ORDER WITHOUT LAW IN THE EXPERIENCE OF ITALIAN CITIES

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Abstract

A significant number of cases show that cities are increasingly called upon to resolve potential or effective social conflicts through the recourse to informal law tools. Generally speaking, the law scholars are led to neglect the importance of them on the grounds that they are assumed to be irrelevant to law. This paper tries to show that another approach should be undertaken. Taking the hint of different real cases, the author envisages some different models where the municipal authorities resolve social conflicts stepping paths falling outside the scope of formal and traditional legality. The thesis is that these models are not extraneous to law, but they outline an "informal public law" coexisting with the positive and formal law in a more or less problematic way. However, if the "informal public law" is able to attain some public objectives more effectively, it also arouses a lot of challenges with particular reference to the principle of equality. At the end, though, the "informal public law" allows to rediscover another feature of cities: they are not only a creature of the States, but also a creature of the community.

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1. The discovery of "informal public law" in the experiences of cities

In a well-known essay[1] of more than thirty years ago, Gerald Frug, arguing on the evolution of the legal concept of the city, maintained that their history could be summed up in the following dichotomy: cities as "creatures of State" and cities as "creatures of communities". Needless to say, after the affirmation of the nation States between the seventeenth and nineteenth centuries, the first legal concept has clearly prevailed since States have eradicated municipal experiences as a self-sufficient dimension that had characterized all pre-modern law[2], placing the prevalence of formal law as the absorbing and centralizing fulcrum of law experiences. Cities absorbed by State systems have been left with exercising marginal and undifferentiated functions of the public State tasks in a condition of narrow instrumentality. The passive role of the cities was due to the logic of endowing the cities with the infrastructures from the States in order to affirm citizenship rights, administrative ability, efficacy of decisions and deliveries of public services[3].

However, that conceptual mind is undervaluing the capacity of cities to create law. Actually cities can be also seen as a free association of human beings who share urban land and spaces for better value of their interests[4]. From this perspective cities are able to exhibit a polity itself with the task of ruling the territory interests[5]. Taking the clue from the Frug's insights again, cities

[1] Cf. G. Frug, *The city as a legal concept*, 93 Harv. L. Rev. 1059 (1980).

[2] It is notable the paradox highlighted by M.S. Giannini, *Autonomia locale e autogoverno*, in ANCI, *Autonomia comunale. Sintesi dei rapporti presentati al Congresso di Parigi (luglio 1947)*, (1948), 48, according to which the cities had encouraged the evolution of the legal systems preordained to rise the national States, which then established the end of the cities themselves as an experience of self-government. One can read again a classical author as L. Mumford, *The city in history. Its origin, its transformations, and its prospects*, (1961) spec. 410.

[3] However, a different logic could be also tracked down, aimed at focusing the attention on the needs of territory through which the cities partially restore a specific autonomy and an active role. Cf. J.B. Auby, *Droit de la Ville*, (2016).

[4] In USA the debate is focused on the new significance and value of the "Home Rule", according to which the cities could reserve wide room in order to innovate policies and law; cf. recently R. Su, *Have cities abandoned home rule?*, in 44 Fordham Urb. L.J. 141 (2017).

[5] Cf. R. Cavallo Perin, *Beyond the Municipality: the City, its Rights and its Rites*, in IJPL, 311-313 (2013) who underlines the aggregative feature of the cities for

would be as «creature of community» too. That way allows the law to rediscover its social origin[6], its ability to be creative and innovative.

Emphasising this second mark means dealing with the law of the cities in a new way. To push the emergence of this new institutional reality is the growing lack of state rationality to meet social demands, especially in the local scope. The well known phenomenon of urban sprawl is a clear demonstration: it is increasingly giving rise of inaccuracy, decay and abandon of many urban goods because of incapacity of the local authorities to manage this transformation in an ordered way with the classical planning tool. This forces cities to experience re-generation and re-use of urban goods, like buildings, parks, cultural goods, dismissed factories and so on, in a way local authorities and community pool together in order to make those goods resourceful again. Municipal authorities are constantly challenged by social experiences that, although they originate outside the traditional circuits of legality, take on importance because, acting on spaces and goods that have fallen into disuse or that are in a state of neglect, reactivate their use for social purposes. Examples of this are projects of urban decorum, the management of rundown green areas, the renovation of areas and buildings that have lost their original functions, and more[7].

It is interesting to note that the vast majority of legal studies developed on these issues has focused on less developed areas of the world[8], thus confining the emergence of what I would term

cultural, social and practitioners movements in the territory. See also R.C. Shragger, *The political economy of city power*, in 44 Harv. L. Rev. 114-124 (2017), who maintains that the Frug's vision of the cities as creature of community is able to better handle the economic inequality and the democratic process nowadays.

[6] In other words, that way allows scholars to resume the Romano's view about the social origin of law: cf. S. Romano, *The legal order*, (2017).

[7] On these dynamics see also J.B. Auby, *Espace public, espaces publics*, in Droit administratif, 7 (2009).

[8] In this regard one can cite among others: A. Datta, *The Illegal City. Space, Law and Gender in a Delhi Squatter Settlement*, (2016); A. Brown, *Claiming the Streets: Property Rights and Legal Empowerment in the Urban Informal Economy*, 76 World Development 238 (2015); J. Hohmann, *The right to housing. Law, concepts, possibilities*, (2014); T. Kuyucu, *Law, Property and Ambiguity: the Uses and Abuses of Legal Ambiguity in Remaking Instanbul's Informal Settlements*, 38 Int. Jour. of Urb. and Reg. Research 609 (2014); S. Schindler, *Producing and contesting the*

"informal public law" to situations in which there is assumed to be an inadequate structuring of the network of public powers able to satisfy the claims and expectations of the various social actors[9]. This fact takes on special significance in the light of mounting experiences across Europe. This increasing emancipation of the cities is also proved by the transnational networks they have spontaneously created in different fields[10]. In some circumstances they have earned an active support from the EU (i.e. the Convenant of Mayors, even with more recent developments in energy field[11]); in other ones, they are linked in weaker way (i.e. the rebel cities as Barcelona and Naples)[12]. Moreover, the same EU launched the *Urban Agenda for the EU* in order to develop some actions placing cities at core so as to build a more effective system of different government levels for attaining Union objectives[13].

My hypothesis is that the cities are on frontline facing new social challenges where they are forced to play a creative role so that they are not the only final entities to implement national or regional statutes. Cities use more and more negotiations to address a growing social demand of regeneration so that a creative role of law prevails over the order by (national or regional) law[14].

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formal/informal divide: regulating street Hawking in Delhi, India, 51 Urban Studies 2596 (2014); J.L. Van Gelder, *Paradoxes of Urban Housing Informality in the Developing World*, 47 Law & Soc'y Rev. 493 (2013).

[9] However, some pioneering studies were not absent in Europe: see E. Bohne, *Der informale Rechtsstaat*, (1981). See also the contribution of German scholarship to new grounds of administrative law and, particularly, M. Fehling, *Informelles Verwaltungshandeln*, in W. Hoffmann-Riem, E. Schmidt-Aßmann, A. Vosskhule (eds.), *Grundlagen des Verwaltungsrecht*, III, 1341 (2008). For the combination of urban subjects with the commons theory, see S.R. Foster, *Urban Informality as a Commons Dilemma*, 40 U. Miami Inter-Am. L Rev. 261 (2009).

[10] Cf., for instance, M. Beltrán De Felipe, *La internacionalizatión de la ciudades (y el régimen municipal)*, 305 REALA, 57 (2007).

[11] Cf. V. Heyvaert, *What's in a Name? The Convenant of Majors as Transnational Environmental Regulation*, RECIEL, 78 (2013).

[12] Cf. D. Harvey, *Rebel Cities. From the Right to the City to the Urban Revolution*, Verso (2012). See also C. Iaione, *The Right to the Co-City*, in IJPL, 80 (2017).

[13] This Agenda is a result of Pact of Amsterdam signed by the corresponding EU Member States Ministries in 2016.

[14] Cf. G. Berti, *Stato di diritto informale*, in Riv. Trim. Dir. Pubbl., 4-5 (1992) with regard to the use of negotiations when informal law is required. See also C. Iaione, *Governing the Urban Commons*, in IJPL, 158 (2015).

On that basis, the following takes stock of this emergence, inspired by events that have taken place in Italy.

2. Four models of "informal public law"

By looking at the Italian cases four models of "informal public law" can be summed up according to the following division: the tolerance model, the recognition model, the original legal qualification model and the pact of collaboration model.

The tolerance model – The first to be considered is the most complicated and intended to coexist with degrees of uncertainty and serious conflict with positive law, because informality and illegality tend to overlap. These are situations in which social experiences are simply tolerated. Here positive law has little effect because relationships develop primarily on a political level in a condition that is inevitably destined to be resolved in one of two ways: either by terminating the informal social experience, re-determining a re-expansion of the positive law, or by vectoring the social experience through one of the more innovative forms of "informal public law" with an agreement. Beyond the final outcome, what is interesting to note is that before it occurs, conditions exist in which illegality is tolerated. While this of course can never be considered an acceptable legal condition, the fact remains that public authorities continue to maintain temporary informal relationships of coexistence with such social experiences.

An example has been the management of immigrants temporarily present on Italian soil, as organized by the *Baobab* centre in Rome during 2015 and 2016[15]. In the summer months (and not only) of those years, a significant number of immigrants, lacking a definite legal status since they were neither asylum seekers nor registered as individuals to be expelled, arrived in Rome in a state of total confusion both because reception services were lacking and because they themselves were uncertain about where to go. Thus the city's public facilities soon were occupied and transformed into unhygienic open-air dormitories. To cope

[15] Find the report of this case in N. Lagioia, *Il centro Baobab a Roma è un antidoto al razzismo*, in Internazionale, 27 luglio 2016 (https://www.internazionale.it/opinione/nicola-lagioia/2016/07/27/baobab-roma-razzismo) and https://baobabexperience.org

with this situation, a group of associations took it upon themselves to organize hospitality in an area southeast of the city, occupying an abandoned private property site. This circumstance of obvious illegality did not trigger the immediate reaction of the public authorities to dismantle the centre, thereby restoring a normal condition of formal legality, but instead led the municipal authorities to play a mediating role among the various groups managing the centre, the property owner and security authorities in an attempt to find a solution that balanced the rights in question, which involved offering immigrants temporary housing (and control) that would avoid their running rampant in the city streets. In this role of mediation of the local authorities a significant factor was also the support of the centre that a great many residents of Rome guaranteed with donations of all kinds.

Of course, as anticipated, the experience ended in a cloud of controversy and the condition of tolerance thereinafter came to nothing. This kind of social experience either has the toughness to survive in complete concealment or, once it has established a relationship with the public authorities, first develops an interest in a formal recognition that inevitably leads to a more appropriate legal solution; in fact, the groups that ran the *Baobab* centre were well aware of this. The key point is that for months this condition was tolerated by the public authorities and was sustained by informal kinds of support. The municipality's social services attempted to coordinate the actions of the various volunteer groups and, in the end, the city fully footed the costs of cleaning up and restoring the area after evacuation. Is it fair to say that just because the juridical relationship took place outside of a formalized procedure the law was excluded in this case? To argue this would mean not only failing to get to the bottom of this fact, namely the inability of public authorities to provide assistance services[16], but also closing their eyes to a reality in which, through informal relations tolerated and implemented by public

[16] After clearing out the centre in Cupa street, the Municipality of Rome strove for new accommodation for the immigrants, but a few of them were settled in the new residential centres run by other charity associations. In 2016 the Extraordinary Commissioner of the Municipality of Rome tendered for a contract with reference to new accommodation according to the positive law of public contracts, but it is estimated most of immigrants had followed different ways and abandoned the town.

authorities, important human rights were in any case guaranteed. At the very least, it may be noted that the local government authorities temporarily decided not to observe precise rules of positive law as they cast about for a solution consistent with formal legality. Something not to be underestimated[17].

The recognition model – There are also situations in which informality has transited within a framework of weak legality. Such are those conditions in which the public authorities have formally recognized the value of certain social experiences, but which, after the transitional period has expired, they have continued without these initial conditions being definitively resolved and formalized. A recent judicial case that still concerns the city of Rome can be cited as a useful example.

Before going in-depth analysis of case, it is not useless to remember that in Italy the Court of Auditors is not only a body exercising control on public finance and spending of administration, but also a judicial court. Particularly, as a court in strict sense, the Court of Auditors is entitled to enforce the civil servants responsibility for damage to treasury[18]. It is worth noting that the Court of Auditors is subdivided in regional sections and is also composed of two branches, namely the General Prosecutors, who make the accusation of responsibility for civil servants, and the formation of the Court.

With this in mind, the General Prosecutor of Latium Region's Court of Auditors promoted a lawsuit in 2016, regarding financial liability against a number of Roman city officials guilty of tolerating favorable treatment granted to a civic association which managed a public good in the absence of a definitive grant decision. The charge raised against the officials was the following: after the temporary granting order issued by the city had expired

[17] Cf. R.C. Ellickson, *Order without Law. How Neighbors Settle Disputes*, 134-136 (1991), who maintains that every legal system is based on five types of rules: *substantive rules*, *remedial rules*, *procedural rules, constitutive rules, and controller-selecting rules*. Particularly the *controller-selecting rules* allow the responsible subject to select the rules in the concrete case and the legal tools for enforcement. The mentioned *Baobab* case, therefore, is a clear example of this type of rules, so that, far from being extraneous to the law, it amounts to one of the possible ways the law follows, even if it is radically different from the formal one.

[18] Another judicial remit of the Court of the Auditors is assessing the litigation about pensions, but this type of jurisdiction is outside of the object of this paper.

– even after many years from when the civic association had taken over the management without prior formal recognition – the officials should have demanded the return of the asset to the city and, in any case, should have imposed financial penalties on the operators for unlawful conduct and require payment of at least the subsidized costs. With judgment no. 77/2017 the Latium Region's Court of Auditors[19] did not accept these compensation claims since it ruled that the charge had not proven that the conditions which had led the city to issue a temporary concession, i.e. the use of a good for social ends, had changed[20]. The Court of Auditors concluded that the city's recognition of the social value of the use of the real estate, even if temporary, meant that the officials were not liable, since in the specific circumstances what was contested was not an use inconsistent with the purposes that the city itself found deserving of support. In other words, the Prosecutor opposed a *formal objection* arising from the expiry of the temporary grant. Thus, it follows that the concession measure, in recognizing the social function of the management of the asset, attributed to that situation – no longer falling within the scope of formal legality – a capacity to resist claims of a different use in application of the law. Although in a condition of precarious coexistence, the expiration of the validity of a legitimating title cannot be invoked to claim a different use of a good unless it is accompanied by the assertion that the social use – once established – has defaulted. Therefore the social value underlying the use of the good prevails over a supposed alternative use justified by the law, even though it has received no formal consecration. Of course, the alternative use that the Prosecutor suggested was that of a direct alternative use to the one authorized by the city or a management corresponding to market logic.

The original legal qualification model – A totally different solution is the one offered by Naples, which has provided an

[19] Corte dei conti, sez. Lazio, 18 April 2017, n. 77. Likewise it is also the finding n. 76/2017 of Court of Auditors.

[20] This case law was decided on the grounds of the "absorbing cause of the accusations" technique, through which - according to the judicial process rules - the judges assessed just one of the causes of the accusations, because they deemed that prevailing over the others. That way, the judges did not assess every causes raised by the General Prosecutor. That is why, now it is pending an appeal before the national Court of Auditors.

original answer to recognizing social experiences of general interest. Starting from the experience of the former Filangieri Asylum, a well-known complex located in the city centre, but repeated in other cases, the city of Naples adopted a series of resolutions declaring this type of property *a civic urban asset*[21]. The essential feature of these city council resolutions, which entrust to citizens' committees the use of goods meant exclusively for collective enjoyment, is that through this original qualification, which is extraneous to any definition of clear-cut law, they recognize forms of self-management of organized social groups which the local administration guarantees to the community. Self-management involves the recognition of civic communities that, through democratic assemblies and self-determined acts make decisions to determine the use of goods qualifying for civic use and related activities. As far as these collective organizations are concerned, municipal authorities become supporters and, at the same time, guarantors toward the community itself. This is precisely one of the possible forms of that "informal public law" which goes hand in hand with positive law, by granting to social experience a full legal qualification.

However, it should be noted that the determining factor for achieving this result is the municipal authority's resolution of qualification, which is necessarily singular since it has no general scope but is focused on a single good or space. The content of this resolution is, however, entirely original and not attributable to the general category of formal acts that the national legal system prescribes.

The pact of collaboration model – The last case represented is the pact of collaboration one adopted by municipalities that have chosen to approve the regulation for the collaboration between municipalities and their citizens for managing common urban goods, starting with the example of Bologna, which was the first to adopt it in 2014[22]. Pacts of collaboration are those stipulated

[21] See the decision of the Naples Municipal government no. 893 of 2015, concerning just the former Filangieri Asylum, which represents a sort of paradigm for the next resolutions the Municipality adopted.

[22] This issue has drawn many Italian scholars: E. Chiti, *La rigenerazione di spazi e beni pubblici: una nuova funzione pubblica*, in F. Di Lascio, F. Giglioni (ed.), *La rigenerazione di beni e spazi urbani. Contributo al diritto delle città*, 15 (2017); R. Tuccillo, *Rigenerazione dei beni attraverso i patti di collaborazione tra*

between city authorities and citizens, or citizens groups, who decide to use or regenerate urban spaces and assets for collective purposes. In this case, the initiative can start either from the administration itself or from its citizens, but the real novelty is the all-important negotiating tool that is called upon to regulate this kind of relationship. The nature of the agreement allows the parties to redefine in a creative and non-standardized manner, except for the simplest implementations, solutions that are commensurate with their concrete objectives and the specific factors at hand, making it possible to build – even in this instance – an "informal public law" determined by the subjects involved. Under the terms of Pacts of collaboration a resolution is made by the local government in the form of a general regulation, which both determines the legitimacy of the pacts themselves and offers a general discipline that allows the potential use of any good or space on condition of ensuring their collective use. By the way, two points should be emphasized: (i) the municipal regulations are not enacted by any statutory provision but, from its first articles, they make direct reference to the Constitutional provisions; (ii) almost all the regulations discussed here contain in their first articles a set of highly original principles, among which constant and significant recourse to the "informality principle"[23].

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amministrazione e cittadinanza attiva: situazioni giuridiche soggettive e forme di responsabilità, in F. Di Lascio, F. Giglioni (ed.), *La rigenerazione di beni e spazi urbani. Contributo al diritto delle città*, 89 (2017); F. Giglioni, *I regolamenti comunali per la gestione dei beni comuni urbani come laboratorio per un nuovo diritto delle città*, in Munus, spec. 291 (2016); G. Arena, *Democrazia partecipativa e amministrazione condivisa*, in A. Valastro (ed.), *Le regole locali della democrazia partecipativa. Tendenze e prospettive dei regolamenti comunali*, 232-235 (2016); P. Michiara, *I patti di collaborazione e il regolamento per la cura e rigenerazione dei beni comuni urbani. L'esperienza di Bologna*, Aedon, 2 (2016); G. Calderoni, *I patti di collaborazione: (doppia) cornice giuridica*, Aedon, 2 (2016).

[23] In Article 3 of Bologna Regulation, which other local authorities made use of, one can read with reference to the informality principle: «the administration demands that the partnership with the citizens takes place in accordance with the requested formalities only when it is provided for by law. In the rest of the cases it ensures flexibility and simplicity in the relationship, as long as it is possible to guarantee the respect of the public ethic, as it is regulated by the code of conduct of the public sector employees, and the respect of the principles of impartiality, efficiency, transparency and judicial certainty» (the translation is drawn by http://www.labgov.it/wp-content/uploads/sites/9/Bologna-

3. The balance between formality and informality in the models under consideration

The cases presented here are an example of the reactions of public local authorities that, in the face of claims from civic participation, do not react by applying legislative command (because they are often not in a position to do so), but by producing a new legality that coexists with the strictly positive one[24]. This is perhaps their feature of greatest interest.

To borrow Ellickson's well-known theory[25], what has emerged here is a special version of *order without law*, whereby rules of law emerge disregarding law as a formal source, so as to establish a system that serves general interests more effectively. However, it must be noted that the definition of *order without law* is employed here in an original and different manner from Ellickson's theory. The first difference lies in the legal and cultural contexts: Ellickson's is a theory applied to common law, while here we are dealing with a judicial system of civil law. This distinction is crucial because, while Ellickson's study shows how formal law can be disapplied to the benefit of *social norms*[26], in the cases outlined above, except for the isolated *Baobab* case, formal law is not supplanted by social norms but by laws that follow paths other than those of formal law so that are always based on the involvement of public authorities in enacting them, as well as judicial authorities in placing them within the Constitutional

Regulation-on-collaboration-between-citizens-and-the-city-for-the-cure-and-regeneration-of-urban-commons1.pdf).

[24] Cf. S.R. Foster, *Collective Action and the Urban Commons*, 87 Notre Dame L. Rev. 57 (2011).

[25] That is the reference to the well-known book written by R.C. Ellickson, *Order without Law. How Neighbors Settle Disputes*, cit. at 17, 15, where the author, through the close-examination of some cases drawn by a small Northern area of California, Shasta County, highlighted how the County inhabitants preferred to enforce social norms instead of common law in a multitude of potential or effective controversy. So the author outlines the existence of another order which is not based on the formal rules, but rather on the social norms regulating the coexistence of residents.

[26] Cf. R.C. Ellickson, *Law and economics discovers social norms*, 27 J. Legal Stud., 537 (1998), who underlines the exaggerated value given to the law for social control by the law and economics scholars, instead of emphasizing the informal enforcement of social norms.

framework. It is informal law, but not exactly an expression of social norms[27].

Another key difference is that in Ellickson's study the observed rules on the communities under consideration were those that individuals developed to protect their own interests in the belief that this also acted for the common good, while in the cases highlighted here the relationship always implies the intervention of public authorities, and the interest of their interventions is always a functional one rather than that of individuals. Even when Ellickson demonstrated a mixed use of informal and formal rules in the subject of his study, the combination still aimed at choosing which rule would ensure the best individual interest, while in the cases so far examined the combination serves the best pursuit of general interests.

However, despite these clear and important differences, the evidence seems to suggest, just as Ellikson's theory does, a legal system of *praeter legem* rules, in which the realization of general interests requires a change of attitude on the part of the public authorities, who see in the collaboration with the community instead of in formal law a bond for achieving the tasks assigned to it[28].

Shifting the legal implications of these experiences onto a deeper level, we need first to make an observation. In all these cases, public authorities create informal relationships because of their inability to meet a social demand. Can it be considered for this alone that the law is extraneous? The latest studies of public

[27] In order to avoid ambiguity in terms of language translation, it is conducive to specify that *social norms* means in this paper non-juridical norms, given that in a broader sense all the juridical norms are social norms too; see, for instance, V. Crisafulli, *Lezioni di diritto costituzionale*, I, 33-36 (1970). To borrow a distinction put forward by A. Nieto, *Critica della ragion giuridica*, 76-79 (2012), what differs juridical norms, is the fact that they are subject to judicial review from properly courts or from other administrative remedies; conversely, social norms are totally based on informal enforcement.

[28] Cf. R.C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 Yale L.J., 1222-1223 (1996), who underlines the role of citizens for controlling abandoned urban areas by executing social norms. In this respect the notion of «collaborative praxis» could be called upon, which includes procedures falling outside the formal law for equity or correctness. In the case of «collaborative praxis» the validity of praxis hinges on realizing the maximum attainment of the general interest with the active contribution of citizens.

law, including those carried out in Italy, show that administrative inefficiency is an issue of public law[29]. The distance between formal abstract law and real law is not bridged by arguing that the latter belongs to the world of facts, but by looking for ways that can reconnect the two domains, allowing them to acceptably coexist. Already a well-known Spanish scholar observed that in public law there are "free zones" of formal law[30] which, far from being considered alien to the law, deserve to be studied because they are based on relationships made of agreements, claims and rules that are spontaneously enacted and as such are juridically relevant. Thus they re-echo the studies that emphasize the wide range of behaviors and rules produced by the operative practice of *praeter legem*, meaning those activities that are suitable for achieving a general political purpose or a primary objective of legislation, perhaps outside of the specific predictions of individual laws[31].

Of course, the four models are very different from each other, expressing a modular combination of formality and informality: very important for understanding their durability before positive law. In other words, while highlighting all the informality of legal relations, the four cited examples establish different forms of "stitching" with formality, which makes them diversely suited to resist the claims that positive law can make.

The first model is undoubtedly the most precarious, the one least able to last very long, even though it is not necessarily subject to a traditional formal outcome. This condition of difficulty is determined by the fact that it starts from a condition in which

[29] One of the most recent handbooks of the Italian administrative law contains, for example, an entire chapter dedicated to the ineffectiveness of administration and administrative law, so that it is a really new law subject; cfr. M. D'Alberti, *Lezioni di diritto amministrativo*, 300-316 (2012). See also R. Ursi, *Le stagioni dell'efficienza. I paradigmi giuridici della buona amministrazione*, (2016), who recalls a new reading of the concept of efficacy.

[30] See A. Nieto, *La organización del desgobierno*, 182-183 (1987), where the author notes that the excessive rigidity of formal law is the origin of attitudes of subjects searching for other ways out, as the numerous convenants between administration and citizens clearly show.

[31] Cf. R. Baldwin, *Rules and Government*, (1995) but also R. Baldwin, M. Cave, M. Lodge, *Understanding Regulation*, 307 (2012), about the preference of guidance as source of law for a principle based regulation, according to which it adequately meets social expectations.

informality and illegality coincide, so that their resistance to normalization is weaker. In the other three cases, however, also in adherence to observations known to legal doctrine[32], informality does not coincide with illegality, although they present in turn specific peculiarities.

The second model demonstrates a durability and coexistence with the strongest positive law, but is enrolled in a risky environment in which the elements of detail and context can play a decisive role. Indeed, the survival of the model is due not to the conscious choice of administrative authorities but to the interpretation of judges, which makes this case more dependent on case-by-case assessment.

The other two solutions of informal law, on the other hand, show a more convincing capacity to be compatible with positive law, especially since they presuppose on the part of local authorities a clear political choice of building an explicit alliance with social experiences. However, within this common frame there are differences. In particular, the third solution can be defined as punctiform in the sense that it always requires a city council resolution for the specific qualification of certain goods, on which the concrete legitimization of the social experience depends. It is not a case of traditional concession because it is based on original forms of legal and management qualification, but it nevertheless presupposes a foundational act that the municipalities adopt on the basis of a precise administrative policy addressing the interpretation of territorial interests in a given historical moment. The relationships thus created stand outside of any immediately recognizable legal framework, but are nevertheless linked to formal pronouncements by local authorities which thus express the interests of the community.

The fourth, on the other hand, aims to define a more structural solution, which implies a general choice determined by the municipal regulation which confers on the pacts of collaboration the power to create self-managed forms for the general interest. It thus constitutes an authentic governing model.

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[32] Cf. A. Datta, *The Illegal City. Space, Law and Gender in a Delhi Squatter Settlement*, cit. at 8, 36-37, who notes that the informal procedures do not involve illegality. In urban contexts the former is a result of providing services and infrastructures falling outside the planning and zoning framework, the latter, though, is given when such informal activities infringe the property law.

It should be noted that in this case, the municipalities' regulation resolutions also implement another Constitutional principle, that of Article 117, Section 6, which leaves to local authorities the general discipline of their organization and activities, as a full expression of autonomy[33].

Despite their differences, the models are not necessarily alternatives for each other.

4. The open challenges of "informal public law"

Of course, the challenges posed by the creation of such a "informal public law" are formidable. First, what should be avoided is that the elaboration of such a conceptual category of law be used to legitimize the disengagement of public authorities from the substantive task that the Constitution entrusts to them, namely the attainment of citizens fairness. The experiences that have arisen between those in which reconnection of informality with formal law occurs in a framework of precarious legality depict an administration that is unaware of its role and that prefers to accommodate *de facto* solutions because it is incapable of coming up with adequate responses. Paradoxically, while it is true that the creative law of cities presupposes a stronger investment in the capacity of social communities to satisfy social needs, it is equally true that all this requires an administration even stronger and more capable of governing the network of experiences so that these solutions do not wind up evading the obligations that the Italian Constitution imposes on public authorities to respect the principle of equality. Valuating informal relationships serves to demonstrate that public authorities have new tools to accomplish their tasks[34]. However, if these solutions were used to evade their obligations, the balances that would be produced would be

[33] The full legality of the municipalities' regulations was uphold by the Court of Auditors, whose branches of control stated that, though they were adopted regardless of a previous statute provision, they are coherent with the Constitutional provisions; see Corte dei Conti, sez. contr., ad. plen., n. 26/2017.

[34] It is a key-factor: the involvement of citizens should be deemed as an integrative resource for administration, beyond the classical one (budget, civil servants, goods). See for this opinion G. Arena, *Introduzione all'amministrazione condivisa*, 117-118 Studi parlamentari e di politica costituzionale, 29 (1997); G. Arena, *Ripartire dai cittadini*, in C. Magnani (eds), *Beni pubblici e servizi sociali in tempi di sussidiarietà*, 77 (2007).

unsatisfactory and would create unlawful privileges. Administrations are in this sense destined to change, not to recede. From this point of view, then, it is obvious that the training and culture of public employees still scarcely reflects these transformations. In order for these experiences not to reproduce the backwardness of the responsibilities of public administrations, it is necessary to invest heavily in organization and in the personnel called upon to interpret them.

Secondly, "informal public law" appears weaker in resisting political guidelines applied to the territorial context. Experiences that do not achieve an adequate degree of formalization are weak, as the *Baobab* case demonstrates, but so are the others, given their episodic and very singular character. Surely in this sense they seem more able to withstand the experiences of the pacts of collaboration supported by municipal regulations, since the normative act makes it possible to place the experiences within a related framework of stability. This is an important point, because in "informal public law" the extent to which public administrations are subject to actuating public policies seems to prevail over their other traditional task of being impartial. In this sense, therefore, the dosage between "informal public law" and the positive law must be well calibrated.

Thirdly, a very sensitive point is that of the potential discriminatory capacity that the experiences of "informal public law" can produce. Encouraging some experiences, however prone to ensuring collective interests, imposes choices of privilege that may benefit some categories of citizens and exclude others culturally and socially. One recalls cases where the subjects of these actions are foreigners or vice versa citizens only in a formal sense, characterized by a strong cultural cohesion that groups some but excludes others; or the use of assets for producing services that supplement those offered by organizing a public service that discriminates between people with large economic resources and others, or between categories of people, such as the young and the elderly[35]. In this sense, "informal public law" should not occupy a space that ends up overly reducing the

[35] This is dramatically underlined in the American cities: cf. A.L. Cahn, P.Z. Segal, *You can't common what you can't see: towards a restorative polycentrism in the governance of our cities*, 43 Fordham Urb. L.J., 241-244 (2016).

sphere of action of positive law, which represents important values such as, first and foremost, the principle of citizens' equality.

The last major challenge is that recognizing the value of "informal public law" must also be confirmed by its interpreters. In this sense, awareness in the law doctrine is growing, and important contributions are being made that can create a cultural context suitable for finding support. Of equal importance is that it should become a matter for case law, which can offer great insights to strengthen these developments[36], although everything is now passing through reconstructions that still seem intent on not deviating from the traditional legal system. Yet, it is precisely the confirmation of these tendencies that will make it possible to enrich the solutions for governing the complex interests that the "informal public law" of cities seems capable of promoting. What also hangs in the balance is the ability of lawmakers to offer useful contributions to social dynamics and not to be left out of transformations that mark important changes.

[36] As for the Constitutional Court is concerned, one can find the rulings no. 203 of 2013 and no. 119 of 2015, through which, on the one hand, judges have widened the field of application of the family leave by enhancing the meaning of family relations as a result of social autonomy and, on the other, they stated illegal the limitation of the civil service to the only formally Italian citizens, thus extending the meaning of citizenship. As for the administrative courts, those findings assigning particular binding legal strengths to the covenants regulating the land use deserve to be mentioned: see, for example, Tar Puglia, 5 dicembre 2013, n. 1642; Consiglio di stato, sez. IV, 6 ottobre 2014, n. 4981. From different perspective it is also interesting rulings demanding the involvement of community when the use of public good is to be decided: see, for example, the pharmacy case Tar Liguria, 15 giugno 2011, n. 938 and the beach case Tar Liguria, 31 ottobre 2012, n. 1348. As for the Court of Auditors is concerned, interesting opinions are Corte dei conti, sez. Piemonte, delib. no. 171/2015/PAR; Corte dei conti, sez. Lombardia, delib. no. 89/2013/PAR; Corte dei conti, sez. Puglia, delib. no. 53/2013/PAR; Corte dei conti, sez. Piemonte, delib. no. 483/2012/PAR; Corte dei conti, sez. Lombardia, delib. no. 349/2011/PAR, where a range of forms of grants to private subjects is considered legally valid if they are aimed at pursuing general interests coherent with the one that the formal law prescribes to public authorities.

5. New perspectives for public law

While taking the necessary precautions to prevent distorted uses of these experiences, in concluding we note that an observation of reality poses to lawyers and, in particular, to those who study public law important research questions that should be developed in the future. This new path of study obliges a juridical valuation of informal experiences. Of course, becoming aware of this means freeing ourselves of some of the ideal constructs on which, above all, the public law of continental Europe has been formed, but this is indispensable for preventing the increased distance of lawyers and their contributions from constructing a sense of today's reality.

The growing affirmation of informal relations is now renewing the debate on this issue and may rediscover the other nature of cities, as being creatures of communities. Of course, this raises important questions related to the evolution of the legal systems. In other words, the promotion of informality in public law is not an issue linked solely to verifying coexistence with the principle of legality, but demands important reflections on the relationship that they develop with States[37]. It is no coincidence that publications by international law scholars, who have long argued for balances between the formalities and informalities of international law, have significantly recognized the emergence of cities as one of the most emblematic features of this evolution[38].

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[37] Periodically the relationship between cities and States is going under strain; cf. O. Gaspari, *Cities agains States? Hopes, Dreams and Shortcomings of the European Municipal Movements. 1900-1960*, 11 Contemporary European History 597 (2002). For a more actual confrontation with one of the most important contemporary issues, see R.B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures*, 50 Ariz. L. Rev. 681 (2008).

[38] See for instance H.P. Aust, *Shining Cities on the Hill? The Global City, Climate Change, and International Law*, 26 Eur. J. Int. Law, 1, 255 (2015); F.G. Nicola, S. Foster, *Comparative urban governance for lawyers,* XLII Fordham Urb. L.J., 1 (2014); J.B. Auby, *Mega-Cities, Glocalisation and the Law of the Future*, in S. Fuller e al. (eds.), *The Law of the Future and the Future of Law*, 203 (2011); J. Nijman, *The Future of the City and the International Law of the Future*, in S. Fuller e al. (eds.), *The Law of the Future and th(e Future of Law*, (2011); I.M. Porras, *The city and international law: in pursuit of sustainable development*, 36 Fordham Urb. L.J., 3, 537 (2008); M. Beltràn De Felipe, *La internacionalización de la ciudades (y el régimen municipal)*, cit. at 10, 57; Y. Blank, *Localism in the New Global Legal Order*, 47 Harv. Int'l L.J. 263 (2006); Y. Blank, *The City and the World*, 44 Colum. J. of Transnat'l L.

All this envisages potentialities that make it possible to rediscover some of the features of European law that seemed extinct and that have now been revived in a context that is profoundly renewed, so that these same elements of the past do not reproduce the old systems but coexist in a new framework. "Informal public law" emphasizes forms of civic participation, that is to say it shows a new shape of democracy based on effective and concrete capability of citizens[39]. All this means that democracy and rule of law are increasingly under the strain, so that the fight for law is not anymore the fight for an abstract legality necessarily[40].

875 (2006); G. Frug, D.J. Barron, *International Local Government Law*, 38 The Urban Lawyer 1 (2006).

[39] Cf. B.R. Barber, *Three Challenges to Reinventing Democracy*, in P. Hirst. S. Khilnani (eds.), *Reinventing Democracy*, 147 (1996) who alludes to the new challanges coming from the civic organizations to institutions.

[40] An interesting point of view is that of Schragger as to the ability of the cities to control mobile capital in order to plan an equal and democratic development of city communities. He contends the widespread idea the States are the most appropriate subjects to attain the social needs, by just giving to them the responsibility to make the cities weak: see R.C. Schragger, *Mobile capital, local economic regulation, and the democratic city*, 123 Harv. L. Rev. 534-536 (2009).