

**THE ADMINISTRATIVE POLICE AND PUBLIC SECURITY
IN THE DISTRIBUTION OF RESPONSIBILITIES BETWEEN
STATE AND LOCAL REGIONS**

ANNUAL REPORT - 2011 - ITALY

(June 2011)

Prof. Giuseppe TROPEA

INDEX

- 1. THE DEVELOPMENT OF THE NOTION BEFORE THE REFORMATION OF THE 5TH TITLE CONSTITUTION.**
- 2. PUBLIC ORDER, SECURITY AND LOCAL ADMINISTRATIVE POLICE AFTER THE REFORMATION OF THE 5TH TITLE CONSTITUTION.**
- 3. ANALYSIS OF THE MOST RECENT JURISPRUDENCE OF THE CONSTITUTIONAL COURT. IN PARTICULAR: URBAN SECURITY**
- 4. CONCLUSIONS: IS THE CONCEPT OF SECURITY A NEW TRANSVERSAL TOPIC?**
- 5. BIBLIOGRAPHY**

1. THE DEVELOPMENT OF THE NOTION BEFORE THE REFORMATION OF THE 5TH TITLE CONSTITUTION.

It is a commonly held opinion that the modifications to the structure of the public administration, connected to the establishment of the social State, have progressively led to

a reduction in the role of the administrative police thus allowing them to play a central role in ordinary development activities.

The concept that excludes an autonomous configuration of the administrative police has been confirmed by the law of the constitutional court, which has underlined the absence of a “separate” subject from the administrative police, that, on the contrary, is characterized by a secondary role, as opposed to a single subject that is referred to time after time (Constitutional court n. 77/1987;n. 218/1988; n.115/1995). In particular, according to the constitutional court, in order to decide if the administrative police can be responsible for a specific power that has been transferred or delegated to the regions, it is necessary to satisfy two criteria: a) verify whether the functions of the police reach the subject that has been transferred or delegated to the regions; b) verify that the interests to be protected by the relevant function are not included in the concept of public order (Constitutional court, n. 218/1988).

According to these outlines, therefore, the administrative police is nothing but a collection of activities that, in an originally less liberal and centrally organized system, were entrusted to the exclusive care of the Authority of public security, as part of a pervasive concept of public control over the activities of private entities.

However, with the progressive transfer of the administrative functions of the state to the local authorities comes a definitive outline of the conceptual limits of the administrative police. The transfer also of secondary functions, that concern all the preventive and repressive measures taken to avoid any damage, harm or disruption derived from the performance of activities covered and regulated under the specific matters assigned to the local authorities (article 9,d.P.R 24 July 1977,n. 616), does nothing but confirm the process of loss of former identity of the administrative police, which prompts the consideration of a non-existent judicial notion significant to the administrative police, or, at least, the non-recognition of an independent conceptual space.

Such an evolution of the concept of the administrative police has been confirmed by Article 158, comma 2, e 159, comma 1, from the D. Lgs.31 March 1998, n.112. On one

side there is assignment to regions and local authorities of functions and tasks of the administrative police in all matters assigned to them, and on the other side the content of the regional and local administrative police is outlined as a complex of functions intended to avoid any damage or harm that could be caused to legal entities by the performance of activities relating to matters resulting from the exercising of responsibilities, including those delegated to the regions and local authorities, without causing harm or putting at risk the assets and interests that are protected according to public order and public security.

In this way, the administrative police has come to be an important litmus test for identifying the impact of the principle of subsidiarity, both vertically and horizontally, bearing in mind past responsibilities included in the powers of the police and which are now subject to liberisation

In order to verify such issues, the development of constitutional law over recent years should be taken into consideration.

2. PUBLIC ORDER, SECURITY AND LOCAL ADMINISTRATIVE POLICE AFTER THE REFORMATION OF THE 5TH TITLE CONSTITUTION.

According to Art. 117, paragraph 2., let. h, of the Const., introduced by the reformation of the 5th Title Constitution of 2001, the State has legislative power over public order and security, excluding the local administrative police; furthermore, modified Art 118 entrusts state law with coordination between the State and Regions for, among other things, the matters referred to in Art 117, paragraph 2., let. H.

It has been asked whether the effect of these hypotheses can be to establish that the administrative police has somehow been elevated to the rank of an independent subject, susceptible to a specific legal framework. Furthermore, it does not appear to be clear how the management of the local administrative police, which has flowed back into the residual

responsibilities of the Regions in Art.117, paragraph 4., Const, can be reconciled with the power of the State to dictate the regulation of the fundamental principles in the event of interference with competing matters. Another question has been concerned with the difficult coordination between the letter h and the letter p of Article 117, which refer to how the State has exclusive authority as regards the fundamental functions of towns, provinces and cities: so if it was considered that one of them could include the local administrative police, the regional assignments would likely be substantially depleted.

It is true that even though we can recognize that the previous organization of responsibilities is still valid following the reformation of Title V, it often seems difficult to trace back certain functions among those of the administrative police or those concerning public safety and security. According to this perspective, the tools of a fair collaboration and coordination, of which Art 118, paragraph 3. Const. talks about, play a fundamental role, even if they have not been adequately exploited until now.

In any case, after the reformation in 2001, the first commentators together with the Constitutional Court, supported a strict interpretation of notions of public order and security. First of all, this interpretation was in accordance with the general thinking concerning changes in the criteria for distribution of legislative power between the State and regions that results in today's State responsibilities being very limited. Furthermore, this interpretation was specifically intended to avoid that public order and security could be seen to be of excessive scope, that is as transversal matters that legitimize an indiscriminate State invasion of exclusive and competitive regional responsibilities. Finally, this restrictive interpretation allows the adoption of rules that, as in the past, unlawfully harm constitutionally protected rights and liberties.

In this way the Constitutional court, with case n. 290 of 2001, states that the expression "primary public interests", used in Art. 159 of d.P.R. n. 112/1998 to define the functions and administrative roles relating to public order and security, must be understood to be not just any public interest which the public administration takes care of, but it

should be regarded as only those interests that are essential for maintaining an ordered civil society.

The question has been raised as to whether in cases of competing jurisdiction, the exclusive jurisdiction should prevail when regulating issues that have direct and immediate importance for the safety of people and their property, so that these facets of the State legislator would have jurisdiction to dictate not only the fundamental principles, but also detailed regulations.

Even in this case, the Court has – at least in the first years after the reformation of 2001 - contradicted this approach. In fact, it has ruled that the jurisdiction of the State according to Art. 117, paragraph 2, let. H, has a transverse character. Consider case n. 6/2004 which states that “the possible effects in terms of public order of the poor functioning of the energy sector” do not justify the provision of “planned limits to the regional powers”, but rather they allow the Government to exercise substitute powers according to Art. 120 Const. (see also Const. Court, n.383/2005). Even with case n. 95/2005 giving a strict interpretation to the concepts of public order and security, with reference to some regional laws, by eliminating the obligation to have a document of medical fitness for personnel in charge of production and sale of food and for pharmacy personnel, it was believed that the exclusive legislative jurisdiction of the State according to Art. 117, paragraph 2, let. H, Const., was infringed.

3. ANALYSIS OF THE MOST RECENT JURISPRUDENCE OF THE CONSTITUTIONAL COURT. IN PARTICULAR: URBAN SECURITY

Such a trend has not been confirmed by recent decisions that have frequently favoured the criteria of so-called “prevalence”, especially with regard to sectors connected to the prevention (by administrative means) of criminal behavior. It has in fact led to an

extension of cases considered under exclusive State jurisdiction, often to the detriment of regional responsibilities in matters concerning the local administrative police. It is well known, however, that there is a more general trend, as established by the developing case law on the subject of division of legislative responsibilities concerning environmental matters, in respect of which it has recently been highlighted that there is a “re-materialization“ of the environment and the reemergence of a supreme “hierarchy” of the State law in regulating the environment as a “system”.

With two cases, n.222 and n.237 of 2006, the Court has respectively declared that the jurisdictional dispute raised by the autonomous province of Bolzano against the Order of 9th September 2003 adopted by the Ministry for health for safeguarding the public against the risk of attack by potentially dangerous dogs, is unfounded. Instead, it has welcomed the government appeal against the law of the autonomous province of Trento that regulates the installation of certain gaming equipment in public places. In the first case, according to the Court, the measures taken by the State actually have the predominant aim of public order and security, in so far as the order aims to prevent crimes against the person, because it functions to safeguard the public from the risk of attack from animals that have been trained to be aggressive. In the second case, it is argued that in practice it is in effect specific state legislation that aims to prevent criminal behaviors connected to gambling.

It is clear that if such an approach should take root, the risk that the State legislation could have an invasive effect on the regional authorities could increase. However, this is in a context in which the constitutional case law discussed regional legislation, even in cases, ways and with limits from time to time allowed by the state law (eg. non-custodial measures or compulsory alternatives to detention, measures of an administrative character relating to public order and security, etc.)

In any case, the Constitutional Court has confirmed these assumptions in a situation that has, again, seen the State and the autonomous province of Bolzano in a jurisdictional dispute (case no. 129/2009). This time it dealt with a challenge to the

responsibility of the Commissioner in adopting measures (eg. Article 100 t.u.p.s.) to suspend any commercial activity which resulted in episodes of disturbance of the public order connected to the carrying out of that activity. According to the Provincial administration, the statutory provisions and those whose implementation would be entrusted to the President, in matters assigned to the jurisdiction of the autonomous Province, including those of public enterprises including the functions of public security, where it is not possible to identify a clear separation between duties of the local administrative police and interventions to protect public security. The court does not accept such argument, since the contrary opinion is that in this case there is a clear separation between the goals pursued by means of enacting the contested measure (public security and order) and matters of public enterprises within provincial jurisdiction.

Such an interpretation is substantially upheld in case no. 196/ 2009 on the subject of urban security. In this case, to be censored, again from the autonomous province of Bolzano, Art.6 of l.d.n. 92/2008, modified by Art. 54 t.u.e.l., since this provision, assigns to mayors as governmental officials, powers of public security and public order, it would put a strain on the responsibilities assigned to such sectors by special statutes and implementing regulations of the President of the autonomous Province. Furthermore, a jurisdictional dispute has also been raised relating to m.d. August 5th 2008 that, in defining the concepts of «public safety» and «urban security» provided for in Article 6 from l.d. n. 92/2008, it would infringe the primary legislative power of the Province in matters of «protection and preservation of history, art and popular culture», «protection of the landscape», «road systems», as well as secondary matters of «commerce», «public enterprises», and «public security».

According to the Court in new article 54 t.u.e.l. the powers exercisable by mayors can only be aimed at preventing and combating crime, and not concerned with carrying out the work of the administrative police in matters relating to jurisdiction of the Regions and the autonomous Province. The statute and the implementing regulations, have not changed «the nature of the powers conferred to the Presidents of the provinces, that remain as special duties of the administrative state that are assigned to them, without which it may be

inferred, with a kind of inverted parallelism between administrative and legislative functions, the ownership of the legislative powers of the Province in matters of public security, such as to prevent a shift of the state legislation in these matters».

Accordingly, the court seems to return to the traditional strict approach in matters of public order and security. Nevertheless, even in this case there clearly emerges a willingness to save the state legislation under contest. This occurs in a context, which is that of «living law» of the Order, in which the link with such a narrow concept of public order and security often does not exist. In this sense, the court seems to have taken a stance in favor of the argument that sees urban security as part of public order, public security «minor», rather than rejecting the paraphrasing that sees urban security as an intertwining and point of coordination between different jurisdictions, state and non-state, not only in a narrow sense, (e.g. security) in the prevention and repression of crimes, but also in a broad sense (e.g. safety) in promoting social cohesion. All this leads to establishing a potential undue removal of exclusive or competing regional responsibilities, in respect of matters that may well include urban security. Thought should be given to training and protection and safety at work, social services, cultural activities and education, businesses, and to urban planning and construction.

Furthermore, there is a problem of organization: it alludes to the compatibility with the current constitutional framework of the post of mayor or president of the provincial council, as government officials, an assumption on the basis of which the court has turned its arguments of a centralist nature. However, it appears evident how this discourse could be reversed: this puts in doubt the legitimacy of the old organizational structure, especially after the Reformation of the 5th Title Constitution, so most of the Court's arguments would in the end weaken.

However, with the existing difficulties in improving regional and local jurisdiction in matters of urban security, owing to the aforementioned interpretation of the Court, a more practicable way forward could be that of legislative intervention aimed at the implementation of Art. 118, paragraph 3. Const. However, there are fringes who believe

that the post of major as a government officer has faded, in the light of the inclusion of the local police as a fundamental function of each municipality, on the basis of Art. 21, paragraph 3, of law n. 42/2009 on the subject of fiscal federalism. With regards to this point, consider also Art. 2, paragraph 1, of the governmental l. d.d. dealing with the characterization of the fundamental functions of parts of local authorities and the “code for autonomous local authorities” (A.s. n. 2259) that, in addition to the local police, includes urban security among the fundamental functions.

More recently, the Constitutional Court, with case n. 226/2010, is back on the issue, with reference to the ability to establish the conditions under which towns may avail themselves of the cooperation of private organizations for control of the territory. According to the Regions, law n. 94/2009, implemented by Ministerial Decree August 8th 2009, would exceed the state limits for matters of “public order and security”, set out in Art. 117, paragraph 2, let. H, Consitution. The ruling is partially in line with the previous case n. 196/2009, for the most part relating to the reporting of events that could bring harm to urban security. Another issue is raised with reference to “situations of social distress”, which is considered to be a spurious and eccentric part with respect to the *ratio* of the order, and traced back to social security that is within the residual regional duties. This case deserves to be viewed with a favorable opinion - at least on this point – because this i concept of “social distress”, a steep bank compared to an inclination, is cultural before being judicial. In fact, the decision is contrary to the substitution of public security compared to social security that seems to characterize the most recent public policies in Italy (and beyond).

4. CONCLUSIONS: IS THE CONCEPT OF SECURITY A NEW TRANSVERSAL TOPIC?

Despite the importance of this stance, the most recent case law of the Constitutional Court continues to significantly support the potential impact of State legislation over regional responsibilities.

In fact, with case n. 21/2010, concerning regional law directed at simplifying the provisions that relate to procedures for installation activities inside buildings, the Court has stated that “the matter of security... does not end with the adoption of measures concerning the prevention and repression of crimes, but it includes the protection in the public interest of personal safety, and therefore the preservation of a good that needs uniform regulation throughout the national territory”. In this case, therefore, we cannot trace back the presence of State law in matters of “public order and security”, understood to be prevention and repression of crimes, but it seems to theorize a conception of security as a new transversal subject, understood to be “protection in the public interest of personal safety, and therefore...preservation of a good that needs uniform regulation throughout the national territory”. The capacity for expansion inherent in this notion is clear: think of all the activities that could be considered potentially harmful so as to endanger personal safety well beyond the field of criminal cases.

Of course, this approach, together with the most traditionally restrictive approach is used to preserve the State jurisdiction, on the one hand by limiting “promotional” responsibilities and social cohesion of regional and local authorities, and on the other hand the inability to transform a “positive” connotation and well-being to the administrative police, linked to the transformations of the social state, that as we have previously observed, has affected the survival of the concept of the police as an administrative matter.

But maybe this could be just another indication of the deep crisis (restructuring?) in the model of a democratic and social State that the majority of Western countries have been going through for a long time.

5. BIBLIOGRAPHY

BONETTI P., *Ordine pubblico, sicurezza, polizia locale e immigrazione nel nuovo art. 117 della Costituzione*, in *Le Regioni*, 2002, 483 ss.

BONETTI P., *La giurisprudenza costituzionale sulla materia «sicurezza» conferma la penetrazione statale nelle materie di potestà legislativa regionale*, in *Le Regioni*, 2007, 123 ss.

CAIA G., *L'ordine e la sicurezza pubblica*, in *Trattato di diritto amministrativo*, a cura di S. Cassese, Milano, 2000, 281 ss.

CAVALLO PERIN R., *Il diritto amministrativo dell'emergenza per fattori esterni all'amministrazione pubblica*, in *Dir. amm.*, 2005, 777 ss.

CHIAPPETTI A., *Polizia (dir. pubbl.)*, in *Enc. dir.*, XXXIV, Milano, 1985, 120 ss.

CORSO G., *Fine della polizia amministrativa?*, in *Giur. cost.*, 1990, 1006 ss.

CORSO G., *Ordine pubblico (dir. pubbl.)*, in *Enc. dir.*, XXX, Milano, 1980, 1057 ss.

FALCON G., *Il federalismo dei sindaci (e dei prefetti)*, in *Le Regioni*, 2009, 447 ss.

FARES G., *Ordine pubblico, sicurezza e incolumità pubblica, polizia locale*, in *Il diritto amministrativo dopo le riforme costituzionali*, a cura di G. Corso e V. Lopilato, *Parte speciale*, I, Milano, 2006, 587 ss.

GIUPPONI T.F., *Nascita e trasfigurazione di una materia trasversale: il caso della "sicurezza" (nota a Corte cost., sent. n. 21/2010)*, in www.forumcostituzionale.it.

PIANTEDOSI M., *La polizia amministrativa come materia?*, in *Giorn. dir. amm.*, 1998, 849 ss.

PIANTEDOSI M., *Il nuovo sistema dell'ordine pubblico e della sicurezza dopo la riforma del titolo V, parte seconda della costituzione*, in www.giustamm.it.

TROPEA G., *Sicurezza e sussidiarietà. Premesse per uno studio sui rapporti fra sicurezza pubblica e democrazia amministrativa*, Napoli, 2010.

TROPEA G., *La sicurezza urbana, le ronde, e il disagio (sociale) della Corte*, in *Dir. amm.*, 2011, 55 ss.