décision par un avis de mars 2011[51] dans lequel il est rappelé comment la CJUE établit la précision et l'inconditionnalité des dispositions de la directive.

L'invocabilité d'un traité est aussi subordonnée à la condition de réciprocité telle que posée à l'article 55 de la Constitution. Elle constitue une sorte de borne à la primauté des traités sur la loi de nature à rassurer ceux qui refusent l'idée que cette dernière puisse être soumise à des règles tirés d'engagements que ne respecteraient pas les autres parties. Hormis les cas où cette condition n'a pas vocation à intervenir (droit de l'Union européenne et traités relatifs aux droits de l'homme), le juge administratif accepte de lui donner son plein effet mais a longtemps refusé de procéder lui-même au contrôle de sa réalisation[52] renvoyant au ministre des affaires étrangères le soin de se prononcer sur cette question. Ce refus reposait sur l'idée que la vérification de l'application du traité est une question de nature politique, étrangère aux attributions du juge et ne relevant donc pas de son office.

Cette jurisprudence prête le flanc à la critique. D'abord parce qu'elle fait largement dépendre la solution du litige de la réponse donnée par l'Etat, lequel peut être partie au procès. Ensuite parce qu'elle conduit à soustraire le traitement de la question aux règles du procès. Ce dernier point a été relevé par la Cour européenne des droits de l'homme qui, dans un arrêt de 2003[53], a jugé que la mise en œuvre de la question préjudicielle par le juge administratif est constitutive d'une violation de l'article 6 § 1 de la Convention « en ce que la cause de la requérante n'a pas été entendue par un « tribunal » de

[51] CE avis 21 mars 2011 345978

[52] CE Ass 29 mai 1981 Rekhou et Belil, req 15092 et 15408, CE Ass 9 avril 1999, Mme Chevrol-Benkeddach, req 180277

[53] CEDH 13 février 2003 Chevrol c/France Req 49636/99

pleine juridiction ». Au total, ce refus peut être considéré comme une « mutilation de la fonction juridictionnelle » selon les termes du président Labetoulle[54].

Elle a finalement été abandonnée par le Conseil d'Etat en 2010[55]. Il est admis désormais qu'il appartient au juge administratif « lorsqu'est soulevé devant lui un moyen tiré de ce qu'une décision administrative a à tort, sur le fondement de la réserve énoncée à l'article 55, soit écarté l'application de stipulations d'un traité international, soit fait application de ces stipulations, de vérifier si la condition de réciprocité est ou non remplie ; qu'à cette fin, il lui revient, dans l'exercice des pouvoirs d'instruction qui sont les siens, après avoir recueilli les observations du ministre des affaires étrangères et, le cas échéant, celles de l'Etat en cause, de soumettre ces observations au débat contradictoire, afin d'apprécier si des éléments de droit et de fait suffisamment probants au vu de l'ensemble des résultats de l'instruction sont de nature à établir que la condition tenant à l'application du traité par l'autre partie est, ou non, remplie ».

En définitive, le juge se met en conformité avec les exigences européennes tirées de l'article 6 §1 et poursuit le mouvement d'extension de son office à l'égard des traités et accords internationaux.

En ce sens, mérite aussi d'être cité cet arrêt de 2010 dans lequel le juge affirme la portée et l'autonomie de son pouvoir de qualification au regard d'une disposition de la CEDH à l'occasion du recours pour excès de pouvoir exercé contre une instruction fiscale[56].

[54] Concl. sur CE, sect., 27 oct. 1978 Debout n° 07103

[55] CE Ass 9 juillet 2010 Cheriet Benseghir, req 317747, Concl G.Dumortier, RFDA 2011.1133, J-F.Lachaume, L'application des conventions internationales : le contrôle du juge sur le respect de la condition de réciprocité, RFDA 201.1146

[56] CE 2 juin 2010 Fondation de France req 318014

Après avoir rappelé qu'il est dans les pouvoirs du juge administratif de se prononcer sur le bien-fondé des moyens dont il est saisi et, le cas échéant d'écarter de lui-même, quelle que soit l'argumentation du défendeur, un moyen qui lui paraît infondé, le Conseil indique que saisi de conclusions relatives à l'atteinte au droit au respect des biens garanti par l'article 1er du premier protocole additionnel à la CEDH, « il appartient au juge de se prononcer sur l'existence d'un bien au sens et pour l'application de ces stipulations, alors même que le défendeur ne contesterait pas cette existence ». Et il est précisé « qu'en statuant ainsi, le juge ne relève pas d'office un moyen qu'il serait tenu de communiquer aux parties ».

Ajoutons que le Conseil d'Etat vient préciser la notion d'espérance légitime constitutive d'un bien au sens des dispositions du premier protocole additionnel à la Convention européenne des droits de l'homme et se place ainsi dans la lignée d'un précédent arrêt de 2008[57] dans lequel il avait été établi qu'à défaut de créance certaine, l'espérance légitime d'obtenir la restitution d'une somme d'argent doit être regardée comme un bien au sens des stipulations de l'article 1er du premier protocole additionnel à la CEDH. En l'espèce il est jugé que la Fondation de France ne pouvait plus se prévaloir de l'espérance légitime de bénéficier des crédits d'impôt revendiqués. Certains commentateurs y ont vu une conception de l'espérance légitime plus restrictive que celle de la jurisprudence européenne[58].

Et doit être mentionné enfin cet important arrêt d'assemblée de décembre 2011[59] relatif à la conciliation de règles internationales invoquées comme règles de référence. Il

[57] CE 19 novembre 2008 Getecom req 292948

[58] D. Bailleul, De l'espérance légitime d'obtenir un avantage à l'espérance légale de conserver un droit AJDA 2010.1828

[59] CE Ass 23 décembre 2011 Brito Paiva req 303678, concl J.Boucher RFDA 2012.1, note D.Alland, Le juge interne et les « conflits de traités » internationaux, RFDA 2012.26

s'agit pour le Conseil de préciser l'office du juge en présence d'un moyen tiré de l'incompatibilité des stipulations, dont il a été fait application par la décision en cause, avec celles d'un autre traité ou accord international. Il est indiqué à ce sujet « qu'il incombe dans ce cas au juge administratif (…) de définir, conformément aux principes du droit coutumier relatifs à la combinaison entre elles des conventions internationales, les modalités d'application respectives des normes internationales en débat conformément à leurs stipulations, de manière à assurer leur conciliation, en les interprétant, le cas échéant, au regard des règles et principes à valeur constitutionnelle et des principes d'ordre public ». Et il est ajouté que dans l'hypothèse où « il n'apparaît possible ni d'assurer la conciliation de ces stipulations entre elles, ni de déterminer lesquelles doivent dans le cas d'espèce être écartées, il appartient au juge administratif de faire application de la norme internationale dans le champ de laquelle la décision administrative contestée a entendu se placer ».

2.2 Volonté de coopération juridictionnelle

Le juge administratif a œuvré, sans se faire trop prier, en faveur de l'articulation des voies de droit et de ses conséquences.

1-Articulation des voies de droits

La manière dont le Conseil d'Etat a abordé la question, lourde d'enjeux, de l'articulation de la question prioritaire de constitutionnalité et des autres contrôles, dont celui de conventionalité, est remarquable. Comme l'a été, en sens contraire, celle de la Cour de Cassation.

Rappelons pour commencer la démarche engagée par cette dernière dans son célèbre arrêt Melki de 2010[60]. La Cour pose à la CJUE deux questions préjudicielles dont la première consiste à déterminer si l'article 267 du Traité sur le fonctionnement de l'Union européenne s'oppose aux dispositions tirées de la loi organique du 10 décembre 2009 (n°

[60] Cass 16 avril 2010 Melki et Abdeli n° 10-40001

2009-1523) en ce qu'elles imposent aux juridictions « de se prononcer par priorité sur la transmission, au Conseil constitutionnel, de la question de constitutionnalité qui leur est posée, dans la mesure où cette question se prévaut de la non-conformité à la Constitution d'un texte de droit interne, en raison de sa contrariété aux dispositions du droit de l'Union ». La question est habile et la difficulté réelle.

Avant même que la Cour ne réponde (cf infra), le Conseil constitutionnel est intervenu sur ce problème par une décision du 12 mai 2010, suivi de près par le Conseil d'Etat, l'un et l'autre s'accordant dans ce qui a été perçu comme un duo[61].

Le Conseil constitutionnel[62] a en effet saisi l'occasion de l'examen d'une loi au titre de l'article 61al 2 et répondu à l'invitation qui lui est faite par les requérants à vérifier que la loi « n'est pas inconventionnelle » en se référant pour cela à l'arrêt de la Cour de cassation du 16 avril 2010 qui indique qu'il pourrait exercer « un contrôle de conformité des lois aux engagements internationaux de la France, en particulier au droit communautaire » .

Le Conseil rappelle que « le moyen tiré du défaut de compatibilité d'une disposition législative aux engagements internationaux et européens de la France ne saurait être regardé comme un grief d'inconstitutionnalité ». Par là même, il condamne le point de départ du raisonnement de la Cour de cassation selon lequel le Conseil constitutionnel en cas de saisine d'une question prioritaire de constitutionnalité serait conduit à effectuer un contrôle de conventionnalité. Il ajoute que « l'examen d'un tel grief, fondé sur les traités ou le droit de l'Union européenne, relève de la compétence des juridictions administratives et judiciaires ». Puis enfin et surtout, il indique que « le juge qui transmet une question

[61] Cf D.Simon, Les juges et la priorité de la question prioritaire de constitutionnalité : discordance provisoire ou cacophonie durable ? » Revue critique de droit international privé 2011.1

[62] déc 2010-605 DC 12 mai 2010 Loi n° 2010-476 du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne

prioritaire de constitutionnalité, dont la durée d'examen est strictement encadrée, peut, d'une part, statuer sans attendre la décision relative à la question prioritaire de constitutionnalité si la loi ou le règlement prévoit qu'il statue dans un délai déterminé ou en urgence et, d'autre part, prendre toutes les mesures provisoires ou conservatoires nécessaires; qu'il peut ainsi suspendre immédiatement tout éventuel effet de la loi incompatible avec le droit de l'Union, assurer la préservation des droits que les justiciables tiennent des engagements internationaux et européens de la France et garantir la pleine efficacité de la décision juridictionnelle à intervenir ; que l'article 61-1 de la Constitution pas plus que les articles 23 1 et suivants de l'ordonnance du 7 novembre 1958 susvisée ne font obstacle à ce que le juge saisi d'un litige dans lequel est invoquée l'incompatibilité d'une loi avec le droit de l'Union européenne fasse, à tout moment, ce qui est nécessaire pour empêcher que des dispositions législatives qui feraient obstacle à la pleine efficacité des normes de l'Union soient appliquées dans ce litige ».

Le Conseil d'Etat enchaîne immédiatement[63] et affirme que les dispositions de la loi organique de 2009 « ne font pas obstacle à ce que le juge administratif, juge de droit commun de l'application du droit de l'Union européenne, en assure l'effectivité, soit en l'absence de question prioritaire de constitutionnalité, soit au terme de la procédure d'examen d'une telle question, soit à tout moment de cette procédure, lorsque l'urgence le commande, pour faire cesser immédiatement tout effet éventuel de la loi contraire au droit de l'Union ; que, d'autre part, le juge administratif dispose de la possibilité de poser à tout instant, dès qu'il y a lieu de procéder à un tel renvoi, en application de l'article 267 du traité sur le fonctionnement de l'Union européenne, une question préjudicielle à la Cour de justice de l'Union européenne ».

L'accord entre les deux juridictions est parfait. Et ne sera pas fragilisé par la Cour de justice qui dans sa décision du 22 juin[64] invite la Cour de cassation à adopter

[63] CE 14 mai 2010 Rujovic 312305

[64] CJUE 22 juin 2010 Melki et Abdeli C-188/10 et C-189/10

l'interprétation des textes permettant une application du mécanisme de la question prioritaire de constitutionnalité compatible avec le droit de l'Union. Elle indique que l'article 267 TFUE ne s'oppose pas à une législation d'un État membre qui instaure une procédure incidente de contrôle de constitutionnalité des lois nationales « pour autant que les autres juridictions nationales restent libres:

- de saisir, à tout moment de la procédure qu'elles jugent approprié, et même à l'issue de la procédure incidente de contrôle de constitutionnalité, la Cour de toute question préjudicielle qu'elles jugent nécessaire,

-d'adopter toute mesure nécessaire afin d'assurer la protection juridictionnelle provisoire des droits conférés par l'ordre juridique de l'Union, et

-de laisser inappliquée, à l'issue d'une telle procédure incidente, la disposition législative nationale en cause si elles la jugent contraire au droit de l'Union. ».

La Cour de cassation fit alors le choix de persister dans son point de vue singulier décidant alors[65] que « dans l'hypothèse particulière où le juge est saisi d'une question portant à la fois sur la constitutionnalité et la conventionalité d'une disposition législative, il lui appartient de mettre en œuvre, le cas échéant, les mesures provisoires ou conservatoires propres à assurer la protection juridictionnelle des droits conférés par l'ordre juridique européen ; qu'en cas d'impossibilité de satisfaire à cette exigence, comme c'est le cas de la Cour de cassation, devant laquelle la procédure ne permet pas de recourir à de telles mesures, le juge doit se prononcer sur la conformité de la disposition critiquée au regard du droit de l'Union en laissant alors inappliquées les dispositions de l'ordonnance du 7 novembre 1958 modifiée prévoyant une priorité d'examen de la question de constitutionnalité ; ».

[65] Cass, ass plén 29 juin 2010 Melki et Abdeli n°10-40001

Est-ce l'office du juge judiciaire qui, parce qu'il ne lui permet pas de prendre les mesures provisoires ou conservatoires, justifie objectivement que ne soit pas respectée la priorité d'examen de la constitutionnalité de la loi ? Et ce, alors même qu'il serait envisageable d'attribuer au juge du fond le pouvoir de prendre ces mesures ?

Il semble bien, en tout cas, que le Conseil d'Etat éprouve moins de réticence à penser son office comme « l'office communautaire du juge national ». Et l'on mesure alors, toute la portée de la décision du 16 juin 2010 Mme Diakité de ce point de vue.

2-Autorité de la chose jugée

Les suites données par le Conseil d'Etat à une décision du Conseil constitutionnel rendue à propos d'une question prioritaire de constitutionnalité dans deux affaires récentes, permettent d'apprécier l'état d'esprit dans lequel le juge administratif entend appliquer cette nouvelle voie de droit.

La disposition en cause dans la question portée devant le Conseil constitutionnel est l'article L114-5 Code de l'action sociale et des familles encore appelé loi anti-Perruche[66]. Il est prévu, en outre à l'article 2 de la loi du 11 février 2005 non codifié que ces dispositions « sont applicables aux instances en cours à la date d'entrée en vigueur de la loi n° 2002-303 du 4 mars 2002 précitée, à l'exception de celles où il a été irrévocablement statué sur le principe de l'indemnisation ».

Cependant la Cour européenne des droits de l'homme a jugé en 2005[67] que l'application de ces dispositions aux instances en cours est contraire au droit au respect des

[66] L'article 2 II-1 de la loi n° 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées décide que « Les trois premiers alinéas du I de l'article 1er de la loi n° 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé deviennent l'article L. 114-5 du code de l'action sociale et des familles »

[67] CEDH 6 octobre 2005 Maurice c. France et Draon c. France n° 11810/03 et 1513/03

biens garanti par l'article 1er du premier protocole à la CEDH. De telle sorte la loi a été écartée pour les requérants qui avaient introduit une instance avant l'entrée en vigueur de la loi du 4 mars 2002 et le régime jurisprudentiel antérieur est resté applicable. On rappellera, en outre, que le Conseil d'État avait adopté une position différente sur cette question[68].

Une question prioritaire de constitutionnalité ayant été soumise par le Conseil d'Etat en 2010[69], le Conseil constitutionnel a été conduit à se prononcer sur l'entrée en vigueur de ces dispositions[70]. Sa réponse n'est pas dépourvue d'équivoque en ce que les nuances qu'il introduit dans les motifs de sa décision ne sont pas reprises dans le dispositif. En effet, le Conseil indique dans les motifs que le législateur a rendu le dispositif anti-Perruche applicable aux instances non jugées de manière irrévocable à cette date, puis ajoute que « si les motifs d'intérêt général précités pouvaient justifier que les nouvelles règles fussent rendues applicables aux instances à venir relatives aux situations juridiques nées antérieurement, ils ne pouvaient justifier des modifications aussi importantes aux droits des personnes qui avaient, antérieurement à cette date, engagé une procédure en vue d'obtenir la réparation de leur préjudice ». Mais il ne mentionne pas cette distinction dans le dispositif et déclare simplement la disposition transitoire contraire à la Constitution.

En clair et comme le résume parfaitement un commentateur[71], la décision quelque peu énigmatique car «si la censure de l'application de la loi anti-Perruche aux instances en cours ne fait aucun doute, comment interpréter le sort réservé à son application aux instances postérieures ? »

[68] CE Ass 6 déc. 2002, Draon, n° 250167

[69] CE 14 avril 2010 Mme Lazare n° 329290

[70] décision n° 2010-2 QPC du 11 juin 2010

[71] P.Deumier, L'aprés QPC de l'anti-Perruche, épisode1 » RTDC 2012.71

Le Conseil d'Etat tire les conséquences de cette décision[72] et choisit de lire le dispositif à la lumière des motifs. Il commence par rappeler le cadre des effets dans le temps des déclarations d'inconstitutionnalité rendues sur une question prioritaire de constitutionnalité en citant la décision n° 2010-108 QPC en date du 25 mars 2011, dans laquelle le Conseil constitutionnel a jugé que « si, en principe, la déclaration d'inconstitutionnalité doit bénéficier à l'auteur de la question prioritaire de constitutionnalité et la disposition déclarée contraire à la Constitution ne peut être appliquée dans les instances en cours à la date de la publication de la décision du Conseil constitutionnel, les dispositions de l'article 62 de la Constitution réservent à ce dernier le pouvoir tant de fixer la date de l'abrogation et reporter dans le temps ses effets que de prévoir la remise en cause des effets que la disposition a produits avant l'intervention de cette déclaration ; ».

Puis, reprenant à la lettre les éléments de la décision, le Conseil d'Etat aborde la question concrète de la portée de la décision du Conseil quant à la constitutionnalité du dispositif anti-Perruche. Il affirme « qu'il résulte de la décision du Conseil constitutionnel et des motifs qui en sont le support nécessaire qu'elle n'emporte abrogation» de ce dernier «que dans la mesure où cette disposition rend les règles nouvelles applicables aux instances en cours au 7 mars 2002 ». L'effet rétroactif n'est donc abrogé qu'en tant qu'il vise les instances déjà engagées à la date de l'entrée en vigueur du dispositif.

Saisi du même problème, la Cour de Cassation[73] ne suit pas la position du Conseil d'Etat quant à l'interprétation qu'elle donne de la portée abrogative de la décision du Conseil constitutionnel à l'égard du dispositif transitoire déclaré inconstitutionnel : « faute de mention d'une quelconque limitation du champ de cette abrogation, soit dans le dispositif, soit dans des motifs clairs et précis qui en seraient indissociables, il ne peut être

[72] CE Ass 13 mai 2011 Lazare req 329290, voir aussi CE Ass 17 mai 2011 Delannoy req 317808

[73] Cass civ 1 15 dec 2011 10-27473

affirmé qu'une telle déclaration d'inconstitutionnalité n'aurait effet que dans une mesure limitée ».

La limitation de l'effet rétroactif serait-elle donc un obiter dictum plutôt qu'une réserve d'interprétation[74] ? Mais alors si tel était le cas, on ne peut que relever la bonne volonté évidente d'un juge administratif qui applique l'autorité de la chose jugée à une telle incise.

Le Conseil d'Etat et la Cour de cassation ont donc adopté deux approches différentes de la portée de la décision du Conseil constitutionnel à l'égard du dispositif transitoire de la loi du 4 mars 2002. Rien d'inédit dans une telle divergence mais en l'espèce cela aboutit à créer une inégalité de traitement entre les requérants. En effet seront appliquées des règles différentes à des actions engagées postérieurement à l'entrée en vigueur de la loi du 4 mars 2002 -lorsque la naissance des enfants concernés aura été antérieure- selon qu'il s'agit d'un contentieux impliquant un praticien et un établissement du secteur public ou du secteur privé.

Ce bilan nécessairement sélectif n'appelle pas en soi de conclusion mais plutôt une suite. Les premiers mois de l'année 2012 nous livrent déjà quelques beaux témoignages de la toujours forte nature du droit administratif. Quand le conceptualisme ne se refuse pas un certain empirisme, il y a de belles constructions et un certain désordre en perspective.

[74] P.Deumier L'après-QPC de l'anti-Perruche, épisode 2, RTDC 2012.75

iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

THE CONSTITUTION OF THE UNITED KINGDOM.

A POSITIVIST PERSPECTIVE

(November 2012)

Prof. Sebastian SCHMID

INDEX

This paper will focus on three basic aspects of the UK constitution: That it is *unwritten*, its categorisation as *political* constitution and *parliamentary sovereignty* as its prime principle. Admittedly, writing about these standard topics of UK constitutional law requires special justification: This article aims to contribute to the discussion by adopting a theoretical approach which is not popular and thus not common among Anglo-American scholars. It can be described as strictly positivist view on law.[1] According to this approach, legal norms are created by human beings

[1] See for the following Hans Kelsen, *Pure Theory of Law*, translation from the second German edition by Max Knight (University of California Press, 1967); ibid., *General Theory of Norms*, translated by Michael Hartney (Clarendon Press, 1991); Robert Walter, *Der Aufbau der Rechtsordnung*, 2nd edn (Manz, 1974); Rudolf Thienel, *Kritischer Rationalismus und Jurisprudenz* (Manz, 1991); Matthias Jestaedt, *Das mag in der Theorie richtig*

and regulate human behaviour in the form of commands; seemingly other types of norms such as authorising and enabling norms are regarded as parts of commands, since they are indissolubly linked to commanding norms. Law is basically regarded as a system of coercive orders which are regularly effective. It is an essential position of this theoretical approach that the science of law is only concerned with questions of what and how the law *is* and not how it *should be* which is identified as a question of (legal) political science. In describing the meaning of legal provisions by interpretation, legal scholars provide information on how individuals *should* behave and not on their *actual* behaviour. Thus, this theoretical approach aims to separate legal science from other sub-disciplines of jurisprudence – used here as a generic term – such as legal political science, legal historical science or legal philosophy and to establish it as an own branch of science with a particular methodology.

In adopting this approach, this article will try to show that the peculiarity of the UK constitution is not that it is unwritten but that the United Kingdom does not have a constitution in a formal sense. The discussion on political and legal constitutions will be embed in the fundamental distinction between ethics and legal science which will lead to the conclusion that basically every country has a political as well as a legal constitution. In regard to the principle of parliamentary sovereignty, it will be argued that the existence of a supreme or sovereign law-maker is a common feature of all modern legal systems.

1.The *unwritten* constitution of the United Kingdom

The UK constitution – as well as the constitutions of New Zealand and Israel – is often scientifically classified as *unwritten* in order to differentiate it from written constitutions. Such a conception of a scientific term can be distinguished from

sein... Vom Nutzen der Rechtstheorie für die Rechtspraxis (Mohr Siebeck, 2006); Stefan Griller and Heinz Peter Rill (eds), *Rechtstheorie. Rechtsbegriff – Dynamik – Auslegung* (Springer, 2011).

making statements on norms.[2] This division refers to the two major aims of legal science: to systematise and to classify law on the one hand, and to describe the legal provisions in force on the other hand.[3] Statements on norms aim to provide information on the validity and content of legal norms. As epistemic acts, they are made under the principle of truth. In other words: To say that a specific norm has certain content, can be verified or falsified.[4] In contrast, the conception of scientific terms is not primarily based on considerations about truth; rather, it is based on the premise of usefulness and appropriateness. Consequently, the conception of scientific terms can be considered useful or inappropriate; however, it cannot be verified or falsified. The following paragraphs will focus on the question, whether it is appropriate to call the UK constitution "unwritten" in order to describe its distinctiveness from other constitutions.

At first glance, it does not seem appropriate to call the UK constitution unwritten since some of its parts are written down, for instance, in Acts of Parliament.[5] At the same time, the extent to which unwritten provisions, such as conventions, are regarded as a part of the constitution is exceptional in contrast to other legal systems. However, the attribute "unwritten" cannot be taken literally and it is, thus,

[2] Heinz Peter Rill, *Gliedstaatsverträge* (Springer, 1972) pp.2-3.

[3] Thienel, *Kritischer Rationalismus und Jurisprudenz*, p.210.

[4] Kelsen, *Pure Theory of Law*, p.73; Robert Walter, "Normen und Aussagen über Normen" in Bernd-Christian Funk et. al. (eds), *Staatsrecht und Staatswissenschaften in Zeiten des Wandels. Festschrift für Ludwig Adamovich zum 60. Geburtstag* (Springer, 1992) 714-720; Eugenio Bulygin, "On Norms of Competence" (1992) 11 *Law and Philosophy* 201 at p.211.

[5] See, e.g., the Human Rights Act 1998 or the Constitutional Reform Act 2005.

regularly understood in a broader sense as "not codified":[6] According to a conception of van Caenegem

> "[a] true codification is an original work and, in contrast to a compilation, must be intended as a general, exhaustive regulation of a particular area of law (for example, civil law or civil procedure). Furthermore, the drafting of a code involves a coherent programme and a consistent logical structure. The language of a modern code ought to be accessible to all and, as far as possible, free from archaisms and technical professional jargon. Codes of this type appeared only from the eighteenth century onwards."[7]

Based on this definition, it is true that the UK constitution is not written down in one document and that its fragmentation differentiates it from other fundamental legal orders. This understanding is supported by the argument that in a common law system, constitutional law cannot be organised in the same way as in a civil law country in the sense that all norms of constitutional law are codified in one document. Since not only Acts of Parliament but also decisions of courts are generally binding, a codified or totally incorporated constitution which comprises all generally binding provision – such as the German *Grundgesetz*[8] – would require continuous and frequent adaptation. However, there are many civil law jurisdictions which do not have an incorporated constitution such as Germany or a

[6] See Vernon Bogdanor and Stefan Vogenauer, "Enacting a British Constitution: Some Problems" [2008] P.L. 38-57; Richard Gordon, *Repairing British Politics. A Blueprint for Constitutional Change* (Hart, 2010) pp.xiii, 8; Jeffrey Jowell and Dawn Oliver, "Editors' Introduction" in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution*, 7th edn (Oxford University Press, 2011) pp.2-3; Peter Leyland, *The Constitution of the United Kingdom. A Contextual Analyses* (Hart, 2007) p.2; David Pollard, Neil Parpworth and David Hughes, *Constitutional and Administrative Law*, 4th edn (Oxford University Press, 2007) p.2.

[7] Raul C. van Caenegem, *An Historical Introduction to Private Law* (Cambridge University Press, 1992) p.12.

[8] Grundgesetz für die Bundesrepublik Deutschland (German Federal Law Gazette 1949, p.1, subsequently amended).

comprehensive codification of constitutional law at all. Examples for fragmented fundamental laws comprising different legal sources can be found in Sweden[9] and Austria[10]. Thus, the lack of codification – or in other words: fragmentation – is not an exclusive feature of the UK constitution.[11]

The unique characteristic of UK constitutional law is that it is solely determined by substantive criteria and that it cannot be defined, as probably in all other legal systems, by formal criteria such as special majorities in parliament or the need for a referendum when enacting or amending it.[12] In terms of this characteristic, the UK constitution is sometimes called *unentrenched*.[13] The distinction between constitutional law in a formal and substantive sense is a long standing categorisation of legal science. It refers, on the one hand, to procedural aspects, on

[9] The Swedish Constitution consists of four fundamental laws: The Instrument of Government (SFS 1974:152, subsequently amended); The Act of Succession (SFS 1910:926, amended 1979); Freedom of the Press Act (SFS 1949:105, subsequently amended) and The Law on Freedom of Expression (SFS 1991:1469, subsequently amended).

[10] In Austria, constitutional law can be found in many different documents. Next to the *Bundes-Verfassungsgesetz* (Austrian Federal Law Gazette 1930/1) which consists of more than 200 articles, there are more than 300 constitutional provisions in other constitutional Acts of Parliament and "ordinary" Acts of Parliament; see Ewald Wiederin, "Verfassungsrevision in Österreich" in Michael Thaler and Harald Stolzlechner (eds), *Verfassungsrevision. Überlegungen zu aktuellen Reformbemühungen* (Jan Sramek Verlag, 2008) 17 at p.25.

[11] Thus, opinions such as Vernon Bogdanor's (*The New British Constitution* [Hart, 2009] p.8) that all but three democracies (United Kingdom, Israel, New Zealand) have constitutions "embodied in a document" and that "[i]n this sense, of course, Britain has no constitution" are to be rejected.

[12] This insight is far from being new; see A.V. Dicey's comparison between the US and the UK constitution in *Introduction to the Study of the Law of the Constitution*, 10th edn (Macmillan, 1959) pp.4-6 who is referring to Émile Boutmy, *Etudes de Droit constituionel*, 2nd edn (Plon, 1888) p.8.

[13] H.L.A. Hart, *The Concept of Law*, 2nd edn (Oxford University Press, 1994) p.150. The term is also used by S.E. Finer, Vernon Bogdanor and Bernard Rudden, *Comparing Constitutions* (Clarendon Press, 1995) p.43. However, these authors create a link between entrenchment and codification which is not necessarily the case: entrenched legal provisions do not have to be codified and *vice versa*.

the other hand, to the content of legal provisions: If a specific procedure to enact or amend constitutional law exists (constitutional law in a formal sense), "any contents whatever may appear under this form".[14] *Vice versa*, the procedure according to which a legal provision is enacted does not play any role, when constitutional law is defined by content-related criteria (constitutional law in a substantive sense). Consequently, not only constitutional Acts of Parliament but also "ordinary" Acts of Parliament, regulations or judgements are regarded as constitutional law as long as their subject of regulation is of constitutional nature.

A problem of substance-related definitions of constitutional law is uncertainty of what the legal constitution is. Which contents characterise constitutional law? According to the predominant definition among UK legal scholars – if there is one provided at all[15] –, constitutional law is

> "a body of rules, conventions and practices which describe, regulate or qualify the organisation, powers and operation of government and relations between persons and public authorities."[16]

This definition finds support within the judiciary as Laws LJ stated in *Thoburn v. Sunderland City Council*:

> "We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is

[14] Hans Kelsen, *General Theory of Law and State*, translated by Anders Wedberg (Havard University Press, 1946) p.125.

[15] Ian Loveland, *Constitutional Law, Administrative Law and Human Rights*, 5th edn (Oxford University Press, 2009) p.4, follows a functional approach according to which "a constitution is to articulate and preserve a society's fundamental principles." Instead of offering a one sentence definition "the entire book" shall be seen as definition.

[16] Colin Turpin and Adam Tomkins, *British Government and the Constitution*, 7th edn (Cambridge University Press, 2011) p.4.

> one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights."[17]

At first glance, these definitions sound useful and have almost reached authoritative status by repetition,[18] but an example might prove its weakness: Is an Act of Parliament which regulates the electoral system in detail constitutional law?[19] It can be argued that the right to vote is a fundamental political right in a democracy and that the relationship between citizens and the State is concerned. However, electoral provisions are usually very specific in regulating how the national territory is divided into constituencies or how the votes are counted and transferred into seats in a legislative body. Such detailed rules do not seem to be "fundamental enough" for a basic law which sets principles for state organisation. Thus, if the "basic tenets"[20] of the UK constitution are put aside, a substance-related definition of constitutional law almost necessarily ends up in a controversy whether certain norms are to be classified under the category of constitutional law or not.[21]

[17] *Thoburn v Sunderland City Council, Hunt v London Borough of Hackney, Harman and Dove v Cornwall County Council, Collins v London Borough of Sutton* [2002] EWHC 195 Admin at [62].

[18] Similar substance-related definitions can be found in Bogdanor, *The New British Constitution*, p.9; Anthoney Bradley and Keith Ewing, *Constitutional and administrative law*, 14th edn (Pearson Education, 2006) pp.3-4; Leyland, *The Constitution of the United Kingdom*, p.1.

[19] This question has already been asked by Bogdanor and Vogenauer, [2008] P.L. pp.42-43.

[20] The Select Committee on the Constitution identified five basic tenets of the Constitution in its First Report: Sovereignty of Parliament, Rule of law encompassing the right of the individual, union State, representative government, and membership of the Commonwealth and other international organisation.

[21] Turpin and Tomkins, *British Government and the Constitution*, p.4. See already Dicey, *Introduction to the Study of the Law of the Constitution*, p.7: The "English commentator or lecturer [...] will find, unless he can obtain some clue to guide his steps, that the whole province of so-called "constitutional law" is a sort of maze in which the wanderer is perplexed by unreality, by antiquarianism, and by conventionalism."

The distinction between constitutional and "ordinary" legislation is not only a question of scientific classification; it is crucial in regard to the application of law: According to Schedule 5 of the Scotland Act 1998, one of the so-called "Reserved Matters" which remain in the exclusive legislative competence of Westminster Parliament, is "The Constitution". However, although five sub-items[22] define what is meant by "The Constitution" in this context, the question arises – especially for the Supreme Court[23] – which contents of statutes are to be qualified as "constitutional".

This uncertainty in the qualification of legal provision as constitutional or "ordinary" Act of Parliament does not appear when a formal view is adopted: Since the hierarchical position of a legal provision results from the procedure by which it is enacted, the classification of norms of a legal system into different hierarchical layers turns out to be unproblematic. In the case of constitutional law, procedural provision quite often require specific quorums in parliament, sometimes combined with a referendum or the explicit designation as "constitutional law". If such a viewpoint is adopted, legal provisions of any content may be classified as constitutional law. It is up to the constitutional legislator and in terms of legal policy recommendable that only such provisions are enacted as constitutional law which constitute fundamental rules. However, the attempt to identify constitutional law in a formal sense in the UK legal system does not produce a result. It fails because there are no specific procedural rules provided according to which constitutional Acts of Parliament can be distinguished from "ordinary" Acts of Parliament. The United Kingdom does not have a constitution in a formal sense which makes this legal system indeed outstanding.

[22] Which are a) the Crown, including succession to the Crown and a regency, b) the Union of the Kingdoms of Scotland and England, c) the Parliament of the United Kingdom, d) the continued existence of the High Court of Justiciary as a criminal court of first instance and of appeal, and e) the continued existence of the Court of Session as a civil court of first instance and of appeal.

[23] Section 33 and Sch.6 Scotland Act 1998.

A consequence of the lack of formal constitutional law in the United Kingdom is the principle of parliamentary sovereignty: No superior law – except European Law – limits the legislative competences of Westminster Parliament. Moreover, the legal norms which are regarded as constitutional law due to their content do not enjoy greater legal protection than "ordinary" Acts of Parliament. Thus, "[t]here is an obvious weak link in the protection of fundamental constitutional principles" in the constitution of the United Kingdom.[24]

As mentioned above, the United Kingdom is regularly categorized as one of the few countries which are regarded to have an unwritten constitution. This description turns out to be misleading and is, thus, inappropriate. It is neither its characteristic as being unwritten nor its lack of a codification which makes the UK constitution special. The outstanding characteristic of UK constitutional law is that it cannot be defined by formal criteria since "ordinary" Acts of Parliament and "constitutional" Acts of Parliament can only be distinguished in respect of their content. This result challenges the myth that there are significant parallels between the constitutions of the United Kingdom, New Zealand[25] and Israel[26] since the legal

[24] Dawn Oliver, "Constitutionalism and the Abolition of the Office of the Lord Chancellor" (2004) 57 *Parliamentary Affairs* 754 at p.765.

[25] According to s.268 of the Electoral Act 1993, five provisions of this Act and one provision of the Constitution Act 1986 can only be amended by a majority of 75% of all the members of Parliament.

[26] In contrast to the regular procedure, according to which the Knesset passes bills by a simple majority (majority of the members present, s.25 Basic Law: The Knesset 1958), s.4 of this Act can only be amended by an absolute majority (majority of the members of the Knesset). This procedure is, for instance, also provided for amendments of any provision in the Basic Law: Freedom of Occupation 1994 (s.7) or most of the provisions of the Basic Law: Government 2001 (s.44). Furthermore, according to the consistent case-law of the Israeli Supreme Court all so-called "Basic Laws" have a constitutional status so that regular Act of the Knesset have to be in accordance with these Laws. From a formal point of view, this jurisdiction can be based on the sophisticated observation that Basic Laws without a special amendment procedure can be separated from regular Acts of the Knesset because of their explicit designation as "Basic Law" when they are published. As a consequence, any amendment of a Basic Law has to designated as "Basic Law" as well (see decision of the Israeli Supreme Court in the case HCJ 6821/93 *United Mizrachi Bank Ltd v Migdal Cooperative Village*, 49 (4) PD 221; Suzie Navot, "Israel" in Dawn Oliver and

systems of both countries contain constitutional law which can be defined according to formal, i.e. procedural criteria.

2. The *political* constitution

In the late 1970s, J.A.G. Griffith made a declaration for the political constitution of the United Kingdom.[27] The idea of a political constitution is characterised by the existences of non-legal norms which regulate the political process. In contrast to legal norms, the creation of these other social norms which can be referred to as "norms of morality" is less formalised, since they are a result of the day-to-day-political process. Thus, their normative content as well as the working of a political constitution is difficult to discern.[28]

For over three decades, constitutional scholars have raised the question whether the UK constitution is rather political or legal. Today, there is broad agreement that the constitution is in transition from a political to a legal or "principled"[29] legal order. However, the debate drifted away from Griffith's initial thoughts by asking "either" / "or" questions. Griffith did not argue, I would dare say, that the United Kingdom has solely a political constitution[30] and he did not deny that there are provisions in the UK legal system which are to be classified as "constitutional". Rather, Griffith's major argument was that legal instruments are not suited for

Carlo Fusaro [eds], *The Changing Constitution* [Hart, 2011] 191-209.

[27] J.A.G. Griffith, "The Political Constitution" (1979) 42 M.L.R. 1-21.

[28] Graham Gee and Grégoir C.N. Webber, "What Is a Political Constitution?" (2010) 30 O.J.L.S. 273 at p.286.

[29] Dawn Oliver, "The United Kingdom Constitution in Transition: from where to where?" in Mads Andenas and Duncan Fairgrieve (eds), *Tom Bingham and the Transformation of Law. A Liber Amicorum* (Oxford University Press, 2009) 147-162.

[30] See Dawn Oliver, *Constitutional Reform in the UK* (Oxford University Press, 2003) p.21 who characterises Griffith's concept of a political constitution as "lacking normative content".

solving certain political issues. Going back to Griffith's initial article, the following paragraphs try to demonstrate that the distinction between political and legal constitutions refers to a more fundamental theoretical setting: the distinction between legal and moral norms and between legal science and ethics respectively.

In his article, Griffith explicitly adopted a positivist view on the UK constitution and constitutional law:

> "I do not believe that the concept of law is a moral concept. Of course I will, as cheerfully and as seriously as the next person, engage in discussions about the value of individual laws and pass moral judgements about them. But laws are merely statements of a power relationship and nothing more. [...] I am arguing then for a highly positivist view of the constitution; of recognising that Ministers and others in high positions of authority are men and women who happen to exercise political power but without any such right to that power which could give them a superior moral position; that laws made by those in authority derive validity from no other fact or principle, and so impose no moral obligation of obedience on others".[31]

It is one of the fundamental positions of a pure positivist theory of law that legal norms have to be distinguished from norms of morality.[32] Both, legal and moral norms regulate human behaviour; thus, legal science is not the only discipline which is concerned with the description of social norms.[33] One difference between a legal and a moral system is that legal norms are created by legally authorised human beings. It is crucial that the power to adopt a legal norm can only result

[31] Griffith, (1979) 42 M.L.R. p.19.

[32] Maxim of separation of law and morals (*Trennungsthese*); Heinz Peter Rill, "Grundlegende Fragen bei der Entwicklung eines Rechtsbegriffs" in Stefan Griller and Heinz Peter Rill (eds), *Rechtstheorie. Rechtsbegriff – Dynamik – Auslegung* (Springer, 2011) 1 at pp.15-19.

[33] Ethics is a science concerned with norms of morality.

from another legal (enabling) norm so that, as a consequence, legal systems appear as self-contained normative orders the validity of which does not derive from norms of morality. A further difference is that legal norms are enforceable by use of state power whereas sanctions for immoral behaviour are imposed interpersonal.

From a positivist point of view, the relationship between law and morality is characterised by the insight that both normative systems exist independently, especially that the validity of a legal norm does not depend on a judgement with regard to its compliance with moral values. To claim that legal provisions are only valid if they are just or in compliance with morality[34] implies that there are absolute moral values. This presumption is challenged by representatives of a pure theory of law by arguing that it is not possible to objectify moral values from a scientific point of view.[35] Attempts to identify perfectly valid norms of just behaviour, i.e. norms which exclude the possibility to consider other behaviour than determined by the norm as just, are doomed to failure. No judgement on justice can ever claim to be perfectly valid because the possibility of a differing value judgement cannot be excluded. The content of a moral system changes over time and is highly related to the background of the judging individual.[36] This view on the relationship between legal and moral systems does not deny that factual relationships between law and morality exist and it certainly does not exclude the claim that law should be in accordance with moral values which are valid within a society. But these empirical and political viewpoints do not influence the validity of legal provisions which are in force independently of any however fundamental moral position.

[34] For theories of law that include justice as criterion for the validity of law, see generally Hart, *The Concept of Law*, ch.9; see further Stephen Guest, "Why the Law is Just" (2000) 53 *Current Legal Problems* 31-52.

[35] However, this does not mean that it is not possible to enter into a rational discourse on value judgements. See basically Hans Kelsen, *What is justice? Justice, Law and Politics in the Mirror of Science* (University of California Press, 1957).

[36] Relativistic theory of values.

It is this understanding of the relationship between legal and moral norms which is the foundation for Griffith's article on the political constitution:

> "For myself, I am very doubtful about the value of the exercise of telling judges or other legislators that they should look towards the ideal of justice, truth and beauty in their search for the right solution to difficult cases or problems. And I am even more sceptical when they are urged to look to the moral standard of the community – or the general welfare – because I do not think that these things exist. All I can see in the community in which I live is a considerable disagreement about the controversial issues of the day and this is not surprising as those issues would not be controversial if there were agreement."[37]

In this context, the *political* constitution is a generic term for all the non-legal norms in force which regulate the constitutional order of the United Kingdom. It comprises all the long-established practices by which state representatives feel bound because of valid moral obligations. It makes perfectly sense that the notion of a political constitution has great influence in the United Kingdom since the extent to which constitutional life is regulated by moral norms is exceptionally high compared, for instance, to some positivistic continental constitutions.

In contrast to the post-Griffith discussion, he himself does not argue that the UK constitution is either legal or political. Put pithily, his key message is: Do not mix up law and politics. That is a purely political statement reflecting Griffith's personal view on the reasonable use of legal instruments.

> "I believe firmly that political decisions should be taken by politicians. In a society like ours this means by people who are removable. It is an obvious corollary of this that the responsibility and accountability of our rulers should be real and not fictitious. ... And we need to force governments out of

[37] Griffith, (1979) 42 M.L.R. p.12.

> secrecy and into open. So also the freedom of the Press should be enlarged by the amendment of laws which restrict discussion. But the remedies are political. It is not by attempting to restrict the legal powers of government that we shall defeat authoritarianism. It is by insisting on open government."[38]

It is an illusion – I believe he argues – to solve problems within a society merely by enacting laws. Further juridification and justicialisation in form of a codified constitution – as often proposed in the last centuries – are not regarded as proper answers to current problems within society.

According to what has been said, I think the term "political constitution" was not introduced to invent a model *in contrast* to the model of a legal constitution but rather *in addition* to it. When Gee and Webber[39] have only recently come to the conclusion "that Britain's constitution today embraces [...] *both* a political model *and* a legal model" we are exactly where we started in 1979: The idea of political and legal constitutions are not excluding models. The distinction refers to different normative systems which have, according to Griffith, different functions and thus should not be mixed up. Apart from that, not only the United Kingdom has a political constitution; any constitutional order is consisting of legal and moral or political norms, though, in regard to the influence and prevalence of one normative system, differences occur. It is the maxim of separation of law and morals which leads to the recognition of a political constitution which found a strong supporter in Griffith.

Conclusively, the discussion on legal and political constitutions has to be placed within the general distinction between law and morality. The debate is not on a

[38] Griffith, (1979) 42 M.L.R. p.16.

[39] Gee and Webber, (2010) 30 O.J.L.S. p.292.

yes/no question but, rather, on the recognition and the influences of legal and moral norms within a constitutional system.

3. Sovereignty of the Queen-in-Parliament

Much has been written about parliamentary sovereignty as the basic principle of the UK constitution.[40] It basically concerns the unlimited legislative powers of Westminster Parliament and its relationship to the courts. The principle of parliamentary sovereignty is multifaceted and its content changes depending on the viewpoint adopted. The following paragraphs do not aim to give an update of the discussion but rather to identify its legal characteristics instead of political realities.

According to Dicey who is still cited frequently in this respect the

> "principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament [...] has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[41]

Thus, it is one aspect of the principle of parliamentary sovereignty that "under the English constitution" Westminster Parliament has unrestricted power to legislate and to pass Acts of Parliament on any subject matter. In other legal systems, Parliaments are limited in their function as "ordinary" legislators because of constitutional norms, for instance, concerning the distribution of legislative competences in a federal state. Thus, the sovereignty of Parliament is sometimes considered as counterpart to the sovereignty of a constitution.[42]

[40] For an overview see Jeffrey Goldsworthy, *Parliamentary Sovereignty. Contemporary Debates* (Cambridge University Press, 2010); Loveland, *Constitutional Law, Administrative Law and Human Rights*, pp.22-52.

[41] Dicey, *Introduction to the Study of the Constitution*, pp.39-40.

From a theoretical point of view, this distinction is unfounded: It is a characteristic of modern legal systems that they appear as a hierarchical orders consisting of norms of different levels.[43] The norms of the highest level are created by a sovereign law-maker who is free to change them in any direction. That might not always be the Parliament, however, quite often it is: The South African constitutional legislator, for instance, has unlimited power to amend the South African Constitution according to the procedural rules set out for its change.[44] While in many legal systems it is the constitutional legislator who is sovereign,[45] in the United Kingdom, it is the "ordinary" legislator. This is the consequence of the fact that the United Kingdom does not have a constitution in a formal sense: The formal legal procedure to enact constitutional Acts of Parliament is not different from the one for "ordinary" Acts of Parliament. Thus, the distinction between sovereignty of Parliament and sovereignty of a constitution – more precisely: sovereignty of the constitutional legislator – does not characterise fundamentally different forms of legal systems. This categorisation merely depends on how varied a legal system is with regard to different hierarchical layers.

[42] See, e.g., the book review by Dawn Oliver, "Richard Gordon, Repairing British Politics: A Blueprint of Constitutional Change" (2010) 6 *International Journal of Law in Context* p.399.

[43] A.J. Merkl, "Prolegomena einer Theorie des rechtlichen Stufenbaus" in Alfred Verdroß (ed.), *Gesellschaft, Staat und Recht. Festschrift Hans Kelsen zu 50. Geburtstag gewidmet* (1931) pp.252-294; Kelsen, Pure Theory of Law, pp.221-278; Ewald Wiederin, "Die Stufenbaulehre Adolf Julius Merkls" in Stefan Griller and Heinz Peter Rill (eds), *Rechtstheorie. Rechtsbegriff – Dynamik – Auslegung* (Springer, 2011) pp.81-134; Joseph Raz, *The Concept of a Legal System* (1970) pp.95-100; for the UK legal system see Hart, *The Concept of Law*, p.25.

[44] Section 73 and 74 Constitution of the Republic of South Africa 1996 (Act 108 of 1996, substituted by s.1 (1) of Act 5 of 2005).

[45] Section 2 of the South African Constitution is headed "Supremacy of Constitution" and states: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." According to the view represented in this article, this declaratory provision is to be interpreted as meaning that the Constitution is supreme with regard to the "ordinary" legislator. However, since in South Africa any constitutional law can be changed, it is the constitutional legislator who is sovereign and not the Constitution.

It could be argued against this position that the conception of Westminster's sovereignty differs from other sovereign legislators because in the United Kingdom, Acts of Parliament are passed when either House agrees on by a majority of votes cast. In contrast, the unlimited legislative competences of other Parliaments such as the South African can only be exercised by super-majorities.[46] Further, the legal basis for the legislative process in the United Kingdom can be found in Standing Orders, while the legislative procedure for changes of constitutional law in other legal systems is usually regulated in the constitution itself. However, differences concerning the form and procedure in which a legal norm is enacted lie within the power of each sovereign law-maker who elsewise would not be sovereign. Undoubtedly, Westminster Parliament has the power to pass a bill concerning the legislative procedure.[47] It is not useful to refer to the procedure and form in which a sovereign law-maker decides to enact legal provisions, since these are not useful qualities to point out the characteristics of legislative sovereignty. Thus, if the powers of Westminster Parliament are not compared with other "ordinary" legislators but instead with other sovereign legislators, the UK principle of parliamentary sovereignty appears as entirely common feature of modern legal systems.

Some constitutions explicitly state that certain – most fundamental – provisions cannot be amended.[48] These norms of constitutional law cannot be changed within the procedural framework of the constitution; an amendment can only be adopted

[46] According to s.74 of the South African Constitution amendments of s.1 and s.74 require a 75 per cent majority of all members of the National Assembly and a supporting vote of at least six provinces; any other provision of the Constitution can be amended with a majority of two-thirds of all members of the Assembly and the support of six provinces.

[47] See, e.g., the Parliament Acts 1911 and 1949.

[48] So called "eternity clauses"; see, e.g., art.79 para.3 German Basic Law; art.89 para.5 French Constitution or art.9 para.2 Constitution of the Czech Republic.

by an extra-constitutional act which creates a completely new constitution.[49] A sovereign legislator with unlimited law-making power does not exist in these legal systems. It has been argued that also Westminster's sovereignty is limited in on respect, namely, that the principle of parliamentary sovereignty itself cannot be changed or abolished, for instance, by the implementation of a constitution in a formal sense.[50] This opinion is regularly based on the existence of a "rule of recognition"[51] which establishes the "criteria of validity in any given legal system" as an "empirical [...] question of fact".[52] The content of the rule of recognition is "whatever rules legal officials do in fact accept and follow when they make, recognise, interpret or apply law."[53] According to this view, the supreme position of Westminster Parliament is a result of the fact that its sovereignty is accepted by the government and the courts. However, these arguments cannot be used as a legal foundation of parliamentary sovereignty in general and the unchangeability of the principle specifically. From the perspective of a pure theory of law, it lacks the insights that what ought to be cannot be derived from facts.[54] The validity of a norm necessarily can only result from another norm. By going back to the historically first constitution, a layer of norms is reached the foundation of which cannot be traced back to other norms. Thus, the idea to scientifically prove the

[49] Werner Heun, *The Constitution of Germany. A Contextual Analyses* (Hart, 2011) pp.25-26; G.F. Schuppert, "The Constituent Power" in Christian Starck (ed.), *Main Principles of the German Basic Law* (Nomos, 1983) pp.37-54.

[50] H.W.R. Wade, "The Basis of Legal Sovereignty" (1955) C.L.J. 172 at p.174; Goldsworthy, *Parliamentary Sovereignty*, p.192; Anthony Lester, "The utility of the Human rights Act: a reply to Keith Ewing" [2005] P.L. 249 at p.257.

[51] See generally Hart, *The Concept of Law*, ch.6.

[52] Hart, *The Concept of Law*, p.292.

[53] Goldsworthy, *Parliamentary Sovereignty*, p.54.

[54] Kelsen, *Pure Theory of Law*, p.193.

objective validity of a legal system has to be abandoned, since the ultimate foundation of a legal system cannot be explained by means of legal science.[55]

From a legal point of view, the reference to a rule of recognition cannot be applied to explain the origin of parliamentary sovereignty[56] and no other indication can be found in the UK legal system in force as to why Westminster Parliament should not be legally allowed to finally transfer powers to another authority.[57] Thus, not much support can be found for the widly held view that parliamentary sovereignty cannot be restricted.

According to the second major characteristic of the principle of parliamentary sovereignty, the courts cannot review Acts of Parliament. This aspect is sometimes used as political claim to argue that ultimate law-making power should remain with Westminster Parliament as democratically legitimised legislator and not with the courts which are only indirectly legitimised. However, in the context of this article, the legal aspects of the relationship between Parliament and the courts are of interest.

From a Diceyean point of view,[58] the courts are subordinate to Parliament. Some authors have argued against this view that the UK constitution is based on common law and that consequently the courts are empowered to decide whether Parliament

[55] Thienel, *Kritischer Rationalismus und Jurisprudenz*, pp.100-101. This is the basis for Kelsen's concept of a basic norm (*Grundnorm*) which, from a formal legal point of view, is nothing more and nothing less than the assumption that norms of the highest level are objectively valid. Only under such an assumption, norms of a legal system can be treated as objectively valid. Kelsen, *Pure Theory of Law*, pp.193-221.

[56] However, the rule of recognition is useful to describe empirically how a legal system is established.

[57] Powers of Westminster Parliament were limited, e.g., when legislative competences were finally transferred to the Canadian Parliament by s.2 of the Canada Act 1982.

[58] Dicey, *Introduction to the Study of the Law of the Constitution*, pp.60-61, 70.

is sovereign or not.[59] However, this argumentation has been refuted, for instance, by Jeffrey Goldsworthy who reasoned that neither a "historical" nor a "philosophical" analysis supports the thesis of a common law basis of the UK constitution.[60] Rather, it is generally regarded that the revolution of 1688 established the legal authority of Acts of Parliament over common law.[61]

Based on the assumption that Acts of Parliament are legal norms of the *highest* level in the UK legal system, it makes sense that the courts do not have the power to review parliamentary legislation: There is *no legal standard of review* for Acts of Parliament against which their legality can be measured. The insight that legal systems appear as orders of different hierarchical layers of legal norms leads to the conclusion that legal norms of a lower level have to be in accordance with norms of higher level.[62] Since Acts of Parliament are norms of the highest level in the UK legal system – putting aside EU Law – the power to review Acts of Parliament necessarily has to be accompanied by the determination of a standard of review.[63] According to the legal system in force, it is the decision of the sovereign Westminster Parliament to enact laws according to which courts have the power to

[59] T.R.S. Allan, *Constitutional Jusitce: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) p.271; W.S. Holdsworth, A History of English Law, 2nd edn (Methuen and Sweet & Maxwell, 1937), vol.6, p.263; Ivor Jennings, *The Law and the Constitution*, 5th edn (Hodder and Stoughton, 1959) p.39; Wade, (1955) C.L.J. pp.188-189.

[60] Goldsworthy, *Parliamentary Sovereignty*, ch.2.

[61] Loveland, *Constitutional Law, Administrative Law and Human Rights*, p.28.

[62] See fn.43.

[63] Even if there were norms of a higher level above "ordinary" Acts of Parliament, the courts would only have the competence to review legislation, if such a power is assigned to them by a legal norm. According to Art 190 of the Swiss Federal Constitution, "ordinary" Federal statutes are immunised against judicial review. Thus, even if they are in breach with constitutional law, "federal statutes remain 'binding' for the time being"; see Giovanni Biaggini, "Switzerland" in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change. A Comparative Study* (Hart, 2011) 303 at p.321.

review Acts of Parliament. Even if the UK Supreme Court would claim the competence to review Acts of Parliament[64] - regardless of the reasons it would give and regardless of the standards of review it would adopt – it is the solely decision of Westminster Parliament to put the Court in its place.

Consequently, both aspects of the principle of parliamentary sovereignty – unlimited legislative power and non-reviewability of norms enacted by a sovereign legislator – turn out to be common features of modern legal systems. Differences only occur in regard to procedural aspects and the authority which has sovereign legislative power which may be the the people via referendums, a Parliament by legislation, a court in passing judgements or a combination of two or more of such legislative authorities. However, these dissimilarities are not so significant as to justify that the Westminster model of parliamentary sovereignty is characterised substantively different than other forms of legislative sovereignty.

4. Final remarks

Most European countries saw a period of constitutionalisation in the 19th and early 20th century. It took some time to recognise what is taken for granted today: The power of Parliaments as "ordinary" legislators is not unlimited. In this sense, Adolf Julius Merkl held in 1916: "One often overlooks that the legislator is not omnipotent but instead nothing but the creature of the State Constitution."[65] Sovereign legislative power was transferred from the "ordinary" to the constitutional legislator.

[64] See, e.g., Lord Steyn (para.102) and Lord Hope (para.107) in *Jackson and others v Her Majesty's Attorney General* [2005] UKHL 56.

[65] "Man übersieht vielfach, daß der Gesetzgeber nicht allmächtig ist, sondern nichts als die Kreatur der Staatsverfassung ist"; A.J. Merkl, "Die Verordnungsgewalt im Kriege III" (1916) *Juristische Blätter* 397, 409 at 410.

In accordance with the attitude “If it ain’t broke, don’t fix it” this development did not take place in the UK legal system with the major consequence that constitutional law in a formal sense is not a source of law in the United Kingdom. However, the lack of a constitution in a formal sense only leads to the conclusion that the UK legal system is less varied compared to other legal systems. Other characteristics of the UK constitution which are frequently and intensively discussed, such as the so-called “political constitution” and the parliamentary sovereignty, turn out to be common features of modern legal systems.

iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

REPUBLICANISM, THE DISTRIBUTION OF POWER AND THE WESTMINSTER MODEL OF GOVERNMENT: LESSONS FROM 20TH CENTURY IRISH CONSTITUTIONALISM

Prof. Tom HICKEY[1]

INDEX

Abstract

In recommending the constitution to Dáil Éireann in the summer of 1937, the Taoiseach, Eamon de Valéra, forthrightly asserted: "if there is one thing more than any other that is clear and shining through this whole constitution," he insisted, "it is the fact that the people are the masters."[2] The language is striking in the context of a republican analysis.

[1] *Lecturer in Law, National University of Ireland, Galway*

[2] *Dàil Debates*, vol. 67, col. 40, 11 May 1937.

Following the lead of Philip Pettit and Quentin Skinner, neo-republican scholars theorize the idea of freedom by reference to the image of the master-and-slave relationship.[3] The slave's situation captures the very essence of domination, or *un*freedom. He lives *in potestate domini*: in the power of a master. His choices are reliant entirely on his master's will. His master can therefore interfere in his choices on an unchecked or arbitrary basis and it is this fact, republicans suggest, that explains the slave's state of unfreedom.

The republican concern for the checking of power is fundamental in this analysis of the Westminster model of "responsible government" and its incorporation into the nascent Irish state in the constitutions of 1919 and 1922. For republicans, the "responsible" element is critical. The thought is that those who wield executive power do not enjoy it on an arbitrary basis: they are responsible, in the sense of being accountable or answerable, to parliament. Their power is controlled by the people's representatives and so the decisions taken by government ministers running the departments of state are taken with both eyes firmly fixed on the people's interests and the common good. In theory at least, executive power is exercised on the people's terms. In this way, the Westminster model of responsible government seems to do well by the republican account of freedom as non-domination.

This analysis is simplistic, of course, and ignores some grave problems in the Westminster model as it works in practice. Most obviously, it ignores the fact of the effective fusion of executive and legislative power, and the related tendency for executive control of parliament. As executive power shifted from crown to cabinet in the nineteenth century, an apparent contradiction developed in Westminster. Where previously parliamentarians could tackle ministers without fear of a consequent collapse of government, gradually they – or at least, by definition, a majority of them – began to understand their primary parliamentary role to be to maintain the government of the day in power. This challenges the ideal image presented of responsible government and suggests an apparent tendency towards the concentration, rather than the dispersion, of political power. More to the point, it suggests a fundamental tension between republican idealism and that model of government.

[3] On neo-republicanism, see for example, P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), Q. Skinner, *Liberty before Liberalism* (Cambridge: Cambridge University Press, 1998).

This article addresses this and related questions by reference to the 20th century Irish constitutional experience. It critiques the Irish constitutions of 1919, 1922 and 1937 in respect of the distribution of political power. It looks at the apprehensions of the main political actors of the period regarding the extent to which the Westminster model tended to concentrate excessive power in the cabinet, and assesses the efforts made to counteract that tendency. It also considers the performance of Dáil Éireann in the exercise of its three essential constitutionally-mandated functions: the appointment and dismissal of governments, the holding of government to account, and the making of laws. The article identifies a tension between theory and practice – between how the constitution appears to envisage parliament working and how it actually works – and argues that this tension seriously undermines the republican credentials of the Irish constitution.

While the focus is very much on the Irish experience in the twentieth century, two broader themes underlie the arguments. First, there is this general concern that the question of the compatibility of the model of responsible government with republican idealism remains under-explored. The thought is that perhaps the weaknesses of that model are such that republican theory might instead recommend "consociational" or "consensus" type models.[4] Second, there is the concern that the excessive control of political power-wielders in systems modeled on the British constitution receives inadequate attention amongst constitutional scholars and those engaged in public law. The danger is that scholars engaged in the legal, human rights and related fields may tend towards the dangerous misapprehension that the task of protecting the citizen against the abuse of public power, so far as constitutionalism is concerned, is for the courts alone, by way of the fundamental rights provisions and judicial review.[5] This evokes the arguments made by republican-minded public law scholars such as Adam Tomkins and Richard Bellamy against the notion of "legal constitutionalism" (as distinct from their preferred notion of *political*

[4] On the distinction between "Westminster" models and "Consensus" models, see generally A. Lijphart, *Patters of Democracy: Government Forms and Performance in Thirty-Six Countries*, 2nd ed., (New Haven: Yale University Press, 2012), p. 9-45.

[5] Such an approach is problematic for all kinds of reasons, not least those relating to participation and access. More substantively, the vexed questions on the representativeness of judges and the legitimacy of judicial activism also arise.

constitutionalism), which refers, amongst other things, to the tendency to see law as an activity that is not only distinctive from but also superior to politics, and to a tendency to see law as an enterprise that is to take place only in the courts.[6] The suggestion is that the public law community cannot ignore the ways in which a "republican" constitution mandates a broader democratic culture, as well as specific political institutions, with a view to protecting the citizen from arbitrary power.

The article is in three parts. Part I assesses the incorporation of the Westminster model into the nascent state in the constitutions of 1919 and 1922. Part II turns to the constitution of 1937, and presents this tension between the theoretical design and the institutional practice. Part III looks to institutional reforms that might do well by the republican account of freedom. Before taking up these tasks, the remainder of this introduction offers an overview of that account of freedom.

Overview of republican freedom

The neo-republicanism associated with Philip Pettit and Quentin Skinner emerged in the wake of a "republican revival" in the middle and towards the end of the 20th century, following seminal works by historians such as Gordon Wood and J.G.A. Pocock.[7] Neo-republican scholars draw on the themes that emerged in the Roman republic, such as the rule of law, the idea of a "mixed constitution," and an objection to factional approaches to public affairs. Republican ideas were heavily shaped by Machiavelli, and later by 17th century English republicans, most notably, James Harrington.[8] Another great surge in

[6] See R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007), A. Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005), pp. 10-31.

[7] The "revival" is associated with works such as: G.S. Wood, *The Creation of the American Republic: 1776-1787* (Chapel Hill: The University of North Carolina Press, 1969) and J.G.A Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975).

[8] J. Harrington, *The Commonwealth of Oceana and A System of Politics*, J.G.A. Pocock ed., (Cambridge: Cambridge University Press 1992 [1656]).

republican thought came in the writings of Jefferson, Madison and the American founding generation.

The themes of republican thought already mentioned – and others such as the importance of civic virtue and of vigilance on the part of citizens regarding abuse of power, the objection to corruption, the concern about majority tyranny and so on – are all concerned fundamentally with one goal: the checking of power. Republicans therefore insist on the dispersion of power, in both its public and its private forms. No individual or institution in a republic enjoys unchecked, or arbitrary, power. Arbitrary power, or *domination*, which republicans equate with unfreedom, prevails when one agent – whether an individual or a group of individuals – can interfere in the choices of another or others at *will*. Hence James Harrington's immortal phrase: a republic is "an empire of laws and not of men."[9]

This republican way of thinking about freedom contrasts with the classical liberal or libertarian account, associated with Thomas Hobbes and Jeremy Bentham amongst others, which insists that freedom consists simply in non-interference, not in non-domination. That is, an agent enjoys freedom simply to the extent that his choices go unobstructed. Whether the obstruction is on an arbitrary or a non-arbitrary basis is irrelevant, at least insofar as the concept of freedom is concerned. The conclusion, of course, is that an individual could be as free, or even more free, under a monarchical regime than under a republican form of government: a monarch may happen to interfere in the lives of his subjects with less frequency and intensity than a republican government in the lives of citizens.[10] In the contemporary context, a citizenry may be well be more free under an all-powerful government than under a government that is meaningfully accountable for its decisions to the people's representatives in parliament.

The Hobbesian argument prompts republicans to respond by invoking the image of the "kindly master."[11] The slave of a kindly master – a master who enjoys the power to

[9] Harrington, *The Commonwealth of Oceana*, p. 170.

[10] It is worth bearing in mind that this debate took place against the backdrop of the execution of Charles I in 1649.

[11] This idea is widely invoked in the neo-republican literature. See for example, Pettit, *Republicanism*, p. x

interfere in the choices of his slaves but who, for whatever reason, chooses not to exercise his powers of interference – therefore enjoys "freedom," on Hobbesian lights. Republicans simply point out the incongruity of the idea that a slave could be described as "free." Applying the Hobbesian thesis to the present context, an excessive concentration of political power is, in itself, unobjectionable. A group of individuals – such as those who comprise a particular cabinet – may enjoy *any* degree of power over *any* length of time. The concern amongst proponents of freedom as non-interference would be for how power is exercised, not for whether or to what extent it is enjoyed. They might ask: to what extent does the cabinet actually introduce laws that obstruct (or *interfere* with) the choices of individuals living under their authority? Republicans, by contrast, would ask: to what extent is the power of the cabinet "hemmed in" by law such that they do not rule on an unconstrained basis? In the case of the Westminster model of government, republicans would thus follow Bernard Crick in asserting that parliamentary control of the executive – rightly conceived – is not the enemy of good government, but its primary condition.[12]

I. The constitutions of 1919 and 1922: the entrenchment of responsible government

In light of the political culture that the primary actors had experienced, it is probably unsurprising that the system of government established in independent Ireland should have so closely resembled the Westminster model. Before assessing its incorporation into the Irish constitutional order, mention of two aspects of that model is warranted. One of its most prominent features – and the feature that perhaps most clearly distinguishes it from the presidential model of government – is what Walter Bagehot famously referred to as "the close union, the *nearly complete fusion*, of the executive and legislative powers."[13] That is, where in a presidential system of government the executive power is elected directly by the people and is a branch separate from the legislative branch, in the Westminster model the executive is elected by, and accountable to, the legislature. [14] The government is both chosen by and comprised of members of the legislature. The notion of majority government

[12] B. Crick, *The Reform of Parliament* (London: Weidenfeld and Nicolson, 1970), p. 259.

[13] W. Bagehot, *The English Constitution* (London: C.A. Watts & Co. Ltd.), p. 65 (emphasis added).

necessarily follows: once the government loses the confidence of a majority of members of the legislature, it loses the authority to govern.

The other relevant feature of the British system of government is "party government" involving cohesive and disciplined political parties. The emergence of the modern political party in the nineteenth century is generally attributed to the confluence of two factors.[15] First, the dramatic extension of the electorate in that period, which in Britain came with the passage of the Reform Acts of 1832 and 1867, meant that individual politicians could less easily deploy patronage and bribery to win elections: they began to rely on organized party machines.[16] Second, once executive power had shifted away from the crown and towards the cabinet – a shift that occurred gradually but that was essentially completed by 1841 – party discipline was required in order to avoid regular dismissal of the government by the parliament.[17] Where previously parliamentarians could harangue ministers and hold them to account without any concern around a consequent collapse of government, subsequently, parliamentarians were restricted by that concern. It was they that determined whether a government would remain in office or collapse. This made disciplined parliamentary parties inevitable, with government backbenchers loyal to their colleagues in cabinet.

[14] On "responsible government," see C. Turpin and A. Tomkins, *British Government and the Constitution*, 7th ed., (Cambridge: Cambridge University Press, 2011), pp. 566-572.

[15] Duverger suggested in 1951 that "in 1850 no country in the world (except the United States) knew political parties in the modern sense of the word…In 1950 parties function in most civilized nations…" See M. Duverger, *Political Parties: Their Organization and Activity in the Modern State*, B. and R. North tr. (London: Metheun & Co. Ltd., 1951), p. xxiii.

[16] See G. Sartori, *Parties and Party Systems: A Framework for Analysis, Volume I* (Cambridge: Cambridge University Press, 1976), p. 21.

[17] John Manning Ward specifies the debate on Robert Peele's motion of no confidence in Lord Melbourne's Whig government as the definitive episode completing this shift. See J. Ward, *Colonial Self-Government: The British Experience 1759-1856* (London: MacMillan, 1976), pp. 172-208. Gillian Peele suggests that in the eighteenth century the "authority of the cabinet was still derived from the sovereign and the continuation of a government was dependent on the sovereign's good will rather than on the ministry being able to command parliamentary support…Only in the nineteenth century did the Crown lose the power to choose who should become prime minister and to veto ministers to whom the monarch objected." See G. Peele, *Governing the UK*, 3rd ed. (Oxford: Blackwell Publishers, 1995), p. 92.

In the context of the general analysis around the distribution of political power, these developments placed an apparent contradiction at the heart of the constitutional order, and one that is essential to the arguments made in this article: the control and accountability of government relied upon members of a parliament in which a majority of members, by definition, regarded its principal parliamentary function to be to maintain the government in power. The irony is that as parliament became stronger in terms of *formal* constitutional power, it became less inclined to use that power, and so weaker in terms of *actual* constitutional power.[18] Holding the executive to ultimate account now came at a cost: the collapse of government. Moreover, it came at potentially a great cost to each parliamentarian: an election and the subsequent loss of one's seat. This might prompt a skeptical observer to wonder whether the upshot of these developments was that dominating control had simply shifted from an individual to a group agent: from king to cabinet? The people still lived *in potestate domini*.

There was almost no attempt by the Irish "revolutionaries" and "republicans" to construct a system of political institutions featuring a genuine separation of powers.[19] A system of responsible government virtually identical to that of Britain was incorporated by the Dáil Éireann Constitution, which was adopted by the technically illegal First Dáil in January 1919. It was subsequently entrenched by the Free State Constitution in 1922 – albeit with some elements designed to counteract the tendency to concentrate power – and by Bunreacht na hÉireann in 1937.[20]

[18] It is interesting to note that as Bagehot wrote *The English Constitution* in 1867, the system he was describing was in the process of changing dramatically. He suggested, for instance, that the House of Commons "lives in a state of perpetual choice" and that "at any moment it can choose a ruler and dismiss a ruler." See W. Bagehot, *The English Constitution*, p. 158. Notably, in the period between 1832 and 1867 no less than seven cabinets had been replaced by the House of Commons, that is, without an intervening general election.

[19] See B. Farrell, "The First Dàil and its Constitutional Documents" in B. Farrell ed., *The Creation of the First Dàil: A Volume of Essays from the Thomas Davis Lectures* (Dublin: Blackwater Press, 1994), p. 69.

[20] Farrell suggests that its five short articles "promise no revolution." Rather, "they incorporate, in a basic but clearly discernable form, the main elements of the British cabinet system of government." See Farrell, "The First Dàil and its Constitutional Documents," in Farrell ed., *The Creation of the First Dàil*, p. 69.

The significance of the 1919 constitution might easily be overlooked, perhaps because of the fact that it contained a mere five articles and because it was overtaken within such a short period of time by the 1922 constitution. But the 1919 constitution was of international historical significance. As Alan J. Ward has noted, because the British system operated according to constitutional conventions, the 1919 constitution "presented the most basic rules of the British model of government in a formal constitutional document for the first time."[21] Hence, Article 1 vested legislative power in Dáil Éireann. Article 2 assigned executive power to the members of the "Ministry" – or, in colloquial terms, the cabinet – which was to consist of a president and four executive officers. The president was to be elected by the Dáil and was empowered to nominate and dismiss the executive officers.[22] Each member of the cabinet was to be a member of the Dáil, to which the cabinet was to be "at all times responsible…"[23]

Although it was relatively insignificant in itself, it is noteworthy in the present context that there was at least some expression of concern amongst the deputies at the extent of the concentration of power in the cabinet. The Cumann na nGaedheal TD, JJ Walsh brought a motion, seconded by Seán MacEntee, proposing that executive power would be vested in Ministers assisted by committees of the Dáil, where the latter would enjoy genuine control of the executive. The idea was that parliamentarians would thus play a meaningful part in the process of government, reminiscent of their counterparts in the U.S. Congress. The motion is worth setting out in full:

> Whereas Mr. de Valéra has repeatedly publicly announced in America that the Constitution of the Irish Republic was based on the democratic foundations underlying the Constitution of the United States; and whereas the latter body provides for the consideration of all phases of legislative activity through the medium of Committees whose findings are subject only to the veto of the whole

[21] A.J. Ward, *The Irish Constitutional Tradition: Responsible Government and Modern Ireland, 1782-1992* (Dublin: Irish Academic Press, 1994), p. 156.

[22] The nomination was subject to subsequent approval by the Dáil.

[23] Dàil Éireann Constitution, Art. 2 (c).

> Parliament…and as no such machinery has yet been set up within the Irish Republican Government, with the consequent practically entire exclusion of three-fourths of the people's representatives from effective work on the nation's behalf, we now resolve to bring this Constitution into harmony with the American idea of Committees elected by the whole House, and clothed with similar powers.[24]

Walsh's motion was opposed in the Dáil. The Minister for Finance, Michael Collins, objected on the (surely disingenuous) argument that the constitution vested ultimate control of the cabinet in the Dáil.[25] Both Arthur Griffith and Eoin MacNeill opposed on the grounds that the proposal would amount to a "revolution" in the constitution. (The irony that actors at this juncture in Irish history might reject a proposal on the basis that it amounted to a "revolutionary" measure cannot go without mention.) In the end, by a vote of thirty-three to one, it was agreed to postpone the motion for a year, which, predictably, was its last meaningful mention.

For now, the point is to gesture at the significance of the 1919 constitution in the context of the concentration of political power in the cabinet. It established the essential arrangements for the political institutions that have remained to the present day. It is understandable, perhaps, that the main actors could not seem to summon the intellectual energy to rethink the model most familiar to them, or at least to integrate elements designed to counteract its most manifest weaknesses. They were, after all, engaged in a revolution of a more immediately demanding kind. But the dye had been cast: many of the problems around the concentration of power that continue to afflict the Irish constitutional order almost a century later had been set. This was a significant "constitutional moment" and, arguably, an opportunity lost.

The Free State constitution of 1922 followed a similar pattern. It entrenched the essentials of responsible government, with an effective fusion of executive and legislative power.

[24] As quoted in Ward, *The Irish Constitutional Tradition*, p. 159.

[25] It is inconceivable that Collins could have been ignorant of the extent of the dominance of the cabinet in practice. In this vein, Farrell suggests that there was "a certain *ad hominem* quality" about Collins's response. See Farrell, "The First Dàil and its Constitutional Documents," in Farrell ed., *The Creation of the First Dàil*," p. 71.

Much as others have suggested of its predecessor, the German scholar Leo Kohn wrote that the 1922 document "reduced to precise terms the conventional rules of the British Constitution."[26] The debates around it, however, as well as some of its detail, justify a more comprehensive analysis. There was a clear awareness amongst leading political actors of the period, most notably the Minister for Home Affairs Kevin O'Higgins, of the tendency of the Westminster model to concentrate excessive power in the cabinet.[27] Although the efforts to counteract that tendency ultimately failed, they were at least innovative, and remain worthy of consideration in the context of contemporary reform ideas.

The drafters of the Free State constitution were restricted by the requirement that the provisions of the Anglo-Irish Treaty be respected. Article 51 thus recognized the monarch as head of the executive, and provided that executive authority would be exercisable through the representative of the crown, the Governor-General, "in accordance with the law, practice and constitutional usage" of Canada. In other words, the Governor-General, although theoretically administering the King's control, was in practice obliged to accept the advice of the "Executive Council" (the cabinet).[28] The Executive Council was to consist of between five and seven Ministers, all of whom would be members of the Dáil, and was "responsible to Dáil Éireann."[29] It was to be "collectively responsible for all matters concerning the Departments of State administered by Members of the Executive Council" and would "meet and act as a collective authority."[30] Article 53 required the Governor-

[26] See L. Kohn, *The Constitution of the Irish Free State* (London: George Allen & Unwin Ltd., 1932), p. 80.

[27] O'Higgins managed the Dáil debate on the constitution on behalf of the government.

[28] This arrangement had very stark anti-republican implications: it is a classic illustration of the idea of domination-without-interference. The idea was that the Governor General would never interfere, but that he, or rather, the King, enjoyed the capacity to interfere should he have so chosen. Despite this provision, the Free State constitution could also lay claim, in virtue of Article 2, to having satisfied the ultimate republican condition: that all powers of government are derived from the people. Indeed, it is worth noting that Kohn described it as "in spirit, an essentially republican constitution on most advanced continental lines." See Kohn, *The Constitution of the Irish Free* State, p. 80.

[29] Constitution of the Irish Free State, Art. 51.

[30] Constitution of the Irish Free State, Art. 54.

General to appoint the President of the Executive Council "on the nomination of Dáil Éireann," hence entrenching the practice of majority government. Similarly, the President would nominate the members of the Executive Council following their approval by the Dáil, while the Executive Council would resign should the President "cease to retain the support of a majority in Dáil Éireann."[31]

The innovating feature of this constitution, certainly in respect of the distribution of power, was the provision for the so-called "extern minister."[32] The concept was directly concerned with empowering the parliament *vis-à-vis* the cabinet, and can be traced to the Quaker businessman and subsequent first vice-chair of the Irish Free State Senate, James Douglas, who introduced the idea at a meeting of the Constitution Committee (of which he was a member) in early 1922.[33] It involved an effective division of the responsibilities of government into two categories: the "sensitive" and "political," on the one hand, and the "technical," or "non-political," on the other. The political responsibilities – the likes of Finance, Defence, and "probably Home Affairs" were mentioned in the debates – would be administered by members of the Executive Council.[34] The extern ministers would administer the non-political responsibilities, such as Education, Industry and Local Government.[35] These ministers would be nominated by the Dáil on the recommendation of an "impartially representative" committee of the Dáil, and would not be subject to collective responsibility.[36] They would not necessarily be members of the Dáil, but would

[31] Constitution of the Irish Free State, Art. 53.

[32] The term "extern minister" is popularly used but was not in the constitution. The rather clunky term used in the constitution was "ministers who shall not be members of the Executive Council." For good analysis (upon which this article relies and draws upon), see Kohn, *The Constitution of the Irish Free State*, pp. 271-283, and Ward, *The Irish Constitutional Tradition*, pp. 204-209, 216-220.

[33] See Brian Farrell, "The Drafting of the Irish Free State Constitution" (1970) 5 *The Irish Jurist* 115, p. 131.

[34] See Dáil Éireann, *Debates*, vol. 1, 5 October, 1922, col. 1245.

[35] See Dáil Éireann, *Debates*, vol. 1, 5 October, 1922, col. 1245.

[36] As Minister for Home Affairs Kevin O'Higgins reasoned: "why lose your best servant because he does not agree with you on matters outside the scope of his work?" See Dáil Éireann, *Debates*, vol. 1, 20 September, 1922,

be individually responsible to that chamber, and would be entitled to speak in that chamber.[37] In an early draft of the constitution prepared by the Constitutional Committee – with words that clearly illustrate the concern around the tendency of party politics to promote factionalism – these ministers were to be chosen "with due regard to their suitability for office" and would be, as far as possible, "generally representative of the Irish Free State as a whole rather than of groups or of parties."[38]

The Minister for Home Affairs Kevin O'Higgins, betraying awareness that it was an experimental project, explained the essential motivation for the concept:

> It is well worth trying whether we could not devise a better system of Government than that system by which men constantly, as a matter of routine, vote against their own judgment, and almost against their own conscience, for fear of bringing down the particular Party Government to which they adhere. We should try that. There is nothing admirable in the Party system of Government. There is much that is evil and open to criticism. If we can find, or think we can find, a better system, we ought to try.[39]

In similar vein:

> [The extern ministers] are to bring forward proposals from [their] Department in a way that will leave free thought and discussion here [in the Dáil], and that will eliminate the evils of the party system by which men vote for a particular Ministry under the crack of the party whip rather than bring down the Administration…

col. 487.

[37] Constitution of the Irish Free State, Art. 55

[38] The Constitution Committee prepared three drafts: Draft A, Draft B and Draft C. This provision is contained in Article 54 of Draft B. Draft B, which had been supported by James Douglas, Hugh Kennedy and C.J. France, was adopted by the provisional government as the basis for the document subsequently submitted to the United Kingdom. The full text of this draft is available in B. Farrell, "The Drafting of the Irish Free State Constitution" (1971) 6 *The Irish Jurist* 111, p. 114-124.

[39] See Dáil Éireann, *Debates*, vol. 1, 5 October, 1922, col. 1271.

> These proposals will make the Irish Parliament what the British Parliament is not. It will make it a deliberative Assembly that will weigh carefully on their merits the measures brought before it, and solely with an eye to the results of these measures in the country. It will ensure that men will not vote for a particular measure that they think will have evil results for the country, simply to save that particular Administration.[40]

The concept was thus concerned with counteracting the stultifying effects of the doctrine of collective responsibility and with placing parliament in control of the ministers. The ministers would bring forward reform proposals on matters relevant to their departments.[41] The members of parliament could reject them without any consequent requirement that the minister, or indeed the cabinet, would resign.[42] The clear logic is that the minister would bring forward proposals with an eye on the considered opinions of the members of parliament – the representatives of the people – and that both the minister and the parliamentarians would engage in deliberation based on the common good. They would not be institutionally bound to operate with one eye, at least, firmly fixed on party or factional concerns.

Although the extern minister experiment failed, it had already been fatally undermined by the time it had been set into operation by the constitution. Critically, under the draft by the Constitution Committee that had been favoured by the Provisional Government, the extern

[40] See Dáil Éireann, *Debates*, vol. 1, 6 October, 1922, col. 1306-1307.

[41] O'Higgins insisted that the extern ministers would "stand or fall by the administration of their own particular departments, and by the measure in which they win the approval or disapproval of the Dáil for the administration of those departments…A Minister for Education would formulate his Education plans with due regard to the probable support he would receive in the Dáil as a whole and without regard to the views of the Dáil on [,for example,] external affairs… See Dáil Éireann, *Debates*, vol. 1, 20 September, 1922, col. 488.

[42] O'Higgins emphasized the point about Dáil control, in a casual but effective style: "I was speaking of this particular proposal to a Deputy the other day, and he said: 'Oh, yes, these men that we cannot get at.' Now, that is not correct. These particular outside ministers are as much amenable to the Dáil, and as much available for the Dáil to question, as any other member of the Ministry…In fact, the Dáil…can appoint these outside Ministers, and a Committee of the Dáil so appointed can remove them, and there is no question that these are men who will be in some way beyond the control of Parliament." See Dáil Éireann, *Debates*, vol. 1, 20 September, 1922, col. 486.

ministers would *not* have been members of the Dáil.[43] The thought was that this would be essential to insulating them from the "evils" of party politics. This proposal met resistance in the Dáil, however, on the argument – whether well-grounded or otherwise – that it would have undermined the ministers' individual responsibility to the legislature.[44] Hence, in the final document, extern ministers could simultaneously be members of the parliament, although they were not required to be.[45] This effectively doomed the project, as a president was hardly likely to nominate non-partisans when he had the option of nominating from amongst his own parliamentary party ranks.[46] In the event, all such ministers subsequently appointed were members of the Dáil – and indeed, were Cumann na nGaedheal party men – and so the non-partisan element of the experiment never got off the ground.[47]

If this was the primary cause of the failure, there were two other concerns that have relevance to any consideration of a revival of the concept. First, there was no obvious way of distinguishing between government responsibilities that should fall within and outside of the "executive" category, and there was much controversy, for instance, when Industry was

[43] The favoured draft was Draft B.

[44] See for example the intervention of Deputy Darrell Figgis on the matter at Dáil Éireann, *Debates*, vol. 1, 6 October, 1922, col. 1302. O'Higgins had emphatically rejected this argument in the debates, but was overruled on the matter.

[45] The articles on government composition were referred to a Dáil committee, chaired by George Fitzgibbon QC, which included four members of the pro-Treaty Sinn Féin party, three of Labour, one Farmers' Party deputy, and two independent deputies. John Coakley points out that although the report of the committee was formally rejected by the Dáil, its provisions were incorporated through a series of amendments. See J. Coakley, "Selecting Irish Government Ministers: An Alternative Pathway?" (2007) 58(3) *Administration* 1, p. 12.

[46] There was much controversy following the announcement of the nominees for external ministers in October 1923. Opposition members of the nominating committee insisted that the candidates had been pre-selected by Cumann na nGaedheal at party meetings. The leader of the Labour Party, Thomas Johnson, complained that "the decisions were made at Party meetings beforehand and the names were tabled… A decision had been made and the committee was a farce." See Dáil Éireann, *Debates*, vol. 5, 10 October, 1923, col. 194.

[47] For details, see Coakley, "Selecting Irish Government Ministers: An Alternative Pathway?" (2007) 58(3) *Administration* 1, pp. 15-16.

included and Agriculture excluded in 1923.[48] Indeed, Leo Kohn suggested as far back as 1932 that any such division was "devoid of any reality in the conditions of the modern state."[49] The point, so far as it goes, is surely no less persuasive in the present day: the current debates in the Department of Education and Skills around reform of the patronage model in the primary schooling system, for instance, divide opinion heavily and are "political" by any measure. Teasing out Kohn's argument a little, however, there seems nothing objectionable – at least on the basis of the argument around what counts as "political" – if this department were to be administered by an extern minister, as that minister would be accountable to, and indeed controlled by, the people's elected representatives.

Second, and perhaps more substantively, the concept arguably made for incoherence in government in respect of government expenditure.[50] That is, all ministers spent public money, but only some of them were collectively responsible for finance. This led, perhaps inevitably, to tensions between ministers in the short period of the experiment.[51] In the end, the fifth amendment to the Free State constitution, introduced by ordinary vote of the Dáil in 1927, permitted all twelve ministers to be members of the Executive Council.[52] Although the theoretical possibility of appointing an extern minister thereby remained, the president could then choose not to appoint any, and none was appointed subsequently.

The extern minister experiment in the 1922 constitution should not be summarily dismissed as a failure: as the Labour leader Thomas Johnson insisted in 1926, "this experiment…has

[48] See Ward, *The Irish Constitutional Tradition*, p. 219.

[49] Kohn, *The Constitution of the Irish Free State*, p. 280.

[50] This point is also made by Kohn, who suggested that "the work of every department, however technical its scope, involves expenditure which necessarily must fall on the central fund of the state." See Kohn, *The Constitution of the Irish Free State*, p. 280.

[51] For details, see Ward, *The Irish Constitutional Tradition*, p. 219.

[52] Constitution (Amendment No. 5) Act (No. 13 of 1927). Under Article 50, the constitution could be amended by ordinary vote of the Oireachtas for a period of eight years.

not been tried, and whatever value was in it has not had a chance of finding expression."[53] Whether it is compatible with the model of responsible government, or capable of meaningfully counteracting the tendency of that model to concentrate dominating power in the hands of the cabinet, is unclear, but it is worthy of further consideration. Given the chance to operate in appropriate conditions, it may very well prove a helpful remedy, and one that republican theory might recommend. These conditions might include, for instance, that the "impartially representative" committee of the Dáil tasked with appointing these ministers would not be controlled by government, but instead by the parliamentarians, with the aim of promoting non-factional deliberation in making the appointments.[54] A further condition might be that such ministers resign their membership of any political party upon taking office, or even that they resign their membership of the Dáil should they be members prior to appointment. The critical condition – and one that the aforementioned conditions might help foster – would be that a non-partisan culture develop around the extern minister concept. On the other hand, it may be that once responsible government takes root, the concentration of power in the cabinet is inescapable and that, as John Coakley suggests, much bolder constitutional reform – such as reform requiring that all ministers be non-parliamentarians – is needed to strengthen the role of the Dáil and to distribute power more appropriately.[55]

While the extern minister feature was perhaps the most innovative of the 1922 constitution – at least so far counteracting the concentration of political power is concerned – it was not the only feature designed for that purpose. There was also provision, in Article 47 and Article 48, for a kind of direct democracy in the form of the Initiative procedure. Both articles were quite convoluted, and a brief outline suffices here in any case. Article 48 envisaged that fifty thousand registered voters could petition the Oireachtas to enact a particular measure, and that if the Oireachtas rejected the proposition, that the proposed law be put to the people in a referendum. Article 47 envisaged that the people – again in a

[53] See Dáil Éireann, *Debates*, vol. 17, 1 December, 1926, cols. 420-422.

[54] This matter is discussed further in the concluding section.

[55] See Coakley, "Selecting Irish Government Ministers: An Alternative Pathway?" (2007) 58(3) *Administration* 1, p. 22.

referendum – could block a proposed bill that had been passed by the Oireachtas from becoming law, should the opportunity to do so be afforded to them by a resolution assented to by three-fifths of the members of the Seanad.

These provisions were never used, and were removed from the constitution by the Cumann na nGaedheal government in 1927. Their removal was prompted in part by concerns relating to the declared intention of de Valéra to use the Initiative procedure to secure the abolition of the oath of allegiance, which would have violated the Anglo-Irish Treaty, thereby provoking a constitutional crisis. Ward has suggested, however, that the removal of these provisions was also prompted by the experience that Cosgrave and Cumann na nGaedhael had had in government, which had engendered in them a belief in the merits of stronger executive power.[56]

Article 53 contained a further significant antidote to executive dominance inasmuch as it provided that the "Oireachtas shall not be dissolved on the advice of an Executive Council which has ceased to retain the support of a majority of Dáil Éireann."[57] In other words, once the government has lost the confidence of the Dáil, it can no longer dissolve the Dáil and cause a general election. This distinguished the Irish arrangement from that of Westminster, where a Prime Minister could advise the head of state to dissolve parliament even *after* he had lost the confidence of a majority of the House of Commons. This provision very much empowered the Dáil *vis-à-vis* the executive inasmuch as it would be up to the Dáil – and not the government – to decide whether or not to call a general election. The Dáil could instead decide to form a new government from amongst its members. In the Westminster system, by contrast, the government could use its power in this regard to protect itself and to ward off potential votes of no confidence. That is, it could conceivably win a formal vote of confidence that it would not otherwise win by effectively threatening a general election (i.e. on members of parliament all of whom would be concerned about the chance of losing their seats in such an election) were it to lose that formal vote of confidence.

[56] See Ward, *The Irish Constitutional Tradition*, pp. 223-224.

[57] Constitution of the Irish Free State, Art. 53.

These features were also motivated by essentially republican inclinations: the aim was to check power. It is unclear, of course, if in practice such constitutional arrangements might actually promote non-domination. The Initiative procedure, for instance – much as it might counter the concentration of power in the executive – would have the effect of intensifying the political clout of majority groups, and perhaps of engendering a kind of majority tyranny so loathed by republicans. A procedure of this kind in the Swiss constitution, for instance, enabled a fringe group of politicians to launch a federal popular initiative in 2007 proposing an amendment to the constitution that would prohibit the construction of minarets.[58] Despite opposition from the Swiss government and parliament, as well as human rights organizations, the prohibition was approved in the resulting referendum.

If nothing else, it is instructive to observe from these provisions, and from the debates around them, that many of founding generation – conservative though they may have been – were quite conscious of the shortcomings of the Westminster model. They were concerned about the extent to which aspects of that model undermined parliament as a deliberative assembly and turned the minds of political representatives away from the common good. The concern seemed to diminish subsequently, however, as the leading actors became accustomed to the experience of government and to the holding of power. By the time de Valéra came to government in 1932, most of these features had been all but undone. The great "republican" then took up the baton and began arrogating power with as much or more gusto.

II. The constitution of 1937 and de Valéra's taste for strong government

For technical and political reasons relating mainly to partition, the 1937 constitution stopped short of formally declaring a "republic."[59] It is nonetheless generally understood as

[58] See generally M. Stüssi, "Banning of Minarets: Addressing the Validity of a Controversial Swiss Popular Initiative" (2008) 3 *Religion and Human Rights* 135.

[59] The absence from the document of the term itself was strategic on de Valéra's part. He went as far as to suggest that "if the Northern Ireland problem were not there…in all probability there would be a flat downright proclamation of a republic in this Constitution." See *Dail Debates*, vol. 68, 14 June, 1937, col. 430. This is a

at least a partly republican document. Certainly, de Valéra – the primary political influence – thought of himself as a republican, whether justifiably or otherwise.[60] He also regarded the constitution as republican in all but name.[61] There is much in the strict text of the 1937 constitution that might be deemed, at least in the superficial sense, "republican." Basil Chubb suggests that the provisions relating to the popularly-elected President, the "symbol of republican status," might be understood in that way.[62] Similarly, much like its predecessor, the text ostensibly embraces separation of powers theory. Article 6 refers to "all powers of government, legislative, executive and judicial…" Article 15.2.1 provides that "the sole and exclusive power of making laws for the State is…vested in the Oireachtas." Article 13.1 provides that the Dáil nominates the prime minister – now known as the Taoiseach – and approves the members of government, while Article 28.10 asserts that the Taoiseach shall resign upon ceasing to retain the support of a majority of the Dáil.[63] Article 28.2 declares that "the executive power of the State shall be exercised…by or on the authority of the Government…," while according to Article 28.4.1, "the Government shall be responsible to Dáil Éireann." Article 26 and Article 34, in different contexts, grant powers to the courts to invalidate legislation that is deemed repugnant to the constitution.

The Preamble, similarly, despite the reference to the "Most Holy Trinity" and to "our obligations to our Divine Lord, Jesus Christ," seems essentially republican. It refers to the

reference, apparently, to the view that an outright proclamation would have required an exit from the Commonwealth, which would in turn have ended any prospect of tempting Northern Ireland unionists into an all-island State. On this point, see B. Chubb, *The Government and Politics of Ireland*, 3rd. ed., (Harlow: Longman, 1992), p. 43.

[60] Farrell, for example, quotes de Valéra in a speech to the First Dàil as follows: "Sinn Féin aims at securing the international recognition of Ireland as an independent Irish Republic…" See Farrell, "The First Dàil and its Constitutional Documents" in Farrell ed., *The Creation of the First Dàil*, p. 62.

[61] See J.A. Murphy, "The 1937 Constitution – Some Historical Reflections" in T. Murphy and P. Twomey eds., *Ireland's Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998), pp. 18-19.

[62] Chubb, *The Government and Politics of Ireland*, p. 43.

[63] The "Taoiseach" holds the office that had been held by the "President of the Executive Council" under the previous constitution.

notion of "the common good," and grounds the whole constitutional order on the idea of popular sovereignty: "we the people of Éire…do hereby adopt, enact, and give ourselves this Constitution." There was no longer need for the simultaneous recognition – incongruous as it had been – of both a monarch and "the people" as the ultimate source of political authority. The authority to enact the constitution, and to change it, is enjoyed by the people.

These provisions seem at one with de Valéra's assertion concerning the citizens as masters, with which this article began. The image presented is one of the citizens electing representatives to the Oireachtas specifically for the purpose of the making of the laws that are to govern them. Dáil Éireann, in turn, is to elect a government that governs the country, in the sense of running the departments of state, and that is to be accountable, *on an ongoing basis*, to parliament. The *text* of the constitution thus imagines the citizenry in command, through their representatives in parliament. They "control the control" of government in a way that seems to sit well with the republican account of liberty.

The shortcomings of this system of government – which was in essence carried over the 1922 constitution – have already been emphasized. De Valéra's enthusiasm for a new constitution had nothing to do with any eagerness on his part to enhance the role of parliament. In Chubb's words, he "found the system which he inherited an adequate instrument for his purposes and, indeed, well suited to a strong prime minister leading a loyal majority party that looked to him for initiative and direction."[64] Rather, his enthusiasm had to do with setting the polity in a Catholic frame and, to an even greater extent, with aiming a final kick at the Anglo-Irish Treaty that he had so dreaded.

Indeed, far from reforming the system of government, the 1937 constitution entrenched an even more intense version of the Westminster model. The extern minister concept, which had all but disappeared in 1927, was formally removed from Irish constitutional arrangements, while nothing of the Initiative procedure was revived. There was also a notable increase in the power of the prime minister, in the form of three new features.[65] First, the provision whereby an Executive Council that had lost its majority in the Dáil

[64] B. Chubb, *The Constitution and Constitutional Change in Ireland* (Dublin: Institute of Public Administration, 1978), p. 32.

could not seek a dissolution was removed. The new arrangement in Article 13.2.2 permitted a Taoiseach who had lost his majority to request a dissolution of the President, although the President could refuse such a request "at his absolute discretion," thereby enabling the President to ask the Dáil to form a new government if he was of the understanding that one could be formed.[66]

Second, and more significantly, under Article 28.9.1, the power to dissolve the Dáil is vested personally in the Taoiseach, so long as he continues to enjoy the support of a majority in the Dáil. This power, which had been enjoyed by the Executive Council as a collective body under the 1922 constitution, is considerable in practice, as the timing of a general election can be so pivotal to its outcome. Bagehot wrote of the "English" constitution that this power – which was enjoyed by the Prime Minister rather than the cabinet – meant that members of parliament were far more inclined towards deference to the executive: they are "collected by a deferential attachment to particular men…and they are maintained by fear of those men – by the fear that if you vote against them, you may find yourself soon to have no vote at all."[67] The fact that it is enjoyed personally by the Taoiseach enhances his authority considerably, both amongst members of "his" cabinet, as well as more generally in parliament and amongst the public.

Finally, where there was no provision in the 1922 constitution allowing the President of the Executive Council to dismiss a minister, under Article 28.9.4 of the 1937 constitution, the Taoiseach may request a minister to resign "at any time, for reasons which to him seem sufficient." De Valéra rejected arguments made by opponents in the Dáil that this might render ministers subservient. In words that evoke the republican image of the "kindly master," he argued that it was inconceivable that a Taoiseach could "in a purely arbitrary way…compel the resignation of a member unless there was concurrence on the part of the

[65] Chubb suggests that "the very title he chose, Taoiseach…suggests that the Irish Prime Minister is the essential pivot on which the government rests." See Chubb, *The Government and Politics of Ireland*, p. 187.

[66] Although this change may appear to undermine the Dáil and concentrate power in the Taoiseach, in fact it barely does, and was designed to overcome what had been an acknowledged difficulty with the arrangement under the 1922 constitution: that it was unclear what would happen if the Dáil could not agree on a new prime minister.

[67] Bagehot, *The English Constitution*, p. 158-159.

other members of the Government."[68] It is surely true that it is unlikely that a Taoiseach would use this power in an utterly capricious fashion as he could hardly hope to do so while continuing to enjoy the support of his parliamentary party upon which he relies for his Dáil majority. Nonetheless it is a significant departure from the 1922 constitution, as it vests a great deal of authority and even prestige in the Taoiseach. Its inclusion dispels any doubt that de Valéra had had any misgivings about the distribution of power in the Westminster model of government.

III. Tensions between theory and practice: a dysfunctional parliament?

The functions of parliament under the 1937 constitution, just as in the case of all parliaments operating on the Westminster model, are threefold: to appoint and dismiss governments, to hold those governments to account, and to make laws. The role of the Dáil in the appointment and dismissal of government – much like as in other Westminster-type parliaments – is essentially formal, despite the constitutional provisions that envisage the House as a powerful agent in the processes.[69] Generally, a particular proposed coalition will win a majority of seats, and the parliamentarians duly vote accordingly in a vote for Taoiseach and in approving his proposed members of cabinet.[70] The same point can be made with respect to Article 28.10 and the power of the Dáil to break a government.[71] Because of the solidity of political parties within the political culture, generally a government will either last a full term, or will choose to "go to the people" at whatever time

[68] See Dáil Éireann, *Debates*, vol. 67, 26 May, 1936, col. 1188.

[69] The important constitutional provisions are as follows: Art. 13.1.1 declares that "[t]he President shall, on the nomination of Dáil Éireann, appoint the Taoiseach…" while Art. 13.1.2 provides that "[t]he President shall, on the nomination of the Taoiseach with the previous approval of Dáil Éireann, appoint the other members of the Government."

[70] This is, of course, a simplified account. For a detailed historical analysis, see Gallagher, "The Oireachtas: President and Parliament" in Coakley and Gallagher, eds., *Politics in the Republic of Ireland*, pp. 204-207.

[71] Art. 28.10 provides that "[t]he Taoiseach shall resign from office upon ceasing to retain the support of a majority of Dáil Éireann…"

the leaders of a government and their advisors deem it most advantageous electorally. Government backbenchers will toe the line because to do otherwise would likely end their prospects of gaining high political office.

There is a clear and important democratic connection between the people and their government under this model: they elect the parliamentarians, who in turn appoint the government that has "won" the election. The difficulty, however, is that although the citizens elect their preferred government at election time, they have virtually no control over the continuance or discontinuance in office of their government *in between elections*. One of the outstanding theoretical features of the notion of responsible government is that government is perpetually concerned about the prospect of being dismissed by parliament, yet, just as in Westminster, governments in Ireland are barely at all concerned about the prospect on a month-to-month or even year-to-year basis.[72] They are concerned about their popularity amongst the electorate, certainly, with an eye on the next election, but they are not concerned about the prospect of being dismissed in the meantime by the people's representatives. This is not to argue that the party system is antithetical to republican ideals. The other side of the argument is that a system of 166 atomized parliamentarians, or even one with only casual ties amongst them, would be chaotic and unworkable. Governments would be made and broken much too regularly, and usually, no doubt, on the basis of populist and unworthy reasons. For now, the point is simply to bring attention to the dissonance between theory and practice, and to the to general problem so far as the control of public power is concerned.

The role of parliament in holding government to account is arguably more important than its role in the making and breaking of government. On this function, Article 28.4.1 of the 1937 constitution could not be more succinct: it provides only that "[t]he government shall be responsible to Dáil Éireann." Again, however, much as in the case of other Westminster-model countries, there is a dissonance between theory and practice. There are two systems

[72] Governments in Britain were defeated on votes of confidence on only three occasions in the 20th century: twice in 1924 and again in 1979. See Turpin and Tomkins, *British Government and the Constitution*, p. 568. Similarly, the Dáil did actually "bring down" a government on two occasions, while it should be acknowledged that governments have often "jumped before they were pushed." The argument is not that parliament is impotent in this regard. It is merely that they are much less potent in practice than in theory.

established by the Dáil standing orders for the purpose of the holding of government to account: the system of Parliamentary Questions (PQs) and the committee system.[73] The scholarship on PQs points overwhelming to a dysfunctional system.[74] It suggests that there is an essential culture amongst both ministers and senior civil servants of secrecy and obfuscation. The findings of the Beef Tribunal, for instance, capture the problem starkly. Mr. Justice Hamilton's report suggests that if questions had been answered in the Dáil as comprehensively as they had been in the Tribunal, the Tribunal – which lasted three years and cost in excess of €17 million in the pre-Celtic Tiger era – would never have been necessary.[75] The report found evidence of deliberate vagueness and a culture of evasiveness amongst civil servants, whose primary concern was to protect their minister and department.[76] On the other side, there is evidence of an excessive tendency amongst TDs to submit PQs relating to constituency-specific issues.[77] Very often, the purpose seems to be to generate a press release for the local newspaper proclaiming the fact that they had secured some grant or social welfare payment which had already been legally available without any input from the particular TD.[78]

[73] See Houses of the Oireachtas, "A Brief Guide to How Your Parliament Works," available at *http://www.oireachtas.ie/parliament/media/michelle/parliamentworks/Parliamentary-Guide-Eng-(web).pdf* [accessed September 27, 2012].

[74] See for example, S. Dooney and J. O'Toole, *Irish Government Today* (Dublin: Gill and McMillan, 2009), Chapters 1-3, M. MacCarthaigh, *Accountability in Irish Parliamentary Politics* (Dublin: Institute of Public Administration, 2005), Chapter 4.

[75] See The Report of the Tribunal of Inquiry into the Beef Processing Industry (Dublin: Statutory Office, 1994), as quoted in F. O'Toole, *Meanwhile Back at the Ranch: The Politics of Irish Beef* (London: Vintage, 1995), p. 241.

[76] See O'Toole, *Meanwhile Back at the Ranch*, p. 241.

[77] Shane Martin's analysis of PQs between 1997 and 2002 finds that 55 per cent of them do *not* have a constituency basis. By any measure, this suggests that a disproportionate number concern constituency issues, given that the parliament is concerned, fundamentally, with national laws and policies. See S. Martin, "Monitoring Irish Government" in E. O'Malley ed., *Governing Ireland* (Dublin: Institute of Public Administration).

[78] See F. O'Toole, *Enough is Enough: How to Build a New Republic* (Dublin: Penguin, 2010), pp. 67-70.

Much the same can be said of the committee system in the Irish parliament. Since 1992, the committees in the Irish parliament are structured to match or "mark" government departments. Each committee monitors a government department, discusses its estimates, and deals with the third stage of legislation that has been introduced by the relevant Minister. The analysis on the system in Ireland suggests that, despite considerable improvements in the 1990s, it is unfit for purpose. For MacCarthaigh, the chief cause of the dysfunction is the partisan political culture. He suggests that "if the committees used all their powers to look at such issues as secondary legislation, departmental strategy statements or the work of state agencies under the aegis of various departments, they could contribute significantly to a culture of parliamentary accountability" but notes that "the attraction of media attention rather than the obligation of democratic accountability" undermines the system.[79] Gallagher attributes the shortcomings to the fact that government ministers – just like all power-wielders – tend to dislike scrutiny, and so have a plain disincentive to improve the committee system. [80] He suggests that those most likely to benefit from a strong committee system – backbenchers and the opposition – have a related disincentive: they aim to be ministers themselves some day, and would prefer not to place their future selves under a heavier burden should they be successful. Gallagher further notes that the government parties tend to hold a majority of seats on the committees and that the "whip" system applies with the result that party loyalty and discipline is as entrenched as ever, to an extent inimical to the accountability required by the constitution.

The dominance of the executive is similarly evident in regard to the law-making function.[81] Indeed Article 15.2.1, which vests "sole and exclusive" law-making authority in the Oireachtas, might be described as the single greatest myth of the 1937 constitution.[82] It

[79] See MacCarthaigh, *Accountability in Irish Parliamentary Politics*, p. 142.

[80] See Gallagher, "The Oireachtas: President and Parliament" in Coakley and Gallagher, eds., *Politics in the Republic of Ireland*, p. 232.

[81] Chubb suggests that government ministers have a "virtual monopoly of initiating legislation and other policy proposals…" See Chubb, *The Government and Politics of Ireland*, p. 158.

[82] Hence the title to Basil Chubb's chapter: B. Chubb, "Constitutional Myth and Political Practice" in B. Farrell ed., *De Valéra's Constitution and Ours* (Dublin: Gill and MacMillan, 1988).

should be acknowledged that the law-making process must allow that the government of the day has the opportunity to have its legislative agenda pursued. This agenda has, after all, won the approval of the citizens in a general election. But this should not be taken to mean that the role of parliament in both the deliberative and scrutinizing senses are unimportant. Analysis of the process suggests that government dominates to an extent that parliament is barely relevant. When a government minister wishes to introduce new law, he brings a "memorandum for government" to the cabinet outlining the essentials of the proposed law. [83] Essentially, once he has the approval of his colleagues in cabinet, the bill will become law, more or less in the same form. It goes through a number of formal "stages," but the grip of the governing parties is such that, notwithstanding the power of the courts to invalidate laws that are deemed unconstitutional, it is only just an exaggeration to argue that the Minister's expressed *will* amounts to law.

The legislation goes through the Office of the Parliamentary Draftsman to the Oireachtas, and then through five stages. The second and third stages are the most significant, but only in a comparative sense. The second stage is the debate on the broad principles of the bill. Although the constitution might envisage this as the great event in the life cycle of the law (i.e. the Dáil exercising the power which it enjoys solely and exclusively) it is, of course, all a formality. The Minister reads out a script: the opposition reacts, generally negatively, and the bill is passed. There is little point in the opposition reacting positively by offering an alternative approach, as there is virtually no prospect that government backbenchers will breach the code of loyalty out of political conviction, and place their own political careers in jeopardy. The third is the "committee stage." Notably, once the bill has passed through the second stage, the relevant committee cannot amend the essential principles. In other words, the committees are left to tease out minor amendments and technical details, utterly undermining the committee concept and process.

In respect of all three of these constitutionally-mandated functions of Dáil Éireann, there is a dissonance between constitutional theory and institutional practice. The constitution theoretically envisions the House of Representatives as the primary agent controlling the government so that law and policy-making as well as the running of the departments of

[83] This snapshot relies on Gallagher, "The Oireachtas: President and Parliament" in Coakley and Gallagher, eds., *Politics in the Republic of Ireland*, p. 230-232.

state occur on the people's terms. But in practice, as those who designed the text well knew it would, it is the government of the day that is in control, scarcely at all checked by the Dáil. There is the argument, of course, that there is this ultimate democratic connection between the people and their government engendered through the ballot box at election time. This moment is highly significant, but it is worth dwelling on the fact that it is just that: a moment. To count as a republic in the sense theorized by scholars such as Pettit and Skinner, much more is needed for the control of the power-wielders in cabinet not to count as *arbitrary* control. This momentary democratic connection is thus inadequate for the vindication of de Valéra's assertion with which the article commenced.

In the case of each of the three constitutionally-mandated functions, the shortcomings are intimately connected with that contradiction that developed in the Westminster-model in the mid-18th century, mentioned at the outset. The temptation is to look for one great solution: to cast this model to the dustbin of history and to look to an alternative model such as a presidential system of government, or, to draw on Arendt Lijpart's scholarship, to a "consensus" type democracy rather than the "majoritarian" kind.[84] How this model might promote the ideal of non-domination is an immense scholarly question. It is surely simplistic, however, to deem one model "superior" to the other, whether generally, or when measured by republican ideals. It is likely that either model, in the abstract, is capable of accounting for the avowable interests of all citizens in diverse modern societies, and of promoting their equal freedom: it is in the detail that these models fail. Accordingly, this final section turns to consider concrete reforms that might enhance Dáil Éireann in the execution of its functions. The thought is that it is not the Westminster model that is at fault. It is the particular instantiation of that model that is problematic from the republican point of view, as well as the political culture that has developed around that model.

IV. Will the long-suffering political generation stand up for the republic?

The Fine Gael/Labour coalition government elected in March 2011 came to office at an exceptional period in modern Irish history. Fianna Fáil – the party that had dominated Irish

[84] See generally Lijphart, *Patters of Democracy* (New Haven: Yale University Press, 1999).

politics since the 1930s – had lost more than half of its first-preference vote from the 2007 election as well as fifty-seven of its seventy-seven Dáil seats. This followed the Fianna Fáil/Green coalition government of 2007-2011, which had governed during a period defined by the decline of the "Celtic Tiger" property boom, the near-collapse of the Irish banking system and the EU-IMF bailout of November 2010. The scene seemed thus set for reform of the political system: a public disenchanted with politics and an incoming government comprised of parties that had long suffered the frustration of the opposition role in parliament.[85]

The Programme for Government agreed by Fine Gael and Labour, entitled the "Government for National Recovery 2011-2016," contained some interesting commitments regarding constitutional and political reform.[86] It began with familiar rhetoric, insisting, for example, that "an over-powerful Executive has turned the Dáil into an observer of the political process rather than a central player," but this was backed up with concrete commitments.[87] On the accountability function, there were proposals on improving the system of PQs, including the introduction of "a role for the Ceann Comhairle [Speaker] in deciding whether a Minister has failed to provide reasonable information in response to a question."[88] There was also a commitment to the establishment of an Investigations, Oversight and Petitions Committee which would be a channel of consultation and collaboration between the Oireachtas and the Ombudsman. It would be "bi-partisan in structure and chaired by a senior member of the opposition."[89]

[85] By 2011, Fianna Fáil had been in government for twenty one of the twenty four years since 1987. Fine Gael had been in government only in the 1994-1997 period during that time.

[86] See Government for National Recovery 2011-2016, available at *http://per.gov.ie/wp-content/uploads/ProgrammeforGovernmentFinal.pdf* (accessed September 27, 2012).

[87] See Government for National Recovery, p. 19-20.

[88] See generally Government for National Recovery, p. 21.

[89] See generally Government for National Recovery, p. 21.

On the law-making function, there was a commitment to "break[ing] the Government monopoly on legislation and the stranglehold over the business of the Dáil." Specifically, committees would be empowered to introduce legislation. So too would backbench TDs, in virtue of a new *10 Minute Rule*. Similarly, there would be an "amendment to cabinet procedure instructions so as to allow government to publish the general scheme of a bill so that Oireachtas committees [could] debate and hold hearings at an early stage" in the legislative process.[90] There would also be a dedicated "Committee Week" every fourth sitting week, in which the Dáil plenary would sit only for questions and the order of business leaving the remainder of the day devoted to committee work.[91]

The emphasis on strengthening the committee system is encouraging. As Kaare Ström has argued, committees are "critical to the deliberative powers of parliaments" and a "necessary condition for effective parliamentary influence in the policy-making process."[92] A good system allows for specialization on policy matters and it tends towards balancing the excessive partisanship in Westminster model systems. Because the committees concentrate on particular policy areas – Education, Justice, Health etc. – policy-minded parliamentarians are afforded the opportunity to focus on particular areas, and to develop expertise in those areas.[93] The "small group psychology" that might develop amongst colleagues on a particular committee could challenge the intense party loyalty that, so often, undermines the constitutional vision of accountability. Ultimately, a strong committee system provides an opportunity for backbenchers to have a parliamentary role beyond being mere "lobby fodder."

[90] This proposal is encouraging. One of the conditions for a strong committee system is that committees be centrally involved in the law-making function: put simply, the earlier the involvement of committees in the process, the stronger their influence.

[91] See generally Government for National Recovery, p. 22-23.

[92] See K. Ström, "Parliamentary Committees in European Democracies" 4(1) *The Journal of Legislative Studies* 21, p. 47.

[93] See S. Martin, "The Committee System" in M. MacCarthaigh and M. Manning eds., *The Houses of the Oireachtas* (Dublin: Institute of Public Administration, 2010).

The fatal weakness in the committee system is not mentioned in the Programme for Government, however. This is the fact that the composition of committees, or, at least, the process of the appointment of members and of chairs, is controlled by the cabinet. To return to what might be deemed the elementary argument: it is absurd that those who are to *be scrutinized* control those who are to *do the scrutinizing*, in this case, in respect of their appointment. Of the thirteen substantive committees in the present Dáil, Fine Gael and Labour together hold twenty four of the twenty six chair and vice chair positions, with the chair of the Public Accounts Committee (as per the same constitutional convention that operates at Westminster) and the chair of the newly formed Public Service Oversight and Petitions Committee (as promised in the Programme for Government) held by members of the opposition.[94] This amounts to a 92% share for the government parties, compared to their 68% share of the overall seats in the Dáil. The government holds a majority on eleven of those thirteen committees, an equal share on one and a minority on one. Each committee also has two "convenors" whose task it is to ensure that a quorum is present for each meeting, but who essentially act as whips ensuring voting along party lines.[95] The proposals in the Programme for Government fall short to the extent that they fail to address this critical weakness.

To this end, reforms introduced at Westminster (perhaps ironically) in recent times are noteworthy. The expenses scandal of 2009 seemed to be the "rupture" that prompted Westminster power-wielders to accept the importance of institutional reform that would result in the holding of power to account. The "Report of the House of Commons Reform Committee," which was prepared by a Westminster committee chaired by the academic and parliamentarian Tony Wright, focuses much attention on this tendency of the government

[94] See Oireachtas Joint, Select and Standing Committees for the 31st Dáil and 23rd Seanad, at *http://www.oireachtas.ie/parliament/oireachtasbusiness/committees_list/* (accessed September 27, 2012).

[95] On the functions of convenors see Houses of the Oireachtas, Fact Sheet 2: The Role and Work of Oireachtas Committees, available at *http://www.oireachtas.ie/parliament/media/committees/factsheets/Fact-Sheet-2-The-Role-and-Work-of-Oireachtas-Committees-without-codes.pdf* (accessed September 27, 2012), p. 8. Martin suggests that "the allocation of committee chairs, although perhaps formally an issue for each individual committee, seems to be decided in negotiations more centrally among Party Whips…" See Martin, "The Committee System" in MacCathaigh and Manning eds., *The Houses of the Oireachtas: Parliament in Ireland*, p. x.

of the day to control parliamentary committees by controlling their membership and the appointment of chairs.[96] The report begins by outlining practice as it had been: at the beginning of each parliament there would be a standard division of places between the parties for each select committee, based on a calculation of the seats held by each party.[97] The party whips would bring individual names to fill the party "quota" on each committee. It would be up to the parties themselves to determine who would be selected, without any requirement for transparency. In other words, "mavericks" or those more inclined to thoroughly scrutinize decisions made by power-wielders could be excluded, and membership of a committee could be – or at least could be *perceived* to be – a matter of patronage or reward for loyalty. Similarly in respect of the appointment of committee chairs: while each committee was theoretically entitled to choose any of its members for the chair, in practice the matter hinged on the outcome of private negotiations between party whips the outcome of which would be passed on to individual committee members.[98]

In what would be a significant departure for the Irish parliament, the Wright Committee favoured retention of the system whereby each committee would be comprised of members of the parties in proportion to the balance of parties in the Chamber as well as the system whereby non-majority or opposition parties hold a proportionate number of chairs of committees.[99] The reform recommended is that the whole House would elect chairs of the committees *by secret ballot* (i.e. following agreement as to how many chairs each party group would have).[100] The thought is that by having been elected by the whole House, the

[96] See House of Commons Reform Committee: First Report of Session 2008-09, "Rebuilding the House," available at *http://www.publications.parliament.uk/pa/cm200809/cmselect/cmrefhoc/1117/111702.htm* (accessed September 27, 2012).

[97] See generally "Rebuilding the House," pp. 18-19.

[98] The report suggests that "it is common knowledge that the whips on all sides ensure that members of their own party are left in no doubt about the 'official' view as to the preferred candidate." See "Rebuilding the House," p. 21.

[99] See "Rebuilding the House," p. 25.

[100] The report recommends that the relevant minister and the principal front-bench Opposition spokesperson would voluntarily abstain from casting their votes for the chairs of the departmental committee relating to their

chairs would be representative of the whole House and would hold a clear mandate.[101] Subsequently, there would be election *by secret ballot* within each party of members from that party to particular committees, in accordance with the representation of each party within the House (i.e. each party would function as a kind of "electoral college").[102] These intra-party elections would be governed and supervised by parliament (through the Speaker) rather than by the parties themselves. In other words, the whips would no longer control this process: the power-wielders would no longer control those who were tasked with holding them to account.

The other critical matter determining the capacity of the parliament to function is the control of the agenda and the scheduling of business. To recall, the Programme for Government committed to breaking the "stranglehold [of the Executive] over the business of the Dáil" with the promise of new Friday sittings dedicated to private members' business. The Wright Committee Report – perhaps in part because of the extent of the public disgust at the political elite that led to its establishment – offers more radical reform proposals. After noting that the "default position" is that parliamentary "time 'belongs' to the Government" and that the Government enjoys "not merely precedence but *exclusive domination* of…the House's agenda," the report asserts that "it should be for the House as a whole to determine how much time to devote to…debate and scrutiny" of bills and that it is "unacceptable that Ministers can determine the scheduling of Opposition Days…[and] that they have untrammelled power to decide the topics for general and topical debates."[103]

The main proposal of the Wright Committee – premised on the principle that "time in the house belongs to the House" – is the establishment of a "Backbench Business Committee" with the power to schedule all business other than that which is exclusively Ministerial business (i.e. all business other than Ministerial-sponsored legislation and associated

responsibilities. See "Rebuilding the House," p. 27.

[101] See "Rebuilding the House," p. 26.

[102] See "Rebuilding the House," p. 28.

[103] See "Rebuilding the House," p. 49.

motions).[104] This committee would be comprised of between seven and nine members elected *by secret ballot* of the House as a whole, again, with due regard to party proportionality.[105] The chair would be elected in the same way, with frontbench members of all parties ineligible for membership. The committee would meet weekly to consider competing claims for time made by the select committees and backbenchers. Although Ministers would continue to enjoy the power to choose the time of pursuing their legislative agendas, they would no longer enjoy the power to dictate the length of debate, for instance. A debate at any given stage of a bill is, after all, *parliamentary* business rather than *government* business, and accordingly ought to be controlled by parliament. The point, ultimately, is that the weekly draft agenda for the House would no longer be assembled and arranged by the Government Chief Whip's Office. Rather, it would be controlled by a House Business Committee that would be designed to account appropriately for the interests of all parts of the House with a direct interest: backbenchers (through the Backbench Business Committee), Government and the Opposition.[106]

The Programme for Government makes certain commitments regarding the agenda and business of the Dáil: it proposes a *10 Minute Rule* and Friday sittings dedicated to private members' business, as already mentioned. It also expresses a general promise to "restrict the use of the guillotine motions…so that guillotining is not a matter of routine."[107] These kinds of reforms amount to little more than fiddling around the edges of the problem. The comparison with Westminster only goes so far, of course. The sheer size difference – six hundred and fifty as against one hundred and sixty six – cannot be ignored. Put simply, *more* backbenchers are *more* difficult to control. Nonetheless, the unchecked control of the agenda and schedule enjoyed by the executive in Dáil Éireann undermines that body as a

[104] See "Rebuilding the House," pp. 53-54.

[105] See generally "Rebuilding the House," p. 54.

[106] The agenda for the week would be put to the House as a composite motion, having been assembled by a House Business Committee. The members of this committee would be comprised of the elected members of the Backbench Business Committee along with frontbench members nominated by the three party leaders. For more comprehensive overview, see "Rebuilding the House," pp. 59-60.

[107] Government for National Recovery 2011-2016, p. 22.

deliberative forum capable of holding the government of the day to account. A Backbench Business Committee of the kind proposed for the House of Commons by the Wright Committee (and which, indeed, has since been established) would go a considerable way towards checking the power of the whips and counteracting the more destructive and unnecessary aspects of party discipline.[108]

V. Conclusion

With the growing power and importance of international institutions, it may be that the task of checking public power is more multifarious than before. If anything, this intensifies the urgency of empowering parliaments in Westminster-model countries such that those parliaments might fulfill their function of holding government to account. There are many aspects of the legal framework around this question in twentieth century Irish constitutionalism that have been ignored in this article. Little has been said, for instance, about important questions such as freedom of information laws, the office of the Ombudsman, or the role of Seanad Éireann. The focus has been specifically on the relationship between the cabinet and the lower house of parliament. The article has emphasized that the contradiction at the heart of the Westminster model of responsible government has proved troublesome in Ireland as it has elsewhere: the accountability of government to parliament relies on parliamentarians the majority of whom, by definition, see their primary parliamentary role to be to maintain the government in office.

There are limits, of course, to what can be achieved through formal legal and institutional change: the problems are partly cultural. Much depends on the extent to which parliamentarians tend to put their own career interests, or the interests of their party, ahead of the common good. (Although to this end, institutional reform, as well as effecting changes directly, can effect change indirectly too, in the sense of promoting conditions in which parliamentarians are more likely to develop virtue.) Much depends also on the

[108] The Backbench Business Committee has been operating since 15 June 2010. See *http://www.parliament.uk/bbcom* (accessed September 27, 2012).

expectations citizens have of their representatives, and on whether, for instance, they elect them on the basis of local or factional interests as distinct from national interests.[109]

But equally, much can be achieved through formal institutional reform. The ideas canvassed in this article, it is suggested, are worthy of careful consideration. It may be, for instance, that the extern minister idea from the 1922 constitution could be revived, and that many of the departments of state could be run by ministers directly accountable to parliament and not hindered either by concerns around party discipline or by collective responsibility. Moreover, the committee tasked with appointing these ministers could be controlled by the Dáil rather than by the government of the day, with the Backbench Business Committee at Westminster as a good working model. This would remove the primary cause of the failure of the project in the 1920s: the fact that the process was controlled by government rather than by parliament. The extern minister idea would go a considerable way towards returning parliament to the so-called golden era prior to 1841. Parliamentarians could harangue these ministers and hold them to account without the concern that the government would collapse and that an expensive election would be prompted, potentially causing the loss of those parliamentarians' seats. This would promote the idea that the people would be governed on their own terms.

Similarly, as JJ Walsh insisted in the Dáil debates on the 1922 constitution, a proper role for parliamentary committees would enhance parliament markedly, both in regard to its law-making and its accountability functions. The reforms of the ways in which committee members and their chairs are appointed, as well as the role of such committees in the law-making process would tend towards reversing the arrangements whereby, in Walsh's words, "three-fourths of the people's representatives [are excluded] from [undertaking] effective work on the nation's behalf."[110]

The article has been less concerned with specific reforms, however. The main concern has been to assess the general arrangements around the distribution of political power in the

[109] On this argument, see the section dealing with the skills and dispositions of citizenship in T. Hickey, "Civic Virtue, Autonomy and Religious Schools: What Would Machiavelli Do?" in F. O'Toole ed., *Up the Republic: Towards a New Ireland* (Dublin: Faber and Faber, 2012).

[110] See fn. 25.

constitutions since 1919. The article has argued that the constitutional arrangements, or more accurately the constitutional practices that have developed around those arrangements, undermine the "republican" credentials of Irish constitutionalism in the 20th century, owing to the excessive concentration of power in the cabinet. Reforms of the text of the constitution would not seem particularly necessary to render he constitution *more* republican. The text of Article 28.4.1, for example, seems to do perfectly well by republican idealism. It is the various legal and institutional arrangements around such constitutional provisions that are problematic. Much as there are deep challenges to making the Westminster model of responsible government *serve* the citizenry, the notion that the model is incompatible with republican idealism is simplistic. At its heart, after all, the model is concerned with holding power to account. It is concerned essentially with the idea that the political power-wielders are *responsible* to, in the sense of being answerable or accountable to, the people's representatives. To this end, republican idealism – far from requiring that the model be cast aside – seems to demand reform of the practices around the model along with the development of common good oriented virtues amongst both political actors and citizens.

iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

ENVIRONMENTAL LEGISLATION

ANNUAL REPORT - 2012 - SPAIN

(January 2012)

Prof. Blanca LOZANO[*] and Diana COGILNICEANU[**]

INDEX

[*] Public Law Professor of the País Vasco University and Academic Advisor of Gómez-Acebo & Pombo law firm.

[**] Lawyer of Gómez-Acebo & Pombo law firm.

6. DIRECTIVE 2011/65/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 8 JUNE 2011, ON THE RESTRICTION OF THE USE OF CERTAIN HAZARDOUS SUBSTANCES IN ELECTRICAL AND ELECTRONIC EQUIPMENT

7. ROYAL DECREE-LAW 12/2011, OF 26 AUGUST, AMENDING THE ACT 1/2000, OF 7 JANUARY, ON CIVIL PROCEDURE, FOR THE IMPLEMENTATION OF THE INTERNATIONAL CONVENTION ON ARREST OF SHIPS AND REGULATION THE COMPETENCIES OF AUTONOMOUS COMMUNITIES ON HYDRAULIC PUBLIC DOMAIN POLICE POWERS

8. NATIONAL AIR QUALITY IMPROVEMENT PLAN

9. ROYAL DECREE 1494/2011, OF 24 OCTOBER, REGULATING THE CARBON FUND FOR A SUSTAINABLE ECONOMY

1. Act 40/2010, of 29 December, on geological storage of carbon dioxide

Published in the Official State Gazette on December 30th, 2010, with the aim to incorporate into the Spanish legal system the Directive 2009/31/CE, regarding the capture of carbon dioxide (CO_2) emitted by industries, its transport for storage through pipes or tanks and, finally, its injection into an appropriate underground geological formation for its permanent storage.

The main administrative instruments that are required: **(i)** the research license and **(ii)** the storage concession, granted both of them by the Ministry of Industry, Tourism and Commerce, prior positive reports of the Ministry of Agriculture, Food and Environment and the Autonomous Community where the location of the storage is foreseen. The first one determines the applier´s capacity to storage the CO_2, conferring him the exclusive right to investigate during a 6 years period of time (extendable up to 3 years). The second one,

consequently, offers to the applier the exclusive right to storage the CO_2 during a 30 years period of time, extendable for two successive periods of 10 years.

Both of them may be legally transferred to a third party, prior authorization from the Ministry of Industry, Tourism and Commerce. Once the professional activity is finished, it is the State who will assume the ownership and control of the place of storage, with the corresponding transfer of liabilities.

2. Act 41/2010, of 29 December, on marine environment protection

This Act incorporates into the Spanish legal system the Directive 2008/56/CE of the European Parliament, on Marine Strategy Framework, of June 17th, 2008. Its legal provisions shall be applied to the territorial sea, to the Atlantic exclusive economic zone and Bay of Biscay, to the Mediterranean protected fishing zone and the Continental Shelf (that includes all marine waters, the sea bed, subsoil and natural resources). The same Act also establishes a legal framework applicable to waste discharges into the sea from ships and aircraft, the incineration and the placement of materials on the sea bed.

The marine environment regulatory framework will be drawn up using "marine strategies", and the Ministry of Agriculture, Food and Environment, prior consultation of the Autonomous Communities, will define a Programme of Measures for a 6 years period of time, designed to reach or maintain a save environmental condition of national waters.

The liability for the environmental damages caused to the marine environment shall be determined according to the provisions contained in the Act 26/2007, of 23 October, on Environmental Liability.

3. Royal Decree 301/2011, of 4 March, on mitigation measures equivalent to the participation in the emission trading scheme, for the purpose of exclusion of small facilities

This RD relies on the legislative power granted to competent autonomous bodies to exclude from the emission trading scheme the facilities located in their territories considered as small emission issuers and hospitals, from January 1st, 2013, according to the Fourth Additional Provision of the Act 13/2010, modifying the Act 1/2005, on regulation of trading greenhouse gas emission scheme. Shall be considered small issuers the facilities that have registered less than 25,000 tonnes of carbon dioxide equivalent, that have carried out combustion activities and have a rated thermal input below 35 MW.

The regulatory text contains provisions regarding mitigation measures that are considered equivalent to those previewed in the emission trading scheme, as well as a monitoring, verification and notification system designed for the excluded facilities and simplified measures for facilities, according to their annual volume of verified emissions.

The mitigation measures are the following: **a)** in case of facilities submitted to the emission trading scheme, the obligation to reduce their emissions to 21% by 2020, with regard to the year 2005; **b)** the obligation to deliver carbon credits equivalent to the amount of CO_2 emissions that exceed the allowed limit, according to the free allocation rules; **c)** the existence of a CO_2 emissions fee applied to the facilities that exceed the amount of emissions granted to them according to the free allocation rules.

4. Royal Decree 556/2011, of 20 April, for the development of the Spanish Inventory of Natural Heritage and Biodiversity

The referred Royal Decree regulates the Spanish Inventory of Natural Heritage and Biodiversity, composed by maps, inventories, lists or catalogues that collect information regarding the areas listed in its Annex I (ecosystems, fauna and flora, natural and genetic

resources, protected areas and areas of interest, adverse effects on the natural heritage and the biodiversity, etc.).

The primary objective of this new regulatory tool is to include instruments that contain information on the risks to the natural heritage and biodiversity. As consequence, an integrated information system is created, called *Databank of Nature*, which has assigned the functions of harmonization, analysis and dissemination of the information contained in the Spanish Inventory of Natural Heritage and Biodiversity.

The Ministry of Agriculture, Food and Environment will carry out the task of control, developing an annual report on the Natural Heritage and Biodiversity situation, in collaboration with the autonomous communities.

5. Act 22/2011, of 28 July, on waste and contaminated soils

By means of this act is transposed into the Spanish legal framework the Directive 2008/98/CE and updated the legal framework on waste, established in Spain more than 10 years ago. Its purpose is to regulate the waste management, promoting appropriate measures to prevent its generation, and to mitigate adverse impacts on human health and the Environment, as well as to normalize the legal framework applicable to contaminated soils.

The Act also describes the coordination that must be achieved between the different Public Administrations, identifying the obligations imposed to waste producers and managers, and creating the required instruments to carry them out.

It contains the polluter pays principle, under which the costs generated by the waste management will have to be charged to the first producer of waste, to the previous or current holder of waste. But, on the other hand, is created the legal figure of the extended liability of waste producers, in order to support the prevention and improve the reuse of waste. The new act strengthens the functions of monitoring, inspection and control, by

simplifying the administrative procedures, creating a specialized registry shared between the different Public Administrations.

The Second Additional Provision of the Act establishes a timeframe until 2018 regarding the replacement of single-use plastic bags non-biodegradable.

6. Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011, on the restriction of the use of certain hazardous substances in electrical and electronic equipment

This Directive determines the rules applicable to restrictions on the use of hazardous substances in electrical and electronic equipment (EEE), as to ensure the protection of human health and Environment. It is applicable to large and small household appliances, computers and telecommunication equipment, lighting devices, toys, sporting goods and leisure equipment, and other EEE listed in its Annex I.

It introduces the legal term of *EU Declaration of Conformity*, which implies the assumption by the manufacturer of the responsibilities established by the Directive. Member States shall ensure that the EEE entering into the European market do not contain the substances specified in its Annex II, and the manufacturers, at the same time, are obliged to ensure that the EEE introduced on the European market have been designed and manufactured in accordance with the European requirements. There is also previewed certain obligations on importers, who must be sure that the EEE introduced on the EU market comply with the regulation contained in this Directive; for example, that the EU mark is duly placed.

Member states must incorporate this Directive to their national legislative framework until January 2nd, 2013.

7. Royal Decree-Law 12/2011, of 26 August, amending the Act 1/2000, of 7 January, on Civil Procedure, for the implementation of the International Convention on Arrest of Ships and regulation the competencies of autonomous communities on hydraulic public domain police powers

The Council of Ministers celebrated on 26 August 2011 approved this Royal Decree which amends the consolidated legal text of Water Act, in order to transfer the so-called "police" powers on hydraulic public domain to the autonomous communities which have assumed in their Statutes the executive jurisdiction over these powers. The *police powers* that are been transferred are, among others, the inspection and control of the public domain, the inspection and surveillance of all the public waters exploitations, the performance of capacity and quality controls, and the leading of fluvial control services.

8. National Air Quality Improvement Plan

On November 4th, 2011, the Council of Ministers adopted the National Air Quality Improvement Plan, to promote a model of development and sustainable welfare, and improve the quality of the information received from managers and citizens. The Plan aims also to strengthen the coordination between other regional plans of air quality that the autonomous communities and local entities have intention to adopt.

The Plan provides concrete action strategies designed to ensure the compliance with the established limit values for nitrogen dioxide and particulate material, as well as the reduction of ozone precursors in agglomerated areas, creating for this purpose a System of Information, Monitoring and Prevention of Air Pollution, as to ensure the functioning of mechanisms for exchange of information in situations of risk to health.

9. Royal Decree 1494/2011, of 24 October, regulating the Carbon Fund for a Sustainable Economy

This Royal Decree normalizes the activity and organization of the Fund referred in the Article 91 of the Act 2/2011, of 4 March, on Sustainable Economy. It is a public Fund, without legal personality, attached to the Secretary of State for Climate Change, which will contribute to the fulfillment of the objectives of reducing greenhouse gas emissions taken by Spain with the acquisition of carbon credits. The acquisition of carbon credits itself is not subject to the Act 30/2007, of 30 October, on Public Sector Contracts, but to the national or foreign legislation that may be applicable in each case.

The purchased carbon credits are considered assets of the State, and the administration, management and direction of the Fund will be realized by a Governing Council and its Executive Committee.

iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

CONSTRUCTION, CITY PLANNING AND ZONING

ANNUAL REPORT - 2011 - Germany

(December 2011)

Prof. Dr. Jens KERSTEN

Design and development of German planning law is determined by federal governance structures. The main legislative focus of planning is based on federal law [Article 74, paragraph (1), clause 18 and clause 31 Grundgesetz (Basic Law)]. However, the influence of EU law on spatial development and urban planning in Germany is increasing, e.g. EU ecological planning law, EU competition law, EU structural policy and EU soft law [ESDP, TAEU, LCSEC)]. In contrast, planning practice and planning administration are tasks of the Länder [federate states] and the municipalities.

German planning law differentiates between sectoral planning and general spatial planning. Sectoral planning is divided into specialised sectors, e.g. infrastructure of transport, of communications and of energy, or agriculture. Special statutes of sectoral planning exist for each field, for instance the Federal Street Building Act. In contrast to sectoral planning, general spatial planning is cross-sectoral, comprehensive planning. It has the function of preparation and control of land-use to ensure all social, economic and ecological issues. Competences for general spatial planning can be found on all political levels in the form of state, regional and urban spatial planning and development. General spatial planning on the state and regional level is codified in the Federal Spatial Planning Act [Raumordnungsgesetz] and spatial planning statues, enacted by the Länder.

Urban planning and development concerning land-use is conceptualised by two constitutional guaranties: the basic right of property [Article 14, paragraph (1) Basic Law] and the guarantee of local self-government [Article 28, paragraph (2), sentence 1 Basic

Law]. It is regulated by the Federal Building Code [Baugesetzbuch] and the Building Utilisation Ordinance [Baunutzungsverordnung]. Generally spoken, urban development is managed by urban land-use plans. The Federal Building Code comprises two types of urban land-use plans: the preparatory land-use plan [Flächennutzungsplan] and the binding land-use plan [Bebauungsplan] [Section 1, paragraph (2) of the Federal Building Code]. The task of preparatory land-use plans is the preparation of binding land-use plans by structuring the entire municipal territory and outlining the use of land to be kept for the planning and development goals of the municipality [Sections 5 to 7 Federal Building Code].

The binding land-use plan [Bebauungsplan] sets out legally binding stipulations for urban development [Sections 8 to 10 Federal Building Code]. These stipulations are arrangements concerning property within the scope of Article 14, paragraph (1), sentence 2 Basic Law. Accordingly, the enforcement of urban development instruments is mainly based on the binding land-use plan, which is the chief instrument of local planning. First of all, the Federal Building Code structures the urban land-use planning by procedural law, that combines elements of representative and participatory democracy [Sections 1 to 4c and 10 Federal Building Code]: Urban land-use plans are to be prepared, amended, supplemented or set aside by municipalities as required for urban development and planning purposes [Section 1, paragraph (3) Federal Building Code]. In this process municipalities have to involve the public, public authorities and other public agencies at the earliest possible planning stage. Especially the public has to be informed about the general aims and purposes of the binding land-use plan and about alternative planning solutions. The public has to be provided with suitable opportunities for comments to and discussion of the binding land-use plan [Section 3, paragraph (1) Federal Building Code]. The aims and principles of urban land-use planning are laid down in form of planning guidelines [Section 1, paragraph (5) Federal Building Code]: The planning decision has to balance public and private interests, in particular social, economic and ecological issues, to secure sustainable urban development [Section 1, paragraphs (5), (6) and (7) Federal Building Code]. Ecological issues gain a special role in the planning procedure: The ecological aspects of the binding land-use plan have to be documented in a special environmental report (Section 2a Federal Building Code). The Higher Administrative Court can adjudicate binding land-use plans on application of any natural or juristic person claiming a violation of rights by

the plan [Section 47 Code of Administrative Court Procedure (Verwaltungsgerichts-ordnung)].

In addition to urban land-use planning, several other instruments of sustainable urban development were established during the last decades: The urban development contract is becoming increasingly important for huge planning projects [Sections 11 and 12 Federal Building Act]. Financial aid for municipalities by the government secure urban redevelopment measures [Section 164a Federal Building Code]. The Federal Building Code was also supplemented by urban governance structures for special challenges in urban development, e.g. the consequences of segregation and the aging of society: The concept of urban reconstruction is designed to avoid demographic perforations of cities [Sections 171a to 171d Federal Building Code]. The concept of the so-called "Social City" stands against segregation [Section 171e Federal Building Code]. To enhance the status of urban districts Business Improvement Districts (BIDs), Neighbourhood Improvement Districts (NIDs) and Housing Improvement Districts (HIDs) have been formalized [Section 171f Federal Building Code].

The current challenge for sustainable urban development in Germany is to ensure climate protection by urban land-use planning. First steps of the legislator included the codification of climate protection as a general task of urban land-use planning [Section 1, paragraph (5), sentence 2 Federal Building Code], the codification of special designation possibilities for climate protection [Section 9, paragraph (1), clause 23 and clause 24 Federal Building Code] and planning instruments for wind farms and hydro power plants [Section 35, paragraph (1), clause 5 Federal Building Code]. But while performing the "Energiewende", sustainable urban development issues will further be an important item on the political agenda.

iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

PUBLIC CONTRACTS

ANNUAL REPORT - 2012 - ITALY

(September - 2012)

Prof. Gabriella M. RACCA

INDEX

1. THE ITALIAN IMPLEMENTATION OF EUROPEAN DIRECTIVES NO. 2004/18/EC AND 2004/17/EC

The **EU Directives of March 31, 2004, N. 2004/17** and **N. 2004/18**[1] regulating public contracts, works, services and supplies have been implemented in Italy by means of Legislative Decree n. 163, of April 13, 2006 of the Public Contracts Code (hereafter PCC). In June 2011, the government regulation implementing the code entered into force[2] (D.P.R. 5 October 2010. Cfr. Cons. Stato, 24 February 2010, n. 313, opinion on *Schema di regolamento di attuazione ed esecuzione del codice dei contratti pubblici relativi a lavori, servizi e forniture, di cui all'articolo 5, D.Lgs. 12 aprile 2006, n. 163*) The new regulation abrogate the previous one (D.P.R. 21 December 1999, n. 554) on the public works sector (L. 11 February 1994, n. 109). This regulation governs the award and execution of public contracts and public works (classic sector arts. 9-251; utilities sector arts. 339-359), also

[1] **TREATIES**: A. Carullo, G. Iudica, *Commentario breve alla legislazione sugli appalti pubblici e privati*, Padova 2012; R. Caranta, *I contratti pubblici*, Torino 2012; A. Massera, *Lo Stato che contratta e che si accorda. Vicende della negoziazione con le PP.AA., tra concorrenza per il mercato e collaborazione con il potere*, Pisa, 2011; G. D. Comporti, *Le Gare pubbliche: il futuro di un modello*, Napoli, 2011; R. Garofoli, G. Ferrari, *Codice degli appalti pubblici*, Lecce 2011; V. Cerulli Irelli, *Amministrazione pubblica e diritto privato*, Torino, 2011; L. Fiorentino, *Gli acquisti delle amministrazioni pubbliche nella Repubblica multilivello*, Bologna, 2011; C. Franchini (eds.), *I contratti di appalto pubblico*, Torino, 2010; M. Clarich (eds.), *Commentario al Codice dei contratti pubblici*, Torino, 2010; C. Franchini (eds.), *I contratti con la Pubblica Amministrazione*, Torino, 2007, I e II, in P. Rescigno, E. Gabrielli (eds.), *Trattato dei contratti*, Torino, 2007; A. Grazzini, *Appalti e contratti - Percorsi giurisprudenziali*, Milano, 2009; M. A. Sandulli, R. De Nictolis, R. Garofoli (eds.), *Trattato sui contratti pubblici*, Milano, 2008; M. Baldi, R. Tomei, *La disciplina dei contratti pubblici - Commentario al codice appalti*, Milano, 2009.

[2] **GOVERNMENT REGULATION ON PUBLIC CONTRACTS CODE**: R. De Nictolis, R. Garofoli, M. A. Sandulli (a cura di), *Trattato sui contratti pubblici*, vol. VIII - *Il regolamento di attuazione*, Milano, 2011; R. Giovagnoli (a cura di), *Il nuovo regolamento sui contratti pubblici*, Milano, 2011; R. Garofoli, G. Ferrari, *Il nuovo regolamento appalti pubblici*, Lecce, 2011; R. De Nictolis, *Il nuovo regolamento dei contratti pubblic*i, in questa *Rivista*, 2011, 136.

with reference to services and supplies (classic sector arts. 271-338; services for architecture and engineering arts. 252-270; utilities sector art. 339-359). The provisions on public works have been extended, where compatible, to these sectors. In order to modernize, improve Italian infrastructures and enhance market competition the regulation aims to simplify administrative procedures by using IT solutions, fight organized crime prevent criminal infiltration of the public contract sector.

The EU Commission's data indicate that in 2010 the Italian market value for public procurements (concerning the total expenditure for the purchase of works, services and supplies) exceeded 252 billion euros (European Commission, *Internal Market, Public procurement indicators 2010*, November 4, 2011) which corrisponds to 16,3% of National GDP.

The Italian Authority for the Supervision of Public Contracts calculated that in 2010the amount of resources involved in public procurements exceeding 150,000 euros was 87 billion euros, equivalent to 6.6% of GDP, while in 2009 it had been 79.4 billion euros (the Italian Authority for the Supervision of Public Contracts, *Relazione annuale 2010*, June 15, 2011). The value of the contracts covered by the EU Directive n. 2004/18 was 64 billion euro (about 35.7% for works, approximately 27.3% for supplies and approximately 37% for services), and 23 billion concerned the special sectors (about 33.9% for works, about 27.3% for supplies and about 38.8% for services). The higher value of public contracts in 2010 compared to 2009 can largely be explained by the entry into force of the law on traceability of financial flows (L. 13 August 2010, n. 136 special plan against the Mafia and the delegation to the Government on anti-mafia legislation, Art. 3) which provides a Procedure ID Code (CIG). The CIG Code is an alphanumeric code generated by the Information System on Monitoring awarding procedure (SIMOG) of the Italian Authority for the Supervision of Public Contracts.

1.1 The allocation of Legislative power between State and Regions[3]

The State has exclusive legislative competence on competition and consequently, on public contracts[4].Regions have filed claims before the Constitutional Court so as to assert their competence on: public contracts design and planning (Corte Cost. No. 221/2010); contracts below threshold (Corte Cost. No. 401/2007); exclusion of abnormally low tenders (Corte Cost. No. 160/2009). The Constitutional Court left to Regions only a limited discretion in the choice of the composition and functions of the jury.

1.2 The Italian Authority for the Supervision of Public Contracts for works, services and supplies

The Italian PCC (art. 6) envisages the institution of the Italian Authority for the Supervision of Public Contracts (Autorità di vigilanza sui contratti pubblici), with the task of monitoring both the award and the execution of public contracts.

This authority expresses opinions on the correct interpretation and implementation of the PCC and it submits to the Government proposals for legislative amendements to the PCC. It also prepares an annual report on public contracts award and execution for the Parliament (for further reference visit www.avcp.it).

The Authority's Monitoring Board on public contracts was created to collect and process data on public contracts worth over 150 thousand euros awarded and executed in

[3] **STATE-REGION COMPETENCE:** A. Massera, *La disciplina dei contratti pubblici: la relativa continuità in una materia instabile*, in *Giornale Dir. Amm.*, 2009, 1252; D. Casalini, *Il recepimento nazionale del diritto europeo dei contratti pubblici tra autonomia regionale ed esigenze nazionali di «tutela dell'unità giuridica ed economica» dell'ordinamento*, in *Foro Amm. – C.d.S.*, 2009, 1215-1237.

[4] Art. 117, co. 2, lett. *e, l, m, s*, Cost.

Italy, so as to define standardized costs according to territory and sector. The Monitoring Board has also recently been entrusted with the management of the database of non-compliant tenderers that were excluded from public tender due to violations or false declarations, either in the selection or in the execution phase (see the Public Contract National Database below in § 5). The Authority's activities are funded by the State, by the awarding authorities and, partly, by bidders, since the latter have to pay a set contribution for participating in award procedures.

2. THE IMPLEMENTATION OF THE DIRECTIVE ON: PUBLIC CONTRACTS FOR WORKS, SUPPLIES AND SERVICES IN THE AREAS OF DEFENCE AND SECURITY

In 2011 Directive 2009/81/EC regarding **public contracts for works, supplies and services in the areas of defence and security** was implemented. This provision applies to public contracts for the supply of military or sensitive equipment, as well as for works, supplies and services directly related to them and services specifically for military purposes. In this field contracting authorities during the awarding procedure, May use the restricted procedure, negotiated procedure (with the prior publication of a contract notice, or without) or competitive dialogue (D.Lgs. n. 208 of 2011, art. 16, comma 1). The possibility of using framework agreements is also proved. In this case the term of a framework agreement May not exceed seven years, except in exceptional circumstances determined by taking into account the expected service life of any delivered items, installations or systems, and the technical difficulties which a change of supplier may cause (Law n. 208 of 2011, art. 16, comma 4).

3. SUBJECTIVE AND OBJECTIVE COVERAGE, IN HOUSE PROVIDING

The subjective coverage of public procurement legislation is often litigated in Italy. Some interpretative uncertainties still undermine the non-industrial and commercial character of **the body governed by public law**[5]. The qualification of body governed by public law was denied for a consortium company whose shares were partially held by public authorities and whose task was to run a public market area since it bears the economic risk of its activities (Cass., SS.UU., No. 8225/2010). On the other hand, three companies entrusted respectively with the tasks of building and operating airport facilities (Cass., SS.UU., ord. No. 23322/2009), highway facilities (T.a.r. Lazio, Roma, III, No. 2369/2009 and T.a.r. Puglia, Bari, I, No. 399/2009) and organizing a Public Fair, the *aziende speciali delle Camere di commercio* (Cons. Stato, VI, 24 November 2011, No. 6211), as well as *RAI* (Cass., SS.UU:. 22 December 2011, No. 28329) were considered bodies governed by public law.

[5] **BODY GOVERNED BY PUBLIC LAW**: S. Girella (a cura di), *Organismi di diritto pubblico e imprese pubbliche : l'ambito soggettivo nel sistema degli appalti europeo e nazionale*, Milano, Angeli, 2010; D. Casalini, *Concessionario, organismo di diritto pubblico o gestore in house: chi sopporta il rischio economico della gestione delle autostrade?*, in *Urb. e app.*, 2009, 882-889.

The constant specification of **in house providing**[6] requirements through ECJ case-law (ECJ, C-324/07, *Coditel Brabant SA*; ECJ, C-573/07, *Sea s.r.l. v Comune di Ponte Nossa*) shed light on the interpretative issues at stake at the national level, mainly underlining the distinction between property of and control over the in house provider as for the assessment of the similar control requirement (ECJ, C-371/05, *EU Commission v Italy*; ECJ, C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo)* c. *Transformación Agraria SA (Tragsa), Administración del Estado*). The requirement is met whenever several public authorities, holding even a minimal share in the in house provider's capital, exercise the actual power of defining the industrial strategies and the core decisions of the in house provider (Cons. Stato, V, 3 February 2009, No. 591, Cons. Stato, V, 9 March 2009, No. 1365 e Cons. Stato, v, 26 August 2009, No. 5082; Cons. Stato, V, 11 August 2010, No. 5620; Cons. Stato, V, 24 September 2010, No. 7092; Cons, Stato, V, 8 March 2011, No. 1447; Cons. Stato, I, parere, 23 March 2011, No. 5653). The essential destination requirement shall be assessed both from a qualitative and quantitative point of view (ECJ, C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia c. Administración del Estado*; Corte Cost. No. 439/2008). However the Italian legislation limited the in house provider's activities outside its relevant territories, forbidding even the power of tendering in awarding procedures issued by public

[6] **IN-HOUSE PROVIDING**: for the similar control requirement see C. Volpe, In house Providing*, Corte di giustizia, Consiglio di Stato e legislatore nazionale. Un caso di convergenze parallele?*, in *www.giustizia-amministrativa.it*; R. Cavallo Perin, D. Casalini, *The control over in-house providing organizations*, in *Public Procurement Law Review*, No. 5/2009, 227-240; for a wider perspective see R. Caranta, *The In-House Providing: The Law as It Stands in the EU*, in *The In House Providing in European Law*, M. Comba and S. Treumer (eds.), Copenhagen, 2010; M. Comba, *In-House Providing in Italy: the circulation of a model*, in *The In House Providing in European Law*, M. Comba and S. Treumer (eds.), Copenhagen, 2010; F. Cassella, *In-House providing - European regulations vs. national systems*, in *The In House Providing in European Law*, M. Comba and S. Treumer (eds.), Copenhagen, 2010; M. G. Pulvirenti, *Recenti orientamenti in tema di affidamenti in house*, in *Foro Amm. – C.d.S.*, 2009, pag. 108; G. Corso e G. Fares, *Crepuscolo dell'in house?*, in *Foro it*., 2009, I, 1319; H. Simonetti, *Il modello delle società in house al vaglio della corte costituzionale*, in *Foro it.*, 2009, I, 1314; G. Piperata, *La corte costituzionale, il legislatore regionale ed il modello «a mosaico» della società in house*, in *Regioni*, 2009, 651.

authorities other than the controlling ones (l.d. No. 223/2006 converted by law No. 248/2006). The exception to public procurement rules set out by the ECJ in C-480/06 (*Commission* v *Germany*), concerning cooperation arrangements among public authorities aiming at carrying out public tasks jointly and without a financial consideration, has not yet found application in our national case-law. Nonetheless, several forms of cooperation and joint exercise of public tasks among local public authorities have long been known in the Italian legal system (art. 15, law n. 241/1990 and art. 31-33, D.L. n. 267/2000) and have recently been promoted or even imposed by the budgetary law (L. n. 244/2007, art. 2, § 28; D.L. n. 78/2010, art. 14, § 25-31). As for the definition of economic operator, any individual or legal person offering work, supply or service provision on the market, regardless of its legal qualification as non-profit organisation[7], NGO, public or private body in the relevant national system, is considered an «economic operator» according to EU directives on public procurement (Cons. Stato, VI, 8 June 2010, No. 3638; Cons. Stato, V, 25 February 2009, No. 1128; Cons. Stato, V, 26 August 2010 No. 5956 Autorità per la Vigilanza sui Contratti Pubblici, determinazione 21 ottobre 2010, No. 7, *questioni interpretative concernenti la disciplina dell'articolo 34 del d.lgs. 163/2006 relativa ai soggetti a cui possono essere affidati i contratti pubblici*; CGCE, 23 December 2009, C-305/08).

The special legislation on organized crimes (L. 13 August 2010, No. 136, Art. 13) defines modalities to create at regional level one or more central purchasing bodies (specifically named **stazioni uniche appaltanti** – SUA,[8] for the implementation of the provision see: D.P.C.M. 30 June 2011, regarding the *Stazione Unica Appaltante, in attuazione dell'articolo 13 della legge 13 August 2010, No. 136 - Piano straordinario*

[7] **NO PROFIT ORGANIZATION**: S. Mento, *La partecipazione delle fondazioni alle procedure per l'affidamento di contratti pubblici*, in *Giornale Dir. Amm.*, 2010, 151.

[8] **STAZIONE UNICA APPALTANTE**: M. Pignatti, *La Stazione Unica Appaltante: le modalità di finanziamento e la trasparenza dell'attività*, in *Foro Amm., C.d.S.*, 2011; R. De Nictolis, L*a nuova disciplina antimafia in materia di pubblici appalti*, in *Urb. e app.*, 2010, 1129.

contro le mafie). This provision also establishes the awarding of public contracts and the checking of the execution phase at territorial level (regional, provincial, interprovincial, municipal and inter municipal level) with the other administrative bodies involved. Some limitations of this provision seem to concern the territory in which these authorities can operate. The risk is the duplication of the contractual activity with other central purchasing bodies on the same territory and difficulty in aggregating needs of local authorities. The provision may give rise to the opposite effect by maintaining many individual award procedures in the hands of the SUA rather than a real aggregation of needs and joint procurement through framework agreements.

P.C.C., Art. 33, c. 3 *bis*, (introduced by D.L. 6 December 2011, No. 201, Art. 23, c. 4, converted into L. 22 December 2011, No. 214) limits capacity to stipulate contracts of **municipalities with less than 5000 inhabitants**. These municipalities, organized in aggregations of municipalities (according to Art. 32, d.lgs. 18 August 2000, No. 267) or consortium, from 31 of March 2013 (on the introduction of this term see D.L. 29 December 2011, No. 216, Art. 29, c. 11 *ter*, converted with amendments into L. 24 February 2012, No. 14) will have to entrust their procurements of works, services and supplies to a central purchasing bodies (P.C.C., Art. 33, c. 3 *bis*, introduced by D.L. 6 December 2011, No. 201, Art. 23, c. 4, converted into L. 22 December 2011, No. 214). The same municipalities can also make their purchases through the electronic means managed by other central purchasing bodies (D.L. 6 July 2012, Art. 1, c. 4).

4. STRATEGIC USE OF PUBLIC PROCUREMENT POLICIES

The new Government regulation enforcing the code introduced the **planning of the awarding procedures**[9] (Art. 271). The new regulation provides that the contracting

[9] **PLANNING OF THE AWARDING PROCEDURES**: C. Contessa – P. De Bernardis, *Organi del procedimento e programmazione nel nuovo regolamento unico*, in *Urb. e app*., 2011, 757 e ss.

authorities can annually approve the planning of purchases for the following financial year by extending to the contracts of services and supplies the same provisions that are mandatory for public works (Art. 128, c. 2 last commas, 9, 10 e 11), apart from the possibility to purchase goods and services not provided for in such planning in cases of necessity and urgency. Concerning public works, the government regulation enforcing the code specifies also provisions about work planning (it establishes a term for the adoption of the three-year program, cf. Artt. 13 and ff.) and it expressly provides the content of the feasibility study (Art. 14).

In 2011, a new provision was introduced thereby contracting authorities are obliged to split contracts into functional lots (P.C.C., Art. 2 , c. 1 *bis*, introduced by D.L. 6 December 2011, No. 201, Art. 44, c. 7, converted in law 22 December 2011, No. 214). Such a provision can be interpreted as a social clause to facilitate the participation of small and medium enterprises (SMEs) in the public procurement market, thus promoting open competition.. With specific reference to public works sector in the field of large infrastructure the law provide the involvement of SMEs (P.C.C., Art. 2 c. 1 *bis*, introduced by D.L. 6 December 2011, No. 201, Art. 44, c. 7, converted in law 22 December 2011, No. 214). These provisions, in line with policies set by the EU Commission (see *Green Paper on the modernization of EU public procurement. For a more efficient European market for procurement*, COM (2011) 15 final; *Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation*, SEC (2011) 853 final) allow the inclusion in tender documents of social clauses, in favor of SMEs, that take into account, the EU rules and principles. However Italian law does not specify how to achieve those results.

The urgency of a **spending review** required the establishment of an interministerial committee (D.L. 7 May 2012, No. 52, Art. 1, converted in law 6 July 2012, No. 94) and the appointment of a "commissario straordinario" (special commissioner) to which is attributed the definition of the spending level on public purchases of goods and services and the tasks of supervision, monitoring and coordination of the public procurement of goods and services. For the same purposes was encouraged the use of electronic means, through the availment of a IT system (ASP - Application Service Provider) of the Ministry of Economy and Finance (D.L. May 7, 2012, No. 52, Art. 9,

converted in law 6 July 2012, No. 94). To simplify the public procurement of goods and services related to IT systems was excluded both the obligatory nature of the technical opinion (previously mandatory and non-binding) that would be required to the National Centre for Computing in Public Administration (D.L. May 7, 2012, No. 52, Art. 10, converted in law 6 July 2012, No. 94) and the administrative fees applied by local governments for the purchases of goods and services made by using IT tools (D.L. 7 May 2012, No. 52, Art. 13, converted in law 6 July 2012, No. 94).

Public procurement aggregation[10] has been one of the main focus of the recent Italian legislation who established central purchasing bodies at the local level[11] able to network with the national central purchasing body (Consip)[12] which, since 2000[13], is entrusted with the task of awarding framework agreements which the government

[10] **PUBLIC PTOCUREMENT AGGREGATION**: G. M. Racca, *Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement*, in *Public Procurement Law Review*, 2010, 119; G. M. Racca, *La professionalità nei contratti pubblici della sanità: centrali di committenza e accordi quadro*, in *Foro Amm. – C.d.S.*, 2010, 1475; G. M. Racca, R. Cavallo Perin e G. L. Albano, *The safeguard of competition in the execution phase of public procurement: framework agreements as flexible competitive tools*, in *Quaderni Consip*, VI (2010); G.L. Albano e F. Antellini Russo, *Problemi e prospettive del Public procurement in Italia tra esigenze della pubblica amministrazione obbiettivi di politica economica*, 2009, in *Economia Italiana*, 809; D. Broggi, *Consip: il significato di un'esperienza, Teoria e pratica tra e-Procurement ed e-Government*, Roma, 2008, 9.

[11] L. 27 december 2006, No. 296, *Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2007)*, Art. 1, c. 455. See also: Autorità per la Vigilanza sui Contratti Pubblici di Lavori, Servizi e Forniture, *Censimento ed analisi dell' attività contrattuale svolta nel biennio 2007-2008 dalle Centrali di Committenza Regionali e verifica dello stato di attuazione del sistema a rete*, 27 e 28 january 2010, in *http://www.avcp.it/portal/public/classic/.*

[12] See agreement of 21 december 2009 between SCR-Piemonte S.p.A. and Consip S.pA., in *http://www.consip.it.*

[13] L. 23 december 1999, No. 488, *legge finanziaria per l'anno 2000*, Art. 26.

administrations are compelled to take part in[14]. However, it is worth noticing that the framework agreements awarded by Consip concern a very few category of products and services, set out annually by a Ministerial decree. Local authorities shall refer to Consip's framework contracts as price and quality **benchmarks**[15] for their own purchasing[16] (Cons. St., V, 2 February 2009, No. 557) and local civil servants who fail in enforcing these benchmarks are **liable** (C. conti, giur. Reg. Valle d'Aosta, 23 November 2005, No. 14; D.L. 6 July 2012, n. 95, Art. 1).

The provisions on spending review (D.L. 6 July 2012, Art. 1, c. 7) provide an obligation for public entities and companies entirely public (included in the consolidated statement of public administration - Law 31 December 2009, No. 196, Art. 1) to purchase through contractual instruments provided by Consip SpA or other regional central purchasing bodies some goods and services (electricity, gas, fuel, fixed and mobile telephony).

In drafting the competitive tender documents and in the awarding procedures the contracting authority has to use improved value for money parameters compared to those contained in similar tenders and goods and services contracts made by the central

[14] legge 23 december 1999, No. 488, *Budgetary law for 2000*, e Art. 26, providing the mandatory participation in Consip agreement for any public authority, apart from the municipalities with less than 1000 or 5000 (if mountain) citizens. See also the *Budgetary law for 2001*, Art. 58; L. 24 december 2003, No. 350, *Budgetary law for 2004*, Art. 3, § 166; D.L. 12 july 2004, No. 168, Art. 1, conv. in L. 30 july 2004, No. 191; L. 24 december 2007, No. 244, Art. 2, § 574, *Budgetary law for 2008.*

[15] **BENCHMARKS: ART.** 1, c. 4, lett. c, D.L. 12 july 2004, No. 168; S. Ponzio, *La verifica di congruità delle offerte rispetto alle convenzioni Consip s.p.a. negli appalti pubblici di forniture e servizi* in *Foro Amm. - CdS*, 2009, 2352; I. Pagani, *Appalti di fornitura ed "anomalia esterna" rispetto alle previsioni del codice dei contratti pubblici*, in *Urb. e app*., 2009, 592.

[16] L. 23 december 1999, No. 488, Art. 26, c. 3, providing Consip framework contracts' price and quality as mandatory benchmarks for any contracting authority, apart from the municipalities with less than 1000 or 5000 (if mountain).

purchasing body – congruence assessment - (D.L. 7 May 2012, No. 52, Art. 7, converted in law 6 July 2012, No. 94; see also D.L. 6 July 2012, n. 95, Art. 1). This is not required when the contracting authority verifies fulfilment of the value for money benchmarks contained in the framework agreements made by the central purchasing body (D.L. 7 May 2012, No. 52, Art. 7, converted in law 6 July 2012, No. 94). For the in-progress awarding procedures, where the tender has already been published, Consip S.p.A. can publish the applicable parameters on its website.

The regulation has specified the tasks of the person in charge of the procedure also in relation to the services and supplies sector (Artt. 272-274). It provides that if purchasing is carried out through central purchasing bodies, the individual contracting authority (the contractor) shall appoint another person to be in charge of the procedure besides the first one who was appointed by the central purchasing body. In this case the director of the procedure (in coordination with the director of the execution phase if one has been appointed) are entrusted with the tasks of overseeing, controlling and surveillance in the execution phase of the contract in order to assure that the contract performance will be correct.

5. RULES ON PUBLIC CONTRACTS

5.1 Award procedures and new contractual tools

The **negotiated procedure** is frequently used in Italy: as for the public contracts (including those below threshold) awarded in 2010, more than 30% (with peaks of m0ore than 60% in the sectors covered by EU Directive No. 17/2004) of the overall tendering procedures are negotiated procedure, accounting for a 28% of the total public contracting expenditure (Autorità per la Vigilanza sui contratti pubblici, *Relazione annuale 2010*, 15 June 2011). Therefore our PPC did not implement two of the cases justifying use of the negotiated procedure with prior publication of a contract notice, according to EU Directive No. 18/2004, Art. 30, § 1, lett. b) and c): the exceptional cases, when the nature of the

works, supplies, or services or the risks attaching thereto do not permit prior overall pricing as well as the case of services, *inter alia* services within category 6 of Annex II A, and intellectual services insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision.

The negotiated procedure without prior publication of a contract notice entails the simultaneous dispatch of invitations to submit a tender to, at least, three economic operators meeting the qualitative selection criteria for the provision of the subject-matter of the contract, thus reducing considerably the competition for the award of the contract.

The implementation of **competitive dialogue**[17] in Italy has been postponed until the entry into force of the Government regulation enforcing the code (Art. 253, § 1-*quarter* PCC). Since the implementation of PCC, a kind of competitive dialogue in Italy has been used solely as a possible instrument to award the few public contracts that do not fall within the scope of the Directives, such as concession of works or services and other forms of PFI and PPP. Nonetheless, Italian PCC limits the use of competitive dialogue which is not available for the most complex work procurements such as strategic infrastructure works and production plants (Art. 161-205 PCC), far beyond the purpose of EC law (whereas 31 of EU Directive No. 18/2004).The government regulation enforcing the code define the elements that must be contained in the contract notice, the procedure for submitting tender (including the presentation of innovative solutions) and final offers by economic operators and the possibility of introducing a provision for the purchase of the project submitted.

[17] **COMPETITIVE DIALOGUE**:, G. M. Racca - D. Casalini, *Competitive dialogue in Italy*, in S. Arrowsmith - S. Treumer, *Competitive dialogue*, forthcoming, Cambridge, 2012; G. M. Racca - D. Casalini, *Implementation and application of competitive dialogue: experience in Italy*, *Public Procurement: Global Revolution V*, University of Copenhagen, 9-10 september 2010; on the comparison between competitive dialogue and French *marchés de définition*: S. Ponzio, *Gli "appalti di definizione" nell'ordinamento francese. La violazione dei principi di trasparenza e concorrenza nell'aggiudicazione degli appalti pubblici*. in *Foro Amm. – C.d.S.*, 2010, 22.

The *Ministero dell'economia e delle finanze* (through Consip S.p.A.) now has to create the instruments for the management of a **dynamic purchasing system** for public procurement (Art. 287) also included IT tools and an advisory system for contracting authority.

In case of **framework agreements** concluded with several economic operators has been clarified that where all the terms are laid down in the framework agreement (*framework contract*) and is required the use of the "rotation" criterion, the order of priority should be done taking into account not only of results of the tender, but also the content of individual bids in relation to the needs of individual contracting authorities wishing to use the framework agreement to meet their needs (Art. 287). This provision could allow a derogations from a strict application of the rotation criteria, especially when the framework agreement has been awarded with the most economically advantageous tender. In this case, goods and services offered by successful tenderers may have different characteristics. Now the regulation enforcing the code provides rules on the selection procedures of the contractor which are done digitally and it has also abrogated the previous regulation (d.P.R. 4 April 2002, No. 101).

The rule provide the means for the use of **electronic auction**, the IT system, the participation, the design of tender documents and improvements to an electronic auction conclusion, identifying the tasks of the manager IT system.

As for **project financing initiative**[18], following a EU Commission infringement procedure against Italy, (Cons. Stato, IV, 13 January 2010, No. 75), Italian legislation was

[18] **PFI:** M. Mariani, *Il Project financing. Analisi giuridica, economico-finanziaria, tecnica, tributaria, bancaria, assicurativa*, Giappichelli, Torino 2012; M. Baldi, *Il nuovo modello di project financing introdotto dal D.L. 70/2011*, in U*rb. e app.*, 2011, 1040 e ss.; G. F. Cartei, M. Ricchi (a cura di), *Finanza di Progetto. Temi e Prospettive*, Napoli 2010; G. Manfredi, *La finanza di progetto dopo il d.lgs. No. 152/2008*, in *Dir. amm.*, 2009, 429; V. Cesaroni, *La finanza di progetto*, in *Riv. amm.*, 2009, 119; M. Mattalia, *Il* Project financing *come strumento di partenariato pubblico privato* in *Foro Amm. – CDS*, 2010, 23; Id, Project financing, un istituto in continua evoluzione, in Giur. It., 2011, 5 e ss. M. Baldi, Le novità del D.L. 70/2011, in Urb. e app., 2011, 1012;

amended, restoring equality of treatment between the promoter and any other participant (Art. 153, § 1-14 modified by l.d. No. 152/2008). PFI in Italy is designed as a two-fold procedure where the first phase (to choose the promoter) is not an awarding procedure subject to the relevant EU rules, whilst the second phase is subject to EU directives on public procurement as far as it aims to choose the final concessionaire (Cons. Stato, Ad. pleNo., 15 April 2010, No. 1; Cons. Stato, V, 28 May 2010, No. 3399). The possibility of issuing *project bond* by the project company is provided (P.C.C., Artt. 157 and 158, as amended January 24, 2012 by D.L., No. 1, Art. 41 , converted into Law March 24, 2012, No. 27).

Regarding the possibility of activating interventions not covered in the three-year program provided in the Code of public contracts, was amended in 2011 (P.C.C., Art. 153, c. 19, amended by D.L. 13 May 2011, No. 70, Art. 4, c. 2, lett. q) and completely rewritten in 2012 (D.L. 24 January 2012, No. 1, Art. 59 *bis*, converted in L. 24 March 2012, No. 27). Recent Italian case law stated that the position of advantage of the "promoter" immediately affect the legal position of other tenderers which can not take part in the subsequent procedure for the award of the concession on the basis of their project and allows the proposition of a claim (Cons. St., Ad. Plen. 28 January 2012, n. 1)[19].

M. Mattalia, Project financing, un istituto in continua evoluzione, in Giur. It., 2011; S. Luce, La progettazione dei contratti pubblici di lavori, servizi e forniture. I profili problematici, Lecce, 2011

[19] M. Mattalia, *La nomofilachia dell'Adunanza plenaria in materia di* project financing, 2012, in corso di pubblicazione; M. Pignatti, *La legittimazione e l'interesse al ricorso in materia di finanza di progetto*, *Foro Amm. – CDS*, 2012.

Concerning **public-private partnership**[20] has been introduced the availability of the "**contratto di disponibilità**". In this kind of contract the economic operator shall assume the costs and risks related to the construction and provision of the work. Contracting authority shall use this work for a period of time established in the contract during which pay a fee (P.C.C., Art. 3, c. 15bis.1 and 160 ter, introduced by D.L. 24 January 2012, No. 1 Art. 44, c. 1, letter. a), converted into Law 24 March 2012, No. 27).

The EU Treaty principles and provisions on the qualification requirements for planners and executors are applied to **sponsorship contracts**[21] of over forty thousand euro (P.C.C., Art. 26, as amended by 20, c. 1, lett. b), D.L., 9 February 2012, No. 5, converted in L. 4 April 2012, No. 35). A specific discipline on the procedures for choosing sponsors has also been introduced in the cultural heritage sector (P.C.C., Art. 199 *bis*, introduced by Art. 20, c. 1, lett. h), D.L., 9 February 2012, No. 5, converted in L. 4 April 2012, No. 35).

The P.C.C. provides that in a restricted procedure, negotiated through the publication of a call for tenders or competitive dialogue, the contract awarding bodies – if the work is complex – may limit the number of suitable candidates on the basis of objective and not discriminatory criteria on the basis of the principle of proportionality identified in the call for tenders together with the minimum number of candidates and if required also the maximum number (PCC, Art. 199 *bis*, introduced by Art. 20, c. 1, lett. h), D.L., 9 February 2012, No. 5, converted into L. 4 April 2012, No. 35). This possiblity is also known as "forcella". Resort to this provision, which had originally been conceived for public works, was extended in 2011 also to cover supplies and services of any price (P.C.C.

[20] **PUBLIC-PRIVATE PARTNERSHIP:** M. A. Sandulli, *Il partenariato pubblico privato istituzionalizzato nell'evoluzione normativa*, in *www.federalismi.it*, 2012; F. Mastragostino (a cura di), *La collaborazione pubblico-privato e l'ordinamento amministrativo*, Torino, 2011; G. F. Cartei, *Le varie forme di partenariato pubblico-privato. Il quadro generale*, in *Urb. e app*., 2011, 893 e ss.

[21] **SPONSORSHIP CONTRACTS**: M. Mattalia, *Le sponsorizzazioni delle amministrazioni pubbliche: dalla libertà alla concorrenza*, Nel Diritto, Lecce, 2012.

Art. 199 *bis*, introduced by Art. 20, c. 1, lett. h), D.L., 9 February 2012, No. 5, converted in L. 4 April 2012, No. 35).

The awarding of **public services concessions**[22] (CGCE 10 March 2011, in C-274/09, *Privater Rettungsdienst und Krankentransport Stadler* v *Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau*; Cons. Stato, V, 9 September 2011, No. 5068; Cons. Stato, V, 6 June 2011, No. 3377) falls outside the scope of EU Directive on public procurement and is subject to the European principles of competition in the internal market (CGCE, 9 September 2010, C-64/08, *Ernst Engelmann*; CGCE, 3 June 2010, in C-203/08, *Sporting Exchange Ltd* v *Minister van Justitie*). Recently the Italian Consiglio di Stato stated that **public services concessions** shall be awarded by means of an open or restricted procedure, whereas the use of a negotiated procedure comply with the EU principles only in case of extreme urgency or disproportionate costs in choosing alternative solutions due to their different technical characteristics (Cons. Stato, V, 21 September 2010 No. 7024). With regard to public services concessions, the Law of August 6, 2008, No 133 was recently abrogated by art 1(1), d.P.R. 18 July 2011, No. 113, as from 21 July 2011. The D.L. of June 25, 2008, No 112 (*Disposizioni urgenti per lo sviluppo economico, la semplificazione, la competitività, la stabilizzazione della finanza pubblica e la perequazione tributaria*) had been converted by the Law 6 August 2008. Art. 23 of the

[22] **PUBLIC SERVICES CONCESSIONS:** G. Rizzo, *La concessione di servizi*, Giappichelli, Torino, 2012; G. Caia, *Finalità e problemi dell'affidamento del servizio idrico integrato ad aziende speciali*, in *Foro Amm. – TAR*, 2012, 663 – 677; G. F. Cartei, *Il principio di equilibrio economico-finanziario e la disciplina del contratto di concessione*, in *Urb. e app.*, 2012; F. Goisis, *Concessioni di costruzione e gestione di lavori e concessioni di servizi*, in *Ius Publicum Network Review*, http://www.ius-publicum.com/ repository/uploads/14_06_2011_17_33_Goisis_IT.pdf 2011; C. Volpe, *Appalti pubblici e servizi pubblici. Dall'Art. 23-bis al decreto legge manovra di agosto 2011 attraverso il referendum: l'attuale quadro normativo*, 17 ottobre 2011, in *www.giustizia-amministrativa.it*; L. Perfetti, *La disciplina dei servizi pubblici locali ad esito del referendum ed il piacere dell'autonomia locale*, in *Urb. e app.*, 2011, 906 e ss; R. Villata (a cura di), *La riforma dei servizi pubblici locali*, Torino, 2011; C. Viviani, *La disciplina dei servizi pubblici locali di rilevanza economica: si definisce il quadro della Riforma del Governo Monti*, in *Urb. e app.*, 2012, 511; A. Arena, *La nozione di servizio pubblico nel diritto dell'integrazione economica. La specificità del modello sovranazionale europeo*, Napoli, 2011.

latter D.L. regulates procedures for management of local public services of economic importance, in compliance with EU regulations (Cons. St., V, April 11, 2011, No 2222). The D.L. 13 August 2011, No 138 *Ulteriori misure urgenti per la stabilizzazione finanziaria e per lo sviluppo* was converted with amendments by Art. 1, L. 14 September 2011, No. 148, Art. 4, *Adeguamento della disciplina dei servizi pubblici locali al referendum popolare e alla normativa dall'Unione europea*, substituting the previous regulations. This law does not apply to the water service and does not provide the competitive award procedure to "in house" companies which are entirely public owned when the economic value of the service is equal to or less than the total sum of 900,000 Euros per year (§ 13).

The new Government regulation enforcing the code specified some aspects of the public procurement procedure for alternative catering services (Art. 285 which defines the activity covered by the service, identifies as preferential criterion for the awarding of the contract that of the economically most advantageous bid providing for the obligation of motivation in the case of the application of the criterion of the lowest price, a list of examples of the assessment criteria of the bids) and of cleaning of buildings (Art. 286 identifies evaluation criteria which have to be considered for the awarding, their relative weighting, the content of the technical report, the modalities for awarding points).

5.2 *Qualitative selection of tenderers and technical specifications*

In Italy, there's a specific system for **work suppliers' suitability requirements' verification**[23], according to which licensed private companies (SOAs see: Autorità per la

[23] **WORK SUPPLIERS QUALIFICATION SCHEME**: C. Contessa, *Giunge alla consulta la questione dell'obbligo per le SOA di svolgere attività in via esclusiva*, in *Urb. e app.*, 2012; L. Perfetti, *Sulla necessità di distinguere fra*

Vigilanza sui contratti pubblici, Determinazione, 15 March 2011, No. 1, concerning c*hiarimenti in ordine all'applicazione delle sanzioni alle SOA previste dall'articolo 73 del D.P.R. 5 ottobre 2010, No. 20*) have the task of certifying and assessing the qualification requirements of undertakings which provide works (Artt. 34 and 40, PCC). The suitability requirements of suppliers and service providers can be self-declared by the latter and their assessment is done by each single contracting authority within each single awarding procedure, thus entailing a considerable amount of time and resources. The verification concerns the winning tenderer and at least 10 % of the other participants chosen by lot (Art. 48 PCC see: Autorità per la Vigilanza sui contratti pubblici, Determinazione 21 Maggio 2009, No. 5, *Linee guida per l'applicazione dell'Art. 48 del D.lgs. No. 163/2006*)).

The extreme detailed Italian discipline on suitability requirements (including personal situation, economic and financial standing and technical and professional ability) often leads to interpretative issues which courts try to settle through the application of principles such as ***favor partecipationis*****, equality of treatment** and **non-discrimination**[24], in order to allow for the widest possible participation (Cons. St., V, 2 February 2012, No. 546).

The Italian PCC was amended in order to comply with an ECJ decision (ECJ, IV, 19 May 2009, C-538/2007) stating that any national provision defining cases of exclusion from an awarding procedure has to be proportional and reasonable and the exclusion shall

pincipes sans texte e sans fondament. *Considerazioni in merito a requisiti di qualificazione, quote di partecipazione in associazioni o raggruppamenti e di esecuzione di lavori pubblici*, in *Foro amm*., *C.d.S*., 2011, 2142 – 2149; L. Giampaolino*, Il codice degli appalti e il sistema di qualificazione*, in *Riv. trim. appalti*, 2009, 301.

[24] ***FAVOR PARTECIPATIONIS*** **AND EQUALITY OF TREATMENT:** S. Usai, *L'interpretazione delle clausole ambigue inserite nella* lex specialis *della gara*, in *Urb. e app*., 2010, 1319; S. Monzani, *L'integrazione documentale nell'ambito di un appalto pubblico tra esigenze di buon andamento e di tutela della par condicio dei concorrenti*, in *Foro Amm. – C.d.S*., 2009, 2346; I. Filippetti, *Par condicio e favor partecipationis nell'interpretazione degli atti di gara*, in *Urb. e app.*, 2009, 821.

follow a specific procedure which the participants are allowed to take part in. The Italian PCC presently (Art. 38) provides for the exclusion of participants who are substantially and mutually linked only insofar as it is proved that the relevant offers of the linked participants come from the same decisional structure (Cons. Stato, VI, 25 January 2010, No. 247; Cons. Stato, VI, 26 February 2010, No. 1120; C.G.A., 21 April 2010, No. 546; Cons. Stato, VI, 7 April 2010, No. 1967; Cons. St., V, 6 April 2009, No. 2139; Cons. St., V, 8 September 2008, No. 4267). This is the case of firms using the same venues, having the same telephone number, whose chief executives are relatives (Cons. Stato V, 10 February 2010, No. 690). Italian case-law requires a specific procedure to assess the **substantial links**[25] among tenderers in order to allow their exclusion Cons. St., IV, 12 March 2009 No. 1459; C. Stato, V, 20 August 2008, No. 3982; Cons. Stato, IV, 28 January 2011, No. 673; Cons. Stato, V, 30 November 2011, No. 6329) and rules for the recording of the exclusion by the Authority for the Supervision of Public Contracts (Cons. Stato, VI, 15 June 2010, No. 3754; Cons. Stato, VI, 5 February 2010, No. 530).

A widespread ground of exclusion is the false or defective self-declaration of the **personal situation requirements**[26] by the tenderers (T.a.r. Piemonte, II, 16 March 2009,

[25] **SUBSTANTIAL RELATIONSHIP AMONG TENDERERS**: S. Monzani, *L'estensione del divieto di partecipazione ad una medesima gara di imprese controllate o collegate in nome della tutela effettiva della concorrenza*, in *Foro Amm. – C.d.S.*, 2009, 666; M. Briccarello, *Collegamento sostanziale: il superamento del divieto assoluto di partecipazione alla gara*, in *Urb. e app.*, 2010, 731; S. Ponzio, *Il procedimento per l'accertamento del "collegamento sostanziale" tra imprese negli appalti pubblici*, in *Foro Amm. – C.d.S.*, 2010, 1795.

[26] **PERSONAL SITUATION**: G. Ferrari, *Dichiarazione personale del possesso del requisito di moralità da parte dei singoli rappresentanti dell'impresa*, in *Giornale Dir. Amm.*, 2010, 537; G. Manfredi, *Moralità professionale nelle procedure di affidamento e certezza del diritto*, in *Urb. e app.*, 2010, 508; A. Azzariti, *Requisiti di capacità tecnico-professionale e cause di esclusione negli appalti di forniture delle asl*, in *Sanità pubbl. e privata*, 2009, 5, 77; G. Ferrari - L. Tarantino, *Revoca di aggiudicazione provvisoria per condanna penale dell'amministratore e direttore tecnico*, in *Urb. e app.*, 2009, 1518; P. Patrito, *L'Art. 38 del codice dei contratti pubblici nuovamente al vaglio della giurisprudenza*, in *Urb. e app.*, 2009, 858; D. De Carolis, *Vicende soggettive delle imprese, obblighi del partecipante e poteri della stazione appaltante*, in *Urb. e app.*, 2009, 327; F. Bertini, *Durc e gare di appalto, tra dubbi e certezze*, in *Urb. e app.*, 2009, 10, 1214; G. Ferrari, *Verifica dei requisiti di ammissione in caso di*

No. 772; Cons. Stato, V, 2 February 2010, No. 428; Cons. Stato, VI, 6 April 2010, No. 1909; Cons. Stato, V, 11 May 2010, No. 2822; Cons. Stato, VI, 22 February 2010, No. 1017; Cons. Stato, V, 13 July 2010, No. 4520; Cons. Stato, V, 26 May 2010, No. 3364; Cons. Stato, V, 23 February 2010, No. 1040 Cons. Stato VI, 12 April 2011, No. 2257; Cons. Stato, V, 21 October 2011, No. 5674; Cons. Stato, IV, 22 November 2011, No. 6153; Cons. Stato, VI, 18 January 2012, No. 178; Cons. Stato, V, 2 February 2012, No. 527) that are required even with regard to the economic operator whose qualitative requirements the tenderer relies upon (Cons. Stato, VI, 6 April 2010, No. 1930; Cons. Stato, V, 23 February 2010, No. 1054; Cons. Stato, VI, 15 June 2010, No. 3759; Cons. Stato, , V, 23 May 2011, No. 3077; Cons. Stato, III, 15 November 2011, No. 6040). Italian PCC provides also for the exclusion of tenderers who has incurred in previous breaches of public contract even if agreed upon with other contracting authorities (Art. 38, § 1, lett. f, PCC; Cons. Stato, V, 15 march 2010, No. 1550; Cons. Stato, VI, 28 July 2010, No. 5029; Cons. Stato, V, 5 July 2011, No. 4025; Cons. Stato, III, 4 November 2011, No. 5866; Cons. Stato, V, 28 December 2011, No. 6951).

From 2013 the contracting authorities will acquire the data demonstrating possession of the technical, organizational, economic, financial and general requirements needed to participate in the procedures regulated by the P.C.C. through the **Public Contract National Database** at the Italian Authority for the Supervision of Public Contracts (P.C.C., Art. 6 *bis*, introduced by Art. 20, c. 1, lett. a), D.L., 9 February 2012, No. 5, converted into L. 4 April 2012, No. 35). This Authority will define the data which should be included in Database and the updating procedures.

In 2011 the regulation of the general requirements of tenderers (P.C.C., Art. 38) was amended. For example, the requirement for professionals working in enterprises to

scissione societaria, in *Giornale dir. amm.*, 2009, 539; M. Napoli, *Imprese vittime della criminalità organizzata ed esclusione dalle pubbliche gare*, in *Urb. e app.*, 2009, 1413; F. A. Giordanengo, *Sulle caratteristiche essenziali dei consorzi stabili*, in *Foro Amm. - T.a.r.*, 2010, 1567.

have a clean criminal record has been further tightened (Art. 38, lett. b) and c) of the P.C.C.). However, their exclusion would no longer be valid in the case of depenalisation, rehabilitation, extinguishment of the offence or reversal of judgment. Tax evasion (D.L. 2 March 2012, No. 16, converted with amendments into L. 26 April 2012, No. 44) is considered serious criminal conduct entailing exclusion from the tender if the amount exceeds ten thousand Euros (D.L. 13 May 2011, No. 70, Art. 4, converted into L. 12 July 2011, No. 106)[27].

A **mandatory exclusion of tenderers clause**[28] has been introduced in the awarding procedure (D.L. 13 May 2011, No. 70, Art. 4, converted into L. 12 July 2011, No. 106). The contracting entities will thus exclude the tenderers only on grounds of non fulfillment provided by P.C.C. by its regulation of implementation and execution and of the other law provisions, and "in cases of absolute uncertainty of the contents and origins of the tender; lack of signature or any other essential elements or if the package containing the tender or applications has been tampered with or any other irregularities regarding the packaging leading to the suspicions that the confidentiality principle of the tender has been violated in the specific case". Any other exclusion clauses are considered unenforceable.

[27] I. Pagani, *La valutazione della stazione appaltante sulla gravità degli inadempimenti contributivi*, in *Urb. e app*., 2012; F. A. Giordanengo, *Sulla dichiarazione sostitutiva ex art. 38 D.Lgs. 163/2006 resa con riferimento ai soggetti cessati*, in *Urb. e app*., 2011, 1440.

[28] **MANDATORY EXCLUSION OF TENDERERS CLAUSE:** C. E. Gallo, *Le prescrizioni a pena di esclusione alla luce dell'Art. 46, comma 1 bis, del codice dei contratti pubblici*, in *Foro amm. - Cd.S*., 2011, 3733; R. Giani, *Le cause di esclusione dalle gare tra tipizzazione legislativa, bandi standard e dequotazione del ruolo della singola stazione appaltante*, in *Urb. e App*., 2012, 95 e ss.; A. Massera, *Il "decreto sviluppo"*, in *Giornale Dir. Amm*., 2011, 1049; R. De Nictolis, *Le novità del D.L. 70/2011*, in *Urb. e app*., 2011, 1012; S. Ponzio, *I limiti all'esclusione dalle gare pubbliche e la regolarizzazione documentale*, in *Foro Amm. – C.d.S*., 2011, 2464 e ss.

5.3 Award criteria

The **distinction between qualitative requirements and selection criteria**[29] (ECJ, I, 24 January 2008, in C-532/06, *Emm. G. Lianakis AE* v *Dimos Alexandroupolis*; Circolare del Dipartimento per le Politiche Europee della Presidenza del Consiglio, March 1 2007; Cons. St., V, No. 2716/2009) is still debated in Italy since Italian administrative courts allow or the evaluation of subjective elements whenever they seems decisive in granting the fair performance of the contract, mainly in case of services contract (Cons. St., V, 21 May 2010, No. 3208; Cons. St., V, 12 June 2009, No. 3716; Cons. St., V, 2 October 2009, No. 6002; Cons. Stato, V, 22 June 2010, No. 3887).

In case of awarding on the ground of the **most economically advantageous tender criterion**[30] (Autorità per la Vigilanza sui contratti pubblici, *Il criterio di aggiudicazione dell'offerta economicamente più vantaggiosa*, December 2011; Id, Determinazione 24 November 2011, No. 7, Linee guida per l'applicazione dell'offerta economicamente più vantaggiosa nell'ambito dei contratti di servizi e forniture), the

[29] **DISTINCTION BETWEEN QUALITATIVE REQUIREMENTS AND SELECTION CRITERIA:** M. Pignatti, *Selezione dell'offferta e selezione dell'offerente: la distinzione fra la fvalutazione dei requisiti dell'offerente e la qualità dell'offerta*, in *Foro Amm*., C.d.S., 2010, 2414 e ss.; A. Annibali, *Requisiti di idoneità e criteri di aggiudicazione dell'offerta*, in *Urb. e app*., 2010, 201; M. E. Comba, *Selection and Award Criteria in Italian Public Procurement Law*, in *Public Procurement Law Review*, 2009, 122; A. Annibali, *Requisiti di idoneità e criteri di aggiudicazione dell'offerta*, in *Urb. e app*., 2010, 201.

[30] **MOST ECONOMICALLY ADVANTAGEOUS TENDER:** I. Franco, *Trasparenza e pubblicità nelle gare di appalto con il criterio dell'offerta economicamente più vantaggiosa*, in *Urb. e app*., 2009, 137; C. Contessa, *L'offerta economicamente più vantaggiosa: brevi note su un istituto ancora in cerca di equilibri*, in www.giustamm.it; A. Mascaro, *Appalti: il prezzo non prevale automaticamente sulla qualità se la lex specialis rispetta i parametri di proporzionalità e ragionevolezza*, in www.dirittoegiustizia.it.

contracting authority must appoint a **jury**[31] whose composition is defined by Italian PCC in details (Art. 84 PCC). The members of the jury must have adequate professional skills with regard to the subject-matter of the contract (Cons. Stato, IV, 10 January 2012, No. 27; Cons. Stato, III, 12 April 2011, No. 2265; Cons. Stato, V, 4 March 2011, No. 1386; Cons. Stato, IV, 31 March 2010, No. 1830; Cons. Stato, V, 14 June 2010, No. 3732; Cons. Stato, V, 30 April 2009, No. 2761) and they must be appointed before the opening of the envelopes that contain the offers (Cons. Stato, V, 6 July 10, No. 4311; Cons. Stato, V, 27 October 2011, No. 5740).

According to the principle of **transparency**[32], every sessions of the awarding body must be open to the public, the only exception being the evaluation of the single element of the most economically advantageous tender criterion by the jury (Cons. Stato, VI, 8 June 2010, No. 3634).

As the *Adunanza Plenaria of the Consiglio di Stato* declared (Cons. St., Ad. Plen., 28 July 2011, No. 13), when the **most economically advantageous tender**[33] is applied the envelopes that contain the technical offer have to be opened in public in order to check that all the required documents have been produced by the tenderers (d.P.R. 5 October 2010,

[31] **JURY**: M. Sichetti, *La commissione giudicatrice nella procedura di valutazione dell'offerta economicamente più vantaggiosa*, in *Corriere Merito*, 2010, 3; C. Silvestro, *Funzionari interni componenti delle commissioni giudicatrici e requisiti di professionalità*, in *Urb. e app*, 2009, 1373.

[32] **PUBLICITY OF SESSIONS**: R. Ricci, *Concentrazione, continuità e pubblicità delle sedute di gara: presupposti imprescindibili die lavori delle commissioni giudicatrici*, in *Foro Amm., C.d.S.*, 2011, 1241 e ss.; A. Valletti, *La pubblicità delle sedute di gara si estende all'offerta tecnica*, in *Urb. e app*., 2011, 11, 1314; A. Gandino, *Sulla pubblicità delle sedute di gara: riflessioni a margine della trasparenza amministrativa nel codice dei contratti pubblici (e non solo)*, in *Foro Amm.-Tar*, 2009, 1276.

[33] **MOST ECONOMICALLY ADVANTAGEOUS TENDER**: A. Valletti, *La pubblicità delle sedute di gara si estende all'offerta tecnica*, in *Urb. e app*., 2011, 1299.

No. 207, Art. 120 as amended by D.L. 7 May 2012, No. 52, Art. 12, converted in law 6 July 2012, No. 94).

As for the most economically advantageous tender (Art. 83, § 4, PCC), Italian rules compel contracting authorities to define in advance, within the contract documents, the elements of tender subject to evaluation and their relative weighting (Cons. Stato, III, 29 November 2011, No. 6306; T.a.r. Piemonte, II, 19 March 2009, No. 785). The jury is allowed to specify the criteria used to mark each element used to determine the most economically advantageous tender, providing that this specification do not entail a modification of the relevant criteria (Authority, opinion No. 119 of 22 January 2007; No. 90 of 20 March 2008; No. 125 del 23 April 2008; No. 183 del 12 June 2008; Cons. Stato, V, 8 September 2008, No. 4271; Corte di Giustizia, decision of 24 November 2005, case C-331/04).

The most economically advantageous tender criterion is sometimes applied in Italy by means of **mathematical formulae**[34] which should provide an easier marking of the single element of the tender, and can seem to be an aid to the objective evaluation of the tender. Nonetheless, they can be thwarted by tenderers and may lead to further criticalities instead of smoothing the process. The proportionality and reasonableness of these formulae are often subject to judicial review in order to avoid that a single element of the tender alone could turn to be decisive for the final awarding (Cons. Stato VI, 15 November 2011, No. 6023; Cons. Stato, V, 16 July 2010, No. 4624; Cons. Stato V, 9 April 2010, No. 2004; Cons. St., V, 22 June 2010, No. 3890; Cons. St., VI, 17 December 2008, No. 6278). Some problems may arise when the price element of the tender is zero[35], since the mathematical

[34] **MATHEMATICAL FORMULA**: M. Mattalia, *L'offerta economicamente più vantaggiosa e l'applicazione della formula matematica prevista dal disciplinare di gara*, in *Foro Amm. C.d.S.*, 2010.

[35] G. Ferrari, L. Tarantino, *Sugli esiti dell'offerta economica pari a zero*, in *Urb. e app.*, 2010, 1115 e ss.

formula becomes inapplicable or has an unexpected outcome (leading to a zero mark), thus leading to the exclusion of the tender (Cons, Stato, V, 16 July 2010, No. 4624).

In case of **abnormally low tenders**[36], the contracting authority shall verify their constituent elements by consulting the tenderer, taking account of the evidence supplied (Cons. Stato, III, 22 November 2011, No. 6144; Cons. Stato, VI, 24 August 2011, No. 4801; Cons. Stato, IV, 2 August 2011, No. 4593; Cons. Stato, VI, 15 July 2010, No. 4584; Cons. Stato, IV, 30 October 2009 No. 6708; Cons. St., V, 13 February 2009 No. 826; T.a.r. Puglia, Lecce, III, 24 September 2009 No. 2186) even when the contract documents require the tenderer to provide in **advance**[37] the justifications of some elements of the tender when the latter is submitted (Cons. Stato, V, 17 February 2010, No. 922; Cons. Stato, VI, 2 April 2010, No. 1893 Cons. Stato VI, 2 April 2010, No. 1893; Cons. Stato V, 19 September 2011, No. 5279). To that aim, among the details of the constituent elements of the tender which can be considered relevant are: the possible economic exploitation of the service provided in other markets or other contractual relationships (Cons. Stato, V, 2 February 2010 No. 443), the timetable of the contract perfomance (T.a.r. Calabria, Reggio Calabria, 4 June 2010 No. 532) and the reutilization of materials and ancillary services produced during the contract perfomance (T.a.r. Lazio, Roma, III *ter*, 20 may 2010 No. 12518).

[36] **ABNORMALLY LOW OFFER**: M. Pignatti, *Il giudizio sulle offerte anomale tra effettività del contraddittorio ed oggettività nelle valutazioni*, in *Foro Amm. – C.d.S.*, 2009, 1302; T. Del Giudice, *La rilevanza della concorrenza «effettiva» nel giudizio di anomalia dell'offerta: riflessioni in ordine alla compressione dell'utile d'impresa*, in *Foro Amm. – Tar*, 2009; A. Manzi, *Le novità in materia di offerte anomale*, in *Urb. e app.*, 2010, 270; E. Santoro, *Offerte anomale e calcolo del costo del lavoro: favor per le imprese che assumono lavoratori dalle liste di mobilità*, in *Urb. e app.*, 2010, 208; L. Masi, *Offerte con ribassi identici nel procedimento di determinazione della soglia di anomalia*, in *Urb. e app.*, 2010, 186; L. Miconi, *Il problema dei ribassi elevati nell'affidamento dei servizi di architettura e ingegneria: breve commento al nuovo regolamento di attuazione del d.leg. 163/2006 e parere del consiglio di stato No. 313/2010*, in *www.giustamm.it.*

[37] G. Fares, *Sulle conseguenze dell'omessa presentazione delle giustificazioni preventive*, in *Foro Amm.-Tar*, 2009, 813.

6. CONTRACTS BELOW EU THRESHOLDS

In Italy, public **contracts below threshold**[38] are highly widespread, commonly as a result of a lack of supply chain planning or malpractices in procuring management that can sometimes be regarded as subdivisions to prevent their falling within the scope of EU Directive, thus in breach of the latter (Art. 9, § 3, Directive No. 18/2004; Cons. Stato, V, 9 June 2008 No. 2803).

In Italy, public contracts below threshold are subject to the same principles but to simplified rules with respect to those applicable to the contracts above EU threshold: the contract notices can be published in any local newspapers and journals as well as only on the contracting authority's website, thus strongly limiting its advertising effect and reducing possible competition; the economic, financial and technical qualitative selection requirements are simpler and lower and the deadlines for tenders submission are shortened (Art. 121-124 PCC). The compliance with EU principles applicable to public contracts that fall outside the scope of EU directives of the rule which allows contracting authorities procuring below threshold to exclude abnormally low offer without requesting the tenderer any details of the constituent elements of his tender is still debated in Italy (Cons. Stato, cons. atti normativi, 6 February 2006 No. 355/06; ECJ, IV, 23 December 2009, in C-376/2008, *Serrantoni Srl and Consorzio stabile edili Scrl* v *Comune di Milano;* ECJ, IV 15 May 2008, C-147/06 *SECAP Spa* v *Comune di Torino* e C-148/06 *Santorso soc. coop. Arl* v *Comune di Torino*; Interpretative Communication on *relativa al diritto comunitario applicabile alle aggiudicazioni di appalti non o solo parzialmente disciplinate dalle direttive «appalti pubblici»*, in GUCE 1 June 2006, C-179/2).

[38] **CONTRACT BELOW THRESHOLD**: D. Dragos (eds.), *Outside the Procurement Directives - inside the Treaty?*, Djøf Publishing: Copenhagen, forthcoming; E. D'Arpe, *Le acquisizioni in economia di beni e servizi mediante la procedura di cottimo fiduciario*, in *Corriere merito*, 2009, 95; M. Giovannelli e F. Bevilacqua, *Ammissibilità della procedura negoziata ai contratti fino a cinquecentomila euro*, in *Urb. e app*., 2009, 401.

Besides the ordinary awarding procedures for public contracts below threshold, Italian PCC (Art. 125) allows contracting authorities to directly provide works, services and supply by means of using their own material and human resources (*amministrazione diretta*) or to enter into the public contract by means of a negotiated procedure (*cottimo fiduciario*: T.a.r. Campania, Napoli, I, 9 June 2010, No. 13722; T.a.r. Piemonte, II, 19 March 2009, No. 785: T.a.r. Toscana, II, 22 June 2010, No. 2025).

Contracting authorities often purchase below threshold through the e-marketplace established by Consip (*Mercato Elettronico della Pubblica Amministrazione*[39] - M.E.P.A.): through the MEPA, economic operators may offer supply and services to public authorities who can purchase directly without issuing any awarding procedure.

In the **procedures for works involving a contract value that is below the EU threshold,** if the value is worth less than one million euros (provided that at least ten subjects have been invited to tender) it is possible to award the contract using a negotiated procedure which does not require the prior publication of a call for tenders (D.L. 13 May 2011, No. 70, Art. 4, cit.). In the case of works whose value is less than 500,000 euros at least five subjects have to be called to tender. In this case subcontracting is limited to 20% of the value of the works of the main category. Also for the services and supplies contracts, the figure for directly awarding the contract by the person in charge of the procedure has been raised to forty thousand euros. For public contracts worth 1 million euros or less, or for services and supplies worth 100,000 euros or less if the lowest price criterion is applied, the contract awarding body can provide in the tender for the **automatic exclusion**[40] of any bids which present a percentage of reduction that is equal to or higher than the threshold of

[39] **E-MARKETPLACE – MERCATO ELETTRONICO DELLA PUBBLICA AMMINISTRAZIONE:** d.P.R. 4 april 2002, No. 101, Art. 11, *Regolamento recante criteri e modalità per l'espletamento da parte delle amministrazioni pubbliche di procedure telematiche di acquisto per l'approvvigionamento di beni e servizi*.

[40] **AUTOMATIC EXCLUSION:** F. Decarolis, *Cronaca di un fallimento annunciato: l'impiego dell'esclusione automatica negli appalti di lavori pubblici*, in *Giornale Dir. Amm.*, 2011, 1246.

anomaly. This faculty can be applied where the number of bids allowed is less than ten and in any case until 31 December 2012. This term has been postponed to 31 December 2013 raising the value by which the automatic exclusion is permissible up to the EU thresholds (D.L. 13 May 2011, No. 70, Art. 4, cit., c. 2, lett. ll, which amends Art. 253, c. 20 *bis* of P.C.C.).

The Regulation of the P.C.C. has amended the discipline of the **electronic market**. This has been defined as the instrument which allows telematic purchasing based on a system that activates awarding procedures which are entirely managed electronically and telematically. Procuring entities can use these procedures to purchase goods and services below the threshold both by competitively comparing public supply on the electronic market or supply received on the basis of a request for supply addressed to qualified suppliers. Purchases made by public authorities via the electronic market are expressly excluded from the application of the standstill period before the conclusion of the contract (P.C.C., Art. 11, c. 10 *bis*, lett. b), as amended by D.L. 7 May 2012, No. 52, Art. 11, converted in law 6 July 2012, No. 94).

This provision aims to prevent an aggravation of the awarding procedure, especially considering the recent Italian case law on the application of standstill period in the "cottimo fiduciario" procedure (T.A.R. Toscana, Firenze, 10 November 2010 No. 6570; T.A.R. Lazio, Roma, II *ter*, 11 April 2011, No. 3169).

7. ENVIRONMENTAL AND SOCIAL CONSIDERATIONS[41]

The Italian PCC, according to ECJ case-law (ECJ 17 September 2002, cause C-513/99, *Concordia Bus*), allows for social and environmental considerations to be include as qualitative selection criteria, technical specifications or most economically advantageous tender criteria (Art. 2, § 2 and Art. 83, § 1, lett. *E*, PCC).

Some social clauses are expressly provided by Italian legislation which automatically integrates the contract documents even when the latter do not explicitly provide so: it is the case of the compulsory employment of disabled persons (law 12 march 1999, No. 68; Cons. Stato, V, 19 June 2009, No. 4028). A commonly widespread social clause is also the one providing for the compulsory employment of the incumbent provider's employees by the winning tenderer, if compatible with the latter's organization chart (Cons. St., V, 16 June 2009, No. 3900).

[41] **SOCIAL AND ENVIRONMENTAL CONSIDERATIONS**: Commissione UE, *Buying Green! A Handbook on green public procurement*, 2011; Commissione UE, *Acquisti sociali. Guida alla considerazione degli aspetti sociali negli appalti pubblici*, 2011; R. Caranta – S. Richetto, *Sustainable Procurements in Italy: Of Light and Some Shadows*, in *The Law of Green and Social Procurement in Europe*, R. Caranta – M. Trybus (Eds.), Djøf Publishing: Copenhagen, 143; G. M. Racca, *Aggregate Models of Public Procurement and Secondary Considerations: An Italian Perspective*, in *The Law of Green and Social Procurement in Europe*, R. Caranta – M. Trybus (Eds.), Djøf Publishing: Copenhagen, 165; D. Perotti, *La «clausola sociale», strumento di salvaguardia dei lavoratori nel conferimento o nel trasferimento di attività a carattere economico-imprenditoriale da parte delle pubbliche amministrazioni*, in *Nuova rass*., 2009, 24; P. Cerbo, *La scelta del contraente negli appalti pubblici fra concorrenza e tutela della «dignità umana»*, in *Foro Amm. - T.a.r*., 2010, 1875; A. M. Balestrieri, *Gli "appalti riservati" fra principio di economicità ed esigenze sociali*, in *Urb. e app*., 2009, 789; G. Ferrari – L. Tarantino, *Gara pubblica e costo del lavoro*, in *Urb. e app*., 2009, 248.

8. CONTRACT PERFORMANCE[42]

The Italian PCC regulates the **public contract performance phase** as well (Cons. giust. amm. sic., giurisdiz., 21 July 2008, No. 600). Nevertheless, the quality standards promised with the tender submission is not always delivered and procuring entities often accept a different and less worse performance as far as the economic operators fail to fulfil the obligations undertaken[43]. Italian PCC compels the contracting authorities to appoint a supervisor of the contract performance (Art. 119, PCC) but breaches of contract still frequently happen because of lack of professional skills in managing the performance phase of the public contract.

The more detailed rules concern the execution of works contract (Art. 130 et seq. PCC): contracting authorities have the power of supervision of works which entails the power of issuing orders on the performance of works (Art. 1662 cod. civ.) (Cons. Stato, VI, 26 May 2010, No. 3347). A specific discipline concerns **subcontracting**[44] (Art. 118, PCC) which has to be authorized by the contracting authority (Cons. Stato, IV, 24 March 2010 No. 1713; T.a.r. Lazio, Roma, III, 4 January 2010 No. 34) and entails the disclosure of the

[42] **CONTRACT EXECUTION:** G. M. RACCA – R. CAVALLO PERIN – G. L. ALBANO, *Competition in the execution phase of public procurement*, in *Public Contract Law Journal*, vol. 41, no. 1, 2011, 89; M. E. COMBA, *L'esecuzione delle opere pubbliche. Con cenni di diritto comparato*, Torino, 2011.

[43] **CONTRACT PERFORMANCE**: M. Racca, R. Cavallo Perin, G. L. Albano, *Competition in the execution phase of public procurement*, in *Public Contract Law Journal*, 2011; M. E. Comba, *L'esecuzione delle opere pubbliche con cenni di diritto comparato*, Giappichelli, Torino, 2011; G. M. Racca, R. Cavallo Perin e G. L. Albano, *The safeguard of competition in the execution phase of public procurement: framework agreements as flexible competitive tools*, in *Quaderni Consip*, VI(2010); R. Cavallo Perin – G. M. Racca, *La concorrenza nell'esecuzione dei contratti pubblici*, in *Dir. amm*., 2010, 325; A. M. Balestreri, *L'applicabilità di meccanismi revisionali ai contratti di concessione di servizi*, in *Urb. e app*., 2009, 393.

[44] **SUBCONTRACTING**: G. Balocco, *Mancanza od irregolarità della dichiarazione di subappalto ed esclusione dalla gara*, in *Urb. e app*, 2009, 1132.

subcontractors at the tender submission (Cons. Stato, V, 14 May 2010 No. 3016; Cons. Stato, IV, 30 October 2009 No. 6708).

ECJ qualifies any amendments of the public procurement term and conditions during its performance as a new award in breach of EU rules on public contracts (ECJ, III, 19 June 2008, in C-454/06, *Pressetext Nachrichtenagentur GmbH* v *Republik Österreich*, see also: ECJ, III, 29 April 2010 C-160/08, *EU Commission* v *Germany*; ECJ, Grande, 13 April 2010, in C-91/08, *Stadt Frankfurt am Main*; ECJ, III, 25 March 10, in C- 451/08, *Helmut Müller GmbH*). In Italy any **extension of a public contract**[45], if not provided for in the contract documents and conditions, is forbidden as it account for a new direct award without any prior publication of the contract notice (Cons. Stato, VI, 16 February 2010, No. 850).

The fair and correct performance of the public contract is achieved also through the provision of penalties in case of breach of contract which, in case of severe misconduct, can lead to the termination of the contract (T.a.r. Campania, Napoli**,** I, 20 April 2010 No. 2026).

The new Government regulation enforcing the code, for service and supply contracts, provides that a **director of works** (arts. 301-301) may be added to the above directors (director in charge of the procedure and director in charge of the execution phase) in case of particularly complex contracts or contracts worth over € 500.000. The director of works, originally, was provided only for in the context of public works (cf. director of works).

In case of purchase by a contract or framework agreement carried out through a central purchasing bodies, this entity shall monitor and acquire further information regarding the execution of the contract relationship through the **Public Contracts**

[45] **EXTENSION OF PUBLIC CONTRACT**: S. Usai, *La proroga programmata del contratto d'appalto*, in *Urb. e app.*, 2010, 705; G. Ferrari - L. Tarantino, *Proroga contratti di trasporto*, in *Urb. e app.*, 2009, 1148.

Observatory (after the prior stipulation of agreement protocols for computer connection to the network).

In order to make transparent the public procurement market and implement forms monitoring activity of the individual contracting authority is imposed Observatory of public contracts to disclose data relating contracts awarded by contracting authorities using methods that allow the detection of aggregated information relating to the contracting authority, consultant and trader for the delivery item" (D.L. 7 May 2012, No. 52, Art. 8, converted in law 6 July 2012, No. 94) and to transmit the same to the Ministry of Economy and Finance and to the national central purchasing (Consip S.p.A.).

In the services and supplies sector the execution of the contract and its accounting (Art. 307) has been regulated with specific provisions (borrowed from sector of public works) on the subject of execution in advance (Art. 302), delayed starting of work (Art. 305) and suspension of execution (Art. 308), penalty clauses (Art. 298), testing and verification of conformity (arts. 312-325). With particular reference to the **penalty clauses** regarding delayed fulfilment of the contract obligations the regulation quantifies the pecuniary value that the director of the procedure can provide for when drawing up the project. A pecuniary penalty of between 0.3 per thousand and 1.0 per thousand of the net value of the contract for each day of delay can be inserted (Art. 145, c. 3). Moreover there is possibility of including in the contract an “acceleration reward” clause for the executor for each day before the contract deadline if the works are concluded in advance: this has been extended also to the services and supplies sector. In this case the reward is determined according to the same criteria established in the specifications or in the contract as for the calculation of the pecuniary penalty clause by means of utilizing the money for contingencies indicated in the economic framework of the work, provided that the contract has been executed in conformity with the obligations agreed. For public contracts for services and supplies whose execution may cause damage to the environment the contracting authorities are obliged to take into account criteria aimed at reducing use of natural resources, production of waste, energy saving, polluting emissions and environmental damage (Art. 281).

The Special Plan against organized crimes (L. 13 August 2010, No. 136, Art. 3) provides for the **traceability of financial flows**[46] regarding payments made to: contractors; subcontractors; subcontractors of the chain of production; public funding and European funding recipients/grantees of any kind interested in public works, services and supplies (Corte Cost., 23 February 2012, n. 35; T.A.R. Sicilia, Palermo, sez. I, 11 May 2012, n. 959; T.A.R. Sicilia Catania, sez. I, 15 February 2011, n. 389). The Plan also provides for the identification of a current account devoted to transactions with public administrations and it introduces the termination of the contract in the case of a conclusive conviction for the crimes of usury and money-laundering (P.C.C. Art. 135, amended by L. 27 January 2012, No. 3, Art. 3).

9. THE ITALIAN IMPLEMENTATION OF EUROPEAN REMEDIES DIRECTIVE 2007/66/EC

EU Directive No. 2007/66 has been implemented in Italy by the d.leg. 20 March 2010, No. 53 now included in the new Code of administrative procedure (*Codice del processo amministrativo*, d.lgs. 2 July 2010, No. 104 – hereafter CAP)[47]. The new Code of

[46] **TRACEABILITY OF FINANCIAL FLOWS:** B. M.Cavallo, *La tracciabilità dei flussi finanziari negli appalti pubblici. la recente normativa alla luce delle determinazioni dell'autorità per la vigilanza sui contratti pubblici*, in *Giur. merito*, 2011, 1500.

[47] **JUDICIAL REVIEW**: M. Comba, *Enforcement of EU Procurement Rules. The Italian System of Remedies*, in S. Treumer – F. Lichère (a cura di) *Enforcement of the EU Public Proocurement rules*, Djof Publishing: Copenhagen, 2011; M. RAMAJOLI, *Il processo in materia di appalti pubblici da rito speciale a giudizio speciale*, in (a cura di) G. GRECO, *Il sistema della giustizia amministrativa negli appalti pubblici in Europa*, Milano 2010, 47 e ss.; R. POLITI, *Il contenzioso in materia di appalti: dal recepimento della Direttiva ricorsi al Codice del processo amministrativo*, in *www.giustizia-amministrativa.it;* M. A. SANDULLI, *La fase cautelare*, in *Dir. proc. amm.*, 2010, 1130; E. FOLLIERI, *I poteri del giudice amministrativo nel decreto legislativo 20 March 2010 No. 53 e negli artt. 120-124 del codice del processo amministrativo*, in *Dir. proc. amm.*, 2010, 1067; M. Lipari, *La direttiva ricorsi nel codice del processo amministrativo: dal 16 september 2010 si cambia ancora?*, in *Foro Amm. - T.a.r.*, 2010,

administrative procedure (Art. 133) entrusts the administrative courts (Tribunali Amministrativi Regionali and Consiglio di Stato) with the power of declaring the ineffectiveness of the contract as a consequence of the award annulment and regulates the consequences of the failure to comply with the standstill period.

Before the implementation of EU Directive No. 2007/66, the **competence over public contracts litigation** was divided between the administrative court, as for the disputes concerning the awarding procedure, and the ordinary courts (tribunals, court of appeal, Cassazione), as for disputes regarding the contract performance which starts after the contract stipulation. After the implementation of EU Directive No. 2007/66, the administrative courts can declare the award void and the contract ineffective (Cass., SS.UU., ord. 5 March 2010, No. 5291; Cass., SS.U., ord. 10 February 2010, No. 2906; Cons. Stato, V, 15 June 2010, No. 3759), whereas the ordinary courts maintain the competence over the disputes raising during the performance phase (Cons. Stato, VI, 26 May 2010, No. 3347; Cons. Stato, V, 1 April 2010, No. 1885), save the application of

(5) LXXIII; M. Lipari, *Il recepimento della «direttiva ricorsi»: il nuovo processo super-accelerato in materia di appalti e l'inefficacia «flessibile» del contratto*, *www.giustamm.it*; V. Lopilato, *Categorie contrattuali, contratti pubblici e i nuovi rimedi previsti dal d.leg. No. 53 del 2010 di attuazione della direttiva ricorsi*, *www.giustamm.it*.; M. Lipari, *Annullamento dell'aggiudicazione ed effetti del contratto: la parola al diritto comunitario*, in *www.federalismi.it*; R. De Nictolis, *Il recepimento della direttiva ricorsi nel codice appalti e nel nuovo codice del processo amministrativo*, in *www.giustizia-amministrativa.it*; F. Saitta, *Contratti pubblici e riparto di giurisdizione: prime riflessioni sul decreto di recepimento della direttiva No. 2007/66/CE*, *www.giustamm.it*; F. Cintioli, *In difesa del processo di parti (note a prima lettura del parere del consiglio di stato sul «nuovo» processo amministrativo sui contratti pubblici)*, in *www.giustamm.it*; A. Bartolini - S. Fantini - F. Figorilli, *Il decreto legislativo di recepimento della direttiva ricorsi*, in *Urb. e app*., 2010, 638; S. Foà, *L'azione di annullamento nel Codice del processo amministrativo*, in *www.giustizia-amministrativa.it*; V. Cerulli Irelli, *Osservazioni sulla bozza di decreto legislativo attuativo della delega di cui all'Art. 44 l. No. 88/09*, in *www.giustamm.it*.; R. Caranta, *Il valzer delle giurisdizioni e gli effetti sul contratto dell'annullamento degli atti di gara*, in *Giur. It*., 2009, 6; F. Goisis, *Ordinamento comunitario e sorte del contratto, una volta annullata l'aggiudicazione*, in *Dir. proc. amm*., 2009, 116; R. Calvo, *La svolta delle sezioni unite sulla sorte del contratto pubblico*, in *Urb. e app*., 2010, 421.

special public law rules in this phase (e.g. subcontracting: Cons. Stato, IV, 24 March 2010, No. 1713).

The administrative courts shall grant the renewal of the illegal awarding phases and the following new award[48], whenever it is possible (Cons. Stato, V, 9 March 2010, No. 1373). After the contract subscription, the administrative judge can declare its **ineffectiveness** whenever: a) the award was done without prior publication of the contract notice; b) the award followed a negotiated procedure or direct provision of works, services and supply outside the cases; c) the contract was subscribed not complying with the standstill period (Art.121-122, CAP). Whenever the declaration of ineffectiveness is not possible, the judge will rule for compensation of damages[49] (Cons. Stato, V, 15 June 2010, No. 3759 where few months were left before the conclusion of the contract performance).

Italian law implemented the EU rules on the **standstill period**, setting a period of 35 days before the signing of the contract (Art. 11, § 10-10bis PCC; T.A.R. Campania, Napoli, I, 14 July 2010, No. 16776), as well as the relevant derogations provided for in EU Directive No. 89/665/EEC, Art. 2*b* as amended by EU Directive No. 2007/66.

[48] F. Tallaro, *L'esecuzione in forma specifica dell'obbligo di contrarre nei confronti della pubblica amministrazione*, in *Rivista NelDiritto*, 2009, 1195; G. Ferrari - L. Tarantino, *Obbligo della stazione appaltante di formulare una nuova graduatoria di gara*, in *Urb. e app*, 2009, 1385; M. Sinisi, *Il potere di autotutela nell'ambito delle procedure di gara fra annullamento dell'intera procedura e annullamento dei singoli atti della medesima sequenza procedimentale*, in *Foro Amm.-Tar*, 2009, 31; M. Didonna, *Il subentro nel contratto di appalto dopo l'annullamento dell'aggiudicazione*, in *Urb. e app*., 2010, 588; V. De Gioia, *Autotutela demolitoria e risarcimento dell'aggiudicatario*, in *Urb. e app*., 2009, 429.

[49] **COMPENSATION FOR DAMAGES:** E. Boscolo, *L'intervenuta esecuzione dell'opera pubblica: il limite all'annullamento e la sequenza accertamento-risarcimento*, in *Urb. e app*., 2010, 89; A. Reggio d'Aci, *Il G.A. riduce le prospettive di risarcimento per mancata aggiudicazione*, in *Urb. e app*., 2009, 557; B. Gagliardi, *Esecuzione di un contratto* sine titulo, *arricchimento senza causa e diritto all'utile di impresa*, in *Dir. proc. amm*., 2009, 806.

Alternative penalties have been implemented in Art. 123 of the CAP for the cases in which the principle of ineffectiveness is deemed to be inappropriate, with the imposition of fines to the procuring entity of a penalty ranging from 0.5% to 5% of the total value of the award price. Such fines will be included in the State's budget. An alternative penalty provides the shortening of the duration of the contract, ranging from 10% to a maximum of 50% of the remaining duration of the contract.

The quantification of damages[50] for illegal awarding of a public contract amounts in any case to the expenses sustained in preparing and submitting the tender and, only if the economic operator is able to prove that he would have been the awarding firm, also to the profit the economic operator would have gained by performing the contract (max. 10% of the contract value profit provided for by Art. 345 Law 20 march 1865, No. 2248, all. F is only a guideline). The lost profit should amount to less than 10% reaching up to 5% of the contract value whenever the economic operator fails to prove the impossibility of using its own technical and human resources and machinery in performing other contracts (Cons. Stato, VI, 21 September 2010, No. 7004). The amount of compensation is further reduced when there is no evidence of the right to the award of the contract. Damages may also refer to the loss of qualitative selection requirements the economic

[50] **QUANTIFICATION OF DAMAGES**: S. Osella, *La centralità del tempo nella valutazione della correttezza della Pubblica amministrazione*, in *Foro Amm. – CDS*, 2012, 649; G. Crepaldi, *La revoca dell'aggiudicazione provvisoria tra obbligo indennitario e risarcimento*, in *Foro Amm. – C.d.S.*, 2010, 868; G. M. Racca, *Contratti pubblici e comportamenti contraddittori delle pubbliche amministrazioni: la responsabilità precontrattuale*, in *Rivista NelDiritto,* No. 2/2009, 281; H. Simonetti, *Il giudice amministrativo e la liquidazione del danno: temi e tendenze*, in *Foro it.*, 2009, III, 313.

operator would have achieved with the contract performance (amounting to a 1-5% of the contract value) (Cons. Stato, VI, 27 April 2010, No. 2384).

iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

BOOK REVIEW

L. RODRIGUE, *Les aspects juridiques de la régulation européenne des reseaux*, Bruylant, Bruxelles, 2012, ISBN: 978-2-8027-3454-3, 499 pages

(November 2012)

dott. Dario CASALINI

The book addresses one of the core issue of EU efforts towards the establishment of a unique market: the legal framework of essential (e.g. energy, telecommunications) networks regulation. The books analyses the interplay between the competences of EU institutions and Member States on networks regulation, thus revealing one of the most decentralised sector of our common market where cooperation among market players as well as among national regulatory authorities spontaneously blossomed.

The opening up of market sectors historically dominated by national legal public monopoly by means of the separation of the management of the non duplicable network and the provision of services through it cannot be achieved without a stronger European common regulation of the network itself. The inescapable interconnections among the national networks requires more and more a supranational approach grounded on the traditional EU law neutrality regarding the ownership models of such essential networks (art. 345 TFEU).

The book provides a coherent and comprehensive overview of the common issues undermining the overlapping of different regulatory levels and actors, finally pinpointing the opportunities offered by a strengthened uniform regulation at EU level. Decentralised regulatory systems increase operators' transaction costs and

public costs in exercising regulatory functions and hinder the efficiency of regulation itself as well as its understanding by the recipient market operators.

Firstly the Author investigates the several mechanisms of self-regulation or cooperative regulation put in place by the associations among economic operators acting in a particular market sector (e.g. electricity, natural gas, telecommunications, railways,). Those associations offer the chance for sharing best practices, defining common goals and strategies as well as establishing shared rules as soft law instruments.

The stronger examples of self-regulation mechanisms are those offered by networks (railway, energy, telecommunication) operators whose fundamental duty is neutrality and impartiality in granting equal access to networks to any service provider interested in exploiting the essential facility. Among them, the establishment of an energy stock exchange and the role played by the European Federation of Energy Traders (EFET) to that aim represents one of the most interesting experience so far.

Besides market operators' associations, several forms of cooperation have been experienced even by the relevant national regulatory authorities (e.g. European Regulators Group - ERG). Many of these initially informal attempts of coordination of national regulatory practices have been institutionalised afterwards and formally recognised by EU institutions and EU framework directives (i.e. telecommunications, energy, railways), often through the imposition of duties of cooperation legally enforceable on each national regulation authority. The mutual disclosure of documents and sometimes the joint running of regulatory procedures have been the milestones these forms of cooperation are built on.

New forms of institutional cooperation in regulation are more recently experienced in the radio spectrum regulation at EU level (see Decision n. 676/2002/CE) where the attempt in defining a common European policy aims to

achieve a stronger harmonization of national rules granting radio frequencies. Similar efforts with completely different outcomes are taking place as for internet regulation where technical standardization is lead by private associations of operators, displacing any public authorities intervention.

The book underlines the interplay between the regulatory functions of EU Commission and those left to national regulatory authorities along with the judicial review of the latter exerted by national courts. The principle of subsidiarity governs the allocation of competences between EU institutions and national authorities and brings about a stronger and stronger delegation of technical regulatory functions to European agencies established *ad hoc*.

The EU Commission is entrusted with both legislative and executive functions, thus acting as a regulator on both sides by means of hard law and soft law instruments. The definition of rules aiming at introducing or strengthening competition within the network industries markets by EU Commission (and sometimes EU Council) entails policy decisions whose enforcement is supervised and ensured both at European and national level. Bottom-up, the lobbying activities of technical committees and market operators influence the definition of common European rules. Top-down, such rules are implemented by the double and sometimes joint action of EU institutions and national regulatory authorities and judges. To that aim, EU Commission favours the active participation of national authorities in carrying out such regulatory tasks, in compliance with the fundamental principles of subsidiarity and proportionality.

The book outlines the importance and benefits of improving the ascendant effect of subsidiarity, thus expressing a clear preference towards EU institutions' interventions rather than national differentiations in carrying out such regulatory tasks (as regulatory experiences in the electric energy sector suggest). Firstly, regulatory activity at EU level can better benefit and rely on those mechanism of self- and co- regulation offered by agencies and market operators' associations

besides EU Commission fundamental role. Secondly, the geographical dimension, the opportunity of scale and scope economies as well as the supranational interconnections of industrial network regulation ask for a uniform approach, able to minimize the transactional costs brought about by national regulatory fragmentation. Moreover, such fragmentation jeopardizes not only the decisional process (creating rather than solving informational asymmetries) but even its comprehension and understanding by its own recipients.

Nonetheless, the flexibility undermining the principle of subsidiarity allows different approaches that best fit the industrial sector considered. The application of subsidiarity requires both a qualitative and quantitative assessment of the situation to be regulated, thus providing for the best solution, whether at EU or national level.

iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

BIENES Y OBRAS PÚBLICAS

INFORME ANUAL – 2012- ESPAÑA

(Enero 2012)

Prof. Francisco LÓPEZ MENUDO*

ÍNDICE

* Catedrático de Derecho Administrativo. Universidad de Sevilla. España.

1. INTRODUCCIÓN

En el número anterior, con el que se inauguraba esta serie de crónicas en materia de bienes y obras públicas, se recogían las novedades habidas durante el año 2010 así como las del primer semestre del año 2011 al objeto de incluir en lo posible la información más actualizada disponible al momento de su publicación. En esta ocasión se ha optado por recoger las novedades del segundo semestre del año 2011 con la finalidad de cerrar el año natural y el propósito de que las crónicas sucesivas abarquen el año completo de enero a diciembre.

Debe adelantarse que no obstante el breve periodo que abarca esta crónica, por el motivo antes indicado, unido al cese de la actividad parlamentaria estatal por la convocatoria de elecciones generales por Real Decreto 1329/2011, de 26 de septiembre, no ha impedido la aparición de novedades de relativa importancia. Así, en materia de bienes públicos y en el ámbito de la legislación estatal, las novedades más significativas vienen referidas a: a) la gestión y competencias en materia de aguas interiores; b) la aprobación del texto refundido de la Ley de Puertos; c) la gestión y conservación de bienes públicos de marcada trascendencia histórico-cultural como es el caso de los documentos obrantes en los archivos de titularidad estatal; d) el alcance de las obligaciones de descontaminación y recuperación de suelos en los casos de titularidad pública. En materia de obras públicas e infraestructuras la normativa acaecida se refiere a determinados aspectos puntuales de la planificación y desarrollo de infraestructuras aeronáuticas, siendo además de obligada mención la aprobación del texto refundido de la Ley de Contratos del Sector Público siquiera sea por la incidencia inmediata de la normativa de contratación en el desarrollo de las obras públicas. Por otra parte, en cuanto a la producción normativa de las Comunidades Autónomas en materia de bienes públicos, la misma viene referida a la aprobación de Ley de Patrimonio de la Comunidad de Galicia, a la modificación de aspectos puntuales de las leyes de cabecera en otras Comunidades Autónomas y a la regulación del patrimonio documental autonómico de Andalucía. En cuanto a la actividad normativa autonómica relativa a obras públicas e infraestructuras, las novedades se presentan en disposiciones que afectan a la gestión y planificación de las infraestructuras, así como al desarrollo e implantación de actuaciones territoriales estratégicas.

2. LEGISLACIÓN EN EL ÁMBITO ESTATAL

2.1 En materia de bienes

Una de las mayores novedades del período viene referida al otorgamiento a las Comunidades Autónomas determinadas facultades de policía sobre el dominio público hidráulico en las cuencas intercomunitarias, recogido en el **Real Decreto-ley 12/2011, de 26 de agosto, por el que se modifica la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, para la aplicación del Convenio Internacional sobre el embargo preventivo de buques y se regulan competencias autonómicas en materia de policía de dominio público hidráulico.** El Real Decreto-ley introduce una nueva Disposición Adicional Decimocuarta en el texto refundido de la Ley de Aguas (RDL 1/2001, de 20 de julio) por la que se establece que en las cuencas hidrográficas intercomunitarias, corresponderá a las Comunidades Autónomas que tengan prevista la competencia ejecutiva sobre las facultades de policía de dominio público hidráulico en sus Estatutos de Autonomía, el ejercicio, dentro de su ámbito territorial, de las funciones señaladas en el apartado 2 del artículo 94 de la Ley de Aguas (que refiere el catálogo de funciones de policía del dominio público hidráulico en las cuencas intercomunitarias), así como la tramitación de los procedimientos a que den lugar dichas actuaciones hasta la propuesta de resolución. Se materializa así la posibilidad recogida por la doctrina del Tribunal Constitucional que recientemente se ha expresado en la Sentencia 30/2011 de 16 de marzo, en cuyo FJ 12 puede leerse que "*nada impide que la legislación estatal de aguas confiera a las Comunidades Autónomas funciones o facultades de "policía del dominio público hidráulico" en cuencas intercomunitarias (STC 161/1996, de 17 octubre), o que, según el art. 17 d) de la Ley de Aguas, entre las funciones del Estado en relación con el dominio público hidráulico se encuentre el otorgamiento de autorizaciones cuya tramitación puede encomendarse a las Comunidades Autónomas".*

Asimismo, en relación con las competencias y funciones sobre las aguas hay que resaltar **el Real Decreto 1498/2011, de 21 de octubre, por el que, en ejecución de sentencia, se integran en la Administración del Estado los medios personales y materiales traspasados a la Comunidad Autónoma de Andalucía por el Real Decreto 1666/2008, de 17 de octubre**, que obedece a la anulación por las sentencias del Tribunal

Supremo de 13 y 14 de junio de 2011 del Real Decreto 1666/2008, de 17 de octubre, por el que se traspasaron a la Comunidad Autónoma de Andalucía las funciones y servicios de la Administración del Estado en materia de recursos y aprovechamientos hidráulicos correspondientes a las aguas de la cuenca del Guadalquivir que discurren íntegramente por el territorio de la Comunidad Autónoma. El Real Decreto 1666/2008, ahora anulado, había tomado como fundamento competencial el artículo 51 de la Ley Orgánica 2/2007, de 19 de marzo, de reforma del Estatuto de Autonomía para Andalucía, que atribuyó a la Comunidad Autónoma "competencias exclusivas sobre las aguas de la Cuenca del Guadalquivir que transcurren por su territorio y no afectan a otra Comunidad Autónoma, sin perjuicio de la planificación general del ciclo hidrológico, de las normas básicas sobre protección del medio ambiente, de las obras públicas hidráulicas de interés general y de lo previsto en el artículo 149.1.22.ª de la Constitución". Dado que la sentencia del Tribunal Constitucional 30/2011 de 16 de marzo de 2011, declaró la inconstitucionalidad y nulidad del citado artículo 51 del Estatuto Andaluz, el Tribunal Supremo anula el Real Decreto 1666/2008 haber desaparecido su base competencial.

En relación con el uso y aprovechamiento del dominio público hidráulico, el **Real Decreto-ley 8/2011, de 1 de julio, de medidas de apoyo a los deudores hipotecarios, de control del gasto público y cancelación de deudas con empresas y autónomos contraídas por las entidades locales, de fomento de la actividad empresarial e impulso de la rehabilitación y de simplificación administrativa,** ha modificado el apartado 3 del artículo 25 del Texto Refundido de la Ley de Aguas (Real Decreto Legislativo 1/2001 de 20 de julio) al objeto de eliminar la mención a las licencias locales. Con ello únicamente se pretende seguir perfilando el mecanismo de reducción de la intervención administrativa previa al ejercicio actividades de servicios instaurado por la Directiva 123/2006/CEE, de Servicios, que ya se había regulado en el ámbito local mediante la introducción por la Ley 2/2011, de 4 de marzo, de Economía Sostenible, de un nuevo artículo 84 bis en la Ley 7/1985, de 2 de abril, reguladora de las Bases del Régimen Local, que establece que, con carácter general, el ejercicio de actividades por los particulares no queda sujeto a la obtención de previa licencia municipal u otro medio de control preventivo.

Siguiendo con las novedades en materia de aguas, es preciso dar cuenta de la aprobación de diversos Reales Decretos acaecidos en relación con los aspectos organizativos de gestión y de planificación hidráulica. Por una parte, el **Real Decreto 1219/2011, de 5 de septiembre por el que se aprueba el Plan de gestión del distrito de cuenca fluvial de Cataluña,** y por otra, una serie de **Reales Decretos referidos todos ellos a la regulación de funciones, atribuciones y régimen de funcionamiento de los Consejos del Agua de las distintas demarcaciones**. Se trata en estos casos del desarrollo reglamentario de las previsiones del texto refundido de la Ley de Aguas, (RDL 1/2001, de 20 de julio) que establece el Consejo del Agua de la Demarcación como órgano de participación y planificación hidrológica en las demarcaciones hidrográficas con cuencas intercomunitarias, con lo que se sustituyen los Consejos de Agua de la Cuenca creados por la Ley 29/1985, de 2 de agosto, de Aguas. Por vía de simple enumeración, se han creado los Consejos del Agua de la Demarcación Hidrográfica del Duero (**RD 1364/2011, de 7 de octubre)**, Demarcación Hidrográfica del Miño-Sil (**RD 1365/2011, de 7 de octubre**), Demarcación Hidrográfica del Ebro (**RD 1366/2011, de 7 de octubre**), Demarcación Hidrográfica del Guadiana (**RD Real Decreto 1389/2011, de 14 de octubre**), Demarcación Hidrográfica del Cantábrico Oriental (**RD 1627/2011, de 14 de octubre**),Demarcación Hidrográfica del Cantábrico Occidental (**RD Real Decreto 1626/2011, de 14 de noviembre**), Demarcación Hidrográfica del Tajo (**RD 1704/2011, de 18 de noviembre**) y Demarcación Hidrográfica del Segura (**RD 1705/2011, de 18 de noviembre**) .

En materia de puertos, cabe resaltar como una de las novedades más significativas la aprobación del **Real Decreto Legislativo 2/2011, de 5 de septiembre, por el que se aprueba el Texto Refundido de la Ley de Puertos del Estado y de la Marina Mercante.** La conveniencia de la refundición viene impuesta por evolución normativa habida desde el la instauración del modelo portuario por la Ley 27/1992 de 24 de noviembre, que progresivamente ha ido avanzando hacia una mayor apertura y liberalización, así como una mayor eficiencia y rentabilidad en la explotación del dominio público portuario, gestionado cada vez más siguiendo criterios empresariales. El nuevo texto se sistematiza en un Título Preliminar, que contiene las disposiciones generales y tres libros dedicados respectivamente al Sistema Portuario de Titularidad Estatal, a la Marina Mercante y al Régimen de Policía. En cuanto al contenido del Libro Primero, se articula internamente en títulos que se refieren

a la *Organización y Gestión* (Título I), *Régimen presupuestario, tributario, patrimonial, de funcionamiento y control* (Título II), *Régimen de planificación y construcción de los puertos de interés general* (Título III), *Medio ambiente y seguridad* (Título IV), *Dominio público portuario estatal* (Título V), *Prestación de servicios* (Título VI) y al *Régimen económico* (Título VII). El Libro Segundo, dedicado a la Marina Mercante, se organiza en los títulos dedicados, respectivamente, a la *Explotación naviera y régimen de navegaciones* (Título I), a la *Administración Marítima* (Título II), al *Servicio de practicaje* (Título III) y a las *Tasas* (Título IV). En el Libro Tercero, con disposiciones comunes a los dos libros anteriores a tiene por objeto el régimen de policía, es decir, un objeto complementario por igual del de los dos libros anteriores, comprendiendo en títulos diferenciados: *Reglamento de explotación y policía de los puertos del Estado* (Título I), *Funciones de policía especial*. (Título II), *Medidas que garantizan la actividad portuaria y la navegación* (Título III) y *Régimen sancionador* (Título IV).

Por otra parte, dos disposiciones reglamentarias acaecidas en este período vienen referidas a la gestión y conservación de bienes públicos de marcada trascendencia histórico-cultural como es el caso de los documentos obrantes en los archivos de titularidad estatal. La primera de ellas es el **Real Decreto 1708/2011, de 18 de noviembre, por el que se establece el Sistema Español de Archivos y se regula el Sistema de Archivos de la Administración General del Estado y de sus Organismos Públicos y su régimen de acceso**. La norma desarrolla la previsión del artículo 66 de la Ley 16/1985, de 25 de junio, del Patrimonio Histórico Español sobre el Sistema Español de Archivos formado por los archivos de la Administración General del Estado y el resto de archivos públicos y privados, vinculados al Sistema mediante los correspondientes instrumentos de cooperación. La segunda novedad acaecida sobre esta materia es la aprobación **Real Decreto 1674/2011, de 18 de noviembre, por el que se crea el Archivo General e Histórico de la Defensa**, conforme a lo establecido en el artículo 61.2 de la Ley 16/1985, de 25 de junio, del Patrimonio Histórico Español**.**

Por último, **Ley 22/2011, de 28 de julio, de residuos y suelos contaminados,** en lo que se refiere a las obligaciones de descontaminación y recuperación de los suelos por los causantes de la contaminación, establece como regla la responsabilidad solidaria de los

causantes de la contaminación, precisándose la responsabilidad subsidiaria, por este orden, de los propietarios de los suelos contaminados y los poseedores de los mismos. Para los bienes de dominio público en régimen de concesión, se establece la regla especial de responsabilidad subsidiaria en defecto del causante o causantes de la contaminación, por este orden, el poseedor y el propietario. Puede añadirse, además, que entre las exclusiones de la Ley se encuentra, con toda lógica, el almacenamiento de dióxido de carbono en formaciones geológicas declaradas de dominio público de conformidad con la Ley 40/2010, de 29 de diciembre, de almacenamiento geológico de dióxido de carbono, que se comentó en el número anterior de estas crónicas.

2.1 En materia de Obras Públicas

Cabe citar la aprobación de dos Reales Decretos que han regulado diversos aspectos relacionados con la gestión y planificación de infraestructuras aeroportuarias. El primero de ellos, **Real Decreto 1150/2011, de 29 de julio, modifica el Real Decreto 2858/1981, de 27-11-1981 sobre calificación de aeropuertos civiles**, reconsidera los elementos tomados en consideración para la calificación de "aeropuerto de interés general" contenidos en el Real Decreto 2858/1981, que vinculaba el tráfico internacional exclusivamente a los aeropuertos de interés general. La modificación permite, en esencia, que los aeropuertos no calificados de interés general -patrocinados fundamentalmente por las comunidades autónomas- por su propia naturaleza comercial y viabilidad económica puedan gestionar tráfico aéreo internacional y, en consecuencia, puedan tener frontera exterior, gestionada por el Estado. La segunda norma incide en las competencias sobre diversos aspectos del planeamiento de infraestructuras aeroportuarias, recogiéndose en el **Real Decreto 1189/2011, de 19 de agosto, por el que se regula el procedimiento de emisión de los informes previos al planeamiento de infraestructuras aeronáuticas, establecimiento, modificación y apertura al tráfico de aeródromos autonómicos,** y se modifica el Real Decreto 862/2009, de 14-5-2009 que aprueba las normas técnicas de diseño y operación de aeródromos de uso público y se regula la certificación de los aeropuertos de competencia del Estado, el Decreto 584/1972, de 24-2-1972 de servidumbres aeronáuticas y el Real Decreto 2591/1998, de 4-12-1998 sobre la ordenación de los aeropuertos de interés general y su zona de servicio, en ejecución de lo dispuesto por el artículo 166 de la Ley 13/1996, de

30-12-1996, de Medidas Fiscales Administrativas y del Orden Social. En lo esencial, interesa resaltar que la norma tiene por objeto establecer el procedimiento de emisión de los informes y certificados de compatibilidad de la administración competente en materia aeronáutica que tiene como objeto asegurar que, en el ejercicio de las competencias autonómicas, se preservan las competencias exclusivas del Estado procurando asegurar la compatibilidad de la planificación autonómica con la ordenación y estructura del control del espacio aéreo, del tránsito aéreo y del transporte aéreo.

Finalmente, puede señalarse que el Ministerio de Fomento ha anunciado la elaboración de un nuevo Plan de Infraestructuras, Transporte y Vivienda con un horizonte temporal 2012-2024 del que se han adelantado las líneas generales, como el recurso a fórmulas de colaboración público-privada, o el principio de máximo rigor económico en la priorización de inversiones y que pretende llevarse el mes de julio al Consejo de Ministros para su aprobación (www.lamoncloa.gob.es). Aparte de lo indicado, por el momento únicamente cabe mencionar la intención, revelada por la propia denominación del Plan, de tratar conjuntamente las políticas de vivienda con las de infraestructuras y transporte, a diferencia de lo que ocurre con el actual Plan Estratégico de Infraestructuras y Transportes 2005-2020.

3. LEGISLACIÓN EN EL ÁMBITO DE LAS COMUNIDADES AUTÓNOMAS

3.1 En materia de bienes

En el período considerado, las novedades habidas en la normativa autonómica se refieren mayoritariamente a la modificación de aspectos puntuales de las leyes de patrimonio de distintas Comunidades, a excepción de la aprobación de la Ley 5/2011, de 30 de septiembre de Patrimonio de la Comunidad Autónoma de Galicia, como norma principal del sistema patrimonial autonómico, y de la Ley 7/2011, de 3 de noviembre, Documentos, Archivos y Patrimonio Documental de Andalucía, que como en el caso del Estado, regula de manera sectorial patrimonio documental de la Administración.

La **Ley 5/2011, de 30 de septiembre de Patrimonio de la Comunidad Autónoma de Galicia,** justifica su conveniencia y oportunidad en los cambios producidos en la realidad institucional y organizativa y el incremento del patrimonio autonómico desde la aprobación de la anterior norma, vigente desde 1985. A ello se une la necesidad de adaptación de sus preceptos a la Ley de patrimonio de las Administraciones Públicas estatal, Ley 33/2003, de 3 de noviembre, de aplicación general y carácter básico. Según la exposición de motivos de la Ley autonómica, en la consideración de que tanto los bienes demaniales como los patrimoniales están al servicio de los fines de la Administración, deben disfrutar de un sistema esencialmente común de protección, si bien conservando las peculiaridades propias del régimen de gestión de los bienes y derechos demaniales y patrimoniales. En cuanto al ámbito subjetivo de la Ley, se da un tratamiento jurídico sustancialmente común a todos los bienes y derechos de titularidad de la Administración General de la Comunidad Autónoma y todo el entramado de entidades públicas instrumentales, pero sin forzar una unidad patrimonial que iría en detrimento de la autonomía que tienen reconocida. Por el contrario, se excluye de su ámbito de aplicación, con carácter general y sin perjuicio de las disposiciones de la Ley que expresamente les resulten de aplicación, los patrimonios de las sociedades mercantiles públicas autonómicas y de las sociedades en las que la Administración gallega tenga una participación mayoritaria o el control de sus órganos de dirección, así como el de las fundaciones del sector público autonómico.

Por otra parte, la **Ley 7/2011, de 3 de noviembre, de Documentos, Archivos y Patrimonio Documental de Andalucía,** regula el patrimonio documental de la Comunidad Autónoma, cuyos ejes fundamentales, conforme a la Exposición de Motivos, son "*la protección, custodia y difusión de los documentos de titularidad pública y del Patrimonio Documental de Andalucía, la organización del servicio público de los archivos y la consideración de la gestión documental como el conjunto de funciones y procesos reglados archivísticos que, aplicados con carácter transversal a lo largo de la vida de los documentos, garantizan el acceso y uso de los documentos de titularidad pública y la correcta configuración del Patrimonio Documental de Andalucía*". Por lo demás, la estructura de la norma permite disponer de regímenes jurídicos diferenciados para los documentos de titularidad pública, el Patrimonio Documental de Andalucía y los documentos y archivos inscritos en el Catálogo General de Patrimonio Histórico Andaluz.

En cuanto al resto de normativa autonómica que introduce determinadas modificaciones en las Leyes reguladoras del patrimonio de las Comunidades Autónomas, cabe citar en primer lugar la **Ley 7/2011, de 27 de julio, de medidas fiscales y financieras de la Comunidad Autónoma de Cataluña**, que introduce modificaciones Ley del patrimonio de la Generalidad (Decreto Legislativo 1/2002, de 24 de diciembre), con diversos objetivos: delimitar quién asume los gastos de mantenimiento de los edificios que ya no están adscritos a un departamento o a un órgano; establecer criterios de optimización de uso de edificios públicos; introducir el concurso como medio de venta de inmuebles y ampliar los supuestos de venta directa, y regular el procedimiento para incorporar al patrimonio de la Generalidad bienes derivados de reducciones de capital o devolución de aportaciones de cualquier tipo de entidades. En segundo lugar, la **Ley 7/2011, de 26 de diciembre Medidas fiscales y de fomento económico en la Región de Murcia,** modifica varios aspectos en su Ley 3/1992, de 30 de julio, de Patrimonio, referidos a los regímenes de desafectación implícita en supuestos de reconocimiento del derecho de reversión para los bienes adquiridos por expropiación, de disfrute de viviendas de titularidad pública por razón del puesto de trabajo desempeñado por empleados públicos, y a las obligaciones tributarias que incumben a las Consejerías y a sus entidades dependientes cuando les hayan sido afectados, adscritos o cedidos, bienes inmuebles del patrimonio de la Comunidad Autónoma de la Región de Murcia. Asimismo, la Ley 7/2011 introduce la posibilidad de afectación de bienes y derechos demaniales de las entidades locales a un uso o servicio público competencia de otra Administración y transmitirle la titularidad de los mismos cuando resulten necesarios para el cumplimiento de sus fines, manteniendo la Administración adquirente la titularidad del bien mientras continúe afectado al uso o servicio público que motivó la mutación. Nótese que en el número anterior de estas crónicas dimos cuenta de una técnica idéntica que bajo el rótulo "mutación demanial externa" se recogía en la Ley 5/2010 de 11 de junio de autonomía local de Andalucía, si bien la posibilidad de adscripción de los bienes locales quedaba condicionada en la Ley Andaluza a la reciprocidad, es decir, a que por la Administración adquirente se previera en su normativa la posibilidad de adscribir sus bienes a las entidades locales. Por último, el **Decreto-ley 1/2011, de 29 de noviembre, del Gobierno de Aragón, de Medidas urgentes de racionalización del Sector Público Empresarial** dos artículos de la Ley

5/2010 de Patrimonio de la Comunidad Autónoma referidos a la dirección y control de las sociedades mercantiles autonómicas con el objeto de adaptarlos al Decreto-ley.

3.2 En materia de obras públicas.

De entre las disposiciones autonómicas que afectan a la gestión y planificación de infraestructuras, cabe citar en primer lugar el **Decreto 45/2011, de 28 de julio Reglamento de Carreteras de Castilla y León,** que desarrolla, en lo que ahora interesa, las previsiones legales sobre planificación y explotación previsto en la Ley autonómica (Ley 10/2008, de 9 de diciembre, de carreteras de Castilla y León). Por su parte, el **Decreto 173/2011, de 4 de agosto Aprueba el estatuto de la Agencia Gallega de Infraestructuras**, creada con el objetivo, según se desprende de su propio articulado, de impulsar, coordinar y gestionar la política autonómica en materia de carreteras, correspondiéndole planificar, proyectar, construir, conservar y explotar las carreteras que sean de competencia de la Comunidad Autónoma de Galicia y sus servicios anexos, así como garantizar el uso y defensa del patrimonio viario. También relacionado con la gestión de las infraestructuras, en este caso portuaria, en la Comunidad Autónoma de Andalucía se ha aprobado **Decreto 368/2011, de 20 de diciembre, que establece el régimen jurídico de los servicios públicos portuarios, de las actividades comerciales e industriales, y de las tasas de los puertos de Andalucía,** en desarrollo de las previsiones de la Ley autonómica, pudiendo destacarse como novedad la excepción que se refiere a la duración de los contratos de base, ordinariamente de un año, regulándose los contratos de larga duración que pueden llegar hasta los treinta años con el objeto de atender a necesidades de financiación de la Agencia Pública de Puertos de Andalucía relacionadas con la ejecución de obras públicas portuarias.

Otras normas autonómicas, si bien tienen incidencia en la planificación de las obras públicas, presentan un marcado carácter organizativo. De entre ellas, cabe citar en primer lugar, el **Decreto 108/2011, de 11 de noviembre Regula el Consejo Balear de Transportes Terrestres,** que es el órgano superior de asesoramiento, consulta y debate sectorial de la Administración de la Comunidad Autónoma de las Illes Balears en los temas que afectan al sistema de transportes terrestres en su ámbito territorial; y en segundo lugar, la **Ley 4/2011, de 28 de julio, de extinción de MINTRA (Madrid, Infraestructuras del**

Transporte), de la Comunidad de Madrid, entidad de derecho público que tenía encomendado el impulso de las políticas de infraestructuras autonómicas, y cuyas funciones pasan nuevamente a desarrollarse por la Consejería del ramo, siendo encuadrable esta reorganización de funciones dentro de las medidas de racionalización de las estructuras del sector público que de un tiempo a esta parte vienen acometiéndose desde todos los estamentos institucionales debido al debilitamiento del entorno económico.

En otro orden de cosas, con la finalidad de estimular las inversiones, públicas o privadas, la Generalidad Valenciana ha aprobado el **Decreto-ley 2/2011, de 4 de noviembre, de medidas Urgentes de Impulso a la Implantación de Actuaciones Territoriales Estratégicas,** definiéndose éstas como aquellas que tienen por objeto la ordenación, gestión y desarrollo de intervenciones territoriales singulares que presenten relevancia supramunicipal y que así sean declaradas, pudiendo ser de iniciativa pública, privada o mixta, y localizarse en terrenos de cualquier categoría urbanística situados en uno o varios términos municipales. Aparte del innegable impacto sobre el desarrollo de las obras públicas que la implantación de tales actuaciones pudiera tener, interesa resaltar una medida adicional contenida en la norma, referida a la flexibilización de los requisitos para movilizar los bienes y recursos integrantes de los patrimonios públicos de suelo a otras actuaciones distintas a la de promoción de viviendas, referidas todas ellas a inversiones en infraestructuras.

4. JURISPRUDENCIA

Ya hemos hecho mención a la anulación por el Tribunal Supremo del Real Decreto 1666/2008, de 17 de octubre, por el que se traspasaron a la Comunidad Autónoma de Andalucía las funciones y servicios de la Administración del Estado en materia de recursos y aprovechamientos hidráulicos correspondientes a las aguas de la cuenca del Guadalquivir que discurren íntegramente por el territorio de la Comunidad Autónoma. Se trata tres **Sentencias del Tribunal Supremo de 13 y 14 de junio de 2011** dictadas en recursos interpuestos por la Junta de Comunidades de Castilla-La Mancha, la Junta de Extremadura y un particular, que resuelven la cuestión de la única forma posible a la vista de la declaración de inconstitucionalidad y nulidad del artículo 51 del Estatuto de Autonomía de

Andalucía de 2007 por STC 30/2011, de 16 de marzo, que otorgaba competencias exclusivas a la Comunidad Autónoma sobre las aguas de la cuenca del Guadalquivir que discurren por su territorio, siendo así que se trata de una cuenca intercomunitaria. El TC sostiene que el 149.1.22ª CE otorga al Estado la competencia exclusiva sobre las aguas que discurren por más de una Comunidad Autónoma, con lo que, reiterando el criterio mantenido en ocasiones anteriores, así como en la STC 32/2011, de 17 de marzo sobre el mismo asunto respecto de la Comunidad de Castilla y León, rechaza la posibilidad de gestionar de forma fragmentada las aguas pertenecientes a una misma cuenca hidrográfica, y señala que la administración unitaria de un recurso natural de tanta trascendencia como es el agua queda asegurada por las potestades normativas y ejecutivas atribuidas al Estado por el 149.1.22ª CE respecto de las "aguas que discurran por más de una Comunidad Autónoma", Dicho lo cual se entiende que las sentencias del Tribunal Supremo anulen el Real Decreto de traspaso de competencias, al haber desaparecido el soporte competencial en virtud del cual se dictó la norma.

Por otra parte, **la STS de 22 de septiembre de 2011** desestima el recurso interpuesto por la Junta de Comunidades de Castilla- La Mancha contra el Real Decreto 125/2007, de 2 de febrero, por el que se fija el ámbito territorial de las demarcaciones hidrográficas. La recurrente alega la falta de competencia de la Administración General del Estado en relación con las cuencas intracomunitarias que son de la exclusiva competencia de las Comunidades Autónomas, de modo que no podría establecer las demarcaciones hidrográficas cuando se refieren a cuencas cuyas aguas discurran únicamente por el territorio de una Comunidad Autónoma. El Tribunal Supremo recuerda que el Real Decreto viene a concretar en nuestro derecho interno la nueva noción de "demarcación hidrográfica" que asienta su ámbito territorial incluyendo las cuencas intracomunitarias en el caso de Comunidades Autónomas que no hayan asumido efectivamente la competencia de aguas, de que son titulares, al no haberse materializado las trasferencias de medios y servicios, de modo que la demarcación se fija en estos supuestos con carácter provisional hasta que las comunidades autónomas afectadas asuman de manera efectiva las competencias sobre dichas cuencas. Dentro de la extensa argumentación de la sentencia, en el que se reitera la doctrina constitucional al respecto, remarca el Tribunal Supremo que la demarcación ha de permitir una administración equilibrada de los recursos hídricos, en

atención al conjunto y transcendencia de los intereses afectados, si bien la clave para la desestimación del recurso parece sostenerse en la provisionalidad de la medida, afirmándose que con ella se trata de evitar los vacíos en la gestión de los recursos hidráulicos que se produciría en los casos de las cuencas intracomunitarias de Comunidades Autónomas que, ostentando la competencia, constitucional y estatutariamente atribuida, no hayan asumido aún los medios materiales y personales para desempeñar tal servicio en relación con dichas cuencas intracomunitarias.

Finalmente cabe mencionar la Sentencia del Tribunal Constitucional 110/2011de 22 de junio, por el que se resuelve la impugnación de varios artículos de la Ley Orgánica 5/2007, de 20 de abril, de reforma del Estatuto de Autonomía de Aragón por parte de la Comunidad de La Rioja relativos a competencias sobre aguas. La sentencia reitera su doctrina sobre los derechos estatutarios contenida, entre otras, en SSTC 247/2007 y 31/2010, declarando la conformidad constitucional de los preceptos impugnados.

5. BIBLIOGRAFÍA APARECIDA EN EL PERÍODO CONSIDERADO

AGUADO GONZÁLEZ, J.: "La regulación de los usos del agua en el Derecho español", *REDA* nº 151, 2011, págs. 579-625.

CHINCHILLA MARÍN, C.: "La invalidez sobrevenida de un retracto forestal: el transcurso del tiempo, la inactividad administrativa y la actuación del interesado como factores invalidantes de un acto administrativo", *Revista Justicia Administrativa,* nº 54, 4º trimestre 2011, págs. 7- 28.

DESDENTADO DAROCA, E: "La difícil situación jurídica de las actividades económicas ubicadas en antiguas marismas: análisis crítico y propuestas de solución" *RAP* nº 186, septiembre-diciembre 2011, págs. 181-221.

EMBID IRUJO, A., DOMÍNGUEZ SERRANO, J. (dirs.): *La calidad de las aguas y su regulación jurídica (un estudio comparado de la situación en España y México)*, Edit. Iustel, Madrid, 2011.

FERNÁNDEZ GARCÍA, J.F.: "La declaración de interés general de las obras hidráulicas y su incidencia sobre la obligación de tratamiento de las aguas residuales vertidas a los ríos", *Revista Aranzadi de Derecho Ambiental*, nº 19, 2011, págs.119-137

FUENTES DE BARDAJÍ, J., CANCER MINCHOT, P., (dirs.): *Manual de dominio público marítimo-terrestre y puertos del Estado*, Edit. Aranzadi-Thomson Reuters, Cizur Menor (Navarra), 2011.

GONZÁLEZ PASCUAL, M.: "Las competencias estatutarias sobre aguas: las cuencas hidrográficas como criterio competencial (comentario a las Sentencias 32/2011 y 30/2011 del Tribunal Constitucional)", *Revista Aranzadi de Derecho Ambiental,* nº 20, 2011, págs. 119-130.

LAGUNA DE PAZ, J.C.: "Problemas jurídicos derivados de la reordenación del uso del espectro radioeléctrico", *REDA* nº 151, 2011, págs. 509-538.

LÓPEZ RAMÓN, F.: "Teoría jurídica de las cosas públicas", *RAP* nº 186, septiembre-diciembre 2011, págs. 9-51.

MENENDEZ REXACH, A.: "El derecho al agua en la legislación española", en LÓPEZ MENUDO, F. (coord.), *Derechos y garantías del ciudadano*, Edit. Iustel, Madrid, 2011, págs. 283-320.

PÉREZ MARÍN, A. (dir.), SÁNCHEZ NÚÑEZ, P. (coord.): *Derecho de las aguas continentales (a propósito de la ley de aguas para Andalucía con comentarios a su articulado)*, Edit. Iustel, Madrid, 2011.

ROJAS MARTÍNEZ PARETS, F.: *El Régimen de los puertos del Estado*, ejemplar monográfico de la *Revista Aranzadi de Derecho Ambiental*, Edit. Aranzadi-Thomson Reuters, Cizur Menor (Navarra), 2011.

SANZ RUBIALES, I.: "El almacenamiento geológico de dióxido de carbono en la Directiva 2009/31, de 23 de abril" *Revista Aranzadi de Derecho Ambiental*, nº 19, 2011, págs.75-98.

iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

ADMINISTRATIVE LIABILITY

ANNUAL REPORT - 2012 - UK

(July 2012)

Dr. Tom CORNFORD[1]

INDEX

1. INTRODUCTION

As this is my first post, I shall begin by giving a general outline of the way in which administrative liability works in the UK. The account is up to date at the time of writing. In

[1] I would like to thank Professor Chris Himsworth of Edinburgh University for advice in relation to the section on Scottish law and Professor Gordon Anthony of Queen's University, Belfast for advice on the law of Northern Ireland.

subsequent reports, I shall describe later developments. Strictly speaking, there are three distinct legal systems in the UK: that of England and Wales, that of Northern Ireland and that of Scotland. Northern Ireland has its own governing institutions and as a result of the political situation there, aspects of its criminal law and its law relating to civil liberties have historically differed from the equivalent law in England. There are also other minor differences in parts of its statute law. These factors apart, however, the general law of Northern Ireland is barely distinguishable from English law and there is no difference, in particular, in relation to the tort liability of public authorities. For this reason, I say no more about it in this report. The Scottish legal system, by contrast, differs significantly from the English and, of particular relevance in the present context, its law of non-contractual liability, or "delict", as it is called, has historically been quite different from the English law of non-contractual liability or "tort". Nonetheless the general principles that govern administrative liability are extremely similar. I therefore proceed as follows. In part 2, I give an account of the law of England. In part 3, I note some of the features that make the law of Scotland distinct. In part 4, I describe two developments whose effect is uniform across the UK, namely the advent of EU state liability and the coming into force of the Human Rights Act 1998.

2. THE ENGLISH LAW OF ADMINISTRATIVE LIABILITY

2.1 General features

In England, there is no special law of administrative liability. Instead, there is a single body of law, the law of tort, in accordance with which remedies, notably financial compensation or "damages" are awarded to claimants as a result of failure to fulfil non-contractual obligations owed to them by defendants. The principles that apply are in theory the same whether the defendant is a private person or a public authority. This supposed parity of treatment is sometimes referred to as "Dicey's equality principle" after the great Victorian jurist who was the primary proponent of the idea that a defining feature of English law is its refusal to give a special position to public authorities.

A further crucial feature of the English law of tort is that there is no single overarching principle of liability. Instead there is a collection of "causes of action" or

"torts".[2] This means that in relation to each type of wrong recognized by the law a different set of rules – pertaining to matters such as the degree to which the defendant must be at fault, the kind of harm in relation to which a remedy is available and the legal status of claimant or defendant – applies. So, to give one example, the tort of trespass to the person comprises three sub-torts, assault, battery and false imprisonment. In order to commit the tort of assault, the defendant must perform an intentional act that produces in the claimant a reasonable belief that she is about to become the victim of immediate, unlawful force.[3] In order to commit the tort of battery, the defendant must intentionally and without lawful excuse or justification apply force to the person of another. In order to commit false imprisonment the defendant must imprison the claimant without lawful justification or excuse .

A case in which the claimant on the face of it deserves a remedy may quite easily fall outside the requirements of the tort. In *Wainwright v Home Office*,[4] a case whose facts occurred before the coming into force of the Human Rights Act 1998, the two claimants were visitors to a prison who were strip searched. One of the claimants was touched in the course of the search and was thus able to succeed in battery. But the other claimant was not touched and so despite suffering emotional distress as a result of her experience was left without a remedy. (Had the experience led her to suffer from a recognized psychiatric illness she might have been able to succeed in the tort of negligence; but for this purpose, mere emotional distress is not sufficient .)

To give another example, a claimant may bring proceedings in the tort of nuisance where the defendant's behaviour interferes in some way with the claimant's reasonable enjoyment of her land. Thus, for instance, the claimant may be entitled to a remedy where

[2] To have a "cause of action" is to have grounds for bringing proceedings whereas the term "tort" tends to be applied to the act whose commisson provides the victim with grounds for bringing proceedings. Not every cause of action arises from the commission of a tort but every tort provides the victim with a cause of action. In other words "cause of action" is a broader concept than "tort" and includes grounds for bringing proceedings in other areas of law such as contract.

[3] The defendant must intend that or be reckless as to whether this is the effect produced.

[4] [2003] UKHL 53; [2004] AC 406; [2004] UKHRR 154.

dust from the building of a road nearby makes it impossible for her to keep her house clean. But in *Hunter v Canary Wharf*[5] it was held that since nuisance is, properly speaking, a tort against land rather than against persons, the claimant will only be entitled to sue if she has a proprietary or possessory interest in the land affected; the spouse or children or lodgers of a person with a proprietary or possessory interest will not be entitled to bring proceedings.[6]

Winning compensation for a wrong committed by a public authority is thus a matter of finding the appropriate tort. It should not be thought that the whole of the law of tort has the rigid character suggested by the examples given above. The most important tort, the tort of negligence, is much more flexible and, as I shall explain below, much of the uncertainty in this area of English law has arisen from attempts to provide a remedy for harms caused by public law wrongs by extending the boundaries of negligence. Before doing this, however, it will be useful to say something about the relationship between public law, the body of law concerned with the powers and duties of public authorities, and tort law.

Public law and tort law are distinct. At the same time, however, an authority cannot be liable in tort for something that public law authorises it to do and it is consequently a defence to a tort action for a public authority to show that it had legal authority to act as it did. Since most of the powers of public bodies derive from statute, this is usually a matter of the body demonstrating statutory authority for its actions. The policeman who arrests a citizen is usually committing what amount to the tort of false imprisonment if carried out by another citizen. His statutory authority protects him. But if he exceeds his authority and acts unlawfully as a matter of public law he will then be liable for the tort. In similar fashion, a public body that commits a nuisance – for example, as in the case cited above, by covering a landowner's land with dust – will be immune from suit

[5] [1997] AC 655.

[6] The difficulties this position creates were further considered in *Dobson v Thames Water Utilities* [2009] EWCA Civ 28; [2009] HRLR19 where a group of claimants brought actions in both nuisance and for breach of their rights under Article 8 ECHR in respect of smells and mosquitos produced by the defendant's sewage plant. Some of the claimants had proprietary or possessory interests but others did not.

if it can show statutory authority for its actions. But if it has exceeded its authority it will be liable in the same way as a neighbouring landowner who commits a nuisance.[7]

This is the way in which English law has traditionally provided a monetary remedy for wrongs committed by public authorities. It makes it possible for the question of whether the authority has acted lawfully as a matter of public law and the question whether the claimant is entitled to damages to be dealt with at the same time and it is generally speaking satisfactory as long as the acts impugned are of a sort that could equally well be performed by a private person. The problem, of course, is that public authorities' welfare and regulatory powers enable them to injure people in ways that private persons cannot. It is in relation to activities that lack a private counterpart and the injuries they cause that the English approach to administrative liability has often been found wanting. Debate about administrative liability tends, consequently, to focus upon those torts that offer the prospect of providing a remedy for injuries caused by such activities. The torts in question are breach of statutory duty, misfeasance in a public office and negligence. I shall say something about each of these in turn.

2.2 Breach of Statutory Duty

[7] A striking recent instance of the application of this principle in relation to the tort of false imprisonment is the Supreme Court's decision in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245. The claimants there were foreign nationals who had committed crimes and been convicted and imprisoned. The Secretary of State decided that after their release from prison they should be deported back to their countries of origin. Under the Immigration Act 1971, she had the power to imprison persons she intended to deport pending their deportation and in pursuance of this power she had made and published a lawful policy as to when the power should be used. But she had also made an unlawful and secret policy according to which all foreign nationals who had committed crimes and been imprisoned should be imprisoned pending their deportation regardless of the risk they posed to the public or whether it was likely to be possible to deport them in the near future. The claimants were imprisoned under the second, unlawful policy and not under the first, lawful one. They successfully sued the Secretary of State for false imprisonment. The Secretary of State held the SS liable even though she could, if she wished, have imprisoned the claimants under the lawful policy. The fact was that she had imprisoned them and that since the policy she had relied on was unlawful, she lacked a defence of lawful authority. The damages awarded, on the other hand, were only nominal.

Where A owes a duty imposed by statute to B and fails to fulfil the duty thereby causing harm to B of the sort that the duty was intended to avert, then B may sue A for breach of statutory duty and receive an award of damages. Whether the statute contains a duty of the sort alleged is of course a matter of statutory interpretation. But the method of statutory interpretation employed ensures that the kind of duty that will support a claim in damages will only be found in a small minority of cases. The duty must be very specific, leaving little room for the exercise of discretion, and owed to a small and readily identifiable class of persons. The provision in the statute of some remedy other than damages for breach of the duty will generally be taken as a sign that Parliament did not intend there to be a remedy in damages. Few statutory duties of public authorities satisfy these conditions. The broad "target" duties often imposed on public authorities – for example the duty on the fire brigade "to make provision for the purpose of extinguishing fires in its area and protecting life and property in the case of fires in its area"[8] or the Secretary of State's duty to "continue the promotion in England of a comprehensive health service"[9]- are especially unlikely to do so. The tort of breach of statutory duty is, in fact, most likely to be made out not in relation to the duties of public authorities but in relation to the duties imposed on employers (private and public) by health and safety legislation. The typical successful action is one in which an employee sues for damages in relation to an injury caused by the failure of his employer to fulfil the statutory duty to fence dangerous machinery or provide protective goggles or gloves.

For a brief period in the late 1970s and early 1980s the courts showed themselves willing to broaden the class of duties whose breach might give rise to a successful claim for damages. *Thornton v Kirklees Borough Council*[10] concerned section 3(4) of the Housing (Homeless Persons) Act 1977 which provided that if a housing authority "have reason to believe that the person who applied to them may be homeless and have a priority need, they shall secure that accommodation is made available". Clearly performance of this duty involved a significant element of discretion on the part of the authority in deciding whether or not

[8] Fire and Rescue Services Act 2004 s.7(1).

[9] Health and Social Care Act 2012 s.1(1).

[10] [1979] 1 WLR 637.

there was reason to believe that the applicant was homeless and in priority need. Nonetheless, the Court of Appeal held that breach of the duty would entitle the person affected by it to damages. In the years that followed, however, the courts quickly retreated from this position and insisted that it was not appropriate to allow the exercise of discretionary powers of the type in issue in *Thornton* to be questioned in tort proceedings. Doing so, the courts reasoned, inevitably involved arriving at a determination as to the outcome that should have been reached whereas their proper role was confined to considering the propriety of the manner of exercise of the discretion. This latter task belonged to the sphere of administrative law and was thus best undertaken in judicial review proceedings.[11] While breach of statutory duty might thus on the face of it appear to present a promising avenue of redress for the person who has suffered harm as the result of a public law wrong, it in practice yields little.

2.3 Misfeasance in a public office

Misfeasance in a public office is one of the few torts that applies solely to public defendants. It has two limbs. The defendant public official can be liable where he misuses his powers by deliberately setting out to injure the claimant or where he acts unlawfully and with knowledge both of the act's unlawfulness and of the probability of its causing injury to the claimant.[12] The focus on the defendant's state of mind means that liability naturally attaches to the individual official rather than to the authority for which he works but the latter can be made liable via the doctrine of vicarious liability.[13] The same feature means that, as with breach of statutory duty, the tort is seldom much help to the claimant injured by a public authority's wrongdoing. The number of cases in which public officials knowingly act unlawfully is a very small proportion of those in which they simply act

[11] This position was affirmed most emphatically by the House of Lords in *O'Rourke v Camden Borough Council* [1997] 3 WLR 86.

[12] Knowledge includes constructive knowledge. For a detailed elaboration see *Three Rivers D.C. v. Bank of England (No 3)* [2000] 2 WLR 1220.

[13] *Racz v Home Office* [1994] 2 AC 45.

unlawfully, and the number in which they can be proved to have known that they were acting unlawfully is smaller still. A further limitation is that the claimant cannot succeed unless she can show that she suffered financial loss, physical injury or mental injury in the sense of a recognized psychiatric illness.[14]

2.4 Negligence

This brings us to negligence. Negligence is by the far the most important of the torts and also the most flexible but it too is subject to significant restrictions. To prove negligence it is not enough to show that the defendant acted with fault so as to harm some recognized interest of the claimant. It must first be shown that the claimant suffered loss of a kind recognized in the law of negligence. Traditionally this was confined to physical damage to either person or property. The categories of loss have been expanded to include the case in which the claimant suffers a recognized psychiatric illness and, in certain restricted circumstances, financial loss not consequent upon physical damage. But the categories of loss are only expanded by the courts very gradually and with great caution.

It must also be shown that the defendant owed the claimant a duty of care. Where the relationship between the parties is like that in which a duty of care has been found in the past a duty of care will readily be found. Such will be the case, for example, where the defendant carries on some activity that poses a foreseeable risk of physical harm to the person or property of the claimant. But where a clear similarity with past cases is lacking the court will examine carefully the reasons for and against extending the duty of care to cover the new situation. The test that the courts currently apply in deciding whether to extend the duty of care to a new situation is known as the *Caparo* test after the case in which it was set out, *Caparo v Dickman*.[15] The court must ask itself firstly, whether it was foreseeable that the actions of the defendant would cause the claimant harm, secondly whether there was a relationship of proximity between defendant and claimant and thirdly,

[14] *Watkins v Home Office* [2006] UKHL 17; [2006] 2 All ER 353.

[15] [1990] 2 AC 605, HL.

whether it would be fair, just and reasonable to find that the defendant owed the claimant a duty of care. The meaning of the second and third elements of the test are ill-defined and really amount to no more than the requirement that the courts must decide whether, for any of a variety of reasons, it would be desirable for there to be a duty of care where a relationship exists like that between claimant and defendant.

The courts have traditionally been, and continue to be, reluctant to make defendants liable for omissions or in other words, to find that the defendant owes the claimant a duty positively to act so as to confer upon the claimant a benefit. It is notoriously a feature of English law that a citizen who sees a child drowning in a pond is under no legal duty to help the child even if she could do so without danger to herself. Exceptions are made to this basic presumption in a restricted range of types of case. No single principle unites the exceptions and to describe them all would require a long list, but to give some examples: it is well established that a duty of care can arise in the context of a professional relationship such as that between doctor and patient or teacher and pupil, and more generally any person may become subject to a duty where they undertake in some way to assist another. It is also well established that where the defendant is responsible in the first place for creating a danger, she may then owe a duty to others to take steps to prevent the harm that might occur to them as a result. The courts are as cautious in extending the list of exceptions to the presumption against finding a duty to assist others as they are in modifying other restrictions on the incidence of the duty of care.

It has for long been possible to sue public bodies for negligence and doing so presents no difficulty where the activity alleged to be carried on carelessly is one that might just as well have been performed by a private person. So there is no difficulty in holding a public authority liable where it carries on some practical activity carelessly so as to cause physical harm to the person or property of the claimant or where a professional person such as a doctor is employed by a public authority to deliver a service to the public and, having undertaken to assist the claimant, does so carelessly. The problem arises where the authority has powers or duties that have no counterpart in the private sphere and either exercises the powers so as to harm the claimant or fails to fulfil a duty thereby occasioning loss (or failing to confer a benefit upon) the claimant.

The situation is complicated by the long standing uncertainty in English law as to the proper relationship between on the one hand, the administrative law standards that govern the exercise of statutory discretion and on the other, the duty of care in negligence. It is generally accepted that where a public authority has the power to perform a practical activity and does so carelessly (i.e. in the non-technical sense, negligently) then this must make the action unlawful as a matter of public law. What is less clear is whether the finding that some decision of a public authority is unlawful as a matter of public law can ever be a ground for finding that it has breached a duty of care in negligence (or, in other words, whether there can ever be a duty of care to conform to the principles of administrative law in making decisions). The pervasive fear is that the imposition of a duty of care on the exercise of a statutory power will somehow distort it or discourage its proper exercise. It might be thought that the solution to this fear would be to treat public law unlawfulness in itself as amounting to fault thereby avoiding tension between the two sets of standards. But this possibility has seldom been considered by the courts and when it has been considered it has been quickly dismissed.[16] The usual assumption is that the duty of care and the principles of administrative law belong to separate domains.

The present position with regard to the negligence liability of public authorities for the exercise or non-exercise of their discretionary powers is as follows. Possession by a public authority of a statutory power that might be used to assist a particular person, or indeed that the authority might be obliged as a matter of public law to use to assist a particular person, will not constitute a reason for finding that the authority owes that person a duty of care. After many years of equivocation, this was the position reached by the House of Lords in *Gorringe v Calderdale Metropolitan Borough Council*.[17] The claimant in that case was a woman who was injured after she drove her car too fast over the brow of a dangerous hill and hit a bus coming in the opposite direction. She sued the authority in negligence for its failure to maintain adequate warnings on the approach to the hill's summit. The House held that no duty of care could arise either from the simple fact that the authority possessed

[16] See e.g. *Dunlop v Woollahra Municipal Council* [1982] A.C. 158, especially at p. 172; *Rowling v Takaro Properties Ltd* [1988] 1 AC 473, PC, especially at pp.500-503; *R v Knowsley MBC ex parte Maguire* (1992) 90 LGR 653; *Banks v Secretary of State for Environment, Food and Rural Affairs* [2004] EWHC 416; [2004] NPC 43.

[17] [2004] UKHL 15; [2004] 1 WLR 1057.

powers to provide signage and road markings or from the fact that it was arguably under a duty, as a matter of public law, to use them. Since reasons for imposing a duty of care were lacking, this was a straightforward case of omission and there could be no liability.

If, on the other hand, the exercise of an authority's powers involves it in carrying on some activity that might be subject to a duty of care if carried on by a private person and if, in performing this activity, the authority brings itself into the kind of relationship with a member of the public that might be recognized as constituting a relationship of proximity if it subsisted between two private persons, then a duty of care may arise. So, for example, in the joined appeals heard by the House of Lords and reported as *Phelps v Hillingdon Borough Council*[18]the defendant authorities were under statutory duties to provide for the educational needs of children with particular educational difficulties. It was held that a duty of care towards the children could arise because the teachers and educational psychologists employed to discharge the authorities' duties had entered into a relationship with the children analogous to the kind of relationships between professional persons and their clients usually held to give rise to a duty of care. Liability for any breach of the duty of care on the part of the teachers and educational psychologists would attach to the authorities by the principle of vicarious liability.

In cases like *Phelps* the fact that the authority is under a statutory duty to assist the claimant (or possesses a statutory power that could be used to assist the claimant) is not treated as a reason to impose a duty of care. The statute is treated as important, however, to the extent that the court must assure itself that imposing a duty of care will not somehow interfere with the proper exercise of the authority's discretion. In a long line of cases in the 1980s and 1990s culminating in the House of Lords' judgment in *X (Minors) v. Bedfordshire County Council*[19]the courts found that it was not fair, just and reasonable to impose a duty of care on the ground that to do so would, in a variety of ways, have just this effect. Typical arguments given in support of this view – usually described as "policy considerations" – were that the imposition of a duty of care might lead officials to exercise their powers in an over cautious fashion to the detriment of the people they were supposed to help, that it

[18] [2001] 2 AC 619.

[19] [1995] AC 633.

might upset the balance that the authority had to strike between helping those people and harming others who were foreseeably affected by the exercise of the powers, that imposing a duty could lead to costly and unnecessary litigation, and that there existed other avenues of redress for the claimants. The use of these policy considerations, with their underlying assumption that the courts were in a position to know a priori what the practical effect of imposing duties of care on public authorities would be, was subject to a fair amount of academic criticism. It was also disapproved by the European Court of Human Rights in *Osman v UK*.[20]In this case, the family of a man killed by a mentally disturbed acquaintance had sued the police in negligence. The police, the family alleged, had known about the killer's threatening behaviour but had not done enough to prevent the crime. The English courts held, for policy reasons like those outlined above, that there could be no duty of care. The ECtHR held that to exclude the possibility of liabilitywithout full consideration of the facts, as the English courts had done, was a breach of the applicants' Article 6 entitlement to have a claim relating to their civil rights determined by a court. This ruling was criticised by many commentators on the grounds that the ECtHR had overstepped the bounds of its authority by treating a substantive feature of English law – the ability of the courts to determine on the basis of assumed facts whether a duty of care existed in a particular type of case – as a procedural bar to the determination of a civil right. Nonetheless, the immediate effect of the judgment, perhaps combined with the academic criticism referred to, was to make English courts more circumspect about denying the existence of a duty of care on the basis of policy considerations. They have continued to be so despite the fact that in a later case,[21] the ECtHR withdrew its earlier criticism of the nature of the reasoning in *Osman*.

[20] (2000) 29 EHRR 245; [1999] FLR 193. The *X* case , *Osman v Ferguson* [1993] 4 All ER 344, CA, the case before the English courts that gave rise to *Osman v UK*, and many other cases about whether public authorities owe a duty of care involved applications to strike out the claimant's case as disclosing no cause of action. Such an applicaton invites the court to terminate proceedings without full examination of the facts on the ground that even if all the factual allegations made by the claimants are true, they cannot succeed as a matter of law.

[21] *Z and others v UK* [2001] 2 FLR 612.

On the other hand, except for a brief period in the wake of *Osman*, the courts have not become noticeably more enthusiastic about imposing duties of care on public authorities. In place of the policy considerations that were used in the 1980s and 90s to justify the finding that it was not fair, just and reasonable to impose a duty of care, the courts have begun to rely on somewhat more formalistic means to achieve the same end. The ruling in *Gorringe*, described above, is one example of this shift. The courts have also begun to rely increasingly on the claim that where a statutory power is conferred for the purpose of protecting some particular class of person it is inappropriate to impose a duty of care towards some other class of person who might be harmed by the power's exercise. In *D v East Berkshire Community Health NHS Trust*,[22] the House of Lords considered a number of appeals in cases in which public authorities had wrongly removed children from the family home on the suspicion that their parents had been abusing them. The House held that since the authorities' powers were for the purpose of protecting the children, a duty of care was owed to the parents and not to the children. In *Jain v Trent Strategic Health Authority*,[23] Lord Scott, with whom the other members of the House of Lords agreed, set out the general principle that:

> "...where action is taken by a state authority under statutory powers designed for the benefit or protection of a particular class of persons, a tortious duty of care will not be held to be owed by the state authority to others whose interests may be adversely affected by an exercise of the statutory power. The reason is that the imposition of such a duty would or might inhibit the exercise of the statutory powers and be potentially adverse to the interests of the class of persons the powers were designed to benefit or protect, thereby putting at risk the achievement of their statutory purpose."

3. THE SCOTTISH LAW OF ADMINISTRATIVE LIABILITY

[22] [2005] UKHL 23; [2005] 2 AC 373.

[23] [2009] UKHL 4; [2009] 2 WLR 248.

The history of non-contractual liability in Scotland is quite different from that of its English equivalent. Scottish law draws much more heavily than does English law on the concepts of Roman law and it continues to have a distinct terminology and procedure. Scots courts are not bound by the decisions of English ones nor, strictly speaking, are they bound by decisions of the Supreme Court except where it is hearing appeals in Scottish cases or deciding questions relating to the devolution of powers from Westminster to Scotland. The two systems have become so closely intertwined, however, that in practice there is very little difference of substance between the English law of tort and the Scottish law of delict. The concept of a "cause of action" does not exist in Scots law but it recognizes a variety of heads of liability, each governed by its own rules. As in English law, the most important head of liability is that for negligence or, as it is called in Scottish textbooks,"unintentional delict".[24] The concept of the duty of care is sometimes said to be alien to Scottish law just as it is to civil systems. Yet Scottish courts proceed just as English ones do, determining whether a duty exists in the type of situation in question before going on to determine whether there has been breach, causation, loss and so forth. A question that is asked from time to time is whether the test for the existence of the duty of care is the same in Scottish as in English law. The foundational case in both the English law of negligence and the Scottish law of unintentional delict is *Donoghue v Stevenson*,[25] decided in 1932. The case arose in Scotland and was heard by Scottish courts before being brought on appeal to the House of Lords. It concerned what we would now call product liability. Mrs Donoghue alleged that she had suffered shock and illness after the bottle of ginger beer a friend bought for her in a cafe turned out to contain the decomposing remains of a snail. Lacking any contractual nexus with either the cafe owner or the manufacturer Mrs Donoghue sued the manufacturer in delict. The House of Lords found that in circumstances like those in question a manufacturer could owe the ultimate consumer of its product a duty of care. The case stands, however, for the wider proposition that the existence of a duty of care is not strictly confined to those types of situation in which it has been found to exist in the past but can be extended to new ones, key criteria for its existence being that it is foreseeable that the defendant's actions will cause harm to the claimant and that there exists between

[24] See e.g. J. Thomson *Delictual Liability* (4th ed, Hayward's Heath: Tottel Publishing, 2010).

[25] 1932 SC (HL) 31; 1932 SLT 317; [1932] AC 562, HL.

the two parties a relationship of "proximity". As noted above, what constitutes proximity is a blank to be filled in on the basis of a variety of moral, social and practical considerations. In the years since *Donoghue* the willingness of the courts to expand the categories of circumstance in which a duty of care will be found has fluctuated. The House of Lords was at its most expansive in the 1970s, the high water mark being its judgement in *Anns v Merton Borough Council*.[26] There Lord Wilberforce set out a two stage test for the existence of a duty of care whereby the court was to ask first whether harm of the sort suffered by the defendant as a result of the claimant's activities was foreseeable and second whether there were any policy considerations that ought to limit the incidence of the duty. The three stage *Caparo* test, set out above, was intended to put a definitive stop to the period of expansiveness. It signals an approach often so restrictive that it is tempting to ask whether the law has reverted to the state of affairs that the House of Lords judgments in *Donoghue* were said have left behind i.e. one in which the incidence of the duty of care was confined to a limited and fixed set of types of circumstance. The Scottish courts have accepted and apply the *Caparo* test. At the same time, one finds in the case law attempts by litigants to argue that the *Caparo* test does not belong in Scottish law and that it is alien to the spirit of *Donoghue*.[27] Such arguments have been firmly rejected by Scottish courts[28] and judges yet, as I shall suggest below, Scots courts have occasionally shown a greater willingness than their English counterparts to find a duty of care in cases concerning public authorities.

Turning to the specific topic of administrative liability, the basic principle governing the relationship between the general law of delict and public authorities is the same as that governing the relationship between tort and public authorities in English law. There is no special principle of administrative liability but a public authority committing a delictual act

[26] [1978] AC 728.

[27] See e.g. the arguments advanced for the pursuer in *Gibson v Orr* 1999 SC 420 at p.429

[28] See per per Lord Hamilton in *Gibson v* Orr n.27 above at pp.429-431; Lord Hope in *Mitchell v Glasgow City Council* [2009] UKHL 11; 2009 SOT 247; [2009] 2 WLR 481 at [25]. For a discussion of the relationship between English and Scottish courts' treatment of the duty of care and a critique of the latter's acceptance of the English approach see D. Brodie "In Defence of Donoghue" 1997 Juridical Review 65.

will be liable in just the same way as a private person unless it can show that it was acting within the scope of its powers as a public authority, these powers being almost always statutory. Reliance on the ordinary law of delict means that in many cases in which loss is caused by the wrongful exercise of an authority's welfare or regulatory powers, there will be no remedy. Liability for breach of statutory authority operates exactly as it does in English law and the Scottish courts recognize an exact equivalent to misfeasance in a public office although it does not bear that name.[29] In England, negligence is the tort most likely to be invoked in relation to harm caused by a public authority's misuse of its welfare and regulatory powers and in Scotland the same is true of unintentional delict.

As noted above, however, there is occasional evidence of a less restrictive approach to the incidence of the duty of care on the part of Scots courts. A recent example is *Burnett v Grampian Fire and Rescue Services*.[30] There the pursuer was the owner of a flat. A fire broke out in the flat below and the fire brigade came to the scene, appeared to extinguish the fire and forced entry into the pursuer's flat in order to check that the fire had not spread upwards. Subsequently, the fire continued to smoulder and reignited causing substantial damage. The pursuer sought damages claiming that the fire brigade had breached the duty it owed him to extinguish the fire in the flat below and to take reasonable care in ensuring the safety of his flat. The leading English authority was (and is) *Capital and Counties PLC v Hampshire County Council*.[31] In that case, the members of the Court of Appeal based their judgment on the act/omission distinction. They laid down the general proposition that where a fire brigade exercises its statutory powers to put out a fire, it will owe a duty of care to the owners of premises affected not to make matters worse but it will owe no duty to improve matters or to use reasonble care to ensure that the fire is actually put out. In *Burnett*, Lord Macphail rejected this proposition. He questioned the idea that when a fire brigade attended the scene of a fire there could be sufficient proximity for the firemen to

[29] See *Micosta v Shetlands Islands Council* 1986 SLT 193 per Lord Ross at p.198; *Watkins v Secretary of State for the Home Department* [2006] UKHL 17; [2006] 2 AC 395 per Lord Hope of Craighead at [29]; *Phipps v Royal College of Surgeons of Edinburgh* [2010] CSOH 58; 2010 GWD 27-544 per Lord Bonomy at [7]-[10].

[30] [2007] CSOH 3, 2007 SLT 61.

[31] [1997] QB 1004; [1997] WLR 358.

owe a duty not to cause further harm but insufficient proximity for them to be under a duty to positively assist,[32] and, without being absolutely clear as to the analytical basis for so finding, held that in such circumstances there was sufficient proximity to found a general duty to act with reasonable care in extinguishing fire.[33] His lordship also rejected a number of policy arguments advanced by the defenders to show that it would not be fair, just and reasonable to impose a duty including the argument that there was some sort of tension between the duties owed by the fire service to the public at large and the duties it owes those affected by a particular emergency.[34]

4. THE INFLUENCE OF EU LAW AND THE HUMAN RIGHTS ACT

Two further factors complicate the picture so far as the tort liability of public authorities in the UK is concerned. The first is that as a result of the UK's membership of the European Union citizens are entitled to invoke the form of liability created by the European Court of Justice in the *Francovich* and *Brasserie du Pêcheur* cases where they suffer harm as a result of breaches of EU law by public authorities. Liability under this head is treated as a tort for the purpose of calculating damages and time limits.[35]

The second factor is the advent of the Human Rights Act 1998. This act, which came into force on 2 October 2000, makes the rights in the ECHR directly enforceable in UK law. Under s.3 of the Act all legislation must, so far as possible, be read so as to make it compatible with Convention rights. Where a piece of legislation cannot be made compatible then the court may declare it incompatible but this does not affect its validity. Under s.6, it is unlawful for a public authority to act in a way which is incompatible with a

[32] At [49]

[33] At [58].

[34] At [70].

[35] See *Spencer v Secretary of State for Work and Pensions* [2008] EWCA 750, [2009] QB 358.

Convention right. Under s.7 anyone who is a victim of an act which is unlawful under s.6 can bring proceedings against the public authority concerned. S.8 provides that in proceedings under s.7 a court may award damages where it considers it just and appropriate to do so. Courts' powers to award damages under this provision are subject to various conditions. Subsections (3) and (4) of s.8 are in the following terms:

> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—
>
> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
>
> (b) the consequences of any decision (of that or any other court) in respect of that act,
>
> the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
>
> (4) In determining—
>
> (a) whether to award damages, or
>
> (b) the amount of an award,
>
> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

Both *Francovich* and the Human Rights Act introduce into English law what is otherwise lacking, namely a form of liability for harm caused by breach of public law norms. It might have been thought that this would lead the courts towards creating a more general form of such liability, but as yet, there is no sign of it having this effect. *Francovich* liability is applied by the courts as required by EU law but it has no influence beyond EU law's remit. Nor has the introduction of the power to award damages for breach

of human rights done much to alter the courts' overall approach to the problem of public authority liability.

From the point of view of tortious or delictual liability, the HRA presented the courts with two opportunities. Firstly, where existing torts failed to protect human rights, the courts might have transformed the torts so to make them do so. Secondly, the form of liability created by the Act could have been developed so as to constitute in itself a kind of tort, governed by a body of consistent rules and leading to the award of damages calculated in accordance with established tort principles.

Both these opportunities have been eschewed. Existing torts have not by and large been transformed. In one major case, *D v East Berkshire Community Health NHS Trust*,[36] the courts found a duty of care in circumstances in which it had previously been held that there was none in order to comply with Convention rights. In *D*, the House of Lords heard three appeals all concerned with mistaken decisions by the child protection authorities to remove children from parents whom they suspected of abusing the children. At the time, the leading UK authority in this area was *X (Minors) v. Bedfordshire County Council*.[37] There the House had also heard a number of joined appeals. In one of these, the *Bedfordshire* case, the claimants were a group of children who sued the authority for failing to remove them from their neglectful parents. In another, the *Newham* case, the claimants were a mother and daughter whom the authority had separated in the mistaken belief that the mother's boyfriend was abusing the daughter. The House held that, for policy reasons, it would not be fair, just and reasonable to find a duty of care in any of the cases. The claimants in both the *Bedfordshire* case and the *Newham* case then made applications to the ECtHR. The application arising from the *Bedfordshire* case, was heard under the name *Z v UK*[38] and it was here that the ECtHR repudiated the idea that a refusal to find a duty of care prior to a full investigation of the facts of a case constituted a breach of Article 6. It also, however, found that the failure to remove the neglected children was a breach of their rights

[36] N.13 above.

[37] N. 18 above.

[38] [2001] 2 FLR 612.

under Article 2 and Article 8 and that the failure to provide a remedy amounted to a breach of Article 13. The application arising from the *Newham* case was heard under the name *TP and KM v UK*.[39] There the ECtHR found that the wrongful separation of the mother and daughter amounted to breach of their rights under Article 8 and the failure to provide a remedy amounted to a breach of Article 13. In *D*, faced with the question of whether the authorities owed a duty of care to children wrongfully removed, the Court of Appeal asserted simply that the decision in *X* could not survive the Human Rights Act and this conclusion was endorsed by the House of Lords. On the other hand, despite the ECtHR's finding in *TP and KM* that certain of the actions of the authority breached a duty owed to the mother as well as to the child, the House held that the child protection authorities owed no duties to parents when deciding whether to separate their children from them. The reason given was the one referred to above in the section on negligence: that it was undesirable to impose a duty of care towards a class of person which it was not the purpose of the authority's powers to protect.

The courts have also transformed the tort of breach of confidence so as to give horizontal effect to the Convention right to privacy under Article 8. Court and tribunals are included in the definition of "public authority" and thus share with other public authorities the obligation to act compatibly with Convention rights. This has been taken to mean that they must develop the common law as it applies between private persons so as to make it Convention compatible. The most conspicuous failures in the field of private law to protect the interests recognized in the ECHR have been in relation to privacy. The pre-HRA tort of breach of confidence enabled one person A to sue another B where A had disclosed information to B on the understanding that it was to be kept secret and B had sought to publicise it. The post-HRA tort of breach of confidence has become, above all, a means whereby a person in the public eye can obtain a remedy against newspapers or other media outlets that attempt to invade her privacy by publishing pictures or information about her private life. In giving the tort this role, the courts quite explicitly invoke the values

[39] [2001] 2 FLR 549.

protected by Article 8 and weigh these where necessary against the values protected by Article 10 of the Convention.[40]

But the *D* case and the development of breach of confidence are exceptions to the general rule. The development of breach of confidence is explained by the need to make a particular Convention right effective as between private parties and the absence of any method for achieving this in the Act. It is noteworthy in this respect that in the *Wainwright* case mentioned above, where the defendant was a public authority, the courts rejected the suggestion that they should expand the tort of trespass to the person so that it provided a remedy for invasions of the right to privacy under Article 8 ECHR. In *D*, it is significant that the facts in issue arose before the Act came into force. The general approach taken by the courts has been to insulate the law of tort from Convention rights and to insist that in so far as the claimant has suffered a breach of her Convention rights requiring damages by way of remedy, the solution lies in proceedings under the Act. In the case of negligence, this can be seen in the House of Lords judgment in the joined appeals *Van Colle v Chief Constable of Hertfordshire Police* and *Smith v Chief Constable of Sussex Police*.[41] In both cases, the claimants sued the police for failure to prevent a crime, in the first case, the murder of the claimants' son, and in the second the serious assault of the claimant by his former partner. In the first case, the claimants alleged that the police's failure constituted breach of their duty to protect the claimants' son from a risk to his life under Article 2 ECHR. In the second, the claimant alleged that the police had breached the duty of care they owed him in negligence. In both cases the House found against the claimants. In the first, their Lordships held that the level of risk to the claimants' son that the police knew or ought to have known about fell below the level necessary to give rise to an obligation on the part of the police. (Here the House applied the test set out by the ECtHR in the *Osman* case referred to above: that the authorities knew or ought to have known of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party.) In the second case, the House held that "it was a core principle of public policy that, in the absence of special circumstances, the police owed no common law duty of care

[40] There is now a large case law in this area but the leading case remains *Campbell v Mirror Group Newspapers* [2004] UKHL 22; [2004] 2 AC 457.

[41] [2008] UKHL 50; [2009] 1 AC 225.

to protect individuals from harm caused by criminals since such a duty would encourage defensive policing and divert manpower and resources from their primary function of suppressing crime and apprehending criminals in the interest of the community as a whole". Their Lordships rejected the argument that the duty of care should be developed so as to reflect the duty owed by the police under Article 2. Both Lord Hope[42] and Lord Brown,[43] expressed the view that it would be better to allow the different remedies to develop in parallel, Lord Brown claiming that Convention claims and ordinary civil claims had different objectives since the latter were intended to compensate claimants for losses whereas the former were intended to vindicate human rights. As several commentators have pointed out, this overlooks the fact that several torts are mainly concerned with the protection of rights.[44] For example, the various forms of trespass to the person described above protect the rights to bodily integrity and liberty. There is no need for a claimant in trespass to show material loss in order to succeed in a claim.

The assumption that the law of tort and the law concerning Convention rights should remain separate is also reflected in the judgment of the House of Lords in *Watkins v Home Secretary*.[45] There the claimant was a prisoner whose correspondence with his lawyer had been unlawfully opened by the prison authorities. The claimant sued the Home Secretary for misfeasance in a public office but the judge of first instance dismissed his claim on the ground that he had not suffered financial loss or physical or mental injury. On appeal, the Court of Appeal upheld the claim on the ground that an action in misfeasance in a public office could succeed where it was shown that the claimant's constitutional right had been infringed but this finding was in turn reversed by the House of Lords. The HRA was not relied on by the claimant, most of the unlawful acts complained of having occurred before the coming into force of the Act. But the House took it upon itself to mention the

[42] At para [82].

[43] At para [138].

[44] See e.g. M. Lunney and K. Oliphant *Tort Law: Text, Cases and Materials* (4th ed., Oxford University Press, 2010) p.151; J. Steele "Damages in Tort and under the Human Rights Act : Remedial or Functional Separation" [2008] CLJ 606; Arden "Human Rights and Civil Wrongs: Tort Law under the Spotlight" [2010] PL 140 at 150

[45] [2006] UKHL 17; [2006] 2 All ER 353.

Act, giving it is a reason for refusing to interpret the tort as covering infringement of constitutional rights that a remedy for infringements of rights that might be so classified was now obtainable under ss.6-8.[46] Similar reasoning was used by Lord Scott in *Jain v Trent Strategic Health Authority*.[47] The Authority had obtained an emergency order closing down the claimants' care home after an ex parte hearing (i.e. one to which the claimants were not party) before a Magistrates court. The tribunal to which the claimants appealed found that the evidence on the basis of which the authority had applied for the order was grossly inadequate and overturned the order. By this time, however, four months had passed and the claimants' business was in ruins. The claimants sued the authority in negligence. The House of Lords found on two grounds that the authority did not owe the claimants a duty of care. The first ground was the one mentioned above, namely that a duty of the kind argued for would conflict with the authority's statutory duty to protect the vulnerable inmates of care homes. The second was that it would be inappropriate to impose a duty of care in negligence in relation to steps taken in preparation for litigation. The claimants did not argue breach of their Convention rights because this was another case whose facts occurred before the coming into force of the Act. Nonetheless, Lord Scott, who gave the leading judgement, took it upon himself to consider how the case would look if argued on human rights grounds. As if to offer an excuse for the court's failure to rectify an obvious injustice, his lordship asserted that were the same facts to recur the HRA would afford the claimants a remedy for breach of Article 1 Protocol 1 and Article 6 ECHR.

Turning to the form liability under the Act has taken, the courts have adopted what might be called a minimalist approach to the matter. As the words of s.8 quoted above make clear, it was never intended that damages should be awarded for every breach of human rights. But in the leading case of *R (Greenfield) v Secretary of State for the Home Office*,[48] Lord Bingham, with whom the other judges agreed, set out an approach much

[46] At [26] and [64].

[47] N.23 above.

[48] [2005]UKHL 14; [2005] 1 WLR 673.

more restrictive than most observers had anticipated. He held that the Act is not a tort statute and that its objects are different and broader; that damages are not ordinarily needed to encourage high standards of compliance by the states subject to the Convention; that the purpose of incorporating the Convention into English law was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg; that the requirement in s.8(4) that the courts should take into account the principles applied by the European court under article 41 means that in deciding whether to award damages the courts should look to Strasbourg and not to domestic precedents; that the ECtHR's description of its awards as equitable means that they are not to be precisely calculated but are judged by the court to be fair in the individual case and that this should be the practice of the English courts also; and that the English courts should not aim to be significantly more or less generous than the court in Strasbourg.

The English law of tort and its Scots equivalent are far from perfect but they provide us with a well understood body of rules and principles. These govern both the incidence of liability and the calculation of damages. The ECtHR uses its powers to award compensation where this is necessary to make up for deficiencies in the remedies given in respondent states. In part because of this its jurisprudence on this point is notoriously lacking in clear principles. Moreover, no discernible method governs the calculation of the amounts it awards and these are far smaller than the damages in tort or delict awarded by UK courts in similar cases. While s.8(4) of the HRA only requires courts to *have regard* to the principles applied by the ECtHR in relation to the award of compensation under Article 41, the effect of *Greenfield* seems to be that courts and potential litigants must treat Strasbourg rulings as a definitive guide to when damages should be awarded and that litigants must expect awards that are calculated on a casuistic, ad hoc basis and are far lower than they would receive in tort. Claimants like those in *Watkins* or *Jain* who are obliged to bring proceedings based on Convention rights rather than in tort can thus expect something inferior to what they would have received if an action in tort were open to them.[49]

[49] Recent examples of awards of damages are: £5,000 to compensate for non-pecuniary loss to the parents of a severely depressed young woman who committed suicide after the defendant health authority breached its duty under Article 2 ECHR by giving her leave from its mental hospital (*Rabone v Pennine Care NHS Trust* [2012]

It is perhaps significant that Lord Bingham gave a dissenting judgment in *Smith v Chief Constable of Sussex* expressing his view that the common law should develop in such a way as to reflect the values of the ECHR.[50] The decision to adopt a restrictive approach to the question of when damages should be awarded under the HRA would be easier to defend if the approach to the development of the common law suggested by Lord Bingham were adopted. But the other members of the House of Lords have chosen to endorse his lordship's views concerning proceedings under the Act while rejecting his suggested approach to the development of tort.

5. ADMINISTRATIVE LIABILITY AND THE OMBUDSMAN

A spectre that hovers over many debates about administrative liability is the power of ombudsmen – in particular the Parliamentary and Health Service Ombudsman, Local Government Ombudsman and their Welsh, Scottish and Northern Irish equivalents – to recommend the award of damages to victims of maladministration. This power is relevant in a number of ways. Firstly, it provide a point of comparison because, as long as the legal systems of the UK lack a general principle of administrative liability, the ombudsman is able to recommend compensation in many cases in which the courts are impotent. The ombudsman's power cannot, of course, be an entirely satisfactory remedy for the absence of the power on the part of the courts to award damages because his recommendations are not legally binding. But it may often in practice provide an adequate remedy to victims of maladministration and its existence always serves to remind us of what the courts are lacking.

UKSC 2; [2012] 2 WLR 381); a total of £10,500 for a Sri Lankan family of five who were unlawfully denied asylum, unlawfully removed from the country and in relation to whom the Secretary of State refused to admit her mistakes over a number of years, the events in question constituting breaches of Articles 5 and 8 ECHR (*R(M) v Home Secretary* [2011] EWHC 3667 (Admin); [2012] ACD 34); £5,000 each to a group of Nigerian women brought unlawfully into the country and forced effectively to work as slaves after the police breached their duties to the women under Articles 3 and 4 ECHR by failing to investigate their cases over a number of years (*OOO v Commissioner of Police for the Metropolis* [2011] EWHC 1246 (QB); [2011] UKHRR 767).

[50] N.41 above at [58].

Secondly, it was suggested by Sullivan J in *R (Bernard) v Enfield LBC*[51] that the Local Government Ombudsman's awards should serve as a guide to the level of damages to be awarded in claims under the HRA. The claimants in this case were a family with six children and a severely handicapped mother. They alleged successfully that the defendant authority had breached their Article 3 rights by failing to fulfil a statutory duty to provide them with adequate accommodation. The case was thus of exactly the sort in which pre or extra-HRA law provided no remedy and hence little detailed guidance as to the appropriate level of damages. The approach was approved when the case was heard by the Court of Appeal as one of a number of joined appeals in *Anufrijeva v Southwark LBC*. [52] It now seems, however, that as a result of the House of Lords' judgment in *Greenfield*, recommendations of the ombudsman are no longer considered in this context.

Thirdly, the fact that a litigant might receive compensation as a result of a recommendation of the ombudsman has been advanced in the past as a policy consideration militating against the finding that it would be fair, just and reasonable to impose a duty of care. It was, for example, one of the considerations mentioned by Lord Browne-Wilkinson in his judgment in *X (Minors) v Bedfordshire CC*.[53] In the years after the ECtHR's ruling in the *Osman* case[54] it seemed to have ceased to play this role but it reappears in the *Mohammed* case I discuss below.

6. SUMMING UP

In 2008, the Law Commission published a consultation paper proposing a new form of liability roughly similar to state liability in EU law.[55] The details of this proposal

[51] [2002] EWHC (Admin) 2282; [2003] HRLR 4.

[52] [2003] EWCA Civ 406; [2004] QB 1124 at [78].

[53] N.19 above.

[54] N.20 above.

[55] Law Commission *Administrative Redress: Public Bodies and the Citizen* Consultation Paper No.187, available on the Law Commission's website at

were much criticised by academics[56] but it was, in any case, strongly opposed by the government and was consequently abandoned.[57]

In his judgment in *Mohammed and others v Home Office*[58], Sedley LJ makes reference to this fact in a case that encapsulates many of the salient features of administrative liability in the UK. His lordship described the facts of the case as follows: "[t]he eight claimants...are Iraqi Kurds who reached the United Kingdom between 1999 and 2001 and who were eventually found to be entitled to be granted indefinite leave to remain ("ILR"). None of them was, however, granted ILR until 2007, and the last of them was not granted it until 2009. In some cases this was because the applications had been put on hold pursuant to a priority policy which was subsequently held to be unlawful... In the remainder it was because the Home Office failed to implement the appropriate ministerial policy." The claimants sought damages for breach of statutory duty, negligence, and breach of Articles 5 and 8 ECHR. The Home Office applied to strike out the proceedings[59] and at first instance succeeded in relation to the claims of breach of statutory duty and under article 5. The Home Office appealed to the Court of Appeal against the first instance judge's refusal to strike out the claims based on negligence and article 8.

Giving the judgment of the court, Sedley LJ held that the Article 8 claim could proceed but that the negligence claim could not. A duty of care could not be imposed upon the exercise of the Secretary of State's statutory power under s.4(1) of the Immigration Act 1971 especially since "practically everything [the Home Office] does in the exercise of the large section 4(1) function is dictated by policy, whether in the form of immigration rules

http://lawcommission.justice.gov.uk/docs/cp187_Administrative_Redress_Consultation.pdf

[56] The criticisms are summarized by the Law Commission in its *Analysis of Consultation Responses* at http://lawcommission.justice.gov.uk/docs/lc322_Administrative_Redress_responses.pdf

[57] See Law Commission *Administrative Redress: Public Bodies and the Citizen* Law Com No.332, available on the Law Commission's website at http://lawcommission.justice.gov.uk/docs/lc322_Administrative_Redress.pdf

[58] [2011] EWCA Civ 351; [2011] 1 WLR 2862.

[59] I.e. to terminate proceedings without full examination of the facts on the ground that even if all the factual allegations made by the claimants were true, they could not succeed as a matter of law.

or of departmental policies or instructions."[60] Having mentioned the abandonment of the Law Commission's project, his lordship went on:

> "...whatever the reason, a faute lourde system of state liability in damages for maladministration, of the kind that has worked well in France for more than a century [6] , is not on the cards in the United Kingdom. Apart from the limited private law cause of action for misfeasance in public office and the statutory causes of action in EU law and under the Human Rights Act 1998 , there is today no cause of action against a public authority for harm done to individuals, even foreseeably, by unlawful acts of public administration. The common law cause of action in negligence coexists with this doctrine and may on occasion arise from acts done or omissions made in carrying out a public law function; but it may not impinge on the discharge of the function itself, however incompetently or negligently it is performed."[61]

His lordship finished by noting the possibility that the ombudsman might recommend the award of compensation and appeared to endorse counsel for the Home Office's suggestion that this might constitute a reason for holding that it would not be fair, just and reasonable to impose a duty of care.

[60] [17].

[61] [24].

iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

COMPARATIVE ADMINISTRATIVE LAW AND ADMINISTRATIVE PROCEDURE

ANNUAL REPORT – 2011 - GERMANY

(October 2011)

Prof. Dr. Michael FEHLING, LL.M. (Berkeley)

INDEX

1. GENERAL ADMINISTRATIVE LAW IN GERMANY

This report deals with General Administrative Law (*Allgemeines Verwaltungsrecht*) in Germany, which has to be distinguished from the special areas of Administrative Law (*Besonderes Verwaltungsrecht*), such as Environmental Law, Civil Service Law, Public Law and Economics (Regulation) etc. Within the framework of General Administrative Law, some aspects are excluded because they are subject of other reports, e.g. administrative contracts, administrative decisions and the scope of judicial review. Comparative research in Germany is covered as well; again, the focus lies on General Administrative Law.

1.1 The scope of German Administrative Law

While in some other countries the meaning of Administrative Law is confined to administrative procedure, in Germany the term includes material principles as well. Both can be found in the Administrative Procedure Act. The respective acts of the German states (*Länder*) and their federal equivalent are largely similar, so that it usually suffices to consider the provisions of the Federal Administrative Procedure Act.

Unfortunately, the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) does not cover the whole set of general concepts and procedures in Administrative Law. Rulemaking procedures, for example, are excluded. To find out about general ideas and concepts outside of the scope of the Administrative Procedure Act, it is necessary to examine special areas of Administrative Law and draw overarching conclusions from them. Furthermore, new developments often start in special areas of Administrative Law before they become a part of general doctrine. Therefore, legal scholarship often analyses the most advanced special areas as "reference fields" (*Referenzgebiete*)[1] to identify new trends in

[1] See in general *Schmidt-Aßmann*, Das allgemeine Verwaltungsrecht als Ordnungsidee, 2nd ed., Berlin 2006; *Voßkuhle*, Neue Verwaltungsrechtswissenschaft, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), Grundlagen des Verwaltungsrechts, vol. 1, München 2006, § 1 Mn. 43 ff.

General Administrative Law. Under both aspects – filling gaps in the Administrative Procedure Act and searching for new trends – it will be necessary to consider some more specific legal problems as well. In recent years, crucial developments have taken place in Environmental Law, Economic Regulation of Network Industries and Public Procurement Law, many of them subject to European influence.

1.2 The role of Comparative Administrative Law

In Germany, comparative research in administrative law has increased over the last decade and will probably continue to thrive in the future. This due to both academic and economic reasons.[2] Firstly, the number of German scholars that have studied or conducted research abroad is growing. Vice versa, foreign legal scholars undertake comparative research and often publish the result in Germany as well. Secondly, European integration raises the importance of analysing solutions in other member states,[3] especially if all of them have had to transform the same European directives into national law. Thirdly, competition among European legal systems has generally increased, creating the necessity to reform national law in order to increase efficiency. This is still less important in Administrative Law than in Private Law because the former is much more closely linked to the unique national political system and history; in Germany, the catastrophe of Nazism has influenced the development of Public Law and of General Administrative Law in particular. Nevertheless, the rivalry among the member states to encourage business activities urges for more efficient administrative procedures in economic regulation as well. Fourthly, economic integration raises the number and frequency of transnational administrative procedures. These challenges necessitate more comparative research.

[2] For a recent, thorough investigation of the methods and history of Comparative Administrative Law in Germany see *Schönberger*, Verwaltungsrechtsvergleichung: Eigenheiten, Methoden und Geschichte, in: v. Bogdandy/Huber (eds.), Ius Publicum Europeaum, vol. 4: Verwaltungsrecht in Europa, 2011, § 71.

[3] The basis of this is *Schwarze*, Europäisches Verwaltungsrecht, 2nd ed., Baden-Baden 2005; more recently *von Danwitz*, Europäisches Verwaltungsrecht, Berlin 2008.

Comparative research in Germany concentrates on the U.S.[4] and on the biggest EU Member States, France[5] and Great Britain.[6] In Comparative Administrative Law, these countries also represent different legal traditions. Naturally, the other German-speaking countries in Europe, Austria and Switzerland, whose university professors are united in the German Association of Public Law Scholars (*Deutsche Staatsrechtslehrervereinigung)*, are important jurisdictions for comparative research as well. Spain and Italy might be next to mention.[7]

The bulk of comparative research in Administrative Law focuses on special areas closely linked to the economy (environmental law, economic regulation).[8] However, administrative procedure is a central subject of such research as well. Recent special publications will be mentioned in the further chapters of this report.

2. CONCEPTUAL ISSUES

2.1. Classical legal perspective versus outcome-based or governance-approach

For more than 10 years, the concept of scientific research in Administrative Law has been debated among German scholars. The traditional legal school of thought (*juristische Methode*) considers doctrinal issues and focuses exclusively on determining the

[4] In General Administrative Law e.g. *Pünder*, Exekutive Normsetzung in den Vereinigten Staaten von Amerika und in der Bundesrepublik Deutschland, Münster 1995; *Lepsius*, Verwaltungsrecht unter dem Common Law, Tübingen 1997; *Fehling*, Verwaltung zwischen Unparteilichkeit und Gestaltungsaufgabe, Tübingen 2001.

[5] For example *Ladenburger*, Verfahrensfehlerfolgen im deutschen und im fanzösischen Verwaltungsrecht, Berlin 1999; *Neidhardt*, Nationale Rechtsinstitute als Bausteine europäischen Verwaltungsrechts, 2008.

[6] *Brinktrine*, Verwaltungsermessen in Deutschland und England: eine rechtsvergleichende Untersuchung von Entscheidungsspielräumen der Verwaltung im deutschen und englischen Verwaltungsrecht, Heidelberg 1998.

[7] Very important the country reports in *Schneider* (ed.), Verwaltungshandeln in Europa, vol. 1, 2007 (England and Wales, Spain, the Netherlands); vol. 2, 2009 (France, Poland, Czech Republic).

[8] For example *Stelkens/Nogellou* (eds.), Droit comparé des Contrats Publics / Comparative Law on Public Contracts, Brussels 2010; *Lepsius*, Regulierungsrecht in den USA: Vorläufer und Modell, and *Ruffert*, Europäisches Ausland, in: Fehling/Ruffert (eds.), Regulierungsrecht, 2010, § 1 and § 2 .

legality of administrative actions, thus assuming the perspective of judicial review. Today, however, a "New Administrative Law Science" (*Neue Verwaltungsrechtswissenschaft*) advocates a broader frame of reference that includes the changes in reality that Administrative Law and its application intend to bring about. Its German technical term (*Steuerungsperspektive*[9]) is scarcely translatable – it denotes an outcome-oriented point of view that, in comparison to the related governance approach, is actor-based to a greater extent. Critics argue that the rule of law is weakened by assuming this broader perspective, since it takes into account aspects of political science, sociology and economics as well; it enhances the regulatory power of the state and correspondingly diminishes the protection of individual rights. The introduction of social sciences into the legal argumentation threatens to erode the traditional methods of statutory interpretation as a cornerstone of legal certainty.[10] However, from my point of view, this is a misinterpretation of the concept. It does not neglect the aspect of legality but tries to work out the possible regulatory options, measures and instruments within its confines (*Optionenraum*[11]).

Although major contributions to this scholarly dispute are older, there is a lot of controversial discussion on these issues in the last two or three years.[12]

2.2. Towards a new concept of administrative procedure

Since the end of the Nazi Regime, German Administrative Law focuses primarily on the result of administrative action; the scope of substantive review is traditionally broad and there is not much room for administrative discretion.[13] Administrative procedure is

[9] For an overview see *Voßkuhle* (supra note 1), § 1 Mn. 16 ff.

[10] See e.g. *Wahl* Herausforderungen und Antworten: Das öffentliche Recht in den letzten fünf Jahrzehnten, Berlin 2006; *Gärditz*, Hochschulorganisation und verwaltungsrechtliche Systembildung, Tübingen 2009, pp. 182 ff. ; critical review by Fehling, Die Verwaltung 43 (2010), pp. 127 ff.

[11] *Hoffmann-Riem*, Eigenständigkeit der Verwaltung, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (supra note 1), §10, Mn. 45.

[12] In 2012 there will be a 2nd edtion of Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), Grundlagen des Verwaltungsrechts, vol 1.; most recently *Stelkens* Rechtsetzungen der europäischen und nationalen Verwaltungen, VVDStRL 71 (2012, publication forthcoming).

[13] From a historic perspective Wahl (supra note 10), pp. 20 ff.

attributed a mere serving function (*dienende Funktion*) to reach the legally correct result. Procedural errors are considered harmless unless they influence the final administrative decision (§ 46 Administrative Procedure Act – VwVfG). Furthermore, procedural guarantees are traditionally subject to judicial review only if such gurantees serve the interests of the claimant and not only the interests of other people or of the general public as a whole. Under European influence, however, the scope of review concerning complex administrative decisions (e.g. in environmental law and in economic regulation) is a narrower one;[14] as a compensation, administrative procedure and procedural judicial review become much more important. In a regulatory context, this is reinforced by the necessity to gather information from the regulated industry and to acquire knowledge needed to render good decisions.[15] From this starting point, a scholarly discussion is evolving on whether German Administrative Law should shift its attention from substantive justice to procedural justice, giving more weight to the instrumental as well as the non-instrumental justification of administrative procedures.

This suggestion has been deliberated extensively at the annual conference of the association of German Public Law Scholars (*Tagung der Vereinigung der Deutschen Staatsrechtslehrer*) in Berlin 2010[16], in a doctoral thesis[17] and in recent Law Review articles.[18] In my opinion, there are good reasons for boosting the importance of administrative procedure in Germany, especially regarding special procedures (e.g. for

[14] For example in telecommunication BVerwGE 131, 41 (Mn. 14 ff., 21 f, 47 ff., 63 ff.), most recently BVerwG, judgment of 2011, November 23rd – 6 C 11/10; concerning the integrated European administration in the regulation of genetically modified food OVG Lüneburg, NuR 2009, 566 (599).

[15] Most recently *B. Wollenschläger*, Wissensgenerierung im Verfahren, Tübingen 2009.

[16] *Gurlitt*, Der Eigenwert des Verfahrens im Verwaltungsrecht, VVDStRL 70 (2011), pp. 227 ff.: from a Comparative Administrative Law perspective (including England, France, the European Union and the U.S.) *Fehling*, Der Eigenwert des Verfahrens im Verwaltungsrecht, VVDStRL 70 (2011), pp. 280 ff.; report of the discussion pp. 338 ff.

[17] *Quabeck*, Dienende Funktion des Verwaltungsverfahrens und Prozeduralisierung, Tübingen 2010.

[18] *Stelkens*, Der Eigenwert des Verfahrens im Verwaltungsrecht, DVBl. 2010, pp. 1078 ff

public tendering and service concessions[19] and in environmental law) and the procedure within and among different administrative agencies. From a Comparative Administrative Law perspective, these are not German problems but the result of European Law. Only the need to reform rulemaking procedures can be considered specifically German. Apart from a few special areas of Administrative Law, there is no overarching necessity to reduce the scope of judicial review because of more elaborated administrative procedures.[20]

2.3. Is it necessary to reform the Administrative Procedure Act?

The German Administrative Procedure Act has been subject to criticism for quite some time. Most importantly, the Act does not cover rulemaking procedures. Apart from some specific statutes, these are subject only to the Internal Rules of the Federal Government (*Geschäftsordnung der Bundesregierung*) without the force of law.[21] Furthermore, many administrative law scholars argue in favour of the revocation of § 45 (2) VwVfG which today allows the administration to repair procedural mistakes even when an administrative court procedure is already pending.[22] The quasi-judicial procedure for formal adjudication does not make much sense and is widely neglected in the laws governing Special Administrative Law (except for the special provisions concerning procedures for planning approvals). It should be replaced by a more modern procedure governing licensing through participation of the public.[23] Some scholars even propose the integration of further types of procedures or provisions governing certain elements of procedures into the

[19] Recently *F. Wollenschläger*, Verteilungsverfahren, Tübingen 2010; *Kaelble*, Vergabeentscheidung und Verfahrensgerechtigkeit, Berlin 2008.

[20] *Fehling* (supra note 16), pp. 328 f.

[21] *Pünder* (supra note 4), pp. 142 ff.; Wolff, Die dienende Funktion der Verfahrensrechte – eine dogmatische Figur mit Aussagekraft und Entwicklungspotential, in: Festschrift für Scholz, Berlin 2007, p. 977 (988 ff.). The pros and cons of more elaborated rulemaking procedures in Germany have been discussed again recently at the annual conference of the association of German Public Law Scholars (*Tagung der Vereinigung der Deutschen Staatsrechtslehrer*) in Münster 2011; see *Stelkens* (supra note 12) arguing in favour of a codification and the related discussion remarks (publication forthcoming in 2012).

[22] Recently again *Gurlitt* (supra note 16), pp. 260 ff.; *Fehling*, (supra note 16), p. 326.

[23] Most prominently *Wahl*, e.g. Fehlende Kodifizierung der förmlichen Genehmigungsverfahren im Verwaltungsverfahrensgesetz, NVwZ 2002, pp. 1192 ff.; compare *Burgi*, Verwaltungsverfahrensrecht zwischen europäischem Umsetzungsdruck und nationalem Gestaltungsunwillen, JZ 2010, p. 105 (110).

Administrative Procedure Act.[24] The provisions on administrative contracts (*Verwaltungsverträge*) could be amended to include special rules for public-private-partnerships; in addition, § 59 VwVfG dealing with the legal consequences of unlawfulness (whether the contract is void or remains in effect) should be more sophisticated. There has even been a proposal of the Advisary Committee on General Administrative Law (*Beirat Verwaltungsverfahrensrecht*) for such an amendment.[25]

However, there is little political consensus concerning the amendment of the Administrative Procedure Act. Only some of its chapters have been changed to implement the procedural demands of the EU-Service Directive (see next section). The lack of political pressure to thoroughly reform the Act might be due to the fact that legal practice is largely able to deal with its shortcomings. However, an important reform concerning the participation of environmental organisations and their right to judicial review will probably take place – albeit outside of the Administrative Procedure Act.

3. CORE DEVELOPEMENTS IN 2010/2011

3.1 The transformation of the service directive

The EU-Service Directive[26] contains several provisons governing procedures within the European integrated administration concerning transnational service-licensing procedures. Consequently, in 2009 the Administrative Procedure Act has been amendend

[24] Most recently *Fehling* (supra note 16), pp. 326 f., drawing partly on *Hoffmann-Riem*, Verwaltungsverfahren und Verwaltungsverfahrensgesetz – Einleitende Problemskizze, in: Hoffmann-Riem/Schmidt-Aßmann (eds.), Verwaltungsverfahren und Verwaltungsgesetz, 2002, p. 9 (65 f.); compare *Voßkuhle*, Strukturen und Bauformen neuer Verwaltungsverfahren, in: Hoffmann-Riem/Schmidt-Aßmann (ed.), Verwaltungsverfahren und Verwaltungsgesetz, 2002, p. 277 (284 ff.).

[25] *Beirat Verwaltungsverfahrensrecht beim Bundesministerium des Innern*, Fortentwicklung der Vorschriften über den öffentlich-rechtlichen Vertrag (§§ 54-62 VwVfG), NVwZ 2002, pp. 834 ff.; but compare the new advice: Bewährtes Weiterentwickeln, NVwZ 2010, pp. 1078 f. For a recent discussion see *Stelkens*, Kodifikationsidee, Kodifikationseinung und Kodifikationsverfahren im Verwaltungsverfahrensrecht, in: Hill/Sommermann/Stelkens/Ziekow (eds.), 35 Jahre Verwaltungsverfahrensgesetz – Bilanz und Perspektiven, 2011, p. 271 (280 ff.)

[26] Directive 2006/123/EC on services in the internal market of 12 December 2006, OJ L 376, 27/12/2006, p. 36.

by new provisions on official assistance (§§ 8a ff. VwVfG, *Amtshilfe*). New procedures to be dealt with by a single autority (§§ 72a ff. VwVfG, Verfahren über eine einheitliche Stelle), and a provison on fictitious approval (§ 42a VwVfG, *Genehmigungsfiktion*) had already been introduced in 2008. Although these new parts of the Administrative Procedure Act shall transfer the European directive on transnational services into national German law, these provisions are framed in such general terms that they can apply to other special areas of administrative law as well if the special law refers to them. Some major acts concerning business regulation (e.g. *Gewerbeordnung, Handwerksordnung*) already do so.

§§ 8a ff. VwVfG are framed in very general language and do not provide much guidance as to the functioning of transnational administrative procedures. They mostly refer to the special rules laid down in the specific secondary law of the European Union. This is probably why legal scholarship has not focused on these general VwVfG-provisons until now.[27]

The procedures dealt with by a single authority (§§ 71a-71e VwVfG) might become more influential. They articulate the service function of administrative procedures: The applicant shall not be forced to correspond with many agencies for different licenses necessary to set up his business operation, but can contact the single authority (*einheitliche Stelle*) which acts as a front office and organizes the interaction of the specialized agencies involved.[28] Another cornerstone of service-oriented acceleration is the right of the applicant to electronic procedures. It seems possible that these new provisons open up a new era of internet-based administrative procedures which, in the future, might even be applied in many areas of environmental law as well. So far, the complicated and expensive electronic signature that proves the authenticity of electronic declarations (see § 3a VwVfG)[29] is

[27] *Schmitz/Prell,* Europäische Verwaltungszusammenarbeit – Neue Regelungen im Verwaltungsverfahrensgesetz, NVwZ 2009, pp. 1121 ff.

[28] Compare *Ernst*, Die Einführung eines einheitlichen Ansprechparners i.S. der EU-Dienstleistungsrichtlinie durch das 4. Gesetz zur Änderung verwaltungsverfahrensrechtlicher Vorschriften, DVBl 2009, pp. 953 ff.

[29] Compare *Eisenmenger,* in: Fehling/Kastner (eds.), Handkommentar Verwaltungsrecht, 2nd ed. Baden-Baden 2010, § 71c VwVfG Mn. 5

inhibiting this development. The Federal Government is working on a bill to make it significantly easier und cheaper to prove the actor's authenticity on the internet, both for business transactions and for the correspondence with administrative agencies.

§ 42a VwVfG on fictitious approvals is the most controversial one of the new provisons. In a few special areas of administrative law (e.g. building permits due to State law) such provisons which constitute a *de jure* approval if the administrative agency did not react to an application within a certain amount of time, could be found already before. But only now this concept to accelerate administrative proceedings[30] by a fixed decision making period will gain more general importance. Critics argue that the (procedural) rights of third parties might be harmed by such a fictitious approval.[31] Without this concept, however, administrative agencies might find new strategies for undermining the decision-making period (which can only be extended once).[32] Firstly, an agency could be tempted to reject an application simply on the grounds that the fixed decision-making period ends; after some more time and more serious consideration, the agency would still be able to change its prior decision. Secondly, an administrative agency can revoke the fictitious approval afterwards. Both strategies would arguably take more time than a normal decision in the first place. Furthermore, conflict might arise upon the question whether the application documents are complete, because this is necessary for the period to begin.[33]

[30] For this concept see *Fehling*, Beschleunigung von Genehmigungsverfahren in der Umsetzung der Dienstleistungsrichtlinie, in: Fehling/Grewlich (ed.), Struktur und Wandel des Verwaltungsrechts, Baden-Baden 2011, p. 43 ff.

[31] Compare *Fehling* (supra note 30), pp. 52 and 55 f.

[32] See *Eisenmenger* (supra note 29), § 42a VwVfG Mn. 10; *Ziekow*, Möglichkeiten zur Verbesserung der Standortbedingungen für kleinere und mittlere Unternehmen durch Einführung von Genehmigungsfiktionen, Berlin 2008, p. 103.

[33] *Uechtritz*, Die allgemeine verwaltungsverfahrensrechtliche Genehmigungsfiktion des §42a VwVfG, in: *Burgi/Schönenbroicher* (eds.), Die Zukunft des Verwaltungsverfahrensrechts, 2010, p. 61 (70 ff.).

3.2 Freedom of Information

Traditionally, German Administrative Law rests on administrative secrecy. Only participants of an administrative procedure are entitled to inspect the documents connected with the proceedings (§ 29 VwVfG). This started to change with the Act on Information Concerning the Environment (*Umweltinformationsgesetz – UIG*)[34] which transposed the Directive on Free Access to environmental information[35] into German Law. Critics argued that the Act – at least in its first version – contained too many exemptions from freedom of environmental information to protect business secrecies. A more fundamental change came with the Freedom of Information Acts (*Informationsfreiheitsgesetz – IFG*) at the Federal level (2005)[36] and in the German States. Although they are not a part of the Administrative Procedure Act, these new Laws shift the rule from administrative secrecy to openness. Everybody, without the necessity to show a special legal interest, has the right to access all administrative documents unless one of the exemptions laid down in the Act prevails.

The most important doctrinal question is whether these exemptions – to protect an overwhelming public interest or for the protection of private data and business secrets – should be read narrowly or, because of the German tradition, be construed broadly. A further question is which documents fall within the ambit of Freedom of Information; drafts and purely internal papers, for example, are not covered by the act. The last years have seen a growing jurisprudence on these issues.[37] The Federal Administrative Court (*Bundesverwaltungsgericht*) favors a broad reading of the scope of the documents involved, because free access facilitates democratic scrutiny of government action. The Federal Freedom of Information Act covers even documents of the Federal Government, acting

[34] First enacted 2001 (BGBl. I, p. 2218); revised 2004 (BGBl. I, p. 3704).

[35] Directive 90/313/EEC on the freedom of access to information on the environment of 07 June 1990, OJ L 158, 23/06/1990, p. 58; Directive 2003/4/EC on public access to environmental information of 28 January 2003, OJ L 41, 14/2/2003, p. 26.

[36] BGBl. I, p. 2722; commentary on this act by *Schoch*, Informationsfreiheitsgesetz, München 2009.

[37] For a recent overview see *Schoch*, Das Informationsfreiheitsrecht in der gerichtlichen Praxis, VBlBW 2010, pp. 333 ff.

outside of normal administrative duties. In general, restrictions on access must be based on written exemptions in the Act (§ 3 IFG) serving the public interest in secrecy. Only under exceptional circumstances there might be unwritten exemptions directly grounded in the constitution to protect the functioning of policymaking, especially within the cabinet.[38] In several decisions the Federal Administrative Court stressed the fact that written exemptions must not be applied automatically but need to be based on an assessment of the circumstances of the case at hand. Documents which are labelled as "classified – only for internal use" (*Verschlusssache – nur für den Dienstgebrauch*) are not automatically exempted by § 4 No. 4 IFG, but only if an actual need for confidentiality can be established.[39] However, the Federal Administrative Court recognizes the necessity of secrecy e.g. for information about CIA-flights in Germany during the War in Iraq 2003 to protect legitimate interests in foreign affairs according to § 3 No. 1 lit a IFG; there is even a margin of appreciation (*Beurteilungsspielraum*) for the administrative agency.[40] Internal discussions within administrative agencies remain secret according to § 3 No 3 IFG even after the administrative procedure has been finished.[41]

Whether business secrets must be protected (e.g. according to § 3 No. 4 IFG[42] or according to § 6 IFG[43]) has to be decided by balancing of interests; there is no clear presumption for secrecy any longer. Similar rules apply for the Act on Information Concerning the Environment (*Umweltinformationsgesetz*).[44] Until now, there seems to be no clear tendency for a widespread abuse of freedom of information to get insight into business secrets of competitors.

[38] BVerwG, judgement of 2011, November, 3rd – 7 C 3/11.

[39] BVerwG, judgement of 2009, October 29th – 7 C 21/08 – NVwZ 2010, 326 ff.

[40] BVerwG, judgement of 2009, October 29th – 7 C 22/08 – NVwZ 2010, 321 ff.

[41] BVerwG, judgement of 2011, July 18th – 7 B 14/11 – NVwZ 2011, 1072 f..

[42] See BVerwG, judgement of 2011, May 24th – 7 C 6/10 – NVwZ 2011, 1012 ff.

[43] BVerwG, judgement of 2009, May 28th – 7 C 18/08 – NVwZ 2009, 1113 f.

[44] For example OVG Münster, judgement of 2011, May 23th – 8 B 1729/10 – DVBl 2011, 968 ff.

3.3 Environmental Impact Assessment and participation in planning procedures

The Environmental Impact Assessment has been a part of German Environmental Law for quite a long time. Because of the Arhues Convention[45] and the corresponding EU-Directive providing for public participation in environmental decision-making[46] this procedural requirement has become much more important. Now, under the German Environmental Remedy Act (*Umweltrechtsbehelfsgesetz - UmwRG*), environmentalist non-governmental organisations can bring a case to court if such an impact assessment was performed in violation of the law. This brings about two major changes in Administrative Law doctrine. Firstly, the plaintiff does not have to show an individual right for standing. The wording of § 2 (1) and (5) UmwRG is not clear about this, but the European Court of Justice in the Trianel-Case[47] decided that allowing altruistic action for environmentalist NGOs is mandatory under the EU-Directive.[48] Second, § 4 UmwRG dispenses from § 46 VwVfG, which stipulates that an administrative act is not invalid solely on the grounds that the act came into being in violation of governing procedure. If one applies this provision to the environmental impact assessment, the administrative act would not be rendered invalid by its absence if the agency can show that it has taken into account the environmental impact of the project without the formal assesment-procedure. This would pose an eminent danger that elaborate procedural requirements would become meaningless. Thus, according to the Environmental Remedy Act, § 46 VwVfG is not applicable to the Environmental Impact Assessment or to the screening procedure that determines whether such an

[45] Convention on Access to Information, Public Participaton in Decision-making and access to Justice in Environmental Matters of 1998, available at http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf (last accessed 10/02/2012).

[46] Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC of 26 May 2003, OJ L 156, 25/06/2003, p. 15.

[47] ECJ, judgement of 2011, May 12th – C-115/09 – Bund für Umwelt und Naturschutz Deutschland v. Bezirksregierung Arnsberg, Trianel Kohlekraftwerk intervening, DVBl 2011, pp. 757 ff.

[48] For a more detailed description see *Ruffert*, European Administrative Law – Annual Report – 2010 – Germany, under 3., 1.1.; Until the German law has been amended, Art. 10a (2) of the Environmental Impact Assessment Directive is directly applicable, see VGH Mannheim, judgement of 2011, July 20th – 10 S 2102/09 – ZUR 2011, 600 (602).

Assessment is necessary.[49] If, however, the Assessment is not completely missing but only not made properly, § 46 VwVfG still applies. There is a dispute whether severe procedural mistakes must count as if there were no environmental impact assessment at all.[50] Furthermore, the EU-Directive probably (even if the wording of § 4 (1) UmwRG together with § 45 (2) VwVfG is to the opposite) does not allow to make good the lack of an environmental impact statement in case it has become necessary because of a screening procedure conducted only after a court procedure is already pending.[51]

The Trianel-Decision has imposed a duty on the federal legislator to amend the law concerning standing. It is not yet clear whether this reform will take place solely within the Environmental Remedy Act or whether General Administrative Law in the Administrative Procedure Act or in the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*) will be amended as well. There might even be new procedural restrictions (in particular: Provisions that preclude parties from exercising a right [*Präklusionsvorschriften*]) to "compensate" for broadened standing.

Another development at the national level is strengthening public participation in planning procedures. In 2010/2011, there was enormous public protest against the costly replacement of the central railstation in Stuttgart ("*Stuttgart 21*"). *Deutsche Bahn*, the largest German Railway Company, planned to relocate the station and the track systems underground. Critics complained that citizens were not given a chance to stop the project. Although the legal participation procedure (according § 73 VwVfG) had been followed and the planning had been finally approved, many people argued that they did not get enough information about the impact of this infrastructure project. In the end, only a referendum

[49] Compare even before ECJ, judgement of 2004, January 7th – C 201-02 (Delena Wells).

[50] See for example on the one hand *Berkemann*, Die Umweltverbandsklage nach dem Urteil des EuGH vom 12. Mai 2011 – Die „noch offenen" Fragen, NuR 2011, p. 780 (786 f.); *Schlacke*, Zur Beachtlichkeit von Verfahrensfehlern nach § 4 UmwRG, ZUR 2009, 80 (82); on the other hand VGH Kassel, judgement of 2009, September 16th, ZUR 2010, 46 (Mn. 15 ff.).

[51] But compare BVerwG, judgement of 2008, August 20th – 4 C 11.07 – E 131, 352 ff.

(*Volksabstimmung*) for the whole state (*Bundesland*) of Baden-Württemberg settled the issue, because the majority voted in favour of Stuttgart 21.

This case showed once more that the current formal participation procedure might not be enough to guarantee public influence on major infrastructure projects. The formal participation procedure governed by § 73 VwVfG is often conducted too late, when the issue has already been decided at the political level. Conducting it too early, however, poses the opposite risk: At the stage of public participation planning might not be concrete enough to let people know how the project will affect their interests in the end. This problem is particularly relevant at the higher level of Comprehensive Regional Planning (*Raumordnung*) according to § 10 or § 15 Federal Regional Planning Act (Raumordnungsgesetz – ROG).

Because of these problems there is a growing debate on how to amend the law on administrative procedure to enhance the acceptance (*Akzeptanz*) of long-term planning decisions.[52]

3.4 General principles of Administrative Law

Although there are, of course, many new court decisions on general principles of administrative law, one can hardly find any fundamental new developments within the last two years.

The longlasting controversy about the withdrawal (§ 48 VwVfG) of an administrative act because of unlawful State aid seems to be more or less settled. Recently, the Federal Administrative Court made clear that, according to § 44 VwVfG, an administrative act concerning State aid is not automatically void because the given State aid

[52] Compare, for example, *Knauff*, Öffentlichkeitsbeteiligung im Verwaltungsverfahren, DÖV 2012, 1 ff.

violates European Law.[53] A competitor has to invalidate the act by action for annulment (*Anfechtungsklage*).

4. BIBLIOGRAPHY

Burgi/Schönenbroicher (ed), Die Zukunft des Verwaltungsverfahrensrechts, 2010

Fehling, Der Eigenwert des Verfahrens im Verwaltungsrecht, VVDStRL 70 (2011), pp. 280 ff.

Gurlitt, Der Eigenwert des Verfahrens im Verwaltungsrecht, VVDStRL 70 (2011), pp. 227 ff.

Hill/Sommermann/Stelkens/Ziekow (ed.), 35 Jahre Verwaltungsverfahrensgesetz – Bilanz und Perspektiven, 2011

Stelkens, Rechtsetzungen der europäischen und nationalen Verwaltungen, VVDStRL 71 (2012) (forthcoming)

Quabeck, Dienende Funktion des Verwaltungsverfahrens und Prozeduralisierung, 2010

6. WEB SITES

www.iuscomp.org/gla/statutes/VwVfG.htm - Federal Administrative Procedure Act (the last amendment is missing)

[53] BVerwG, judgement of 2010, December 16th – BVerwG 3 C 44.09 – E 138, 322 (Mn. 16).

iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW ON GERMAN ADMINISTRATIVE LAW

ANNUAL REPORT - 2010/2011 - GERMANY

(September 2011)

Dr. Norman WEISS

INDEX

1. GERMANY AND INTERNATIONAL LAW

In the German constitution, the Basic Law (BL) from 1949, Germany made a fundamental decision to become a member of the international community and opened up its national legal order for cooperation and integration. This is clearly laid down in the preamble, in Artt. 24, 25 and 59 BL; Art. 23 BL deals with the European integration process in particular.

1.1 Germany as a party to human rights treaties

Germany has signed and ratified most of the major human rights treaties both on the international and the European level. Shortcomings are with regard to the amendments to the European Social Charter and to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The government withdrew most of the reservations to human rights treaties; in 2011 the declaration that the Convention on Children's Rights is not directly applicable was withdrawn.

1.2 Impact of human rights law on the German legal order

Art. 59 (2) BL requires the formal consent of the Federal Parliament (Bundestag) for all treaties which affect matters of legislation or concern the political relations of the Federal Republic. This formal consent is given by a specific statute which gives a treaty the status of federal law, ranking below the constitution.

International human rights treaties are, once they are transformed, federal law and, therefore, can be altered by a *lex posterior*. As the German legal order respects the obligations resulting from international law, the *lex posterior* will be interpreted in the light of the treaty.

It depends on the content of the treaty whether it and the incorporating statute are directly applicable. This question is generally answered positively for self-executing treaties. Human rights guarantees fall under this category and thus can be invoked before

national courts and authorities. Being part of the federal law, international human rights law is binding for the executive and the judiciary (Art. 20 (3) BL).

International law requires States to bring their domestic statutes into conformity with their international obligations. Failure to do so will result in an international delinquency but will not have an automatic effect on the national legal system.

2. Impact of The European Convention on Human rights and Fundamental Freedoms

The Convention (ECHR) has been, as an international treaty, transformed into the German legal order via Art. 59 (2) BL. The rights and freedoms enshrined therein are directly applicable and can be invoked in German courts and national authorities. As they (only) have the rank of federal (not: constitutional) law an individual constitutional complaint (Verfassungsbeschwerde) cannot be brought before the Federal Constitutional Court claiming that the ECHR had been violated. The Federal Constitutional Court makes only reference to the ECHR when interpreting the Basic Rights.

Art. 34 ECHR empowers every individual to complaint to the European Court of Human Rights which is compulsory for the contracting parties since 1998. The Court's judgments are binding for the state concerned pursuant to Art. 46 ECHR (inter partes). They are understood as an autonomous interpretation of the convention.

On a very prominent occasion,[1] the Federal Constitutional Court has ruled that "[t]he binding effect of a decision of the ECtHR extends to all state bodies and in principle

[1] **Federal Constitutional Court,** Judgment 14 October 2004 – 2 BvR 1481/04, BVerfGE 111, 307 - Görgülü.

imposes on these an obligation, within their jurisdiction and without violating the binding effect of statute and law (Article 20 (3) of the Basic Law), to end a continuing violation of the Convention and to create a situation that complies with the Convention."

"The nature of the binding effect depends on the sphere of responsibility of the state bodies and on the latitude given by prior-ranking law. Courts are at all events under a duty to take into account a judgment that relates to a case already decided by them if they preside over a retrial of the matter in a procedurally admissible manner and are able to take the judgment into account without a violation of substantive law."

The Federal Constitutional Court added that "[a] complainant may challenge the disregard of this duty of consideration as a violation of the fundamental right whose area of protection is affected in conjunction with the principle of the rule of law", thus granting constitutional redress in these cases. The Federal Constitutional Court with this order underlined the importance of the European Court's judgments and of the ECHR as a legally binding instrument for the protection of human rights. Germany, in 2006, introduced a new possibility to re-open civil procedures after the Court has found Germany violating the Convention (§ 580 No. 8 ZPO); a similar provision for criminal procedures already existed.

By the end of 2011, a new complaint procedure for delayed procedures was enacted (§ 198f GVG, §§ 97a-e BVerfGG). It shall encourage courts to speed up and provides, in case they fail to do so, compensation. This amendment became necessary after the European Court's judgment in the case Rumpf vs. Germany (2.9.2010) - cf. infra 2.2.

The following section will briefly outline the impact of several ECHR provisions as interpreted by the Court on German administrative law.

2.1 Prohibition of torture

Art. 3 ECHR reads: "No one shall be subjected to torture or inhuman or degrading treatment or punishment."

Many cases result from police action: personal search, arrest, pre-trial detention, the treatment of asylum-seekers at the border, and interrogation methods may be some of the most critical points. These methods were also at stake in the case Gaefgen v. German (no. 22978/05, GC judgment 1. July 2010). The applicant had kidnapped and murdered a child. He was arrested and interrogated by the police because he was suspected of having kidnapped the boy. The Deputy Chief of the Frankfurt police ordered a police officer to threaten the applicant with considerable physical pain, and, if necessary, to subject him to such pain in order to make him reveal the boy's whereabouts. The police officer threatened the applicant who, for fear of being exposed to the measures he was threatened with, disclosed the whereabouts of the boy's body some ten minutes thereafter.

The Court held: "Having regard to the relevant factors for characterising the treatment to which the applicant was subjected, the Court is satisfied that the real and immediate threats against the applicant for the purpose of extracting information from him attained the minimum level of severity to bring the impugned conduct within the scope of Article 3."

But: "Contrasting the applicant's case to those in which torture has been found to be established in its case-law, the Court considers that the method of interrogation to which he was subjected in the circumstances of this case was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but that it did not reach the level of cruelty required to attain the threshold of torture." The Court dismissed unanimously the applicant's claim for just satisfaction.

Meanwhile, the officer who made the threat of violence against Gaefgen was convicted by national courts of inducing abuse of authority in 2004 and was sentenced to a year's probation.

Another case decide recently by the Court[2] dealt with the seven-day placement of a prisoner in a security cell in order to prevent him from attacking prison staff. The cell had a surface of approximately 8.46 square meters and was equipped with a mattress and a squat toilet and was, therefore, not suited for long-term accommodation. But the prison authorities did not consider the applicant's placement in this cell as a long-term measure. From the circumstances of the case and the general practice, the Court concluded that there are sufficiently strong, clear and concordant indications that the applicant had been naked during the entire period of his stay in the security cell. The domestic authorities had knowledge of these indications.

The Court considered that "to deprive an inmate of clothing is capable of arousing feelings of fear, anguish and inferiority capable of humiliating and debasing him." While, as a rule, inmates were placed without clothes in the security cell in order to prevent them from inflicting harm on themselves, a German court examining the facts of the case at an earlier stage by hearing witnesses could not establish for certain whether there was a serious danger of self-injury or suicide during the time of the applicant's placement in the cell. Furthermore, there was no indication that the prison authorities had considered the use of less intrusive means, such as providing the applicant with tear-proof clothing, as recommended by the European Committee for the Prevention of Torture.

Thus, the Court held that, as the government failed to submit sufficient reasons which could justify such harsh treatment as to deprive the applicant of his clothes during his entire stay, the applicant has been subjected to inhuman and degrading treatment contrary to Article 3.

2.2 Length of proceedings

[2] **ECtHR**, JUDGMENT FROM 7 JULY 2011 (NO. 20999/05), HELLIG V. GERMANY

For several occasions, Germany had been held to violate Art. 6 because of the excessive length of proceedings before the domestic courts, a problem underlying the most frequent violations of the Convention found in respect of Germany. In the first pilot judgment against Germany[3], the Court held that Germany had to introduce within one year an effective domestic remedy against excessively long court proceedings.

Complying with this judgment, Germany enacted a new law providing for a remedy against excessive length of proceedings (§ 198f GVG, §§ 97a-e BVerfGG) which entered into force on 3 December 2011.

The new procedure offers a twofold approach. The first step requires those affected to file a complaint about the delay to the court that in their view is working too slowly. This helps to avoid proceedings of excessive length from the outset. By way of the delay objection, judges receive the opportunity to remedy the situation. If the proceedings continue their delay despite the complaint, in the second step a claim for compensation may be filed. In this compensation proceeding, the affected citizens receive, as a general rule, €1,200 per year for so-called non-pecuniary disadvantage - for example, for psychological and physical burdens caused by the long proceeding - to the extent that reparations of another type are not sufficient. In addition to compensation for non-pecuniary disadvantage, there is additionally appropriate compensation for pecuniary disadvantage, for example if the unreasonably long proceedings lead to a company's insolvency.

It has to be added that this new claim to compensation is not dependent upon fault. In addition to the new compensation rules, claims for official liability may also be lodged if the delay is based upon culpable violation of official duties. In such cases, comprehensive compensation for damage may be claimed, for example compensation for lost profits.

[3] **ECtHR**, JUDGMENT FROM 2 SEPTEMBER 2010 (NO. 46344/06), RUMPF V. GERMANY.

3. IMPACT OF SELECTED UNITED NATIONS HUMAN RIGHTS CONVENTIONS

The treaties to which Germany is a party are transformed into the German legal order via Art. 59 (2) BL as well. The rights and freedoms enshrined therein are directly applicable and can be invoked in German courts and national authorities. On the international level, though, no court of human rights does exist. Here, expert bodies monitor the implementation of the human rights treaties by the States Parties. Monitoring takes place with regard to all treaties in form of the state reporting procedure periodically reviewing progress and problems in compliance. In the course of time, most of the human rights treaties have been amended by an optional protocol offering an individual complaint procedure. Some of the treaty bodies have been given the right to undertake country visits. All decisions and recommendations of the treaty bodies resulting from the various procedures are not legally binding to States Parties. Nevertheless, there is a strong expectation that States Parties comply to them as they accepted the monitoring system when they ratified the treaties. It can be said a state will comply with international human rights norms when its international reputation is at stake.

3.1 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Under this treaty to which it is a party, Germany is obliged to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" (Art. 2 (1) CAT). The Committee Against Torture reviews state reports every four years (Art. 19 CAT) and can, after a state recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention (Art. 22 CAT), deal with individual communications.

In its views on the first individual application against Germany,[4] the issue at stake was whether the forced return of the author is Turkey would violate the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. Referring to its well-established practice, the Committee held that the complainant has failed - as it was necessary - to establish a foreseeable, real and personal risk of being tortured if he were to be returned to Turkey. Therefore, Germany's decision to return the complainant to Turkey did not constitute a breach of Art. 3 CAT. A second case is still pending.

Greater impact results from the state reporting procedure. In its concluding observations to the fifth periodic report of Germany,[5] the Committee urged Germany to give strong and comprehensive support to the victims of human trafficking. Furthermore, it urged Germany to strictly regulate the use of physical restraints in prisons, psychiatric hospitals, juvenile prisons and detention centers for foreigners with a view to further minimizing its use in all establishments and ultimately abandoning its use in all non-medical settings.

The Committee was concerned at information that alleged victims of ill-treatment by the police are not aware of complaint procedures beyond reporting their complaints to the police, who in some cases refused to accept allegations of misconduct by the police. Additionally, there were reported cases of ill-treatment of persons in a vulnerable situation who have declined to file a complaint against the police out of fear of counter-complaints by the police or other forms of reprisals. With regard to this, the Committee recommended

[4] **COMMITTEE AGAINST TORTURE**, COMMUNICATION NO. 214/2002, DECISION OF 12 MAY 2004, UN DOC. CAT/C/32/D/214/2002.

[5] **COMMITTEE AGAINST TORTURE**, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION, CONCLUDING OBSERVATIONS OF THE COMMITTEE AGAINST TORTURE, GERMANY, 12 DECEMBER 2011, UN DOC. CAT/C/DEU/CO/5.

that the State party take appropriate measures to ensure that information about the possibility and procedure for filing a complaint against the police is made available and widely publicized, including by being prominently displayed in all police stations of the Federal and Länder Police. Furthermore, all allegations of misconduct by the police should be duly assessed and investigated, including cases of intimidation or reprisals in particular against persons in vulnerable situation as a consequence of the complaints of ill-treatment by the police.

With regard to reported practices of routine surgical alterations in children born with sexual organs that are not readily categorized as male or female, also called intersex persons, the Committee recommended the effective application of legal and medical standards following the best practices of granting informed consent to medical and surgical treatment of intersex people, including full information, orally and in writing, on the suggested treatment, its justification and alternatives. Germany should undertake investigation of incidents of surgical and other medical treatment of intersex people without effective consent and adopt legal provisions in order to provide redress to the victims of such treatment, including adequate compensation. The Committee stressed the necessity of education and training of medical and psychological professionals on the range of sexual, and related biological and physical, diversity and the proper information of patients and their parents of the consequences of unnecessary surgical and other medical interventions for intersex people.

With regard to refugees and international protection and the transfers of persons under the Dublin II Regulation to Greece, the Committee encouraged Germany to prolong the suspension of forced transfers of asylum-seekers to Greece, unless the situation in the country of return significantly improves. The Committee is concerned that under article 34a, paragraph 2, of the German Law on Asylum Procedure, lodging of an appeal does not have suspension effect on the impugned decisions. It therefore recommended that the State party abolish the legal provisions of the Asylum Procedures Act excluding suspensive effects of the appeals against decision to transfer an asylum-seeker to another State participating in the Dublin system.

Additionally, the Committee called on the State party to guarantee access to independent, qualified and free-of-charge procedural counselling for asylum-seekers before a hearing is carried out by asylum authorities, guarantee access to legal aid for needy asylum-seekers after a negative decision, as long as the remedy is not obviously without a prospect for success.

3.2 Convention on the Rights of Persons with Disabilities (CRPD)

Following the entry into force of this instrument in March 2009, Germany has to comply with its provisions and implement them. The aim is to fully realize human rights of persons with disabilities in Germany. In order to better fulfill these obligations, a CRPD National Monitoring Body had to be established. Its task is to monitor the implementation of the treaty norms in Germany and to promote and protect the rights enshrined in the Convention. It is not mandated to handle complaints or provide legal advice. Requests on individual cases cannot be dealt with. The CRPD National Monitoring Body shall give policy advice, conduct practice-oriented research, organize events, provide information and interact with civil society.

The CRPD National Monitoring Body is located with the German Institute for Human Rights in Berlin that has been mandated to assume the function of an independent national body.

4. WEB SITES

http://curia.europa.eu/jcms/jcms/j_6/ - European Court of Human Rights

www.ohchr.org - Office of the UN High Commissioner for Human Rights

http://www.institut-fuer-menschenrechte.de/ - Deutsches Institut für Menschenrechte / German National Human Rights Institution

iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

BREVI NOTE IN TEMA DI ANNULLAMENTO DELL'AGGIUDICAZIONE ED EFFETTI SUL CONTRATTO: I POTERI DEL GIUDICE ALLA LUCE DEL CODICE DEL PROCESSO AMMINISTRATIVO

REPORT ANNUALE - 2012 - ITALIA

(Settembre 2012)

Ernesto STICCHI DAMIANI

INDICE

1. PREMESSA

Il tema del rapporto tra annullamento dell'aggiudicazione ed effetti sul contratto *medio tempore* stipulato si colloca in un'area di confine tra il diritto pubblico e il diritto privato ed è frutto di un complesso intreccio tra normativa europea e normativa nazionale.

In relazione a tale problematica nel tempo sono state elaborate da dottrina[1] e giurisprudenza[2] molteplici prospettazioni, in costante evoluzione e approfondimento, in

[1] Per una bibliografia in tema di effetti del contratto a seguito di annullamento dell'aggiudicazione si rimanda a G. FERRARI, *L'annullamento del provvedimento di aggiudicazione dell'appalto pubblico e la sorte del contratto già stipulato nella disciplina dettata dal nuovo c.p.a.*, in *Giur. merito*, 2011, 04, 919; DUNCAN FAIRGRIEVE - FRANÇOIS LICHÈRE (a cura di), *Public Procurement Law: Damages as an Effective Remedy*, 2011; G. LEONE, L. MARUOTTI, C. SALTELLI, *Codice del processo amministrativo*, Padova, 2011, 916; D. FATA, M. SANINO, G. CHINÈ, *Le sorti del contratto stipulato a seguito di aggiudicazione illegittima*, in *Commentario al codice del processo amministrativo* (a cura di) M. SANINO, Torino, 2011; AA.VV., *Il processo amministrativo* (a cura di) A. QUARANTA, V. LOPILATO, MILANO, 2011; P. CARPENTIERI, *Sorte del contratto (nel nuovo rito degli appalti)*, in *Dir. Proc. Amm.*, 2011, 664; Cons. Stato, Sez. VI, 3 febbraio 2011, n. 780, in *Resp. civ. e prev.*, 2011, 1088, con nota di F. GASPARRINO, *Nessun risarcimento al contraente che «confida» nel contratto illecito*; R. CARANTA, *Le controversie risarcitorie*, in *Il nuovo processo amministrativo*, diretto da R. Caranta, Bologna, 2011, 659 ss.; GAMBATO SPISANI, *I riti speciali*, in *Il nuovo processo amministrativo*, diretto da R. CARANTA, Bologna, 2011, 732; P. PATRITO, *Annullamento dell'aggiudicazione e inefficacia del contratto d'appalto: strumenti di tutela dell'originario aggiudicatario-contraente, prima e dopo il recepimento della direttiva ricorsi* (nota a Trib. Torino, sez. I, 19 gennaio 2011 n. 307), in *Resp. civ. e prev.*, 2011, fasc. 7-8, 1616; G. GRECO (a cura di), *Il sistema della giustizia amministrativa negli appalti pubblici in Europa*, 2010; A. ANGIULI, *Contratto pubblico e sindacato del giudice amministrativo*, in *Dir. amm.*, 2010, fasc. 4, 865; R. CAVALLO PERIN, G. M. RACCA, *La concorrenza nell'esecuzione dei contratti pubblici,* in *Dir. amm.*, 2010, 325; R. BOSCOLO, *In tema di natura dell'aggiudicazione provvisoria* (n.d.r. commento a Tar Lazio, sez. II-*ter*, 9 novembre 2009, n. 10991), in *I contratti dello Stato e degli Enti pubblici*, 2010, fasc. 1, 59-67; R. CALVO, *Annullamento dei provvedimenti di aggiudicazione definitiva e inefficacia dei contratti a evidenza pubblica* (artt.

243 *bis* e 245 *bis* - 245 *quinquies* del codice dei contratti pubblici relativi a lavori, servizi e forniture, introdotti dal d. lgs. 20 marzo 2010, n. 53, attuativo della dir. 2007/66/CE), in *Le nuove leggi civili commentate*, 2010, fasc. 3, 617-637; ID., *Appalti pubblici e «decodificazione» dei rimedi*, in *Urbanistica e appalti*, 2010, fasc. 7, pagg. 757-761; G. COSTANTINO, *Note a prima lettura sul codice del processo amministrativo. Appio Claudio e l'apprendista stregone*, in *Il foro italiano*, 2010, fasc. 9, parte V, 237-243; G. CREPALDI, *La revoca dell'aggiudicazione provvisoria tra obbligo indennitario e risarcimento* (n.d.r. commento a Consiglio di Stato, sez. VI, 17 marzo 2010, n. 1554), in *Il foro amministrativo C.d.S.*, 2010, fasc. 4, 861-877; O. CRISTANTE, A. ZUCCOLO, *Sorte del contratto* (n.d.r. commento a d.lgs. 20 marzo 2010, n. 53), in *I contratti dello Stato e degli Enti pubblici*, 2010, fasc. 3, 301-308; G. D'ANGELO, *Direttiva n. 2007/66/CE e giurisdizione nelle controversie sui contratti pubblici* (n.d.r. commento a Cassazione Civile, sez. un. ord., 10 febbraio 2010, n. 2906), in *Il corriere giuridico*, 2010, fasc. 6, 741-755; P. DELLA PORTA, S. SACCHETTO, *La disciplina processuale del Codice dei contratti pubblici dopo il d.lgs. 20 marzo 2010, n. 53 (e poco prima del codice del processo amministrativo)* (n.d.r. commento a d.lgs. 20 marzo 2010, n. 53), in *I contratti dello Stato e degli Enti pubblici*, 2010, fasc. 3, 269-299; M.R. BUONCOMPAGNI, *Annullamento dell'aggiudicazione e sorte del contratto*, in *Riv. dir.*, 2010, 3, 402; G. E.FERRARI, *Il contenzioso degli appalti pubblici nel nuovo codice del processo amministrativo*, Roma, 2010, 311; E. SANTORO, *Guida alla giurisdizione in materia di contratti pubblici* , in *Riv. Corte dei Conti*, 2010 fasc. 3, 218; G. DE ROSA, *Quale giudice può decidere la sorte del contratto a seguito di aggiudicazione annullata? L'impatto della direttiva ricorsi* (nota a Cass., SS. UU., 10 febbraio 2010 n. 2906), in *Riv. it. dir. pubbl. comunit.*, 2010, fasc. 3-4, 1035; E. SANTORO, *Una pietra miliare nel cammino verso l'effettività della tutela: le Sezioni Unite affermano la giurisdizione del giudice amministrativo sulla sorte del contratto, anticipando il recepimento della direttiva 2007/66/Ce* (nota a Cass., sez. un., 10 febbraio 2010 n. 2906), in *Riv. giur. Edilizia*, 2010, I fasc. 2, 399; F. ASTONE, *I contratti pubblici fra ordinamento europeo e diritto interno*, in *www.giustamm.it*, 1/06/2010.

[2] Con riferimento ai recenti orientamenti della giurisprudenza si v. Cons. Stato sez. V, 12 maggio 2011 n. 2817; Cons. Stato sez. III, 19 dicembre 2011 n. 6638 secondo cui occorre dirimere la questione se l'inefficacia del contratto, quale condizione logica necessaria ed imprescindibile del risarcimento in forma specifica legittimamente (come s'è visto) perseguibile in sede di ottemperanza, possa essere dichiarata, su domanda dell'interessato, dal giudice dell'esecuzione in sede di individuazione delle misure di attuazione del giudicato ritenute più opportune per la soddisfazione

dell'interesse del ricorrente che ivi abbia proposto domanda di tutela in forma specifica, o se invece, come ritenuto dal T.A.R. con la sentenza impugnata, tale potere debba intendersi riservato al Giudice di cognizione. La privazione degli effetti del contratto è disposta sulla base di determinati presupposti, in esito ad un'indagine che riguarda specifiche condizioni stabilite dalle proposizioni normative ed involge considerazioni di opportunità, che si affiancano alle ragioni dell'annullamento del titolo costituito dall'aggiudicazione, cui sicuramente si estendono i poteri cognitivi classici del giudice dell'ottemperanza, sì da poterlo anche per tal verso ricomprendere nella nozione di giudice dell'annullamento. In tale prospettiva, la domanda di reintegrazione in forma specifica avanzata dall'appellante col ricorso di primo grado ed in questa sede ribadita, possa essere accolta, sussistendo i presupposti per la dichiarazione di inefficacia del contratto *ex* art. 122 c.p.a. (non rientrando la fattispecie nell'ipotesi di annullamento dell'aggiudicazione per gravi violazioni *ex* art. 121, comma 1, c.p.a.), dal momento che il vizio dell'aggiudicazione non comporta l'obbligo per la stazione appaltante di rinnovare la gara ma lo scorrimento della graduatoria. Secondo la sentenza in rassegna è da ritenere ammissibile, nel processo di ottemperanza ai sensi dell'art. 112, comma 4, c.p.a., la domanda volta a conseguire l'aggiudicazione e la condanna alla stipula del contratto di appalto, a seguito dell'annullamento giurisdizionale dell'aggiudicazione precedentemente disposta dall'Amministrazione; tale domanda, infatti, si configura (rientrando pacificamente nei poteri del giudice quello di qualificare l'azione proposta) come richiesta di risarcimento in forma specifica (*ex* art. 124 c.p.a.) , in quanto volta a definire una delle possibili modalità di attuazione del giudicato, anche quando « alcun'espressa domanda » era stata in tal senso avanzata nel giudizio di cognizione. A propria volta l'accoglimento della domanda di conseguire l'aggiudicazione ed il contratto di appalto, avanzata in sede di esecuzione del giudicato, presuppone, a norma dell'art. 124 c.p.a., la dichiarazione di inefficacia del contratto *medio tempore* stipulato ai sensi degli articoli 121, comma 1, e 122 c.p.a.; in difetto della stessa, invero, il contratto deve ritenersi valido ed efficace pur in presenza di annullamento dell'aggiudicazione (così cfr. Cons. Stato, Sez. III, 11 marzo 2011, n. 1570, in *www.giustizia-amministrativa.it*) . In applicazione del principio di cui in massima, la decisione, dopo aver valutato gli interessi delle parti e bilanciato gli stessi con l'interesse pubblico, ha ritenuto di dichiarare l'inefficacia del contratto di appalto sottoscritto tra l'Amministrazione e l'originario aggiudicatario. Secondo la decisione, l'inefficacia deve essere dichiarata a decorrere dal trentesimo giorno successivo a quello di ricezione da parte dell'originario aggiudicatario della comunicazione in via amministrativa (o, se anteriore, a quello di notifica) della sentenza di esecuzione del giudicato, con obbligo per l'Amministrazione di procedere, entro detto termine, alla stipula di contratto di

merito alla natura del vizio che inficia il contratto, al giudice competente[3] ed alla tutela dell'aggiudicatario illegittimamente escluso.

Il presente studio, seguendo il tracciato di quanto ampiamente sviluppato in passato[4], si propone di soffermarsi su tre fondamentali ambiti di indagine, cui sono connessi una serie di aspetti rilevanti.

In primo luogo, la disamina muoverà dall'individuazione di quali siano, sul piano sostanziale, le ripercussioni determinate sul contratto dalla cancellazione *ex tunc* del provvedimento di aggiudicazione.

appalto con il soggetto vincitore del giudizio con scadenza uguale a quella del contratto dichiarato inefficace, previa aggiudicazione in favore della stessa e previa verifica dell'insussistenza a carico dell'aggiudicatario di ogni eventuale impedimento alla stipula.

[3] Per un'analisi del problema nella prospettiva dei poteri attribuiti al giudice si v. M. LIPARI, *L'annullamento dell'aggiudicazione e gli effetti sul contratto: poteri del giudice* in *www.federalismi.it.* La formula <<poteri del giudice amministrativo>> assume rilievo da almeno tre angoli prospettici, quali quello attinente al riparto di giurisdizione, quello inerente alla natura e al tipo di potere giurisdizionale esercitato, quello inerente al rapporto tra le parti e il giudice. L'A. precisa che, secondo l'impostazione civilistica, la valutazione del giudice finalizzata a decidere in ordine alla pronuncia di inefficacia sarebbe di natura equitativa e che altre impostazioni valorizzano, invece, l'interesse generale, parametro estraneo rispetto a quelli utilizzati dal codice civile. Si v., inoltre, A. CARULLO, *La sorte del contratto dopo l'annullamento dell'aggiudicazione: poteri del giudice e domanda di parte* in *www.giustizia-amministrativa.it.*

[4] Sul punto, si sottolinea come il presente scritto si pone in continuità con l'analisi del tema contenuta in E. STICCHI DAMIANI, *La caducazione del contratto per annullamento dell'aggiudicazione alla luce del Codice degli appalti*, op. cit., pagg. 3719-3728.

In secondo luogo, l'analisi si soffermerà sui profili inerenti alla definizione dell'autorità giurisdizionale chiamata a conoscere delle ripercussioni sul contratto dell'avvenuto annullamento dell'aggiudicazione.

Infine, la trattazione si volgerà ad esaminare, specificamente, le dinamiche processuali implicate dal giudizio in ordine alle sorti del contratto. In particolare, ci si chiederà se il G.A. debba conoscere della sorte del contratto solo qualora sia stata proposta domanda di parte o se la cognizione del G.A. sulla propagazione della propria pronuncia sul contratto possa, invece, avvenire d'ufficio.

Assumerà rilievo, inoltre, considerare se sia o meno possibile scindere il giudizio sull'annullamento della gara dal giudizio teso alla caducazione del contratto, oppure se operi il principio del *simultaneus processus* in base al quale tutti gli aspetti del rapporto devono essere esaminati nel medesimo giudizio.

Alla luce di recenti pronunce giurisdizionali, sarà, infine, oggetto di indagine il tema della distinzione tra l'ipotesi in cui l'annullamento dell'aggiudicazione avvenga *ope iudicis* e il caso in cui tale annullamento sia effettuato da parte della P. A..

La disamina tenderà complessivamente a verificare, considerate le peculiarità del giudizio sulle sorti del contratto a seguito dell'annullata aggiudicazione, i poteri del giudice e la centralità della sua posizione, avuto riguardo all'ampia discrezionalità che connota l'esercizio delle sue funzioni.

2. LA DISCIPLINA DELL'INEFFICACIA DEL CONTRATTO NEL CODICE DEL PROCESSO E IL DETTATO NORMATIVO DELL'ART. 121

Tra le tesi esposte in dottrina e in giurisprudenza in ordine alla natura giuridica del vizio inficiante il contratto a seguito dell'annullamento dell'aggiudicazione[5], il Codice ha optato per la categoria concettuale maggiormente evanescente.

Il *genus* inefficacia è, infatti, un *genus* variegato e disomogeneo.

Sono da chiarire infatti, tutti gli aspetti inerenti alla natura e al regime dell'inefficacia e, in particolare, occorre verificare se essa sia o meno un'inefficacia sanzionatoria, conseguenziale ad una patologia del contratto, oppure ad una semplice risoluzione.

Tali profili di indagine trovano una più analitica esplicitazione nell'analisi dettagliata della disciplina introdotta dal Codice *in subiecta materia*.

La disciplina delineata dagli artt. 121 ss. del Codice del processo è imperniata sulla declaratoria di inefficacia del contratto in conseguenza dell'annullamento dell'aggiudicazione e distingue due gruppi di ipotesi prese in considerazione dall'art. 121 c. p. a. con riferimento alle c.d. violazioni gravi e dal successivo art. 122, con riferimento alle

[5] Si è parlato, infatti, di nullità, annullamento, inefficacia, caducazione automatica del contratto, con la pletora delle varianti interne che caratterizzano ognuna delle suddette tesi, trattate in M. MONTEDURO, *Invalidità del contratto*, in L. R. PERFETTI (a cura di), *Repertorio degli appalti pubblici*, II, 2005, 829, e Id., *Illegittimità del procedimento ad evidenza pubblica e nullità del contratto d'appalto ex art. 1418, comma 1, c.c.: una radicale «svolta» della giurisprudenza tra luci e ombre*, in *Foro amm. T.A.R.*, 2002, 2591. L'A. delinea una serie di tesi e sottotesi già originariamente emerse, in ordine al dibattuto tema.

ipotesi di violazione residuali, tipizzate le prime, non tipizzate e, quindi, ordinarie le seconde[6].

Nelle ipotesi di cui all'art. 121 il giudice è tenuto a dichiarare l'inefficacia del contratto, precisando se la stessa debba operare *ex tunc* o *ex nunc.* I parametri in base ai quali il giudice è chiamato valutare attengono alle deduzioni delle parti, alla gravità della condotta della stazione appaltante ed alla situazione di fatto[7].

[6] Per un'analisi delle ricadute applicative della disciplina codicistica e per una ricognizione delle prospettazioni in ordine alle conseguenze dell'annullamento dell'aggiudicazione sulla sorte del contratto si v. F. BOTTEON, *I contratti non relativi a lavori, servizi e forniture pubbliche e l'annullamento dell'aggiudicazione: alcuni spunti sulla questione della sorte dei contratti alla luce del nuovo codice del processo amministrativo*, in *www.lexitalia.it.*

[7] Secondo la prevalente dottrina, tale declaratoria si configurerebbe come un vero e proprio dovere. Si v., in dottrina, M. LIPARI, *Il recepimento della "direttiva ricorsi": il nuovo processo superaccelerato in materia di appalti e l'inefficacia "flessibile" del contratto nel d. lgs. n. 53, op. cit.;* R. DE NICTOLIS, *Il recepimento della direttiva ricorsi* in *www.giustizia-amministrativa.it;* S. FANTINI in A. BARTOLINI, S. FANTINI, F. FIGORILLI, *Il decreto legislativo di recepimento della direttiva ricorsi*, in *Urbanistica e appalti*, 6/2010, 661; C. LAMBERTI, *La caducazione del contratto tra cognizione ed esecuzione*, relazione tenuta al Convegno "*Riforme della giustizia e giudice amministrativo"* Siena, Certosa di Pontignano, 11-12 giugno 2010; V. LOPILATO, *Categorie contrattuali, contratti pubblici e nuovi rimedi previsti dal decreto legislativo n. 53 del 2010 di attuazione della direttiva ricorsi* in *www.giustizia-amministrativa.it*, 2010. In chiave critica verso l'avanzare dell'ipotesi in ordine ai poteri officiosi del giudice, sostiene F. CINTIOLI, *In difesa del processo di parti (Note a prima lettura del parere del Consiglio di Stato sul "nuovo" processo amministrativo sui contratti pubblici*) in *www.giustamm.it* che "teorizzare un potere-dovere di dichiarare inefficace un contratto senza che il ricorrente lo chieda e lo voglia, equivarrebbe a fare di esso un vero e proprio potere amministrativo sanzionatorio officioso. Forse neppure la giurisdizione di diritto oggettivo, nel modo in cui è stata finora intesa, basterebbe infatti a classificarlo".

Alle lett. *a)* e *b)*, il comma 1 dell'art. 121 stabilisce che, qualora l'aggiudicazione definitiva sia avvenuta senza previa pubblicazione del bando o avviso, oppure con procedura negoziata senza bando o con affidamento in economia fuori dai casi consentiti e questo abbia determinato l'omissione della pubblicità del bando o dell'avviso con cui si indice una gara, il giudice che annulla l'aggiudicazione definitiva dichiara l'inefficacia del contratto.

Ciò sembrerebbe dar conto di una tutela piena della concorrenza. Al comma 2 si precisa, però, che il contratto resta efficace allorché ciò sia imposto da esigenze imperative connesse ad un interesse generale.

Nel caso in cui vi sia un interesse generale di tale rilevanza da imporre la conservazione del contratto[8], infatti, al carattere apparentemente vincolato della dichiarazione di inefficacia ("*Il giudice dichiara*") sembra contrapporsi un vincolo di segno opposto (il contratto "*resta"* efficace).

Certamente viene affidata al giudice una notevole area di discrezionalità allorché le esigenze imperative siano connesse a interessi economici.

Il giudice dovrà, infatti, tener conto di una serie di parametri valutativi e, in particolare, sarà spinto a conservare l'efficacia per motivi tecnici solo allorché l'inefficacia non sia funzionale al soddisfacimento delle pretese del ricorrente.

[8] Ulteriori esimenti della declaratoria di inefficacia ricorrono nei casi di cui all'art. 121, co. 5 e all'art. 123. co. 3, nei quali, rispettivamente, la stazione appaltante abbia dichiarato la propria omissione in buona fede degli obblighi pubblicitari o abbia pubblicato un avviso volontario per la trasparenza preventiva e nei casi in cui sussistano violazioni solo formali dei termini dilatorio e sospensivo e non risulti pregiudicata la possibilità per il ricorrente di avvalersi dei mezzi di ricorso prima della stipulazione del contratto, né la sua possibilità di ottenere l'affidamento.

I residui obblighi contrattuali non possono, infatti, essere trasferiti in quanto ottemperabili solo dall'aggiudicatario originario o allorché il ricorrente non intenda servirsene non avendo presentato la domanda di subentro.

Una discrezionalità ancora più forte è, peraltro, attribuita al giudice qualora questi possa astenersi dal dichiarare l'inefficacia del contratto, in particolare nel caso in cui ciò dia luogo a conseguenze sproporzionate.

Da queste disposizioni emerge quindi la rilevata dialettica tra tutela della concorrenza conformata al concreto interesse del ricorrente e gli interessi pubblici sottesi al contratto, il cui contemperamento è affidato alla ponderazione del giudice.

In particolare, a fronte dell'interesse pubblico alla conservazione del contratto, la tutela della concorrenza tende sempre più a coincidere con l'interesse del ricorrente al subentro.

L'art. 121 dà conto, pertanto, della forte complessità della nozione di inefficacia laddove, nell'individuare il regime applicabile nell'ipotesi di gravi violazioni, esso stabilisce che, in caso di violazioni degli obblighi pubblicitari (lett. a-b), il contratto resta comunque efficace in presenza di esigenze imperative connesse a un interesse generale come desumibile da una serie di parametri da utilizzarsi da parte del giudice.

In tal caso, quindi, l'interesse pubblico sotteso al contratto può, nella valutazione ponderativa del giudice, ancorata al criterio della proporzionalità, prevalere sulla tutela della concorrenza, benché questa sia stata gravemente incisa dalla violazione degli obblighi pubblicitari[9].

[9] Sulla rilevanza o meno della buona fede del contraente illegittimo aggiudicatario le opinioni non sono del tutto concordi. In particolare si fa riferimento alla tesi estrema riconducibile a F. CINTIOLI, *In difesa del processo di parti (Note a prima lettura del parere del Consiglio di Stato sul "nuovo" processo amministrativo sui contratti pubblici) op. cit.,* secondo cui il giudice non dichiarerà mai l'inefficacia ogniqualvolta questo possa comportare il travolgimento della posizione del contraente in

Anche la seconda delle gravi violazioni prevista dall'art. 121, quella inerente il mancato rispetto dello "*stand still period*" (lett. c e d), non dà necessariamente luogo, pur nella gravità del *vulnus* inferto alle regole della concorrenza, all'inefficacia del contratto ove tale violazione[10] non abbia inciso sulle possibilità del ricorrente di ottenere l'affidamento.

In tal caso emerge con evidenza come, più che l'interesse pubblico sotteso al contratto, sia di fatto l'interesse o il mancato interesse del ricorrente a garantire la persistente efficacia del contratto stesso.

buona fede. Solo nei casi di mala fede del contraente, il giudice amministrativo potrebbe (e tendenzialmente dovrebbe) accertare l'inefficacia tenendo conto degli altri parametri di cui all'art. 122. Il parametro della buona fede diviene dunque, secondo tale orientamento, prevalente rispetto a tutti gli altri parametri di cui all'art. 122, i quali opererebbero solo in via subordinata. E' fautore di una tesi più moderata M. LIPARI, *Il recepimento della "direttiva ricorsi": il nuovo processo superaccelerato in materia di appalti e l'inefficacia "flessibile"del contratto nel d. lgs. n. 53 del 2010, op. cit.* secondo cui la buona fede del terzo aggiudicatario rileva nei casi di violazioni "non gravi", ma non preclude, automaticamente, la dichiarazione di inefficacia del contratto. L'A. non condivide l'assunto secondo cui la buona fede sarebbe sbarramento invalicabile alla pronuncia di inefficacia, ma individua in essa un parametro concorrente, su un piano di pari dignità, con gli altri parametri di cui all'art. 122.

[10] In particolare, con riferimento alla irrilevanza del carattere colpevole della violazione, occorre richiamare la sentenza della Corte di Giustizia CE, sez. III, 30 settembre 2010 (C-314/09) che, in ordine al difetto di imputabilità soggettiva della violazione commessa dalla stazione appaltante, stabilisce che "*La direttiva del Consiglio 21 dicembre 1989, 89/665/CEE deve essere interpretata nel senso che essa osta ad una normativa nazionale, la quale subordini il diritto ad ottenere un risarcimento a motivo di una violazione della disciplina sugli appalti pubblici da parte di un'amministrazione aggiudicatrice al carattere colpevole di tale violazione*". Tale orientamento è stato seguito dalla giurisprudenza nazionale. Si v., *ex multis*, TAR Brescia, 4 novembre 2010 n. 4552.

Appare evidente, allora, che l'interesse del ricorrente a conseguire l'aggiudicazione si pone come un interesse forte all'interno del confronto che presiede la possibile declaratoria di inefficacia, affidata alla valutazione del giudice.

2.1 Le violazioni "ordinarie" dell'art. 122 e l'art. 123 c.p.a.

La disciplina delle violazioni "ordinarie" di cui all'art. 122**,** vale a dire delle violazioni di più frequente accadimento, conferma la funzionalizzazione della declaratoria di inefficacia alla possibilità di subentro del ricorrente[11].

Tale disciplina prevede, infatti, che l'interesse del ricorrente al subentro nell'aggiudicazione e nel contratto non costituisce elemento di ponderazione da parte del giudice. Esso si pone, invece, come presupposto perché al giudice l'attività ponderativa sia consentita e, infatti, affinché il giudice possa scegliere tra efficacia ed inefficacia del contratto occorre che la domanda di subentro sia stata preliminarmente proposta oppure

[11] In ordine alla distinzione tra i vari modelli di inefficacia si v. F. LIGUORI, *Appunti sulla tutela processuale e sui poteri del giudice nel decreto legislativo n. 53 del 2010,* op. cit. L'A. precisa come la differente funzione dei modelli di inefficacia previsti dal complesso normativo del Codice del processo emerge chiaramente dal dato della norma: nel primo caso, infatti, "*il giudice che annulla l'aggiudicazione dichiara l'inefficacia", nel secondo, invece, "il giudice stabilisce se dichiarare l'inefficacia*". In altre parole, secondo l'A., "*in caso di violazioni gravi il potere decisorio del giudice, e cioè la scelta di non dichiarare inefficace il contratto è subordinata alla sussistenza di condizioni per un verso più rigide per un altro maggiormente collegate alla valutazione dell'interesse pubblico. Nei casi di violazioni meno gravi, il sindacato del giudice è sì di più ampio spettro, implicando una valutazione complessiva della situazione di fatto (quindi del rapporto), ma appare più legato alla considerazione degli interessi delle parti, e segnatamente del ricorrente*".

che la stessa risulti improponibile essendo stato rilevato un vizio riferibile all'interesse strumentale che comporti l'obbligo di rinnovare la gara[12].

In assenza di tali presupposti, il giudice non può dichiarare l'inefficacia del contratto.

I parametri indicati dall'art. 122 cui il giudice è tenuto a fare riferimento sono essenzialmente riconducibili all'accoglibilità della domanda di subentro, e ciò anche in considerazione dell'interesse pubblico sotteso al contratto[13].

[12] L'art. 122, con riferimento alle violazioni ordinarie, stabilisce come l'inefficacia sia connessa ad una serie di parametri, ma ancorata al preciso presupposto della domanda di subentro. Si v. E. FOLLIERI, *I poteri del giudice amministrativo nel decreto legislativo 20 marzo 2010 n. 53 e negli artt. 120 - 124 del Codice del processo amministrativo* in *www.giustamm.it* secondo cui "*la dichiarazione di inefficacia non è fine a se stessa, ma sostituisce l'aggiudicatario con il concorrente che doveva, già in sede procedimentale amministrativa, essere il vincitore della gara e che diviene parte di un altro e successivo contratto. Ovvero, qualora l'annullamento dell'aggiudicazione sia stato determinato non da vizi di legittimità che portino alla scelta di altro concorrente (il ricorrente), ma da illegittimità che determinano la ripetizione della gara, la pronuncia condanna l'amministrazione, dichiarata l'inefficacia del contratto, a procedere al riesercizio dell'azione amministrativa*".

[13] Rispetto a tale prospettazione è, tuttavia, rilevabile un alternarsi di tesi. In particolare alcuni hanno ritenuto che l'inefficacia assume la portata di una nullità-sanzione di regola rilevabile d'ufficio ma, nei casi dell'art. 122, la nullità non può essere pronunciata d'ufficio se manca la domanda di subentro per cui risulta tutelato l'interesse diretto e non quello meramente strumentale alla rinnovazione della gara . In tal senso si v. LOPILATO, *Categorie contrattuali, contratti pubblici e nuovi rimedi previsti dal D.lgs. n. 53/2010 di attuazione della direttiva ricorsi*, in *www.giustizia-amministrativa.it*. Secondo altra tesi "*L'inefficacia, nei casi di cui all'art. 122, non è sanzione; richiede sempre una domanda di parte; tale domanda può ritenersi implicita in quella di subentro; tuttavia, l'art. 122 può consentire al giudice di disporre l'inefficacia anche in assenza di una vera e propria domanda di subentro, ossia anche quando l'interesse dedotto sia non diretto, ma strumentale alla rinnovazione della gara*". Si v., in proposito, M. LIPARI, *Il recepimento della "direttiva ricorsi": il nuovo processo super accelerato*

Risulta, poi, decisiva, in proposito, la previsione dell'art. 123, comma 3 che, per le violazioni dello "*stand still period*" che non abbiano influito sulla possibilità del ricorrente di ottenere l'affidamento, prevede espressamente l'obbligatoria applicazione delle sanzioni[14] alternative all'inefficacia[15], escludendo così inequivocabilmente che possa venir dichiarata l'inefficacia medesima.

in materia di appalti e l'inefficacia "flessibile"del contratto nel d.lg. n. 53 del 2010, op. cit.; ID., *La direttiva ricorsi nel Codice del processo amministrativo: dal 16 settembre 2010 si cambia ancora?,* in *Foro amm. TAR,* 5/2010, LXXIII. Altra dottrina ha ritenuto che "*l'inefficacia, tanto nei casi di cui all'art. 121 quanto nei casi di cui all'art. 122, è sanzione a tutela di interessi pubblici superindividuali e la domanda di subentro è solo uno dei tanti elementi di valutazione*". Si v., in proposito, M. FRACANZANI, *Annullamento dell'aggiudicazione e sorte del contratto nel nuovo processo amministrativo: dall'onere di impugnazione alla pronuncia di inefficacia* in *www.giustizia-amministrativa.it.* Secondo parte della dottrina, "*la norma, piuttosto generica e ad ampio spettro di attuazione, identificando parametri supporto della decisione del giudice sulla sorte del contratto, che spaziano dal tipo di vizio della fase procedimentale allo stato di esecuzione del rapporto negoziale, alla possibilità di subentro del ricorrente, configura pertanto una sorta di inefficacia facoltativa del contratto*". Si v., in tal senso, S. RUSCICA, *Il nuovo processo degli appalti pubblici. Commento organico al D.lgs. 20 marzo 2010 n. 53 di attuazione della direttiva ricorsi 2007/66/CE,* Roma; A. BARTOLINI in A. BARTOLINI, S. FANTINI, F. FRIGORILLI, *Il decreto legislativo di recepimento della direttiva ricorsi,* in *Urbanistica e appalti,* op. cit., 653. Si v., in giurisprudenza, di recente Cons. Stato, 15 novembre 2011 n. 6039 e Cons. Stato sez. V, 28 dicembre 2011 n. 6916 in ordine alla rilevanza degli interessi pubblici coinvolti. Si v., inoltre, Cons. Stato, Sez. VI,17 marzo 2010 n. 1554 secondo cui, in materia di contratti della P.A., il potere di negare l'approvazione dell'aggiudicazione di una gara ben può trovare fondamento, in via generale, in specifiche ragioni di pubblico interesse, senza trovare ostacoli nell'avvenuta aggiudicazione definitiva o provvisoria della stessa.

[14] In proposito appaiono significativi, nel linguaggio normativo comunitario, gli incisi del considerando della Direttiva 2007/66 secondo cui: "*Per contrastare l'aggiudicazione di appalti mediante affidamenti diretti illegittimi… è opportuno prevedere sanzioni effettive, proporzionate e dissuasive; la privazione di effetti è il modo più sicuro per ripristinare la concorrenza e creare nuove*

3. LA QUALIFICAZIONE DELL'INEFFICACIA ALLA LUCE DELLA DISCIPLINA CODICISTICA

A caratterizzare la qualificazione e la disciplina dell'inefficacia, così come emerge dalla disamina delle disposizioni codicistiche, è la sua variabilità.

opportunità commerciali. Per impedire violazioni gravi del termine sospensivo obbligatorio e della sospensione automatica…si dovrebbero applicare sanzioni effettive".

[15] I casi in cui si applicano le sanzioni alternative sono l'inefficacia temporalmente limitata nei casi di gravi violazioni tipizzate, l'efficacia del contratto nei casi di esimenti la declaratoria di inefficacia derivanti da esigenze imperative, l'efficacia del contratto nei casi di violazione degli obblighi pubblicitari in cui però la P.A. ha posto in essere procedure di trasparenza preventiva, l'efficacia del contratto nei casi di mancato rispetto dei termini dilatorio e sospensivo che però non hanno privato il ricorrente delle possibilità di esperire i mezzi di ricorso e di ottenere l'affidamento. Tali sanzioni consistono nella sanzione pecuniaria nei confronti della stazione appaltante di importo tra 0,5 e 5% del valore del prezzo di aggiudicazione o nella riduzione della durata del contratto tra il 10% ed il 50% della durata residua alla data di pubblicazione del dispositivo. Queste sanzioni, alternative all'inefficacia e cumulabili alla medesima solo nei casi di declaratoria d'inefficacia temporalmente limitata, sono dal giudice applicate ora alternativamente tra loro ora cumulando l'una (la sanzione pecuniaria) all'altra (la riduzione del contratto). L'eventuale condanna al risarcimento dei danni non costituisce sanzione alternativa e si cumula con queste. Le sanzioni in commento sono qualificabili come sanzioni amministrative. Si v., P. CERBO, *Voce <<sanzioni amministrative>>* in *Dizionario di diritto pubblico,* diretto da S. CASSESE, Vol. VI, Milano, 2006, 5424 ss.; C.E. PALIERO – A. TRAVI, *La sanzione amministrativa. Profili sistematici,* Milano, 1988; A. CARRATO, *L'opposizione alle sanzioni amministrative,* Milanofiori Assago, 2008, 195 ss..

Si è parlato[16], infatti, di inefficacia flessibile, in considerazione delle svariate gradazioni che essa conosce o può conoscere ed a seconda dei poteri esercitati dal giudice.

Tale inefficacia può essere interpretata come inefficacia sanzionatoria e, in tal senso, essa costituirebbe la sanzione che l'ordinamento impone al contratto in considerazione della nullità che lo affligge.

Tale impostazione avrebbe la sua base nella considerazione dell'imperatività delle norme violate, quali le norme imperative e le norme comunitarie sull'evidenza pubblica e opererebbe, così, nell'alveo della classica nullità del contratto per violazione di norme imperative, *ex* art. 1418 co. 1° c.c..

L'assunto è confermato dalla terminologia usata dal legislatore che si esprime nel senso della "dichiarazione" dell'inefficacia.

Si tratta, pertanto, di una pronuncia non costitutiva, ma dichiarativa, com'è tipico della nullità. In tale prospettiva, imperatività della norma e dichiaratività della pronuncia sarebbero elementi sintomatici della sussumibilità di tale inefficacia nell'ambito della nullità sanzione.

È chiaro che, da questo tipo di premessa, si traggono alcuni corollari.

Il primo è caratterizzato dall'assenza dei termini per agire ai fini della nullità. Ne deriva che l'azione sarebbe imprescrittibile. La nullità è opponibile ai terzi indipendentemente dalla buona fede, in base alle regole specifiche di cui al codice civile. In terzo luogo, opererebbe il principio della rilevabilità d'ufficio della nullità di cui agli artt. 1421 e s.s. c.c.

[16] In dottrina, M. LIPARI, *Il recepimento della "direttiva ricorsi": il nuovo processo superaccelerato in materia di appalti e l'inefficacia flessibile del contratto nel d.lg. n. 53 del 2010,* op. cit.

Secondo altra impostazione mancherebbero, invece, i profili caratterizzanti della nullità, quali, in particolare, l'automatismo della pronuncia e l'originarietà del vizio contrattuale. Pertanto, non si tratterebbe di un'inefficacia derivante da nullità, ma di una risoluzione giudiziale[17], essendo conferito al giudice il potere di risolvere sul piano degli effetti il contratto.

La teoria della risoluzione rende ragione della discrezionalità del potere attribuito al giudice, in quanto si configura una risoluzione giudiziale in cui la natura della pronuncia assume portata costitutiva.

In relazione alla categoria dell'inefficacia emersa dalla disciplina codicistica possono, tuttavia, prospettarsi letture volte a ritenere diversa la graduazione dell'inefficacia a seconda che si consideri il regime giuridico di cui all'art. 121 o quello di cui all'art.122.

L'inefficacia dell'art. 121 si configurerebbe, così, come un'inefficacia sanzionatoria inquadrabile nel *genus* della nullità e ciò avuto riguardo della gravità della violazione e dell'intensità del potere discrezionale del giudice.

L'inefficacia facoltativa dell'art. 122 potrebbe, invece, essere inquadrata nell'ambito dell'inefficacia derivante da risoluzione[18].

[17] Così AULETTA, *Le conseguenze dell'annullamento dell'aggiudicazione sul contratto medio tempore stipulato alla luce del d. lgs. 53 del 2010,* in *Rivista Nel Diritto*, 2010, 757 ss.

[18] Altra impostazione potrebbe fondarsi, invece, non tanto sul disposto degli artt. 121 e 122, quanto sulla decorrenza degli effetti, così ritenendo che vi sia inefficacia - nullità sanzione quando la decorrenza è *ex tunc* ed inefficacia risolutoria nell'ipotesi in cui la decorrenza sia *ex nunc*.

4. L'INEFFICACIA DEL CONTRATTO A SEGUITO DI ANNULLAMENTO GIURISDIZIONALE DELL'AGGIUDICAZIONE OD ANNULLAMENTO IN AUTOTUTELA: IL GIUDICE CHIAMATO A PRONUNCIARSI

Effettuata una disamina categoriale circa la sorte del contratto a seguito dell'annullamento dell'aggiudicazione e circa la natura giuridica dell'inefficacia alla luce della disciplina codicistica, assume rilievo analizzare i profili di criticità inerenti all'individuazione del giudice chiamato a valutare gli effetti sul contratto *medio tempore* stipulato.

Ai fini del soddisfacimento dell'interesse al conseguimento del bene della vita – il subentro nel contratto – il ricorrente ha bisogno, infatti, sia dell'eliminazione dell'aggiudicazione, sia dell'eliminazione del contratto stipulato con l'aggiudicatario illegittimo.

In materia è individuabile un'opzione legislativa chiara. Il legislatore, infatti, ha smentito la ricostruzione della Cassazione del 2007[19], che aveva ritenuto plausibile una scissione tra il giudice del procedimento chiamato a sindacare sulle dinamiche procedimentali e il giudice del contratto cui veniva attribuita la cognizione delle ripercussioni sul contratto.

Attuando la direttiva comunitaria 2007/66, il legislatore ha, invece, considerato il rapporto dedotto in giudizio come rapporto unitario che consta inscindibilmente di aggiudicazione e contratto e ne ha attribuito la cognizione al giudice amministrativo in sede di giurisdizione esclusiva.

[19] Cass. civ. SS. UU. 28 dicembre 2007 n. 27169.

Assume rilievo chiedersi, inoltre, se, in effetti, tale tipo di giurisdizione concerna solo l'inefficacia del contratto a seguito dell'annullamento dell'aggiudicazione *ope iudicis* o anche la caducazione del contratto a seguito dell'annullamento in autotutela.

Parte della giurisprudenza[20] adotta una lettura restrittiva, concludendo nel senso che, in caso di annullamento d'ufficio, l'art. 133 del c.p.a. non opererebbe, essendo all'uopo necessario esperire un'azione specifica tesa all'inefficacia del contratto innanzi al giudice ordinario.

La norma di cui al citato art. 133 sarebbe, infatti, secondo tale interpretazione, norma strettamente connessa con il dettato normativo di cui agli artt. 121 e 122 secondo cui è conferito al g.a. il potere di dichiarare l'inefficacia unicamente come conseguenza dell'annullamento giurisdizionale dell'aggiudicazione.

In tal senso, l'art. 133 andrebbe letto sempre come applicazione di tali norme e non potrebbe riferirsi all'ipotesi di annullamento giurisdizionale.

Recente giurisprudenza del Consiglio di Stato[21] opta, invece, per una lettura non restrittiva dell'art. 133[22], sulla base di un'argomentazione letterale e logica.

A detta del Consiglio, il principio di concentrazione impedisce una scissione dei giudizi, data l'unitarietà dell'oggetto.

[20] Si v. T.A.R. Toscana, 27 gennaio 2011 n. 154

[21] Cons. Stato, V, 7 settembre 2011 n. 5032.

[22] Nell'interpretazione dell'ambito applicativo di questa norma la giurisprudenza recente ha analizzato un ulteriore profilo di rilevante attualità, dovendo valutare se la disposizione in questione valga solo per i contratti di cui all'art. 1 del Codice dei contratti (servizi, forniture, opere: i cd. appalti comunitari), o valga anche per altri contratti, *in species* se valga anche per i contratti di società. In proposito, si v. SS. UU. 30 dicembre 2011, n. 30167.

In tale prospettiva, spetta alla cognizione di un unico giudice sindacare l'annullamento d'ufficio, se esso sia o meno illegittimo e se produca conseguenze sugli effetti della stipulazione contrattuale.

Altrimenti opinando, bisognerebbe, da un lato, contestare l'annullamento d'ufficio dinnanzi al g.a. e, dall'altro, adire il giudice ordinario per l'effetto di tale annullamento.

Ne deriva la preferibilità dell'impostazione secondo cui sono devoluti ad un unico giudice gli effetti che sul contratto producono tutti gli annullamenti, sia quelli giurisdizionali sia quelli in sede di autotutela.

Tale interpretazione risulta, pertanto, sia dalla lettera della legge che in sé non contiene alcun limite, sia dalla considerazione secondo cui, se si optasse per la lettura preclusiva, si discriminerebbero fattispecie completamente speculari e si contraddirebbe il principio di concentrazione, il quale impone che un unico giudice conosca della legittimità dell'annullamento d'ufficio e delle ripercussioni che questo annullamento produce sulla stipulazione contrattuale.

Quanto precede trova, invero, un'ulteriore conferma nell'importanza assunta oggi dal principio di effettività della tutela, sancito espressamente dall'art. 1 del Codice del processo amministrativo e assunto alla stregua di canone interpretativo dell'intero codice, ivi incluse le disposizioni concernenti la giurisdizione[23].

[23] Si v., in proposito, A. POLICE, *Le forme della giurisdizione,* in F. G. SCOCA, *Giustizia amministrativa,* III ed., Torino, 2009, 121 ss..

Quanto alla natura della giurisdizione delineata dall'art. 133 del c.p.a., si noti, infine, che da parte di alcuni interpreti era stata avanzata l'ipotesi di considerare la giurisdizione del g.a. non solo esclusiva, ma anche estesa al merito[24].

La suddetta tesi si pone, altresì, in contrasto esplicito con quanto affermato dall'art. 134 del c.p.a. che non contempla all'interno della materie di giurisdizione di merito il sindacato del giudice sul contratto in conseguenza dell'annullamento dell'aggiudicazione.

Ciò non pare, tuttavia, limitativo dei poteri del giudice, alla luce della nozione di efficacia flessibile e della possibilità di graduare gli effetti della declaratoria di inefficacia del contratto[25].

5. LE DINAMICHE PROCESSUALI. I RECENTI PROFILI DI CRITICITÀ

Il terzo dei profili che ci si propone di indagare, nell'ambito delle dinamiche propriamente processuali, attiene alla valutazione della necessità o meno della domanda di parte e dell'eventuale pronuncia d'ufficio del giudice in ordine all'inefficacia del contratto.

[24] Tale impostazione, suggerita da quanto disposto dalla direttiva europea e da quanto prevedeva sul punto la prima bozza del D. lgs. di recepimento della stessa, ha trovato consenso in CAPONIGRO, *La valutazione giurisdizionale del merito amministrativo* in *www.giustamm.it.* Vi è stato anche chi, in dottrina, ha sostenuto che si sarebbe al cospetto di un'ipotesi innominata di giurisdizione di merito. In proposito si v. LIPARI, *Il recepimento della "direttiva ricorsi", op. cit.*

[25] Così anche E. FOLLIERI, *I poteri del giudice amministrativo nel decreto legislativo 20 marzo 2010, n.53 e negli artt. 120 e 124 del codice del processo amministrativo,* in *www.giustamm.it* dove fa riferimento ad una "*giurisdizione esclusiva speciale, dove i poteri coglitori e decisori del g.a., pur non essendo riconducibili al merito sono posti su un piano di specialità e diversità rispetto alle altre materie, pure di giurisdizione esclusiva".*

Nel silenzio normativo, sono possibili differenti ricostruzioni.

Secondo una prima interpretazione, si può ritenere che la domanda non sia necessaria e che vi sia in capo al giudice il potere di dichiarare d'ufficio l'inefficacia del contratto.

A sostegno di questo assunto si può valorizzare un argomento letterale, secondo il quale la norma è conformata nel senso della rilevabilità d'ufficio dell'inefficacia, nonché un argomento fondato sull'assunto secondo cui a fronte della patologia della nullità, la pronuncia deve necessariamente essere effettuata d'ufficio.

Secondo una lettura aderente alla disciplina codicistica, occorrerebbe, invece, distinguere a seconda che si tratti dell'art. 121 o 122 c. p. a..

Nel primo caso, trattandosi di nullità-sanzione, la rilevazione dovrebbe assumere carattere di ufficiosità; nel secondo caso, se si accoglie la tesi per cui si tratterebbe, di fatto, di una risoluzione, sussisterebbe la necessità di una domanda di parte.

Appare emergere, così, l'evolversi della giurisdizione amministrativa nella direzione della giurisdizione oggettiva, in quanto il processo diretto a tutelare un interesse, di fatto, trascende quello individuale del ricorrente.

L'art. 122 sembra, invece, improntato ad un modello di giurisdizione in cui, essendo assente l'intento sanzionatorio, la domanda di inefficacia dovrebbe essere interposta dalla parte.

Inoltre, quanto alla distinzione o alla unitarietà tra giudizio sull'annullamento e giudizio sulla sorte del contratto, a parere di chi scrive, pare che essi siano conformati unitariamente. La scelta legislativa è chiara nel senso del *simultaneus processus*. Il dato normativo statuisce, infatti, che il giudice che annulla, dichiara l'inefficacia, nello stesso processo.

Tale scelta si allinea all'opzione normativa compiuta nell'art. 30 del Codice del processo, in cui si afferma che la pronuncia di condanna pubblicistica può essere resa nello stesso processo in cui si chiede l'annullamento del provvedimento.

6. LA DIALETTICA EFFICACIA-INEFFICACIA DEL CONTRATTO E LA PONDERAZIONE DEL GIUDICE

Alla luce di quanto finora osservato, pare potersi rilevare come all'annullamento dell'aggiudicazione possa conseguire tanto l'inefficacia del contratto quanto, in via alternativa, il persistere della sua efficacia, seppure accompagnata da specifiche sanzioni.

In secondo luogo, emerge come il verificarsi dell'una o dell'altra fattispecie è ricondotta a puntuali parametri normativi riconducibili a loro volta a specifici interessi pubblici tutelati dal legislatore.

Infine, risulta evidente come l'applicazione di tali parametri e, quindi, la ponderazione degli interessi pubblici che inducono l'efficacia o l'inefficacia del contratto sia, di fatto, affidata al giudice amministrativo sulla base del principio di proporzionalità.

Ne deriva, pertanto, la sussistenza di una duplice prospettiva idonea a valorizzare, da un lato, la declaratoria di inefficacia del contratto, qualora essa sia preordinata al subentro e, dall'altro, la persistente efficacia del contratto, qualora sussistano alla base rilevanti interessi pubblicistici connessi all'esecuzione del contratto.

Rileva considerare l'ampiezza del potere del giudice nel decidere l'inefficacia sia sul piano dell'*an* che sul piano del *quando*.

Lo stesso, infatti, è chiamato a stabilire se dichiarare l'inefficacia e, in particolare, se dichiararla *ex nunc*, *ex tunc* o parzialmente *ex tunc*.

Le scelte che il giudice può compiere sono connotate, pertanto, da quattro profili di variabilità e sono tutte esercitabili in considerazione dell'ampia discrezionalità attribuitagli.

La categoria dell'inefficacia derivante dalla disciplina codicistica risulta, peraltro, variabile anche sul piano normativo, posto che gli artt. 121 e 122 disciplinano diversamente l'intensità del potere del giudice a seconda della gravità della violazione.

Nelle ipotesi di cui all'art. 121, come precisato, risulta sussistere un'inefficacia necessaria o cedevole, essendo essa la regola che cede il passo solo in presenza di eccezioni assolutamente residuali. In questi casi l'inefficacia è la regola ed eccezionalmente è possibile derogarvi, in presenza di eccezionali ragioni imperative di interesse pubblico.

Invece, nei casi di violazione meno gravi, il codice dà al giudice un potere discrezionale più ampio, non sussistendo, infatti, né la specificazione di una regola, né la determinazione di particolari condizioni.

La regola è individuata dal giudice nel caso concreto e non dalla portata della norma. In questo caso il giudice può decidere, comparando gli interessi, valutando l'esecuzione parziale o meno del contratto e gli altri profili della fattispecie, anche la posizione del controinteressato, stabilendo se e da quando far decorrere l'inefficacia della stipulazione contrattuale.

In particolare, l'inefficacia con conseguente subentro è idonea a realizzare quella che è stata definita come la tutela utile della concorrenza, mentre la permanente efficacia del contratto determina l'inveramento dell'interesse pubblico della collettività sotteso alla stipulazione del contratto, inteso come interesse pubblico oggettivo esponenziale non coincidente con l'interesse soggettivo della pubblica amministrazione che viene infatti contestualmente sanzionata.

L'interesse pubblico sotteso al contratto non prevale necessariamente rispetto alla domanda di subentro, ma diventa oggetto di ponderazione da parte del giudice, il quale, nelle diverse fattispecie, dovrà valutare, rispetto ai vari parametri, quale dei due interessi debba prevalere sulla base del principio di proporzionalità.

Dalla disamina effettuata emerge, peraltro, il necessario rapporto dialettico tra gli interessi in gioco, tutela della concorrenza, tutela degli interessi pubblici, tutela delle

ragioni dell'aggiudicatario in buona fede, la cui complessiva composizione è affidata all'autorità giurisdizionale.

Nella concreta ponderazione degli interessi pubblici antagonisti[26], l'autorità giurisdizionale[27] sembra, così, potersi avvalere di una discrezionalità più propriamente pertinente all'esercizio del potere amministrativo[28].

[26] Si v., n tal senso, Cons. Stato, 21 settembre 2010 n. 7004 secondo cui "*In sede di risarcimento dei danni derivanti dalla mancata aggiudicazione di una gara di appalto, il mancato utile nella misura integrale spetta, nel caso di annullamento dell'aggiudicazione e di certezza dell'aggiudicazione in favore del ricorrente, solo se il ricorrente dimostri di non aver potuto altrimenti utilizzare maestranze e mezzi, tenuti a disposizione in vista dell'aggiudicazione; in difetto di tale dimostrazione, è da ritenere che l'impresa possa aver ragionevolmente riutilizzato mezzi e manodopera per altri lavori o servizi e, pertanto, in tale ipotesi deve operarsi una decurtazione del risarcimento di una misura per l'aliunde perceptum vel percipiendum. In tal caso, l'applicazione del principio dell'aliunde perceptum pare, precipuamente, volto a evitare che, a seguito del risarcimento, il danneggiato possa trovarsi in una posizione addirittura migliore".*

[27]Si v., di recente, Cons. Stato sez. III, 19 dicembre 2011 n. 6638 secondo cui "*la privazione degli effetti del contratto in conseguenza dell'annullamento dell' aggiudicazione di una pubblica gara è oggetto di una pronuncia giurisdizionale tipica. Infatti spetta al giudice amministrativo il potere di decidere discrezionalmente (anche nei casi di violazioni gravi) se mantenere o meno l'efficacia del contratto nel frattempo stipulato; il che significa che l'inefficacia non è conseguenza automatica dell'annullamento dell' aggiudicazione , che determina solo il sorgere del potere in capo al giudice di valutare se il contratto debba o meno continuare a produrre effetti".* Si v., inoltre, TAR Sicilia, Catania, 26 marzo 2012 n. 839 con cui il Collegio ha dichiarato inammissibile il ricorso sul rilievo che gli interessi economici invocati dalla ricorrente non possono integrare le esigenze imperative tali da rendere doveroso il mantenimento del contratto. Il Collegio muove dal riferimento all'attuale quadro normativo che vede il giudice titolare del potere diito dichiarare o meno l'inefficacia del contratto.

In questo senso, i poteri del giudice previsti dall'art. 34 e dall'art. 114 del codice del processo manifestano, peraltro, la crescente ampiezza delle decisioni adottabili dallo stesso.

In tale prospettiva pare rilevante precisare come nell'ambito dei poteri ordinari del giudice confluiscano poteri nuovi di decisione, cognizione ed esecuzione, per cui la valutazione sulla sorte del contratto si inserisce in un unitario giudizio con connotati misti di cognizione e di esecuzione.

[28] Quanto ai profili inerenti alla giurisdizione si v. Cass. Civ., SS. UU., 28 dicembre 2007 n. 27169 e Cons. Stato, Ad. Plen. 30 luglio 2008 n. 9 e n. 12 per una affermazione della sussistenza di una giurisdizione del giudice ordinario. Si v., inoltre, Cass. Civ., SS. UU., 10 febbraio 2010 n. 2906 che, in controtendenza rispetto all'orientamento consolidato, ha affermato sussistere la giurisdizione esclusiva del giudice amministrativo in relazione alle conseguenze dell'annullamento dell'aggiudicazione sul contratto *medio tempore* stipulato. Si v., inoltre, T.A.R. Roma Lazio sez. III, 8 marzo 2011 n. 2122, secondo cui "*in materia di aggiudicazione di appalti pubblici, l'annullamento dell' aggiudicazione e la privazione degli effetti del contratto, in quanto derivanti da una fattispecie unitaria, sono oggetto di una cognizione piena e diretta del g.a., perché la privazione degli effetti è disposta in esito ad una indagine che riguarda specifici presupposti di legge e considerazioni di opportunità che si affiancano, in piena autonomia, alle ragioni dell' annullamento del titolo costituito dall' aggiudicazione*". Sulla questione dibattuta in giurisprudenza sono intervenuti a fare chiarezza il Codice dei contratti pubblici e il Codice del processo amministrativo. In particolare, il comma 1 dell'art. 244 del Codice dei contratti pubblici, confluito nell'art. 133, comma 1, lett. e) n. 1 c.p.a., dispone che "*la giurisdizione esclusiva si estende alla dichiarazione di inefficacia del contratto a seguito di annullamento dell'aggiudicazione".* Risulta rilevante, in dottrina, il dibattito in ordine alla natura di tale giurisdizione. Si v. F. CINTIOLI, *In difesa del processo di parti (Note a prima lettura del parere del Consiglio di Stato sul "nuovo" processo amministrativo sui contratti pubblici)* in *www.giustamm.it* e, per la teorizzazione di un'ipotesi innominata di giurisdizione di merito, M. LIPARI, *Il recepimento della "direttiva ricorsi", op. cit.*.

iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

BRIEF NOTES ON THE SETTING ASIDE OF AN AWARD AND THE EFFECTS ON THE CONTRACT: COURTS' POWERS IN LIGHT OF THE ADMINISTRATIVE PROCEDURE CODE

ANNUAL REPORT - 2012 - ITALY

(September 2012)

Prof. Ernesto STICCHI DAMIANI

INDEX

1. FOREWORD

The question of the relationship between the setting aside of an award and the effects on a contract entered into in the meantime is one that straddles the boundary between public and private law and is the product of a complex intertwining of national law with European law.

In this regard over the course of time legal writers[1] and the courts[2] have espoused a multiplicity of constantly evolving views in relation to the nature of the defect that

[1] For literature dealing with the effects on the contract following the setting aside of the award, see: G. FERRARI, *L'annullamento del provvedimento di aggiudicazione dell'appalto pubblico e la sorte del contratto già stipulato nella disciplina dettata dal nuovo c.p.a.*, in *Giur. merito*, 2011, 04, 919; DUNCAN FAIRGRIEVE - FRANÇOIS LICHÈRE (EDS), *Public Procurement Law: Damages as an Effective Remedy*, 2011; G. LEONE, L. MARUOTTI, C. SALTELLI, *Codice del processo amministrativo*, Padua, 2011, 916; D. FATA, M. SANINO, G. CHINÈ, *Le sorti del contratto stipulato a seguito di aggiudicazione illegittima*, in M. SANINO (ED), *Commentario al codice del processo amministrativo*, Turin, 2011; A. QUARANTA, V. LOPILATO. (EDS), *Il processo amministrativo*, Milan, 2011; P. CARPENTIERI, *Sorte del contratto (nel nuovo rito degli appalti)*, in *Dir. Proc. Amm.*, 2011, 664; Council of State (Section VI) judgment no. 780 of 3 February 2011, in *Resp. civ. e prev.*, 2011, 1088, with note by F. GASPARRINO, *Nessun risarcimento al contraente che «confida» nel contratto illecito*; R. CARANTA, *Le controversie risarcitorie*, in R. CARANTA (ED), *Il nuovo processo amministrativo*, Bologna, 2011, 659 *et seq.*; GAMBATO SPISANI, *I riti speciali*, in R. CARANTA (ED), *Il nuovo processo amministrativo*, Bologna, 2011, 732; P. PATRITO, *Annullamento dell'aggiudicazione e inefficacia del contratto d'appalto: strumenti di tutela dell'originario aggiudicatario-contraente, prima e dopo il recepimento della direttiva ricorsi* (note on Court of Turin (Section I) judgment no. 307 of 19 January 2011), in *Resp. civ. e prev.*, 2011, Vol. 7-8, 1616; G. GRECO (ED), *Il sistema della giustizia amministrativa negli appalti pubblici in Europa*, 2010; A. ANGIULI, *Contratto pubblico e sindacato del giudice amministrativo*, in *Dir. amm.*, 2010, Vol. 4, 865; R. CAVALLO PERIN, G. M. RACCA, *La concorrenza nell'esecuzione dei contratti pubblici,* in *Dir. amm.*, 2010, 325; R. BOSCOLO, *In tema di natura*

dell'aggiudicazione provvisoria (comment on Regional Administrative Court of Lazio (Section II-*ter*) judgment no. 10991 of 9 November 2009), in *I contratti dello Stato e degli Enti pubblici*, 2010, Vol. 1, 59-67; R. CALVO, *Annullamento dei provvedimenti di aggiudicazione definitiva e inefficacia dei contratti a evidenza pubblica* (articles 243 *bis* and 245 *bis* - 245 *quinquies* of the Public Contracts Code relating to works, services and supplies introduced by Legislative Decree No. 53 of 20 March 2010, implementing Directive 2007/66/EC), in *Le nuove leggi civili commentate*, 2010, Vol. 3, 617-637; ID., *Appalti pubblici e «decodificazione» dei rimedi*, in *Urbanistica e appalti*, 2010, Vol. 7, pages 757-761; G. COSTANTINO, *Note a prima lettura sul codice del processo amministrativo. Appio Claudio e l'apprendista stregone*, in *Il foro italiano*, 2010, Vol. 9, part V, 237-243; G. CREPALDI, *La revoca dell'aggiudicazione provvisoria tra obbligo indennitario e risarcimento* (comment on Council of State (Section VI) judgment no. 1554 of 17 March 2010), in *Il foro amministrativo C.d.S.*, 2010, Vol. 4, 861-877; O. CRISTANTE, A. ZUCCOLO, *Sorte del contratto* (comment on Legislative Decree No. 53 of 20 March 2010), in *I contratti dello Stato e degli Enti pubblici*, 2010, Vol. 3, 301-308; G. D'ANGELO, *Direttiva n. 2007/66/CE e giurisdizione nelle controversie sui contratti pubblici* (comment on Supreme Court (Civil Section I) order no. 2906 of 10 February 2010), in *Il corriere giuridico*, 2010, Vol. 6, 741-755; P. DELLA PORTA, S. SACCHETTO, *La disciplina processuale del Codice dei contratti pubblici dopo il d.lgs. 20 marzo 2010, n. 53 (e poco prima del codice del processo amministrativo)* (comment on Legislative Decree No. 53 of 20 March 2010), in *I contratti dello Stato e degli Enti pubblici*, 2010, Vol. 3, 269-299; M. R. BUONCOMPAGNI, *Annullamento dell'aggiudicazione e sorte del contratto*, in *Riv. dir.*, 2010, 3, 402; G. E. FERRARI, *Il contenzioso degli appalti pubblici nel nuovo codice del processo amministrativo*, Rome, 2010, 311; E. SANTORO, *Guida alla giurisdizione in materia di contratti pubblici*, in *Riv. Corte dei Conti*, 2010 Vol. 3, 218; G. DE ROSA, *Quale giudice può decidere la sorte del contratto a seguito di aggiudicazione annullata? L'impatto della direttiva ricorsi* (note on Supreme Court *en banc* judgment no. 2906 of 10 February 2010), in *Riv. it. dir. pubbl. comunit.*, 2010, Vol. 3-4, 1035; E. SANTORO, *Una pietra miliare nel cammino verso l'effettività della tutela: le Sezioni Unite affermano la giurisdizione del giudice amministrativo sulla sorte del contratto, anticipando il recepimento della direttiva 2007/66/Ce* (note on Supreme Court *en banc* judgment no. 2906 of 10 February 2010), in *Riv. giur. Edilizia*, 2010, I Vol. 2, 399; F. ASTONE, *I contratti pubblici fra ordinamento europeo e diritto interno*, in *www.giustamm.it*, 1 June 2010.

[2] For recent caselaw trends see Council of State (Section V) judgment no. 2817 of 12 May 2011. See also Council of State (Section III) judgment no. 6638 of 19 December 2011, according to which it is necessary to settle the question of (a) whether the ineffectiveness of the contract, as a logical, necessary and indispensible condition to the specific damages that can lawfully (as mentioned before) be claimed at the time of enforcement, can be declared on the application of the claimant by the execution court when deciding what measures to enforce the judgment would be best suited to satisfying the claims of the claimant that made an application for specific relief or (b) whether, by contrast, as held by the Regional Administrative Court in the challenged judgment, that power must be considered as being vested solely in the review court. Depriving the contract of its effects is ordered on the basis of predetermined prerequisites at the outcome of an investigation that relates to specific conditions laid down by law and involves considerations of expediency alongside the grounds for setting aside the award, which certainly fall within the classic powers of cognizance of the execution court such as to be able to include the latter within the notion of review court. From that standpoint, the claim for specific reinstatement made by the claimant in the application for review at first instance and upheld here may by granted because the preconditions for the declaration of ineffectiveness of the contract pursuant to article 122 of the Administrative Procedure Code are fulfilled (the cases does not fall within the scope of the award being set aside for serious breach pursuant to article 121.1 of the Administrative Procedure Code) given that the defect in the award is not one that obliges the contracting authority to repeat the procurement process because it can go down the ranking.

According to the judgment in question it is permissible in enforcement proceedings pursuant to article 112.4 of the Administrative Procedure Code to submit an application to obtain the award and an order for the signing of the contract following the judicial setting aside of the award previously made by the contracting authority. In fact, that application is to be treated (as it is well established that the court may classify the action as it sees fit) as a request for specific damages (pursuant to article 124 of the Administrative Procedure Code) because intended to settle one of the possible ways of implementing the judgment, including when “no express application” to that effect had been made in the review proceedings. In turn, granting the application to be given the award and the contract made before the execution court presupposes, in accordance with article 124 of the Administrative Procedure Code, a declaration of ineffectiveness of the contract in the meantime entered into referred to in articles 121.1 and 122 of the Administrative Procedure Code. In the absence of that application, the contract must

invalidates the contract, which courts exactly have jurisdiction[3] and how to protect the unlawfully excluded tenderer.

This work, following on from an in-depth consideration of the issue in the past[4], proposes to focus on three fundamental areas of inquiry and associated key aspects.

be considered as valid and effective despite the setting aside of the award (see Council of State (Section III) judgment no. 1570 of 11 March 2011, in *www.giustizia-amministrativa.it*).

Applying the above principle, after having assessed the interests of the parties and balanced them against the public interest, the court declared that the contract signed between the contracting authority and original awardee was ineffective. According to the judgment, ineffectiveness must be declared running from the thirtieth day after receipt by the original awardee of the administrative notice (or, if earlier, service) of the execution judgment with an obligation for the contracting authority to proceed by that deadline to sign the procurement contract with the claimant who won the legal proceedings and with a term equal to that of the contract that has been declared ineffective, subject to first making the award in the claimant's favour and checking that the latter fulfils all of the requirements for concluding the contract.

[3] For an analysis of the issue of what powers the courts enjoy, see M. LIPARI, *L'annullamento dell'aggiudicazione e gli effetti sul contratto: poteri del giudice,* in *www.federalismi.it.* The formula "powers of the administrative court" is important from at least three angles: division of jurisdiction, the nature and type of judicial power exercised, and the relationship between the parties and the court. This author points out that based on a civil law approach, the court's assessment as to whether a declaration of ineffectiveness should be issued is one informed by what is fair and just in the circumstances whereas other approaches would be informed by the general interest, which is a factor extraneous to those contemplated in the Civil Code. See also A. CARULLO, *La sorte del contratto dopo l'annullamento dell'aggiudicazione: poteri del giudice e domanda di parte*, in *www.giustizia-amministrativa.it.*

[4] On this point it should be noted that this work continues the analysis conducted in E. STICCHI DAMIANI, *La caducazione del contratto per annullamento dell'aggiudicazione alla luce del Codice degli appalti*, *op. cit.*, pages 3719-3728.

Firstly, the substantive repercussions on a contract stemming from the cancellation *ex tunc* of the decision making the award will be examined.

Secondly, the analysis will dwell on aspects regarding which court exactly entertains jurisdiction to adjudicate on the repercussions on the contract as a result of the setting aside of the award.

Finally, the work will go on to examine procedural issues in connection with litigation to decide on the fate of the contract. In particular, the question will be posed as to whether the courts may rule on the fate of the contract only where a party actually brings suit or may do so of their own motion.

Furthermore, it will be important to consider whether the proceedings for the setting aside of the award can be separated from those on the ineffectiveness of the contract or whether the principle of *simultaneus processus* applies further to which all aspects of the relationship must be examined in the same lawsuit.

In light of recent caselaw, a final issue to be considered is the distinction between cases where the setting aside of the award occurs as a result of court intervention and cases where it is the contracting authority itself who sets aside the award on its own initiative.

Given the special nature of the proceedings on the fate of a contract following the setting aside of the underlying award, this article will seek to determine the powers of the courts and their central role having regard to the wide discretion that they enjoy in the exercise of their functions.

2. THE RULES ON THE INEFFECTIVENESS OF THE CONTRACT LAID DOWN IN THE ADMINISTRATIVE PROCEDURE CODE AND THE WORDING OF ARTICLE 121

Among the views expressed by legal writers and in caselaw regarding the legal nature of the defect invalidating the contract following the setting aside of the award[5], the Administrative Procedure Code has opted for the most evanescent conceptual category.

The *genus* ineffectiveness is a wide-ranging category that is not at all homogeneous. In fact, all the aspects regarding what ineffectiveness actually means and the rules governing it need to be clarified. One must also establish whether that concept entails a form of penalty or is just mere termination.

Those aspects are examined in more depth in the detailed analysis of the rules on the matter introduced by the Administrative Procedure Code.

The rules laid down in articles 121 *et seq.* of the Administrative Procedure Code hinge on a declaration of ineffectiveness of the contract as a

[5] Reference has been made to nullity, setting aside, ineffectiveness and automatic cancellation of the contract, with a plethora of the variants that each of those concepts incorporate, discussed in M. MONTEDURO, *Invalidità del contratto*, in L. R. PERFETTI (ED), *Repertorio degli appalti pubblici*, II, 2005, 829, and Id., *Illegittimità del procedimento ad evidenza pubblica e nullità del contratto d'appalto ex art. 1418, comma 1, c.c.: una radicale «svolta» della giurisprudenza tra luci e ombre,* in *Foro amm. T.A.R.*, 2002, 2591. The author outlines a series of theories and sub-theories already advanced regarding the matter addressed in this work.

result of the setting aside of the award and distinguish between two cases, one addressed in article 121 governing so-called 'serious' breaches and one addressed in article 122 governing other breaches, with the former being expressly listed and the latter so-called 'ordinary' ones not[6].

In cases covered by article 121 the court must declare the contract to be ineffective and specify whether the ineffectiveness is to operate *ex tunc* or *ex nunc.* The factors that the court is called upon to consider in making its decision are the parties' arguments, the gravity of the contracting authority's conduct and the facts of the case[7].

[6] For an analysis of the repercussions on the application of the provisions of the Administrative Procedure Code and an overview of the consequences of the setting aside of the award on the fate of the contract, see F. BOTTEON, *I contratti non relativi a lavori, servizi e forniture pubbliche e l'annullamento dell'aggiudicazione: alcuni spunti sulla questione della sorte dei contratti alla luce del nuovo codice del processo amministrativo*, in *www.lexitalia.it.*

[7] According to prevailing opinion among legal writers, that declaration is a must. See M. LIPARI, *Il recepimento della "direttiva ricorsi": il nuovo processo superaccelerato in materia di appalti e l'inefficacia "flessibile" del contratto nel d. lgs. n. 53, op. cit.;* R. DE NICTOLIS, *Il recepimento della direttiva ricorsi*, in *www.giustizia-amministrativa.it;* S. FANTINI in A. BARTOLINI, S. FANTINI, F. FIGORILLI, *Il decreto legislativo di recepimento della direttiva ricorsi*, in *Urbanistica e appalti*, 6/2010, 661; C. LAMBERTI, *La caducazione del contratto tra cognizione ed esecuzione*, report presented at the conference on "*Riforme della giustizia e giudice amministrativo"* held in Certosa di Pontignano in Siena on 11-12 June 2010; V. LOPILATO, *Categorie contrattuali, contratti pubblici e nuovi rimedi previsti dal decreto legislativo n. 53 del 2010 di attuazione della direttiva ricorsi* in *www.giustizia-amministrativa.it*, 2010. For criticism of the rise in popularity of the view that the court can act on its own motion, see F. CINTIOLI, *In difesa del processo di parti (Note a prima lettura del parere del Consiglio di Stato sul "nuovo" processo amministrativo sui contratti pubblici)*, in *www.giustamm.it*, who maintains that "to theorise a power-duty enjoyed by the court to

Subparagraphs *a)* and *b)* of article 121.1 provide that where the final award is made without first publishing the contract notice or call for competition, using the negotiated procedure without publication of a contract notice or through a single tender action without that being permissible in circumstances that lead to no notice or call for competition being published, then the court that sets aside the final award must declare the ineffectiveness of the contract.

This would seem to fully protect competition. However, article 121.2 states that overriding reasons relating to a general interest may require that the effects of the contract should be maintained. If fact, if there is a general interest of such importance as to warrant preserving the contract[8], the apparently mandatory nature of the declaration of ineffectiveness ("The court declares") seems to be tempered by an equally mandatory provision to the contrary (the contract "remains" effective).

declare a contract ineffective without the claimant so requesting or desiring would be equivalent to making it a veritable official administrative power concerning a sanction. Perhaps not even the jurisdiction designed to secure observance of the law, in the sense understood to date, would manage to classify it".

[8] Further exemptions to a declaration of ineffectiveness occur in the cases covered by articles 121.5 and 123.3, respectively where the contracting authority has declared that its failure to comply with the publication requirements was in good faith or has published a notice for voluntary ex ante transparency or where there were only formal infringements of the stand still and suspension periods and the infringement in question did not deprive the claimant of the possibility to pursue pre-contractual remedies or did not damage the claimant's chances to obtain the contract.

Certainly, in this way courts are given a significant degree of discretion if the overriding reasons are connected to economic interests.

Indeed, the court must take into account a whole series of factors in its assessment and, in particular, will lean towards preserving effectiveness for technical reasons only when ineffectiveness will not satisfy the demands of the claimant. In fact, the outstanding contractual obligations cannot be transferred in as much as they can be performed only by the original awardee or when the claimant does not intend to perform them not having applied to take them over. Even greater discretion is afforded to the court when it can refrain from declaring the ineffectiveness of the contract, especially where that would give rise to disproportionate consequences.

These provisions highlight the need, on the one hand, to protect competition allied to the claimant's own interest and, on the other hand, the public interest underlying the contract, with the courts being entrusted the task of striking a balance between them.

In particular, in the face of a public interest in maintaining the effectiveness of the contract, protection of competition increasingly tends to coincide with the claimant's interest in taking over the contract.

Therefore, article 121 reflects the significant complexity of the notion of ineffectiveness when, in identifying the rules to apply to cases of serious breach, it provides that in cases of infringement of publication requirements (subparagraphs a-b), the contract remains effective if overriding reasons relating to a general interest so dictate, such to be decided on the basis of a series of factors to be considered by the court.

Accordingly, in that case the public interest underlying the contract may, in the court's judgment, having regard to the principle of proportionality, take precedence over the need to safeguard competition even though the latter has been seriously prejudiced by infringement of the publication requirements[9].

Likewise the second of the serious breaches envisaged by article 121.1, i.e. infringement of the "stand still period" (subparagraphs c and d), does not necessarily lead to ineffectiveness – despite the gravity of the harm caused to the rules of competition – of the contract where that

[9] Not all legal writers agree on the relevance of the good faith exhibited by the successful tenderer in whose favour the award was originally and unlawfully made. Reference should be made to the extreme view espoused by F. CINTIOLI, *In difesa del processo di parti (Note a prima lettura del parere del Consiglio di Stato sul "nuovo" processo amministrativo sui contratti pubblici)*, *op. cit.*, according to whom the court should never declare ineffectiveness if such could damage the position of a contracting party who acted in good faith. Only in cases of bad faith on the part of the awardee could (and generally should) the court declare ineffectiveness taking into account the other factors laid down in article 122. Therefore, according to this approach good faith trumps all other factors listed in article 122. An advocate of a more moderate view is M. LIPARI, *Il recepimento della "direttiva ricorsi": il nuovo processo superaccelerato in materia di appalti e l'inefficacia "flessibile"del contratto nel d. lgs. n. 53 del 2010, op. cit.,* for whom good faith on the part of the awardee is relevant only in cases of "minor breaches" but does not automatically preclude a declaration of ineffectiveness of the contract. The author does not share the view that good faith is an insurmountable barrier to a declaration of ineffectiveness but sees it as a factor of equal weight with the others mentioned in article 122.

infringement[10] did not affect the chances of the claimant to obtain the contract in the first place.

In that case it is clear that it is not so much the public interest underlying the contract but more the claimant's interest or lack of interest that militates in favour of maintaining the effectiveness of the contract itself. Thus, it is evident that the claimant's interest in obtaining the contract will be a significant factor in the court's decision as to whether it should issue a declaration of ineffectiveness.

2.1 'Ordinary' breaches under articles 122 and 123 of the Administrative Procedure Code

The rules governing so-called 'ordinary' breaches laid down in article 122**,** i.e. the infringements that most often occur, confirm how a

[10] In particular, as regards the irrelevance of culpability in the infringement, reference should be made to European Court of Justice (Third Chamber) judgment of 30 September 2010 (case C-314/09) ruling as follows in relation to the matter: "Council Directive 89/665/EEC of 21 December 1989 must be interpreted as precluding national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable". That approach has been followed in domestic caselaw: see, amongst many, Regional Administrative Court of Lombardy, Brescia, judgment no. 4552 of 4 November 2010.

declaration of ineffectiveness is linked to the possibility that the claimant could take over the contract[11].

In fact, those rules provide that the claimant's interest in taking over the award and the contract is not a matter that the court must take into account because that factor is actually a prerequisite for enabling the court to decide between the effectiveness and ineffectiveness of the contract. Indeed, for the court to do so, an application to take over the contract must have been submitted or such an application must be impossible because the offending defect is one that entails an obligation to repeat the procurement process[12].

[11] Regarding the distinction between the various models of ineffectiveness, see F. LIGUORI, *Appunti sulla tutela processuale e sui poteri del giudice nel decreto legislativo n. 53 del 2010, op. cit*. The author stresses that the different functions of the models of ineffectiveness envisaged by the overall body of rules laid down in the Administrative Procedure Code clearly emerge from the very wording of the provisions in question. In the first case, "the court that sets aside the award declares ineffectiveness". In the second case, "the court decides whether to declare ineffectiveness". In other words, it is the author's view that "in cases of serious breach the court's decision-making power. i.e. the decision whether or not to declare the contract ineffective, is subject to fulfilment of conditions that in one sense are more rigid but in another sense are more closely linked to an assessment of what is in the public interest. In cases of minor breaches, the court's powers of review are wide, entailing an overall assessment of the facts of the case (hence the relationship) but appear to be more linked to the parties' interests and especially those of the claimant".

[12] Article 122, with reference to so-called 'ordinary' breaches, provides that ineffectiveness is linked to a series of factors but tied to the precise assumption that there is an application to take over the contract. See E. FOLLIERI, *I poteri del giudice amministrativo nel decreto legislativo 20 marzo 2010 n. 53 e negli artt. 120 - 124 del Codice del processo amministrativo*, in *www.giustamm.it*, according

In the absence of those prerequisites the court may not declare the contract to be ineffective.

The factors that article 122 states that the court must take into account essentially relate to whether the application to take over the contract can be granted having regard also to the public interest underlying the contract[13].

to whom "the declaration of ineffectiveness is not an end in itself but replaces the awardee with the competitor who should, at the time of the administrative procedure, have won the contract and who now becomes a party to a new and subsequent contract. If the setting aside of the award is caused not by defects that lead to another competitor (the claimant) being selected but by defects that require the procurement process to be repeated, the judgment declares the contract to be ineffective and orders the contracting authority to repeat the administrative procedure".

[13] There is however an alternative view. In particular, some argue that ineffectivness is a form of nullity conceived as a penalty that as a rule can be raised by a court of its own motion but in the case of article 122 nullity cannot be declared by the court of its own motion in the absence of an application to take over the contract, meaning that a direct interest is protected and not merely one instrumental to the repetition of the competition. In that sense see LOPILATO, *Categorie contrattuali, contratti pubblici e nuovi rimedi previsti dal D.lgs. n. 53/2010 di attuazione della direttiva ricorsi*, in *www.giustizia-amministrativa.it*. According to another view "ineffectiveness in the cases covered by article 122 is not a penalty; it always requires that a party apply for it; that application can be implied in an application to take over the contract; however, article 122 may allow the judge to declare ineffectivness even in the absence of a veritable application to take over the contract, in other words, also when the interest that the lawsuit concerns is not direct but instrumental to the repetition of the competition". See, in that regard, M. LIPARI, *Il recepimento della "direttiva ricorsi": il nuovo processo superaccelerato in materia di appalti e l'inefficacia "flessibile"del contratto nel d.lg. n. 53 del 2010, op. cit.*; ID., *La direttiva ricorsi nel Codice del processo amministrativo: dal 16 settembre 2010 si cambia ancora?*, in *Foro amm. TAR*, 5/2010, LXXIII. Another writer maintains that "ineffectiveness, both in cases under 121 and in cases under article 122 is a penalty designed to

Decisive in this regard is article 123.3 regarding infringements of the "stand still period" that did not affect the chances of the claimant to obtain the contract. It expressly provides in that case for the imposition of penalties[14] as an alternative to ineffectiveness[15], thereby unequivocally ruling out any declaration of ineffectiveness.

protect the superindividual public interest and the application to take over the contract is just one of the many elements to be assessed". See, in that regard, M. FRACANZANI, *Annullamento dell'aggiudicazione e sorte del contratto nel nuovo processo amministrativo: dall'onere di impugnazione alla pronuncia di inefficacia*, in *www.giustizia-amministrativa.it.* According to other writers "the rule, rather general and with a broad scope of application, identifying as it does factors to substantiate the decision of the court on the fate of the contract – ranging from the type of defect in the procedural stage to the state of performance of the contract and to the possibility for the claimant to take over the contract – thus envisions a form of optional ineffectivness of the contract". See, in that sense, S. RUSCICA, *Il nuovo processo degli appalti pubblici. Commento organico al D.lgs. 20 marzo 2010 n. 53 di attuazione della direttiva ricorsi 2007/66/CE*, Rome; A. BARTOLINI in A. BARTOLINI, S. FANTINI, F. FRIGORILLI, *Il decreto legislativo di recepimento della direttiva ricorsi*, in *Urbanistica e appalti*, *op. cit*., 653. In caselaw see the recent Council of State judgment no. 6039 of 15 November 2011 and Council of State (Section V) judgment no. 6916 of 28 December 2011 concerning the importance of the public interests involved. See also Council of State (Section VI) judgment no. 1554 of 17 March 2010, according to which in matters concerning government contracts the power to deny approval to an award can be based, in general, on specific reasons of public interest even where a provisional or final award has already been made.

[14] Significant in this regard is the wording to be found in some of the recitals to Directive 2007/66/EC, according to which: "[i]n order to combat the illegal direct award of contracts ... there should be provision for effective, proportionate and dissuasive sanctions", "[i]neffectiveness is the most effective way to restore competition and to create new business opportunities" and "[i]n order to prevent serious infringements of the standstill obligation and automatic suspension ... effective sanctions should apply".

3. THE MEANING OF INEFFECTIVENESS IN LIGHT OF THE LEGISLATIVE PROVISIONS.

A striking feature of the meaning of ineffectiveness and the rules governing it, based on an examination of the relevant provisions of the Administrative Procedure Code, is how variable the concept of ineffectiveness actually is.

[15] The cases in which alternative penalties apply are ineffectiveness that is limited in time in cases of typified serious infringements, effectiveness of the contract in cases of an exemption to a declaration of ineffectiveness due to overriding reasons, effectiveness of the contract in cases of infringement of publication obligations where the contracting authority has complied with the ex ante transparency procedure, effectiveness of the contract in cases of infringement of the stand still and suspension periods that have not however deprived the claimant of its chance to apply for review and obtain the contract. Those penalties take the form of fines on the contracting authority of between 0.5 and 5% of the contract price or the shortening of the duration of the contract by between 10% and 50% of the residual duration as at the date of publication of the judgment. The penalties, alternatives to ineffectivness and cumulable with ineffectiveness only in cases of a declaration of ineffectiveness that is limited in time, can be imposed by the court either alone or in conjunction with each other (i.e. both a fine and shortening the duration of the contract). An award of damages is not an alternative penalty but would be additional. The penalties in question can be classed as administrative in nature. See P. CERBO, *"sanzioni amministrative"* entry in S. CASSESE (ED), *Dizionario di diritto pubblico,* Vol. VI, Milan, 2006, 5424 *et seq.*; C. E. PALIERO – A. TRAVI, *La sanzione amministrativa. Profili sistematici,* Milan, 1988; A. CARRATO, *L'opposizione alle sanzioni amministrative,* Milanofiori Assago, 2008, 195 *et seq.*

There has been talk[16] of flexible ineffectiveness in view of the various degrees that it may or could take depending on the powers exercised by the court.

That ineffectiveness could be interpreted as serving a penalty-like purpose and in that sense would constitute the sanction that the legal system attaches to the contract in light of the nullity that affects it. That approach would be based on considering the infringed rules as mandatory ones, i.e. the Community rules on publication, and as such the approach would fall within the realm of classic nullity of a contract for breach of mandatory rules pursuant to the first paragraph of article 1418 of the Civil Code.

That view is confirmed by the terminology used by the law, which speaks in terms of a "declaration" of the ineffectiveness. However, the court judgment would not be a constituent one but a mere declaratory one, as is typical of nullity. From that standpoint, the mandatoriness of the rule and the declaratory nature of the judgment would be symptomatic of the fact that ineffectiveness falls within the scope of nullity conceived as a penalty.

It is clear that any such premise would have a number of corollaries. The first, is the absence of a time limit for bringing an action for nullity. It follows that the action could never be statute barred. Secondly, nullity can be raised irrespective of good faith on the basis of the specific rules laid down in the Civil Code. Thirdly, the principle, enshrined in articles 1421 *et seq*. of the Civil Code, that nullity can be raised by a court of its own motion would apply.

According to another approach the defining features of nullity are absent like, in particular, the automaticness of the judgment and the original nature of the contractual defect. Therefore, it would not be a case of ineffectiveness deriving from nullity but judicial

[16] Among legal writers see M. LIPARI, *Il recepimento della "direttiva ricorsi": il nuovo processo superaccelerato in materia di appalti e l'inefficacia flessibile del contratto nel d.lg. n. 53 del 2010, op. cit*.

termination[17] since the court is given the power to terminate the contract in terms of its effects. The theory of termination is consistent with the discretionary power granted to the courts because it would then be a case of judicial termination that takes on the form of a constituent judgment.

Regarding the concept of ineffectiveness that one can deduce from the provisions of the Administrative Procedure Code, it appears that ineffectiveness differs in degree depending on whether article 121 or article 122 is involved.

Ineffectiveness under article 121 would be ineffectiveness in the form of a penalty falling within the *genus* of nullity, bearing in mind the gravity of the infringement and the extent of the court's discretionary power, whereas optional ineffectiveness under article 122 could be considered as falling within ineffectiveness deriving from termination[18].

4. INEFFECTIVENESS OF THE CONTRACT FOLLOWING THE SETTING ASIDE OF THE AWARD BY A COURT OR BY THE CONTRACTING AUTHORITY ITSELF: WHICH COURT HAS JURISDICTION

Having examined the fate that befalls a contract after the setting aside of the award and considered the legal nature of ineffectiveness in light of the relevant legislative

[17] So maintains AULETTA, *Le conseguenze dell'annullamento dell'aggiudicazione sul contratto medio tempore stipulato alla luce del d. lgs. 53 del 2010*, in *Rivista Nel Diritto*, 2010, 757 *et seq.*

[18] Other approaches could be based not so much on the provisions of articles 121 and 122 but more on when the ineffectivness runs from, such that ineffectivness would constitute nullity conceived as a penalty when *ex tunc* and termination when *ex nunc*.

provisions, next one needs to analyse the critical issue of which court exactly has jurisdiction to assess the effects on the contract signed in the meantime.

In order to achieve its practical aim – taking over of the contract – the claimant needs both the award itself and the contract signed in the meantime with the successful tenderer to be eliminated.

A clear legislative choice has been made in this regard, which repudiates the view expressed by the Supreme Court in 2007[19] that it was possible that one court could entertain the proceedings to review the legality of the award while another one could entertain those in relation to the repercussions on the contract.

Implementing Directive 2007/66/EC the legislator considered the disputed relationship to be a single indivisible one consisting of an award and a contract and granted exclusive jurisdiction in the matter to the administrative courts.

Moreover, it is necessary to ask oneself whether that jurisdiction concerns solely the ineffectiveness of the contract following the setting aside of the award by the court or also cancellation of the contract in cases where it is the contracting authority itself who sets aside the award.

Some caselaw[20] adopts a restrictive interpretation to the point that where a contracting authority sets aside an award on its own initiative, article 133 of the Administrative Procedure Code would not apply, it being necessary in that instance to bring specific action before the ordinary courts seeking ineffectiveness of the contract. According to that view the rule laid down in article 133 is one strictly connected with the provisions of articles 121 and 122 in accordance with which the administrative courts are granted power

[19] Supreme Court (Civil Division) *en banc* judgment no. 27169 of 28 December 2007.

[20] See Regional Administrative Court of Tuscany judgment no. 154 of 27 January 2011.

to issue a declaration of ineffectiveness solely as a consequence of the setting aside of the award by the courts themselves. Accordingly, article 133 is to be read as an application of those provisions and cannot cover the setting aside of an award by other than a court.

By contrast recent caselaw of the Council of State[21] has opted for a non-restrictive reading of article 133[22] relying on logic and a literal approach to interpretation.

The Council of State held that the principle of concentration is an impediment to any separation of the legal proceedings given that the subject matter is one and the same. From that standpoint just one court alone can review the contracting authority's setting aside of the award on its own initiative, in other words, assess whether it is lawful or not and if it has repercussions on the effects of the ensuing contract. Holding otherwise would require the administrative courts to hear the case on the setting aside and the ordinary courts to hear the one on the effects of that setting aside.

It follows that this second view is to be preferred in which a single court decides the effects on a contract in all cases of setting aside, be the setting aside ordered by the court or the result of steps taken by the contracting authority itself on its own initiative.

That interpretation best fits the letter of the law, which would not appear to contain any limits. In addition, there is also the point that if one were to opt for an exclusionary interpretation one would end up treating totally identical situations differently and this would contradict the principle of concentration requiring that just one court should rule on

[21] Council of State (Section V) judgment no. 5032 of 7 September 2011.

[22] In interpreting the scope of application of this provision caselaw has recently analysed a further topical aspect, having to assess whether the provision in question applies solely to the contracts specified in article 1 of the Public Contracts Code (services, supplies, works: so-called 'Community' contracts) or also to other contracts, specifically if it applies to corporate contracts. In that regard see Supreme Court *en banc* judgment no. 30167 of 30 December 2011.

the dispute concerning the lawfulness of the contracting authority's own setting aside and the repercussions of that same setting aside on the contract.

The foregoing is further confirmed by the importance attributed nowadays to the principle of effectiveness of protection, specifically enshrined in article 1 of the Administrative Procedure Code and which informs the interpretation of the entire code including the provisions on jurisdiction[23].

As for the nature of the jurisdiction under article 133 of the Administrative Procedure Code, finally, it should be noted that some commentators had advanced the view that the jurisdiction of the administrative courts was not only exclusive but also extended to the merits[24]. However, that view clearly conflicts with article 134 of the Administrative Procedure Code, which does not contemplate administrative courts' jurisdiction on the merits as including their review of a contract as a consequence of the setting aside of the award.

That said, the foregoing does not does limit the power of the courts in light of the concept of flexible effectiveness and the possibility for the courts to graduate the effects of the declaration of ineffectiveness of the contract[25].

[23] See, in that regard, A. POLICE, *Le forme della giurisdizione*, in F. G. SCOCA, *Giustizia amministrativa*, III edition, Turin, 2009, 121 *et seq.*

[24] That approach, suggested by the content of Directive 2007/66/EC and what was envisioned in the first draft of the Legislative Decree drawn up to transpose it, found favour with CAPONIGRO, *La valutazione giurisdizionale del merito amministrativo*, in *www.giustamm.it*. Another writer maintained that there was an implied extension of jurisdiction to the merits: see LIPARI, *Il recepimento della "direttiva ricorsi", op. cit.*

[25] See also E. FOLLIERI, *I poteri del giudice amministrativo nel decreto legislativo 20 marzo 2010, n.53 e negli artt. 120 e 124 del codice del processo amministrativo*, in *www.giustamm.it*, referring to

5. LITIGATION MATTERS. RECENT KEY ISSUES.

The third aspect that this work proposes to examine in a purely litigation context relates to assessing whether the claimant has to specifically seek a declaration of ineffectiveness and whether the court may declare ineffectiveness of its own motion.

The law is silent on the matter, so a number of different views are possible.

According to one interpretation, a specific request is not necessary and of its own motion the court may declare the ineffectiveness of the contract. In support of this view is a literal argument to the effect that the rule is constructed in a way as to admit a declaration of ineffectiveness by the court of its own motion as well as a further argument based on the assumption that as nullity is involved the declaration must necessarily come from the court of its own motion.

According to a second interpretation taking into account the provisions in the Administrative Procedure Code itself, one has to draw a distinction depending on whether article 121 or 122 is involved

In the former, as it is a case of nullity conceived as a penalty, the ineffectiveness should be declared by the court of its own motion. In the latter, if one accepts the view that it is actually a case of termination, then the party concerned would need to have specifically applied for a declaration of ineffectiveness.

"special exclusive jurisdiction, whereby although the administrative courts' cognizance and decision-making powers might not cover the merits they are nonetheless on a special and different level compared to other matters, including exclusive jurisdiction".

It would thus appear that administrative jurisdiction has developed in the direction of securing observance of the law, with the proceedings designed to safeguard an interest that to all intents and purposes transcends the claimant's individual one. On the other hand in article 122, informed by a model of jurisdiction in which there is no penalty aspect, it is the claimant who must seek the declaration of ineffectiveness.

Moreover, as for separating or unifying the proceedings on setting aside the award and those on the fate of the contract, in this author's view the latter is the correct interpretation. The law is clear in favouring *simultaneus processus* because the relevant provisions state that the court which sets aside is also the one which declares ineffectiveness in the same proceedings.

That approach is consistent with the choice made by the legislator in article 30 of the Administrative Procedure Code, in which it is provided that an active judgment can be issued in the same proceedings in which the setting aside of a decision is sought.

6. THE EFFECTIVENESS VS. INEFFECTIVENESS OF THE CONTRACT AND THE COURT'S ASSESSMENT

In light of what has been stated so far, one can conclude that the setting aside of the award may lead to the ineffectiveness of the contract or alternatively to the effects of the contract being maintained but accompanied by specific penalties.

Secondly, whether effectiveness or ineffectiveness is the outcome depends on precise legislative factors that in turn are informed by specific public interests protected by the law.

Finally, it is clear that the application of those factors and hence the assessment of the public interests that lead to the effectiveness or ineffectiveness of the contract are entrusted to the administrative courts having regard to the principle of proportionality.

It follows therefore that there is a dual standpoint from which a court must assess, on the one hand, a declaration of ineffectiveness of the contract when such is required to enable the contract to be taken over and, on the other hand, the continued effectiveness of the contract when there are important public interests in connection with performance of the contract.

In it also important to consider the breadth of the discretion that a court enjoys in deciding on ineffectiveness itself and when precisely that ineffectiveness runs from. In fact, the court is called upon to decide whether a contract is to be declared ineffective and if so whether to declare it *ex nunc*, *ex tunc* or partially *ex tunc*.

The choice that the court may make is thus conditioned by four variables and all of them may play a role given the wide discretion that the court enjoys.

Moreover, the types of ineffectiveness can also vary on a normative level given that articles 121 and 122 provide that the extent of a court's discretion differs according to how serious the breach is.

In cases under article 121, as mentioned before, ineffectiveness is the norm unless some very limited exceptions apply. Ineffectiveness is the rule, which can be derogated from solely in exceptional circumstances to do with overriding reasons of public interest. On the other hand, for more minor breaches, the law grants the courts wide powers of discretion without specifying a general rule nor particular conditions.

The rule is determined by the court depending on the facts of the case and not the wording of the legislation. In that case the court may – weighing the competing interests and evaluating partial performance or not of the contract and the other circumstances of the case, including the position of the opposing party – establish whether the contract should be declared ineffective and if so from what point in time.

In particular, ineffectiveness followed by the taking over of the contract has been defined as effective protection of competition while maintaining the effectiveness of the contract is more about protecting the public interest that the community may have in the

conclusion of the contract, understood as an objective exponential public interest not coinciding with the individual interest of the public administration, which is simultaneously fined.

The public interest underlying the contract does not necessarily prevail over the request to take over the contract but is an issue to be considered by the court, which in the actual case before it will have to assess – in light of various factors – which of the two interests must take precedence bearing in mind the principle of proportionality.

Moreover, the analysis conducted so far highlights the necessary interplay between the interests at stake, protecting competition, safeguarding the public interest and upholding the rights of the good faith awardee, whose overall mix is entrusted to the court for consideration.

In their actual weighing of opposing public interests[26], the courts[27] would seem to be able to rely on a discretion that is more characteristic of the exercise of administrative power[28].

[26] See in that sense Council of State judgment no. 7004 of 21 September 2010 according to which "When assessing damages for the loss deriving from failing to win a procurement award, full loss of profits is to be granted in the case of the setting aside of the award and certainty of the award for the claimant solely if the claimant proves that it was not otherwise able to use the labour and equipment kept on hand in view of the award. If that cannot be proved, it is to be held that the enterprise could reasonably have reused the labour and equipment for other works and services and thus in that instance the compensation must be reduced to take account of other actual earnings in the meantime and other sums that could have been earned in the meantime in an attempt to mitigate the loss. In that case, application of the above principle of *aliunde perceptum vel percipiendum* appears designed to avoid a situation whereby after obtaining the damages the injured party could well be better off".

[27] See, recently, Council of State (Section III) judgment no. 6638 of 19 December 2011 according to which "the removal of the effects of the contract as a result of the setting aside of the award made in a

public competition is the object of a standard judicial decision. In fact, it is a matter for the administrative court to decide at its discretion (including in cases of serious infringements) whether to maintain the effects of the contract entered into in the meantime. This means that ineffectivness is not an automatic consequence of the setting aside of the award, which merely triggers the power of the court to decide whether or not the contract must continue to be effective". See also Regional Administrative Court of Sicily, Catania, judgment no. 839 of 26 March 2012 declaring inadmissible an appeal on the point that the economic interests invoked by the claimant cannot constitute the overriding reasons that make it imperative to maintain the effectiveness of the contract. The Court based its ruling on the current legislative framework, which provides that it is the court that has the power to decide on whether the contract is to be effective or ineffective.

[28] As for the aspects pertaining to jurisdiction, see Supreme Court (Civil Division) *en banc* judgment no. 27169 of 28 December 2007 and Council of State *en banc* judgments nos. 9 and 12 of 30 July 2008 ruling that the ordinary courts enjoy jurisdiction. See also Supreme Court (Civil Division) *en banc* judgment no. 2906 of 10 February 2010, which, going against the grain of well established caselaw, ruled that the administrative courts have exclusive jurisdiction in relation to the consequences of the setting aside of the award on the contract signed in the meantime. See also Regional Administrative Court of Lazio (Section III), Rome, judgment no. 2122 of 8 March 2011 according to which "in the matter of the awarding of public contracts, setting aside of the award and depriving the contract of its effects, in as much as deriving from a single situation, are matters for full and direct cognizance by the administrative courts because depriving the contract of its effects is ordered after an investigation that relates to specific conditions laid down by law and involves considerations of expediency that flank, in a totally autonomous manner, the reasons for the setting aside of the award". This question, discussed in the literature, has been clarified in the Public Contracts Code and the Administrative Procedure Code. In particular, article 244.1 of the Public Contracts Code, now also point 1 of article 133.1(e) of the Administrative Procedure Code, provides that "exclusive jurisdiction extends to the declaration of ineffectivness of the contract following the setting aside of the award". Important among legal writers is the debate as to the nature of that jurisdiction. See F. CINTIOLI, *In difesa del processo di parti (Note a prima lettura del parere del Consiglio di Stato sul "nuovo" processo amministrativo sui contratti pubblici)*, in *www.giustamm.it*. For a theory that what is involved is implied jurisdiction on the merits, see M. LIPARI, *Il recepimento della "direttiva ricorsi", op. cit.*

In this sense the power of the courts envisioned by articles 34 and 114 of the Administrative Procedure Code is an expression of the growing breadth of the decisions that they can adopt.

From that perspective it is worth pointing out that the ordinary powers of the courts incorporate new powers of decision, cognizance and execution such that the assessment of the fate of the contract occurs within a single decision-making process with shades of both cognizance and execution to it.