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TABLE OF CONTENTS

EDITORIAL

ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT

Marta Cartabia.....1

ARTICLES

CONSTITUTIONAL LAW AND ITS METHODS

Gaetano Azzariti.....3

CONSTITUTIONAL JUSTICE IN ITALY AND BEYOND:
A COMPARATIVE (AND PRIVATE LAW) PERSPECTIVE

Mauro Bussani.....12

THE IMPORTANCE OF BEING OPEN.
LESSONS FROM ABROAD FOR THE ITALIAN CONSTITUTIONAL COURT

Vittoria Barsotti.....28

OF BRIDGES AND WALLS: THE "ITALIAN STYLE" OF CONSTITUTIONAL ADJUDICATION

Marta Cartabia.....37

IS THERE AN "ITALIAN STYLE" IN CONSTITUTIONAL ADJUDICATION?

Oreste Pollicino.....56

AN ITALIAN OR A EUROPEAN STYLE OF JUDICIAL REVIEW?
SETTING THE AGENDA FOR COMPARATIVE RESEARCH ON COURTS

Patricia Popelier.....72

THE SUCCESS OF A CONSTITUTIONAL EXPERIMENT: WHEN HISTORY MATTERS.
THE ITALIAN CONSTITUTIONAL COURT IN GLOBAL CONTEXT

Andrea Simoncini.....79

FROM MUTUAL RECOGNITION TO EU AUTHORIZATIONS:
A DECLINE OF TRANSNATIONAL ADMINISTRATIVE ACTS?

Luca De Lucia.....90

THE LIFE AND DEATH OF THE SCHENGEN AGREEMENT:
IS THE ABOLITION OF INTERNAL BORDERS A REALISTIC GOAL?

Marie Gautier.....115

SHORT ARTICLES

DIGITALISATION AND REFORMS OF PUBLIC ADMINISTRATION IN ITALY

Stefano Civitarese Matteucci.....127

PROFESSIONS IN ITALY: A GREY AREA

Stefano D'Alfonso.....164

THE RISE OF GLOBAL STANDARDS. ICAO'S STANDARDS AND RECOMMENDED PRACTICES

Francesco Giovanni Albinetti.....203

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EDITORIAL

ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT

*Marta Cartabia**

1956-2016: the Italian Constitutional Court just turned 60, as her first decision was issued in June 1956.

It was a momentous event for the Italian Republic. Not only did a new institution move her first step in the new constitutional framework, but also she spoke with authority. She affirmed her jurisdiction over the old legislation enacted before the Republican Constitution; she acted as a guardian of citizens' freedom and stroke down a fascist provision very restrictive of freedom of speech.

Since then, the Constitutional Court has gained a robust position in the domestic legal order and a distinguished recognition among her counterparts. The second part of the 20th century was the day of constitutional adjudication: all over Europe, and beyond, Constitutional courts were established in the new constitutional democracies. The Italian and the German one were the pioneers, together with the Austrian prototype; all of them became models for other younger experiences.

Anniversaries are occasions to look back and reconsider the historical developments, the achievements, the weak points, the new perspectives. In the present issue of the IJPL a number of scholars discuss about the "Italian style in constitutional adjudication", moving from the first book on the Italian Constitutional Court published for an English speaking audience, recently published for Oxford University Press (Vittoria Barsotti, Paolo Carozza, Marta Cartabia, Andrea Simoncini, *Italian Constitutional Justice in a Global Context*, OUP, 2016).

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They were invited to single out the “Italian voice” in the choir of the constitutional adjudicators - touching upon a broad range of topics, from fundamental rights and liberties, to the allocation of governmental powers and regionalism - and to discuss its distinctive features, among many actors.

ARTICLES

CONSTITUTIONAL LAW AND ITS METHODS*

*Gaetano Azzariti***

Abstract

The article critically reviews the book “*Italian Constitutional Justice in Global Context*”, analysing the extensive use of the case approach made in the text and examining the creative nature of the Italian constitutional Court. The essay underlines in particular the “style” adopted by the Italian Court, which, according to the authors, is characterised by a principle of relationality with other institutional actors: Courts, judges, policies, and citizens.

TABLE OF CONTENTS

| | |
|--------------------------------|---|
| 1. Introduction..... | 3 |
| 2. The method..... | 5 |
| 3. The role of the Courts..... | 7 |
| 4. The Italian Style..... | 9 |

1. Introduction

Italian constitutional law and its constitutional jurisprudence are not entirely unknown outside of Italy. It would therefore be an exaggeration to say that this book, addressed to non-Italian scholars, fills a knowledge gap. However, it is also true that, at the supranational level, there is only an occasional and sporadic perception of the Italian system, largely the result of dialogue between courts. So I feel that the specific contribution of

* This essay was delivered on February 15th, 2016 at the University of Notre Dame, Rome Global Gateway in Rome, at the Symposium “Italian Constitutional Justice in Global Context”.

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this text lies in the way it highlights the qualities of the overall model. The volume essentially provides a generally systematic overall view of the role of the Constitutional Court in Italy. It thus fosters a move away from the fragmented dialogue that has largely characterised the Court to a more open dialogue with the whole community of interpreters of law. This is a first significant element to be acknowledged with regard to this book.

The volume provides an analysis of the Italian model bearing in mind the different systems and global contexts, in close - though sometimes implicit - dialogue with the experience of others. The Italian model emerges favourably from the comparison.

The privileged yardstick is the US system, i.e., the oldest and most important constitutional justice on the planet, and the impression that emerges is very significant: despite their differences, comparison between constitutional justice systems provides useful insights, highlighting the shortcomings, but also the benefits, of their real life experiences.

Before offering some more direct considerations on the content of the book, I would like to mention another of its strong points, perhaps an *indirect*, but nonetheless important one (even though I feel perhaps it is not one of the aims of the volume). In times of fragility and debate regarding the Italian constitutional system, in a period when the Italian constitutional system in general, and Italian constitutional justice in particular, are often at the forefront of controversy, a text of this kind shows its vitality, and in some way contributes, albeit indirectly, to the strengthening of the central role of constitutional justice and the constitutional system as a whole.

Moving on to discuss the merits of the theses presented in the book, I would like to focus on three specific issues characterising this study addressed in the text. In particular, I look at a) the method used, b) the role of the courts within the system, and c) Italian style.

At this point, I present my overall assessment, which is not so much of the book, as, generally speaking, the phase that the whole constitutional justice system is going through, and not just the Italian one. This is the guiding idea running through the considerations I am about to offer.

My personal belief is that national constitutional justice in the global context should find - or perhaps simply consolidate - an equilibrium that as yet does not exist. In this situation of permanent instability, the greatest risk is that of losing the most solid certainties of the national tradition and becoming overwhelmed by events that can rock the entire constitutional justice system, with unfavourable consequences. I aim to explain and justify my impression, considering the three points mentioned.

2. The method

The text makes extensive use of the case approach. With respect to our dogmatic and systematic tradition, this is certainly a quick move forward. I think this is in part dictated by the need for international comparison, as well as the influence that the case approach has on the international level. In part though, I think it is also the result of a particular sensitivity by the authors to a trend that is becoming more widespread and that sees the case approach gaining ground also in the Italian system of constitutional justice, often at the expense of dogmatics and, perhaps, also systematics.

An example might clarify my point. We refer to the extended use, encouraged by the Italian Constitutional Court itself, of interpretation *compliant with*: compliant with the Constitution, compliant with the ECHR, compliant with EU regulations. This favours the spread of control over the constitutionality of laws (i.e., compliance with the ECHR or EU legislation), indirectly and informally placing specific limitations on interpretation by ordinary courts. Anyone wishing, however, to find unity in the system as a whole, must employ the case approach, having to examine each *compliant* interpretation by the different courts and then find - if there is one - a single fabric, a system, or dogmatics. The advantages of this perspective are obvious (basically: the spread and greater concreteness of the judgment on the constitutionality of the norms). It also brings with it some costs, however. Not so much the risk of losing the abstract character of a judgment or its centralised nature as that of the Constitutional Court losing its specific role as decision-maker of last resort, all the more so in a complex, global system where it seems that no one has the last word any longer, especially in a

peculiar order like the Italian one which does not envisage the doctrine of *stare decisis*. Basically, there is a risk that the system of constitutional jurisdiction will no longer have sole competence.

Furthermore, this greater difficulty of finding unity in the constitutional system does not only depend on causes “internal” to the Italian domestic system or the specific techniques of interpretation adopted, but, also in more general terms, it is due to the overall process of gradual integration and interference among national and supranational courts. While hoping for greater dialogue between courts, there is also the risk of eclecticism and an excessive diversity of languages, and the impossibility of the unambiguous and reliable protection of fundamental rights. One could find numerous examples of *different interpretations* by both national and supranational courts, that, from a substantive standpoint, favour a very different range and protection of the same rights; safeguards that at times are at odds with each other. Suffice it to think of the significant case, whose oscillations are sometimes strongly marked by the principle of dignity: “Constitutional Metavalue”, made up of both domestic legislation and judge-made law, and that can be applied in very different ways.

Thus, I think there is a need to seek a balance that has not yet been found. To do this, I wonder if today we should not be thinking about instruments which, alongside the inevitable use of the case approach, might stem any possible excessive eclecticism and diversity of languages, in order to avoid succumbing to the chaos of the opinions of Courts, including the authoritative ones of Supreme Courts. From this perspective, then, our dogmatic and systematic tradition might find renewed strength in a role where it could restore balance, reducing *cases* to *reason*. In this dogma-centred effort, I believe that the national constitutional courts, and especially the Italian ones, can still play a decisive role, perhaps not becoming an “island of reason” - ¹to borrow Franco Modugno’s famous phrase - but, at least, as a beacon indicating the route.

¹ F. Modugno, *L’invalidità della legge. Teoria della Costituzione e parametro del giudizio costituzionale* (1970).

3. The role of the Courts

The creative nature of the Italian Constitutional Court, which participates in its own insertion within the system, emerges very clearly in this book. It is not a question of the total self-determination of their role, but of a sort of co-determination of the Court and its judgments within the overall system of powers.

Looking at a possible constitutional role partly established by the courts themselves from this perspective, the parallel drawn in one chapter of the book between the first judgment of the Italian Constitutional Court, i.e., no. 1 of 1956, and *Marbury v. Madison*² is very significant. Moreover, the creative nature of the Constitutional Court or, more generally speaking, of "Supreme" Courts, must now be considered a universal given. Suffice it to recall the sensational case of the European Court that, in the absence of any explicit formal footing, at least until Maastricht, managed to establish a real system for the protection of fundamental human rights which was only later transposed, normalised, normatised, and perhaps expanded by the political and institutional system through the Charter of Nice.

Speaking of the "imbalances" to be highlighted here, it seems to me that we run today the risk of excessive judicial creativity. I do not pose the question in the more usual terms of excessive judicial activism. Still less would I hope for a simple return to textualism, also because, ultimately, I do not think one can draw an immediate parallel between adherence to the text and the self-limitation of the judges of the Constitutional Courts in particular. Looking at the US experience, the late Justice Scalia showed that, behind the screen of *original intent* he always justified - often brilliantly - daring interpretations of the US Constitution which, however, did not always conform to the spirit of the time and whose rate of creativity cannot be said to be insignificant.

The point I wish to raise, then, is another. It seems to me that an excess of creativity on the part of courts - and, in particular, Constitutional Courts - can sometimes be detrimental to the effectiveness and the very solidity of both the individual rulings and the rights they seek to protect. There is a real risk of

² 5 U.S. 137 (1803).

undermining the rights to be guaranteed and, ultimately, of delegitimising the Constitutional Court itself.

Also in this case I would like to recall only a couple of cases. They are quite well-known judgments. The first is the ruling on the jurisdictional dispute between State powers that³ solved a highly sensitive question, operating at the core of the form of government, formally and substantively endowing the Head of State alone with the power to pardon. It is not my intention to enter into the merits of the decision here. I shall merely make the following observation: the creative *ratio decidendi* by which the issue was solved did not prove able to sustain comparison with reality. The “solely humanitarian basis” that the Court identified to legitimise the presidential power to pardon proved, in fact to be absolutely unfounded. Suffice it to refer to the subsequent pardons granted to Colonel Joseph Romano and other CIA agents involved in the Abu Omar case - where no humanitarian grounds can be discerned, but only political and diplomatic ones - to see how the power of presidential pardon is bereft of any supporting foundation. It is the outcome of a creation with no concrete basis that has rendered indefinite and anonymous such a sensitive institution as presidential pardon.

In this, as in other cases, one wonders how such a strong propensity for creativity on the part of the judges may be justified. I think the underlying reason lies in a radical political crisis that arises from an imbalance in the system and that ends up falling to the courts. We recall, and this is the second of the sentences I wish to refer to, the sentence of the Court on the electoral law⁴. Again - looking beyond the merits of the judgment - what else led to this decision if not the impotence or, perhaps, the arrogance of the political power, which proved unable to approve an electoral law despite three previous recommendations by the Court? This is what led the Constitutional Court itself to produce an electoral law compliant with the Constitution. This was not at all an obvious move; in fact until some time ago, it would have been unimaginable. It would never have been conceivable, in fact, that the most “political” of laws (the electoral law which establishes the basis of representation and is at the foundation of the very

³ Judgment no. 200 of 2006.

⁴ Judgment no. 1 of 2014.

legitimacy of representative democracy) could be created by the Constitutional Court *instead* of Parliament.

Moreover, the judgment on the electoral law that led to such controversy cannot be considered an isolated event, nor is it a mere case for the books, nor yet is it due to any alleged hyperactivity on the part of the Italian Constitutional Court. It reflects a general political imbalance. Ultimately, it is down to the instability and the inability of politics to put in place the constitutionally necessary actions that explain so many other creative choices by judges (and not only in the Constitutional Courts). We need only think of another kind of case of particular relevance today that has produced a very large number of supplementing judgments produced in various ways due to the lack of regulation protecting the fundamental human rights of individuals concerning their sexual orientation.

However, there is no denying that this imbalance, caused by political absence, has sometimes brought about an excess of judicial realism: an absolute pragmatism, with a tendency to self-referentiality that I do not think can be considered a possible goal for the global systems of constitutional protection. I refer to those tendencies that induce courts to over-emphasise the role of the legal fact on a case-by-case basis (cf. the above-mentioned presidential pardon and electoral law). Also to the strong propensity shown by the Courts to respond more to a presumed natural law (the idea of justice) than to the actual text of the Constitution (secularised justice). Not without fault is the increasingly intense dialogue between the Courts, which sometimes appears to absorb, rather than be mediated by, the regulatory and political context, at home, in Europe or internationally.

Each of the cases mentioned suffers from the effect of a *lost balance*. I see no other way to regain this balance than the return of politics to the Constitution, accompanied by the containment of the judiciary within the narrow scope of “negative creativity”, defined by strict compliance with the rules of legal interpretation and constitutional principles.

4. The Italian Style

At this point, we come to the third and final topic that I wish to address. The last, pregnant, pages of the book are dedicated to *Italian Style*. The authors claim that this style is characterised by a principle of *relationality* with other actors: Courts, judges, policies, and citizens. I am unsure whether this may be interpreted as a way of seeking the lamented lost balance that we have mentioned here. But what I definitely want to remark is that this relationality (both “institutional” and “interpretative”) might perhaps be a goal to aim for, but it cannot be considered as a consolidated given within the Italian constitutional justice system in today’s context.

Let us start with “institutional relationality”. There is no doubt that a great many virtuous changes can be attributed to the Italian Constitutional Court and its style. The Constitutional Court has often called on the other institutions - primarily Parliament - to adapt the political system and its norms to the Constitution. There have been countless advances related to this virtuous relationship, from the dismantling of Fascist legislation to that relating to family law. But it is also true that it is not always possible to discern any positive “relationality” actually pursued by the various institutions. The outcome of the rulings in legislation cannot always be said to be linear; indeed, it is sometimes non-existent.

I would also like to emphasise another aspect in an attempt to show how and to what extent I feel “relationality” can, or must, operate. Sometimes relationality should not be understood as a fair effort to cooperate on the part of the Court with the other powers. When fundamental rights or supreme constitutional principles are at stake, it must be acknowledged that the Court operates “intransigently”. I think this should happen every time that, faced with a violation of supreme constitutional legality by a political majority, the counter-majority role of the Court has to be brought into play as a constitutional Court that asserts itself as an indefatigable guarantor of the Constitution and the rights of the individual against any majority temporarily in government.

Clearly, this does not concern only relations with Parliament or the political majorities, but in all cases when the Court interacts with the other powers; including that of the judiciary. In this case too it can not be forgotten that the hoped for harmony is not always present. There have been not a few “wars

between the Courts". A dose of conflict between different types of Courts is to be considered natural: there is always a crisis always lurking round the corner. So also in this case relationality must be understood as a goal to be pursued, and not a natural characteristic of Italian style.

But perhaps the most sensitive point that the book raises concerns "interpretative relationality", addressed in the closing pages. Different and competing methods of interpretation are presented in two parts of the book, be they originalist, teleological, related in varying degrees to the above, or the literal or systematic approach. At one point we read this sentence: "The constitutional court follows a comprehensive methodology, one that does not shy away from complexity⁵." I wonder if this is an elegant way of exposing the abuse of eclecticism. What is certain is that in reading the case law of this Court, occasional excess can be observed: with slightly forced balancing acts, excessively abstract reasonableness, and artificially induced proportionality, it is doubtful whether a balance has really been achieved. My impression is that there is a lot of work to be done by both scholars and judges in the field of constitutional interpretation, while some of the canons used, such as reasonableness and proportionality, at times prove too elastic, far too elastic. In these cases, the Court tends to over-widen the margin necessary to achieve a constitutionally acceptable result, thus risking to venture too close in the direction of interpretative subjectivism. So, in addition to interpretive relationality it is necessary to exercise care in maintaining close relationality with the text of the Constitution. This too can be of help in finding that constitutional balance which as yet does not exist.

⁵ V. Barsotti, P.G. Carozza, M. Cartabia & A. Simoncini, *Italian Constitutional Justice in Global Context* (2015) 238.

CONSTITUTIONAL JUSTICE IN ITALY AND BEYOND: A COMPARATIVE (AND PRIVATE) LAW PERSPECTIVE*

*Mauro Bussani***

Abstract

This article takes a comparative law perspective to examine a series of issues that, through the lense of the recently published book 'Italian Constitutional Justice in Global Context', appear to be closely interconnected. It starts with a survey of the overall global circulation of Italian legal models. Secondly, it focuses on the general features and inner limits of so-called global constitutionalism. Thirdly, it addresses the interactions at work in a civil jurisdiction between the Constitutional Court and the other domestic, European and Western legal formants. The final part of the paper chooses private law as a litmus test to review the practical dimension of the above-mentioned interactions.

TABLE OF CONTENTS

| | |
|---|----|
| 1. A book of virtues..... | 12 |
| 2. Italian law in the world..... | 13 |
| 3. Constitutional justice between localism and globalism..... | 17 |
| 4. A story of dialogues..... | 22 |
| 5. Looking through the private law keyhole..... | 24 |

1. A book of virtues

'Italian Constitutional Justice in Global Context' makes a strong contribution to disseminating knowledge about the Italian Constitutional Court within the marketplace of ideas – a marketplace that, by definition, transcends national borders and is largely globalised.

* This essay was delivered on February 15th, 2016 at the University of Notre Dame, Rome Global Gateway in Rome, at the Symposium "Italian Constitutional Justice in Global Context". The original text and colloquial tone of the lecture have been preserved. Footnotes have been added.

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This effort at dissemination is meritorious in itself – regardless of any virtues that the book may, and actually does, possess. It is meritorious because, despite the authentic or derived originality that Italian legal architectures and their scholarly foundations often possess¹, Italian law is little known compared with the law of the Western jurisdictions which are (or are deemed to be) paradigmatic. Limited knowledge of Italian law abroad is an issue that deserves brief discussion here, also because one of the reasons why I was invited to speak today is, I suppose, that I have worked on a project examining this very issue, from which a book has recently been produced².

2. Italian law in the world

The project aimed to turn the widespread and servile opinion that post-unification Italy³ has merely been a taker – rather than a maker – of legal rules, into a provocation, and into a series of questions, including, ‘Is legal Italy only an imitating country?’ and ‘Haven’t the Italian legal tradition and models in turn been known, admired, and imitated by others?’

A word of clarification: the underlying idea was not to solicit answers imbued with pride, or to take a nationalistic stance. The goal was rather to do an exercise in comparative law and to understand how and why Italian law has been able, or has failed, to make itself known beyond domestic circles.

It goes without saying that the legal dimension I refer to is not only that of State legislation. A legal tradition is of course made up of a number of authoritative rules set out by legislators

¹ See the contributions in S. Lanni, P. Sirena (eds.), *Il modello giuridico – scientifico e legislativo – italiano fuori dell’Europa*, Atti del II Congresso Nazionale della SIRD (2013).

² M. Bussani (ed.), *Il diritto italiano in Europa (1865-2014). Scienza, giurisprudenza, legislazione*, in *Annuario di diritto comparato* (2015).

³ Before the political unification of the peninsula in 1861, history gave Italian law a primary and incessant role in producing a substantial part of the legal infrastructure of continental Europe: from Roman law to municipal statutes, from *ius commune* to *iura mercatorum*, from Muratori to Filangieri to Beccaria. See, for example., P. Cappellini, P. Costa, M. Fioravanti, B. Sordi (eds.), *Enciclopedia italiana. Il contributo italiano alla storia del pensiero giuridico* (2012) XXXIII.

and judges. But this is not the whole story. Any legal tradition, including the Italian one, is best understood as “a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and polity, about the proper organisation and functioning of a legal system, and about the way law is or should be made, applied, studied, perfected and taught”⁴. From this cultural perspective, law emerges as a social infrastructure, relentlessly built and re-built by many different formants and actors, all with their own functions, aspirations, and roles.

Seen from this perspective, the Italian legal tradition (like many others) cannot but prove to be the long-term product of a mixed past⁵. What we dub ‘Italian law’ is the mobile result of a many-faceted history of legal transplants and transmitting of ideas, original solutions, and reinterpretations of borrowed ones. It is a history shaped by different forces, moving at different speeds and in different directions. A history of coexistence and competition among a plurality of legal orders and local variations. A history, like other legal histories, full of departures and returns, of renaissances and changes, of confrontation and dialogue with otherness⁶.

Unlike other Western legal sub-traditions, our post-unification legal system has never hidden its mixity. Over time, Italian jurists have endured, questioned, and proclaimed the ‘mixedness’ of their legal culture, and have always been able to convert it into a valid currency for their domestic intellectual exchanges. Thanks to a cultural modesty to which I shall come

⁴ J. Merryman, R. Perez-Perdomo, *The Civil Law Tradition* (2007), 1-2 (who then add: “The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective”).

⁵ E. Özücü, *General Introduction. Mixed Legal Systems at New Frontiers*, in Ead. (ed.), *Mixed Legal Systems at New Frontiers* (2010), 1 (“a great variety of legal systems have developed from mixed sources and all modern systems of any sophistication or complexity are mixed to a certain extent”); Ead, *What is a Mixed Legal System: Exclusion or Expansion?*, *ibid.*, 53, 54 (“all legal systems are mixed, whether covertly or overtly”).

⁶ M. Infantino, *The Italian Legal Recipe: Basic Ingredients and the Bustle of Time*, 6 J. Comp. L. 70-85 (2011). See also P. Cappellini, P. Costa, M. Fioravanti, B. Sordi, *Introduzione*, in *Enciclopedia italiana*, cit. at 3.

back later, Italian jurists have more sparingly used that currency for their exchanges with other national traditions.

The frequency and quantity of these exchanges have, of course, differed through time and across places. Outside Europe, and particularly in Latin America, in the Horn and North of Africa, and (in the last thirty years) in China, the demands of Italian law – above all, although not exclusively, of scholarly law – have been intense, and most of the time fully met⁷. Throughout Europe, too, our proposals and debates have circulated widely in many fields – from Roman law to international law, from criminal procedure⁸ to research on the Common Core of European Private Law⁹ to constitutional justice itself¹⁰.

What should be noted is that the above ‘proposals’ and ‘debates’ were, and still are, almost exclusively put forward by scholars. In reality, it was the academic élites that took, and still take Italian codes, statutes and case law beyond our borders, acting as our ‘heralds of the Italian legal tradition’¹¹. It is scholars who make Italian-born ideas known elsewhere. Scholars explain Italian case law and legislation to those who have no access to

⁷ Some illustrations are offered in S. Lanni, P. Sirena (eds.), *Il modello giuridico – scientifico e legislativo – italiano fuori dell’Europa*, cit. at 1.

⁸ See the contributions by M. Brutti, *I romanisti italiani in Europa*, 211-54; E. Cannizzaro, *Il mutamento dei paradigmi della scienza giuridica internazionalista e la dottrina italiana*, 77-98, and M. Chiavario, *Il diritto processuale penale italiano e i suoi quattro codici: luci e ombre di una «presenza» in Europa*, 149-96, in M. Bussani (ed.), *Il diritto italiano in Europa*, cit. at 2.

⁹ The project was founded more than twenty years ago by Ugo Mattei and the author of this paper with the aim of unearthing what is common and what is different within and across European private laws. For more information about the methodology, contents and results of the project, see M. Bussani and U. Mattei, *The Common Core Approach to the European Private Law*, 3 *Columbia Journal of European Law* 339 (1997/98); M. Bussani, “*The Common Core of European Private Law*” *Project Two Decades After: An Endless Beginning*, *European Lawyer Journal* 12 (2016), forthcoming; see also F. Fiorentini, *Un progetto scientifico che stimola e affascina l’Europa: «The Common Core of European Private Law»*, in M. Bussani (ed.), *Il diritto italiano in Europa*, cit. at 2, 275-306.

¹⁰ See especially Martia Cartabia’s study on Italian incidental procedure as a model for European constitutional justice: M. Cartabia, *La fortuna del giudizio di costituzionalità in via incidentale*, in M. Bussani (ed.), *Il diritto italiano in Europa*, cit. at 2, 27-53.

¹¹ In these terms, but regarding commercial law studies, see P. Grossi, *Scienza giuridica italiana. Un profilo storico 1860-1950* (2000), 187.

them. Scholars are read, (sometimes translated), often appreciated, and discussed in foreign *fora*. The list of Italian scholars who are highly thought of abroad is long – and includes the Italian authors of the book we are discussing here.

That being said, we are also obliged to acknowledge the limits and fragilities currently besetting Italian legal culture and its outward projection. If “‘legal culture’ (in its narrowest meaning) can be defined as the legal narrative of a society told from the perspective of the legal professionals operating in that society”¹², we are forced to conclude that a substantial portion of the Italian professional class is today constraining Italian legal culture between petty parochialism and pure fantasy. The parochialism is plain to see: it lies in the tardiness and superficiality with which many Italian legal professionals receive streams (not to say: fragments) of others’ debates and discuss them in the absence of any comparative contextualisation. Yet parochialism is often overwhelmed by fantasy. Fantasy takes hold of multitudes of domestic lawyers who naïvely believe that “legal experience cannot but be intrinsically local”¹³, and often are as assertive and self-congratulatory within their national borders as they are stuttering and unheard beyond them.

To say the very least, this legal culture serves neither itself, nor the present or the future of the country of which it is the expression. Nor does it support the work of judges and lawyers, whose task it is to participate in the world of ideas not only as listeners, but also as active debaters and transmitters of vision, critiques, and solutions.

Against this framework, the book under review presents itself as an austere challenge to local provincialism, and as a fertile promise of the dissemination of Italian views in the transnational marketplace of ideas. I will shortly highlight what I consider to be the volume’s most remarkable virtues. Before doing so, however, let me sketch some piecemeal comments on the text.

¹² P. Cappellini, P. Costa, M. Fioravanti, B. Sordi, *Introduzione*, in *Enciclopedia italiana*, XXXI, cit. at 3, (“‘cultura giuridica’ (in senso stretto) è la rappresentazione *more iuridico* che un ceto professionale offre di una determinata società”).

¹³ A. Gambaro, *Il modello giuridico – scientifico e legislativo – italiano fuori dell’Europa. Riflessioni conclusive*, in S. Lanni, P. Sirena (eds.), *Il modello giuridico – scientifico e legislativo – italiano fuori dell’Europa*, cit. at 1, 459, 460.

3. Constitutional justice between localism and globalism

Since I do not intend to renege on my 'dialoguing' scholarly role, I have forced myself to find some criticisms regarding the volume.

My first and most general observation is that the book implicitly embraces some of the mainstream narratives on constitutional adjudication. The authors probably had no alternative, given their commendable aim of speaking to, and being heard by the transnational public at large. What the authors could perhaps have done, however, would have been to set out some of these narratives in a more critical light. For instance, the authors could have better contextualised their historical account and critique of the limited independence of the judiciary in post-unification Italy (p. 8). On the formal level, one might recall that for centuries in England, until the recent Constitutional Reform Act 2005, the Lord Chancellor was at the same time the head of the judiciary, a member of the executive, and the presiding officer of the House of Lords¹⁴. On the substantive level, one might observe that, in the legal tradition that the book most often takes as a benchmark, i.e., the United States, judges are selected through either competitive election or political appointment. Illustrations such as these would have helped to show that the fabric and backbone of judicial independence, beyond and before positive law, have never resided in institutional constraints or selection procedures only, but have always had to do with the internal and external perception (of the law and) of the judges' role within the given legal tradition.

In the same vein, the authors could have placed more emphasis on the historical precedents for the story they are narrating, a story wholly centred on the American model of judicial review. History shows us that the overlap between judicial and political power was a characteristic feature of the Middle Ages, in France as in England. This feature was taken to, and maintained in, the United States even after the formation phase of the Republic, when the judicial power to say what the law is was associated with the mixed judiciary-legislative power to tell the legislature what the law could not be. True, in eighteenth-century

¹⁴ See, for example, J. Bell, *Judiciaries within Europe. A Comparative Review* (2006) 310, 320.

England, Blackstone emphatically rejected judicial authority to uphold established principles against legislation that violated them, no matter how gross that violation was. Yet, at the basis of the U.S. model of judicial review, there is the old English practice of controlling legislation through common law. That practice percolated from England to the United States, where scholarly and judicial engagement perpetuated and transformed it into the American doctrine of judicial review – a doctrine whose roots are deeply anchored in England’s legal past.

For a long time, continental and Italian history – as the authors know much better than I – has been a different one. Continental judges, like their English colleagues, became lions under the throne, as Francis Bacon¹⁵ put it, or the ‘bouche de la loi’, to quote Montesquieu¹⁶. On the European continent, the pressure to resist legislative centralism by counter-majoritarian, or simply technocratic means of controlling parliamentary powers, has only emerged cumulatively as the result of multiple instances¹⁷.

Our history was different, as I have just mentioned. But many of its current features are now common to Anglo-American ones. Think for instance of the reference that often recurs in the volume at hand (as well as in the specialised literature), to formulas such as that of ‘constitutional patriotism’ (*Verfassungspatriotismus*)¹⁸. What I want to stress here is that only Westerners could have conceived of a political organisation, such as the State, as being built upon ideals such as that of constitutional patriotism. Indeed, it is one thing to look at Constitutions as ‘narrating selves’ or identity narratives (and even from this perspective, questions about which Constitution, written by whom, interpreted by whom and for whom, read as a portrait of what – the present, the recent past, the future – would

¹⁵ Francis Bacon, *Of Judicature*, in *Essays* (1625).

¹⁶ *Esprit des Lois*, Liv. XI. Chap. VI.

¹⁷ M. Bussani, *Il diritto dell’Occidente. Geopolitica delle regole globali* (2010), esp. 189-191.

¹⁸ J. Habermas, *Warum braucht Europa eine Verfassung?*, in *Die Zeit*, 28 June 2001, n. 27, 7.

straightforwardly emerge¹⁹). It is quite another to believe that the text of a constitution can lay the foundations for a system's legality, and the sense of unity and identity of people living in that system. Behind such a belief there is nothing more than strategic opportunism or a dangerous naiveté²⁰. Suffice it to consider that, taken at face value, such a belief implies that neither a system's legality, nor people's sense of unity and identity, could exist

¹⁹ See, for example, C.R. Sunstein, *Designing Democracy: What Constitutions Do* (2001), 3, 239; M.R. Ferrarese, *Il diritto al presente. Globalizzazione e tempo delle istituzioni* (2002) 97; see also A. Simoncini, *Beyond Representative Democracy: The Challenge of Participatory Democracy and the Boundless Galaxy of Civil Society*, in M. Cartabia, N. Lupo & A. Simoncini (eds.), *Democracy and Subsidiarity in the EU. National Parliaments, Regions and Civil Society in the Decision-Making Process* (2013) 45. In this light, an examination of U.S. constitutional discourse may be of particular interest. On the one hand, U.S. efforts to transplant their own Constitution are premised, in the domestic legal and political debate, upon the 'civilising' mission Americans attribute to their own law. On the other hand, the same debate largely denies that comparison with other legal experiences should matter in domestic constitutional adjudication (and sometimes refers to constitutional comparative exercises as a 'meretricious practice': R. A. Posner, *The Supreme Court 2004 Term. A Political Court*, 119 *Harvard L. Rev.* 31, 98 (2005)). See, for example., A. Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A. Scalia et alii, *A Matter of Interpretation: Federal Courts and the Law* (1997) 3, 37.; R. Bork, *Coercing Virtue: The Worldwide Rule of Judges*, New York, Random House (2002), 135; A. Scalia, S. Breyer, *Justice, U.S. S. Ct., Discussion at the American University Washington College of Law* (Jan. 13, 2005), 3 *Int'l J. Const. L.* 519 (2005). But for a fierce and accurate defense of the view that would oblige (at least) the Supreme Court to consider and understand foreign ideas and the international circulation of ideas, see S. Breyer, *The Court and The World. American Law and the New Global Realities* (2015).

²⁰ See for instance N. MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth* (1999) 63; M.J. Horwitz, *Constitutional Transplants*, 10(2) *Theoretical Inquiries in Law* 535 (2009); D. Chirot, *Does Democracy Work in Deeply Divided Societies?*, in Z. Barany, R.G. Moser (eds.), *Is democracy exportable?* (2009) 85; D.H. Levine, *Rule of Law, Power Distribution, and the Problem of Faction in Conflict Intervention*, in M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in a Comparative Perspective* (2010), 147. A good illustration of the opportunism/naiveté mentioned in the text comes from the U.S. Department of State, *The Future of Iraq Project*, a series of 13 volumes written between October 2001 and September 2003, and available under National Security Archive Electronic Briefing Book n. 198, at: gwu.edu), chapter 4, *Democratic Principles and Procedures*, 49: "The first task of politics is to restore the faith of the people of Iraq in the idea of a founding document, a Constitution".

without a constitution. However, everybody would agree that no constitution (and, more generally speaking, no statutory law) could create a legality, or a sense of unity and identity from the scratch, that is, without the support of widespread circles of cultural and social consensus production.

In this perspective, the ‘global context’ – to which the book belongs and speaks – should be understood as a purely Western story. Current constitutional debates, and the notions and ideas they produce, are rarely supplied with data, elements and observations stemming from beyond the Western dimension – a dimension that, far from being merely geographical, overlaps with the area dominated by Western cultural influence²¹. In other words, what falls outside the Western radar screen is attention to the impact that our debates might have on non-Western experiences, whose cultural frameworks for discussing public reasons, for selecting who is to handle societal and legal conflicts, and for identifying who can claim what against whom, are variable, often distant, and sometimes dramatically different from Western ones²².

Let us be clear: scholars do their work. They build perspectives, set horizons of meaning, and propose solutions. There would be nothing wrong if scholars, when making comparisons, especially ‘global’ ones, called the results of their research ‘studies on Western constitutional law’, or ‘studies on Western constitutional justice’. Yet this does not normally happen,

²¹ For some observations on the distinction between a ‘transcendental’ and ‘comparative’ approach to the problems and priorities of global justice, and on the practical effects that can derive from such a distinction, see A. Sen, *The Idea of Justice* (2009), esp. 403.

²² Suffice it to mention, on the one hand, that John Rawls – one of the most authoritative and respected voices of the debate on the notion of justice – centres his vision on the model of a ‘self-contained’ and ‘closed’ society (explaining such an abstract choice ‘because it enables us to focus on certain main questions free from distracting details’: *Political Liberalism*, Columbia U.P., 1993, rev. ed. 1996, 12), and, on the other hand, that the same author limits his analysis of international relations to relationships between ‘liberal and decent peoples’: *The Law of Peoples*, (1999) 3. Among the rich literature on these issues, see the critiques raised against Rawls’ views by G. Teubner, *Self-subversive Justice: Contingency or Transcendence Formula of Law?*, 72 *Mod. L. Rev.* 1-23, esp. 3 (2009).

since in most cases their discourses show a vocation that is implicitly (yet undisputedly) universal.

Allow me to better explain what I am referring to with a brief example taken from Islamic countries – that is, from a large part of the ‘legal global’ that is allegedly addressed by mainstream constitutional discourse. Firstly, comparison with Islamic countries makes clear the relative significance and limited relevance of our assumptions about the centrality of Western-style constitutional frameworks (as we know them). Both in the West and in the Islamic world, there is invariably a level of ‘constitutional’ legality which is higher than the will of any single parliament or government. When these bodies, both in Islamic societies and in the West, issue any law, they do so in their capacity as organs bound by ‘superior’ laws, principles and values – the ones embedded, respectively, in our constitutions and in sharia. The crucial point is therefore the content and, even more so, the way the superior constitutional structure operates, which is the way(s) we in the West know, but which arises ‘there’ from the complex interaction between sharia and the State-positing law, the *siyasa*. This is why there is a lot more than just the formal existence of a ‘law of the land’ and/or the articulation and balance of powers it guarantees that makes our constitutions not just a ‘sacred’ text, but an instrument for political battles transferred to legal grounds and then disputed or disputable before the (secular) Courts.

Secondly, what should be stressed even more is the dialectic relationship existing – in the West as well as in Islamic countries – between civilisation and legal tradition: the ‘secular’ legal tradition is a fundamental pillar of our civilisation, as much as the ‘Koranic’ tradition is for the Islamic countries. In other words, within both traditions we can observe: a) a one-to-one correspondence between the values of civilisation and the values of the law, and b) the main role, in the development of those values, played by the jurist or legal practitioner – a layman in the West, a religious figure in the Islamic countries – as the maker and messenger of that complex of rules which make up the historical and current ground of the different societies²³.

²³ In a similar vein, see, for instance, A. Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and*

This is just an example of the many possible crossover points of the discourse. Yet ‘global’ legal scholarship, even the most sophisticated, rarely considers these points of juncture worthy of analytical (not to mention: critical) attention. Was the task of the volume we are celebrating today to overturn such an attitude? I do not think so. I nevertheless think that the narratives on global contexts should give greater consideration to otherness and embrace broader horizons.

4. A story of dialogues

As I mentioned, the above considerations are simply fragmentary footnotes to the volume – raindrops falling into the sea of suggestions, visions, and information that flow from this book.

Among the many virtues of the book under review – and in addition to what I said in section 1 and at the end of section 2 – two further features deserve mentioning. The first is immediately clear to any scholar of comparative law, and permeates every single chapter of the book. A virtue that emerges from the emphasis placed on the constant dialogue between the Italian Constitutional Court and other domestic, European and Western legal formants.

Starting from the European and Western perspective, the authors rightly point out that interaction between the Italian Constitutional Court and other (constitutional and supranational) judicial authorities is, today, a fundamental necessity (see esp. pages 231-2). We live in a world where rules controlling a large number of fields, such as trade, banks, currencies, loans, environment, space and energy, air and maritime transportation, the management of marine resources, fisheries, agriculture, food, telecommunications, intellectual property – not to mention finance – are largely denationalised. All these rules are neither determined, nor exclusively influenced, by States. Rather, they are the by-product of centres of legal production located in regional and global arenas. These centres have a huge impact on domestic

American Jurisprudence, 28 Cardozo L. R. 67 (2006); T. Kuran, *The Rule of Law in Islamic Thought and Practice: A Historical Perspective*, in J.J. Heckman, R.L. Nelson, L. Cabatingan (eds.), *Global Perspectives on the Rule of Law* (2010), 71.

legal systems. Such an impact is sometimes mediated by States, whose involvement may be necessary for the enforcement of rules. At other times the impact is direct, with no domestic intermediation²⁴, and at still other times it is the result of the ever deeper collaboration between States and global judicial authorities²⁵.

Against this framework, cross-jurisdictional dialogue is not only necessary, but it is a key for surfacing and dismantling the guileful posturing of legal parochialism one can find everywhere. I would like to underline that the authors' perusal of the nature, quality and quantity of the Court's dialogues is as admirable and accurate as it is rare in current legal scholarship.

²⁴ "[M]ost citizens greatly underestimate the extent to which most nations' shipping laws are written at the IMO in London, air safety laws at the ICAO in Montreal, food standards at the FAO in Rome, intellectual property laws in Geneva at the WTO/WIPO, banking laws by the G10 in Basle, chemical regulations by the OECD in Paris, nuclear safety standards by IAEA in Vienna, telecommunication laws by the ITU in Geneva and motor vehicle standards by the ECE in Geneva": K. Braithwaite and P. Drahos, *Global Business Regulation* (2000) 488. See also J.E. Alvarez, *International Organizations as Law-Makers* (2005) 217, 608.

²⁵ S. Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale* (2009) *passim* and esp. 89; Id. (with E. D'Alterio), *Introduction: The Development of Global Administrative Law*, in Id. (ed.), *Research Handbook of Global Administrative Law* (2016) 1, esp. 7-9; E. Benvenisti and G.W. Downs, *Court Cooperation, Executive Accountability and Global Governance*, Tel Aviv University Law Faculty Papers, 2009, paper 108, 1, 6; E. Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 *Am. J. Int'l L.* 241, 247 (2008); G. della Cananea, *Il diritto amministrativo globale e le sue Corti*, in F. Mangarano and A. Romano Tassone (eds.), *Dalla cittadinanza amministrativa alla cittadinanza globale* (2005), 137; V. Barsotti, *Tra il dialogo e la cooperazione. Il nuovo ruolo delle corti nell'ordine giuridico globale*, in L. Antonioli, G.A. Benacchio & R. Toniatti (eds.), *Le nuove frontiere della comparazione. I Convegno Nazionale della SIRD* (2012), 199-215. For an analysis of the mixed fate encountered in domestic jurisdictions by the horizontal application of international treaties, that is, the ability of individuals to invoke a provision from a treaty against another individual, see, in general, D. Shelton, P. Carozza, *Regional Protection of Human Rights* (2013), 126-135; D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement. A Comparative Study* (2009); with a special focus on Europe, see A. Colombi Ciacchi, *European Fundamental Rights, Private Law, and Judicial Governance*, in H.-W. Micklitz (ed.), *Constitutionalization of European Private Law* (2014), 102; M. Cartabia, *L'ora dei diritti fondamentali nell'Unione Europea*, in Ead. (ed.), *I diritti in azione* (2007).

5. Looking through the Private Law Keyhole

The second (and final) note concerns the domestic side of the picture and is presented from the private law perspective²⁶. It aims to praise another virtue of this book, i.e. the accuracy and acuity with which the authors analyse the interchange between the Constitutional Court and local formants.

Private lawyers have long noted that when the Constitutional Court is called to enter into private law domains, it always does so through a dialogue with the other interpretive formants: directly with judges, and, through them, with legal scholarship. What is worth observing is that, as far as private law is concerned, it is often judges of the lower courts who ask the Constitutional Court to review the constitutional legitimacy of a line of case law. The phenomenon is easy to explain. The discretion of trial judges is culturally (although not formally) bound by *stare decisis*²⁷. These judges have very little occasions to criticise the decisions of their colleagues, especially those who sit at the upper levels of the hierarchy. Resorting to the Constitutional Court, by contrast, provides the judges of the lower courts with an instrument to express disapproval of other judges' (including the Court of Cassation's) positions, and to open or sharpen the debate on given issues, putting pressure on all legal formants to take a stance. Thus, the Constitutional Court is frequently called within the circle of production of private law rules to act as the ultimate arbiter of conflicts, at whose core is the constitutionality not of a legal provision, but of a judicial interpretation.

²⁶ To be noted in passing (but the note may be useful to most constitutional lawyers) is the counter-power role private law has played in the history of both common and civil law. Private law has in fact long been the legal dimension in which the driving force of individual freedom has been fed and increasingly protected by rules developed by scholars and/or judges. This was done over time and before any code or constitution came into play to seal the achievements of private law practitioners – esp. the idea that individual sovereignty over personal, social, and economic relationships is as worthy of protection as rulers' sovereignty over their country. See M. Bussani, *Il diritto dell'Occidente. Geopolitica delle regole globali* (2010), esp. 187-188; Id., *Democracy and the Western Legal Tradition*, in M. Bussani and U. Mattei (eds.), *The Cambridge Companion to Comparative Law* (2012), 384, 385-387.

²⁷ M. Cappelletti, *Doctrine of Stare Decisis and the Civil Law: A Fundamental Difference or No Difference At All?*, in *Festschrift für Konrad Zweigert* (1981), 381.

What is also interesting to analyse is the way in which the Constitutional Court has managed its relationships with lower and upper level judges until now. Among the sizeable amount of possible instances, let me focus on some tort law developments.

In this field it is easy to realise how often the Court emphasises the exclusive jurisdiction of trial judges in distributing the cost of the accident between the parties in the light of the overall circumstances of the case. The Constitutional Court has repeatedly stressed that the decision on how to allocate the burden of damage undergone can only be made “against the facts of the case”²⁸, and that the general tort law clause of Art. 2043 of the Italian Civil Code²⁹ “allows judges to adapt the liability rule to a specific conflict through the assessment of the importance of the victim’s interests vis-à-vis those of the the defendant in light of the evolving social conscience and of the legal system as a whole, as well as of the other instruments of protection available to plaintiffs”³⁰.

²⁸ Constitutional Court, 16 October 2000, n. 243, in *Giust. civ.*, 2001, I, 306; see also Constitutional Court, 24 October 2001, n. 340, in *Giur. It.*, 2001, c. 165, as well as Constitutional Court, 10 May 1999, n. 156, in *Giust. civ.*, 1999, I, 1927.

²⁹ “Any malicious or negligent act that causes a wrongful injury to another obliges the person who has committed the act to pay damages”.

³⁰ The provision of Article 2043 of the Civil Code “consente al giudice l’adattamento di tale norma alle circostanze del caso attraverso la valutazione dei limiti di meritevolezza degli interessi pretesamente lesi, anche in relazione ad altri interessi antagonisti, secondo l’evolversi della coscienza sociale e del sistema giuridico generale nonché degli strumenti normalmente a disposizione dei soggetti titolari di tali interessi”: Constitutional Court, 10 May 1999, n. 156, in *Giust. civ.*, 1999, I, 1927. Incidentally, it should be noted that the realism thus displayed by the Constitutional Court does not prevent it from performing a pedagogical role. In many opinions, besides clarifying the doubts that triggered the request for judicial review, the Court seizes the opportunity to remind the remittal judge and his colleagues about the fundamentals of liability: M. Bussani and M. Infantino, *La Corte costituzionale, l’illecito e il governo della colpa*, in M. Bussani (ed.), *La responsabilità civile nella giurisprudenza della Corte costituzionale* (2006) 34; similar observations can be read in F.D. Busnelli, *Il danno biologico dal “diritto vivente” al “diritto vigente”* (2001), 142, 146; G. Ponzanelli, *Corte costituzionale e responsabilità civile: rilievi di un privatista*, in *Foro it.*, 1988, I, c. 1057, 1059. For an illustration of the technique mentioned in the text, see: Constitutional Court, 14 July 1986, n. 184, in *Giur. it.*, 1987, I, c. 392; and then Constitutional Court, 11 July 2003, n. 233, in *Foro It.*, 2003, I, c. 2201; Constitutional Court, 27 October 1994, n. 372, in *Giur. It.*, 1995, I, c. 406; Constitutional Court, 16 October 2000, n. 423, in *Foro It.*, 2001, I, c. 4;

Further, even when the Constitutional Court's opinions on tort law are welcomed by the debate due to their wealth of innovation, what the Court in fact does is to select and reshape the best constitutionally oriented arguments from among those produced and refined by scholars, and then percolated down, or up, through the judicial hierarchy³¹. Let me recall, for instance, the Constitutional Court's approach to personal injury and 'biological damage' ('danno biologico')³². With regard to this issue, the Constitutional Court followed the path already opened by the Court of Cassation (that, in its turn, was driven by legal scholarship) in connecting the notion of 'injustice' under Art. 2043 of the Italian Civil Code to the constitutional provision on the protection of health under Art. 32 of the Constitution³³. But one may also think of the current framework of compensation for non-patrimonial damage, which was made possible by an expansion of the area of recoverable injury advocated by scholarship, implemented by justices of peace, enforced by trial and appellate

Constitutional Court, 18 April 1996, n. 118, in *Giust. civ.*, 1996, I, 1879. An analysis of the structure of the Constitutional Court's opinions in these cases is offered, among others, by E. Lamarque, *La tutela dei diritti costituzionali in Italia tra Corte costituzionale e giudici comuni (2003-2008)*, in M. Cartabia, A. Simoncini (eds.), *La sostenibilità della democrazia nel XXI secolo (2009)*, 277; G. Tucci, *Danno non patrimoniale, valori costituzionali e diritto vivente*, in *Danno resp.* 17 (2004), 701, 703.

³¹ Moreover, one should note that the Constitutional court displays a remarkable tendency to keep its activity separated from that of ordinary judges. This implies that, every time justices are required to assess the legitimacy of the interpretation given to black-letter rules by ordinary courts (especially by the Court of Cassation), they are inspired by a noteworthy self-restraint. Multiplication of summary judgments on inadmissibility and manifest groundlessness of the claim in this area is evidence of the Court's cautiousness when reviewing ordinary judges' work: M. Bussani, M. Infantino, *La Corte costituzionale*, 33; on the same lines, see also P. Cendon, P. Ziviz, *Vincitori e vinti (...dopo la sentenza n. 233/2003) della Corte costituzionale*, in *Giur. it.*, 2003, c. 1776.

³² Namely, the Italian method of assessing the non-economic consequences of personal injuries on the basis of pre-established models, translating into monetary terms the victim's percentage of temporary or permanent disability.

³³ For a more detailed illustration of these developments, see M. Bussani, *Introduzione*, in M. Bussani (ed.), *La responsabilità civile nella giurisprudenza della Corte costituzionale*, VII, IX-X.

judges, and then finally legitimised by the Constitutional Court itself³⁴.

Naturally, the clock of history sometimes swings towards harmony between ordinary and constitutional judges, and sometimes moves towards disharmony. Yet both in times of harmony and disharmony, the Court always performs a difficult and praiseworthy balancing role in reading at the same time the formal constitutional text and its unwritten, 'living' contents³⁵. This role obliges the Court to relentlessly take a position amidst interpretive disputes, and to measure itself against other (national and supranational) courts, as well as the great and powerful grande dame of civil law, i.e., the *scientia iuris* – understood as the sophisticated and (unavoidably) transnational upper side of legal scholarship.

The contents, style and method displayed in the analysis of the role played by the Italian Constitutional Court has already earned this new and fascinating book a front row seat in the arena of transnational legal scholarship. I am certain that it will set the quality standard for future efforts to describe and understand (not only Italian) constitutional justice.

³⁴ Cf. Constitutional Court, 11 July 2003, n. 233, in *Foro It.*, 2003, c. 2201, and the two previous opinions of the Court of Cassation, 12 May 2003, nn. 7281, 7282, 7283, published in *Foro it.*, 2003, 2274; *Resp. civ. prev.*, 2003, 676 and *Giur. it.*, 2004, 1130 respectively.

³⁵ M. Bussani, *Introduzione*, XI, cit. at 33.

THE IMPORTANCE OF BEING OPEN. LESSONS FROM ABROAD FOR THE ITALIAN CONSTITUTIONAL COURT*

Vittoria Barsotti **

Abstract

The article examines the institutional relations between Italian Constitutional Court and its stakeholders, as political bodies or courts. At the same time through a comparative overview it shows the specificity of our Court in relation to the others European Constitutional Courts.

TABLE OF CONTENTS

| | |
|--|----|
| 1. Different kinds of relationality..... | 28 |
| 2. Separate opinions..... | 30 |
| 3. <i>Amici curiae</i> | 33 |
| 4. The importance of being open..... | 35 |

1. Different kinds of relationality

The Italian constitutional “style” - following the celebrated John Henry Merryman’s definition¹ - has been labeled “cooperative” and the word “relationality” has been used to capture its essence².

* This essay was delivered at the 2016 ICON-S Conference *Borders, Otherness and Public Law - Berlin*, June 17th-19th, 2016. The panel, composed also by M. Cartabia, O. Pollicino, P. Popelier and A. Simoncini, chaired by N. Lupo, discussed the main outcomes of the Volume *Italian Constitutional Justice in Global Context* co-authored by V. Barsotti, P. Carozza, M. Cartabia, and A. Simoncini.

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¹ J.H. Merryman, *The Italian Style: Doctrine*, in 18 Stan. L. Rev., 39 (1965); Id. *The Italian Style: Law*, in 18 Stan. L. Rev., 396 (1966); Id., *The Italian Style: Interpretation*, in 18 Stan. L. Rev., 639 (1966).

² V. Barsotti, P. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context* (2016).

Whether in its historical development, its internal workings and methods, its institutional relations with other political bodies or courts, or in its substantive jurisprudence on a number of issues of global concerns, the Italian Constitutional Court operates with a notable attentiveness to the relations between persons, institutions, powers, associations, and nations. Like any judge in well-functioning systems of justice generally, the Italian Constitutional Court is indeed independent from other branches of Government. However, it always acts as part of a complicated machine, within which many other institutional gears have their part as well. Although granted the final word by the Constitution, it does not speak the only word in constitutional matters. Instead, it is embedded in a fabric of relations that affect its agenda, its deliberative process, its method of interpretation, the typology of its decisions, and even its vision of the persons, society, and state subject to its judgments.

Obviously, the Italian Constitutional Court is not always perfectly consistent and successful in maintaining its distinctive identity and is not alone within the European complex landscape in trying to enhance its cooperative and dialogical nature.

Two different kinds of relationality have been described for the Italian Constitutional Court. Institutional relationality: the ability of the Court to establish sound and vital connections with other institutional actors, both political and judicial, national and supranational. Interpretive relationality: the capacity of reading the constitution as a whole, as a system, avoiding a fragmented interpretation and adopting an inclusive and holistic approach to legal reasoning³.

It has also been evidenced a more specific “external institutional relationality”. This consists of the particular capacity of communicating with the European legal order both at the horizontal level (with other national courts) and at the vertical level (with the European Court of Justice and the European Court of Human Rights). “External institutional relationality” is an important feature belonging not only to the Italian experience but shared by many other European systems⁴. A new feature slowly

³ V. Barsotti, P. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context*, cit. at 2, 231-242.

⁴ M. De Visser, *Constitutional Review in Europe. A Comparative Analysis*, 392-440 (2013).

becoming, in various degrees, a common trait of the European model of constitutional adjudication, and which is crucial within the European networked system for the protection of rights⁵.

Relationality, in its multiple facets, is the positive core of the Italian model of constitutional justice. However, looking at the Italian system from a comparative perspective, two issues will be addressed which perhaps belong to the “dark side” of the Italian relational style. The issues are loosely linked. Both touch upon procedure and how it connects to models of constitutional justice - and, in the very end, to the democratic accountability of courts⁶.

2. Separate opinions

Taking into consideration the rules of procedure and the ways in which the Italian Constitutional Court effectively works, a principle of collegiality comes in great evidence. In every step of the decision process, all the 15 judges - although coming from different backgrounds and having reached the Court through different ways of appointment - work closely together and the final decision derives from the “the Court” in its entirety⁷. No concurring or separate opinions are allowed. A strict principle of collegiality distinguishes the Italian Constitutional Court not only from the supreme courts of common law countries but also from many of its European counterparts.

The German *Bundesverfassungsgerichtshof* is one of the best known examples of a civil law country allowing constitutional judges to issue separate opinions (*Sondervotum*). While judges

⁵ V. Barsotti, *Relationality. New Colors for the European Model of Constitutional Adjudication*, (forthcoming). “External institutional relationality” can be considered a new common feature of the European model of constitutional adjudication to be added to those pointed out by V. Ferreres Comella, *Constitutional Courts and Democratic Values* (2009). See also T. Groppi, *Introduzione: alla ricerca di un modello europeo di giustizia costituzionale*, in T. Groppi, M. Olivetti *La giustizia costituzionale in Europa*, (2003).

⁶ I like to thank Tania Groppi for having intelligently and constructively commented on the book *Italian Constitutional Justice in Global Context*. Her remarks helped me to better consider some problematic aspects of the Italian relational style. See T. Groppi, *Giustizia costituzionale “Italian Style”? Sì, grazie (ma con qualche correttivo)*, in 2 *Dir. Pubbl. Comp. Eur.* (2016).

⁷ V. Barsotti, P. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context*, cit. at 2, 43-49.

sitting in ordinary courts are bound to respect the secrecy of deliberations and votes, since 1971 constitutional judges represent an exception to this rule.

A slightly different case is that of Spain, which has allowed separate opinions for the Constitutional Court from the very beginning of its functioning, in 1979, and constitutional judges are used to write separately much more frequently than their German colleagues. Moreover, in Spain, ordinary Supreme Court's judges can publish separate opinions also and this is quite unique in continental Europe.

After the breakdown of the socialist regimes, most Central and Eastern European countries largely adopted a German model of constitutional adjudication including the possibility of publishing separate opinions.

A comparative overview clearly shows that the vast majority of European Constitutional Courts, although following different practices, and the European Court of Human Rights permit judges to hand down multiple decisions⁸. As for the European Court of Justice, the issue is under serious discussion. This is the case notwithstanding the civil law tradition that decisions come from the entire court and represent a single will, therefore precluding the identification of individual judicial personalities. Since many European countries follow the common law style and allow constitutional judges to publish concurring and dissenting opinions, they have taken advantage of the migration of constitutional ideas⁹.

⁸ A very useful and instructive study, which takes into consideration both Supreme and Constitutional Courts, is published by the "Policy Department of Citizens' Rights and Constitutional Affairs of the European Parliament": *Dissenting opinions in the supreme courts of Member States* (2012).

⁹ The traditional distinction between common law and civil law is becoming more and more blurred. The "converging trend" is common language among comparative scholars (although not universally agreed upon). This is particularly true when it comes to style of opinions. Taking into account both constitutional courts and ordinary courts, the divide between common law and civil law is far from sharp. A simple example. On one side, in Spain, a traditional civil law country, the practice of *voto reservato* is historically known and presently both ordinary judges and constitutional judges write separate opinions. On the other side, Ireland represents a rare exception since the constitution explicitly prohibits the Supreme Court the publication of separate opinions in most constitutional cases. A seminal article on style of opinions in comparative perspective and which describes the historical and procedural

This is not yet the case in Italy. After an intense debate that considered both the strengths and the weaknesses of separate opinions, as well as the historical, cultural and institutional reasons that explain the difference between common law and civil law judicial style, the principle of collegiality - and the related, but not necessarily inseparable, principle of secrecy of deliberation - still prevails¹⁰.

The debate on separate opinions is commonplace in comparative law discourse and pros and cons are well known.

Separate opinions favor courts' accountability and the transparency and sharpness of their reasoning; a plurality of opinions candidly shows the complexity of constitutional interpretation; moreover, the dissenting opinion of today can become the majority of tomorrow and therefore separate opinions can contribute to the dynamism of case law.

On the other hand, the principle of collegiality is a way of protecting the Court from the pressures and interferences of politics: allowing judges the opportunity to express their views freely, without having to justify their position outside the Court. This is particularly important in a system where constitutional judges have no life tenure but a fixed term of nine years, as in Italy. In addition, the prohibition on disclosing individual opinions favors judicial modesty and is thought to discourage from excessive emphasis on the judge's person as an individual rather than in the institutional role of the judge. In the Italian case, it is also underlined the importance of crafting the Court's decisions through compromise, which unfortunately does in some cases contribute to cryptic and opaque reasoning, but it is said to correspond in part to the nature of the Constitution itself, which represents a compromise among many fundamental principles that all need to be balanced.

roots of the common law -civil law distinction is G. Gorla, *La struttura della decisione giudiziale in diritto italiano e nella "common law": riflessi di tale struttura sull'interpretazione della sentenza, sui "Reports" e sul "Dissenting"*, in *Giur. It.*, Parte I, Sez. I, c. 1232 (1965).

¹⁰ The Italian Constitutional Court itself has organized, from time to time, seminars for the discussion of separate opinions. See <http://www.cortecostituzionale.it/documenti/convegniseminari>. See also S. Cassese, *Lezione sulla cosiddetta opinione dissenziente*, in 4 *Quad. Cost.*, 973 (2009).

However, while views about separate opinions vary, there is a general agreement that these best serve their purpose if they are limited in number, circulate in advance, and are drafted in a respectful manner.

In the end, Italy belongs to a small group of European countries (Italy, Austria, Belgium, France, Luxembourg, and Malta) not allowing separate opinions for constitutional court's judges¹¹. From a comparative perspective, something is missing.

3. *Amici curiae*

Something else is missing in the Italian model of constitutional adjudication. It is well known that the Italian system is a centralized one, and constitutional questions reach the Constitutional Court mainly through the referral of the ordinary judge that has been considered the "gatekeeper" of the Constitutional Court¹². This is the incidental method of judicial review, which helped ordinary courts and the Constitutional Court to build a loyal cooperation; and which is an important part of the Italian relational style.

In the constitutional proceedings, that is, in the process that unfolds before the Constitutional Court, once the case is referred to it, only the parties to the original case can present briefs and oral arguments. The absence of subjects advocating interests different or complementary to those of the parties to the case from which the constitutional issue originated is remarkable.

The rules of procedure and the tradition have created an extremely "closed" system. The idea of *amici curiae* is foreign to the Italian Constitutional Court.

Again, this feature of the Italian model is important from a comparative perspective - given the fact that a great number of courts performing constitutional adjudication are more open than the Italian one.

Almost every common law jurisdiction in the world, in which generally a diffuse system of judicial review is at work, recognizes some form of *amicus curiae* participation. The most

¹¹ K. Kelemen, *Dissenting Opinions in Constitutional Courts*, in 14 *Germ. Law J.*, 1345 (2013).

¹² P. Calamandrei, *Il procedimento per la dichiarazione di illegittimità costituzionale*, in *Opere giuridiche*, Vol. III, 372 (1965).

renowned and obvious example is that of the United States where significantly the role and number of *amici* briefs changed with the shift from what Abram Chayes called a private law model of litigation to a more public one¹³. Australia, Kenya and Hong Kong can also be mentioned. The Constitutional Court of South Africa is another important case. In many systems of Latin America friends of the courts (supreme and constitutional) are well known: Argentina, Brazil, Ecuador, Mexico, Panama, Paraguay, and Peru.

In Europe, the European Court of Human Rights acknowledges the participation of interest groups to the judicial process.

The German *Bundesverfassungsgerichtshof* permits “knowledgeable third persons” to submit written brief in proceedings before it. This mechanism appears to have been frequently used by unions, churches or other religious institutions, refugee organizations, representatives of the government or administration, and university professors.

Amicus participation is allowed in some form, although not expressly codified in procedural rules, in the constitutional courts of the Czech Republic, Slovakia, and Latvia.

In France, friends are welcome not only, since the constitutional reform of 2008, in the *Conseil Constitutionnel*, but also in the ordinary supreme courts.

Presenting to the court all the different perspectives and interests involved in the litigation can be crucial, especially when it comes to fundamental rights that often must be balanced one with the other; or when it comes to cases that involve the public general interest, such as environmental issues.

The comparative approach shows a widespread *amici* participation and its importance in litigation that involves hard choices between conflicting rights and values.¹⁴ However, the analysis also highlights some possible downsides of a very open system of constitutional adjudication. First, it can amplify the discretionary power of courts: What are, for instance, the criteria for the admission of *amici* briefs? Who are the persons, groups,

¹³ A. Chayes, *The Role of The Judge in Public Law Litigation*, in 89 Harv. L. Rev., 1281 (1976).

¹⁴ Unfortunately, comparative studies and research on *amicus curiae* are not as developed as those on the decision making process of Supreme and Constitutional Courts in general and on separate opinions in particular.

associations allowed to present *amici* briefs? Various procedural solutions can be adopted for such problems, but the issue is a delicate one. Second, and probably more important, in a global context of litigation, within a “global community of courts”¹⁵, powerful lobbies tend to be extremely active and the same groups and organizations (generally non-governmental organizations) present with force their interests to different courts belonging to different cultures. If a positive general effect of this phenomenon is a world where comparative law arguments are becoming “inevitable”¹⁶, the negative effect is that it can favor an excessive politicization of the system of adjudication, emphasize the trend towards “juristocracy”¹⁷, and promote a standardization of values with the prevalence of the most economically or culturally strong.

4. The importance of being open

Despite the awareness of some negative effects of separate opinions, and of the possible dangers of a system of constitutional adjudication which becomes very much open to external (global) influences, the comparative mirror reflects a couple of dark spots for the Italian relational style of constitutional adjudication.

The countermajoritarian difficulty, although theorized and perceived in slightly different ways on the two sides of the Atlantic, is always around the corner¹⁸. Concerns about the accountability and transparency of legal institutions are common to many systems. Courts can overcome the countermajoritarian difficulty by implicitly engaging in societal debate and allowing political institutions to respond. They have the possibility of enhancing the legitimacy of constitutional decision-making as they provide opinions with reasoned based justifications. They are able to facilitate and encourage consensus, and provide a forum

¹⁵ A.M. Slaughter, *A Global Community of Courts*, in 44 Harv. Int'l L. J., 191 (2003) and Id., *A New World Order* (2005).

¹⁶ M. Tushnet, *The Inevitable Globalization of Constitutional Law*, in 49 Vand. J. Int'l L., 985 (2009).

¹⁷ R. Hirschl, *Towards Juristocracy. The Origins and Consequences of New Constitutionalism* (2007).

¹⁸ A.M. Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, 14-33 (1962).

where differences can be smoothed and compromises reached¹⁹. An essential role of constitutional courts is that of enabling broad, deliberative exchanges for which they are an appropriate forum. Deliberative judicial lawmaking is a multifaceted phenomenon, making constitutional courts actors in society-wide deliberation; in this capacity, courts can also engage in institutional dialogue and reinforce political deliberation.²⁰

Opposed forces are at work in Europe. The constant search for cultural cohesion clashes with the strong desire of protecting constitutional identities. The ideal of an inclusive society is often at odds with a rapidly evolving multiculturalism. The tension between global and local is becoming dramatically evident. The process through which Constitutional Courts decide cases is an essential tool for dealing with conflicts connected to the new European scenario. European Constitutional Courts must take advantage of an open deliberative approach to decision making in order to find their way to tame the complexities of the new plural societies and to mediate between conflicting values.

Separate opinions favor transparency, honesty and represent an important choice for candor. A more open court is a more legitimate court, and the participation of all the interests and values involved in the litigation favors public acceptability. Both instances, in the end, can improve mutual and responsible understanding between the Italian Constitutional Court and the people. Both instances can contribute strengthening the relational nature of the Italian Constitutional Court.

¹⁹ A. Mazmanyan, *Majoritarianism, Deliberation and Accountability as Institutional Instincts of Constitutional Courts*, in P. Popelier, A. Mazmanyan & W. Vandenbruwaene (Eds.) *The Role of Constitutional Courts in Multilevel Governance*, 167 ff. (2013).

²⁰ P. Popelier, A. Mazmanyan & W. Vandenbruwaene, *Constitutional Courts and Multilevel Governance in Europe. Editors' Introduction*, in P. Popelier, A. Mazmanyan & W. Vandenbruwaene (Eds.) *The Role of Constitutional Courts in Multilevel Governance*, cit. at 19, 11.

OF BRIDGES AND WALLS: THE “ITALIAN STYLE” OF CONSTITUTIONAL ADJUDICATION*

*Marta Cartabia***

Abstract

Taking into account the methodology adopted by the Italian constitutional Court in its legal reasoning, the essay puts forward a framework of its jurisprudence, showing the approach followed in constitutional adjudications. In order to retrace the trends of the Italian constitutional judge, the author follows two charts that, in 60-years history, inspired the intervention of the constitutional Court in Italy: an “institutional relationality” and an “interpretative relationality”. In this perspective, on the one hand, the article examines the relationship that the Italian Court establishes with the other branches of government at national level. On the other hand, the essay considers the effects of European integration and globalization on constitutional law in general, scrutinizing the interaction between the Italian constitutional Court, the Court of Justice of the European Union and the European Court of Human Rights.

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TABLE OF CONTENTS

| | |
|--|----|
| 1. A challenging and successful story..... | 38 |
| 2. Relational capabilities as a relevant indicator for comparative studies..... | 42 |
| 3. Institutional and interpretative relationality..... | 44 |
| 3.1. Institutional relationality..... | 47 |
| 3.1.1. The Constitutional Court and ordinary courts..... | 47 |
| 3.1.2. The Constitutional Court and European Courts..... | 49 |
| 3.2. Interpretative relationality..... | 51 |
| 3.2.1. An integrated legal reasoning..... | 52 |
| 3.2.2. Balancing human rights..... | 53 |
| 4. Conclusion..... | 54 |

1. A challenging and successful story

A fortunate coincidence brings us to Bled to celebrate the 25th anniversary of the Slovenian Constitutional Court, while the Constitutional Court of Italy – which I am honoured to represent – has just turned 60. Indeed, its first decision was issued in April 1956.

The Italian Court is one of the earliest examples of the “European model of constitutional review of legislation” to develop in the aftermath of World War II together with the German *Bundesverfassungsgericht*. Both of these courts followed the pioneer of all European constitutional courts – the Austrian one – as revisited under the influence of the United States’ experience¹.

Anniversaries are invitations to learn from history. The question thus arises: what we can learn – if anything – from the Italian history of constitutional adjudication? In other words, what does the balance of these 60 years of history look like?

I would say that – all things considered – the story of the Italian Court is one of success, although it has met its fair share of challenges.

When the Italian Court was established, the legal and political environment was not at all favourable to the judicial review of legislation. For different reasons, the major political

¹ On this point, M. Cappelletti, *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato* (1968); M. Cappelletti, W. Cohen, *Comparative constitutional law: Cases and materials* (1979).

parties in Parliament were hostile; the judiciary was suspicious; and the majority of legal scholars were wary. All things considered, the new institution was set up in an inhospitable environment.

Nothing in the legal and political culture was ready to welcome the new special constitutional body, and yet the Italian legal system very much needed it. As most European countries recovering from the totalitarian era, Italy was under pressure to introduce a judicial review of legislation. During the twenty years of the Fascist regime, a huge number of shameful and atrocious crimes were committed *through* the law, rather than *despite* the law. Generally, the rule of law was formally respected, at least from the procedural point of view; however, from a substantive point of view, the legal provisions issued by the national Parliaments in those years were at odds with the most basic sense of justice. Suffice it to recall one example: the racial legislation issued by the Italian Parliament in the late 1930s, which openly and severely discriminated against and persecuted Jews and other groups on the ground of race. Having this background in mind, the national constitutions approved after the end of the war, starting with the German and the Italian ones, unsurprisingly introduced the judicial review of legislation, together with special procedures for constitutional amendments; furthermore, they were enriched with a generous catalogue of fundamental rights, for the protection of which a new special judge was established. For similar reasons, other European countries followed the same route once they were released from the bondage of dictatorship: this was the case with Spain and Portugal in the 1970s and 1980s, and, some years later, with all Central and Eastern European countries after the fall of Communism².

In Europe, all post-totalitarian constitutions gave space to constitutional adjudication and established special tribunals for the purpose. Constitutional courts were, and still are, regarded in Europe as watchdogs against all forms of "legal injustice", as Gustav Radbruch stated in a famous book of 1946. And rightly so.

² An excellent overview of the diffusion of constitutional adjudication in Europe and around the world is provided by T. Groppi, *Introduzione: alla ricerca di un modello europeo di giustizia costituzionale*, in T. Groppi, M. Olivetti (eds.), *La giustizia costituzionale in Europa* (2003).

Nonetheless, at the time, the Italian legal and political culture was still imbued with the key concepts and structures of nineteenth-century modern constitutionalism, which was based on the centrality of parliaments and of the principles of *légalité*, the *volonté générale*, the rule of law and the separation of powers. To reconstruct a democratic order after the shameful experience of the Fascist period, the founders of the new Republic naturally relied upon the existing traditional institutional architecture: however, the presence of a powerful judge vested with the competence of reviewing parliamentary legislation was somewhat inconsistent with that framework.

The Italian constitutional mindset of the post-World War II period was a strange mix of British and French nineteenth-century legal tradition. On the one hand, according to the British legal tradition, the principle of the "sovereignty of Parliament" was undisputable: the legislature was the sole institution vested not only with law-making power but also with a "permanent constitution-making" power. On the other, unlike the British, but very close to the French tradition, the Italian judiciary was meant to be *la bouche de la loi*, and was composed of judges "subject to the law" (Article 101 of the Italian Constitution). The judiciary consisted of bureaucratic staff, and the judicial function was conceived as rather mechanical.

Consider that one of the most popular and influential books was *Le gouvernement des juges* ("The government of judges"), written by E. Lambert. The book was published in 1921 and based on an account of the power held by the judiciary in the United States during the Lochner Era. The description of such an activist Supreme Court became a veritable spectre for the European statesmen of the time.

In those years, the fundamental pillars of modern continental European constitutionalism were averse to the idea of judicial review of legislation. In Europe, distrust towards the judiciary, together with a great emphasis on "the law" and "parliaments", was part and parcel of the major legal myths of the time³.

The clearest sign of this distrust towards the new Constitutional Court was the delayed implementation of the

³ P. Grossi, *Mitologie giuridiche della modernità* (2007).

institution. Indeed, it was envisaged in the Constitution of 1948, but implemented only in 1956 – eight years later.

Moreover, even after its implementation, the Supreme Court of Cassation, adopted a conservative approach in its case law⁴ that was likely to tame the role of the new Constitutional Court. I refer, in particular, to the “programmatically vs. preceptive norms” doctrine.

The idea was that the Constitution consisted largely in principles and not in preceptive rules, and those principles – defined as *programmatically norms* – were not suitable to be applied by the courts, but rather required prior implementation by Parliament. As long as such parliamentary legislation was not adopted, the Constitution remained essentially ineffective. This doctrine would have placed the implementation of the Constitution by and large in the hands of the political bodies, removing it from those of the judiciary. Certainly, had this doctrine taken root, constitutional review would have been much less effective.

However, despite the early distrust, the Italian Constitutional Court soon became one of the most influential authorities in the Italian institutional architecture, quickly gaining the utmost respect from all other branches of government.

How did the new Constitutional Court respond to such an unfavourable context? How did the Constitutional Court interact with its opponents? What “strategy” did the Court adopt to overcome the pervasive resistance against it at the dawn of the Republic?

Since its very origins, the Italian Court has adopted a twofold attitude. On the one hand, it has shown solid self-awareness and high consideration for its own mission; on the other, it has maintained a very open and relational approach to other actors, both political and judicial. Later, the Court began to interact with its European counterparts following a similar approach. In the search for its own role in the national and European institutional order, the Italian court has proved to be a resolute guardian of the national constitutional identity and yet open to and cooperative with other counterparts.

⁴ E. Lamarque, *Corte costituzionale e giudici nell'Italia repubblicana* (2012).

In the following pages, I would like to insist on this second feature: recalling John Merryman, it can be said that the "Italian style" of constitutional adjudication lies in its "relational character"⁵. This "relational style" may become of some interest for all European courts in the current context, one in which they are called upon to operate in a space of constitutional interdependence and interaction.

2. Relational capabilities as a relevant indicator for comparative studies

It is somewhat unconventional to describe an institution according to its approach to other actors and its counterparts. Generally, institutions are qualified by their composition, their organization, the procedures they follow, their competences and the effects of their actions. Their relational approach to other bodies tends to escape the interest of traditional scholarship.

As for constitutional courts, comparative legal scholars propose a classification⁶ that contrasts, for example, centralized and diffuse systems of judicial review of legislation, referring to the judicial body that is given the power of judicial review; abstract or concrete procedures, as regards access to the court; *ad hoc* or *erga omnes* effects, in relation to the effects of their decisions; or fundamental rights adjudicators or institutional dispute resolvers, in terms of the court's "core business".

In accordance with these benchmarks, they have elaborated a "continental European model of constitutional adjudication"⁷, arising out of the convergence between the Kelsenian model and the concrete US system. The Italian court fits into this model perfectly.

As any other constitutional court of the European family, the Italian Court is a *special judge*: it performs its function following judicial procedures, but the procedure to appoint its members is different from that adopted for other judges, and involves other political bodies. Moreover, it is also a *specialized*

⁵ This idea is developed in V. Barsotti, P.G. Carozza, M. Cartabia & A. Simoncini, *Italian constitutional justice in global context* (2015).

⁶ M. De Visser, *Constitutional review in Europe. A comparative analysis* (2013).

⁷ V. Ferreres-Comella, *Constitutional Courts and democratic values. A European perspective* (2009).

body, which deals only with constitutional adjudication. Unlike supreme courts, European constitutional courts are not part of the ordinary judicial branch and their jurisdiction is one of pure constitutional adjudication. Finally, constitutional courts are *centralized bodies*: judicial review of legislation falls within the exclusive province of the Constitutional Court. Had a US-style judicial review of legislation been introduced in Europe, where the principle of *stare decisis* does not endow judgments with the same binding force as it does in common law countries, then values such as legal certainty, the uniform application of the law, and even the equality of citizens would be threatened. For these reasons, ordinary judges were prevented from scrutinizing legislation – especially, to preserve the uniform application of the law – whenever a legislative provision conflicted with the Constitution.

Although the traditional approach to comparative constitutional adjudication remains meaningful and undisputed, new indicators are becoming relevant and should be taken into consideration, to fully understand each individual constitutional experience.

The current European context has undergone an important transformation, and new features have become relevant in assessing the true identity of national constitutional courts. Today, European constitutional adjudication occurs in complex and composite legal systems populated by multiple systems of protection of fundamental rights, in which various courts – with overlapping jurisdictions – compete with each other; and in which an increasing number of charters, constitutions and conventions have entered into force, each of which envisages new bodies for the protection of rights, such that quasi-judicial bodies and independent agencies operate alongside traditional courts and tribunals. The European constitutional landscape is densely populated indeed.

Many cases and controversies are brought before different courts, and many of them require the concurrent implementation of national and transnational legal standards.

If we consider the complexity of this context, a new taxonomy of constitutional courts may be elaborated on the basis of their general attitude towards other actors. Today, the courts' relational qualities matter. Similar courts may behave in a

solipsistic or a cooperative manner, or may take a confrontational or a dialogical stance.

In this respect, if there is a single phrase that can describe the Italian Constitutional Court, this is its "relational approach to constitutional adjudication". Italian constitutional law is intensely relational – it speaks of cooperation, connection, interdependence, interactions, links, networks, and the like.

Indeed, no single idea is capable of capturing the essence of an institution as rich in history, complexity, and even contradiction as the Italian Constitutional Court. However, many of the interesting aspects of the Court and its case law that stand out when viewed in comparison with other experiences may be summed up with the term "relationality". At its best, the Court operates with notable attentiveness to the relations between persons, institutions, powers, associations and nations.

This is not to imply that the Italian Court is always consistent and successful in maintaining this distinctive identity, nor that its relational approach is always an unambiguous asset. As has been remarked⁸, some aspects of the process and style of the Court's opinions are not an outstanding example of openness and transparency.

Nor it can be suggested that the Italian Court is absolutely singular in this effort at relationality: any successful constitutional tribunal must attend, to some degree, to the political realities of its position within the constitutional order, and the Italian court undoubtedly still has much to learn from other systems in this regard.

Nevertheless, when reviewing the history of the institution, it is helpful to adopt a hermeneutic of positivity – to tease out, from a complex jumble of data, that which is of particular value, and to offer it as a narrative that calls forth the best version of the Court. Viewed in this perspective, the relational qualities of the Italian Court are valuable assets, worth articulating and sharing.

3. Institutional and interpretative relationality

⁸ T. Groppi, *Giustizia costituzionale "Italian Style"? Sì, grazie (ma con qualche correttivo)*, 2 Dir. Pubbl. Comp. Eur. 321 (2016).

What are the origins of the relational mindset of the Italian Constitutional Court?

To a significant degree, this pervasive feature of the Italian Constitutional Court emerges from the very particular intra-institutional relation-building capacity within the Court itself.

Indeed, relationality is imprinted into the very structure of the Court. Let us consider the composition and fabric of the Court. Of its 15 judges, five are elected by the Parliament, five are appointed by the President of the Republic and five are elected by the other branches of the judiciary: both ordinary and administrative bodies. Therefore, all the other branches of the State have a say in the appointment of the Constitutional Court's 15 members. Although the members of the Court are fully independent and do not answer to their "constituencies", they proceed from different bodies. This fact matters.

Moreover, although all judges are jurists, some of them come from the academy, as legal scholars; others from the bar; and yet others from the judiciary.

The constitutional judges are diverse due to their different sources of appointment - some selected by the highest courts of the ordinary judiciary, others by Parliament, and others by the President - and due to their different backgrounds, with career judges working alongside university professors and practicing lawyers. They are united by a common legal education, but differ in terms of their previous professional trajectories and personal cultural formation. This pluralism has always been a great asset of the Court.

This pluralistic composition matters if it is considered that the Court's rules of procedure are dominated by a paramount principle: that of *collegiality*. Justices are prompted towards dialogue and agreement because of the principle of collegiality that governs the Court's work. The Court's internal organization and working procedures are designed to encourage the judges to work intensely with one another; they are obliged to dialogue with one another. This fosters reciprocal cross-fertilization among the Court's members and their respective ideas, political and social backgrounds, cultures and mentalities; it also serves as the principal growth factor in the Court's capacity for building relations.

Every single step in the decision-making process requires the participation of all 15 members. Some features of the decisional process are worth noting, to fully appreciate the strict collegiality that governs the Italian Constitutional Court.

For example, unlike many other constitutional courts, the Italian Court never splits into chambers: every single case is discussed and decided by a plenary panel, even cases that may be minor or repetitive. No filter is applied to scrutinize the admissibility of an application, and every controversy enjoys the same procedural dignity.

Another expression of the principle of strict collegiality is that the individual voices of the judges cannot be recognized. The Court always speaks with one voice, and separate opinions are not allowed. Although the issue has been discussed from time to time, to date the Court has rejected all proposals aiming to introduce the plurality of opinions. Every decision is the result of the deliberation of all 15 members of the Court; even those who do not agree have a say and can contribute to the drafting of the Court's judgment. Without the possibility to publish a dissenting opinion, even those judges who were not part of the majority of the Court participate in writing the official judgment. The absence of separate opinions, and the requirement that the draft judgments be read together in chambers and collectively approved, fosters compromise and encourages the Justices to broadly incorporate the particular views of their individual colleagues into the final text. These methods favour efforts to reconcile and unify divergent views into a composite that cannot be reduced to the perspective of a single judge, politician or scholar.

A third characteristic of the Italian Court is that the President of the Court does not play a predominant role over the entire body; rather, his position is commonly defined as one of *primus inter pares* – first among peers. Indeed, an unwritten rule has been followed to date, with only a few exceptions: the President is chosen by seniority. Consequently, almost all of the constitutional judges have had the chance to chair the Court, albeit for a very short term (even of a few weeks or a few months). Even the most significant powers of the President of the Court – that of nominating the *juge rapporteur* for each controversy and that of casting a double vote in case of parity – are subdued, in a sense, by the brevity of his mandate. The opinion expressed by the

President of the Court does not control the opinion of the overall court at all: in this respect, his voice is no more relevant than that of the other members.

The Court's internal structural and procedural pluralism, and the principle of strict collegiality governing its operation, are reflected in its external activities. First, at least two dimensions of its relational approach to constitutional adjudication may be singled out: the institutional dimension and the interpretative dimension.

3.1. Institutional relationality

In the performance of its duties, the Italian Court – as any other constitutional court – must cooperate with other branches of government: the Parliament, the Government, the President of the Republic, the Regions, and other components of the Judiciary, at national and European levels. All the functions of the Italian Constitutional Court imply interaction with other bodies. These interactions may be adversarial or synergic. The distinctive trait of the Italian experience, however, is the latter. Occasional conflicts do not contradict the general trend, consisting of dialogue, collaboration, cooperation, accommodation, compromise, and the like.

As a paradigmatic example, the relations of the Constitutional Court with other branches of the national and European judiciary are worth examining in further detail. Such branches are, on the one hand, in “competition” with the Constitutional Court; on the other, however, they are necessary partners.

3.1.1. The Constitutional Court and ordinary courts

Cooperative relations with other national judicial bodies have been crucial for the proper operation of constitutional adjudication in Italy. The incidental method of review, which remains the main pathway of access to the Constitutional Court, entrusts ordinary judges with the role of gatekeepers of the Constitutional Court, as defined by Piero Calamandrei⁹, as it is precisely ordinary judges who decide which cases will be

⁹ P. Calamandrei, *Il procedimento per la dichiarazione di illegittimità costituzionale*, (1965).

admitted for constitutional review and which will not. This mechanism is based on the cooperation of ordinary judges. If ordinary courts do not activate the procedure, the Constitutional Court cannot play its part.

The incidental procedure is structured as follows¹⁰: when a judge, in the course of a judicial proceeding concerning any kind of case - criminal, property, tort, administrative - is called upon to apply a legal provision the constitutionality of which is questionable or suspect, he is required to suspend the procedure and refer the case to the Constitutional Court, so that the legislation may be reviewed. Once the Court has issued a binding decision on the point, the ordinary judge can resume the case and decide it in accordance with the Constitutional Court's judgment.

Ordinary judges cannot review legislation themselves; however, they are involved in the constitutional review of legislation because they are the gatekeepers to the Constitutional Court. It is up to them to send a question of constitutionality to the Court. Loyal and active cooperation is thus necessary between ordinary judges and the Constitutional Court in its position as special judge for the judicial review of legislation.

As seen above, when discussing the early history of the Constitutional Court, smooth relations with the ordinary judiciary were not to be taken for granted: the case of the "programmatically vs. preceptive norms" doctrine is self-explanatory.

An important contribution to fostering respectful and synergic relations with national ordinary courts was given by the "living law doctrine" and by the method of *interpretation "in conformity with the Constitution"*.

According to the former, the Constitutional Court tends to review the challenged legislation as it is interpreted by ordinary courts, without imposing its own interpretation. When the case law of ordinary courts, and especially that of the Supreme Court of Cassation, uniformly adopts a given interpretation of a legal provision, the Constitutional Court accepts that interpretation as "living law" (*diritto vivente*). Consequently, the Constitutional Court decides the issue upon the assumption that the interpretation at issue is the correct one. Thus, when the Court finds the provision unconstitutional, it declares it null and void on

¹⁰ See Article 23 of Law n. 87 of 1953.

its face, rather than adjusting the problem at the interpretative level.

On the other hand, since the mid-1990s, the Constitutional Court has invited ordinary courts to read statutory texts in such a way that they concord with the principles enshrined in the Constitution. Ordinary judges, following the case law of the Constitutional Court, have adopted the so-called *interpretazione conforme a Costituzione* ("interpretation in accordance with the Constitution"): that is, they themselves construct meanings of statutes that are compatible with the Constitution and that do not violate it. Judges may sometimes even force the literal meaning of the text, to "save" the statute and therefore avoid referring the case to the Constitutional Court.

Through these doctrines, the Constitutional Court has displayed a great deal of trust in the ordinary judiciary, preserving the primary competence of the latter as the interpreter of legislation. As for the interpretative powers, these doctrines distinguish the domain of the ordinary judiciary - vested with the power to interpret parliamentary legislation - from the domain of the Constitutional Court - which is vested with the power of interpreting the Constitution and reviewing legislation according to it.

This distinction demonstrates respect for ordinary judges, and contributed a great deal to build good relations with them. Most of the Constitutional Court's decisions presuppose a healthy cooperation with the ordinary judiciary, including both lower courts and the highest courts (the Supreme Court of Cassation and the State Council). Without this inter-judicial relationality, the doors of the Constitutional Court would have remained closed, and the pronouncements of the Constitutional Court ineffective.

3.1.2. The Constitutional Court and European Courts

A similarly active and loyal cooperation is required for smooth relations with what shall hereinafter be referred to as the European Courts: the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).

As a matter of principle, in a centralized system as is the Italian one, the Constitutional Court is endowed with the exclusive and final power to review legislation. As a matter of fact, however, the Italian Constitutional Court is networked with other

judicial bodies: the ordinary judiciary – as seen above – and the two European Courts, the role of which is growing in significance.

Certainly, the missions of the national constitutional courts and those of the European Courts do not overlap, and neither of them has jurisdiction over constitutional judicial review of national legislation, which falls within the exclusive domain of the national constitutional courts. Nevertheless, the three legal orders – EU, ECHR, and national legal orders – have developed into a “composite” constitutional system and a number of interactions occur among their respective judicial bodies, especially when they act as human rights adjudicators. Each of them cannot do without the others.

Within the European context, the Italian Constitutional Court has dramatically changed its attitude over time, moving from a strict “constitutional patriotism” towards an incremental openness to the European environment. While, at the beginning of the European adventure, the Italian Court considered its supranational and foreign counterparts as aliens, a period of informal reciprocal influence then followed, during which the Italian Constitutional Court – while avoiding all formal reference to the case law of the two European Courts – was actually well aware of the case law developed in Luxembourg and in Strasbourg. Today, the European case law is an ordinary constituent of the legal authorities on the basis of which constitutional adjudication is conducted and justified.

The current framework of the relationship with the CJEU was established in 1984¹¹, although direct dialogue by means of preliminary ruling was inaugurated only in 2008 and confirmed in 2013¹²; as for the relationship with the ECtHR, the turning point is represented by the “twin” judgments issued in 2007¹³. However, long before opening up to direct dialogue with the European Courts, the Italian Constitutional Court maintained an implicit and silent, although influential, attention to their decisions. A similarly implicit and silent, but influential, consideration is paid by the Constitutional Court to foreign law and comparative

¹¹ Constitutional Court, Judgment n. 170 of 1984.

¹² Constitutional Court, Judgment n. 103 of 2008 and n. 207 of 2013. On this point, see the rich debate published by the Special Issue of the *German Law Journal*, n. 6 of 2015.

¹³ Constitutional Court, Judgments nn. 348 and 349 of 2007.

sources: whereas, in recent years, the Italian Constitutional Court has occasionally openly referred to the case law of other constitutional courts, the influence of the latter is actually much deeper than may be apparent on the surface.

In conclusion, Italian constitutional justice has incrementally entered into an active relationship with European, international, and comparative law, and especially with the judge-made law of the two European supranational Courts, in particular in human rights cases. While, in some areas, the impact of these external sources has induced the Constitutional Court to revise its previous case law and to develop new principles and standards, in other cases the Italian Constitutional Court intentionally takes a different position from European or foreign courts, especially when the core values of constitutional identity are at stake. In short, now the Court does engage in open and direct relations with external judicial bodies. However, those relations are not oriented towards an unreasoned importation of judicial solutions from the outside; rather, it is a two-way relation between peers, a dialogue that triggers constructive convergence but also leaves room for difference and distinctiveness¹⁴.

As a result, from the institutional point of view, the Italian Court is now a protagonist of a composite system of judicial review, which envisages the Constitutional Court at its centre, and includes other actors too – ordinary judges and European courts. The Italian Court is well aware of this fact and does its utmost to maintain good “neighbourly” relations with all of them.

3.2. Interpretative relationality

The relational institutional context within which the Constitutional Court operates resonates in its doctrines. The ability of the Italian Constitutional Court to establish sound and vital two-way relations with other institutional actors – both political and judicial, national and supranational – is in significant ways mirrored in the methods of constitutional interpretation that distinguish the Italian Constitutional Court, which could be defined as methods of “interpretative relationality”.

¹⁴ Constitutional Court, Judgments n. 264 of 2012 and n. 49 of 2015.

3.2.1. An integrated legal reasoning

In its legal reasoning, the Constitutional Court follows a comprehensive methodology, one that does not shy away from complexity. Indeed, a simultaneous multiplicity of approaches to constitutional interpretation can often be found in the decisions of the Italian Constitutional Court. Moreover, and even more significantly, the Court interprets the Constitution as a whole, as a system, avoiding the fragmented interpretation of a single provision removed from its contextual relationship with the other principles, rules and rights enshrined in the Constitution. The Court's methods of interpretation and of legal reasoning are broadly inclusive, go beyond the single textual provision at stake, and draw inspiration from the spirit of the Constitution.

From the methodological point of view, the Italian Court uses a holistic, syncretic, inclusive and integrated form of legal reasoning, one based on a composite combination of different approaches to constitutional interpretation.

Textual, teleological, historical, and systemic constructions of the Constitution are often jointly used in the Court's reasoning. To be clearer:

- the text does matter, but the Court is not trapped in a narrow form of textualism; it does not stick strictly to the written word of the Constitution or to literal interpretation of its provisions;
- the original intent may also be important, but has never been used as a conclusive argument;
- foreign law is taken into account, but does not control the Court's decision;
- changes in public opinion and in the legal and social context are taken into account – as “the living constitution” – although the Court does not hand over its interpretative power to popular sentiment;
- the Court does not disdain teleological interpretation, but also attaches great importance to its own precedents and to the coherence of its case law.

In other words: the Constitution is considered as a whole, as an integrated system, avoiding fragmented interpretation or the isolation of a single provision from other parts of the text.

3.2.2. Balancing human rights

This final remark brings us to another distinctive feature of Italian constitutional doctrine in the field of human rights.

The Constitution and the Constitutional Court endorse a relational understanding of individual rights, one that corresponds to the peculiar understanding of fundamental rights endorsed by the Italian Constitutional itself. Indeed, Article 2 of the Constitution establishes that rights belong to each person, considered as an individual and as a member of the social groups within which his or her life develops and flourishes:

“The Republic recognizes and guarantees the inviolable rights of man, both as an individual and in the social groups where his personality is expressed, and requires fulfilment of the inderogable duties of political, economic and social solidarity”.

Moreover, the individual rights listed in the Constitution are divided into four groups, which are titled as follows¹⁵:

- a. *civil relations*
- b. *ethical and social relations*
- c. *economic relations*
- d. *political relations*

Although fundamental rights are recognized to each individual, they concern the relational aspects of social life.

When brought to the bar, indeed, most cases involve a number of competing fundamental rights; this requires the Court to properly balance them all.

The Court insists on the fact that no individual right is absolute; all rights protected by the Constitution are to be balanced with other rights and relevant public interests. Therefore, a holistic, rather than piecemeal, interpretation of the Constitution is most appropriate in the field of fundamental rights. That is, rather than regarding the Constitution as an assemblage of fragmented and unconnected propositions, all the rights and values proclaimed within it are considered to be components of a unified mosaic, such that each element reveals its full meaning only in the context of a broader design.

The three doctrines that provide structure to the Court’s constitutional reasoning are balancing, reasonableness and proportionality.

¹⁵ Emphasis added.

A clear example of this approach to the protection of inviolable rights may be seen in Judgment n. 85 of 2013, which dealt with a complex case concerning the ILVA steel mills. The case involved the right to health and to a safe environment on the one hand, and the right to work (of a great number of people) and the right to free economic activity on the other. In its judgment, the Court clearly stated that:

"All fundamental rights protected by the Constitution are mutually related to one another and it is thus not possible to identify any one of them in isolation as prevailing absolutely over the others. Protection must at all times be "systematic and not fragmented into a series of rules that are uncoordinated and potentially conflict with one another" (Judgment 264/2012). If this were not the case, the result would be an unlimited expansion of one of the rights, which would "tyrannise" other legal interests recognised and protected under constitutional law, which constitute as a whole an expression of human dignity."

A careful reading of this passage shows that the Italian Court considers balancing rights to mean that: (a) no constitutional right has an absolute value, nor does it enjoy absolute predominance over the others – if it were otherwise, it would become a "tyrant" right; (b) the Constitution does not establish an abstract ranking of rights; (c) the balancing exercise requires flexible and unfixed relations between different rights, depending on the concrete case at hand; (d) balancing rights requires engaging in reasonableness and proportionality tests, and never allows the complete sacrifice of one of the values at stake.

4. Conclusion

Institutional relationality, interpretative relationality: a 60-year history of the Italian Constitutional Court has shown how fruitful this approach to constitutional adjudication can be.

This is not a minor legacy to constitutional adjudication in the new millennium.

European integration and globalization have affected constitutional law and constitutional adjudication to such an extent that national constitutional courts are now inevitably linked in a "network". They interact with other bodies – whether they

wish to do so or not – within the national legal system as well as outside of it, with their foreign or supranational counterparts.

In such a context, where the diversity of interrelated cultures can easily turn into conflict and distrust, good mutual relationships are vital for the flourishing of constitutional adjudication and to better serve the legal protection of human dignity.

It helps to build bridges, rather than walls.

IS THERE AN “ITALIAN STYLE” IN CONSTITUTIONAL ADJUDICATION?*

*Oreste Pollicino***

Abstract

The article, taking inspiration from the recently published book “Constitutional Adjudication in Global Context” by Barsotti, Carozza, Cartabia and Simoncini, deals with the question whether there is an “Italian style” in constitutional adjudication will be explored. In order to answer to the above mentioned question, the paper focuses on the internal and external challenges to the emerging and consolidation of the Italian Court’ crucial position in Italian constitutional landscape. The main idea behind the paper is that such challenges favored the rise and the growth, in the constitutional case law, of a judicial style that is, in a way, “by design” aimed at fostering the relational dimension and at allowing the Italian Court to adapt (and to adjust) its strategy depending on the evolution of the relevant context. Thanks to a sort of “internal unchosen training”, the Italian Constitutional Court has been able to find itself well trained and more prepared than other European courts to play a key role in the current period of cooperative constitutionalism in Europe.

TABLE OF CONTENTS

| | |
|---|----|
| 1. Introduction..... | 57 |
| 2. The “Italian style” according to Merryman..... | 57 |
| 3. External challenges..... | 60 |
| 4. Internal challenges..... | 62 |
| 5. Conclusions..... | 70 |

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1. Introduction

In this article the question whether there is an “Italian style” in constitutional adjudication will be explored. It ought to be stated at the outset that whether the answer is right or wrong, it depends on what exactly the question means (or suggests) to imply.

If the question aims at suggesting that the ambition to establish a variety of relationships with other actors (from an institutional and interpretative point of view) is an exclusive feature of the Italian Constitutional Court (hereinafter, “ICC”), then the answer is certainly a negative one. As Patricia Popelier claimed, it can be argued that a European common style in constitutional adjudication has emerged and is now well established.

If, by contrast, the idea of an Italian style in constitutional adjudication is not meant to suggest that there is an Italian peculiarity, but, rather, that some distinctive traits emerge from its first 60 years of jurisprudence ICC case law, then the answer can be a positive one. This seems to be also the perspective followed by the authors of the book that is under review. “We do not want by any mean” - they make clear - “to suggest that the ICC is absolutely singular in this effort at rationality”¹.

But first the meaning and significance of the term “Italian style”, so far as it is relevant to the role of the ICC in its controls, will be considered. The discussion will then broaden to the “external” and “internal” challenges and this will lead to a better consideration of the conjecture set out initially.

2. The “Italian style” according to Merryman

As it is well known, the idea that points out the existence of special features in the Italian style has been introduced for the first time, more than fifty years ago by John Henry Merryman, through three seminal articles regarding, respectively, doctrine, law and interpretation as developed in the Italian legal context².

¹ V. Barsotti, P. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context* (2016), 235.

² J.H. Merryman, *The Italian Style*, 18 *Stan. L. Rev.* 39, 396, 583 (1965-66).

It is helpful to begin with a couple of quotations which give a clear idea of the bridge existing between Merryman's inspiring words and the Authors' intuition to focus on an Italian style in constitutional adjudication. First, he observed that "the norms, institution and process of Italian law become truly Italian only when they are seen through Italian eyes". Against this background, it is easy to observe that the book under discussion is the first attempt, in the Italian scholarly debate, to shed some light on the distinguishing features of the Italian constitutional adjudication for a broader audience. Not only is the book written in English, but it also uses a distinctive approach. Instead of following the approach that is traditional in Italian commentaries and treatises, this book is based on both a deductive approach and a wide use of cases (precisely for this reason, it would be very helpful and useful to arrange an Italian version of the book).

Secondly, in an almost prophetic way, Merryman observed that: "The future would seem to hold an expanded role and greater prestige for Italian judges. In part this will come through deflation of the bloated conception of the legislator that has loomed over continental legal thought since 1804. In part will flow from a reconsideration of nature and rigidity of the separation of powers".

Merryman's call for a reconsideration (if not crisis) of the traditional way to conceive the separation of powers is particularly helpful here. It highlights what is the main reason that lies behind the rise of the relationality factor, which the Authors have the great merit to recognize as the main ingredient of the "Italian style" of constitutional adjudication. A judicial style based on a relational cooperative and adaptive approach which the ICC was in a way forced to develop in order to face several challenges over the last 60 years.

Such challenges favored the rise and the growth, in the ICC case law, of a judicial style that is, in a way, "by design" aimed at fostering the relational dimension and at allowing the ICC to adapt (and to adjust) its strategy depending on the evolution of the relevant context. Thanks to a sort of "internal unchosen training", the ICC has been able to find itself well trained and more prepared than other European courts to play a key role in the current period of cooperative constitutionalism in Europe.

Before considering some cases in which the ICC has shown the aforesaid attitude to change its skin without changing its identity, it is helpful to shortly set the relevant European background in which the Italian style is rooted and the language of the ICC is spoken. Few quotations can shed some light on the essence and uniqueness of the European constitutionalism in the last decades. This first is drawn from Mauro Cappelletti (1986), according to whom “unlike the American Supreme Court and the European constitutional courts, the ECJ has almost no powers that are not ultimately derived from its own prestige, [and the] intellectual and moral force of its opinions”. The courtesy pedagogy is a key element in the Court of Justice reasoning³. The second quotation is drawn from Giuseppe Federico Mancini, for a long time Advocate-general at the ECJ. In 1989 he observed that “the Luxembourg Judges have been able to develop a judicial style which explains how it declares the law”⁴. Finally, in 2000 Joseph Weiler argued that the constitutional ingredient which shapes the European legal order’s uniqueness is a distinctive element; that is, that “constitutional actors in the Member States accept the European Constitutional discipline not because as a matter of legal doctrine [...] They accept it as an autonomous voluntary act endlessly renewed by each instance of subordination”⁵. This implies that unlike constitutional courts, the Court of Justice of the European Union can rely only on a “voluntary obedience” by the political and judicial actors of Member States whereas the formers can always use the weapons of the obligation to obey.

Despite the different perspectives followed by the three points of view just mentioned, they seem to share the same common denominator: that is, the tension and the alleged antinomy between the authoritativeness of the European courts on the one hand, and the authority of constitutional courts. In other and clearer words, I am arguing that in the current stage of cooperative constitutionalism, the equation “authoritativeness:

³ See M. Cappelletti, D. Golay, *Judicial Branch in the Federal and Transnational Union*, in M. Cappelletti, M. Seccombe, J.H.H. Weiler (eds.), *Integration Through Law*, (1986), 333, note 281.

⁴ G.F. Mancini, *Attivismo e autocontrollo nella giurisprudenza della Corte di giustizia*, 30 Riv. Dir. Eur. 233 (1990).

⁵ See J.H.H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, 10 Harvard Jean Monnet Paper 13 (2000).

European courts = authority: constitutional courts" is likely to be wrong, or at least misleading. Indeed, more than ever, for the constitutional courts it is always more crucial the moral and persuasive force of their opinions, beyond their original power to rely on (in Weiler's words) an obligation to obey. It is more in the dimension of authoritativeness than on that of authority that constitutional courts must use their best cards. This is true, in particular, for those constitutional courts that aim to play a front runner role in the (not so) new stage of global constitutionalism.

The binding effects of constitutional courts' judgments are to an extent natural and almost inevitable. However, what is striking - and this Book confirms it - is that the ICC is in a privileged position to play its role in the global arena precisely because of the "unchosen domestic training" mentioned before. Both external and internal challenges forced the e ICC to go beyond the formalistic self-reassurance related to the binding nature of its judgments and to develop a pedagogic, cooperative and relational style or, to borrow again Cappelletti's words, to elaborate a courtesy pedagogy.

3. "External" challenges

In practice, the elaboration of the Court's relational approach is the product of several causes. There are, first, "hostile" external factors. There are, second, internal challenges; that is, the cases in which an initially unsuccessful judicial approach has required an *ex post* creative judicial "adjustment".

With regard to the external hostile factors, reference must be made to the first and maybe hardest one that the ICC had to face in 1956, when it finally started to operate. To give an idea of the institutional environment in which the ICC operated, nothing is more significant than the words of Court's first President, Enrico de Nicola: "when we arrived we had no chairs, there was a single member of staff and we had to get a glass of water by ourselves"⁶.

In this background, which is described by the book under review⁷, three main challenges (or hostile elements) contrasted the

⁶ V. Barsotti et al., *Italian Constitutional Justice in Global Context*, cit. at 1, 27.

⁷ *Ibid.*, 33.

ICC's attempt to legitimize itself as new actor in the Italian constitutional arena. First of all, there had been a full decade of diffuse constitutional review, by administrative and ordinary courts. Secondly, there was a significant asymmetry between the legislator and the ICC. While the former was considered as a sort of omnipotent authority, the latter's lack of legitimation was manifest in the debate which characterized the Constituent Assembly. Some political forces openly opposed to the creation of a constitutional court - it was seen as usurping the roles of politicians in an undemocratic way. Finally, the judiciary was dominated by conservatism: an attitude of cultural inertia and lack of openness toward new methods.

That being the scenario, perhaps it would not have been too provocative to raise in 1956 a question (borrowing the title of an article by a judge of the European Court of Human Rights written in 1964): has the ICC a future?⁸

It is not too far from the true to affirm that it has been the same ICC in the first judgment (no. 1/1956) to make the decisive step to secure its own future by overstepping the aforementioned obstacles. And it did so in its own way (an Italian way).

A twofold element characterized the approach of the ICC. On the one hand, it engaged immediately in an elaborated, public reasoned discussion about the normative value of the Italian constitutional order. It is not by chance that it in the book under review the first judgment (no. 1/56) of the ICC is compared to *Marbury v. Madison*⁹. Similarly to the landmark US Supreme Court decision has pointed out¹⁰, the ICC clarified that Constitution is

⁸ H. Rolin, *Has the European Court of Human Rights a Future?*, 11 Howard L.J. 442 (1965). At the time Judge Rolin expressed this preoccupation, the European Court of Human Rights had ruled on only two cases in six years. The European Court of Human Rights ("ECtHR") started to operate in 1958. Its first case, a judgment was adopted in 1960, whereas in 1961 it ruled on the merits of a controversy. In 1962, in the second of the cases assigned them, ECtHR judges could only ascertain its irrelevance because in the meantime the Belgian government adopted measures to restore the claimant's position. Other two years were to pass before the Court was assigned a third case. The judgment for this case was only decided in 1967. With only three cases in eight years, there was reason to be worried.

⁹ 5 U.S. 137 (1803).

¹⁰ "The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other

the highest law of the land which must be taken seriously, even with regard to those provisions that were wrongly regarded - by some ordinary judges - as being only programmatic and, therefore, deprived of immediate effects. On the other hand, by showing at the same time a flexible, adaptive, relational approach in which there was no sign of constitutional arrogance, but rather an expression of cooperative constitutionalism.

This cooperative approach was addressed, first and foremost, to the judiciary. For the new court, it was simply vital to convince "common" (ordinary and administrative) judges raise questions of constitutionality before the ICC. And, since such judges were suspicious and reluctant to play the new "game", the ICC did its best to involve them in a conversation, or dialogue. Secondly, the ICC elaborated a successful approach *vis à vis* the legislator. Its approach was a mixture of deference towards Parliament - a short term strategy, seen retrospectively - and of emphasis on the need to implement constitutional provisions through legislative action¹¹. An important element of the Court's strategy was its choice to focus on legislation enacted before the entry into force of the Constitution (1948), that is to say the rules enacted under Fascism (1922-1943). This avoided or at least attenuated potential conflicts with the Parliament of the day.

4. Internal challenges

In this section I continue my consideration of the relationships between the ICC and other "players", focusing on the legal relevance and significance of the European Convention of Human Rights (hereinafter, ECHR). This will show the evolution of the relationships between the ICC and the European Court of Human Rights (hereinafter, "ECtHR").

The role of the ECHR has been significantly affected by the reform of the Italian Constitution that took place in 2001. Although such reform was meant to deal exclusively with the relationship between the State and Regions, it had an important impact on the status of both EU and international law. Article 117

acts, is alterable when the legislature shall please to alter it". 5 U.S. 137 (1803), 177.

¹¹ V. Barsotti et al., *Italian Constitutional Justice in Global Context*, cit. at 1, 34.

(1) of the Constitution now provides that “legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from the EU legal order and international obligations”.

A literal interpretation might suggest that the constitutional status of EU law has been compared to that of international law, European Convention on Human Rights (hereinafter, “ECHR” or “Convention”) included. However, the courts have not embraced this interpretation. Immediately after the entry into force of the new constitutional provision, a new brave judicial approach¹² by ordinary judges held that the well-known paragraph 16 of the landmark decision of the Court of Justice in *Simmmenthal*¹³ applied to the ECHR.

Only six years after 2001 did the ICC find the possibility to elaborate and present its vision on the constitutional provision. It did so by way of its judgments no. 348 and no. 349 of 2007. The Court’s vision is characterized by three main elements. First, EU law enjoys a particular legal status, to the extent to that its primacy is recognized with the only exception of the doctrine of “*controlimiti*”; that is, the supreme constitutional principles. By contrast, according to the ICC, Article 117 (1) provides the ECHR with a higher status than domestic ordinary legislation. Secondly, and consequently, the ECHR itself has to respect the Constitution in its entirety, and not just its fundamental principles which define the scope of the applying in respect to EU law. Thirdly and finally, the ICC held that, if ordinary judges find that domestic law infringes the ECHR, they must stay the case and refer a question of constitutionality to the ICC, thus preventing judicial activism.

This is the reason why the assessment carried out by the ICC is based on a two stages approach. The first stage has the

¹² The Court of Genoa, for instance, in order to solve a conflict between ordinary national laws and ECHR principles, started to apply the same solution according to which, since the historic decision of the Constitutional Court in *Granital* in 1984, ordinary judges have applied the priority of EC law in cases of conflict between national law and EC law. It has been followed in this position by other courts of first and second instance.

¹³ See par. 21, Court of Justice, Case C-106/77, *Simmmenthal*, according to which: “Every national Court must in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with Community law, whether prior or subsequent to the Community rule”.

purpose to verify the existence of a contrast between the relevant ECHR provisions and the Italian Constitution. Only if the contrast is excluded, the ICC will move to the second stage of its evaluation, ascertaining the possible incompatibility of the domestic legislation with the ECHR. In the case the contrast is found to occur, domestic legislation is struck down because of the violation of Article 117 (1) of the Italian Constitution.

Interestingly enough for the focus of the present paper, in its judgments no. 348 and no. 349 of 2007 the ICC added, that the exact meaning of the ECHR can be determined only as it is interpreted by the European Court of Human Rights. In fact, according to the ICC, the content of the Convention is essentially that "which may be inferred from the case law developed by the Court over the time". This was the first time, after the entry in force of Article 117 (1), in which the ICC laid down an unconditioned obligation (for itself as well as for all Italian judges) to interpret to the Convention in accordance with the meaning given by the ECtHR in its case law.

In the light of these circumstances, it can be suggested that the ICC sought to achieve a sort of compensation. On the one hand, it excluded that the new constitutional provision - article 117 (1) - which mentioned both EU law and international obligations soon after the Constitution could be interpreted literally, that is, in the sense that the Convention had the same legal status of EU law. On the other hand, the ICC acknowledged that the ECHR had a special legal status, above legislation.

Whatever the actual reasons behind this step, the constitutional judges realized almost immediately that such interpretative constraint, enforced in a radical and absolute way, gave them too little *margin de manouvre* with regard to the ECtHR case law. Such first judicial move, as it has been anticipated, needed then to be revisited, without a radical and too explicit *revirement* which would have affected the relationship with the ECtHR.

The Court had to make use of its adaptive, flexible and relational style. In so doing, it used several judicial techniques, with the goal or at least the effect of attenuating the unconditional obligation to be bound to ECHR interpretation by the ECtHR reading, without never, at least explicitly, abnegating it.

The first judicial technique takes the view that the case law of the Court of Strasbourg would be binding for the ICC only in its substance (or in its essence). Strangely enough, this judicial technique emerged for the first time in the same ruling in which the constitutional judges have drawn the most radical implications from the said self-imposed obligation to be bound by the ECtHR interpretation of the Convention. More precisely, in its decision no. 311 of 2009, the ICC, affirmed that “this Court cannot substitute its own interpretation of a provision of the ECHR for that of the Strasbourg Court, thereby exceeding the bounds of its own powers, and violating a precise commitment made by the Italian state through signature and ratification of the Convention without any derogations”. In other words, a departure from the interpretation of the ECHR given by the Strasbourg Court would produce an infringement of the obligation resulting from international law. However, the ICC added, that “it goes without saying that the assessment of the European case law established regarding the relevant Convention provision must be carried out in a manner that respects the essence (or the substance) of case law of the European Court of Human Rights”¹⁴. It is here that the emphasis put on substance produces its effects.

This approach is not immune from problems. It is not clear which would be the basis for such limitation: why should only the essence of the case law of the ECtHR be binding when, on the contrary, the case law of the ECJ is binding in all its elements? In order to explain this difference, it is not sufficient to point out the different status enjoyed by EU law and the ECHR, respectively, with the result that only the fundamental principles of the Constitution are deemed to be an obstacle to the national enforcement of EU law. Nor is the basis for drawing the distinction what is essential and what is not essential, in the ECtHR case law easy to understand.

No clear answers to such questions emerge from the case law of the ICC. In 2011, instead, it used another judicial technique with a view to departing from the (self-imposed) obligation to consider entirely binding the case law of Strasbourg Court. More precisely, in its decision no. 236/2011, the ICC considered a challenge to a national legislation which provided that a reduction

¹⁴ See par. 6, Constitutional Court, judgment 16 November 2009, no. 311.

in time-barring limits for certain offences would not apply retroactively to the benefit of the accused to proceedings which were already pending before courts of appeal or before the Court of Cassation. The ICC held the question was unfounded, drawing heavily in its judgment from the case law of the ECtHR, but in a quite original way. It admitted that, had it affirmed that the principle of the retroactivity of more favorable criminal legislation (as asserted by the ECtHR) were to be held to be more rigid than that already recognized in the case law of the said Court (in the sense that such principle could not be subject to exceptions or restrictions justified by special circumstances), this would have been constituted a departure from the case law of ECtHR. However, using the distinguishing technique, the ICC noted that "no such novel characteristic is apparent from the judgment of the European Court of 17 September 2009 (*Scoppola v. Italy*). There is nothing in the Court's judgment which can preclude the possibility that, in special circumstances, the principle of retroactivity *in mitius* may be subject to exceptions or restrictions. This is an aspect which the Court did not consider, and which it had no reason to consider, given the characteristics of the case upon which it was deciding"¹⁵. In other words, according the second judicial technique under investigation, the ICC emphasized the difference between the case at stake and the relevant case law of the ECtHR, by reading in this case law something more (or less) than its actual and "true" meaning.

In its third judicial technique the ICC emphasized the difference between the fragmented evaluation carried out by the ECtHR and the comprehensive one at the heart of the ICC reasoning. More precisely in the decision no. 264/2012 the ICC affirmed that the balancing exercise carried out by the ECtHR would be "broken down into a series of provisions that are uncoordinated and potentially in conflict with one another"¹⁶. By contrast, the assessment which characterizes the activity of the ICC is said to be "systematic" and "coordinated", because includes a check and balance attitude among the different values at the heart of a constitutional legal order. This implies, in other words, that the same case, in Strasbourg and in Rome, could be

¹⁵ See par. 13, Constitutional Court, judgment 19 July 2011, no. 236.

¹⁶ See par. 4.1, Constitutional Court, judgment 19 November 2012, no. 264.

decided in a different way because of the different context and the different nature of the judicial assessment.

This is what happened in the decision no. 264/2012. The ICC was requested to judge the constitutionality of legislation modifying the arrangements applicable to the calculation of pensions for workers who have spent all or part of their working life in Switzerland. Whereas under the previous interpretation of Italian legislation, payment of contributions in Switzerland established entitlement to a pension in Italy on the basis of Italian contributions at equivalent salary, irrespective of the fact that the contribution levels in Switzerland were significantly lower, following an enactment providing for an “authentic interpretation”, an Italian pension was to be calculated on the basis of the actual level of Swiss contributions, thus resulting in lower pensions. The Court’s consideration of such issue was openly carried out in the light of the ECHR case law, with specific reference to the *Maggio* case¹⁷. The European Court had held that it was “not persuaded” of the fact that the general interest reason was compelling enough to overcome the dangers inherent in the use of retrospective legislation. It had thus concluded that Italy had infringed the applicants’ rights under Article 6, paragraph 1, of the ECHR by intervening in a decisive manner to ensure that the outcome of proceedings to which it was a party were favourable to it.

Despite the relevant case law of ECtHR was clearly suggesting to conclude for the annulment of the Italian legislation, the ICC concluded that compelling general interests could justify the recourse to retrospective legislation. According to the ICC, “the effects of the said provision are felt within the context of a pension system which seeks to strike a balance between the available resources and benefits paid, in accordance also with the requirement laid down by Article 81 (4) of the Constitution, and the need to ensure that the overall system is rational (judgment no. 172 of 2008), thus preventing changes to financial payments to the detriment of some contributors and to the benefit of others”¹⁸. It is not difficult to identify the application, in a concrete case, of

¹⁷ Eur. Ct. H. R., judgment of 31 May 2011, *Maggio and others v Italy* (applications nn. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08).

¹⁸ See par. 5.3, Constitutional Court, judgment 19 November 2012, no. 264.

the dichotomy "individual justice" versus "constitutional justice" which the ICC has theoretically developed in the decision 311/2011¹⁹.

The three judicial techniques outlined in this section, in line with the relational matrix of the ICC style which has been presented at the beginning of the paper, have tried to avoid a direct clash between the ICC and the ECtHR and, even before it, a direct and explicit *revirement* of what has been formally declared in the "twins" decisions of 2007 with regard to the self-imposed obligation to be bound by the ECtHR interpretation of the Convention.

By contrast, with a fourth one judicial technique, the ICC, focusing on a more substantial criteria in order to gain a broader *margin of manoeuvre* with respect to the case law of the ECtHR, has been able to achieve the second goal, i.e. to avoid an explicit *revirement* of the principle adopted in 2007, but not for sure the first one, i.e. to prevent a direct contrast with the ECtHR. More precisely, in its judgment no. 49/2015, the Court was requested to consider two referral orders questioning the constitutionality of legislation which purportedly prohibited the confiscation of property following the commission of a development offence in the event that, notwithstanding that a finding of criminal responsibility had been made, no conviction was imposed on account of the time barring of the offence. The referring courts stated that, whilst the traditional interpretation of the legislation would have allowed confiscation, the judgment by the European

¹⁹ It should be added that the ICC, one year later (judgment no. 170/2013) has partially revisited its radical contrast with the Strasbourg court in relation to the admissibility of the retrospective legislation. In this case the Court heard a referral from a bankruptcy judge questioning legislation which enabled certain amounts due to the state in respect of tax to be granted priority ranking in bankruptcy proceedings, notwithstanding their otherwise unsecured status, and stipulated that such arrangements were to apply with retroactive effect to bankruptcy proceedings that had already been initiated when the legislation came into force. The ICC held, referring also to the ECHR, that whilst retroactive legislation in the area of private law was permitted as a matter of constitutional law, it must be justified by "compelling reasons of general interest", which this time, according to the same Court, were not present in the case.

Court of Human Rights in *Varvara v Italy*²⁰ now precluded such an outcome. The ICC ruled the questions inadmissible, holding that the referring courts had ascribed an excessive scope and binding force to the *Varvara* judgment, and that the judgment in the *Varvara* case left room for interpretation in a manner consistent with the well-established Italian law permitting expropriation. The underlying rationale is a distinction between settled case law and isolated judgments of the ECtHR: national judges cannot disregard the former, by are not bound by the latter.

The idea to make reference to the vague²¹ and changing notion of ECtHR “consolidated case law” as main criteria to identify the thin red line between the binding and not binding effects of the judgments delivered by the ECtHR does not seem coherent with the cooperative relational approach that has characterized so far the relationship between ICC and Court sitting in Strasbourg. In particular, the assumption that “consolidated law it is only that one resulting from the case law of the European Court on which the national courts are required to base their interpretation, whilst there is no obligation to do so in cases involving rulings that do not express a position that has not become final” raises some doubts. It is not clear how it is possible to consider “final” the position of a judicial body competent to interpret a constitutional “work in progress” like the Convention which, according to the same ECtHR, amounts to a “living

²⁰ Eur. Ct. H. R., judgment of 29 October 2013, *Varvara v Italy*, application no. 17475/09.

²¹ According to the ICC, “It is not always immediately clear whether a certain interpretation of the provisions of the ECHR has become sufficiently consolidated at Strasbourg, especially in cases involving rulings intended to resolve cases that turn on highly specific facts, which have moreover been adopted with reference to the impact of the ECHR on legal systems different from that of Italy. In spite of this, there are without doubt signs that are capable of directing the national courts during their examination: the creativity of the principle asserted compared to the traditional approach of European case law; the potential for points of distinction or even contrast from other rulings of the Strasbourg Court; the existence of dissenting opinions, especially if fuelled by robust arguments; the fact that the decision made originates from an ordinary division and has not been endorsed by the Grand Chamber; the fact that, in the case before it, the European court has not been able to assess the particular characteristics of the national legal system, and has extended to it criteria for assessment devised with reference to other member states which, in terms of those characteristics, by contrast prove to be little suited to Italy”.

instrument"²² that must be interpreted according to present-day conditions. Moreover, current circumstances are by definition different from those of yesterday and those of tomorrow. Accordingly, a position of ECtHR could never be labeled as final.

5. Conclusions

Looking at the relevant scenarios in which the ICC has been able to train its persuasive skills in order to foster trust and voluntary obedience in its different interlocutors, it can be said that very often (though not always) the ICC has found the best key in order to establish a dialogical relationship with its counterparts.

Nonetheless, in the next weeks this approach will be seriously challenged: the ICC will have to decide how to deal with the "time bomb" related to the constitutional fate of ECJ *Taricco* judgment (²³). As it is well known, the CJEU ruled that operation of the limitation periods in Italian law infringed Article 325 TFEU. A limitation period was not objectionable as such, but national law made it effectively impossible to prosecute offences because the way in which it calculated breaks in the prosecution. Also, the national law infringed the principle of equality set out in Article 325, since other national laws on similar types of economic crime did not contain the same problematic rules on calculation of breaks.

For the CJEU, national courts must not apply the relevant national law. This obligation is based on Article 325 TFEU, which sets out precise and unconditional rules on effective and equal protection of the EU financial interests. Such prohibition to apply the domestic provisions regarding limitation periods for criminal offences (that would result in the application of a longer limitation period) is, however, likely to be detrimental to the interests and rights of the defendant. Consequently, it could be in contrast with the principle of non-retroactivity of criminal law, as three national judges suggested, raising a question of constitutionality in front of ICC. At the heart of the such question there is an underlying assumption confirmed by a well-established case law of the ICC

²² The idea that the ECHR is a living instrument has figured in Strasbourg's case law since its very early days. The European Court first acknowledged it in the judgment of *Tyrer v United Kingdom*, delivered in 1978.

²³ Court of Justice, Case C-105/14, *Ivo Taricco and others*.

on the substantive nature of the statute of limitation. The assumption is that, by refusing to apply the period of prescription provided national legislation, the criminal judge would breach Article 25 (2) of the Constitution (*nulla poena sine lege*). This is a fundamental principle of the constitutional order, a principle which would thus have the status of a limit (“counter-limit”) to the primacy of EU law.

This is not the right place to enter into a more detailed analysis and to guess which could be the option that will be followed by the ICC, among the quite wide range of possibilities from the inadmissibility of the question to the enforcement of counterlimits. However, among the others, the ICC has the chance to apply, once again, the option that would be more consistent with the relational attitude that has been a driving force of its case law so far. Even at first glance, the judgment handed down by the CJEU raises several issues. In particular, it fails to strike a fair balance between the interests at stake. First, it fails to consider adequately Article 47 of the Charter of Fundamental Rights of the EU, which excludes from the scope of application of the principle of legality any interference with the statute of limitation detrimental to the defendant. Second, it overestimates the financial interests of the European Union, a kind of interests that the Court of Justice ranks at the same level as other fundamental rights.

In the light of these issues, a solution is however left to the ICC. It could refer once again a preliminary question to the CJEU, with a view to obtaining clarifications on the outcome of the *Taricco* judgment in light of the relevant constitutional framework. This option, of course, could also be taken by the referring courts, though none of them did so. Precisely for this reason, the ICC could use this option. On the other hand, there are no obstacles preventing the ICC to look for a liaison with the CJEU. In front of an actual and clear risk of collision, where the clash with the EU legal order is most likely to occur, the model of cooperative dialogue and the relational attitude of the ICC could pave the way to reconcile the view of European and national judges.

AN ITALIAN OR A EUROPEAN STYLE OF JUDICIAL REVIEW?
SETTING THE AGENDA FOR COMPARATIVE RESEARCH ON
COURTS*

*Patricia Popelier***

Abstract

The paper suggests that the book on *Italian Constitutional Justice* does not so much describe a typical 'Italian' style of constitutional adjudication, but a continental European one. In fact, the authors of the book identify an 'Italian style' of constitutional adjudication defined as 'relationality'. But similar characteristics can be found in other European jurisdictions.

TABLE OF CONTENTS

| | |
|---|----|
| 1. Introduction..... | 73 |
| 2. An 'Italian style' of constitutional adjudication..... | 73 |
| 3. Constitutional adjudication in other European jurisdictions..... | 74 |
| 4. Conclusions..... | 77 |

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1. Introduction

With the rise of constitutional review world-wide, came scholarly attention to the position of constitutional courts in the institutional set-up. In Europe the institutional set-up is complicated by the presence of two supra-national courts, the European Court of Justice and the European Court of Human Rights. In attempts to analyze the complex relations that follow from the institutional context, scholars have focused in particular on the relations between courts under the denominator of 'judicial dialogue' or 'constitutional conversations'¹. Nonetheless, the relationship of the Constitutional Court with other actors is precisely the angle under which the authors of the book *Italian Constitutional Justice in Global Context* claim the Italian's court uniqueness².

2. An 'Italian style' of constitutional adjudication

The authors identify an 'Italian style' of constitutional adjudication defined as 'relationality'. They distinguish its 'institutional' and its 'interpretative relationality'. The first is the 'ability to establish sound and vital two-ways relations with other institutional actors, both political and judicial, national and supranational'³. The authors explain how the Italian Constitutional Court, in difficult circumstances, managed to build smooth relations with Parliament, but how it also enters into dialogue with other national courts and with European and foreign courts. The latter refers to its method of constitutional adjudication. It is 'the ability to combine and balance all the different sources of constitutional regulation of rights and powers'⁴, with focus on balancing, reasonableness and

¹ E.g. M. Claes, M. de Visser, P. Popelier & C. Van de Heyning (eds), *Constitutional Conversations in Europe* (2012); A. Rosas, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, 1 Eur. J. Legal St. 121-136 (2007).

² V. Barsotti, P.G. Carozza, M. Cartabia & A. Simoncini A, *Italian Constitutional Justice in Global Context* (2016).

³ *Ibidem*, p. 238.

⁴ I quote from A. Simoncini, *The Success of a Constitutional Experiment: When History Matters. The Italian Constitutional Court in Global Context* in this issue as it is not clearly defined in the book.

proportionality and a systematic, holistic method of interpretation.⁵

While the authors maintain that all this makes for a typical 'Italian' style, at the same time, they admit that the Italian Court is not 'absolutely singular in this effort at relationality; any successful constitutional tribunal needs to attend to some degree to the political realities of its place in the constitutional order'.⁶ Scholars have provided many examples of such institutional relationality. Vanberg research on the German Constitutional Court made clear that constitutional courts, when making judgments, take into account the 'tolerance threshold of governing majorities' and the broader political environment so as to secure implementation of their judgments.⁷

3. Constitutional adjudication in other European jurisdictions.

Similar findings can be found in other jurisdictions. For example in Belgium the Constitutional Court was established in the 1980s as a 'Court of Arbitration', with limited access and the sole power to solve conflicts of competences between central and subnational authorities in a context of a fragmenting federalization process. However, with its prudent performances it was able to gain Parliament's confidence which was crucial for its development into a full-fledged Constitutional Court.⁸ At the same time it entered into a dialogue with domestic and European courts. Relations with the Supreme Court are sometimes strained, but various efforts, including a symposium co-organized by the courts' Presidents, were made to ease the tensions.⁹ As to the European courts: the Belgian Constitutional Court sends the most preliminary references to the European Court of Justice compared

⁵ V. Barsotti, P.G. Carozza, M. Cartabia & A. Simoncini A, *Italian Constitutional Justice in Global Context*, cit. at 2, 238.

⁶ *Ibidem*, p. 235.

⁷ G. Vanberg, *The Politics of Constitutional Review in Germany* (2005).

⁸ See in more detail P. Popelier, K. Lemmens, *The Constitution of Belgium. A Constitutional Analysis*, 197-198 (2015).

⁹ J. Velaers, *The Protection of Fundamental Rights by the Belgian Constitutional Court and the Melki-Abdeli Judgment of the European Court of Justice* in M. Claes M. et al. (eds), *Constitutional Conversations*, cit. at 1, 325-326.

to other courts,¹⁰ and the European Convention of Human Rights including the Strasbourg case law is read in the constitutional clauses on fundamental rights.¹¹ The same applies with regard to the idea of 'interpretative relationality'. The Belgian Constitutional Court's jurisprudence is characterized by its efforts to find compromises, to uphold legislation through constitutional interpretation, to afford the lawmaker time for adjustments and give instructions for those adjustments, and by its broad consideration of political bottlenecks, balances and compromises.¹²

What is true for the Belgian Constitutional Court, undoubtedly applies to certain other courts as well. For example, with regard to the relationship with other domestic courts, Garlicky came to the following conclusions based upon a comparative analysis: (1) 'tensions among the courts constitutes a necessary component of every system of centralized review'; (2) this seems to be a 'more general structural problem' apart from context (such as the transition from authoritarian history), and (3) constitutional courts are often the weaker participants in this process and therefore turn to 'dialogue and persuasion' as a more effective method than open conflicts and confrontations.¹³

Even supranational courts such as the European Court of Human Rights show a 'relational' attitude. Keeping good relations with the Contracting States is crucial for the Court's viability, and particularly delicate, given the diversity of the Contracting States in terms of political and legal culture and history. To this end, the Strasbourg Court seeks a difficult balance between deference and fundamental rights control. Despite the storm of criticism the Court had to go through in recent years and with a few exceptions, it seems to have succeeded in building good relations. Even where political communication is critical, most countries in practice are compliant when it comes to the execution of the

¹⁰ See the statistics for 1952-2015 in Court of Justice, *Annual Report 2015. Judicial Activity*, Luxembourg 2016, 97-99.

¹¹ On the references to Strasbourg case law as a judicial strategy, see P. Popelier *Belgium: Faithful, Obedient, and Just a Little Irritated*, in P. Popelier, S. Lambrecht & K. Lemmens (eds), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level*, 123-127 (2016).

¹² See P. Popelier P, K. Lemmens, *The Constitution of Belgium*, cit. at 8, 203-212.

¹³ L. Garlicki, *Constitutional Courts versus Supreme Courts*, 5 I*CON 63-68 (2007).

ECtHR's judgments.¹⁴ To this purpose, the Court is prudent where matters touch upon a Contracting Party's 'constitutional identity' or national feeling.¹⁵ For example, the first *Lautsi* judgment, where the Court stated that the compulsory display of a crucifix in classrooms violated the Convention, was met with much resistance and public indignation.¹⁶ The Grand Chamber, having become aware how sensitive the matter was in Italian society, changed position and decided that the authorities had 'acted within the limits of the margin of appreciation'.¹⁷ Judicial techniques to uphold the balance, are the proportionality test, the notions of subsidiarity and the margin of appreciation, and procedural rationality review. The latter allows the Court to keep control where it is unable to execute a substantive examination, for example when a broad margin of appreciation applies. In that case it can examine whether the national decision making process contained guarantees to secure a balanced decision.¹⁸ When the Court, in *Animals Defenders International*, used this type of review to uphold a broad restriction of freedom of public interest speech, which falls within a narrow margin of appreciation, this raised the suspicion that the Strasbourg Court, confronted with growing hostility in the UK, tried to appease the United Kingdom.¹⁹

¹⁴ P. Popelier, S. Lambrecht & K. Lemmens, *Introduction: Purpose and Structure, Categorisation of States and Hypotheses*, in P. Popelier, S. Lambrecht & K. Lemmens (eds) *Criticism of the European Court of Human Rights*, cit. at 11, 9.

¹⁵ F. De Londras, D. Kanstantsin, *Managing Judicial Innovation in the European Court of Human Rights*, 15 Hum. Rts. L. Rev., 537 (2015).

¹⁶ *Lautsi v Italy* [App No 30814/06] Decision of 3 November 2009. See G. Martinico, *Italy: Between Constitutional Openness and Resistance*, in Popelier, Lambrecht & Lemmens (eds), *Criticism of the European Court of Human Rights*, cit. at 11, 178.

¹⁷ *Lautsi v. Italy* [App No 30814/06] Grand Chamber Decision of 18 March 2011, para 78.

¹⁸ E.g. *Hatton v. the United Kingdom*, Decision of 2 October 2001, [App. No. 36022/97] and Grand Chamber decision of 8 July 2003, [2003] ECHR VIII.

¹⁹ T. Lewis, *Reasserting the Primacy of Broadcast Political Speech after Animals Defenders International? – Rogaland Pensioners Party v Norway*, 1 J. Media Law, 474 (2009); F. De Londras, D. Kanstantsin, *Managing Judicial Innovation in the European Court of Human Rights*, cit. at 15, 538; P. Popelier, C. Van De Heyning, *Subsidiarity Post-Brighton: Procedural Rationality as Answer?*, Leiden J. Int'l Law (2016) (forthcoming). For other examples: H. Fenwick, *An Appeasement Approach in the European Court of Human Rights?*, UK Constitutional Law Blog, <https://ukconstitutionallaw.org/2012/04/05/helen-fenwick-an-appeasement-approach-in-the-european-court-of-human-rights/> (last accessed: 14/09/2016).

Obviously, each court shows specific features as to attitude and judicial techniques, subject to institutional design, political context and societal cleavages. The question, however, is what is so specific in the Italian operationalization of 'relationality' to distinguish it from that of other courts and whether it is scientifically useful to present it as a singular type of judicial review rather than a particular case within a broader category of 'styles' or 'methods' of constitutional review. The first turns the Italian Constitutional Court into a court *sui generis*, which is a nuisance for academic purposes – '*le supreme refuge des jurists dans l'embarras*'²⁰ – as it hinders the development of a broader theory, the possibility of comparative study, and the gaining of insights into the functioning of courts in general.

4. Conclusions

It can be hypothesized that the book on *Italian Constitutional Justice* does not so much describe a typical 'Italian' style of constitutional adjudication, but a continental European one.

The hypothesis, in the first place, does not include the constitutional adjudication of all courts on the European continent, but only centralized constitutional courts. There are two reasons to expect that a central court's style of adjudication differs from supreme courts' methods. One reason is that the constitutional mandate of constitutional courts is more pronounced, more specialized and more visible than that of other courts, especially if the court has the power to annul parliamentary acts after a procedure of abstract review. The second reason lies in their specific composition. After a comparative overview of European courts, de Visser established that the procedure for selection and appointment of constitutional judges as well as their qualifications point to the desire to endow the court with a specific form of legitimacy, considering the political impact that undeniably follows from the power to censure parliamentary acts.²¹

²⁰ M. Mouskhély, *La Théorie du Fédéralisme*, in *La Technique et les principes du droit public. Etudes en l'honneur de Georges Scille*, 400 (1950).

²¹ M. De Visser, *Constitutional Review in Europe. A Comparative Analysis*, 223 (2014).

Secondly, the hypothesis does not cover all constitutional courts, but is limited to constitutional courts within the European Union. We can expect that embedment within the European legal space facilitates the development of a specific type of constitutional adjudication. Judicial dialogue develops between the domestic courts and the European Court of Justice, between the domestic courts and the European Court of Justice, between both European courts, and between national courts, for example in the development of strategies to protect constitutional values against EU supremacy. This has intensified dialogue and networks, resulting in a two-way relation, with on the one hand the internationalization of fundamental rights and principles to what the authors of the book call a 'European common law',²² and on the other the constitutionalisation of European fundamental rights.

All this sets the agenda for future research. More case-studies like the one in the book on *Constitutional Justice in Global Context* is needed in order to establish whether there is a 'European' style of constitutional adjudication and what exactly it involves. This should amount into a broad comparative study where indicators and criteria that characterize this specific style are examined for each country. On the basis thereof we should be able to define and explain commonalities but also to comprehend national adjudication and discover what is actually country-specific and what not find; to establish what are the contextual, institutional, organizational and functional aspects that shape, encourage or discourage this European style; and to find whether this specific method of judicial review is able to overcome the counter-majoritarian obstacle so often debated in (mostly Anglo-Saxon) scholarship. This, however, requires a broad comparative research network, with local experts writing reports on the basis of uniform questionnaires, and the building of databases of judgments coded in similar ways, so as to test hypotheses and distinguish defining aspects and explanatory factors in a statistically significant way.²³

²² V. Barsotti et al., *Italian Constitutional Justice in Global Context*, cit. at 2, 230.

²³ Such database was built at the University of Antwerp for the Belgian Constitutional Court, for a project funded by the FWO (Flemish Scientific Fund), supervised by Popelier and Beyers, and executed by Josephine De Jaegere.

THE SUCCESS OF A CONSTITUTIONAL EXPERIMENT:
WHEN HISTORY MATTERS.
THE ITALIAN CONSTITUTIONAL COURT IN GLOBAL CONTEXT*

*Andrea Simoncini***

Abstract

The paper takes the cue from the analysis offered by the book *“Italian Constitutional Justice in Global Context”* to suggest some remarks on the way the Italian Constitutional Court has become, in a relatively short period of time, a strong, stable and respected constitutional actor. In fact, despite having started its activity, in 1956, in a context of real hostility due to the strong role of the Parliament on one side and the weakness of the lower courts (that were supposed to bring cases before the Constitutional Court) on the other side, the new institution was capable to conquer its role by developing cooperative and collaborative relations with both the Legislature and the judiciary. In other world, the adaptive capacity of this institution and its “relationality” has been at the basis of its recognition and its acceptance by the others institutional actors.

TABLE OF CONTENTS

| | |
|---|----|
| 1. The “relational” Court: an answer to the “fact of constitutional pluralism” | 80 |
| 2. The origin of the “Italian Style”: how to survive in a hostile context. The historical perspective..... | 81 |
| 3. The judicial hostility: “programmatically vs. preceptive” doctrine..... | 85 |
| 4. A “relational” style: on the Parliament side..... | 86 |
| 5. (cont’d): on the Judiciary side..... | 87 |

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1. The “relational” Court: an answer to the “fact of constitutional pluralism”

Echoing a famous Rawlsian expression, the world today is characterized by what we might call the “fact of [constitutional] pluralism”¹.

Over the last decades we have seen the growth and increasing interaction of various national, international and supranational legal systems; all endowed with *constitutional* characteristics² and guaranteed by Supreme/Constitutional Courts.

This very “fact” represents the main interpretive conundrum for contemporary constitutionalism: is that plurality a dodecaphonic ensemble or a polyphonic choir? And, in this perspective, which are the distinctive voices and contributions of each element of this plural organism?

The book *Italian Constitutional Justice in Global Context*³ clearly fits into that research stream, as it tries to single out the features that typify the Italian Constitutional Court in this global conversation.

The central claim of the book is that the peculiar feature of the Italian Court, what the authors call the “Italian style” in constitutional adjudication⁴, is its “*relationality*”.

The expression, taken from the sociological research lexicon⁵, means, in an *institutional* dimension⁶, the capacity of the Italian

¹ J. Rawls, *Political Liberalism*, Expanded edition (2005), 441 ss.

² J.H.H. Weiler, *The transformation of Europe*, 100 Yale L.J. 8, Symposium: International Law (1991).

³ V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context* (2016).

⁴ *Ibidem*, 234; the expression was coined by John Henry Merryman.

⁵ On “relational” sociology, among the others, see: M. Emirbayer, *Manifesto for a Relational Sociology*, Am. J. Sociology 103 (1997); A. Mische, *Relational sociology, culture, and agency*, in *The Sage Handbook of Social Network Analysis* (2011); P. Donati, *Birth and development of the relational theory of society: a journey looking for a deep “relational sociology”*, http://www.relationalstudies.net/uploads/2/3/1/5/2315313/donati_birth_and_development_of_the_relational_theory_of_society.pdf

⁶ V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice*, cit. at 3, 235.

Constitutional Court to build cooperative relations with the other actors of the constitutional system and, in an *interpretive* dimension⁷, its ability to combine and balance all the different sources of constitutional regulation of rights and powers.

The idea behind this is that, neither constitutional courts nor constitutional rights are “absolute” - in the Latin meaning of the word “ab-solutus” - that is “un-bounded” or “un-related” -; their power (as Courts), like their effectiveness (as rights) are always “relational”, that is, proportional to the recognition offered by the other constitutional actors.

We could say that, although the Italian constitutional model belongs to a *strong* form of judicial review (entrusting the Constitutional Court with the power to declare the legislation “null and void”), it prefers to use this last-word power softly, thus acting like a *weak* form of judicial review (leaving a wide range of action not only to the Parliament, but also to the Judiciary power at large).

This circumstance produces a sort of “variable geometry model” in which either the *interpretive* or the *institutional* “relational” dimension may vary according to the issues involved.

2. The origin of the “Italian Style”: how to survive in a hostile context. The historical perspective

Where does this “Italian Style” come from?

The hypothesis advanced in the volume is that it derives from a sort of *adaptive capacity* to survive in a *complex* and *hostile* constitutional context which has been developed by the Constitutional Court during sixty years of Republicanism⁸.

⁷ V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice*, cit. at 3, 238.

⁸ The popular referendum to choose between Monarchy and Republic was held on June 2nd, 1946. On the same day, a Constitutional Assembly was elected to write the new Constitution. The Constitutional Court started its activity in 1956.

I will not here address the question of this *complexity* as it is quite intuitive how today constitutional adjudication at national level has become an increasingly complex function.

Courts (either constitutional or lower judges) are no longer the lonely guardians of nations; the constitutional landscape, in the meanwhile, has become densely populated. Different constitutional *charters*, different constitutional *courts*, new rights and also new violations; it is not surprising that *complexity* is among the most used words in contemporary legal literature. Rather, I would suggest some remarks on the question of *hostility*, taking the cue from the analysis offered by the volume.

Indeed, the story and the present practice of the Italian Constitutional Court is an extremely useful lesson for reconsidering the old and new *enemies* (and conversely the old and new *friends*) of constitutional justice and the key-factors of a successful constitutional review system.

To that purpose we must follow one important dimension of the book's inquiry: the historical perspective.

Generally speaking, a great deal of the "Italian style" is due to history. The problem is that the knowledge of Italian history - legal history included - often stops at the Roman Empire, the Middle Ages or the Renaissance, while in our case the "key" period is contemporary history.

As we know, the Italian Constitution was written immediately after World War II and, at that moment, the legal and cultural context was deeply hostile to a system of judicial review of legislation.

The success story of the Italian Constitutional Court, which, in a relatively short period of time, has become a strong, stable and respected new constitutional actor, is really surprising if we look back to the historical trajectory and consider Italian culture immediately following Fascism, when the Court was founded.

It is a fact that although the new Italian Constitution entered into force on January 1948, we had to wait until 1956 - eight years after - to see the effective start of the new Court.

The reasons of that “long gestation” - as it is defined in the book⁹ - were many.

On the one hand, the complexity of the task for the new Parliament to outline a proper institutional “dress” for this entirely new Constitutional body¹⁰.

On the other hand, the political deadlock between the two main opposing parties (Christian-Democrats and Communist Party) in reaching a compromise on the nomination of 5 (out of 15) Constitutional Justices¹¹.

But the most important reason for this long delay in the activation of the new Court, was the difficulty in legal and political circles of understanding the true nature of this new Institution.

An insightful example of that reluctance of the constitutional system to understand and accept the Constitutional Court is the story, mentioned in the volume, known as the “War of the Thrones”: the first two Presidents of the Constitutional Court - until the end of 1960's - refused to participate in any official ceremonies of the Republic, - so, symbolically, a very strong protest - because the official protocol did not provide a proper seat for the President of the Court.

As the Constitutional Court was an entirely new institution, the Ceremonials Officers of State decided to put the President of the Court in fifth place (after the President of the Republic, the President of Senate, the President of the Chamber of Deputies and the Prime Minister). This was unacceptable for the Court.

Until the Ceremonial Protocol was amended and the president of the Court was placed- after the President and the Parliament, but - *before* the Executive, the Constitutional Court did not participate in any official event.

The Court, therefore, began its activity in a remarkably hostile situation or - what is even worse - in a profoundly *un-aware* context.

⁹ V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice*, cit. at 3, 19.

¹⁰ *Ibidem*, 21.

¹¹ *Ibidem*, 23.

As an entirely new constitutional actor, it had to physically “conquer” its place in a constitutional map that did not deem it worthy of consideration.

To understand the reasons for this difficulty we have to move backwards again, because the 1948 Republican Constitution is not the first “constitution” of Italy; the first one was “conceded” by the King of Italy Carlo Alberto exactly one century before: the so-called *Statuto Albertino*.

If we consider that older constitutional regime, we can easily understand the resistance to the new Court.

The two main features of the pre-fascist constitutional mindset were a strange mix of British and French legal tradition. On the one hand, according to the British legal tradition, the principle of the “sovereignty of the Parliament” was undisputable: the legislature was the unique institution vested not only with the law-making power but also with a “permanent constitution-making” power¹².

On the other, unlike the British, but very close to the French tradition, the Kingdom of Italy was characterized by an extremely weak judiciary, made up of King-appointed bureaucrats, without any tradition of independence¹³.

This is one of the reasons why, during the XIX Century, despite theoretically being in a condition very similar to the US – because the Statuto also proclaimed itself as a “perpetual, irrevocable and supreme law of the land” – we did not have our “*Marbury vs. Madison*” and the constitutional system remained “flexible”.

That was the reason why, after the War, almost nobody among the constitutional actors was able to recognize the role and the function of the new Court. The Parliament was still linked to its “omnipotence”; so it waited 8 years to approve all the implementing legislation and to elect 5 out the 15 judges, practically blocking for almost a decade the effective implementation of the constitutional review in Italy.

¹² G. Arangio-Ruiz, *Istituzioni di diritto costituzionale italiano* (1913) 466.

¹³ M. Bignami, *Costituzione flessibile, Costituzione rigida e controllo di costituzionalità in Italia (1848-1956)*, (1997), 19.

3. The judicial hostility: “programmatically vs. preceptively” doctrine

Furthermore, the Judiciary power was extremely lukewarm regarding the new Constitution, and this was an even bigger problem, because the Italian model of the *incidental* access¹⁴ to the Constitutional justice relies greatly on a positive and effective cooperation with the lower courts to bring cases before the Constitutional Court. Without relations with other ordinary judges, the Italian Constitutional Court cannot do its job.

However, the large majority of the judges on the bench in the 1950s -at the beginning of the new Constitutional era - had studied and been formed during the Fascist period or even earlier, therefore they had been educated under the “parliamentary omnipotence” doctrine.

It was not easy for them to realize the new role of a *rigid* constitution, which is a super-law endowed with a superior hierarchical rank within the legal system.

As a matter of fact, the Supreme Court of Cassation adopted a very conservative jurisprudence, known as the “programmatically vs. preceptively” doctrine.

The conceptual background was that the new Constitution was largely made up of very broad “principles” (equality, freedom, regionalism, separation of powers) and not by strict “preceptive rules”; and those principles were defined as *programmatically norms*.

Those kinds of norms were, *per se*, not justiciable, because they were too broad.

In order to become effective parameters for the Court’s review, they needed an implementing legislation from the Parliament. As long as such legislation was not approved, the Constitution remained essentially ineffective and incapable of affecting the validity of the previous legislation.

¹⁴ V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice*, cit. at 3, 54.

The reaction of the Court in this context and the way it interacted with its enemies is a clear example of what we call “relationality”.

On the one hand, in order to have sound relations with others, you must have a clear notion of your identity and this the Court clearly did.

With its very first decision, n. 1 of 1956 - defined by the authors as the “Italian *Marbury vs Madison*” - the Court explicitly rejected the “programmatic” doctrine of the Cassation, affirming clearly both the preceptive value of the entire Constitutional text and its own authority to use that text to invalidate previous and subsequent legislation.

With this seminal decision the Italian Constitutional Court broke explicitly with the old fascist and pre-fascist Italian legal tradition which was, still rooted in the political and judicial institutions.

But, on the other hand, this self-consciousness of the new Court coupled with positive action to have this constitutional identity accepted in the legal context, including both the institutional system and civil society.

To that end the Court over the 60 years of its existence has constantly sought and still seeks *institutional* relations, mainly with the Parliament, and *interpretive* relations, mainly with the Judiciary.

4. A “relational” style: on the Parliament side

Every Constitutional Court, reviewing acts of legislation, is *per se* an antagonist of the Parliament. Nevertheless, the Italian Court developed a great number of doctrines to enhance cooperative relations with the Legislature: some of these doctrines are very well-known to comparative constitutional law, like the self-restraint from “political questions”, but in the history of the Italian Court probably the most distinctive element is the diversification of decisional instruments.

Consider, for example, the invention of the “interpretive judgments”, through which the Court, separating the interpretations

from the texts, strikes down an interpretation, while keeping the parliamentary “text” alive.

The volume describes many other relevant decisional tools derived from this original idea¹⁵.

This creativity of the Constitutional Court in finding new sentencing techniques aims - to the greatest possible extent - not to displace the Parliament in its law-making power.

Moreover, this creativity does not belong only to the past history of the Court but it is still producing very many innovations.

An example is the recent 2015 decision on the so called Robin Tax¹⁶ - where the Court for the first time ruled on the time-span effects of its own decision, deciding it will not affect the pending case. One of the reasons for this momentous innovation was to “enable the legislator to act promptly”. A further example is the growing number of decisions - even on politically hot issues¹⁷ - in which the Court explicitly asks the national parliament to find a reasonable solution.

5. (cont'd): on the Judiciary side

But also on the Judiciary side - despite some very problematic periods in which the dialogue seemed to be almost lost - the Court has always sought and still seeks a collaborative relation.

If lower courts do not activate the constitutional procedure, the Court performs its function.

This is the reason why in the very beginning the Court enormously enlarged the prerequisites to obtain access to its jurisprudence and then, when it started to be overwhelmed, it changed orientation.

Generally speaking, the Constitutional Court shows a great deal of trust in the interpretive function of the ordinary judiciary, for

¹⁵ V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice*, cit. at 3, 82 ss.

¹⁶ Dec. n. 10/2015.

¹⁷ Like those on frozen embryos (Dec. n. 84/2016) or on the requirements to build mosques (Dec. n. 63/2016) both available in English on the Court's website.

example, through the doctrine of the “living law” (that is, interpreting a legislative text according to the common confirmed interpretation of ordinary courts) and also by promoting creative methods of constitutionally compatible interpretation by lower courts.

Finally, as regards the relations with other European constitutional judges, the Italian Court followed a very unique path, trying to join neither the “pro-European” nor “anti-European” aprioristic camp. Instead it engaged in a dialogue with the European Court of Justice through the preliminary ruling procedure and accepted the Strasbourg Court’s interpretations, but always keeping its role and trying to interpret this dialogue as we say in the book as a “two-way relation among peers”.

The case of the Italian Constitutional court shows a strong path-dependency; its “relationality” stems from its adaptive capacity developed not simply to *use* its constitutional power, but also to let the other constitutional actors *understand* and *accept* it.

The lesson we may learn from the Italian experience is that Constitutional Courts like Constitutional systems, need not only to be respected, but also *understood* and, given the growing *complexity* of their task, they increasingly need to be helped in their function.

Constitutional norms (especially constitutional rights) are not simply legal rules to be applied, they are principles requiring a common understanding, a multilevel implementation and, moreover, a *cooperative normative effort*¹⁸ of different institutional actors (international organizations, state, regions; public powers and civil society; national and supranational courts).

This “organic”¹⁹ nature of contemporary constitutionalism is particularly evident if you read the text of the Italian Constitution and of a great number of all the European post-World-War II constitutions.

¹⁸ “Law as a normative cooperative effort” see I. Trujillo, F. Viola, *What Human Rights Are Not (Or Not Only). A Negative Path to Human Rights Practice* (2016).

¹⁹ “Organic” as related to an “organism”, that is a systemic whole made up of interrelating parts.

This very nature explains why “relationality” – intended as an institutional and interpretive connecting capacity - can be considered the Italian Constitutional court’s distinctive feature and the reason for its success.

FROM MUTUAL RECOGNITION TO EU AUTHORIZATION: A DECLINE OF TRANSNATIONAL ADMINISTRATIVE ACTS?*

*Luca De Lucia***

Abstract

The paper has two goals. First it seeks to examine the main features of transnational administrative decisions in the EU legal system (i.e. acts of one Member State which, according to a European secondary legal norm, produce juridical effects in one or more of the other Member States). Second it discusses the tendency towards centralisation and re-nationalisation in the most recent legislation and the consequences of the abandonment of the model of transnational administrative decisions in some important economic areas. Finally, some brief conclusions on the perspective of horizontal administrative cooperation will be drawn.

TABLE OF CONTENTS

| | |
|--|-----|
| 1. Introduction..... | 91 |
| 2. Market unity and State competences in the legal discipline of transnational administrative acts..... | 94 |
| 2.1. Authorisations with automatic transnational effects..... | 95 |
| 2.2. Joint decisions..... | 96 |
| 2.3. Authorisations subject to recognition..... | 97 |
| 2.4. Mutual recognition in parallel..... | 98 |
| 3. Common features in the types of authorisations described..... | 99 |
| 3.1. The inter-administrative tie..... | 100 |
| 3.2. Administrative conflict resolution..... | 101 |
| 3.3. The competence of the home country judges and the bi-polarity of the transnational act..... | 102 |

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In memory of Nicola Bassi.

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| | |
|--|-----|
| 4. Recent moves away from transnational administrative authorisations..... | 104 |
| 4.1. Centralisation..... | 104 |
| 4.2. Weakening of the cross-border effect..... | 105 |
| 5. Towards the reshaping of the transnational administrative authorisation?..... | 108 |
| 6. Final remarks..... | 113 |

1. Introduction

In the European legal order the principle of mutual recognition has always been one of the key instruments for the creation of the single market¹, as it is now for the construction of an “area of freedom, security and justice” (“free movement of judicial decisions”)². Limiting the analysis to the single market, our starting point must be that of the famous *Cassis de Dijon* decision³ in which the Court of Justice stated that “Any product imported from another Member State must in principle be admitted to the territory of the importing Member State if it has been lawfully produced, that is, conforms to rules and processes of manufacture that are customarily and traditionally accepted in the exporting country, and is marketed in the territory of the latter”⁴. According to the European Court, however, exceptions to this are cases in which administrative controls – which must be appropriate and not excessive – are necessary on the part of the destination State in order to protect essential needs (public health, consumer and environmental protection, correctness in

¹ There is a vast amount of material on this theme: see for all C. Janssens, *The Principle of Mutual Recognition in EU Law* (2012); M. Möstl, *Preconditions and Limits of Mutual Recognition*, in *Comm. Mkt. L. Rev.*, 405–436 (2010); *The Law of the Single European Market*, C. Barnard, J. Scott (Eds), (2002); G. Rossolillo, *Mutuo riconoscimento e tecniche conflittuali* (2002); V. Hatzopoulos, *Le principe communautaire d'équivalence et de reconnaissance mutuelle dans la libre prestation de services* (1999); P. Maduro, *We the Court* (1998).

² See among others K. Lenaers, *The principle of mutual recognition in the area of freedom, security and justice*, in *Dir. Un. Eur.*, 525 ff. (2015); C. Janssens, *The Principle of Mutual Recognition*, cit. at 1; M. Möstl, *Preconditions*, cit. at 1.

³ Court of Justice, cause 120/78 of 20 February 1979, *Rewe v Bundesmonopolverwaltung für Branntwein*, C:1979:42.

⁴ Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('*Cassis de Dijon*'), OJ C 256, 03/10/1980, 2-3.

commercial transactions, etc.). On this basis the principle has been gradually extended to cover also the other freedoms to circulate recognised in the Treaty⁵.

In essence, the principle of mutual recognition is aimed at reaching a deep integration of the market, whilst at the same time respecting the diversities within the Member States⁶. However, the mutual recognition founded only on the Treaty (and therefore on the repeated intervention of the Court of Justice) could potentially have led to “a colossal market failure”, as it was based in most cases on legal action taken by private citizens who found their fundamental freedoms to be limited⁷. In substance, “one cannot plan, produce and market product lines hoping that eventually a court decision will vindicate a claim of mutual recognition or functional parallelism”⁸. For this reason, as is well known, a rich and complex legislation followed, aimed at facilitating the free circulation of goods, services, capital and people in the single market (for e.g. harmonisation, technical harmonisation, standardisation and normalisation policies)⁹.

In this context, in some cases secondary laws regulated precisely the division of tasks between the various administrations of the common market, providing for authorisations issued by the Commission (or other EU bodies) or by national administrative bodies. In the latter case the national measures can produce legal effects within the territory of the other Member States or across the entire EU: These are transnational administrative acts¹⁰.

⁵ On this topic, see C. Janssens, *The Principle of Mutual Recognition*, cit. at 1, 14-23.

⁶ E.g. J. Pelkmans, *Mutual Recognition: Economic and Regulatory Logic in Goods and Services*, Bruges European Economic Research Papers 24, 1(2012).

⁷ E.g. N. Bernard, *Flexibility in the European Single Market*, in *The Law of the Single European Market*, cit. at 1, 101 ff., spec. 110.

⁸ J.H.H. Weiler, *The Constitution of the Common Market Place: The Free Movement of Goods*, in P. Craig, G. De Burca (Eds) *The Evolution of EU Law*, 368 (1999).

⁹ See for all, P. Craig, *The Evolution of the Single Market*, in *The Law of the Single European Market*, cit. at 1, 1-40.

¹⁰ Some clarification is necessary on this point. According to doctrine, transnational administrative acts can have different forms: M. Ruffert, *The transnational Administrative Act*, in O.J. Jansen, B. Schönendorf-Haubold (Eds) *The European Composite Administration*, 277 ff (2011). The first form is the administrative act which produces “effect-related transnationality”; in this case an “administrative act is enacted in a state with regard to the addressee resident there, and which develops a legal effect beyond the borders of this state” (281).

Transnational administrative acts - used by the EU legislator also in cases unconnected with market integration¹¹ - have attracted the attention of many scholars, who have examined many of their characteristics and highlighted the numerous legal problems related to their use¹². Nevertheless some recent

In the second form “the transnational character results from the fact that the issuing authority and the addressee of the administrative act are located in different states” (“addressee-related transnationality”: 287 ff.). In the third form “a foreign authority itself crosses the state border in order to issue an administrative act abroad” (“authority-related transnationality: 290 f.). See also M. Ruffert, *Rechtsquellen und Rechtsschichten des Verwaltungsrecht*, in W. Hoffmann-Riem, E. Schmidt-Aßmann, A. Voßkuhle (Eds) *Grundlagen des Verwaltungsrechts*, 2° ed., vol. I, 1234 f (2012). In this article the term transnational act/effect will be used mainly according to the first meaning i.e. “effect-related transnationality”.

¹¹ See e.g. A.M. Keessen, *European Administrative Decisions*, Groningen/Amsterdam, 2009, spec. 58 ff and 117 ff.; M. Gautier, *Acte administratif transnational et droit communautaire*, in G.-B.Auby, Dutheil de la Rochère (Eds) *Droit Administratif Européen*, Bruxelles, 1303 ff, (2014).

¹² See for e.g. J.J. Pernas García, *The EU's Role in the Progress Towards the Recognition and Execution of Foreign Administrative Acts: The Principle of Mutual Recognition and the Transnational Nature of Certain Administrative Acts*, in J. Rodrigo-Arana Muñoz (Ed) *Recognition of Foreign Administrative Acts*, Cham, Heidelberg et al., 15-31 (2016); A.S. Gerontas, *Deterritorialization in Administrative Law: Exploring Transnational Administrative Decisions*, in Col. J. Eur. L., 423 ff., (2013); T. Kemper, *Der transnationale Verwaltungsakt im Kulturgüterschutzrecht*, in *Natur und Recht*, 751 ff. (2012); H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law and Policy of the European Union*, 645-648 (2011) (who talked about “transterritorial application of national decisions”); C. Ohler, *Europäisches und nationales Verwaltungsrecht*, in Terhechte (Ed) *Verwaltungsrecht der Europäischen Union*, 345 ff. (2011); H. Wenader, *Recognition of Foreign Administrative Decisions*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 755 ff. (2011); L. De Lucia, *Amministrazione transnazionale e ordinamento europeo* (2009); A.M. Keessen, *European Administrative Decisions*, cit. at 11; N. Bassi, *Mutuo riconoscimento e tutela giurisdizionale* (2008); M. Gautier, *Acte administratif transnational et droit communautaire*, cit., 1303 ff. (Ead, *Une autre traversée du Rhin. A propos de l'acte administratif transnational*, in *AJDA*, 2015, p.1139-1143); G. Sydow, *Verwaltungskooperation in der Europäischen Union* (2004); J. Becker, *Der transnationale Verwaltungsakt*, in *Deutsches Verwaltungsblatt*, 856 ff. (2001); M. Ruffert, *Der transnationale Verwaltungsakt*, in *Die Verwaltung*, 453 ff. (2001); S. Galera Rodrigo, *La aplicación administrativa del derecho comunitario*, 108 ff. (1998); V. Neßler, *Der transnationale Verwaltungsakt - Zur Dogmatik eines neuen Rechtsinstituts*, in *Neue Zeitschrift für Verwaltungsrecht*, 864 ff. (1995); E. Schmidt-Aßmann, *Deutsches und Europäisches Verwaltungsrecht* in *Deutsches Verwaltungsblatt*, 924 f. and 935 f. (1993). For a more general perspective, see G.

developments can present the opportunity for further reflection on the possible future of the transnational act within the EU legal system. This article aims to contribute to the research on this theme. In particular, after having briefly illustrated four types of national acts with cross-border effects (par. 2) and having shed light of some elements they have in common (par. 3), a recent legislative tendency (and to a lesser extent jurisprudential) which seems to be moving towards a re-dimensioning of these decisional models will be examined (par. 4). After that an attempt will be made to explain the reasons behind this orientation of European legislation (par. 5) and to reach some (provisory) conclusions on this matter (par. 6).

2. Market unity and State competences in the legal discipline of transnational administrative acts

Through the legal discipline of transnational administrative acts, the EU legislator in general balances two values: the unity of the single market (or rather the effective exercise of the fundamental freedoms) and the protection of the competences and important interests of the Member States (towards not only the European Union, but also the other Member States)¹³. This balancing is not done in a uniform way, but varies depending on the type of transnational act. The analysis below highlights the principal traits of four common types of transnational act in EU legislation¹⁴.

della Cananea, *From the Recognition of Foreign Acts to Trans-national Administrative Procedures*, in *Recognition of Foreign Administrative Acts*, cit. at 12, 219 ff.; M. Ruffert, *Recognition of Foreign Legislative and Administrative Acts*, in *Max Planck Encyclopedia of Public International Law*: <http://opil.ouplaw.com/home/EPIL>.

¹³ E.g. G. Sydow, *Verwaltungskooperation*, cit. at 12, 48 ff.

¹⁴ See L. De Lucia, *Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts*, in *Rev. Eur. Adm. L.*, 2012/2, 17-45. For partially similar classifications see: A.M. Keessen, *European Administrative Decisions*, cit. at 11; H.C. Röhl, *Procedures in the European Composite Administration*, in J. Barnes (Ed) *Transforming Administrative Procedure*, Seville, 92 ff. (2008); G. Sydow, *Verwaltungskooperation*, cit. at 12, 126 ff.; S. Galera Rodrigo, *La aplicación administrativa*, cit. at 12, 108 ff.

2.1. Authorisations with automatic transnational effects

The first are authorisations that automatically produce transnational effects. These administrative measures allow the beneficiary to exercise a fundamental freedom beyond their home country territory without the host administrations having to give their own consent¹⁵. This model – that has its origins in the rulings of the Court of Justice on mutual recognition¹⁶ – generally presupposes a high level of harmonisation between national legal orders. For example, in this group we find: the authorisation for the sale of mineral waters¹⁷; the licence for the provision of air transport services for passengers, post and/or goods¹⁸; and the authorisation for the taking up and pursuit of the business of direct insurance or reinsurance¹⁹.

The criteria for the division of administrative tasks are centred here on the home administration, which exercises its powers autonomously. This means that greater importance is placed on the unitary principle, which leads to a particular bias towards the exercise of fundamental freedoms. As a consequence, the transnational effect is in this case particularly incisive in the host country, which must accept the host authorisation, allowing the private party to carry out their activities. Nevertheless, host countries are not completely powerless to react; indeed the majority of the EU secondary norms allow them to respond in

¹⁵ For reference to “perfect mutual recognition”, see M. Tison, *Unraveling the General Good Exception. The case of Financial Services*, in M. Adenas, W.H. Roth (Eds) *Services and Free Movement in EU Law*, 321 ff. (2002); see also E. Schmidt-Aßmann, *Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft*, in *Europarecht*, 300 (1996) (“echte Transnationalität”); whilst for “passive mutual recognition”, see K.A. Armstrong, *Mutual Recognition*, in *The Law of the Single European Market*, cit. at 1, 240 ff.

¹⁶ E.g. Court of Justice, C-390/99 Judgment of the Court of 22 January 2002, *Canal Satélite Digital SL v Administración General del Estado, and Distribuidora de Televisión Digital SA (DTS)*, C:2002:34; M. Möstl, *Preconditions*, cit.

¹⁷ Directive No 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters.

¹⁸ Articles 3 ff. of the Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community.

¹⁹ Art. 14 of the Directive No 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

situations where important collective interests are endangered (e.g. health and environment) through the suspension of activities in its territory authorised by the transnational act (so-called 'safeguard measures')²⁰. These measures are however, preceded or followed by agreements or contacts with the home administration in order to reach a mutual understanding for the solution of the critical issue.

2.2. Joint decisions

The joint decision is a national authorisation which is the result of a composite procedure in which all the State administrations involved (and at times also the Commission) participate with a co-decisional role. Examples which can be mentioned here are the authorisation of the placing on the market of genetically modified organisms not contained in food substances²¹ and that for inter-community transport of waste for disposal²².

Despite differing in certain ways, these EU norms provide for cooperation mechanisms within the procedure conducted by a single State. Following the examination of the request and of the documents presented by the applicant at a national level, a multilateral phase then takes place in which the administrations affected are called (at times through silent assent) to express their agreement on the issuing of a favourable decision. Only in the absence of opposition from the other administrations can the competent office grant the authorisation. Directive 2001/18 stipulates that where there is an objection from one of the Member States (or the Commission), the matter must be returned to the Commission (see below).

This model represents a further form of balancing between the principle of the protection of the State competences and that of unity and is justified by the overwhelming importance of the public interests affected by those legal regulations which require

²⁰ E.g. Art. 155, Dir. No 2009/138/EC; Art. 11, Dir. No 2009/54/EC.

²¹ Articles 18 ff. of the Directive No 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms (consolidated version).

²² Articles 4 and 7 ff. of the Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (consolidated version).

the prior involvement of the public bodies concerned in the decision process. In substance, the proceeding is aimed at “(...) compensating administrative polycentrism with the unity of the decision”²³.

Also in these legal norms any of the States affected can initiate a revision procedure (also in conjunction with a safeguard measure) for the protection of health and environment “indicating whether and how the conditions of the consent should be amended or the consent should be terminated...” (Article 20, Dir. 2001/18). It is important to emphasise that here the State offices cannot unilaterally take a final decision on the matter but can only start a second level procedure which has to be conducted jointly with the other Member States (and at times the Commission).

2.3. Authorisations subject to recognition

In general, this decisional model – whose fundamental structure is based on the rulings of the Court of Justice on mutual recognition²⁴ – is made up of two or more interconnected authorisations issued in the legal system of each Member State. The first measure has legal effects only in the home country, whereas the second allows effects to be produced also in the host country. For this reason, at times this is referred to as authorisations in sequence²⁵. The recognition of some professional qualifications²⁶ is in this group.

The transnational effect acts here within the recognition procedure that is carried out by the second State. In fact the host administration is limited to looking at the results of the examination (e.g. technical or chemical tests) on which the first act

²³ S. Cassese, *L'arena pubblica. Nuovi paradigmi per lo Stato*, in Id. *La crisi dello Stato*, 86 ff. (2003).

²⁴ E.g. Court of Justice, C-272/80 of 17 December 1981, *Frans-Nederlandse Maatschappij voor biologische Producten*, C:1981:312: host authorities “are not entitled unnecessarily to require technical or chemical analyses or laboratory tests where those analyses and tests have already been carried out in another Member State and their results are available to those authorities, or may at their request be placed at their disposal” (par. 14). See also Court of Justice, C-25/88 of 11 May 1989, *Wurmser and Others*, C:1989:187, par. 18-19.

²⁵ E.g. E. Schmidt-Aßmann, *Verwaltungskooperation*, cit. at 15, 285.

²⁶ Directive No 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (consolidated version).

was based and, without repeating the tests, can only determine the effects in its legal system²⁷. Hence the home administration substitutes that of the host country by carrying out the majority of the necessary analyses²⁸. This model is therefore a response to the need to put greater weight on the role of the host administrations, which in the majority of cases must ensure that the first act is adapted to their own legal system. In this way room is given to national diversity²⁹.

Nevertheless, in some cases (for e.g. the recognition of the authorisation for the commercialisation of pharmaceutical³⁰ or biocidal products³¹ on the market) the EU legislator provides for variations to this model. In these cases it is established that a Member State cannot unilaterally refuse to recognise an authorisation issued by another State: if there is no agreement, a negotiation phase is foreseen within specific coordination groups³² and, if the negotiation fails, the decision is left to the Commission which must act according to comitology rules (examination procedures), after having listened to the opinions of technical bodies. These legal regulations therefore limit to a certain extent the autonomy of the national administrations and hence the possibilities for differentiation.

2.4. Mutual recognition in parallel

Finally, mention should be made here to parallel authorisations³³ which represent a further variation of the act subject to recognition. Also in these cases, checks and controls are carried out by one individual national administration and, on the

²⁷ E.g. Court of Justice, C-452/06 of 16 October 2008, *Synthon*, C:2008:565.

²⁸ G. Biscottini, *Diritto amministrativo internazionale*, 117 (1964); Id, *L'efficacité des actes administratifs étrangers*, Recueil des Cours de l'Académie de droit international de La Haye, 639 ff. (1961).

²⁹ See e.g. K.A. Armstrong, *Mutual Recognition*, in *The Law of the Single European Market*, cit. at 1, 242, who talked about the "... domestication of the foreign regulatory process ...".

³⁰ Articles 28 ff. of the Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (consolidated version).

³¹ Articles 32 ff. of the Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (consolidated version).

³² Art. 35, Reg. No 528/2012; Art. 27, Dir. 2001/83/EC.

³³ See E. Schmidt-Aßmann, *Verwaltungskooperation*, cit. at 15, 286.

basis of this, other national authorities issue a single authorisation whose effectiveness is limited to their own territory. This model - used for example for some authorisations for the placing on the market of pharmaceuticals for human³⁴ or veterinarian use³⁵ or of biocidals³⁶ - includes functional and structural elements partly from the model of authorisations subject to recognition, and partly from that of common decisions. Indeed, despite the need for consent to be expressed by every national administration on the results of the inquiry carried out by another Member State (as is the case of administrative acts subject to recognition), mutual recognition in parallel favours - also through proceedings aimed at solving eventual administrative disagreements - the preventative aligning of the content of each authorisation. From a functional point of view, this is an element that characterizes the common decision.

3. Common features in the types of authorisation described

It is well known that every form of execution (whether centralised or decentralised) of European law is founded on complex cooperation mechanisms between national and European administrations in order to ensure coordinated, efficient and as far as possible homogeneous actions, as well as reciprocal control amongst the various public bodies involved³⁷. The forms and

³⁴ Articles 28 ff., Dir. 2001/83/EC.

³⁵ Articles 32 ff. of the Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products (consolidated version).

³⁶ Articles 34 of Regulation (EU) No 528/2012.

³⁷ For all, see L. De Lucia, *Strumenti di cooperazione per l'esecuzione del diritto europeo*, in Id., B. Marchetti (Eds) *L'amministrazione europea e le sue regole*, 171 ff. (2015); E. Schmidt-Aßmann, *Verfassungsprinzipien für den Europäischen Verwaltungsverbund*, in *Grundlagen des Verwaltungsrechts*, cit. at 15, vol. I, 261 ff.; H.H. Trute, *Die Demokratische Legitimation der Verwaltung*, ivi, 341 ff. spec. 427 ff.; W. Kahl, *Der Europäische Verwaltungsverbund: Strukturen – Typen – Phänomene*, in *Der Staat*, 353-387 (2011); E. Chiti, *The administrative implementation of European Union law: a taxonomy and its implications*, in H.C.H. Hofmann, A.H. Türk (Eds) *Legal Challenges in EU Administrative Law*, Cheltenham et al., 9 ff. (2009); E. Schmidt-Aßmann, *Einleitung*, in Id., B. Schöndorf-Haubold (Eds) *Der Europäische Verwaltungsverbund*, 1 ff. (2005); G. Sydow, *Vollzug des europäischen Unionsrechts im Wege der Kooperation nationaler und europäischer Behörden*, in *DöV*, 66 ff. (2006).

means of cooperation vary however in every normative field - we can therefore speak about different sectorial administrative unions. Indeed, in each sectorial union four elements are combined in different ways: decisional autonomy/interconnection of decisional powers, national competence/European competence³⁸. The combination of these elements changes however in relation to the specific administrative activities that are carried out in each sectorial union.

With limited reference to transnational authorisations it can be observed that administrative cooperation performs also the function of assuring alternative (or better compensative) forms of involvement in the decisional process of the host authority (and at times of the European administration)³⁹. In these institutional contexts, the public bodies concerned (even if different from that which issued the act) can in fact intervene at various points in the life of the transnational act in order to protect important collective interests (e.g. safeguard measures). Consequently, under the force of the transnational measure the fundamental freedoms can be exercised in the European Union and this is made possible through the coordination of the administrative functions of the origin and host authorities. On the other hand, within the sectorial unions, the national administrations can compare positions in relation to problems that could be caused by the act.

Despite the fact that each typology of transnational act consists of different forms of division of tasks between national administrations, they have three elements in common.

3.1. The inter-administrative tie

In all cases, the transnational effect aims at guaranteeing the effective division of tasks between a plurality of national authorities. In particular, the host administration cannot (unilaterally) question the validity or appropriateness of the measure of other States and must from time to time link this to legal consequences as established by European laws⁴⁰. This

³⁸ See in general M. Ruffert, *Von der Europäisierung des Verwaltungsrechts zum Europäischen Verwaltungsverbund*, in *Die Öffentliche Verwaltung*, 761 ff. (2007).

³⁹ E.g. G. Sydow, *Verwaltungskooperation*, cit. at 12, 49 ff.

⁴⁰ For a similar view see M. Ruffert, *Der transnationale Verwaltungsakt*, cit. at 12, 473 ff.

outcome, which can be called an 'inter-administrative tie'⁴¹, operates in different ways in the models described above. Its scope is wider with regard to authorisation with automatic transnational effects (i.e. when the country of origin has extensive decisional autonomy). Its scope is more limited, on the other hand, when a interconnection of decisional powers is provided for, i.e. with regard to joint decisions and in authorisation subject to recognition (including mutual recognition in parallel). In essence, there is an inverse relationship between the scope of the inter-administrative tie and the protection of the interests of the host country.

From a structural point of view, moreover, in the authorisation with automatic transnational effects and in the joint decision, the cross-border effect has two elements: the first of which is substantive, under which the private party can exercise a fundamental freedom; and the other organisational (the inter-administrative tie itself) which is binding on the other authorities, preventing them from carrying out autonomous checks on the validity of the measure issued by other States; the tie here has an instrumental function with regards to the substantive effect. In acts subject to recognition, the tie has a procedural nature and consists of the fact that the destination administration cannot contest (autonomously) the examination that the country of origin has carried out before issuing the first act. These limits are in any case set up to safeguard the freedom of private parties, even though this protection occurs within the recognition procedure itself.

3.2. Administrative conflict resolution

The transnational act represents an instrument to govern administrative pluralism. Is therefore likely that the public players involved will express contrasting points of view concerning the same administrative matters, depending either on their praxis, the interpretation of norms or conflicts of interest. In other words, given that the cross-border effects concern not only the administration that issued the measure, but also other States - and at times also European bodies - in many EU norms these effects

⁴¹ For reference to the German concepts of *Tatbestands-*, *Feststellungs-* and *Bindungswirkung*, see in general E. Schmidt-Aßmann, *Verwaltungskooperation*, cit. at 15, 299 f.

can be questioned by one of the host authorities or by the Commission (or by the European Supervisory Authority). This is foreseen, for example, when a State administration intends to contest a transnational act (e.g. through a safeguard measure) and it opposes the issuing of a joint decision or the recognition of an authorisation. In these cases often specific administrative procedures are provided for with the aim of resolving conflict between different administrations (e.g. negotiation, mediation, decisions taken by the Commission or other EU entities). The goal of these procedures is to reach a decision which is as far as possible shared between the parties in conflict, hence avoiding the recourse to the European judges⁴². In summary, they should transform conflict into cooperation.

As a consequence, in many cases the balance between public and private interests is not a product solely of the transnational authorisation but can also be realised outside of this as the outcome of a negotiation between the public players involved in a conflict within a sectorial union. For this reason, such measures can result in a limited stability of private rights which can lead to a high degree of uncertainty for private parties.

3.3. The competence of the home country judges and the bipolarity of the transnational act

Transnational authorisations can raise problems with regard to the protection of rights, as administrative pluralism often corresponds to a plurality of potentially competent courts⁴³. According to general principles, the recipient must challenge the unfavourable decision in the court of the legal system to which the issuing administration belongs⁴⁴. However, when a European

⁴² For an overview see, L. De Lucia, *Conflict and Cooperation within European Composite Administration (Between Philia and Eris)*, in *Rev. Eur. Adm. L.*, 1, 43 ff. (2012).

⁴³ E.g. F. Shirvani, *Haftungsprobleme im Europäischen Verwaltungsverbund*, in *Europarecht*, 619 ff. (2011); A.M. Keessen, *European Administrative Decisions*, cit. at 11, spec. chap. V.

⁴⁴ See in general Court of Justice, C-562/12 of 17 September 2014, *Liiuimaa Lihaveis*, C:2014:2229. In doctrine, see, amongst other M. Ruffert, *Der transnationale Verwaltungsakt*, cit. at 12, who raises the question of the possible remedies against an administrative act issued by another State which violates in an extreme way the fundamental rights of a private individual (476); see also T. Kemper, *Der transnationale Verwaltungsakt*, cit. at 12, 755; F. Shirvani,

decision has to be implemented through an administrative act (with transnational effects) of a Member State⁴⁵, this rule has to be adapted: Given that in this case the recipient can be considered directly and individually concerned by the EU decision, they must address the matter to the European court, without having to wait for the implementation of the EU measure at national level⁴⁶.

The position of third parties is more complex, however. In fact such measures can violate the principle of effective legal protection when the third party must undertake legal action in a country which is not that of their residence (or of establishment): economic costs or limitations with regards to the *locus standi*⁴⁷ could constitute a barrier to their access to the courts⁴⁸. Without going into this complex problem in too much depth, it should be observed that in some circumstances these limits could nonetheless be compensated for by the fullness of the protection in front of an ordinary court. During a civil trial in which the applicant asks to be safeguarded in the face of the private activity authorised by the transnational measure enacted abroad, the host (ordinary) court must not question the legitimacy of the authorisation, focusing its attention solely on the conduct of the private party causing the alleged damage. In the judgment, the act itself is therefore unimportant and cannot serve as a justification for the detrimental conduct⁴⁹.

Most of these legal norms place the burden of responsibility of conduct above all on the beneficiary of the transnational authorisation who must consequently protect third parties and collective interests (e.g. public health, environment etc.), adopting all the necessary precautions, even if these are over and above

Haftungsprobleme, cit. at 43, 619 ff.; A.M. Keessen, *European Administrative Decisions*, cit. at 11, spec. chap. V; J. Hofmann, *Rechtsschutz und Haftung im Europäischen Verwaltungsverbund* (2004).

⁴⁵ E.g. Art. 34, Dir. 2001/83: A Commission decision on one State's refusal of recognition of a host authorisation of a pharmaceutical product.

⁴⁶ E.g. Court of Justice, C-188/92 of 9 March 1994, *TWD v Bundesrepublik Deutschland*, C:1994:90 and C-178/95, of 30 January 1997, *Wiljo v Belgische Staat*, C:1997:46.

⁴⁷ E.g. A.M. Keessen, *European Administrative Decisions*, cit. at 11, chap. V.

⁴⁸ E.g. N. Bassi, *Mutuo riconoscimento*, cit. at 12, 69 ff.; M. Ruffert, *Der transnationale Verwaltungsakt*, cit. at 12, 476.

⁴⁹ For a wider view see L. De Lucia, *Administrative Pluralism*, cit. at 14, 35 ff., with reference to the jurisprudence.

those prescribed in the authorisation itself⁵⁰. In other words the transnational measure in the host country is characterised by bipolarity, as in principle it only guarantees the protection of specific public interests, but it does not govern private relationships and does not ensure the correct functioning of the social dynamics⁵¹.

4. Recent moves away from transnational administrative authorisations

In the face of these complicated regulations, a current legislative (and jurisprudential) trend can be seen which in some cases foresees the substitution of transnational authorisations with forms of centralisation (par. 4.1.) or, on the contrary, the weakening of the cross-border effect (par. 4.2.).

4.1. Centralisation

As an example of centralisation, mention can be made here of the new regulation for authorisations to take up the business of a credit institution, the responsibility for which in the Eurozone is now attributed to the European Central Bank⁵²; in the past these acts were instead issued by the Member States and produced automatically transnational effects (the so-called “European passport”)⁵³, or of the recent regulation of the European Union Agency for Railways⁵⁴, which gives the Agency a series of powers, amongst which the issuing of the authorisations for the placing on the market of railway vehicles and types of vehicles and

⁵⁰ See e.g. Art. 20, para. 2, Dir. 2001/18; Art. 25, Dir. 2001/83.

⁵¹ See as above L. De Lucia, *Administrative Pluralism*, cit. at 14, 37 ff.

⁵² Articles 20-21 of the Council Regulation No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions. On this issue see for e.g. S. Antoniazzi, *The ECB's Banking Supervision And European Administrative Integration: Organisation, Procedures And Legal Acts*, in this Journal, 2, 318 ff. (2015).

⁵³ Articles 25 ff. of the Directive No 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions.

⁵⁴ Regulation (EU) No 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004.

authorisation for the placing in service of trackside control-command and signalling sub-systems; in the past also these acts had automatic transnational effects⁵⁵.

In addition there is the registration of ratings agencies; today this administrative act is issued by the European Banking Authority⁵⁶, whilst under the previous regulation it was the result of a composite procedure (similar to the joint decision) of national competence but still with transnational effects⁵⁷. The same can be said of some biocidal products that now can be directly authorised by the Commission⁵⁸; this procedure was not provided for in the previous EU legal discipline (which dealt only with authorisations subject to recognition)⁵⁹. Finally, whilst in the past the release on the market of novel foods and novel food ingredients was subject to authorisation adopted through a joint decision⁶⁰, since 2015 these measures have been passed to the competence of the Commission which must act with the support of the European Food Safety Authority⁶¹.

4.2. Weakening of the cross-border effect

There is however a movement in the opposite direction

⁵⁵ Articles 20 ff. of the Directive 2008/57 (EC) of the European Parliament and of the Council of 17 June 2008 on the interoperability of the rail system within the Community.

⁵⁶ Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies.

⁵⁷ Articles 15 ff. of the Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies.

⁵⁸ Art. 41, Reg. No 528/2012. According to the recital 26 of the Reg. cit. "To facilitate the placing on the EU market of some biocidal products with conditions of use analogous in all Member States, it is opportune that these products are authorised at EU level".

⁵⁹ Art. 4 of the Directive No 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market.

⁶⁰ Articles 4 ff. of the Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients.

⁶¹ Regulation (EU) 2015/2283 of the European Parliament and of the Council of 25 November 2015 on novel foods, amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council and repealing Regulation (EC) No 258/97 of the European Parliament and of the Council and Commission Regulation (EC) No 1852/2001.

towards giving more weight to national interests at the expense of the transnational effect (and hence the unitary needs).

This development we see above all in the rulings of the Court of Justice regarding driving licences⁶². Driving licences are administrative acts with automatic transnational effects⁶³, which have the dual aim of facilitating the free movement of people taking up residence in a Member State other than the one issuing the licence and of improving road safety⁶⁴. In the past, the Court of Justice, by virtue of the principle of reciprocal recognition, clarified that Directive 91/439/EC (which in this regard was similar to the current one)⁶⁵ precluded “a Member State from refusing to recognise a driving licence issued by another Member State on the ground that, according to the information available to the first Member State, the holder of the licence had, on the date on which it was issued, taken up normal residence in that Member State and not in the Member State in which the licence was issued”⁶⁶. Subsequently, however, the EU Judges - to curb the practice of the so-called “driving licence tourism” - recognised wider powers to the destination authorities to check the existence of the requirement of residence, allowing them to verify from this point of view the validity of every single licence issued in other Member States⁶⁷. Therefore, despite the absence of any legislative change, in the interest of protecting road safety the Court has restricted the scope of the inter-administrative tie. Hence a new decisional model has emerged: the national administrative act

⁶² Directive No 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licenses.

⁶³ Art. 1, par. 2, of the Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (Recast).

⁶⁴ E.g. M. Ruffert, *Europäisiertes Allgemeines Verwaltungsrecht im Verwaltungsverbund*, in *Die Verwaltung*, 543 ff., spec. 554 (2008); M. Szydło, *EU Legislation on Driving Licences: Does It Accelerate or Slow Down the Free Movement of Persons?*, in *German Law Journal*, 13, 345 ff. (2012). See also N. Bassi *Il mutuo riconoscimento in trasformazione: il caso delle patenti di guida*, in *Riv. It. Dir. Pubbl. Com.*, 1517 ff. (2008).

⁶⁵ Council Directive 91/439/EEC of 29 July 1991 on driving licences.

⁶⁶ Court of Justice, C-476/01, of 29 April 2004, *Kapper*, C:2004:261, par. 47. See also Court of Justice C-230/97, of 29 October 1998, *Awoyemi*, C:1998:521.

⁶⁷ For a review of this legislation with reference to Germany, see M. Ruffert, *Verwaltungsrecht im Europäischen Verwaltungsverbund*, in *Die Verwaltung*, 547, spec. 551-555 (2015).

with transnational effects subordinated to controls⁶⁸.

Another couple of examples of this can be found in secondary legislation. In Directive 2001/18 (on the placing on the market of GMO products) the foundation of the authorisational effect is variable. As mentioned above, when there is the consensus of all the Member States, the competent national administration can issue the favourable measure: unanimity represents here the justification of the cross-border effects⁶⁹. If there is a conflict (i.e. when there are objections from one or more States) the decisional power passes to the Commission which must define the question in a binding way for all the Member States. This system has proved to be dysfunctional, however, essentially due to the alarm this causes in public opinion in some Member States⁷⁰. For this reason in 2015 the directive was modified: today the Member States, in addition to being able to raise an objection to the placing on the market of a GMO, can ensure (through a rather complex system) during the authorisation proceedings that all or part of their territory is excluded from the cultivation of candidate products because of environmental policy objectives, town and country planning, land use, socioeconomic impacts, agricultural policy objectives, etc.⁷¹. In essence, each Member State can unilaterally refuse the transnational effect without this leading to an administrative conflict with the other States and without therefore generating the need for a Commission decision.

The placing on the market of plant protection products is

⁶⁸ E.g. E. Schmidt-Aßmann, *Verwaltungskooperation*, cit. at 15, 300 ff. For another example of this model, see also Art. 34 of the Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas.

⁶⁹ See the Opinion of the Advocate General in Case C-6/99 delivered on 25 November 1999, *Greenpeace France and Others*, C:1999:587, par. 56.

⁷⁰ See for all, M. Weimar, *Risk Regulation and Deliberation in EU Administrative Governance – GMO Regulation and its Reform*, in Eur. L.J., 622-640 (2015).

⁷¹ Art. 26-ter, Dir. 2001/18, added by the Directive (EU) 2015/412 of the European Parliament and of the Council of 11 March 2015 amending Directive 2001/18/EC regarding the possibility for the Member States to restrict or prohibit the cultivation of genetically modified organisms (GMOs). See. M. Porpora, *Gli OGM e la frammentazione della governance nel settore alimentare*, in Riv. It. Dir. Pubbl. Com., 1661 ff. spec. 1678 ff. (2016).

another example of this⁷². Even though the regulation is a highly complex, it must be highlighted that, in contrast to the past, on the basis of current legislation each Member State can refuse to recognise the authorisation for the placing on the market issued by another Member State for reasons connected with the health of people or animals and for the protection of the environment⁷³. Also in this case, the refusal, differently to the old regime⁷⁴, does not give rise to an administrative conflict (and all that follows) but simply to the exclusion of the transnational effect in each single Member State.

5. Towards the reshaping of the transnational administrative authorisation?

Could these trends mean that the transnational administrative authorisation is in crisis and that it is destined to be re-dimensioned? Only time will give the answer to this question, if for no other reason than the fact that we need to see whether these tendencies extend to other fields. For the moment some brief observations can be made on this point.

The principle of mutual recognition has been interpreted in various ways by scholars. For example according to some it represents one of the consequences of the “horizontal opening up” of the States originating from European integration⁷⁵, which results in a form of governance of the single market based on the competition (or better a competition in the shadow of EU hierarchy) between national authorities and national legal orders⁷⁶. Others, on the contrary, maintain that it gives rise to an institutional system aimed at resolving conflicts between the

⁷² Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC.

⁷³ Articles 36, par. 3 and 41, Reg. No 1107/2009.

⁷⁴ Articles 10 and 11, Council Directive No 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market.

⁷⁵ See for e.g. M. Kment, *Grenzüberschreitendes Verwaltungshandeln – Transnationale Elemente deutschen Verwaltungsrechts* (2010).

⁷⁶ T. Börzel, *European Governance: Negotiation and Competition in the Shadow of Hierarchy*, in J. Comm. Mkt. St., 191 ff. (2010); in different terms, P. Maduro, *We the Court*, cit. at 1, spec. 111 ff.

norms of the various Member States⁷⁷.

As is well known, this second approach has greatly influenced the study of EU law. According to one of the most original theories on this theme, the concept of conflict between norms and legal systems in itself should constitute one of the bases for a renewed European constitutionalism⁷⁸. At the centre of this complex and fascinating reconstruction is the idea that the strengthening of EU democracy necessitates the abandonment of the mere defence of the national State, which itself cannot be the federal prototype for the European Union. The proposal is thus made of a "horizontal constitutionalism", meaning a system in which the function of the EU law is to ensure the co-existence of different legal systems within the EU, identifying rules and principles which could be acceptable to all. All of this should be founded on a (meta-)principle that is able to increase the democratic potential of the Member States: Taking their neighbours' concerns seriously⁷⁹.

This idea, which has a markedly deliberative mould, is well-suited to interpreting and justifying conceptually many of the secondary norms which regulate transnational administrative acts⁸⁰ - norms and proceedings that in many cases are aimed at facilitating the reaching of consensus within the single sectorial unions of the national administrations around a decision issued (or to be issued) by a single Member State and consequently to avoid forms of rejection by national constituencies.

It must be underlined that this deliberative need is often heightened by the fact that many transnational acts are

⁷⁷ E.g. G. Rossolillo, *Mutuo riconoscimento e tecniche conflittuali*, cit. at 1. For a general overview, see also M. Ruffert, *Recognition of Foreign Legislative and Administrative Acts*, cit. at 12.

⁷⁸ The reference here is obviously to Christian Joerges, of which see for example: Id., M. Everson, *Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts-Law Constitutionalism*, in Eur. L.J., 644 ff. (2012); Id., *The Idea of a Three-Dimensional Conflicts Law as Constitutional Form*, RECON Online Working Paper, 5 (2010); Id., *Rethinking European Law's Supremacy*, EUI Working Paper Law, 12(2005).

⁷⁹ C. Joerges, M. Weimar, *A Crisis of Executive Managerialism in the EU: No Alternative?*, Maastricht Faculty of Law Working Paper 7, 29 (2012).

⁸⁰ E.g. H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law and Policy*, cit. at 12, 645; see also L. De Lucia, *Amministrazione transnazionale*, cit. at 12, spec. chap. 6.

instruments for risk management. They are decisions (for example regarding GMOs, pharmaceuticals, plant protection products, biocidals and so on) which, owing to technical or scientific uncertainties, can endanger important public interests (for example human or animal health, the environment etc.). This justifies the recourse to highly complex administrative proceedings (involving many different national and European entities), who are able not only to generate consensus, but also to gain knowledge and guarantee rational decisions which can be adapted to the conditions of uncertainty⁸¹. All of this clearly requires the maximum level of trust amongst administrative bodies (especially technical ones) from the various legal systems.

Even so, for some time now scholars have highlighted the limitations of this approach, for example by underlining that, if properly founded, also the lack of trust of an administration towards its counterpart in another Member State, must lead to legal consequences⁸². Moreover, as has been seen, the price of the deliberative horizontal governance (even more so for “risky” decisions) can be very high in terms of the complexity of decision-making processes and can cause significant differences in the practices followed by the national administrations (which in turn can be transformed into protectionist behaviours)⁸³. In other words the legal discipline of transnational acts in many cases has shown negative consequences, due to an excessive guarantee of institutional pluralism.

These considerations explain the tendency towards centralisation in the fields mentioned above. This change is partly

⁸¹ On this matter there is a wide range of material. See for e.g. A. Barone, *Il diritto del rischio* (2006); W. Hoffmann-Riem, *Risiko-und Innovationsrecht im Verbund*, in *Die Verwaltung*, 140 ff. (2005); A. Scherzberg, *Risikosteuerung durch Verwaltungsrecht: Ermöglichung oder Begrenzung von Innovationen?*, in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 214 ff. (2004); *Risk Regulation in the European Union: Between Enlargement and Internationalization*, G. Majone (Ed), EUI (2003).

⁸² E.g. E. Schmidt-Aßmann, *Perspektiven der Europäisierung des Verwaltungsrechts*, in P. Axter, B. Grzeszick, W. Kahl, U. Mager, E. Reimer (Eds) *Das Verwaltungsrecht in der Konsolidierungsphase*, *Die Verwaltung*, Beiheft 10, 263 ff., spec. 272 ff. (2010).

⁸³ See for e.g. F. Bignami, *The Challenge of Cooperative Regulatory Relations after Enlargement*, in G. Bermann, K. Pistor (Eds) *Law and Governance in an Enlarged European Union*, 104 (2004).

linked to the recent crisis and to the different administration abilities of Member States in the field of finance⁸⁴. It also stems more generally in part from the need to simplify certain authorisation procedures⁸⁵. In any case this offers the advantage of unifying the decision-making moment, with significant benefits for example in terms of the protection of rights and of the clearer identification of the responsibility for individual decisions⁸⁶. But above all centralisation allows for the optimisation of the State's administrative resources⁸⁷. For example the new rules on banking supervision and the authorisation of biocidals give fundamental preparatory tasks back to the national authorities. In essence, centralisation, despite simplifying the decisional process, is itself founded on complex collaboration techniques with the Member States and hence allows the interests and characteristics of each individual national context to emerge; all of which, however, under the control (but not necessarily under the hierarchy) of the EU authorities. It could thus be seen as a form of soft centralisation. Administrative pluralism has therefore not failed (nor could it fail); with respect to the principles of subsidiarity and effectiveness (Art. 298 TFEU)⁸⁸, it has been streamlined, without being deprived of the instruments that guarantee deliberative forms of decision (and conflict resolution): suffice to think of the role that the comitology committees (or analogous bodies) play in

⁸⁴ E.g. E. Chiti, *In the Aftermath of the Crisis - The EU Administrative System Between Impediments and Momentum*, in *Cambridge Yearbook of European Legal Studies*, 311 ff. (2015).

⁸⁵ See e.g. the Commission Staff Document Impact Assessment, Accompanying the documents Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004, SWD(2013) 8 final, of the 1 January 2013, spec. par. 3. See also the Proposal for a Regulation of the European Parliament and of the Council on novel foods COM/2013/0894 final - 2013/0435 (COD), in particular par. 2, 3, and 6.

⁸⁶ E.g. B. Marchetti, *Il sistema integrato di tutela*, in *L'amministrazione europea e le sue regole*, cit. at 37, 209 ff.; E. Schmidt-Aßmann, *Verwaltungs Kooperation*, cit. at 15, 296.

⁸⁷ E.g. P. Maduro, *We the Court*, cit. at 1, spec. 111 ff.

⁸⁸ Stating that "the centralisation of decision-making can be due to the fact that the Member State alone is not able in a sufficient or effective way to carry out its administrative tasks", G. Sydow, *Verwaltungs Kooperation*, cit. at 12, 47 (our translation).

these decision-making processes⁸⁹.

Along these lines, the fact should not be overlooked that the centralisation in the Commission (or other EU institutions or bodies) of authorisation competences is considered by the Court of Justice one of the instruments that can ensure the orderly functioning of the internal market where there is a risk of differing behaviours between the Member States (Art. 95 TCE and now Art.114 TFEU)⁹⁰; an objective that leaves the EU legislator a wide margin of choice⁹¹.

The process towards giving more weight to national interests is a more complex issue. Above all given that the phenomenon described above depends on the characteristics of each sector, it is impossible to formulate general remarks on this point. However, it can be observed that in the case of driving licences the problem which led to the reduction in the scope of the inter-administrative tie, has an essentially procedural nature. In fact in future it cannot be excluded that a more sophisticated system of administrative cooperation (for example also through information technology) could contribute to overcoming many of the problems encountered⁹². On the other hand, especially for GMO products, there are political problems respect to which no general agreement has been found between the Member States and the EU institutions⁹³. This has led the EU Legislator (on the initiative of the Commission) to change the balance in the sectorial unions, giving the Member States the possibility to be excluded, in full autonomy, from the effects of the authorisation⁹⁴.

⁸⁹ On this issue, see for all C. Joerges, J. Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, in Eur. L.J., 273 ff. (1997).

⁹⁰ In jurisprudence, recently Court of Justice, C-270/12 of 22 January 2014, *United Kingdom v Parliament and Council*, C:2014:18, par. 110; in doctrine, in general M. Möstl, *Preconditions*, cit., 415 f.

⁹¹ E.g. Court of Justice, C-66/04 of 6 December 2005, *United Kingdom v Parliament and Council*, C:2005:743, par. 45 f.

⁹² For arguments on this area, see Court of Justice C-419/10 of 26 April 2012, *Hofmann*, C:2012:240, par. 82.

⁹³ See the Commission report on the proposal to modify regulation (CE) no. 1829/2003 regarding the possibility of the Member States to limit or prohibit in their territory the use of foodstuff or animal feed which has been genetically modified COM(2015) 177 final.

⁹⁴ Nevertheless in October 2015 the European Parliament, contrary to this tendency towards re-nationalisation, rejected the proposal of the Commission

6. Final remarks

What has been said so far does not mean that the project for the “horizontal governance” of the single market is definitively waning. It suggests rather that we need to take note of the practical problems that this conceptual and institutional approach has produced and to reflect on possible corrective measures. Without claiming to identify binding rules on this issue, the legislation mentioned above (and the rulings of the Court of Justice) give some interesting clues about a possible rationalisation of the legal discipline of some common market authorisation procedures.

First, we need to move away from forms of “procedural optimism” (or better “procedural ingenuity”), meaning the idea that a well-structured administrative procedure can in all cases contribute to overcoming all forms of institutional dissent, including political dissent. The new legal discipline of the GMOs represents a perfect example of this.

Secondly, it seems reasonable and useful to give EU bodies the competence to issue authorisations when:

- a) these can affect the entire EU market and
- b) they concern “(...) fields which are characterised by complex technical features”⁹⁵. In this case the centralisation of administrative powers would conform to the principles of proportionality and subsidiarity.

As a result, it would be better to resort to complex national decision-making - such as joint decisions or some form of authorisation subject to recognition - only when dealing with relations between two or three countries (as happens now for the cross-border transport of waste). Practice has shown that in other cases, this model can easily be transformed into a dissipation of administrative (and private) resources. For the same reasons, national authorisations with automatic transnational effects should concern simple and non-discretionary cases, as otherwise problems of market fragmentation (due to dishomogeneity in the execution phase) could arise.

Obviously, if such indications were taken on board in future

to extend the limitation mechanism already identified for the GMO cultures also to GMO foods and animal feed: see the European Parliament legislative resolution of 28 October 2015, P8_TA(2015)0379

⁹⁵ See again Court of Justice C-66/04, par. 45.

by the EU legislator, a substantial strengthening of executive activity at European level would follow. However, this would require a major adjustment effort both in the legislation and in the behaviour of European bodies, above all to avoid excessively technocratic forms of decision-making⁹⁶ and, more generally, to guarantee a respectful relationship with the networks of national authorities who continue to represent an essential factor for the legitimacy of the EU administration. Moreover, it would be important for the rules which call for the centralization to be structured in multi-polar form, to allow (and to force) the European administration to take full responsibility for the consequences of its decisions on the internal social dynamics of Member States.

If this were to happen the process of centralisation that is currently taking place could bring significant benefits in the future.

⁹⁶ On this issue see e.g. M. Weimar, *Risk Regulation and Deliberation*, cit. at 70.

THE LIFE AND DEATH OF THE SCHENGEN AGREEMENT: IS THE ABOLITION OF INTERNAL BORDERS A REALISTIC GOAL?*

Marie Gautier**

Abstract

The Schengen System is currently going through a radical shift. As we observe its relative failure, the inadequacy of our models (especially legal) as well as the possibility of an area composed by States without internal borders, have to be put in question. The paper argues that if ever the borders controls were to be definitely reintroduced, that would not mean that Schengen would completely disappear.

TABLE OF CONTENTS

| | |
|--|-----|
| 1. Introduction..... | 115 |
| 2. Incomplete transfers of powers..... | 118 |
| 2.1. Powers that were not transferred..... | 119 |
| 2.2. Transferred competencies retained by Member States..... | 120 |
| 3. Inadequate legal tools?..... | 122 |
| 3.1. A precedent: free movement of goods..... | 123 |
| 3.2. Managing people: Success and impasses..... | 123 |
| 4. Conclusion: What will be left from Schengen?..... | 125 |

1. Introduction

In may 2016, in the French Conseil d'Etat, in a conference about the European legal melting pot concerning foreign national law, professor Cassese underlined how the three constitutive elements of the State (territory, population, sovereignty) are currently going through a radical shift¹. The Schengen System

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perfectly illustrates these shifts. As we observe its relative failure, the inadequacy of our models (especially legal) as well as the possibility of an area composed by States without internal borders, have to be put in question.

Implementing the Schengen agreement of the 14th June 1985 and 1990 convention² set a particularly ambitious target, aiming to create a European area without internal borders for individuals³. It does not merely ensure E.U nationals, now European Citizens, the right to enter and stay in the territory of another member state. This was the object of the free movement of persons provided by the Treaty of Rome. Even if it took a few decades⁴, it was put into effect within that framework –with a few limits that will be addressed later. With Schengen, they will exercise this right without any formality, that is to say border control. But to reach such a target, not only the applicable rules regarding the movement of EU citizens have to be defined : it is also necessary to agree on the applicable rules for foreigners. This latter issue is relevant as entering one of the Schengen area territories allows entry to any other Member State’s territory. The movement of Europeans, free of any control, triggers an increase of cross-country legal issues and consequently enhances the need for harmonisation.

Clearly, such an agenda is deeply destructive for the three constitutive elements of the State. For the *Territory* it is destructive,

¹ <http://www.conseil-etat.fr/Actualites/Le-Conseil-d-Etat-vous-ouvre-ses-portes/Les-colloques-en-vidéos/Le-creuset-normatif-europeen-l-exemple-du-droit-des-étrangers>

² OJEC, n° L 239, 22 Sept. 2000

³ Even if it is one the European Community’s goal since the Single Act (see art. 7 A), it was necessary to make a detour with an international agreement beside the European community because of the opposition of some member States (see J. C. Gautron, *Droit et politique: le cas de Schengen*, in E. Bort, R. Keat (eds.), *The Boundaries of Understanding. Essays in Honour of Malcom Anderson*, 155 (1999) However, since the incorporation of Schengen in the Community framework with the treaty of Amsterdam, the goal and the means to achieve it belong to the same legal order.

⁴ One can assume that the main principles of the free movement of persons as it was conceived in the treaty of Rome was globally achieved with the three directives of 1990 about the free movement of the inactive (directives 90/364/EEC, 90/365/EEC and 93/96/EEC), even if the implementation of those principles is still very discussed (EUCJ, 11 November 2014, Elisabeta Dano and Florin Dano v Jobcenter Leipzig, Case C-333/13).

as what physically defines its limits partly disappears. This occurs as it no longer appears as a valid element to judge the territorial validity of administrative acts, particularly for foreigners. It is also destructive for the *Sovereignty*, since the State transfers at least part of its competency in order to unilaterally state who can or cannot enter its territory. Lastly, it is destructive for the *People*, since the State is no longer competent to define who foreigners are and what rights they are entitled to.

In light of the above challenges, the success of Schengen might be surprising. No matter how tedious the beginnings were (with 5 years to negotiate the convention, 5 more on the implementation of technical elements such as Schengen Information System and 2-3 years of full-scale tests), the Member States managed to set up a space without internal borders -at least seemingly, making the Schengen Area one of the greatest achievements of the EU.

The discrepancy between today's situation is therefore striking. Recently, Austria, Germany, France, Denmark, Norway and Sweden notified the European Commission about their reintroduction of border controls⁵. France claimed the reintroduction was linked to the UEFA European Champions and the Tour de France. And then because of the emergency state as introduced further to the Nice attack. However, the risk of massive arrivals of refugees is the main cause of the reintroduction of border controls. The countries concerned with the reintroduction got in May the authorization to extend it until the end of the year⁶. It is slowly drifting from a temporary situation to a permanent one.

⁵ Which is possible pursuant article 23 of the Schengen Borders code (regulation n° 562/2006) but for a short period (30 days) that may be prolonged with a special procedure. See Commission opinion of 23.10.2015 on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria pursuant to Article 24(4) of regulation n° 562/2006, C (2015) 7100 final.

⁶ Council Implementing Decision setting out a Recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, 12 May 2016 and the full list available on the European Commission website (http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index_en.htm).

Reintroduction of border controls comes alongside direct and indirect reconsiderations of the system itself by the States Members, as well as proposals aiming to «save» the system – but not without radical modifications (such as Netherlands’ idea to create a «mini Schengen» with fewer states). Even the Commission’s communication «Back to Schengen - a Roadmap»⁷ issued last March does not give a very hopeful impression, admitting that the reintroduction of borders controls was necessary to face systemic failures, notably Greek ones. It is not the first time that the Schengen system has been strongly criticized and put into question, but this time might be the last.

In view of the unique situation Europe is facing today, with what we refer to as the “migrant crisis”, one could say that the Schengen system is crumbling down under the effect of difficult circumstances.

However, it seems to me that Schengen has been weakened by structural factors as well as the current inability to create a space composed by States, but without internal borders. This systemic weakness is twofold. On the one hand, the States were reluctant to the idea of being deprived from any attributes of sovereignty, which triggered an incomplete transfer of competency. Schengen seems condemned to be a patchy system. On the other hand, the functioning of the system was inspired by the free movement of goods, which turned out to be inadequate when it came to the free movement of people. New legal instruments need to be invented.

2. Incomplete transfers of powers

Schengen’s main agenda, setting up an area without internal border, was never fully accepted by the Member States. I am not referring here to the States that refused the principle as a whole and thus were granted opt-outs such as United Kingdom and Ireland (even if, in fact, the two countries take part in some of the repressive actions of Schengen⁸). For all the other members of

⁷ COM(2016) 120 final, 4.3.2016. The title itself implies that we are not in Schengen anymore...

⁸ According to article 4 of the Protocol n° 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, “The United Kingdom or Ireland may at any time after the adoption of a

the Schengen area (that is to say EU Member States, Norway and Iceland), transfers of power have been left incomplete. This exists because parts of the prerogative remained in the hands of States. Alongside this, the powers that were actually transferred are still under the influence of the national governments.

2.1. Powers that were not transferred.

Schengen was never an area within which foreigner-related issues were tackled together. The transfer of power took place only regarding the entrance and short-term stay of aliens (i.e. external borders control and visas policy)⁹. Concerning long-term legal immigration, common legal dispositions are scarce and deficient. The directive concerning the status of third-country national who are long-term residents¹⁰ or the directive on the right to family reunification¹¹ are, at least for now, much more a juxtaposition of national legal provisions than a downright alignment.

It is quite easy to explain. Despite a relative consensus between the States on a very restrictive policy regarding entrance to the territory, there is no such unity when it comes to reliance on immigration and the fate of all foreigners that are legally resident.

measure by the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union notify its intention to the Council and to the Commission that it wishes to accept that measure". In pursuant to these provisions, the United Kingdom operates for example the SIS within the context of law enforcement cooperation, and both the United Kingdom and Ireland are bind by Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals (OJEU, n° L 149, 2.6.2001).

⁹ In those areas, the legal framework is however impressive, especially with the Schengen Borders Code (Regulation (EC) N° 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, modified several time since, consolidated version of March 2016 : OJ L 77, 23.3.2016), the common list of countries whose citizens must have a visa when crossing the external borders and a list of countries whose citizens are exempt from that requirement and the Visas Code (Regulation (EC) n. 810/2009 of the European Parliament and of the Council of 13 July 2009, OJ L 243, 15.9.2009 ; amended the last time with Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013, OJ L 182, 29.6.2013).

¹⁰ Council Directive 2003/109/EC of 25 November 2003, OJEU L16, 23.1.2004.

¹¹ Council Directive 2003/86/EC of 22 September 2003, OJEU L 251 , 03.10.2003

The demographics of the European states, their level of attractiveness for foreigners, their need for workforce as well as the public opinion within their borders are too contrasting to envision a real common immigration policy beyond a few dispositions about immigration of third-country nationals for the purposes of highly qualified employment¹².

This distortion between an almost complete alignment of short-term entry policies and a state-owned competence over long-term residence cannot work if there is no common agenda between the States, that is zero immigration. Any deviation from this -implicit- target will lead to tensions and further reconsideration of the idea of a space without internal borders. This is how the regularisation policies implemented by Italy and Spain (even though they would not have translated into a wave of immigrants, since their resident permit was solely valid in these two countries)¹³ lead to a temporary reintroduction of borders control in France. Likewise, Germany's unilateral announcement to welcome Syrian refugees led to deadlock in the European arena.

Incomplete transfer of competency regarding migratory matters is a first factor of weakness. A second one is the way those powers are exercised.

2.2. Transferred competencies retained by Member States

In order to set up a legal area that is unified, yet composed by separate states, a minimal centralization of the decision-taking process seems necessary. The monitoring of its proper implementation should complement this. Within the EU, two institutions build a solid foundation for centralization. Firstly, the European Commission, 'Guardian of the treaties' and initiator of the legal process. Secondly, the European Court of Justice, for the benefit of which Member States have waived to dispense justice on their own behalf. It is known that states originally built Schengen outside of the EU, not only because of the oppositions of some of the co-members, but also to avoid the usual constraints of the normal functioning of the Union. Also known is the fact that

¹² Council directive /50/EC of 25 May 2009 on the "blue card", OJEU L 155 18.6.2009

¹³ See H. Delzangles, *Des voies à harmoniser? Les politiques de régularisation*, in C. Gauthier, M. Gautier (eds.), *L'immigration légale: aspects de droits européens*, 68 (2011).

the integration into the European Union happened gradually through the 'third pillar' channel. The uptake of the 'normal' institutional framework took place at the expense of a new kind of opt-out, invented for Denmark (It belongs to the Schengen area but the legal dispositions within the system are considered as norms of international law - which the country has to ratify and can unilaterally oppose).

Today, Schengen is no longer different from an ordinary EU policy. However, the core of the system still relies on both unilateral decisions by the states and collective mechanisms, instead of transfer of competency towards integrated authorities. Two examples illustrate how many competencies are retained by the Member States.

The first one is the reintroduction of border controls. Although it seems logical that the creation of a common spaces would come along with safeguard clauses to allow the States to pull out when facing urgencies. This is how the Internal Market includes safeguard clauses in all its aspects. However, these ones have a very restrictive definitions and the Commission strictly regulates their application. One might say that the clauses concerning free movement of persons (as the right to move around freely for EU citizens) have been battered in the last years. The 'public order' clause has not soften since the mid-seventies and seems even less protective today when applied by the States to European citizens such as Romanians and Bulgarians¹⁴. Likewise, the « Social Security and Sufficient Resources » clause is at the heart of Great Britain's concerns and debates around the Brexit.

Within Schengen, the safeguard clause is in fact maintaining the States' unilateral power, unknown in the Internal Market functioning. Despite its initial will, the Commission hasn't managed to monitor the use of these clauses when the Schengen Border Code was adopted. This is true both in substance (the articles 23 to 30 could not be more lax) and in terms of process (only a notification to the Commission is needed). The latter can even be bypassed without any legal proceeding. For instance, when facing a massive flow of foreigners (especially from Tunisia) in April 2011, Italy decided to grant residence permits for

¹⁴ CE, 1^{er} octobre 2014, Mme D., n° 365054, publié au Recueil.

humanitarian reasons. In response to that, France took the decision to reintroduce controls at its borders with Italy, since the flow of migrant was making its way towards the French territory¹⁵. In addition, it seems that the Tour de France is now a legitimate reason for reintroducing borders controls. Here it is, a space without internal borders but within which controls could be reinstated yearly, for France's tour in July, Italy's Giro in May or Spain's vuelta in September.

The second example shows how the transfer of competency was never fully accomplished and address the evaluation of the correct implementation by the Member States of the Schengen Agreements. The control of the EC acquis relies on the Commission and the ECJ, which can both be referred to by the Member States. The centralisation of control is, therefore, quite proficient. But Schengen is not like so. Monitoring for compliance of Applicant and Member States to the rules from the EC acquis is entrusted to teams composed by both Commission and Member States representatives¹⁶. Therefore, they all take an active role in mutual surveillance. In addition, reviewing the mechanism in 2013 did not deeply modify it. Its principle is, besides, laid down in the article 70 of the treaty. The control shows that there is no environment of mutual trust. On the contrary, mutual suspicion cripples the usual legal tools of the Union law.

3. Inadequate legal tools?

Beyond the States' reluctances and admitting that a further transfer of the necessary competencies is possible, there is still an obstacle to be overcome: find the adequate legal tools to manage a space without internal borders for people.

¹⁵ See M.-L. Basilien-Gainche, *La remise en cause des accords de Schengen*, <http://ceriscope.sciences-po.fr/content/part2/la-remise-en-cause-des-accords-de-schengen>.

¹⁶ Council regulation (EU) n° 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJEU L 295 6.11.2013.

3.1. A precedent: free movement of goods.

At first glance, it seems like we have the know-how. In fact, there is such an area without internal borders when it comes to free flow of goods, an area completed in 1992. This space legally relies on one principal : mutual recognition. It gave birth to what the German Doctrine calls transnational administrative actions. Pr Schmidt-Aßman defines it as so :«based on a 'uniform law' (a Community Regulation, a national legislation implementing a directive or a directly applicable directive) and enacted par a national authority, it has binding legal effects determined by this uniform law, in every member states, without the need of an act of recognition»¹⁷. The transnational administrative act brings to light a process de-territorialization in law. It disrupts the functioning of government systems by redefining the territorial scope of what epitomizes the State's sovereignty: unilateral administrative acts.

Concerning the free movement of goods, this unilateral act is the basic unit of the construction of the Community, since EJC's «Cassis de Dijon» ruling. It displaced the need for harmonisation by the existence of mutual trust, which made transnational administrative acts legally and politically acceptable¹⁸.

Even if it does not apply solely in the EU, the combination of mutual recognition / transnational administrative acts finds its best expression in Europe, where it effectively filled the void left by no overhanging federal construction. Logically, the construction of the Schengen area relied on the same ways and means.

3.2. Managing people : Success and impasses

At first sight, Schengen illustrates the success of the instruments just described. It is, in fact, based on the mutual recognition principle. It also relies on legal acts adopted by a Member State, with legal effects in other States, based on an authorization given by the EU law. This is how short-term visas (or Schengen visas) delivered by each members states accounts for

¹⁷ E. Schmidt-Aßman, *Les influences réciproques entre les droits administratifs nationaux et le droit administratif européen*, n° spécial du 20 juin 1996, AJDA, 196 (1996).

¹⁸ See M. Gautier, *Acte administratif transnational et droit communautaire*, in J. B. Auby, J. Dutheil de la Rochère (eds.), *Droit administratif européen*, 1069-1083 (2007).

a permission to enter the territory of all the others. They are delivered through common process and conditions. As for long-term visa (for which the issuance process has not been standardized), they account for short-time visa in other Member States territories¹⁹. They are a perfect example of mutual recognition. Likewise, when a government decides to register an undesirable alien in the SIS, the decision binds on all the other Member States, which are then bound to deny them a visa and entry into the national territory²⁰. It is, therefore, a truly transnational act.

In some respects, the system Schengen generates an unconventional kind of transnational act, one where the execution itself is transnational. In his attempt to classify transnational acts, Prof. Mattias Ruffert underlined the right of hot pursuit provided by the Schengen convention²¹. Another example would be the possibility to organise joint flights in order to keep away undesirable aliens. Set up by one of the States, it enforces the others' removal orders²².

Nonetheless, these undeniable successes barely hide the obstacles that Immigration Law is facing when it comes to applying those principles. First of all, people are not merchandise: their behaviour after crossing the border is hard to anticipate. They will move again, study, work, get married, have children, maybe kill or steal. Then, unlike merchandise, people have basic rights. They cannot be handled like goods, which puts their management at stake. This is why the level of harmonisation needed to insure mutual trust, essential to the well functioning of the system, is immeasurably higher. Mutual trust is what asylum policy and European Arrest Warrant recently stumbled over : despite the adoption of several legislative measures harmonising common minimum standards for the treatment of asylum seekers,

¹⁹ Council Regulation (EC) n° 1091/2001 of 28 May 2001 on freedom of movement with a long-stay visa, OJEU L 150, 6.6.2001.

²⁰ According to the Schengen Border code and the Visa code (see note 9).

²¹ M. Ruffert, *The transnational administrative act*, in O. Jansen, B. Schöndorf-Haubold (eds.), *The European composite administration*, 277-306 (2011).

²² Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders, n° 2004/573/EC, OJEU L 261 du 6.8.2004.

the corner stone of the European asylum policy – the Dublin mechanism to determine the member State responsible for asylum application – is ruined by the M.S.S./ N.S. case law²³; despite its huge success, the European Arrest Warrant is both undermined by the German federal constitutional court case law²⁴ and, even if it is with less force, by the EUCJ case law itself²⁵.

This is why, undoubtedly, new mechanisms are to be invented. For instance, preliminary ruling between national courts could, in some cases, turn out useful. In fact, when controlling an act implementing an administrative act adopted by another Member State (such as a visa refusal based on a registration on the SIS made by another State), the National court cannot examine the latter, for sovereignty reasons²⁶. And maybe, as the Commission seems to think, perhaps the Schengen Space will only exist alongside with integrated border police corps.

In any case, Schengen does not seem to have the legal and political means to build anything better than a space with intermittent internal borders.

4. Conclusion: What will be left from Schengen?

If ever the borders controls were to be definitely reintroduced, would that mean that Schengen completely disappeared? No, as some components of the system will endure and will give the illusion of Schengen's survival. It is particularly true for repressive instruments such as SIS or police and judicial cooperation. SIS has gradually become a data base with multiple

²³ ECtHR, 21 January 2011, M.S.S. vs. Belgium and Greece, application n° 30696/09 ; EUCJ, 21 December 2011, N. S., C-411/10 and C-493/10.

²⁴ See the press release of the *Bundesverfassungsgericht* about the 15 December case

(<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html>) and A. Gaillet, *Confiance et méfiance autour du mandat d'arrêt européen*, AJDA, 1112 (2016).

²⁵ EUCJ, 5 avril 2016, Pál Aranyosi (C-404/15) et Robert Căldăraru (C-659/15 PPU).

²⁶ CE, 9 juin 1999, F. (Rec. CE 1999, p. 170 ; AJDA 1999, p. 725-728, concl. B. Martin Laprade; LPA 4 janv. 2000, p. 13, note E. Aubin) ; CE, 23 mai 2003, n° 237934, C. (AJDA 2003, p. 1576). See M. Gautier, *Le dispositif Schengen, vecteur d'une nouvelle forme d'intégration juridictionnelle* in *Les dynamiques du droit européen en début de siècle. Études en l'honneur de J. Cl. Gauthron*, 69 (2004).

uses, where undesirable aliens, stolen objects, missing people and terrorists mingle - which is questionable from a civil liberties point of view but fits the expectations of the States their services. Beside, taking part in the SIS is now disconnected from the Schengen membership. This is how the United Kingdom gets to engage in SIS, as well as its evaluation and monitoring mechanism. At least, for the time being...

Beyond all of this, a whole part of immigration law, especially regarding short-term visas, will endure, as long as the European States will keep a very restrictive view on their award. But then, one essential element would be missing. The abolition of borders, alone, justified a repressive cooperation such as this. However it does not, at this stage, appears as a fully realistic objective.

SHORT ARTICLES

DIGITALISATION AND REFORMS OF PUBLIC ADMINISTRATION IN ITALY

*Stefano Civitarese Matteucci**

Abstract

This article aims to discuss how and to what extent “digitalisation” is affecting and should affect the functioning of public administration in Italy. With the Public Administration Reorganisation Act of 2015, a quite comprehensive reform of the organisation of Italian public administration has been set in motion in which digitalisation is meant to be the main means to change the State. The article purports that terms such as ‘digital citizenship’ and ‘digital first’, upon which the reform hinges, should not be overestimated. In acknowledging digitalisation (and e-government) as an incremental process driven by the technological sophistication deployed, one should bear in mind that it is made of various dimensions such as information, transaction, political participation and different manners of interaction within PA and with citizens. Each of these present opportunities and risks and the concrete outcome depends both on the cultural and economic context in which information and communication technology is placed and political choices. The paper suggests that a normative model of the implementation of e-government should be based on information and bureaucracy organisation rather than on the ambiguous conferment of ‘digital rights’.

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TABLE OF CONTENTS

| | |
|---|-----|
| 1. Introduction..... | 128 |
| 2. Conceptual and Terminological Premises. An Explicative-Normative Model for E-government..... | 130 |
| 3. Digital Agenda and the Principle “Digital First” | 137 |
| 4. The Problem of Measuring the Impact of ICTs upon Public Administration..... | 143 |
| 5. The Effects of Digitalisation on the Functioning of Public Administration..... | 145 |
| 5.1. Open Data..... | 146 |
| 5.2. Administrative Procedure and Participation..... | 148 |
| 5.3 Organisation and Procedural Forms. Orientation Effect of ICTs. Discretionary Power and Accountability..... | 150 |
| 5.3.1. Re-engineering Public Administration..... | 150 |
| 5.3.2. Automated Decision-Making..... | 152 |
| 6. Some Conclusive Notes to Continue..... | 160 |

1. Introduction

This article aims to discuss how and to what extent “digitalisation” is affecting and should affect the functioning of public administration in Italy, building on a research project whose outcomes will be published in one of a series of volumes revolving around the past and future of administrative law after 150 years from the so called statutes of administrative unification of 1865 under the general coordination of the Department of Law of the University of Florence.¹

Two questions constitute the thread of the article. The first is whether we can still speak of a ‘digital administration’ as distinct from a traditional administration. We are undoubtedly going through a transitional era even though our daily experience teaches us that a great deal of Italian public administration keeps working according to the ‘dusty files’ culture celebrated by some

¹ S. Civitarese Matteucci, L. Torchia, *La tecnificazione della pubblica amministrazione* (Technologisation of Public Administration), forthcoming (2017). Hereafter when referring to one of the papers collected in this book I will use the acronym TPA.

great XIX Century novelists. It is hardly deniable though that within a few years the 'administrative transactions' could be ordinarily digital and thus the 'code of digital administration' might become the 'code of public administration' tout court. With the Public Administration Reorganisation Act (of Parliament) n. 124 of 2015, a quite comprehensive reform of the organisation of Italian public administration (PA) has been set in motion in which, according to the Italian Ministry for Public Administration Marianna Madia, «digitalisation is *the* means to change the State at long last and not simply one among many others. This is why it represents the heart of the reform»².

Secondly, we wonder whether and to what extent changing the means of communication within the public administration arena changes the substance of interactions which occur there. In a way this is the old issue of the relationship between form and substance, where the first now bears the semblance of a powerful technology. This is a question which especially besets public law scholars. Although it depends on the scope of the application of ITCs to public administration, it is not audacious to foresee the extreme scenario of the replacement of human decisions with computer decisions, which, thanks to the Internet, can store and elaborate a huge amount of information. In such a case we would have a 'technical' decision replacing a 'political' one. It is not clear, though, whether recent reforms by bringing forward digitalisation pave the way for automated decision-making too.

The article is structured as follows. In the ensuing section some terminological and conceptual clarifications are offered, viz. the notions of "online public services" and *e-government* taken in an incremental perspective. I contend, namely, that within such a perspective the transactional dimension of e-government is to be conceived as the main goal to pursue as it is somehow more complete and desirable than the informative dimension only. The third section deals with the impact, both quantitative and qualitative, of e-government upon government and public administration, especially regarding the level of diffusion of e-

² See at http://www.corrierecomunicazioni.it/pa-digitale/39379_marianna-madia-il-digitale-cuore-della-riforma-pa-basta-indugi.htm (last visited 16 March 2016).

government also in light of the “digital agenda” policy. The fourth section discusses the literature on the analysis and assessment of the practice and change brought about by ICTs in the activity of bureaucracies with an attempt to model the possible impacts upon different segments of such an activity. The fifth section sheds light on some analytical and conceptual aspects of the impact of the use of the ICTs on the structure and functioning of public administration, particularly by taking on open data, administrative procedure and participation, and the so called re-engineering of bureaucratic processes, while the sixth section offers some final remarks.

The point I shall make is that the introduction in the legislation of terms such as ‘digital citizenship’ and ‘digital first’ should not be overestimated. The idea of shifting the focus from policy to rights to change the inertia of e-government, which inspires the said reform, is little more than a good slogan. This choice belongs to the rhetoric of rights widespread in our contemporary public discourse which is particularly inadequate in this field. In describing e-government as an incremental process driven by the technological sophistication deployed, we should bear in mind that there are various dimensions of ICTs such as information, transaction, political participation and different manners of interaction within PA and with citizens. Each of these dimensions present opportunities and risks and the concrete outcome depends both on the cultural and economic context in which ICTs are placed and political choices. I purport that a normative model of the implementation of e-government should be based on information and bureaucracy organisation rather than on the ambiguous conferment of ‘digital rights’.

2. Conceptual and Terminological Premises. An Explicative-Normative Model for E-government

First of all, we need to delimitate the phenomenon we want to enquire about, to which I will indifferently refer as ITCs or e-government. It has evolved across the years, moving from the advent of the computer with the employment of simple software

to the design of complex informatics, to cloud computing.³ The phenomenon of e-government has a global nature. It concerns all the states and it has been the object of an ever growing attention by scholars of different social and political fields. Suffice it to think of the collection of cases analysed in the book ‘Comparative E-government’ edited by Christopher Reddick (Springer, 2010) or of the several volumes (21) in the series *Public Administration and Information Technology* by the same Reddick for Springer.

According to one widely acknowledged conceptual framework e-government can be described as a bi-dimensional phenomenon.⁴ The first one regards the level of technological sophistication, ideally placed on the x-axis, the second the type of interaction between the recipients and the service, ideally placed on the y-axis (see fig. 1).

| | STAGES OF E-GOVERNMENT | | | | |
|--------------------------------------|---------------------------------------|--|--|--|-------------------------|
| | Stage 1 | Stage 2 | Stage 3 | Stage 4 | Stage 5 |
| Type of government | Information | Two-way communication | Transaction | Integration | Political participation |
| Government to Individual — Services | Description of medical benefits | Request and receive individual benefit information | Pay taxes online | All services and entitlements | N/A |
| Government to Individual — Political | Dates of elections | Receive election forms | Receive election funds and disbursements | Register and vote. Federal, state and local (file) | Voting online |
| Government to Business — Citizen | Regulations online | SEC filings | Pay taxes online Receive program funds (SBA, etc.) Agricultural allotments | All regulatory information on one site | Filing comments online |
| Government to Business — Marketplace | Posting Request for Proposals (RFP's) | Request clarifications or specs | Online vouchers and payments | Marketplace for vendors | N/A |
| Government to Employees | Pay dates, holiday information | Requests for employment benefit statements | Electronic paychecks | One-stop job, grade, vacation time, retirement information, etc. | N/A |
| Government to Government | Agency filing requirements | Requests from local governments | Electronic funds transfers | | N/A |

Figura 1 from Hiller-Bélanger, 2001.

³ A. Osnaghi, ‘Pubblica amministrazione che si trasforma: “Cloud Computing”, federalismo, interoperabilità, Amministrare 59 (2013).

⁴ J. Hiller, J. F. Bélanger, *Privacy Strategies for Electronic Government*, E-Government Series Pricewaterhouse Coopers Endowment for the Business of Government (2001).

By service I mean here “online service”, expression which stands for the peculiar manner of interaction between providers and users whilst the actual content of such services includes any administrative task, namely – employing a traditional Italian doctrinal distinction – both ‘functions’ (PA prerogatives) and services in the strictest sense. A quite comprehensive definition of online service states it is «an activity or a series of activities, of a more or less intangible nature, which result in an exchange between a provider and a client where the subject of the transaction is an intangible good».⁵

The level of sophistication can in turn be articulated in five stages: information, bi-directional communication, transaction, integration, and political participation.⁶ They are the first four that refer more closely to public administration for the latter prevalently concerns the issue sometimes evoked in terms of e-democracy. It goes without saying, however, that e-democracy is significant to admin law as well. Article 9 of the Code of Digital Administration (CDA) establishes that administrative authorities should favour as much as possible any use of new technologies which is able to enhance citizens’ participation in the democratic process and facilitate the enjoyment of political and civil rights both individually and collectively.

Some Italian literature in the 80s, embracing an optimistic view of the then dawning relationship between ICTs and democratic institutions, envisaged that the development of informatics would be the turning point for a change in the relationships between public institutions and citizens – within which admin law had to be adjusted as well – inspired to a full and authentic democratisation bolstered by the direct participation of people in government.⁷ At the beginning of the 90s the advent of the Internet led a number of authors to consider it as the best solution to the old issue of the lack of quality and

⁵ C. Batini, *Un'introduzione ai servizi di e-government*, 23 *Amministrare* 38 (2013).

⁶ One can find a similar classification in the Guidelines of 2011 regarding how to set up the institutional websites of any public administration issued pursuant to article 4 of the Directive n. 8/2009 of the Minister of la public administration and innovation.

⁷ G. Berti, *Diritto e Stato. Riflessioni sul cambiamento* (1986).

quantity of representation that impairs liberal democracies.⁸ In such a climate several governmental programmes to boost e-government assisted by conspicuous investments were implemented.⁹ Such Panglossian views are nowadays far less popular as their auspices have been proven largely unattainable until now.¹⁰ Due to such failures, the present mainstream view, which can be named pragmatic, purports that technology has nothing particularly new to offer to democracy but reinforce the existing practices and political and social institutions.¹¹ Along with such conceptions a third coexists, which has been defined dystopian, where ICTs are viewed as a means of massive danger both to democracy and basic freedom up to their destruction.¹² Taking heed of such major concerns, the dominant pragmatic approach appears to be the most relevant if we focus on public administration. This is slippery terrain, however, because most of the times such an approach is all but neutral and in fact the rise of e-government has very often been associated with those positions that consider technology as an instrument of the new public management (NPM) ideology. For example to such ideology belongs the idea that ICTs might reduce negative externalities caused by the formalisation of administrative decisions into strictly codified procedures. We shall discuss this aspect throughout the paper, while now it is appropriate to turn to the sophistication issue.

Among the other four levels of e-government sophistication, the information stage essentially concerns the

⁸ D.R. Johnson, D. Post, *Law and Borders – the Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996); B Santos (ed), *Democratising Democracy: Beyond the Liberal Democratic Canon* (2007).

⁹ J. Morison, *Online government and e-constitutionalism*, 14 Pub. L. 15 (2003).

¹⁰ B. Schafer, *Democratic Revival or E-Sell Out? A Sceptic's Report on the State of E-Governance in the UK* Report to the XVIIth International Congress of Comparative Law, 9-11 July 2006; G. Longford, S. Patten, *Democracy in the Age of the Internet*, 56 U. New Brunswick L. J. 5 (2007).

¹¹ P. E. Agre, *Real-Time Politics: The Internet and the Political Process*, (2002) 18 *The Information Society* 311, 317; Longford and Patten (n 5) 9.

¹² B. Koops, *Criteria for Normative Technology: The Acceptability of "Code as Law" in Light of Democratic and Constitutional Values* in R Brownsword and K Yeung (eds) *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes* (2008) 158.

creation of the institutional website pursuant to article 53 CDA, which establishes that institutional websites shall operate through a network which complies with principles of accessibility, enhanced usability, and availability and be disabled people friendly, complete and clear in information, inter-operational, reliable and easy to use. The second level, relating to bi-directional communication, consists of a non-fully complete form of interaction with the users because it does not include any online transaction. It contemplates an exchange of information between officials and users. It is possible that online forms have to be filled in, but the service is provided in an ordinary way. This is still a 'documentary' stage, whilst transaction and integration are the levels of sophistication where the service is appropriately online and ICTs operate in a 'meta-documentary' way.¹³ In such cases one can speak of digital procedure in the specific meaning that the decision which shapes a particular legal relationship is operated through the website, namely by using data elaborating software which produces that decision. In many cases such transactions – for example the payment of a fine – do not seem to appear that different from what happens in e-commerce. In other cases, more complex administrative decisions are dealt with, such as permits or benefits. The difference between the transaction and integration stages regards the fact that in the latter a thorough transformation of back-office practices is pursued, so in a sense the stress is more on specific organisational tools. There is in the literature the idea that the integration stage would imply a proper shift from a bureaucratic-centred concept to a citizen-centred concept of public administration, where, that is to say, both the organisational and service dimensions would adapt according to the users' needs.¹⁴

Considering the other dimension of the phenomenon at hand – which looks at the recipients of e-government – a point stands out as regards the sophistication scale, which is whether the passage from the information stage to the transactional stage is to be considered a sort of progress towards the achievement of "true" e-government, as if, in other words, the higher the

¹³ M. D'angelosante TDA.

¹⁴ A. Tat-Kei Ho, A., *Reinventing Local Governments and the e-Government Initiative*, 18 Pub. Admin. Rev. 434-44 (2002)

sophistication the fuller digital citizenship is. This seems to be the NPM approach, whose model is e-commerce and whose paramount value is efficiency. Such an approach may have influenced policy implemented by the EU commission in agreement with Member States between 1999 and 2006, which clearly show a trend to privilege the e-commerce/transaction side. In this period indeed one notes a sizeable increase in supply of online services, which reached 70% in 2007.¹⁵ However, this was not accompanied by an analogous rise in the employment of online services by the users. Viz. a clear asymmetry persists in Europe between supply and demand of e-government in favour of the former. The “Digital Agenda Targets Progress Report” (Digital Agenda Scoreboard) of June 2015 speaks about a slow increase in e-government. The use of e-government services, measured on the quantity of online forms submitted (only 25% of which is indicated as complete), has risen from 38% to 47% in five years. Such data constitute the average between remarkably differentiated situations in each Member State. As for Italy – which is among the countries at the bottom of the list (third last) – the figure is little more than 10% and it has not seen change across the five-year period.

Those who simply do not have access to the Internet, a number, by the way, which is constantly dwindling, constitute a sub-cluster of people who do not benefit from online e-government. The mentioned Digital Agenda Scoreboard refers to the Internet as a “success story” and in fact at the level of the Union the percentage of Internet users reaches 75%. As regards this point there are also considerable asymmetries between Member States and in fact in the majority of them around a third of the population do not access the Internet. This group includes disadvantaged people who are the most likely candidates to access social services aimed at fostering their social inclusion such as education, social assistance, job activation, etc. They are, moreover, those who are less likely to become ICT users, while to favour their access to social services an astute use of ITCs could

¹⁵ C. Codagnone, D. Osimo, *Beyond i2010. E-Government current challenges and future scenarios*, in P.G. Nixon, V.N. Koutrakou, R. Rawal, eds, *Understanding E-Government in Europe* (2010) 39 fig. 3.1.

make a real difference in the good management of such services.¹⁶ In other words, many of such non ICT users might never become e-government demanders. As has been noted a desirable policy would be to shift the objectives of digitalisation policies from «traditional efforts to help them use ICT to new approaches aimed at using ICT to help them».¹⁷ In brief, the idea that the focus of e-government is to be seen in the transactional stage is not at all undisputed, as, on the contrary, one can sustain that the main value of digital administration is in information and that the transaction stage is neither inevitable nor fully desirable irrespective of contextual conditions.¹⁸

It is undeniable that the moment of the decision on an administrative affair (transaction in the Hiller-Bélanger matrix) is the one which mainly attracts the curiosity of legal scholars. Suffice it to think of the various attempts to configure a species of “digital administrative act”.¹⁹ However, the effects of ICTs should be look into above all on the organisational dimension and how the latter adapt to or resist external inputs. As has been noted, the most crucial aspect resides in the difficulty of reconceptualising and actualising in terms of digital work how bureaucracies operates both internally and as a network of public administrations.²⁰ Hence the phenomenon of e-government should be further anatomised or simply more accurately analysed assuming a different explicative (partly normative) model from the Hiller-Bélanger matrix, centred on the functioning of public administration. I propose, thus, a mono-dimensional model in four stages, which combines sophistication and interaction according to different normative precepts (fig. 2). It considers mono and bidirectional information as the first dimension; transactions in the strictest sense, that is to say relating to those services supplied by PA which can be assimilated to e-commerce,

¹⁶ C. Codagnone, D. Osimo, *Beyond i2010. E-Government current challenges and future scenarios*, cit. at 15, 42-43.

¹⁷ *Ibidem*, 43.

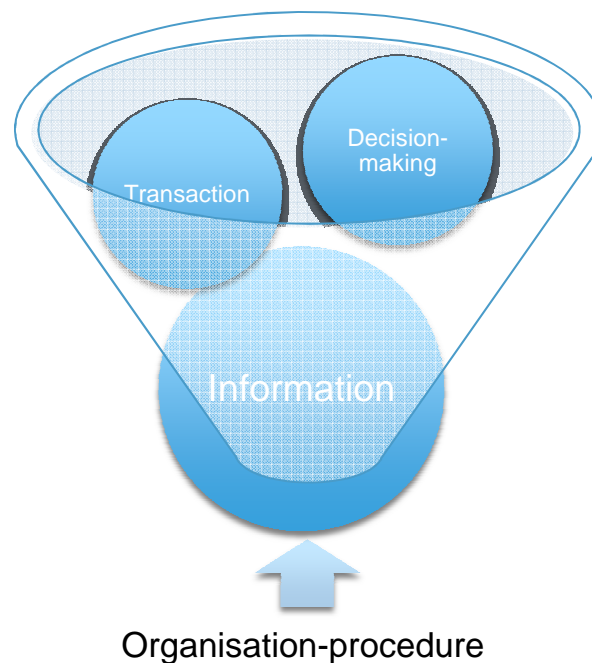
¹⁸ P. Dunleavy, H. Margetts, *New Public Management Is Dead – Long Live Digital-Era Governance*, 16 J. P. Admin. Res. Theory 467-494 (2006).

¹⁹ I.M. Delgado TDA.

²⁰ G. Duni, *Verso un'amministrazione integrata nei procedimenti amministrativi*, 14 *Informatica e dir.* 43-47 (2005).

represent the second dimension; the third dimension regards the functional or purposive element of administrative action, that is to say in which transaction has to do with the outcome of decision-making; the fourth dimension deals with procedure as an element of organisation in order to reshape fundamental patterns of the functioning of public administration. The first and fourth dimensions, information and organisation, are transversal. They constitute the infrastructure of e-government, in other words what makes the other two possible and determines their scope as well and which probably embody the main value of e-government.

Fig. 2. Model of e-government centred on organisation-information



3. Digital Agenda and the Principle “Digital First”

As seen in the previous section, one of the key-points concerns the quantitative and qualitative incidence of e-government on government and public administration, even though, surprisingly, there are not exhaustive studies regarding the Italian situation. Surveys and reports exist as regards the international context. When talking of ICTs and public institutions the literature refers to two aspects or at least the following stand

out. The first regards the level of diffusion of e-government and therefore the success of digital agenda initiatives. The second, much more meaningfully, regards the analysis and evaluation of the practices which are brought about by the use of such technologies. In this section we deal with the first point, while the second will be addressed in the following section. There is a further aspect on which we will turn in section five which concerns the identification of the possible scenarios deducible from the legal rules which accompany the introduction of such technologies and that affect central notions of administrative law such as decision-making, procedure and participation.

As to the first aspect, a sort of paradox lurks here. On the one hand, the pervasiveness of ICTs seems to exert its influence on the very structure of social and institutional models, as much so that it is familiar to refer to our historical time as the digital era. On the other hand, they are phenomena which require a specific governmental implementation, without which, that is to say, change barely takes place. In other words, one cannot say that politics is merely superseded by technology if choices, plans and investment are needed to make e-government become an ordinary practice and if such choices are not neutral towards the model of e-government one wishes to pursue. As we are going to see below, it seems that the employment of ICTs may enhance or emphasise the features of certain ideal-types or models of public administration but it does not constitute a model per se. It is somewhat evident, anyway, that such a digital era yields new asymmetries and disequilibrium. One of the so-called digital divides regards in fact the chasm between the traditional functioning of public administration – suffice it to mention the time issue – and new modalities of socio-economic interaction which develop thanks to the internet.

Governments are expected to be able to detect and acquire remarkably complex and sophisticated operating systems and make them functional and – as the experience of some UE Member

States show – one should not take for granted that such an ability is just a function of the amount of resources invested.²¹

It is in such a framework that “digital agenda” initiatives are to be located. At the level of the EU, the Digital Agenda for Europe, launched within the Europe 2020 strategy, has got broader scope than the digitalisation of PA, for it mainly regards economic growth and employment to be pursued in seven priority areas and 101 actions. Among the most prominent objectives there is the adoption of a new and stable regulatory framework for broadband, the creation of specific infrastructure for digital public services and the increase in digital skill. As mentioned before, the level of achievement of such goals by all Member States is yearly measured in the Digital Agenda Scoreboard where Italy is among the strugglers. The Italian Digital Agenda aims at filling this gap.

Another figure, more comprehensive and refined than the Scoreboard, the Digital Economy and Society Index (DESI) (<http://ec.europa.eu/digital-agenda/en/desi>) provides more precise data regarding each country. This is a composite index, developed by the European Commission, with the purpose of assessing the growth of the Member States towards a digital economy, which considers a cluster of factors dealing with five dimensions: connectivity, human capital, Internet use, integration of digital technology, and digital public services.

In the DESI report for 2015 Italy is ranked 25th within EU countries. Among the factors that determine such a result there is scarce connectivity, due to the little availability of fast Internet connections, paucity of digital skill and generally a limited use of the Internet. 31% of Italians have never used the Internet and the wariness towards online transaction is still widespread. Only 42% of habitual Internet users use online banking and only 31% trade online. All such factors bounce back on the development of e-government and influence the dimension of online public services, which although closer to the EU average is however underdeveloped. The report pins down the lack of digital skill among bureaucrats as an explanation of this condition.

²¹ J. Keen, *Integration at Any Price: The Case of the NHS National Programme for Information Technology*, in H. Margetts, C.Hood (eds.) *Paradoxes of modernization; unintended consequences of public policy reform*, (2010) 138.

What the Italian CDA has promised for a decade, that is to say that central and local public administration shall rethink their organisation and operational way in light of new ICTs to «secure the availability, management, access, transmission, storage and fruition of information in digital modality» is far from being achieved. Another actual issue is that the CDA – which have already been amended many times – provides for the adoption of a sizeable number of measures of implementation through a variety of sources – such as regulations, ministerial decrees, guidelines, technical rules – most of which have not been issued yet.²² The delegated legislation, Act 26 August 2016, n. 179, passed by the government pursuant to article 1 of the Public Administration Reorganisation Act (of Parliament) n. 124 of 2015 tries to face this problem by bestowing most of such a technical regulation upon the governmental Agency for Digital Italy.

The same article 1 of the PA Reorganisation Act – pompously headed “digital citizenship” – aims at changing and integrating the CDA in order to further strengthen the centrality of digital administration. Particularly committing is the wording of article 1, par. b), which introduces the new principle “digital first”. Digital first means that by adopting digital technology on a large scale, administrative procedures and back-office practices have to be redefined and simplified to seek quick decision within certain time and transparency towards both citizens and corporations. It is uneasy to see, however, how the formulation of new principles – allegedly more convincing than the previous ones – can per se make the Italian Digital Agenda more effective.²³ Article 3 of the CDA, in turn, provides citizens and corporations with a new right to the use of ICTs when they communicate with public administration.²⁴ Thereby such a right refers only to the

²² ‘Monitoraggio dell’attuazione dell’Agenda digitale italiana del Servizio Studi della Camera’, 20 March 2015, n. 159 <http://documenti.camera.it/Leg17/Dossier/Pdf/TR0270.Pdf>.

²³ The main provisions concerning the Italian Digital Agenda can be found in the following law decrees: D.L. n. 83 del 2012 (c.d. “Crescita”); D.L. n. 179 del 2012 (c.d. “Crescita 2.0”); D.L. 69 del 2013 (c.d. “del Fare”); D.L. n. 90 del 2014 (“Semplificazione e trasparenza amministrativa ed efficienza degli uffici giudiziari”); D.L. n. 133 del 2014 (c.d. “Sblocca Italia”).

²⁴ This discipline resembles the Spanish’s one as set up by the Act of Parliament n. 11 of 2007, where a right to communicate with PA through electronic means

information level. We wonder whether article 1.1 of the PA Reorganisation Act, which delegates the government to reform ample sectors of the organisation of public administration, by broadening the scope of this right to enable citizens and corporations to have access to all data, documents and services now refers to the transactional stage as well. The report which accompanies the cited act of delegated legislation emphasises that the principle which inspires the reform is to put digital rights first so that – one can argue – processes of digitalisation of PA should be treated as the object of an obligation to fulfil them. This delegated legislation amends the CDA by establishing that PA makes its services (so apparently all its activity) digitally available and providing for a 'public class action' in case an administrative authority does not comply with such "obligations". The idea of broadening the scope of digitalisation to any "service" coupled with attributing a right to have PA to comply with such an organisational requirement may seem the best way of making sure that e-government becomes at last ordinarily practised.

There are, however, a number of downsides to this scheme. Firstly, one has to wonder whether and to what extent we can actually speak of a right-obligation relationship, as such judicially enforceable. The provision of a class action is far from decisive to this regard, as in Italian law it is a tool – available either to any consumers or their associations – conceived as a way to assess that either public services comply with the obligations set out in the consumer charters and qualitative and economic standards or that providers do not fail to adopt such charters or other framework regulations. Administrative courts are just allowed to issue recommendations to make amends of the mismanagement of the service if that is the case and provided that the action recommended does not negatively affect public finance. It is extremely difficult to fathom how such a pattern can be adapted to the sort of 'obligations' at hand. Anyway it is even more difficult to reconcile this action with the protection of specific individual digital rights and it is implausible that administrative courts would interpret these 'rights' as enabling individuals either to

has been established. See I.M. Delgado, *Las notificaciones electronicas en el procedimiento administrativo* (2009) 63.

challenge PA to perform digitally or to impugn decisions not digitally processed/made as procedurally biased. An actual possibility is that the class action will become concretely available if and when the above mentioned governmental Agency issues technical standards and quality levels for PA to comply with. This will occur, though, when digitalisation has already gone well forward.

Secondly, the same alleged extension of the right from the communication to transaction stage makes the notion of digital rights as proper rights even more implausible. It is then more plausible as well as desirable to interpret the reference to “rights” in a moral sense, linked in fact to citizenship, hence as the content of a principled political activation. We should not be too preoccupied with this rhetorical resort to the language of rights – which we are well used to in recent times – in so far as it is not taken in the wrong way. It can become harmful in fact if one wants to interpret it as empowering the courts to manage the policy behind such 'rights'. To be fair the same idea of a right to an indeterminate digitalisation of administrative activity is disputable for the reasons we have expounded above and others we are going to add in the next two sections.

Leaving rights aside, it is more likely that the Italian struggle with digital agenda has to do with cultural and technological structural problems, which one should look into and cope with before investing on programmes which risk remaining manifestos.²⁵ Administrative and administrative law cultures represent in turn but a fraction of such structural problems. The paramount question regards, thus, how the use of ICTs interact with practices and modes of functioning of PA. In the ensuing section we shall discuss two examples, drawn from the literature, which seem representative of generalizable features.

²⁵ Harshly critical remarks are made by G. De Michelis, *Agenda digitale: di cosa si sta parlando?*, *Amministrare* 69 (2013).

4. The Problem of Measuring the Impact of ICT upon Public Administration

In my view two questions particularly stand out. The first is how to gauge the qualitative impact of ICTs on the functioning of PA, where by qualitative I mean not only efficiency gain – for example a reduction in procedural times and financial savings – but also the specific interaction between procedural patterns, decision-making, interaction with external subjects, etc. The second point, rather dependent on the first, revolves around whether, faced with either different models of public administration or different inputs coming from politics, ICTs determine a different impact and/or their qualitative features change.

As to the first question the problem is what indicators to adopt to measure the impact. The following four indicators – drawn from a study which builds on an extensive survey of the literature – seem sufficiently explicative of the effects of ICTs on the functioning of PA: capabilities, interactions, orientations, and value distribution.²⁶

Impact in terms of capability concerns the effects of e-government on how a certain administrative unit relates with its work environment, especially as regards quality of information and change in efficacy and efficiency of services. To a certain extent this first indicator is reconcilable with the informative dimension of e-government which we referred to in section 2 above. The factors which are most relevant are the possibility of accessing data and the quality of the latter in terms of completeness and reliability. The impact on other factors traceable to ‘capability’, such as enhancement of productivity, reduction in costs, and improvement in programming activities is, however, less clear, scarcely perceptible or merely not that studied. By concentrating on interaction between administrative units one wants to look into how e-government exerts influence on the patterns of power exercise and control as well as communication, coordination and cooperation between public offices and private players. Orientations concern cognitive and evaluative

²⁶ K.N. Andersen, H. Z. Henriksen, R. Medaglia, J. N. Danziger, M. K. Sannarnes, M. Enemærke, *Fads and Facts of E-Government: A Review of Impacts of E-government (2003–2009)*, 33 *Int’l J. Pub. Admin.* 564-579 (2010).

considerations, for example whether concerns of a quantitative type have gained momentum in decision-making processes to the detriment of qualitative factors; whether there is a different way of structuring administrative problems; whether decision-makers sense that their discretionary power has been altered by e-government. By value distribution, finally, possible change dealing with general goals sought out by public administration is meant, especially as regards rights and the individuals' wealth, safety, health, freedom, etc.

The analysis demonstrates that the greater and generally positive impact of ICTs is visible especially as regards capability relating to access and quality of information. Appreciable and positive is also the impact of the "interactions" indicator, even though it is unclear whether it is just the unidirectional process of information dissemination or an actual change of procedures involving the public to boost a better disposition of citizens towards PA. The impact of e-government in terms of value distribution (11%) and orientations (3%) is, however, rather scarce.²⁷ Although this research was done more than five years ago, it is sensible to assume that it still provides a reliable picture of the impact of e-government. As to the limited impact of value distribution and orientations it might simply be the consequence of the greater sophistication necessary to apply ICTs to substantive aspects of administrative tasks as well as the difficulty in assessing them empirically. Be that as it may, in the study at hand the impact of ICTs upon the modalities of decision-making is praised by quoting a research carried out on four Swedish local authorities where the informatics applied to political components of administrative decisions has brought about more formalised decisional procedures, thereby simpler to hold to account as well.²⁸ It goes without saying that before such data any evaluation remains debatable, because one can object, say, that such a formalisation inevitably impoverishes decision-making process (see below section 5).

²⁷ K.N. Andersen and al., *Fads and Facts of E-Government: A Review of Impacts of E-government*. cit. at 26, 574-5.

²⁸ Å Grönlund, *Emerging electronic infrastructures: Exploring democratic components*, 21 Soc. Sci. Computer Rev. 55-72 (2003).

Before coming back later to such a discussion, what we can stress here is that the unremarkable impact of ICTs on how PA evaluates policy, interests, etc. reflects overarching aspects of their functioning which are barely changeable in the short term, in Italy least of all. This leads to the second question, relating to the influence of ICTs on the models of public administration on which they are grafted. A review carried out through Parliament, central government, and prime minister websites of 19 OECD countries, concerning the so called financial accountability – that is to say the level of reliability of information on the condition of public finance – shows that the differences detected between such countries do not depend on different implementation of ICTs. It depends, instead, on the “style” of public administration and legal requirements regarding the setting up and management of balance sheets and budget adopted in each legal system.²⁹ In other words, this study confirms that a strong instrumentality of ICTs to other institutional aspects exists. Regarding this point, ICTs seem to work as factors of amplification and greater effectiveness of dynamics which should be otherwise ruled. Digitalisation tends to reflect and reinforce political and administrative models already well in place, particularly one of the four as described by the OECD, the Anglo-American, the German, the Southern European and the Scandinavian. The Internet constitutes a help to change towards a greater accountability of public institutions, but it is not an especially efficacious means of alteration of the distinctive features of any different models, such as citizen participation, public debate or other factors of enhancement of deliberative democracy in decision-making. The picture emerging from the research mentioned at the beginning of this article upholds such outcomes.

5. The Effects of Digitalisation on the Functioning of Public Administration

Taking heed of what we have expounded so far regarding the fundamental characteristics and impact of e-government on

²⁹ V. Pina, L. Torres, B. Acerete, *Are ICTs promoting government accountability? A comparative analysis of e-governance developments in 19 OECD countries*, 18 *Critical Persp. Accot.* (2007) 583–602.

PA, we can now turn to discuss three more specific questions emerging from our research: open data, administrative procedure and participation, and the so called re-engineering of bureaucratic work.

5.1. Open Data

The “informative dimension/impact as capability” pair constitutes the most momentous aspect of our topic because it is likely to exert major consequences on the substance of administrative law in the short term. It particularly regards the access to information that PA possesses both by the individual and the public (so called civic access). This is part of the broader phenomenon – not entirely traceable to the question of accessing PA’s files – of the management of a massive amount of data boosted by the Internet, which has become the object of a heated debate. In the Italian legal system one can make out legal grounds for a sort of presumption that all information produced or possessed by PA is publicly significant and must be managed with the appropriate technique and organisation. From this point of view technology is often considered a source of opportunities and progress, for it creates the condition to enlarge and make rights to information more effective. Somebody speaks of a revolution which will transform our ways of living, working and even thinking.³⁰ By managing such a huge and increasingly complex mass of information it would be possible not only to guarantee more efficient and personalised public services rather than having them provided on a category base, but also to drastically improve decision-making processes in any branches of public administration.³¹

There are, however, those who raise various objections and suggest a more cautious stance. More commons remarks revolve around the threat to privacy and the warning that behind the enthusiasm for big data the commercial interests of powerful multinationals hide. There are also those who are sceptical about

³⁰ V. Meyer-Schönberger, K. Cukier *Big data: a revolution that will transform how we live, work and think* (2013).

³¹ G. Misuraca, F. Mureddu, D. Osimo, *Policy-Making 2.0: Unleashing the Power of Big Data for Public Governance* in M. Gascó-Hernández, *Open Government. Opportunities and Challenges for Public Governance* (2014) 174

the actual impact that the mere increase in data availability may have on decision-making and stress that such phenomenon does not touch on the ability and willingness of decision-makers to take into account such enhanced information dispassionately.³²

We wonder, anyway, whether and to what extent the practice of big data can change dynamics and individual legal positions within administrative procedure in the Italian legal system. The starting point is that the notion of open data has been acknowledged as regards databanks retained by PA by shifting from a conception founded on intellectual property – from which licensed economic rights are derived – to another founded on the freedom to reuse such data. As noted by a scholar, it is a process that emerged as a practice as the legislation still makes the access of individuals to data retained by PA subject to a fee.³³ What happens with data that an administrative authority wants to set access free is that it issues a sort of non commercial licence rather than a commercial one so that anybody can reuse the data in any venue on condition that certain requirements are met, such as the user avoids attributing official character to such information, he or she makes sure that information cannot be misunderstood etc. UE and domestic legislation has then been favouring such a trend by making the possibility of charging access to information with a fee an exception to the rule of freedom of access. Article 1.1 par c) of the Public Administration Reorganisation Act enlists the guarantee to access and freely reuse information produced and possessed by PA in an open format as a criterion for the government to abide by in adopting the delegated legislation.

The interesting problem is how to use open data instrumentally. The idea is that their active use can trigger processes of “good administration” improvement as well as enable people to exercise a more effective political control. As to the former it means that individuals should be able to make such information count to uphold their own interest as participants in an administrative procedure. The issue here is that in such a case data belonging to a databank of an administrative authority is used to give substance to “participatory rights” pursuant to article

³² D. Kahneman, *Thinking Fast and Slow* (2012).

³³ D. Marongiu TDA.

10 of the Administrative Procedure Act 1990 in a procedure carried out by the same or another authority. The main problem is the level of reliability of such data and the way in which it should be taken into account by the proceeding authorities at the moment of adopting a decision. As we have seen the spontaneous origin of open data entails the paradox that their open usage depends on accepting their unofficial character. This is, however, a recurring topic of the information society and big data phenomenon, because it challenges the principle of authoritativeness of information based on the source from which it is drawn. In such a context one should sustain, though, that open public data – usable by any person who takes part in an administrative procedure at his or her own risk – does not present a different legal characteristic from any other data retrievable from the Internet and thus it does not bind public administration more than the normal allegation of parties to support their claims.

5.2. Administrative Procedure and Participation

The latter point evokes the question of the bi-directional and deliberative (or transactional) dimensions of e-government, which as we have seen shows ambivalent aspects from the point of view of their impact on PA. Here we are ideally at the watershed of two separate concepts of e-government: one that considers it a means of affirming new public management and another that radically contends this equation between e-government and NPM and on the contrary conceives the rise of e-government a symptom of the crisis of NPM. It is worth noting that an identical conceptual dialectic goes through the very idea of administrative procedure, respectively seen either as an avenue to ascertain and compose as many interests as possible or as a means of rationalisation/simplification of the tasks assigned to public authorities. This inevitably reminds the Italian reader of the old discussion regarding the presence in the Administrative Procedure Act of both a guaranteeing and efficiency inspiration at the same time.

In fact, the assimilation between NPM and ICTs – with the accusation that administrative procedure is helplessly long, non-transparent, and bureaucratic – is not at all conceptually clear-cut. The fact that, for instance, the use of ICTs should lead to overcoming the linear-like pattern of procedural decision-making

to be replaced by a sort of simultaneous decision-making³⁴ does not seem to undermine either the fundamental notion of a serial interdependence between the acts which form a procedure or the feasibility of continuing to purport a notion of administrative action as having a legal-bureaucratic character according to the Weberian tradition. I shall come to this point again in the next subsection. An important article published ten years ago openly challenges the assimilation between NPM and ICTs by proposing a new explicative model called DEG (digital-era governance) where the paramount importance acquired by informatics in changing administrative practices and interactions with citizens has determined the definitive decline of NPM.³⁵ We find an ample reference to the nexus between participation and digital administration in article 1.1, par c) of the Public Administration Reorganisation Act where it is established that participation to decision-making of public institution shall be digitalised.

A reference to this orientation can also be found in what an Italian scholar suggests about a concept of ameliorative participation which would especially fit the so-called digital environment 2.0, whose fundamental feature is interaction. Such an ameliorative participation presupposes the adoption of organisational patterns which foster the active role of citizens in conceiving and implementing public goals and actively cooperating with public institutions to implement them. This idea hinges on the concept of adaptation of the cycle of online administrative services to the needs of the users and so it emphasises those legislative provisions which get administrative units to change their behaviour to meet the outcome of internal and external assessment, such as directives regarding the charters of public services and the discipline of the so called "performance cycle".³⁶ Apart from the fact that one can still contend that this shift from a model of administration based upon the transmission to bureaucrats of a fraction of political representation to a model of deliberative democracy is desirable, such a scenario – which clearly springs out of a normative endeavour – does not look

³⁴ G. Duni, *L'amministrazione digitale* (2008) 53.

³⁵ P. Dunleavy e al., *New Public Management Is Dead – Long Live Digital-Era Governance* cit. at 18, 478.

³⁶ G. Cammarota, TDA.

implausible in the medium term if one considers the massive presence of social media in our lives. There are hurdles to overcome, though, many of which we have mentioned earlier and among which traditional culture and values imbued in our bureaucracy especially stand out.

5.3 Organisation and Procedural Forms. Orientation Effect of ICTs. Discretionary Power and Accountability

The third point still concerns procedure, but this time from the viewpoint of its structure and its relationship to organisation, the overarching element in our model depicted in fig. 2 above. We can conceive the organisational dimension both in narrow terms and with reference to the decision-making process.

5.3.1. Re-engineering Public Administration

Two are, then, the more relevant factors of such a “mature” or enhanced stage of e-government. It is often said that e-government programmes aim at “re-engineering” administrative procedure at the integration stage, where, that is to say, the design of organisational patterns and manner of decision-making (also involving different authorities and even citizens and corporations) is embedded in one point of access only. Re-engineering should take on the challenge to reorient the organisation and practice of PA around users’ needs by reforming procedural rules so as to conceive them as centred on the delivery of service rather than the exercise of power. One should bear in mind that such a shift of the barycentre of administrative procedure is neither neutral nor simply derived from the different technology employed. The idea of a user centrality can be instrumental both to the corporatisation of PA – which was dear to the first rise of e-government – and opposite ideas such as administration democracy, ameliorative participation, etc. Digitalisation can empower either of such objectives, but, while it remains important to choose one, the fact stands that our present knowledge suggests that ICTs is somewhat parasitic of existing models of PA rather than a factor which changes their fundamentals.

Having said this, the transformation of the information vector from paper and ink to bits plays a major role in the dissemination of information necessary to determine a course of action. Through digital technology information can be centralised,

on the one hand, and easily shared and analysed among several units, in this way decentralised, on the other hand. It is supposed that this process of centralisation-decentralisation of information ensures both more transparency and accountability of officials.³⁷

In the Italian legal system, the discipline of the 'digital file' pursuant to article 41 CDA seems to embody such an idea. All acts, documents and data that pertain to a certain procedure, irrespective of whom has produced them, have to (should) be collected in a digital file which has to be directly accessible by all the authorities involved in that procedure. Still more comprehensive, for it affects the subjective dimension of PA, is the solution adopted in the Spanish legal system, where the legislation has set up an 'electronic site of public administration' which is meant to be a virtual room for carrying out administrative tasks, thereby trying to change the perception that citizens have of public administration as a complex web of inaccessible offices. The law establishes a specific link between the 'electronic site' and the discharge of administrative duties as well as between the former and a specific legal responsibility to act on the part of certain public bodies.

Such coordination-cooperation between different public authorities seems to generalise the precept of "points of single contact"³⁸. In the political science literature this issue is often treated under the label of joined-up government.³⁹ Although there are those who underline the problems of a holistic concept of PA where vertical and horizontal integration (which absorbs even private parties in the unit which operates as the access point) risks confusing duties and accountability,⁴⁰ the idea that this approach yields positive outcomes tends to prevail. Sharing tasks and duties between different administrative units should discourage self-regarding behaviours, boost greater transparency in reciprocal

³⁷ D. Petrakaki, *Accountability in the Context of E-Government*, in P.G. Nixon e al., , *Understanding E-Government in Europe* cit. at 15, 100.

³⁸ Article 6 of the Directive 2006/123/EC of 12 December 2006 on 'services in the internal market'.

³⁹ C. Pollitt, *Joined-up Government: a Survey*, *Pol. Stud. Rev.* 34-49 (2003).

⁴⁰ S. Zouridis, V. Bekkers, *Electronic Service Delivery and the Democratic Relationships between Government and its Citizens*. in J. Hoff, I. Horrocks, P. Tops, eds, *Democratic Governance and New Technology* (2000) 132.

interactions and greater accountability relating to a common achievement.⁴¹

5.3.2. Automated Decision-Making

At the apex of the integration stage e-government entails the automation of administrative procedures, which in a sense change from material to electronic, where human activities are replaced by bestowing ICTs with a number of automatic operations.⁴² This too is deemed to bring about greater transparency, the foreseeability of outcomes, time certainty, easiness of control, strong accountability, and the possibility that procedures are looked after by personnel lacking specific professional skill once the software has been set up and appropriately instructed.

In the Anglo-Saxon area the downsides of such a shift are usually addressed from the perspective of the lawfulness and fairness of automated decision-making. A ground-breaking report of the Australian Administrative Review Council of 2004,⁴³ which led in 2007 to issuing a best practice guide by the Australian Ombudsman, aired a number of concerns regarding automated decision-making.⁴⁴ This report acknowledged that the use of

⁴¹ M. Cole, J. Fenwick, *UK Local Government: The Impact of Modernisation on Departmentalism* 69 *Int'l Rev. Admin. Sci.* 259-270 (2003); B. Illsley, G. Lloyd, B. Lynch, *From Pillar to Post? A one-Stop Shop Approach to Planning Delivery*, *Planning Theory & Practice* 111-122 (2000); N. Curthoys, P.M. Eckersley, P.M. Eckersley, *E-Government* (2003) 227-257.

⁴² By automated decision-making one means «breaking down a decision to a set of 'if then' rules and criteria: a decision is understood as an algorithm (a sequence of reasoning) that selects from predetermined alternatives. An 'inference engine' can systematically check whether the condition of a rule is met; if so, it can 'conclude' that the consequent of that rule applies» (A Le Sueur, 'Robot Government: Automated Decision-making and its Implications for Parliament', in A Horne and A Le Sueur (ed), *Parliament: Legislation and Accountability* (2016) 184.

⁴³ Administrative Review Council, 'Automated Assistance in Administrative Decision Making: Report to the Attorney-General', Report No 46 (2004) available at <http://www.arc.ag.gov.au/Documents/AAADMreportPDF.pdf>.

⁴⁴ 'Automated Assistance in Administrative Decision-Making' http://www.ombudsman.gov.au/__data/assets/pdf_file/0032/29399/Automated-Assistance-in-Administrative-Decision-Making.pdf

'expert systems',⁴⁵ whilst important to improve public administration performance and make savings, had to be attentively assessed to ensure its compatibility with the core administrative law values that underpin a democratic society governed by the rule of law. To this purpose it put forward as many as 27 guiding principles, the first seven of which directly relating to basic characteristics and values of administrative law. The most relevant precepts were based on the distinction between 'making a decision' and 'helping a decision maker make a decision'. The first case should be restricted to decisions involving non-discretionary elements, whilst, when expert systems are used to assist an officer in exercising his or her discretion, the systems should be designed so that they do not fetter the decision-maker in the exercise of his or her power by recommending or guiding the decision-maker itself to a particular outcome. Both these alternatives were deemed to require a statutory recognition of the use of computer programmes, even though the report mentioned views that this would not be necessary because such programmes are simply tools. Equally, the delicate power to override a decision made by or with the assistance of an expert system should be legislatively provided for and disciplined.

As has been recently noted, also in the UK the issue of the legal basis of automated decision making is still to be dealt with.⁴⁶ In Le Sueur's view the fact that there are specific provisions that expressly allow for decisions to be «made or issued not only by an officer of his acting under his authority but also (a) by a computer for whose operation such an officer is responsible» [Social Security Act 1998 (c. 14) Ss. 2-3], in spite of a rather loose approach in English admin law to the need for specific legislative authority for executive action, may be interpreted as a legal necessity for an express legal basis for automation.

As regards this we can note that in the Spanish legal system there is a general provision referring to administrative action carried out via an information system appropriately set up so as to

⁴⁵ In the report an expert system is defined as 'expert systems' as a «computing systems that, when provided with basic information and a general set of rules for reasoning and drawing conclusions, can mimic the thought processes of a human expert».

⁴⁶ A. Le Sueur, *Parliament: Legislation and Accountability*, cit. at 42.

make sure that the intervention of a person is not necessary.⁴⁷ This ample clause does not exclude from its semantic scope any typology of decision and thereby it is open to any technological evolution in the realm of artificial intelligence. The question is that such a general and apparently unconditional acknowledgment of automated decision-making, while formally meets the requirements of the rule of law, risks turning out to be too thin a safeguard of the above mentioned administrative law values. The best way, the one however implied in the Australian Administrative Review Council report, should be to require a specific legal authorisation referring to each and every type of decision-making.

As to Italian administrative law, one can equally wonder whether i) a statutory recognition of automated decision-making power is even necessary, ii) such a recognition may already be in place.

i) Regarding the first point, the rule of law (principle of legality) is considered an unwritten principle of Italian admin law and as such its contours are vague. Pursuant to article 1 of the Administrative Procedural Act of 1990, no 241(APA) public administration has to pursue the objectives established by the law and conform its action to criteria of efficiency, impartiality, publicity and transparency. Moreover, when adopting measures that are not authoritative, it is expected to apply private law rather than public law except for when the law provides otherwise. A stronger notion of the rule of law (procedural fairness, obligation to give reason, hearing, etc.) is advocated when authoritative measures are issued, that is to say when any liberty or right of a person is affected by an administrative decision. In both cases it is difficult to decide whether that a human is accountable and responsible for the decision is or not a requirement of the rule of law. One could take the position that – also given that another clause of the APA reads that public authorities shall encourage the use of electronic communication between different authorities and between the latter and private parties – the resort to computing, as contended during the survey carried out by the Australian

⁴⁷ I.M. Delgado TPA.

Administrative Review Council, is only a means, as such neutral to the rule of law.

ii) As to the second point the hypothesis to confront with is that the delegated legislation amending the CDA, when it establishes that any administrative activity has to be made digitally available, covers automated decision-making as well. As one may recall this availability is meant to be the content of a citizen's right. Yet, it is hard to conceive a right to have a decision made by a computer rather than a human being irrespective of any other circumstance or specific provision. Perhaps, on the contrary, a right to be made aware that an administrative authority decision has been automated and a right to opt out from that process would make more sense.

Anyway, in both perspectives – which end up in a scenario not dissimilar to the Spanish one – the concerns expressed above would be far from overturned.

A general recognition of automated decision-making does not take into account, for example, the line drawn by the cited Australian report as to the desirability of automated decision-making, which relies upon the distinction between discretionary and rule-bound decisions and purports that, provided that all the measures advised are taken, when discretion is not at stake, the benefits of automated decision-making would overcome its drawbacks.

This point is addressed by Le Sueur by observing that automated decision-making might achieve more consistent implementation of written law than can be done by human officials: «automation based on the application of objective criteria holds out the promise of legal certainty (like cases are treated identically), the elimination of bias, ensuring that no irrelevant considerations are taken into account, and that all relevant factors are included. To this extent, automation can be regarded as enhancing the rule of law».⁴⁸ One can think, therefore, that the scenario of an automated procedure fulfils the Weberian ideal of a bureaucrat utterly dispassionate and fully accountable as long as

⁴⁸ See at note 42 above, 190.

he or she is part of a hierarchy that abides by a rigidly pre-set protocol.⁴⁹

Yet there is another side to consider. Within such a perspective, other benefits which the functioning of complex organisations can provide thanks to non-conformist behaviours – the ones that Luhmann called useful illegality – get lost. In Luhmann’s view an unlawful behaviour is one that harms formal expectations. From a systematic perspective, though, behaviours which we can classify in a sort of grey area between legality and illegality can be nonetheless useful, even though they frustrate formal expectations.⁵⁰ Luhmann provides some examples, such as following rules on the grounds of prohibited reasons or goals, abiding by the law but not within the time allowed, flouting habitually obsolete rules or rules whose application can harm more important interests etc. All these are unlawful but useful behaviours as they imply adaptive strategies which favour creative behaviours and adaption to a continually changing environment. One can look at this phenomenon from the perspective of the broader context in which an official has to make a decision. There is a sizeable amount of literature which, building on the work of Lipsky, suggests that administrative decision-making is informed by an ampler set of cultural values than the bureaucratic-legal ones.⁵¹

Purportedly, automation would get rid of such aspects of the functioning of administrative organisations, shifting the focus from the exercise of a kind of interstitial discretionary power accompanied by adaptive behaviours, which imply responsiveness for the use of some kind of contextual evaluation, to a form of accountability which turns into the technology employed. Relating to this there is another aspect discussed by Le Sueur, that is the chance that automated decision-making will favour a trend to design decision-making systems that hinge on

⁴⁹ What is missing of the ideal Weberian’s bureaucrat is the intimate adhesion to a bundle of values and skills which inform bureaucracy as a profession.

⁵⁰ N. Luhmann, *Funktionen und Folgen formaler Organisation* (Berlin 1999-first ed. 1964) 304, V chap. I.3

⁵¹ M. Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (1980); S. Halliday, *Judicial Review and Compliance with Administrative Law* (2004) 100.

bright line rules and reduce or eliminate the margins of discretion expressly or implicitly conferred by the law.⁵²

The issue of automated discretionary decision-making is undoubtedly the most challenging of all. In this case the problem regards the reproducibility through informatics of mental processes which occur when a political choice is made, that is to say to ponder facts and interests at stake to reach a correct decision whatever the meaning of a correct decision might be. In such a circumstance the problem is not only – and not much – the one regarding the ability to build “smart systems” but also to penetrate into the decision theory, which with particular regard to public organisations has long contended that decision-making processes can be encapsulated in a sequence of pre-set steps: for example, choice of the most appropriate course of action, implementation of the decision, and assessment of its effects. There are many other factors at stake, even of an emotional nature and it is not certain that their possible eradication from decision-making by entrusting it to software yields the best possible course of action.⁵³

As we have seen the Australian Administrative Review Council’s view was that automation of discretion collides with the administrative law values of lawfulness and fairness, even though expert systems can be used as an administrative tool to help officials exercise their discretion. The allure of such systems is that they are able to face the greater issue of information age, that is to deal with the innumerable amount of information available to the decision-maker, burdened with the nearly impossible task to select what is relevant,⁵⁴ which implies he or she is able in a relatively short time to assign meaning to such data in a certain context and structure them. Such a function of an expert system seems to suit

⁵² The point is disputed actually. A Buffat, *Street-Level Bureaucracy and E-Government* 17 *Pub. Mgmt. Rev.*, 149-161 (2015), in reviewing the relevant literature detects two opposite attitudes. which she labels respectively ‘curtailment thesis’ and ‘enablement thesis’, and calls for more empirical research on the topic.

⁵³ H.A. Simon, *Reason in Human Affairs* (1983); J.S. Lerner, Y. Li, P. Valdesolo, K.S. Kassam, *Emotion and Decision Making*, 66 *Annual Rev. Psychol.* 799-823 (2015).

⁵⁴ O.E. Klapp, *Meaning Lag in the Information Society*, *J. Comm.* 57-60 (1982).

the idea of computing as helping a decision-making process rather than replacing a human decision-maker.

However, scholars in the field of artificial intelligence applied to legal systems have long claimed that software-agents can be autonomy-furnished, viz. possessing the ability to detect connections with the organisational referring framework, choosing whether or not to abide by a rule, and establishing how to pursue individual and social goals within certain normative constraints.⁵⁵ In other words they would be able to do things such as “exegesis, hermeneutics, legal interpretation, and scientific theorisation” and stimulate the emotional component which is part of dialectic reasoning, founded on typical features of human societies such as debate and discussion in the effort of attributing meaning to things.⁵⁶ In such an interdisciplinary area of research as the one regarding simulation of dynamic systems it is believed that we are not far away from the possibility to transform «intuitive policy making into model-based policy design».⁵⁷ A ‘guru’ of contemporary physics thinks that in the middle of the XXI century the era of “emotional robots” might be blossoming.⁵⁸

It is clear that if this is the direction that the systems of public decision-making will take, then current concepts of accountability and justiciability of administrative decisions will require a complete revision.

The idea that we can limit ourselves to updating our traditional notions does not sound truly satisfactory. In a way, if we look at these problems from the familiar perspective of legal concepts we can apparently continue to rely on the received

⁵⁵ R. Rubino, G. Sartor, *Source Norms and Self-regulated Institutions*, in P. Casanovas, G. Sartor, N. Casellas, R. Rubino, eds, *Computable Models of the Law* (2008) 263-274. P. Lucatuorto, S. Bianchini, *Discrezionalità e temperamento degli interessi nei processi decisionali dall'Amministrazione digitale*, 10 *Cyberspazio e diritto*, 41-58 (2009), claim that e-government discretionary decision-making, facing the reasonable and proportional comparison of competing private and public interests, could be supported by Artificial Intelligence tools.

⁵⁶ *Ibidem*.

⁵⁷ E. Pruyt, *From Building a Model to Adaptive Robust Decision Making Using Systems Modeling*, in M. Janssen, M.A. Wimmer, A. Deljoo, eds, *Policy Practice and Digital Science. Integrating Complex Systems, Social Simulation and Public Administration in Policy Research* (2015) 90.

⁵⁸ M. Kaku, *Physics of the Future* (2011) 83.

'fictional legal notions' (*fictio iuris*). In fact, it is sufficient to impute the artificial will of a software to a public body – in turn a *fictio iuris* itself – and thereby to a public authority to which the former belongs. This point, in other words, regards that special juridical attitude called doctrinal constructivism (dogmatic) which aims at mapping certain areas of law by employing a specifically constructed language.

Spanish and Italian scholars have long elaborated specific legal notions made out of the consolidated precepts of doctrinal tradition to describe such new phenomena. Namely, such key-notions of administrative law as 'organ' and 'administrative act' would not suffer from their being adapted to explain such things as the digitalisation of administrative decisions and the creation of virtual offices. Indeed 'organs' (those particular administrative units which are able to formally express the will of a public authority) can continue to be regarded as administrative units awarding legal powers which affect third parties, and 'administrative acts' as those declarations made by an 'organ' that, by using the power conferred to it, produces any specified legal effect. In this way we can straightforwardly make sense of a 'digital organ' and a 'digital administrative act'. In other words, the fictional nature of such legal concepts fits the even more fictional nature of digital administration. As has been highlighted, the will which an administrative act embodies it is not really a will of a human being, it is instead always a "procedural will"⁵⁹: an administrative organ, irrespective of it being an office composed either of human beings or electronic agents, always comes to issue a declaration of will, judgment, knowledge or wish in order to implement a legal provision with the goal of taking care of public interest.

One wonders, though, what is the actual heuristic value of conceptual constructions which are capable of containing so very different substances, in other words of remaining unaffected by such a huge change of institutional practices as the one by which a human decision shifts into a 'robot' one. In fact, the notion of 'delegating' a decision to an automated system raises a number of

⁵⁹ I.M. Delgado TDA; M.S. Giannini, *Istituzioni di diritto amministrativo* (1981) 292.

unique problems, which cannot be faced by merely updating our fictional legal notions. For instance, just mentioning a couple, who at the end of the day should be identified as the 'decision-maker'? We cannot take for granted that it is the computer itself rather than the programmer, the policy-maker, the authorised operator. Moreover, is the concept of conferring a power by means of a rule appropriately used in this circumstance? As has been pointed out, unlike human agents, a computer software can never truly be said to act independently of its programmer or the relevant administrative authority.⁶⁰

6. Some Final Notes to Continue

At the moment of drawing some final thoughts it is hard to resist the temptation to cast a glance at an aspect which lays in the backdrop of our topic as it is tangential to the scope of a research focused on ICTs and PA practices. It has to do with what somebody in the literature calls the Fifth State meaning a 'place', in principle anarchic, such as the Internet. It might be considered more a space that incorporates - or swallows - other social institutions based on political-territorial links than an instrument that public institutions use to pursue their goals. The question has been cursorily touched upon when referring to the relationship between State or public powers and democracy, but it has even broader boundaries. A scholar has recently conceptualised this idea of a Fifth State building on Castells' account of the Internet as a space of flows rather than a space of spaces,⁶¹ that thereby lets huge masses of players reshape access to information, people, services, and technology.⁶² Here two opposite futurology perspectives appear, the pan-democratic utopia and the cybernetic pessimistic dystopia. In such cases there is always someone who points out a third strategy. One very popular indeed is legal

⁶⁰ M Perry and A Smith, 'iDecide: the legal implications of automated decision-making' (FCA) [2014] FedJSchol 17, available at <http://www.austlii.edu.au/au/journals/FedJSchol/2014/17.html>.

⁶¹ M. Castells, *The Rise of the Network Society* (1996).

⁶² W. Dutton, *The Fifth Estate. Democratic Social Accountability Through the Emerging Network of Networks*, in P.G. Nixon et al., *Understanding E-Government in Europe* cit. at 15, 3.

pluralism where power is seen as a sort of field of multiple forces which challenges the notion of the State as the unitary centre of political power and contends the idea of the State as the main arena of political battle. Several contemporary administrative law scholars do not consider the fall or decline of the State a problem *per se*. The GAL (global administrative law) movement, for example, revolves around the application of certain mechanisms for subjecting decision-making made in legal spaces lacking of a political centre to the procedural guarantees familiar to the national traditions of administrative law. One could, then, apply this framework to that quintessential acephalous space that the Internet is. The issue is, though, well beyond the perspectives of e-government as a model of public administration whose legitimation is still derived from some relationships with political powers.

Coming back to this narrower scenario, let us see what main points we can draw from what we have discussed so far. Technological change is already producing a significant impact on the functioning of PA and its relationship with citizens and corporations and even though Italy is still at an embryonic stage it is not hazardous to speak about the dawn of a digital era. This new era, as it happens for every technological innovation or change of paradigm, did not begin thanks to planned actions by public institutions. However, they remain necessary to try to steer such developments towards general interest. Digital agendas seek to both include as much as possible society and the markets in the arena of digital relations by fighting digital divide and securing quicker and safer trades and identify which model of e-government a community wants to build. We should not take for granted, for example, that the overall inter-operability between public authorities and the one point of access to PA necessarily entails the assimilation of administrative decision to the concept of transaction (typical of e-commerce). Moreover, as we have seen, a polity should choose whether still to invest massively on getting everyone to become an Internet user by fostering demand or employ ICTs to make social welfare services more efficacious. In fact, as regards administrative decisions and procedural techniques of decision-making the range of possible developments and legal change are remarkably vast. The legislation has further emphasised the centrality of digital administration, introducing

symbolic terms such as ‘digital citizenship’ and ‘digital first’ as well as a number of measures to implement the expectations to which such terms allude. In light of such principles administrative procedures and back office practices should be redesigned (“re-engineered”) to make them quicker and more timely, certain and transparent. To what extent this is going to happen in the short term and what kind of administration would turn out of this process is difficult to predict. In describing e-government as an incremental process driven by the technological sophistication deployed, we have noticed that all the dimensions of ICTs – information, bidirectional communication, transaction, integration, political participation – certainly present opportunities and risks whose concrete outcome depends both on the cultural and economic context in which they are placed and political choices. We have, in fact, proposed an explicative as well as normative model of e-government where information and organisation are the driving factors to take into account also in terms of technological sophistication, to which a wary attitude towards a too loose use of the language of rights (to digitalisation) should be added.

A final word regards what can be defined a pragmatic approach to the topic at hand. Especially for Italy much more empirical research is needed as to whether and how ICTs are changing PA and its law, for example as regards the debate on what has been termed as the ‘curtailment thesis’. The literature teaches us two interesting aspects, however. The first is that along with some common features ways of implementing e-government and its impact vary from country to country.⁶³ The second concerns a rough evaluation of e-government as a whole. It is barely doubttable that the massive use of such technology can have disrupting effects, many of which we can already see for example on civil liberties. Let us think of the possible use of cookies by governmental websites. In addition, it can be the case that technology is instrumentally employed to reinforce citizens’ trust in political institutions to avoid real processes of democratisation, as the high level of digitalisation of countries such as China,

⁶³ C. Reddick, *Comparative E-government*, cit.

Singapore, and Malaysia makes us suspect.⁶⁴ Having said this, case study shows that part of the negative externalities can be avoided and that some concerns are misplaced at the proof of fact, for they produce, for example, greater participation and satisfaction of citizen users as the case of Swedish local authorities mentioned in section 4 shows.

⁶⁴ L. Anderson, P. Bishop, *E-Government to E-Democracy: Communicative Mechanisms of Governance*, 2 J. E-Gov't 11 (2005).

PROFESSIONS IN ITALY: A GREY AREA

*Stefano D'Alfonso**

Abstract

The deep roots and development of Mafia-type organisations in local and international settings is in part also a result of the services provided by professionals (for example, in money laundering). Doctrine and case law have highlighted the role of the professionals and their social networks in feeding the relationships of the Mafias in the socio-economic and institutional framework. Professional associations have been criticised for not always being able to prevent or suitably sanction collusive practices either because of inertia or “a desire to not rock the boat”. This paper will deal with a phenomenon which has also been studied by socio-historical sciences through the rigour of a juridical analysis. Therefore, what we will look at are the critical areas in the system, also from a *de iure condendo* point of view. The issue is looked into for the first time by studying four main critical areas in relation to each other: 1. criminal law; 2. the system of the professions and the role of the professional associations with particular reference to disciplinary proceedings; 3. the role of the organs that control and sanction the professional associations; 4. data collection and access to databases of the courts and professional associations.

TABLE OF CONTENTS

| | |
|--|-----|
| 1. When professionals operate in the interest of Mafia-type organisations. Case laws..... | 165 |
| 2. The dialogue between social and juridical sciences: strengths and weaknesses..... | 169 |
| 3. Opposing collusion between professionals and Mafia-type organisations: the role of professional associations in the legal system..... | 175 |

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| | |
|---|-----|
| 4. Anti-Mafia Legislation: critical aspects and prospects for reform..... | 179 |
| 5. Instances of repression and limitation to the autonomy of professional associations..... | 186 |
| 6. For an Anti-Mafia policy in professional associations amid inefficiencies in the information and control systems..... | 196 |

1. When professionals operate in the interest of Mafia-type organisations. Case laws

“The strength of the Mafia” lies “in complicit and functional cultures and behaviour”¹, it finds nourishment externally² and has its major element of strength in “social capital”³. This is where it interrelates with the managerial class, within which are to be found the professions, among the most culturally and technically qualified to be of assistance to the Mafias. As it is clear from case law and legal doctrine, the boundaries between legal and illegal are difficult to distinguish. This lack of distinction generates an indistinct zone which is commonly defined as “grey area”. We are here confronted with an “opaque space”, “made up of a variety of figures”, “different for competences, resources, interests and social roles”, where “the mafiosi” not always “occupy the dominant position compared to”, for example, “politicians, entrepreneurs and professionals”⁴.

¹ See N. dalla Chiesa, *Manifesto dell'Antimafia* (2014), 40.

² See R. Sciarrone, *Mafie vecchie, mafie nuove* (2009), 325.

³ R. Sciarrone, *Mafie vecchie, mafie nuove*, cit. at 2, 46 and 325, otherwise it would be the same as other forms of organised crime.

⁴ The issue has been studied in depth and clarified by R. Sciarrone, *Complici, soci e alleati. Una ricerca sull'area grigia della mafia*, in *Studi sulla questione criminale*, 1 (2012), 66-67. Furthermore, the author remarks (71) how often “a Mafia governance model” is outlined in which “the mafiosi constitute the most important link in the network”. Moreover, expressions such as “entrepreneurial Mafia” and “Mafia business” give a clear representation of one aspect of the grey area. And this also entails connections or crossovers between the legal and illegal [see C. Visconti, *Proposte per recidere il nodo mafie-imprese*, *Diritto penale contemporaneo*, in 1 www.penalecontemporaneo.it (2014)]. In addition, “the presence of criminal organisations in the legal economy conditions the activities and the evolution of many economic sectors”, thus changing “radically the rules of the game” by asking “difficult and sometimes very risky choices of entrepreneurs”, S. Consiglio, E. De Nito, *Quando gli imprenditori usano i clan: il*

The Mafia networking⁵ generates direct benefits for professionals and, at the same time, a negative social, economic and institutional fallout. In this context, the specific role of professionals can take various forms and serve a variety of purposes: it can help mafias to achieve a number of objectives, formally legal or partially or totally illegal. All these activities can be led back to Mafia-type organisations (or “Mafia-type associations”), as defined by Article 416-*bis*, par. 3, of the Criminal Code (henceforth CC)⁶. There are various professional categories involved and types of professional activities that can be exercised for the benefit of Mafia gangs, and many cases have come to the attention of the judiciary. These activities might be covered by specific legal criminal definitions and specific disciplinary offences inside the professional associations. Therefore, before a more in-depth theoretical study, it is useful to examine a number of cases that have seen professionals involved in criminal proceedings.

Within the medical profession, we might mention: the doctor who provided treatment to a fugitive Mafia boss⁷; or the doctor who “hid the trail” that would have led to the fugitive; the case of false information included in medical records; the ophthalmologist who concocted a serious diagnosis for a dangerous and bloodthirsty “camorrista” in order to have him granted house arrest⁸; the cases of the exploitation of the forensic psychiatric profession, a support to the judicial system, in the form of false diagnoses, or advice provided to facilitate the simulation of psychiatric diseases to be submitted to the judiciary

caso del re dei videopoker, in L. Brancaccio, C. Castellano (eds.), *Camorra, mercati e imprese, Le aree grigie nell'evoluzione dei gruppi criminali*, 196 (2015).

⁵ See R. Sciarrone, *Mafie vecchie, mafie nuove*, cit. at 2, 325 e 49.

⁶ The Italian law uses the expression “Associazione di tipo mafioso” (e.g. Art. 416-*bis*, c.c.). For a definition of a possible ideal-type of mafia, R. Sciarrone, L. Storti, *The territorial expression of mafya-type organised crime. The cause of the Italian Mafia in Germany* in 1 *Crime, Law and Social Change* (2013).

⁷ Aggravated assistance, under Article 378, par. 2, c.c. See S. Corbetta, *Obbligo del medico di far catturare il latitante in cura?*, in 11 *Dir. pen. proc.* 1375 (2001).

⁸ This refers to the order for preventive custody issued by the GIP (investigating magistrate) at the Court of Naples on 12 December 2012 which foresees the imputation of external collusion with the Camorra group led by Giuseppe Setola, of the Casalesi Clan.

for a wide variety of purposes (e.g. incompatibility with the regime of so-called “harsh imprisonment”)⁹.

Then there is the case of the notary who was sentenced for providing his professional services which benefited the mafiosis¹⁰.

Turning to chartered accountants, there was the case of a professional convicted of money laundering as well as for having concealed the criminal origin of large amounts of capital¹¹.

In terms of the legal profession the boundaries between legal professional activity and illegal conduct, whether ethically correct or not, are probably among the most complex to describe, in consideration, first of all, of the right to defence enshrined in Article 24, par. 2 of the Constitution, and of the particular ways in which the professional activity is exercised in order to maintain its independence¹². Among the alleged misconduct of lawyers are reported: aggravated assistance¹³ (for example, the case of the defence lawyer who illegally acquires information concerning the criminal proceedings, with subsequent divulgation useful to their client in order to hamper the investigation or avoid arrest)¹⁴; the case of the defence lawyer for a “camorrista” who, in open court, issued threats to judges and journalists¹⁵; the case of the lawyer

⁹ Under Article 41-*bis* of Law no. 354 of 26 July 1975. For reflections on this theme, with references to specific cases as well, see the contribution of a doctor, C. De Rosa, *I medici della camorra* (2011).

¹⁰ Pursuant to Articles 416-*bis* and 110 c.c. In this case, Cass. pen., Sec. VI, 22 March 2004, no. 13910, the legal obligation “of the notary” of the “general duty to provide, in favour of anyone who so requests, does not mean that the notary” should not “abstain from providing the services requested and even performing the role of guarantor and mediator, whenever it can reasonably be inferred that such activities involve illegal acts or apparently legal activities carried out by Mafia members”.

¹¹ Under Article 648-*bis*, aggravated by the special circumstance referred to in Article 7 of Law by Decree no. 152 of 13 May 1991, converted into law no. 203 of 12 July 1991: judgment no. 17694 of the Criminal Court of Cassation, sect. V, 14 January 2010.

¹² On this point see G.C. Hazard, A. Dondi, *Etiche della professione legale* (2005), 228.

¹³ Under Article 378, par. 2, c.c.

¹⁴ Cass. Pen., Sec. I, 1 March 2005 and Sec. I, 24 February 1992, n. 4153, in Cass. Pen. 933 (1994). On this point see E. Dinacci, *Favoreggiamento personale*, in F. Coppi (ed.), *I delitti contro l'amministrazione della giustizia* (1996), 382.

¹⁵ This fact, exceptional for its peculiarities, led to the conviction in the first degree for threats with the aggravating circumstance of them being made on behalf of the Mafia (Court of Naples, Sec. III, 10 November 2014). The reference

accused of collusion with the Mafia (Camorra)¹⁶ for allowing a gang affiliate in detention to maintain communications with other affiliates and to obtain false medical documentation certifying his incompatibility with a prison regime¹⁷; with reference to the same offence, the lawyer who became an “adviser” to a gang and providing legal advice, made suggestions designed to fraudulently evade the law, in order to acquire control of a company¹⁸.

A professional enrolled in a professional association can assist Mafia-type organisations, but they can also do so in the exercise of public functions (in cases where they hold a role in public administration¹⁹ or elected office); they can integrate their professional, social and business network with the more extensive one of the Mafiosi²⁰, who “often tend to act as intermediaries between different networks of relationships” with the illegal and legal world²¹. Finally, a professional, can be the head or a member of a Mafia-type group, projecting themselves fully into the “bourgeoisie Mafia”²². The concept of a “bourgeoisie Mafia” is

is to the well-known case which saw, in the Assize Court of Appeal, Second Section, 11 October 2010, during the *Spartacus* trial, Roberto Saviano and the journalist Rosaria Capacchione being threatened.

¹⁶ Pursuant to Article 416-*bis* and 110 c.c.

¹⁷ The reference is to the order of arrest issued by the investigating magistrate at the Court of Naples on 12 December 2012. This case partly coincides with the abovementioned ophthalmologist.

¹⁸ Cass. pen., Sec. II, 8 aprile 2014, n. 17894, in www.studiolegale.leggiditalia.it.

¹⁹ For which disciplinary proceedings would be twofold, relating to the association and the administration, as a result of which the professional might be subject to sanctions from both the association and the administration. See on this point V. Tenore, *Deontologia e nuovo procedimento disciplinare nelle libere professioni* (2012), 14.

²⁰ See R. Sciarrone, *Mafie vecchie, mafie nuove*, cit. at 2, 52.

²¹ M. Santoro, *Borghesia mafiosa*, in M. Mareso, L. Pepino (eds.), *Nuovo dizionario di mafia e antimafia* (2008), 74-75. On this point see also F. Curcio, *Ndrangheta*, in *Relazione annuale sulle attività svolte dal Procuratore nazionale antimafia e dalla Direzione nazionale antimafia nel periodo 1 luglio 2012 e 30 giugno 2013* (2014), 127 - 128.

²² Thus in many cases reinforcing the sociological model of upward social mobility Id., *Ndrangheta*, in *Relazione annuale sulle attività svolte dal Procuratore nazionale antimafia e dalla Direzione nazionale antimafia nel periodo 1 luglio 2012 e 30 giugno 2013*, cit. at 21, 78. For a number of examples, see Id., *Ndrangheta*, cit. at 21, 112 and M. de Lucia, *Cosa nostra*, in *Relazione annuale sulle attività svolte*, cit. at 21, 725.

extended and sometimes coincides with the more fluid and wider one of the “grey area”²³; this includes the *extraneus*, such as the professional who becomes a point of reference in the network of the organisation and its activities, has a role in designing new strategies for the Mafias²⁴ to adapt, is part of “a triangulation with public officials, criminals (...) and politicians”²⁵, thus ending up colluding externally in Mafia type organisations as defined in Articles 416-*bis* and 110 c.c. The concept of bourgeoisie Mafia, the result of sociological analysis, has also been assimilated into juridical and trial language, as demonstrated by recent case law of the Supreme Court. By “bourgeoisie Mafia” the Court of Cassation means “white collars” i.e. Mafiosi who, thanks to their relations and the prestigious posts they occupy in society, collude with the Mafia in order to get some advantages (“easy and conspicuous wealth; support in elections”), allowing them, therefore, “to increase their spread and penetration in the vital nerve centres of society”²⁶.

2. The dialogue between social and juridical sciences: strengths and weaknesses

The theme of the relationship between the professions and the grey area has to be studied while taking into account the political, legislative, investigative and procedural perspectives. Politicians, legislators, investigators and judges must always take into account the specificity of the socioeconomic networks. Insufficient knowledge is likely to affect, as indeed happens, the efficacy of investigations and prosecution, with a resulting reduction for the prospects of justice in court. The legitimacy of every measure that can be employed²⁷, in fact, alongside the

²³ The concept of “bourgeoisie Mafia” was revived in the 1970s by M. Mineo, *Scritti sulla Sicilia* (1995), as recalled by U. Santino, *La conquista di Bisanzio, Borghesia mafiosa e Stato dopo il delitto dalla Chiesa*, in *Segno* 34 (1982) and, more recently, S. Lupo in G. Savatteri (ed.), *Potere criminale. Intervista sulla storia della mafia* (2010), 167.

²⁴ For reflections on this theme see F. Beatrice, *Camorra*, in *Relazione annuale della Dna*, July 2012 - June 103 (2013).

²⁵ See N. Amadore, *I sovversivi: in terra di mafia la normalità è rivoluzione* (2013), 71.

²⁶ Cass., Sec. II, 8 April 2014, n. 17894.

²⁷ From phone taps to indictments to seizures to arrests.

investigative and prosecution strategy, is based on a delicate balance of several factors. From this point of view the historical, social and economic sciences stand out, with a subsequent effect on the most appropriate methods of analysis on the part of the operators. This is true above all of criminal activities that include offences such as Mafia-type organisation pursuant to Article 416-*bis* and collusion with the Mafia pursuant to Article 110 c.c. Both these articles have applicative limits, also as a result of the linguistic formulations used²⁸.

Another factor is the legal classification of the crimes being prosecuted. The designation of crimes as Mafia-related²⁹, provides, pursuant to Anti-Mafia Code³⁰, that proceedings are the responsibility of the District Anti-Mafia Directorates (henceforth DDA), all the way to the temporary assignment "to local prosecutor's offices" of "judges belonging to the" National Anti-Mafia Directorate and of "those belonging to" the DDA³¹.

As pointed out, what can sometimes be seen is a prosecution strategy that tends to absorb within the jurisdiction of the DDA criminal behaviour of dubious relevance to Article 416-*bis* or other crimes that might lead, for example, to the contestation of the aggravating circumstance of the "Mafia facilitating" (the so called art. 7)³². The intention, in these cases, is to place the investigation and prosecution in a fast-track lane, better equipped in terms of resources compared to the so-called "ordinary business" lane³³.

²⁸ On this point *infra* § 4.

²⁹ Pursuant to article 51, para. 3-*bis*, Code of Criminal Procedure.

³⁰ Article 102 of Legislative Decree no. 159 of 6 September 2011.

³¹ Pursuant to Article 105 of the Anti-Mafia Code, in the case of "proceedings of particular complexity or that require specific experience and professional skills" "that is (...) specific and contingent investigative or procedural requirements".

³² Refer to Article 7, Law by Decree no. 152/1991 converted into law no. 203 of 12 July 1991. On this point see L. Ciafardini, *La costituzione, l'organizzazione della direzione distrettuale antimafia e i rapporti con la direzione nazionale antimafia*, in B. Romano, G. Tinebra (ed.), *Il diritto penale della criminalità organizzata* (2013), 488.

³³ *Id.*, *La costituzione, l'organizzazione della direzione distrettuale antimafia e i rapporti con la direzione nazionale antimafia*, in B. Romano, G. Tinebra (ed.), *Il diritto penale della criminalità organizzata*, cit. at 32, 486-490, for an analysis of the aspects related to the assignation.

Furthermore, all this would allow the use of more effective investigative tools³⁴, such as: telephone taps that have as their presupposition³⁵, sufficient and not serious evidence³⁶.

Because the legislative framework is mainly based on criminal justice, its case law and its legal doctrine, the sociological contributions to the phenomenon of professional are generally schematic³⁷. Despite the necessary differentiation between approaches, there are proven reasons in favour of the need for a dialogue between legal and sociological sciences, sensitive to the need for a common *intelligere* of contiguity with the Mafia. As it has been clearly stated, with reference to the analysis of the “structure and impact of Article 416-bis”, it would be “in truth, superficial and misleading to discuss the” relative “structure and (...) impact without considering the social context in which the Mafia has accumulated its power, as well as the cultural representation that the Mafia has gradually assumed”³⁸.

The socio-historical research should therefore be a scientific reference point in the exercise of legislative³⁹ and judicial power. To better understand the relationships between the sciences it is useful to highlight a number of aspects that characterise approaches to the subject. A certain distrust regarding the quality of its scientific output has been overcome in terms of sociological studies, the results of which, it was noted, were not always appreciated because of a widespread tendency to “be based on conjecture” and not on the information available. Gradually, there

³⁴ Di contra this choice should be assessed in terms of respecting of constitutionally protected guarantees.

³⁵ Pursuant to Article 13 of Law by Decree no. 152/1991 similarly, “when it comes to intercepting communications between those present (...) interception is permitted even if there is no reason to believe that criminal activity is taking place in the aforesaid places”.

³⁶ Derogating from the general provisions laid down in Articles 266 and following of the Code of Criminal Procedure.

³⁷ Thus, recently, N. dalla Chiesa, *Manifesto dell'Antimafia*, cit. at 1, 48, 51-52 speaks of a corporate culture (among others) in the professional associations that occurs when they reject “with contempt” or “treat reports with indulgence”.

³⁸ Cfr. M. Ronco, *L'art. 416-bis nella sua origine e nella sua attuale portata applicativa* in B. Romano, G. Tinebra (eds.), *Il diritto penale della criminalità organizzata*, cit. at 32, 36.

³⁹ See G. Fiandaca, *Il concorso “esterno” tra sociologia e diritto penale*, in G. Fiandaca, C. Visconti (eds.), *Scenari di mafia* (2010), 203-211.

has been a greater recognition of its scientific output, due in part to the increase in the number of publications and a diversification in the topics studied. The wider reference to socio-historical insights is also due to the refinement and consolidation of methods of investigation and a series of factors, among which should be mentioned: the increased number of official sources and the possibility of accessing information; the improvement in the quality of the sources; the increase in "investigations in the field"; access to important sources such as, for example, supergrasses. Scientific contributions have also been characterised by their greater completeness and specialisation⁴⁰ resulting in an appreciation by certain scholars, whose visibility in contexts other than purely scientific or judicial ones, particularly in the *agorà* of the mass media, allowed the attention of the general public and politics to be drawn to aspects of the Mafia that taken individually might have appeared insignificant.

The interaction between legal and social sciences can be perceived in the national and international debate⁴¹ both in terms of advantages and critical areas, but in any case of utility. It is necessary to take these positions into account, on the assumption that the relationship between sciences improves the processes of knowledge of phenomena, increasing the possibility of

⁴⁰ Among the most significant reasons there is, in fact, A. La Spina, *La sociologia del fenomeno mafioso dopo il 2006*, in La Spina, A. Dino, M. Santoro, R. Sciarrone (eds.), *L'analisi sociologica della mafia oggi*, 2 Rass. It. sociologia 307 (2009), a raised awareness among scholars of the different specialties of sociology that has allowed a better understanding of the more specific aspects concerning the Mafias, through sociological interpretations of "deviance and criminal behavior," "legal", of "analysis of public policies", "economic" and "political" and the sociology of the "cultural and communication processes" and of the "organisation".

⁴¹ It is interesting to recall the research conducted by S.P. Green, *I crimini dei colletti bianchi* (2008), XIII-XV, a translation of *Lying, Cheating and Stealing. A Moral Theory of White-Collar Crime*, 2006, on the subject of white collars in the US and UK. It is observed how if, on the one hand, it starts from the usual distinction between legal approach (in particular criminal), and sociological - where the former "focuses not so much on the social class and the characteristics of the offenders, as on the elements of the offence itself" - on the other, it concludes that the lawyer cannot ignore the mutual interference of "subtle distinctions of criminal law" with other "subtle distinctions". Also very interesting is the analysis of psychoanalysis: see, in particular, the recent contribution of G. Starace, *Vite violente* (2014).

identifying the most efficient means of repression. Such a relationship generates, however, friction as well. This arises, in reality, not from the methodologies and classifications of Mafia phenomena, but rather from the transposition of the models into the concrete configuration of the crime and the punishment of the offender. The most critical positions are to be found among criminal lawyers who complain about the inability of sociological models to take into proper account the Constitutional principles of the determination of the legal fact and personal responsibility. Socio-historical analysis, on its own or with others, allows us to place and understand individual criminal events in a wider dimension, but also to explain the behaviour of individuals⁴². The use that the judiciary makes of socio-historical models can also be identified in judicial provisions - albeit to a lesser extent and still paying attention to the ontological limits of criminal law - and in documents adopted outside the courts (think of the reports of the DNA)⁴³.

Compared to lawyers, sociologists and historians move in a way that is more neutral, not recognising, if not rarely and for no less important but still formal aspects, difficulties in comparison with the legal sciences. Among the reasons for this is a sharper definition of the borders of the contributions: "overspill" is rare and for this reason the contributions can be appreciated more in the processes of legal positivism. The sociologist and the historian do not appear to be influenced (nor should they be) by the transposability that their models and interpretations of the Mafia phenomenon might have at both trial and legislative level. It should further be noted how this can also be explained in view of the difficulties inherent in legal technicality and the in-depth understanding of the juridical institutions of substantive and trial law. Among the criticisms made by legal scholars is that of a risk of "excessive influence" of the interpretative (in particular sociological) models in legal reconstructions⁴⁴. One example is the qualification of cases of Mafia association and contiguity in the

⁴² Needed for the configuration of criminal facts and the identification of personal responsibility. Among the authors mentioned most often is R. Sciarrone, *Mafie vecchie, mafie nuove*, cit. at 2.

⁴³ Cfr. F. Beatrice, *Camorra*, cit. at 24, 90.

⁴⁴ Cfr. G. Leo, *Crisi ed attualità del concorso esterno nel reato associativo*, in 6 *Corr. mer.* 551 (2012).

grounds for sentencing and in the drafting of indictments by the prosecution. When operating within the traditional confines of criminal readings it is easy to understand the scepticism that prevails with regard to the socio-historical sciences, above all in the use that the judiciary might make of them, insofar as such readings might not sit well with the Constitutional principles of obligatory prosecution and personal criminal liability - in line with Article 25, par. 2, and Article 27, par. 1, of the Constitution.

Crimes such as criminal association and *extraneus* involvement become a battleground between sociological and legal classifications, where, however, the only ones who defend their position, except sporadically, are legal scholars. Scholars of the socio-historical sciences, as mentioned, if and when they extend their analyses up to and beyond the boundaries that separate them from the legal sciences, do so mainly thinking about legislation, and not the legal issues underlying the practical application of the law, which, instead, is the most common point of confrontation for the criminal lawyer in particular. Judicial provisions and those of the coordinating or investigative authorities, instead, seem to be the main source of information for socio-historical science scholars, to the extent that, this methodological approach has been criticised for its excessive use of such sources, ontologically contaminated by the search for and ascertainment of truth at trial; while, again from the point of view of useful differentiation between the socio-historical and legal sciences, there is a greater demand for historical, sociological and anthropological studies inspired by empirical methods on the ground⁴⁵.

In terms of how lawyers understand their relationship with the social sciences, instead, the error has been pointed out which the lawyer risks committing when they relate with "social analyses" and "criminological studies". The efforts of jurists would be misplaced in making automatic the transposition of the "conceptual models" into the "juridical area to deduce their effects or implications which are directly relevant in the area of the law"⁴⁶; instead, what would be useful would be an

⁴⁵ In this sense, Raffaele Cantone, during a *lectio magistralis* at the Federico II University of Naples, 16 May 2014.

⁴⁶ C. Visconti, *Proposte per recidere il nodo mafie-imprese*, cit. at 4, 1-2.

“empirical” territorial analysis, because it would have the potential to evaluate “the efficacy of the (legislative and judicial) strategies”⁴⁷. The empirical approach also allows for differentiating between the individual Mafias (for example, Mafia, Camorra, ‘Ndrangheta), providing the tools to overcome those generalisations that have misrepresented them as unitary and indistinct⁴⁸.

3. Opposing collusion between professionals and Mafia-type organisations: the role of professional associations in the legal system

The theme of contiguity has often been addressed in a picturesque way in the media, sometimes propagated through the echo of populist representations and movements⁴⁹. Rarely though have judgments of unfitness or inertia of the professional associations and colleges (henceforth professional associations)⁵⁰ in combating Mafia infiltration considered the legal situation, along with the sociological, criminological and journalistic analysis. Instead, it is essential to consider criminal law and the regulations of the professional associations. Indeed, although in many cases the professional associations could have done more, a complete evaluation of the issue cannot be achieved without a close examination of the relationship between criminal and disciplinary proceedings.

As regards the identification of professional associations to observe, the professions that are most involved in Mafia collusion

⁴⁷ *Ibidem*.

⁴⁸ G. Fiandaca, C. Visconti, *Scenari di mafia*, cit. at 39, 9.

⁴⁹ See A. D’Alessio, *Concorso esterno nel reato associativo (ad vocem)*, in *Leggi d’Italia*, § 1 and G. Fiandaca, *Il concorso esterno agli onori della cronaca*, in *V Foro it.* 1 (1997).

⁵⁰ In order to simplify from now on we will only use the expression professional association. Regarding the difference between associations and colleges, the Royal Legislative Decree no. 103 of 24 January 1924, provides that “the professional classes, not regulated by previous laws, are constituted of associations or colleges, depending on whether, for the exercise of the profession, they require a degree or a diploma from universities or colleges or a middle school diploma”. A distinction which does not correspond, among others, with the College of Notaries, access to which, obviously, requires a university degree.

have been verified empirically, and in consideration of the results, it was decided to limit the field of investigation to only those professions that require registration in professional associations and which fall within the category of the so-called regulated or protected intellectual professions⁵¹.

Bearing in mind the Constitutional principles⁵², the laws and the professional associations that characterise the regulation of the professions, the structure of public law that marks the sector is justified for a number of reasons, among them the coincidence of the role of professionals with the function of the protection of state interests (e.g., health and justice)⁵³, and the desire to “ensure the security, certainty and ethics of the professional relationship (...) which only remains intact through a correct and proper exercise of the profession (...)”⁵⁴.

Alongside the traditional duties of probity, dignity, decorum, independence, loyalty, honesty and diligence (which can be in various professional codes), the engineers' Code is worthy of note: in Article 5 on legality it states that “any participation or contiguity in illegal activity in any way connected or linked to organised crime constitutes a serious breach of ethics, detrimental to the profession”. Similar provisions can also be found in the Code of Italian planners, landscape architects,

⁵¹ Which excludes the unprotected or non-regulated professions. For further reading see C. Golino, *Gli ordini e i collegi professionali nel mercato: riflessioni sul modello dell'ente pubblico professionale* (2011), 27-28.

⁵² Among the Constitutional principles, among the others mentioned, should be: the fundamental guarantee of inviolable human rights in Article 2 of the Constitution, insofar as the professional association can be qualified as a social group in which is expressed the individual's personality and which therefore demands “the fundamental duties of political, economic and social solidarity be fulfilled”; Article 41, which conditions private-sector economic initiative to social usefulness, safety, liberty and human dignity; Article 54 which speaks of the “discipline and honour” of public office holders. Consider, in addition, also Article 33. par. 5, Const., with reference to state examinations; mention must be made as well as the Constitutional provisions governing work, including Articles 1 and 4. On this point, consider the Constitutional case law, in particular judgments no. 13 of 29 March 1961 and no. 7 of 8 February 1966. For further discussion, see C. Golino, *Gli ordini e i collegi*, cit. at 51, 41 ff. On this point see G. della Cananea, *L'ordinamento delle professioni*, in S. Cassese (ed.), *Trattato di diritto amministrativo* (2003), 1142-1147

⁵³ See on this point C. Lega, *La libera professione* (1952), 56.

⁵⁴ See C. Golino, *Gli ordini e i collegi*, cit. at 51, 62.

conservationists, junior architects and planners, which also refers explicitly to “involvement in a Mafia-type organisation”⁵⁵.

While the codes of doctors and psychologists, in terms of forensic roles or providing advice to the courts, include norms safeguarding their independence, also in order to protect the credibility of the professional concerned.

It is clear that these normative presuppositions form the basis for a proper and sensitive exercise of disciplinary power when confronted with forms of collusion and aggravated aiding and abetting of Mafia crimes, as well as performing an ethical, social and cultural role for the professionals, both as individuals and as a category that interacts with citizens, businesses and public administrations⁵⁶.

Given the legitimate expectations that stem from the needs of civil society, the institutions, including European and international ones, the judiciary and anti-Mafia organisations and the members of the professional associations, it is essential to evaluate the efficiency and effectiveness and efficacy of the current regulatory framework in order to assess the possibility for reform, also in light of the most recent legislative interventions on the subject.

Before moving on to a detailed analysis we should also consider how the issue has been dealt with in general terms in the past. As we know, the professional associations have been the subject of a reformist debate in a political-institutional setting that only saw partial formal implementation in the most recent legislation. The generally held view of normative inefficiency, also measured through the quantitative datum of the imposing of sanctions for Mafia crimes (a little-known and still very modest datum), is only a symptom, where the causes are to be found in the institutional and political field. It is useful in this regard to point out that had the question of disciplinary power been dealt with in isolation, it is likely better conditions would have been achieved for political convergence along a common line which would have been widely shared among professional associations

⁵⁵ See art. 11 “legality”. On this point see V. Tenore, *Il regime disciplinare degli architetti*, in V. Tenore, P. Mazzoli, *Codice deontologico e sistema disciplinare nelle professioni tecniche: ingegneri, architetti, geologi, geometri* (2011), 99-183.

⁵⁶ On this point see G. della Cananea, *L'ordinamento delle professioni*, cit. at 52, 1161.

and, by extension, in politics and the legislature. If the debate had been limited to the relationship between the professions and the Mafias, there would have been a more realistic possibility of extending the discussion to encompass the long-overdue reform of disciplinary power. In contrast, the perception on the part of the professional associations of being subject to a generalised reformist "siege", a result of European policies⁵⁷, might have been the cause of rigid counter-positions.

The aim of operating in an efficient framework of controls and sanctions is subordinate to the resolution of various critical regulatory areas, which can be traced to sources that depend primarily on the State⁵⁸ and the professional associations.

As we wish to demonstrate, the regulation of disciplinary power is the Gordian knot that needs to be undone to construct a new system better able to respond to the abovementioned legal situations. In attempting to provide an order to the development of the second part of this work, in which it is intended to address, from a legal point of view, the more concrete issues in a development of a perspective of anti-Mafia professional conduct, we can proceed to an analysis of the four major critical areas in the current system.

The first concerns criminal law, insofar as in the general and abstract application of the relevant norms and case-law principles we can see the main legal presuppositions, but also the constraints on the exercise of disciplinary power.

The second relates to the professional association, in particular insofar as regards the associations' exercise of regulatory, administrative and disciplinary autonomy, all in the light of the recent reforms.

The third critical area can be seen in the role that the law leaves to the institutions and bodies that interact with the professional associations, such as the Ministry of Justice, the prosecutors and the courts, and the Parliamentary Anti-Mafia Commission.

Last, but not least, a reflection is needed on the state of the system for the collection and, above all, exchange and access to

⁵⁷ On this point see G. della Cananea, *I problemi delle organizzazioni professionali e il loro futuro*, in Id., C. Tenella Sillani (eds.), *Per una riforma delle professioni* (2002), 7.

⁵⁸ In view of the absolute reserve of law covering criminal matters.

data concerning judicial and disciplinary measures regarding professionals involved in Mafia crimes.

4. Anti-Mafia Legislation: critical aspects and prospects for reform

The multidisciplinary approach is essential in understanding and regulating contiguity and collusion with the Mafia, insofar as they are phenomena of society and the institutions. Article 416-*bis* c.c., which is also the result of the contributions of the sociological and criminological sciences, assimilates the “social dimension” on a legal level, attributing to it an interpretive role as regards the Mafia association structure. In this way have been laid “the foundations for a more flexible approach” to combating “organised crime”⁵⁹.

The counterpart to this approach can be seen in the difficult transposition of the political will for repression into the technical-legislative canons and in the formulation of Article 416-*bis* c.c.⁶⁰, the constitutionality of which has been the subject of doubt⁶¹.

Collusion with the Mafia, however, is not born without any precedents in case law, and there is no doubt that it has come to be “a highly innovative means of opposing criminality”⁶², which goes well beyond the “symbolic-repressive function” and, by means of its “hermeneutic circularity between the fact and the law”, concretely allows the qualification and “discovery of factual situations (...) which” would otherwise have escaped “legal attention”⁶³.

⁵⁹ A. Centonze, *Contiguità mafiose e contiguità criminali* (2013), 7, 13 -14.

⁶⁰ Article 416-*bis*, approved in an emergency situation, was introduced in the infamous year of 1982 which saw the murders of Carlo Alberto dalla Chiesa and Pio La Torre, a member of the Parliamentary Commission of Inquiry on the Mafia in Sicily and first signatory of Law no. 646 of 13 September 1982, which incorporated Law no. 575 of 31 May 1965, (originally) “Provisions against the Mafia” and introduced Article 416-*bis* into the Criminal Code.

⁶¹ See on this point L. Ferrajoli, *Diritto e ragione* (1990), 859 and A. Centonze, *Contiguità mafiose e contiguità criminali* (2013), 3.

⁶² M. Ronco, *L’art. 416-bis nella sua origine e nella sua attuale portata applicativa*, cit. at 38, 32.

⁶³ *Ibidem*, 60.

Difficulties remain, but the case-law consolidated over a long period of application have seen the overcoming, to a large extent, of initial doubts and interpretative difficulties. The Court of Cassation, in particular, has managed to reconcile the impact in criminal-law terms with the sociological leanings of the norms. There remains the consideration that the sociological premises, by their nature, and even more so in reference to the social and economic contexts in which the Mafias are rooted, cannot provide static representations of general and abstract realities governed by law. Thus, for example, Article 416-*bis* c.c., according to what has been said, would be able to better express itself when it has as a reference a model “of hierarchical Mafia”, “where the offer of protection” is “exercised in a monopolistic way in a given local community”. Therefore, in the presence of more fluid organisational models⁶⁴ and ones that are less hierarchical, there should be a reconsideration of the normative points of reference. In some cases this would mean having to respond to the needs for new definitions of crimes⁶⁵, through a “desirable improvement in the instruments of enforcement of criminal law”⁶⁶. These considerations do not appear, however, to coincide with the idea of a legislator which is ready to react in the fight against the Mafias. If this legislative dynamism, all the same, ends up being based on the need for continuous adaptation, it would mean having to deal with at least two critical issues: one legislative, the other more strictly legal. Indeed, it would require the continued attention of the legislature, while, as has been critically observed, the progress of action against the Mafia is unfortunately cyclical⁶⁷, and, moreover, needs to look beyond the confines of the limited anti-Mafia legislation in the codes. Moreover, to say that there should be some sort of dynamic reference to classifications and sociological readings in an interpretive phase and in necessary reformist reconsiderations, would mean weakening the norm, which would ultimately open the way to further criticism and the resulting perceptive uncertainties.

So we wonder, then, if a more realistic approach might not be helpful in thinking about anti-Mafia legislation, distinguishing

⁶⁴ “Fluid structure” is discussed in A. La Spina, *La sociologia*, cit. at 40, 302.

⁶⁵ Cfr. F. Beatrice, *Camorra*, cit. at 24, 89-90.

⁶⁶ Cfr. G. Fiandaca, *Il concorso esterno agli onori della cronaca*, cit. at 49, 202.

⁶⁷ R. Sciarrone, *Mafie vecchie, mafie nuove*, cit. at 2, XXI.

the implementation of existing legislation from the prospect of reform. An approach that we might wish to follow even more, for reasons that will be explained, in reflecting on the room for improvement in the professional associations, through the exercise of normative, administrative and judicial autonomy, but also of the undervalued instruments of moral suasion. Moreover, from a reformist perspective, the system should be read dogmatically, as a whole and in harmony with the Constitution: instances of prevention, control and repression find a response in normative sources that can be traced to many other fields, including public and administrative law. Among the many might be considered ineligibility for election, the transparency of the public administrations, and the rules governing public procurement.

Returning to the substance of the responses to current needs and available means, the discussion needs to be led back to the legal concept of Mafia-type organisation according to Article 416-*bis* c.c. This contains the reference, the typified, autonomous regulatory model “around which are gathered innumerable rules of substantive and trial law, as well as criminal law, which have given rise to a real special criminal system”, produced by numerous pieces of legislation, amended various times⁶⁸. Among these, in view of our common thread that starts from the professionals to extend to the professional associations, should be considered: the special aggravating circumstance referred to in Article 7 of Legislative Decree no. 152/1991, “for crimes carrying a sentence other than life committed under the conditions of Article 416-*bis* (...) that is, in order to facilitate the activities of the associations provided for in that article”, which provides that the penalty should be increased by a third; aggravated “personal aiding and abetting” of the Mafia pursuant to Article 378, par. 2, c.c.⁶⁹; assistance to members, under Article 418 c.c.⁷⁰; recycling,

⁶⁸ Which in part it flowed into Legislative Decree no. 159/2011, M. Ronco, *L'art. 416-bis nella sua origine e nella sua attuale portata applicativa*, cit. at 38, 32-33: see, in particular, *amplius*, nt. 4, which lists and illustrates the sources of law referred to.

⁶⁹ Which punishes the person who is not a member of the Mafia-type organisation nor contributes to it insofar as *extraneus* pursuant to Article 110 and 416-*bis* c.c., but who behaves in a way intended to provide assistance to

under Article 648-*bis* c.c.⁷¹; Article 391-*bis*, recently added to the Criminal Code⁷², which punishes “anyone who allows a prisoner, subject to the restrictions of Article 41-*bis* of Law no. 354 of 26 July 1975, to communicate with others, in circumvention of the requirements imposed for that purpose” and, in particular, which provides for a special aggravating circumstance “if the offence is committed by a public official, a civil servant or a party practising the legal profession”⁷³; and, finally, external collusion with the Mafia, under Article 110 c.c.

Having recalled the main offences that presuppose the existence of a “relationship” with the Mafias, it is opportune to preliminarily anticipate that, leaving aside the ascertainment in the broad sense of Mafia crimes and the penalties that can be imposed, the professional associations, in any case, would be required to consider the behaviour of their member. Thus, a criminal judgment with final conviction, pursuant to Article 653, par. 2, Code of Criminal Procedure⁷⁴, would prove the “existence of the fact,” the “criminal illicit act and the affirmation that the accused committed it”. Behaviour of a criminal sort must also be followed by those which, in contrast to the rules of professional ethics, would result in a disciplinary action, albeit within the

those who have committed crimes that come under Article 416-*bis* c.c. in order to facilitate the circumvention and avoidance of investigations.

⁷⁰ Under which “anyone, except in cases of collusion in the offence or of aiding, provides shelter or food, hospitality, means of transport, means of communication to any individual who are members of the association shall be punished with imprisonment from two to four years”.

⁷¹ Mafia association pursuant to Article 416-*bis* c.c. is one of the crimes under Article 648-*bis* CC. Among the aims of Mafia association is the reintroduction of illicit capital in legal channels (cf. in this sense Cass., Sec. VI, sentence no. 45643, 30 January 2009, in www.iusexplorer.it).

⁷² With Law no. 94 of 15 July 2009, Article 2, par. 26.

⁷³ Specifically in reference to the legal profession, during remarks on the bill no. 733, Rome 18 November 2008, 6, the council of the Unions of the Criminal Courts of Rome, in http://www.ristretti.it/commenti/2008/novembre/pdf8/ucpi_sicurezza.pdf, claimed it was an “attempt to criminalise the defender, identified as a possible contact with the outside”. On this point see also R. Cantone, *Agevolazione criminosa ai detenuti ed internati in regime detentivo speciale*, in *Leggi d'Italia* (2010).

⁷⁴ “Efficacy of the criminal sentence in disciplinary judgment”.

limits of the exculpatory procedural assumptions which cannot but be considered in disciplinary proceedings⁷⁵.

Before coming to the end of the general classification and moving on to deal with the aspects related to the professional associations, some final considerations need to be made with regard to the crime of collusion with the Mafia, insofar as “speaking of contiguity to organised crime in Italy means above all” bringing up “the thorny issue”⁷⁶. *Extraneus* collusion (pursuant to Article 416-*bis* and 110 c.c.), as noted, fulfils the concrete need to provide a criminal-law response that is “anything but dogmatic” to punish “cases of so-called ‘contiguity’ or of collusion and interweaving between organised crime and members of the political, professional and economic-entrepreneurial world”⁷⁷. The dogmatic framework, however, can certainly not be overlooked, since it is an aspect that is not at all subordinate to the evidentiary requirements underlying the application of the norm, as widely argued in doctrine and in case law. As regards the aspect we are interested in, the objective that norm sets is to typify and sanction the “behaviours of those who, within (...) the professional field, although unrelated to the group and not sharing its aims”, make themselves available, for reasons of self-interest or for environmental compromise, to perform illegal actions that redound to the benefit” of the criminal organisation⁷⁸, which, in this way, increases its ability “to expand and enter the nervous system of society”⁷⁹.

The uncertainty which would result from the presence of crimes referred to Articles 416-*bis* and 110 c.c., in terms of the

⁷⁵ Article 653, par. 1, Code of Criminal Procedure in particular states: “The irrevocable criminal sentence of acquittal has the force of *res judicata* for disciplinary responsibility in front of the public authorities insofar as it is a finding that the crime does not exist or does not constitute a criminal offence or that the accused did not commit it”.

⁷⁶ C. Visconti, *Sui modelli di incriminazione della contiguità alle organizzazioni criminali nel panorama europeo: appunti per un’auspicabile (ma improbabile?) riforma “possibile”* in G. Fiandaca, C. Visconti (eds.), *Scenari di mafia*, cit. at 39, 189 and following.

⁷⁷ See A. D’Alessio, *Concorso esterno nel reato associativo*, cit. at 49, 2.

⁷⁸ M. Ronco, *L’art. 416-bis nella sua origine e nella sua attuale portata applicativa*, cit. at 38, 86.

⁷⁹ As stated in the most recent and aforementioned judgment of the Court of Cassation, Sec. II, no. 17894/2014.

Constitutional principle of certainty of law would create a vacuum (also caused by the legislative technique) completely filled, according to a substantial part of doctrine, by the albeit sometimes wavering and oscillating case law⁸⁰. Although, as noted, the case-law definition of the elements of typing would lead to an ultroneous role for case law, opposed to the principle of the separation of powers⁸¹. This is not the proper place to retrace the extensive debate in doctrine exploring in detail the position of the crime of association. In truth, even in the face of the widely supported need for reform, *de iure condito* there is no doubt that case law, especially that of the Court of Cassation, has succeeded, “through the processing of typological cases”⁸², in the objective of qualifying the necessary requirements that constitute the offence and sanctioning collusive and contiguous conduct. The question that arises, and we find ourselves faced with a paradox, is that despite the “constant legislative activism”⁸³, that has enriched the legislation of the abovementioned new typings, all the attention ends up only on Article 110 c.c., insofar as it is the main lever to lift the bourgeois-Mafia lid that blurs the socio-economic roots of the evolutionary dynamics of the Mafias⁸⁴. Or that even the innumerable “criminal instruments” have ended up creating a confused mass and inevitable “inextricable problems of legal

⁸⁰ For a reasonable and linear reconstruction of the precedent of the case law of the Supreme Court see A. Bargi, *Concorso esterno e strumenti patrimoniali di contrasto alla criminalità organizzata*, in May-August Arch. pen. 489 ff. (2012).

⁸¹ M. Ronco, *L'art. 416-bis*, cit. at 38, 88. Also P. Morosini, *La creatività del giudice nei processi di criminalità organizzata*, in G. Fiandaca, C. Visconti (eds.), *Scenari di mafia*, cit. at 39, 538, in taking up the various positions in doctrine on the role of the judiciary, observe how “When dealing with facts related to forms of organised crime (...) the criminal trial is not a neutral ground or one free from conditioning”.

⁸² G. Fiandaca, *Il concorso “esterno” tra sociologia e diritto penale*, cit. at 39, 209.

⁸³ C. Visconti, *Sui modelli di incriminazione della contiguità alle organizzazioni criminali nel panorama europeo: appunti per un’auspicabile (ma improbabile?) riforma “possibile”*, in G. Fiandaca e C. Visconti (eds.), *Scenari di mafia*, cit. at 39, 198-199.

⁸⁴ In the sense of not considering Article 110 c.c. as a “new and bizarre invention of the judges”, C. Visconti, *Sui modelli di incriminazione*, cit. at 83, 189, identifies the normative references and retraces the precedents in case law, also with distant references to the Mafia.

status”⁸⁵, thus suggesting the failure of “a weighted and consistent legislative strategy over the last twenty years”⁸⁶. The overall repressive framework can nonetheless be appreciated and, with reference to collusion with the Mafia, the qualification in case law of many types of behaviour⁸⁷ has made “the full *acquis* of case-law on the subject” less fluid and more limpid⁸⁸.

The efforts of case law are not sufficient however; in fact, as can be gleaned from the report of the DNA in 2013, the current “legal frameworks” are revealed as inadequate “to encompass certain actual realities”⁸⁹. Moreover, questions of undoubted importance remain unresolved, such as, as noted, the system of penalties for collusion. The same penalty being applied for participation in a Mafia-type organisation, in fact, “albeit justified on a formal level” conflicts with the “intuitive (...) different negative social value” and causes “ethical problems” and “is repugnant to the social conscience”⁹⁰. Each occasion of legislative revision needs to overcome the cyclical nature of anti-Mafia policies in Italy⁹¹, in the hope of a political continuity on an issue that, as has been critically observed, is often placed on political agendas as though it were “an issue of marginal interest, evocative of an intellectual *munus*”, “suited at most,” as has been critically noted, “for a number of Southern lawyers with no

⁸⁵ See C. Visconti, *Sui modelli di incriminazione della contiguità alle organizzazioni criminali nel panorama europeo: appunti per un’auspicabile (ma improbabile?) riforma “possibile”*, cit. at 83, 198-199.

⁸⁶ *Ibidem*.

⁸⁷ On successful interpretative action of the Supreme Court see V. Maiello, *Concorso esterno in associazione mafiosa: la parola passi alla legge*, in Cass. Pen. 1353 (2009).

⁸⁸ See C. Visconti, *Sui modelli di incriminazione della contiguità alle organizzazioni criminali nel panorama europeo: appunti per un’auspicabile (ma improbabile?) riforma “possibile”*, cit. at 83, 197.

⁸⁹ Thus F. Beatrice, *Camorra*, cit. at 24, 90, with specific reference to the Camorra and the increasingly frequent use of the (“ambiguous”) Article 110 c.c.

⁹⁰ A. Bargi, *Concorso esterno e strumenti patrimoniali di contrasto alla criminalità organizzata*, cit. at 80, 493.

⁹¹ On this point see again R. Sciarrone, *Mafie vecchie, mafie nuove*, cit. at 2, XXI. N. dalla Chiesa, *Manifesto dell’Antimafia*, cit. at 1, IX, in placing anti-Mafia policies in the history of united Italian notes how, while other most significant critical zones that saw our country separated from the democratic ideal were addressed within “a path”, “only one of the historical scars” has been excluded, resulting in its exponential upsurge, “Mafia criminality”.

professional duties as regards those accused of criminal association"⁹².

5. Instances of repression and limitation to the autonomy of professional associations

From the criminal definition of Mafia offences come two of three main routes that lead to the punishability of Mafia involvement by professional associations.

The first two routes for the majority of professional associations run in parallel. The first is that of criminal law: the courts are responsible for imposing the penalty and any other measures⁹³; this leads, therefore, to effects directly related to the criminal proceedings and the sentence, that is, to the types of crime.

The second is the competences of the associations, with specific reference to regulatory and disciplinary ones. Such parallelism⁹⁴ is initial and continual if the charges against the professional have both criminal and disciplinary significance: the system, in fact, provides - with specific exceptions and not a few uncertainties of application⁹⁵ - that from the start of criminal proceedings (being sent to trial and not merely being under investigation) it has to suspend disciplinary proceedings until the final judgment. This is the so-called "pending criminal proceedings", set out in Article 653 of the Criminal Procedure Code, applicable in cases where accusations against the professional are the object of criminal trial.

The third route instead is autonomous, entirely contained in disciplinary proceedings and regarding behaviour that conflicts with professional rules of ethics that have no criminal

⁹² N. dalla Chiesa, *Manifesto dell'Antimafia*, cit. at 1, IX.

⁹³ In addition to the application of penalties for Mafia crimes, *supra* § 4, we limit ourselves to recalling "additional penalties". For certain crimes and misdemeanours (Article 19 c.c.) is foreseen the "disqualification from a profession" (Articles 30-31 c.c.) or the "suspension from the exercise of a profession" - Article 35 c.c. Consider also the measure of the "temporary ban on engaging in certain professional activities (...)" (Article 290 of the Criminal Procedure Code) following the launch of criminal proceedings.

⁹⁴ Which obviously it does not have to only cover Mafia crimes.

⁹⁵ This is the case with the Association of Chartered Accountants and Bookkeepers and, more recently, for lawyers, as observed later.

relevance (that is, that are not the subject of criminal proceedings) or that are different from other facts that simultaneously have criminal and professional relevance and are subject to prosecution. Putting it more simply, there might be behaviour that does not coincide with the broad category we have highlighted of Mafia-related crimes, but which are part of a broader category of behaviour “of a Mafia flavour”, in such a way as to be characterised as offending the dignity or decorum of the profession among other things.

It is useful to focus jointly on the first two routes described, by far the more important in terms of quantity and quality. As repeatedly underlined, pending criminal proceedings are one of the main critical elements that prevent an effective exercise of professional disciplinary action. This is an assessment that seems to emerge clearly in the recent hearing of the Parliamentary Anti-Mafia Commission of the President of the CNF (the Italian Bar Council) on “the role of Italian legal profession in the fight against organised crime”⁹⁶. The same problem can be found in all the other associations. This is not the place to provide an account of the doctrinal and case-law debate that has characterised the evolution and application of the institution of pending criminal proceedings, which developed before and after the revision of Article 653 of the Code of Criminal Procedure of 2001, while it is opportune to consider the normative evolution, certain exceptions

⁹⁶ Stenographer’s report sitting no. 37 of 4 June 2014, in www.camera.it. The Commission preceded the hearing with a request to the CNF having as its subject “the lists all the lawyers under judicial or disciplinary investigation and indicating the reasons from January 2008 to the present”. From the contents of the hearing, also characterised by its lively tone, emerges a clear need to overcome the pending criminal proceedings. As observed by the President of the Commission, the Right Hon. Bindi, waiting for the final judgment does not make sense because it does not guarantee the citizen’s rights (12). But it is probably the results of the inquiry that aroused most concern: the number of judgments handed down by the CNF (a total of less than ten) really seem to be very few, even if the data suffer from the restrictions on access to information. In fact, as specified by the CNF, *Ufficio studi* (editor), *Dossier di documentazione e analisi*, no. 7/2014, 7, this is the court of appeal. With the result that the data provided to the Anti-Mafia Commission concerns only the decisions of the councils of the association being appealed. Moreover, as noted by the President of the CNF, Stenographer’s report sitting no. 37 of 4 June 2014, 5, the same organ “has no statutory powers over local associations”, so it cannot directly acquire information and data”.

and a number of uncertainties in application, as well as the key points case law has arrived at, in particular in the united criminal and civil sections.

More than one decade after the review of the norm, case law has emphasised the principles of reference and outlined hermeneutic solutions which⁹⁷ confirmed, in 2014, “the relevance of the principle”, for the first time enshrined in the United Sections in 2006⁹⁸, of the suspension of professional disciplinary proceedings⁹⁹. This relationship between criminal and professional disciplinary action cannot alter the criticism made of the professional associations that do not comply immediately in imposing sanctions on members involved in Mafia crimes. We would find ourselves faced, in fact, by an insurmountable constraint of law determined by the multiple relevance of the penal and professional disciplinary offence. Consequently, the only concrete solution that can be proposed, taking this criticism into account, to be considered of an ethical, cultural and political nature, cannot but find a concrete projection in new protections of the juridical good, that is, in a desirable review of the legislation or, less likely, in reconsiderations of case law. While, as noted in doctrine, exceptions to the suspension of disciplinary proceedings would be *contra legem*, insofar as enshrined in a source of primary law, through the exercise of the normative autonomy of the professional associations, therefore by means of professional ethical sources¹⁰⁰.

The criminal and professional disciplinary levels end up intertwining, although not necessarily, in a second moment, that

⁹⁷ Also when they have not directly affected professional associations, but other “public authorities” (Article 653, par. 1 of the CPP) that can be linked to the former.

⁹⁸ Cass. civ., SS.UU., 8 March 2006, no. 4893 with a note by F. Morozzo Della Rocca, *Procedimento disciplinare e pregiudizialità penale nel novellato art. 653 c.p.p.* in 4 Giust. civ. 954 ff. (2007), speaks about a “new course” for pending criminal proceedings, in opposition to previous judgments of the Supreme Court, which, even after the quoted, Law no. 97/2001, had “continued to exclude pending criminal proceedings and, therefore, the applicability of Article 295 of the Code of Civil Procedure to disciplinary proceedings”.

⁹⁹ Already stated in previous case law regarding: the last being Cass. civ. SS.UU., with its judgment no. 11309 of 22 May 2014, in www.iusexplorer.it.

¹⁰⁰ V. Tenore, *Deontologia e nuovo procedimento disciplinare nelle libere professioni*, cit. at 19, 126.

of the professional disciplinary proceedings. In the event of the offence falling under the statute of limitations, pursuant to Article 157 of the Code of Criminal Procedure¹⁰¹, for example, the proceedings will only be activated subsequently. In this (as in every other) case of sentences (for example, definitive conviction or acquittal), the process will occur at a time quite distant from an awareness of the fact. This may have important consequences. In the case of the continuing exercise of professional activity, pending the issuance of an irrevocable criminal sentence of condemnation, it might lead to a loss of credibility for the professional associations. In contrast, on the level of the protection of rights and implementation of the principle of innocence until final conviction, the professional who is finally acquitted, who in the meantime has been prevented from exercising their profession, would suffer an infringement of their rights in the case of the imposition of a professional disciplinary sanction on the basis of the same facts evaluated in the criminal trial. Here too it is the rationale of the pending criminal proceedings, as well as in the possibility on the part of the professional associations to have access to the necessary evidence, which, with greater and more suitable means, might be acquired and ascertained in the criminal trial.

The professional is therefore a subject protected by the professional association and, from the point of view of balancing interests, their status and exercise of the profession are more highly valued than, say, the protection of the prestige of the profession, both in terms of internal relationships (with other professionals enrolled in the same association or with the authorities of the professional associations) and in external relationships (with citizens, institutions, other professionals)¹⁰².

¹⁰¹ The terms of which, it should be remembered, are doubled in the case of Mafia crimes under Article 51, par. 3, Code of Criminal Procedure.

¹⁰² This prestige that might lead the professional to take the risk (at trial) of appealing against a judgment of acquittal, therefore one in their favour, because the formula is not one of the comprehensive ones, such as: "because the crime does not exist" or "because the accused did not commit it". Judgments, then, pronounced with other formulae (such as acquittal for reasons of non-punishability for conduct after the fact) "which, while not applying a penalty, involve - in different forms and to different degrees - a substantial recognition of the responsibility of the accused or, at least, the attribution of the fact", and which, as such, would be able to harm the "moral" but also "the legal interests

In reflecting on the possibility of overcoming the application of the institute of pending criminal proceedings, it is useful to recall, *de iure condito*, two different current disciplines which, instead, would allow the professional association to proceed in any case with its disciplinary proceedings, under given circumstances. The first is sanctioned by Legislative Decree no. 139 of 28 June 2005, "Constitution of the Association of Chartered Accountants and Book-keepers (...)", which has the status of a *lex specialis*, like the more recent law no. 247 of 31 December 2012, "New regulations for the organisation of the legal profession"¹⁰³. These are, therefore, primary sources, operating in derogation of Article 653 of the Code of Criminal Procedure. A second hypothesis is that of the norms of the professional association which state that disciplinary power can be exercised independently, also simultaneously with criminal proceedings¹⁰⁴. This second model, as critically observed in doctrine, "is exposed to objections in judgment"¹⁰⁵, insofar as the association rules and regulations cannot "derogate from the so-called pending criminal proceedings (...)"¹⁰⁶ contained in a source of primary law. In contrast, the first model of derogation merits particular attention, insofar as it is appropriate for untying the Gordian knot that prevents the overcoming of the current system based on pending criminal proceedings.

of the acquitted" - (cf. the judgment n. 85 of the Constitutional court, 4 April 2008, in 2 Giur. cost. 1032 (2008), on this point M. Bargis, *L'imputato può nuovamente appellare (con un limite) le sentenze dibattimentali di proscioglimento: la corte costituzionale elimina (e nel contempo crea) asimmetrie*, in 2 Giur. cost. 1046 (2008) - leaving them still open to "possible consequences (...) of a professional disciplinary nature" - other than "accounting and administrative" (see on this point the United Sections of the Court of Cassation, sentence 11 march 1993, no. 6203 and no. 6989 of the Sixth Section of the Court of Cassation of 30 March 1995). In the same way, the professional, to protect their prestige and integrity, according to Article 157 of the Code of Criminal Procedure, may waive the statute of limitations to seek a judgment of acquittal with the full formula.

¹⁰³ Article 50 "Disciplinary proceedings", par. 10, states: "the professional who is subject to criminal proceedings is also subjected to disciplinary proceedings for the fact that was the subject of imputation, unless they have been acquitted because the crime did not exist or the defendant did not commit it".

¹⁰⁴ This is the case of the "Code of Architects (...)", (Article 37, par. 5).

¹⁰⁵ V. Tenore, *Deontologia e nuovo procedimento disciplinare nelle libere professioni*, cit. at 19, 126.

¹⁰⁶ *Ibidem*, 201.

With reference to the regulations of chartered accountants, Article 50, par. 10, of Legislative Decree no. 139/2005, in conjunction with Article 20, par. 1 of “Regulations for the exercise of territorial disciplinary functions” of 2009, provides that the council of the association “having opened disciplinary proceedings and carried out the hearing stage, may order suspension, pending other proceedings before the judicial authorities”. The application of this nor¹⁰⁷ does not allow the clarification of uncertainties in interpretation, as noted in the professional disciplinary seat¹⁰⁸, despite clearer guidance already provided by the association itself¹⁰⁹.

The most recent law no. 247/2012 sets out a new way of interaction between professional disciplinary and criminal proceedings for the legal profession. Article 54 regulates the relationship between the disciplinary proceedings and the criminal trial, affirming that the former “are defined by a procedure and evaluations which are independent of the criminal proceedings which has as its object the same facts”; if the organs involved believe that “for the effects of the decision” it is “essential to acquire documents and information pertaining to the criminal trial”, it may suspend disciplinary proceedings for a “fixed” period, but for no more than a “total” of “two years”, during which “the limitation period will suspended”. The law gives, therefore, discretion to the competent bodies, establishing the presuppositions for the suspension of disciplinary proceedings. It notes that professional disciplinary proceedings

¹⁰⁷ *Ibidem*, 200 ff., discussing in detail the current regulations, states that “courageously it is expected that prosecution does not suspend or prevent the initiation of disciplinary proceedings where the conduct constitutes *independent* evaluation of the provisions of the Code” (our italics).

¹⁰⁸ As an example, consider the maximum measure taken by the National Council of Accountants, 19 May 2011, no. 9, which states that “Article 653 of the Criminal Procedure Code, affecting the relationship between professional disciplinary proceedings and criminal proceedings both initiated both against same professional for the same offences, introduced a prejudice between the proceedings cited, determining in fact the suspension of disciplinary proceedings pending the criminal outcome”.

¹⁰⁹ A question by an association to the National Council of Chartered Accountants and Statutory Auditors, on the “duration of disciplinary proceedings (...)” on 21 October 2014, was answered by the Director-General of the association reiterating the optional nature of the suspension of disciplinary proceedings, referring to the provisions of the abovementioned Article 20.

should not be suspended when the acquisition of documents and information from the criminal proceedings is not deemed as indispensable. The legislature of 2012, in this way, sought to protect the public interest by the activation of disciplinary proceedings in a certain time frame, "lining them up" (consistently with Article 55) with the regulations on the "prescription of professional disciplinary action".

Furthermore, the legislator, as regards the hypothesis of conflicting judgments, has provided a mechanism for balancing the effects. Article 55 provides for the reopening of proceedings¹¹⁰ and acquittal if "a disciplinary sanction was imposed and, for those same acts, the court" has issued "a sentence of acquittal because the crime does not exist or because the accused did not commit it"; or a new free assessment of the facts when the professional disciplinary process has "issued an acquittal and the criminal court has issued a conviction for an offence committed intentionally founded on facts relevant to the determination of disciplinary responsibility, which were not evaluated by the district board of professional discipline".

These provisions have been defined as 'singular' by authoritative doctrine¹¹¹ and concerns were also expressed about them during the process of approval¹¹². In any event, it is possible to appreciate their innovative character, insofar as a coordinated reading with other institutions reduces the previously mentioned criticality in the application of pending criminal proceedings. It remains, without doubt, entrusted to the associations the role of the supervision of legality in the professional disciplinary settings. The institutes will be verified in the seat of application.

In an era in which justice, because of the length of time trials take, sees its axis move increasingly towards other models, a high degree of distrust of the professional disciplinary function seems to persist. The model, hopefully, in its application, enriched

¹¹⁰ "At the request of the accused or the accuser" (par. 2).

¹¹¹ In this sense, G. Alpa, *L'illecito deontologico e il procedimento disciplinare nell'ordinamento della professione forense*, in *Nuova Giur. Civ.* 4 (2014), note 10, which defines as "singular (...) the institution of the reopening of disciplinary proceedings" as in Article 55.

¹¹² In the *Dossier* prepared by the "Ufficio studi del Senato" "ai disegni di legge", in November 2012, no. 406, in <http://www.senato.it/service/PDF/PDFServer/BGT/00737342.pdf>, 17 to 18.

by an evolution characterised by the desire to maintain solid references to the level of principle, can also be replicated for other associations through national legislative action, while respecting, where necessary, the special features of the regulations of each profession. The practical application of the new regulations for lawyers generates new presuppositions that should allow the legal associations to resolve the critical issues recently highlighted in the Parliamentary Anti-Mafia Commission, in particular the effective ability of the association to protect the interests of the whole community with regard to combating Mafia infiltration in the sectors of the economy, the institutions and society¹¹³.

Undoubtedly, from the combined reading of other provisions, it is possible to pick up on the signs of a process of improvement which, although not complete, when applied with determination, clarity and widely shared objectives, might support the opening of a new phase. The reference is, in particular, to the provisions concerning: prescription, typing¹¹⁴, limitations on the suspension of disciplinary proceedings, information and control activities of the national bodies over the territorial, interim suspension, disbarment, training of the members of the district, territorial and national disciplinary councils and guaranteeing the independence the decision-making of the same in the exercise of their disciplinary functions. Each of these elements presents problem that have to be considered individually and in the wider context. Among these, the last element is what is commonly considered the major cause of the supposed inefficiency imputed to the professional associations. In the public mind, in fact, the overlapping of roles between the professional who violates the rules of ethics and the other professionals who evaluate the application of sanctions has a negative impact on independence and reasoned judgment. Such a critical reading of the phenomenon, which has many supporters, however, must be brought back to the juridical and dogmatic level. It must be said that it is not at all easy to formulate models capable of ensuring a proper balance between (the principles of)

¹¹³ *Infra* § 6.

¹¹⁴ As happens, for example, for the Lawyers' Code of Ethics, which lists the duties of conduct in a series of articles, the last paragraph of which provides for the sanction that can be imposed.

fairness or impartiality¹¹⁵ of the professional disciplinary bodies and the independence of the professional associations that takes the form of an appropriate and necessary level of representation of the professionals¹¹⁶. To take as the basis of the reasoning a practical element, we can look first at the composition of the disciplinary boards, trying to define the features of the models outlined by the system.

A first model that moves in the direction of extending the professional disciplinary bodies to include subjects other than the professionals themselves is that of the notaries. The system foresees that the competent regional administrative disciplinary commission should be chaired by a magistrate¹¹⁷. What we have, then, is a mixed college. A further guarantee is provided by the challenge on appeal¹¹⁸ and, on the occurrence of certain conditions, to the Court of Cassation¹¹⁹.

A second model is the one outlined with the rules regarding deregulation in the Decree by the President of the Republic no. 137 of 7 August 2012. For the associations affected by this legislation - the majority (the medical and legal professions are excluded) - Article 8 establishes territorial disciplinary councils in the territorial boards of the associations, to which are entrusted the tasks of investigation and decision regarding disciplinary matters relating to members. It is first established that, regardless of the number of members of the disciplinary board, the single disciplinary matter must be dealt with by a

¹¹⁵ V. Tenore, *Deontologia e nuovo procedimento disciplinare nelle libere professioni*, cit. at 19, 114 ff., 179 ff. and 213 ff.

¹¹⁶ On this point, see the judgment no. 10875 of the United Sections of the Court of Cassation, 30 April 2008, at <http://www.iusexplorer.it>, according to which the disciplinary function is exercised to protect the interests of the same category by the same professional bodies that represent "the professional group most directly offended by the behaviour of one of its members and therefore more interested in the repression of ethically improper conduct".

¹¹⁷ The reference is to Legislative Decree no. 249 of 1 August 2006, amending Law no. 89 of 16 February 1913. Articles 148 to 153 lay down a set of rules that define the model of the notarial profession.

¹¹⁸ The reference is to Article 158, par. 1 of Legislative Decree no. 249/2006 as amended in 2011, with the limits of applicability pursuant to Article 36 of Legislative Decree no. 150 of 1 September 2011. On this point see Cass. Civ., Sec. II, 23 January 2014, no. 1437.

¹¹⁹ The first model (notaries) was subject to criticism, M. Gozzi, *Il procedimento disciplinare nell'ordinamento delle professioni*, 4-5 Riv. Dir. Proc. 956 ff. (2013).

board consisting of three persons, chaired by the senior member¹²⁰. For the nomination of members of the disciplinary councils, the basic principle is that of the incompatibility between the office of the territorial association and the office of member of the corresponding territorial disciplinary council. This principle is also extended to the national disciplinary councils, in line with the regulations of the national councils of the association. With regard to the appointment (by the president of the court) of external parties (magistrates), it is possible to also include subjects who are not members of the association¹²¹. The role of the president of the court should be highlighted insofar as they have to select the other components from a list drawn up by the associations themselves¹²².

This function, instead, is not foreseen in the new lawyers' association¹²³ - and in this case we would be in the presence of a third model - which foresees an elective system. This choice of the legislature has given rise to criticism because it would lead to a compression of the "relationship of representation between board and members"¹²⁴. On the other hand, it can be held that the role attributed to the president of the court might represent a further guarantee, substantial but also relating to image, of the independence and authority of the names chosen to play an

¹²⁰ This point was subject to criticism, insofar as, M. Gozzi, *Il procedimento disciplinare nell'ordinamento delle professioni*, cit. at 119, § 5, the reduction in the number of members would impede - as instead happened previously, when it was the entire professional association that reached a decision - the pronouncement of the "conspicuous plurality of elected members who ideally should have represented the judgment expressed by the entire professional category".

¹²¹ See article 8, par. 2 and 4.

¹²² According to Article 8, par. 3, those who can be nominated are "specified in a list of individuals proposed by the corresponding association boards or colleges (...) subject to the binding opinion of the supervisory minister".

¹²³ According to Article 50, par. 2, of Law no. 247/2012, which provides that "the district disciplinary council is composed of members elected by democratically one member, one vote, in respect of gender representation under Article 51 of the Constitution, according to the regulation approved by the CNF".

¹²⁴ On this point, See M. Gozzi, *Il procedimento disciplinare nell'ordinamento delle professioni*, cit. at 119, 5, who observes how the general provisions contained in Legislative Decree 137/2012 would be going in the opposite direction to those of the notaries and the legal profession.

important role in the protection of the public interest and the positions of individual rights of the members of the associations.

It is evident how the models will be tested in the disciplinary setting and evaluated considering the other precepts laid down in order to guarantee independence¹²⁵. The model that foresees elections and therefore finds concrete expression in the principle of the accountability of members practicing in full the autonomy of the association will equally be able to meet the objectives of independence and reasoned judgment. We cannot, however, overlook the existence of a greater degree of permeability and risk for the boards, particularly in territories and historical phases in which the presence of the Mafia is heightened.

From the insights gained in the analysis of one of the most important aspects and from the consideration of the need for a reading of the system that considers individual norms in their practical application, it is easy to understand how, by returning to an organic vision, the task of opposing Mafia infiltration and contiguity in a broad sense cannot fall only to the legislator. On these conceptual foundations a real anti-Mafia sense could take root in the associations, in turn traceable to a broader concept of anti-Mafia ethics, which should involve all public or private bodies that have their own codes of ethics and disciplinary bodies called upon to judge responsibilities and impose sanctions, also in terms of warning and guarantee for the daily exercise of all the functions and activities that, inevitably, impact on society and the institutions.

6. For an Anti-Mafia policy in professional associations amid inefficiencies in the information and control systems.

There are two additional elements to be evaluated: the system for the collection of information and data on professionals involved in the Mafia and the supervision of the workings of the

¹²⁵ It should be remembered, in lowering the level of risk, how, like the notaries, the regulations for the lawyers' association (Article 50, par. 3 of Law no. 247/2012) provide that "members belonging to the association in which the professional against whom they must proceed is inscribed" cannot be members of the judging panel of the district disciplinary council.

associations. The description of these two factors might contribute to the evaluation of the effectiveness of the system of controls with respect to cases of inertia and improper exercise of the disciplinary function. The analysis of the organisation and the exercise of the administrative and judicial powers given over to the control and further investigation of the legal facts we are interested in appears necessary for various reasons. Above all, in the face of a sometimes harsh academic criticism of the activity of the associations¹²⁶ and sociological contributions that highlight the negative effects of a certain corporative culture that “prevents the recognition of the presence or infiltration of the Mafia in its own professional association”¹²⁷, it is necessary to reflect starting again from the norms. It must first be noted that there are no systematic insights in legal doctrine¹²⁸ nor unique normative references, and “the ways in which this form of ‘control’ can and should be carried out” appear insufficient.

The supervisory functions, exercised in consideration of the legal nature of public entity of the associations, have been attributed to a large extent, though not exclusively, to the Ministry of Justice¹²⁹. These consist essentially in requests for clarification and, sometimes, in activities of inspection. Their goal is to verify the proper operation and exercise the power of dissolution and shutting down of local or national associations in the case of proven dysfunction or “of serious and repeated violations of the law, variously defined by the regulations as

¹²⁶ As regards “false guardians of professional ethics” see F. Stefanoni, *I veri intoccabili* (2012), 142 ff. The author, taking up a number of legal cases, and statistics on the activity of the associations, highlights the paucity of cases that result in penalties; moreover, among the factors conditioning the disciplinary function are: “the subjective qualities of the members, resources and time available, the number of statements, backlog to be dealt with, (...) good relationships, friendships or enmities (...)” and electoral favours. Also in the case of professionals involved in or convicted of collusion with the Mafia, the situation is described as particularly critical. For a reminder of the case studies in the field of the collaboration of professionals with the Mafia see N. Amadore, *La zona grigia, professionisti al servizio della mafia* (2007).

¹²⁷ See on this point N. dalla Chiesa, *Manifesto dell'Antimafia*, cit. at 1, 209-213.

¹²⁸ On this point, see V. Tenore, *Deontologia e nuovo procedimento disciplinare nelle libere professioni*, cit. at 19, 228 and C. Golino, *Gli ordini e i collegi*, cit. at 51, 273 who point out the deficiencies in this area.

¹²⁹ In particular, the Directorate General of Civil Justice, Office III, sectors 1 and 2, respectively “Notarial” and “Professions”.

violations of the duties of the organ (...) tasks which lie with the Ministry of Justice"¹³⁰.

The control function is also exercised by the public prosecutor¹³¹, either independently or in support of the Ministry. In this case too, the functions attributed do not allow a single reading, in that, except for certain provisions of a general nature, they have as their normative reference the specific legal provisions of the individual associations¹³².

However, it is useful to analyse some of the functions that might be exercised. In addition to the role of pushing for the launch of disciplinary proceedings (also exercisable by fellow professionals, local boards or third parties), the public prosecutor, informed by the associations of the decisions taken in disciplinary proceedings, has the power to impugn them¹³³. The functions of the prosecutor thus appear more incisive than the power of supervision of the Ministry¹³⁴.

The disciplinary measures pronounced by the associations can, therefore, be challenged, as can be seen from most of the laws governing the individual associations, in the national councils, in the ordinary court of first instance or appellate or cassation (united sections and not), or, in some cases in the administrative court¹³⁵.

The disarticulation and uncertainty of the regulatory references¹³⁶ and of the extent of controls understood in the broad sense, represents a first acute shortcoming of the supervisory system, so non-linear and ineffective at the operational level as to

¹³⁰ *Relazione sulla amministrazione della giustizia nell'anno 2013 - Dipartimento per gli affari di giustizia.*

¹³¹ V. Tenore, *Deontologia e nuovo procedimento disciplinare nelle libere professioni*, cit. at 19, 242 and *amplius* 242-252: "Identified each time as prosecutors at the courts of appeal and/or prosecutors at the courts in the district where territorial disciplinary boards are located (...)."

¹³² *Ibidem*, 245 ff., the author reconnects the individual functions to the specific legislative disposition of the associations.

¹³³ The supervisory function may also consist in the possibility of participating in the preliminary disciplinary proceedings.

¹³⁴ Consider also the role that these exercise before the Court of Cassation in case of appeal. On this point, see V. Tenore, *Deontologia e nuovo procedimento disciplinare nelle libere professioni*, cit. at 19, 191.

¹³⁵ *Ibidem*, 166-198 for a reconstruction with doctrinal and case-law references.

¹³⁶ Think merely of the different role assumed by the prosecutor according to the law establishing the association.

constitute an initial strong limitation for the subject of Mafia collusion, but in general for any other matters relating to the associations. As regards the authority of the Ministry, a body with reference to which we can actually speak of supervisory powers, dissolution is an extreme act, principally intended to punish repeated violations or failure to function and thus leaving individual violations outside the margins of operation, such as inertia with respect to individual disciplinary actions or specific misapplication of the rules of professional ethics. We can therefore conclude that for this type of supervision the principle of the autonomy of the associations continues to prevail, with a balancing of interests that appears to be insufficient.

To this must be added the other critical issue represented by the shortage in terms of information that can be detected in the systematic collection of data concerning professionals involved in Mafia crimes and the communication of the same to the organs, not just of control. As there are no systems of data collection, there is obviously no possibility of accessing compiled and individual data that bring together Mafia crimes, professionals, the state of criminal and professional proceedings, disciplinary measures taken or inertia. This state of affairs does not even allow important agencies responsible for combating the Mafia, such as the Parliamentary Anti-Mafia Commission, access to comprehensive information. This also affects the ability of operators and scholars to have access to data on the subject.

The most comprehensive database should be the "single national database of anti-Mafia documentation"¹³⁷, obviously with limited access for security and investigative reasons, of extremely wide scope, whose targeted access, among other things, would lead to great expense for such complex inquiries. The amount of information contained in it does not allow us to imagine its being used for the purpose under discussion, unless it a specific function be established normatively.

The databases of the professional associations not only do not allow, therefore, systematic research, but also appears to be absolutely inadequate¹³⁸ compared to their stated aims, even only

¹³⁷ See art. 96-99 of Legislative Decree n. 159, of 6 September 2011.

¹³⁸ Though there are some partial exceptions: think of the files of the Association of Chartered Accountants and Bookkeepers.

to gain timely information to be reworked later. One step forward, which could be easily carried out, is that already hoped for of giving over to the judiciary the monitoring of “the judgments of the Court of Cassation”¹³⁹ on Mafia crimes, up to those on the first and second degree. A key role could also be played by the Parliamentary Anti-Mafia Commission which already has an important archive containing a wealth of documentation, which includes reports from judges, law enforcement officials, journalists and researchers¹⁴⁰.

From a point of view of legislative approval, therefore, it is necessary to consider this limit, since, as has been critically observed, “there is no database of professionals arrested for criminal association or aiding and abetting (...). There are, unfortunately, no numbers, statistics or monitoring that might provide an idea of the macro phenomenon. In practice it is not known how many white-collar workers are arrested or involved in investigations into the Mafia”¹⁴¹. Some steps in this direction were made by the Anti-Mafia Commission of the current legislature, which has initiated, for now with the CNF, a path of cooperation that will hopefully quickly reach the area of interest. The goal must be to overcome incongruous barriers to access and to reach systems, albeit differentiated, for the sharing of data of interest. The current critical issues emerged during the Anti-Mafia Commission¹⁴² at the hearing of the President of the CNF in June 2014. Thus, for example, it was recognised how the law does not permit the CNF “to acquire directly the provisions that have been filed in cases in which disciplinary proceedings were initiated and then for the most varied of reasons the proceedings were concluded”¹⁴³; nor is there an organic system suitable for acquiring information for the CNF about professionals facing prosecution¹⁴⁴. In these conditions it is difficult to imagine a new

¹³⁹ See N. dalla Chiesa, *Manifesto dell'Antimafia*, cit. at 1, 103.

¹⁴⁰ See L. Pepino, *Antimafia. I. Commissione parlamentare*, in M. Mareso, L. Pepino (eds.), *Dizionario di mafie e antimafia* (2013), 10-11, which on this point also refers to M. Pantaleone, *Antimafia occasione mancata* (1969), 11.

¹⁴¹ N. Amadore, *La zona grigia, professionisti al servizio della mafia*, cit. at 126, 41. The reference is to Cosa Nostra, but the judgment is obviously extendable to the other Mafias. See also 45-46.

¹⁴² On which, *Stenographer's report* cit. at 96, 5 discussed above.

¹⁴³ *Ibidem*, 5.

¹⁴⁴ *Ibidem*, 47.

course that places among the priorities of the associations the fight against the Mafias. We are talking, in fact, of essential conditions for the operability of the organs of the associations.

Placing the reasoning in a broader perspective, the culture of legality should be the focus of political debate, prior to and simultaneous with what takes place in the national, European and international legislatures, and the professional associations. The concept of the culture of legality must have a wide scope, with a natural dialectical-multidisciplinary thrust, extending to new legislative and associative systems, with the aim of following up the proposals made by the highest institutions in the field¹⁴⁵ and the movements and associations involved in the anti-Mafia struggle.

The impetus for reform should be born in a state of tension capable of pushing levels of participation “towards a civil or cultural movement”, which is that of the anti-Mafia movement, beyond its borders and towards every other form “of participation (...) political, trade union, associative, cultural (...) for peace (...), environmental (the fight against the eco-Mafia), (...) for justice or social, civil and human rights”¹⁴⁶. The permeability and the versatility of the shapes and textures of an even wider and transverse anti-Mafia would create a natural contrast to the “systemic nature of the Mafia phenomenon”¹⁴⁷. The anti-Mafia as a political, social, institutional, legislative, judicial reality would be greatly strengthened by a real anti-Mafia in the professional associations¹⁴⁸, shared by all the professional associations, without uncertainty on the legislative, disciplinary, cultural,

¹⁴⁵ F. Beatrice, *Camorra*, cit. at 24, 90.

¹⁴⁶ N. dalla Chiesa, *Antimafia (Movimento)*, in M. Mareso, L. Pepino (eds.), *Dizionario enciclopedico di mafie e antimafia* (2013), 47.

¹⁴⁷ *Ibidem*, 25, discusses about the systemic nature.

¹⁴⁸ Among the initiatives we might recall is the “Ethical charter of the intellectual professions” born in Modena in 2011 as part of the joint committee of the professions and the Manifesto of the Committee of professionals (www.professionistiliberi.it) of Palermo, who along with LiberoFuturo and Addiopizzo foresee the voluntary signing by professionals and public or private employees of a “Declaration of Commitment” with membership of a public directory that involves the obligation to respect the contents of the Manifesto, which if violated will see the exclusion of the professionals. The declaration can be seen at http://www.professionistiliberi.org/?cmd=il_manifesto.

ethical and communicative levels, carefully conceived in terms of legislative technique and in harmony with Constitutional principles, but bold in wanting to oppose any denial and firm in sanctioning the phenomena of collusion and aiding and abetting. Every tool available to the professional associations should be pointed in a single direction, as should ethical training, which should be carried out following a multidisciplinary approach, reconnecting behaviour to values and principles, to the effects on the economic and social level, with the intention of animating a “collective consciousness” aimed at strengthening, as has been observed, “a coercive power that is inherent in the social norm, from blame to the isolation of the group”. Evidently the definition of behaviour contrary to the law and the rules of professional conduct is essential and the professionals themselves should contribute to this through an ongoing case law (in the broadest sense) of the associations, one that is unitary and transparent. The borders between legality and illegality must be as visible as possible, while in some places they are sometimes wilfully obscured for the benefit of a few, with the serious consequence of not being identifiable any more or, and this is even more serious, not shared and recognised by the majority. Only by ensuring the credibility of the professional and social role of professionals can a clear contrast be achieved to the (non) culture of lawlessness that takes root and thrives in the grey area.

From this point of view, it is useful to refer to the legal nature of professional associations and to the different forms of autonomy. Professional associations foster collective¹⁴⁹ and general interests. They are the expression of «a social group»¹⁵⁰ and recognise themselves in their own “social sub-layer”¹⁵¹. By respecting the limits established by the legal system, it is the professional associations’ duty to discipline ethically and deontologically the professionals’ conduct and exercise the powers of control and sanction. Such power is to be concretely intended in a dynamic sense, always taking into account the evolution of the above-mentioned interests.

¹⁴⁹ Of the professional enrolled in the professional associations.

¹⁵⁰ F. Teresi, *Ordini e collegi professionali (ad vocem)*, in Dig. Disc. Pubbl. 452 (1995).

¹⁵¹ G. della Cananea, *L'ordinamento delle professioni*, cit. at 52, 1175.

THE RISE OF GLOBAL STANDARDS.
ICAO'S STANDARDS AND RECOMMENDED PRACTICES

*Francesco Giovanni Albissini**

Abstract

This article aims, using the examination of the regulation of aviation safety by the International Civil Aviation Organization (ICAO) as a case analysis, to demonstrate how the relationship between bureaucratic power and political authority, a recognized problem in public law studies, has shifted into a new context.

Global regulatory regimes express a great variety of standards. This involves critical issues, regarding both sovereignty and legitimacy. Sovereignty, because the increasing number of 'rule-makers' implies a redefinition of the role of States, and legitimacy, because global regulatory regimes do not follow traditional paths of legitimacy as defined within the model of national public powers.

Standards adopted by ICAO have a high degree of effectiveness, considering they are not formally binding. This effectiveness is due to the role assigned to standards in the ICAO Convention, and to the various tools used for ensuring compliance, which are primarily procedural. The adoption of a Universal Security Audit Programme for member States ensures control over the implementation of standards. Consequently, the development of this regulatory system is not merely adopted and 'proposed' to member States, but strongly fostered far beyond the initial understanding. But there is also another crucial factor to be considered. Technicality promotes uniformity, at least on a formal level. The need for a 'common framework' of technical rules, as safety standards are, is better met through a global regulatory regime, expression of bureaucratic power, rather than through a political authority. The balance between these two elements, however, is not clearly defined, and finds at the global level a new dimension of comparison.

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TABLE OF CONTENTS

| | |
|--|-----|
| 1. Introduction..... | 204 |
| 1.1. Global standards as a relevant area of critical issues on sovereignty and legitimacy..... | 204 |
| 1.2. The aviation safety SARPs by ICAO, as a paradigm of the relationship between technical power and political authority..... | 207 |
| 2. The institutional framework of ICAO..... | 210 |
| 3. Standards And Recommended Practices..... | 214 |
| 3.1. Standards and Recommended Practices adopted by ICAO..... | 214 |
| 3.2. The Adoption Procedure of SARPs..... | 220 |
| 4. The implementation of SARPs..... | 223 |
| 4.1. Value of the Standards and implementation by States..... | 223 |
| 4.2. Compliance through Universal Safety Oversight Audit Programme..... | 227 |
| 5. Concluding Remarks. A new balance between technical power and political authority..... | 229 |

1. Introduction**1.1. Global standards as a relevant area of critical issues on sovereignty and legitimacy**

Global regulatory regimes express a great variety of standards¹.

As has been observed, “standards are exemplary measures against which people and things are judged. They can be informal, resembling norms and habits; they can also be formal, resembling laws or written codes of conduct or embedded in material objects. Both formal and informal standards are involved in nearly every aspect of human life”, but “formal standards [...] are those that are primarily invoked in global governance”².

In fact the ‘production’ of formal standards is one of the major features of global regulatory regimes³, though not always

¹ See B. Kingsbury, N. Krisch, R.B. Stewart, *The emergence of Global Administrative Law*, 68 *Law Contemp. Probs*, 15-61 (2005).

² A. Loconto, J.V. Stone, L. Busch, *Tripartite Standards Regime*, in George Ritzer (eds.), *The Wiley-Blackwell Encyclopedia of Globalization* (2012), 1.

³ See S. Cassese, *Il diritto Globale. Giustizia e democrazia oltre lo Stato* (2009); Id., *The global polity: global dimensions of democracy and the rule of law* (2012); M.

considered crucial, especially if the analysis is limited to the 'institutional charters' (of global regimes). However, as has been noted, "institutional charters do not reveal how organs in ICAO, IMO, WMO, FAO, and the WHO, for example, have responded to changes in the world just as the Security Council has responded to perceived changes in security threats"⁴. Powers and functions outlined in 'institutional charters' do not always reveal to what extent different tools used by the 'administrative' bodies follow the aims of global regulatory regimes.

This implies the emergence of various forms of soft law that are not easily placed within traditional sources of international law⁵.

Issues regarding the relationship between States and global regulatory regimes, and resulting implications regarding sovereignty and legitimacy, can be better understood by looking at the '*normative product*' resulting from the activity of global regulatory regimes.

There are in fact relevant implications for sovereignty and legitimacy.

The phenomenon of supranational sources of law (difficult to entirely understand through classic tools of international law) concerns "the central problem of sovereignty: what are powers reserved to government; who exercises which of them, and how should they be exercised?"⁶. Assigning the role of rule-makers to bodies outside national States produces institutional and regulatory outcomes which, even if can hardly be qualified as a clear "transfer of sovereignty", causes indeed wide allocation of regulatory and decisory power, due to the creation of a new institution, as the pattern in the European Union can confirm⁷. It

Bussani, *Il diritto dell'Occidente. Geopolitica delle regole globali* (2010). Specifically on the exercise of legislative functions by International Organizations, see J.E. Alvarez, *International Organizations as Law-makers* (2006) and D. Sarooshi, *International Organizations and their exercise of sovereign powers* (2005).

⁴ J.E. Alvarez, *International Organizations* cit. at 3, 218.

⁵ *Ibidem*, 257.

⁶ D. Sarooshi, *International Organizations* cit. at 3, 7.

⁷ As the Court of Justice of the European Communities highlighted since 1963 in the well known decision *Van Gend & Loos*, 5 February 1963, Case 26/62, "van Gend & Loos v. Netherlands", observing that "this Treaty [the ECC Treaty] is more than an agreement which merely creates mutual obligations between the contracting states. This view is [...] confirmed more specifically by the

also appears that States are not always entirely free to decide whether to adhere or not to a global regulatory regime. Even if it is theoretically possible to withdraw, it is very unrealistic: participation is the most effective way to influence rules that also affect, directly or indirectly, non-member Countries⁸. The idea that States are bound, on supranational level, only by *consensus*, has been contested by Hart, where he states that “[t]here is no way of knowing what sovereignty states have, till we know what the forms of international law are and whether or not they are mere empty forms”⁹. According to Hart, sovereignty of States is strictly connected to supra-national law. With this in mind, the examination of ICAO regulatory regime enables to verify to what extent sovereignty of States is limited¹⁰. The idea of legislative power controlled exclusively by States¹¹ does not reflect the complexity of contemporary international relations. Rules ‘produced’ elsewhere may have a profound effect on a State’s domestic legal systems¹²: “most citizens greatly underestimate the extent to which most nations shipping laws are written at the IMO in London, air safety laws at the ICAO in Montreal, food standards at the FAO in Rome, intellectual property laws in Geneva at the WTO/WIPO, banking laws by the G-10 in Basle, chemical regulations by the OECD in Paris, nuclear safety standards by IAEA in Vienna, telecommunication laws by the ITU in Geneva and motor vehicle standards by the ECE in Geneva”¹³.

There are implications regarding *legitimacy*, because we have to face the experience of rules coming from sources having a legitimacy different than State or State legislation¹⁴, but which are

establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens” [italics added].

⁸ G. della Cananea, *Al di là dei confini statuali. Principi generali del diritto pubblico globale* (2009), 201.

⁹ H.L.A. Hart, *The concept of law* (1994, 2nd), 224.

¹⁰ See D. Sarooshi, *International Organizations* cit. at 3.

¹¹ An idea which has indeed, authoritative advocates: see *Bundesverfassungsgericht*, 2 BvE 2/08 vom 30 juni 2009, in which States are considered “Masters of Treaties”, and therefore are always free to decide whether to adhere or not to supra-national regimes.

¹² M. Bussani, *Il diritto dell’Occidente* cit. at 3, 88.

¹³ K. Braithwaite, P. Drahos, *Global Business Regulations* (2000), 488.

¹⁴ L. Torchia, *Diritto amministrativo, potere pubblico e società nel terzo millennio o della legittimazione inversa*, in S. Battini, G. D’Auria, G. della Cananea, C.

effective¹⁵ and able to introduce “measures against which people and things are judged”. The idea that global regulatory regimes require the same democratic standards that are now applied to States is controversial¹⁶: those forms of legitimacy, which do not follow traditional paths of direct democracy, are situated by their nature at the crossroads between bureaucratic, technical power and political authority.

1.2. The aviation safety SARPs by ICAO, as paradigm of the relationship between technical power and political authority

The International Civil Aviation Organization (hereinafter ICAO) is the global ruler of “aviation safety”, which may be considered a merely technical subject, but really has a key role in developing the regulation of air transportation. Issues concerning aviation safety have global relevance. Typically, the consequences of a journey by aircraft (particularly if “safety” is not properly considered) could have an effect at supra-national level; so that the same technical features of the activity and its cross-border nature encourages the adoption of a global regulation in this field.

Aviation safety does not only involve issues related to the prevention of accidents, but has a broader meaning, connected to all risk management activities concerning air transportation and travelling.

It has been defined by the ICAO Air Navigation Commission¹⁷ as the “state of freedom from unacceptable risk of injury to persons or damage to aircraft and property”¹⁸ and also as “a condition in which the risk of harm and damage is limited to an acceptable level”¹⁹.

Franchini, A. Massera, B.G. Mattarella, G. Napolitano, A. Sandulli, L. Torchia, G. Vesperini (eds.), *Il diritto amministrativo oltre i confini* (2008), 61.

¹⁵ See O. Dilling, M. Herberg, G. Winter, *Exploring Transnational Administrative Rule-making*, in O. Dilling, M. Herberg, G. Winter (eds.), *Transnational administrative rule-making. Performance, legal effects and legitimacy* (2011), 4-7.

¹⁶ See A. Buchanan, R.O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 *Ethics Int'l Aff.*, 405-437 (2006).

¹⁷ It is a Commission established by the ICAO Council, see *infra*, par. 2.

¹⁸ ICAO Working Paper AN-WP/7699, *Determination of a Definition of Aviation Safety*, 11 December 2001, paragraph 2.2.

¹⁹ ICAO, Doc 9735, *Safety Oversight Manual*.

These definitions that refer to *unacceptable or acceptable* level of risk indicate a dynamic concept, constantly changing, involving not only technical assessments, but also legal, financial, and management issues.

It is therefore a task that involves a high degree of expertise, which may not be easily accomplished by a single State, especially developing Countries.

Some scholars have disputed the idea that a single State is not able to manage aviation safety by itself, arguing, with specific reference to the U.S. system, that “the Congress of the United States has the greatest influence on the level of safety, or acceptable risk under which we operate. Congress, of course, writes the law that govern the operation and development of the National system. Congress also controls the budget of the Department of Transportation and in turn, the Federal Aviation Administration”²⁰.

From this point of view the national dimension is not excluded at all, and maintains central relevance, since these issues are solved through the adoption of rules of law, where the only constraints for States come from signed international treaties.

This approach does not appear entirely satisfactory. Aviation is in fact an activity which by its very nature cannot be confined within national borders, due to the fact that risks associated to air transportation and travelling are likely to spread globally. So a single State, even if exercising sovereignty on its own territory, is unable to independently manage the “*safety*” of international civil aviation without the cooperation of other States. As has been rightly pointed out, “global risks require global management and call for concerted international action”²¹. This *concerted international action* produced, as a result (significant though not fully satisfactory), the signing of a treaty, namely the Convention on International Civil Aviation (hereinafter the Convention).

This Convention has established a defined global regulatory system, creating an “*international administration*”²²,

²⁰ F.M. Isaac, *Is It Safe Up There?*, 28 Transp. L. J. 185 (1998).

²¹ J. Huang, *Aviation Safety through the Rule of Law. ICAO's Mechanisms and Practices* (2009), 8.

²² According to the taxonomy proposed by B. Kingsbury, N. Krisch, R.B. Stewart, *The emergence of Global Administrative Law* cit. at 1, 21.

invested with relevant regulatory power. A first key issue concerns the delegation of powers to the organization, and the actual exercise of functions among the bodies that constitute it (see par. 2). The analysis shows that plenary, representative bodies (as the Assembly in the ICAO case) may not be considered the organizational core of global regulatory regimes: the true regulatory power is entrusted mainly to a body with 'administrative' features (the Council), with the fundamental contribution of smaller entities (Air Navigation Commission and Panels), raising problems regarding the participation in the formations of standards. The adoption procedure of standards is therefore carefully examined (see par. 3.2), highlighting how the recourse to proceduralisation allows to overcome the gap between democratic legitimacy and effectiveness.

The exam of organizational and institutional dimensions is essential to understand the influence of global regulatory regimes on national legal orders. But the most significant issue involves the analysis on the 'normative product' of the global regulatory regime, ICAO Standards and Recommended Practices (SARPs, see par. 3.1). It is possible to demonstrate that, although they are not explicitly part of the Convention, they give effective content to its provisions, due the express mention within some articles of the Convention, and therefore gain, in some cases, binding value. SARPs impose, in addition, procedural and substantial limits on States, regarding the possibility of non compliance (see par. 4.1). This leads to the idea of duty of cooperation in establishing an international order, that does not halt to the original transfer of powers, but has further consequences, and involves actors not entrusted, at national level, with legislative functions. The implementation of SARPs by States confirms this hypothesis: usually national legislations refers to ICAO standards with a procedural mechanism which assigns binding value to them, through the mediation of administrative bodies, excluding political evaluation. Implementation is fostered also through procedural tools (see par. 4.2): the Universal Safety Oversight Audit Programme, although does not *per se* increase the binding strength of SARPs, eases their implementation, evidencing critical points in each State experience.

The analysis shows, finally, how the global dimensions of interests protected (as aviation safety) promotes the institution of

a global regulatory regime, with relevant consequences in terms of transformation of the role of States, that shifts significantly from the law-making process to the implementation phase.

2. The institutional framework of ICAO

ICAO is a specialized agency of the United Nations, which was established by the Convention²³.

In 1944 the original signatory States were 52, but to date 191 States have signed the Convention²⁴. Membership to ICAO is directly linked with adherence to the Convention. Adherence of the original signatories was declared by the ratification addressed to the Government of the United States, the depository of the Convention²⁵. Today, member States of the United Nations, may become members of the ICAO by adhering to the Convention²⁶.

The aims of the ICAO are the administration and development of the principles set out in the Convention²⁷. As noted by a scholar, the way this task is organized “emphasizes the predominantly technical nature of the mandate of the Organization”²⁸.

The promotion of *aviation safety* has always been a central element of the activity of ICAO²⁹ and has been achieved mostly through development and continuous updating of a comprehensive set of *Standards And Recommended Practices* (SARPs), set out in the Annexes of the Convention³⁰. These Annexes have been supplemented by a comprehensive audit

²³ Art. 43 of the Convention on International Civil Aviation.

²⁴ As indicated at the date of October 31, 2013 by the ICAO website, <http://www.icao.int/MemberStates/Member%20States.English.pdf> visited on April 20, 2015.

²⁵ Art. 91 (a) of the Convention on International Civil Aviation.

²⁶ Art. 92 (a) of the Convention on International Civil Aviation.

²⁷ According to art. 44 of the Convention on International Civil Aviation, “[t]he aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport [...]”.

²⁸ L. Weber, *International Civil Aviation Organization* (2011), 17.

²⁹ ICAO Assembly Resolution A37-5 reaffirm that “the primary objective of the Organization continues to be that of ensuring the safety of international civil aviation worldwide”.

³⁰ See *infra*, par. 3.

system to monitor the implementation of technical safety standards by ICAO member States (Universal Safety Oversight Audit Programme)³¹.

The Organization is composed of three main bodies (the Assembly, the Council, the Secretariat) and several Committees.

The Assembly is the main policy-making body of ICAO. Each contracting State has a seat in the Assembly and one vote, on an equal basis³². Decisions are taken by majority of the votes cast³³. In most cases, however, decisions are taken by *consensus*. The Assembly meets in ordinary session once every three years. Therefore, although the Assembly has the power to “delegate to the Council the powers and authority necessary or desirable for the discharge of the duties of the Organization and revoke or modify the delegations of authority at any time”³⁴, it is unlikely that it will use these powers to adopt detailed decisions capable to strictly define limits for the Council operations.

The Assembly highlights the main principles and objectives that ICAO must pursue, but it is the Council that makes administrative and regulatory decisions, with those objectives in mind. The Council is the real executive governing body of the organization, a “permanent body responsible to the Assembly”³⁵. It is composed of thirty-six states, elected by the Assembly³⁶. It is important to note that in electing the members of the Council, the Assembly shall give adequate representation to different criteria³⁷:

- 11 States are chosen among those of chief importance in air transport;

- 12 States are chosen among those which make the greatest contribution to the provision of international air navigation facilities;

³¹ See *infra*, par. 4.2.

³² Art. 48 (b) of the Convention on International Civil Aviation.

³³ There are also quorum requirement to be fulfilled for the meetings of the ICAO Assembly.

³⁴ Art. 49 (h) of the Convention on International Civil Aviation.

³⁵ Art. 50 (a) of the Convention on International Civil Aviation.

³⁶ Art. 50 (b) of the Convention on International Civil Aviation. The number of the member of the Council has raised over the years: the original text of the Convention provided for just twenty-one members of the Council.

³⁷ Art. 50 (b) of the Convention on International Civil Aviation.

- 13 States are chosen among those whose designation will ensure that all the major geographic areas of the world are represented on the Council.

This mechanism is aimed at guaranteeing adequate representation of different interests within the Council, which is the organizational core of ICAO, where most relevant decisions are adopted³⁸.

In other words: legitimacy is sought through representation of interests.

The Council has several different tasks, but, as noted earlier, the most relevant is to make regulations. The Council is entrusted with the adoption of international Standards and Recommended Practices³⁹. Decisions of the Council usually require approval by a majority of the members⁴⁰, but in the case of adoption or amendments of SARPs, a majority of two-thirds is required: this means that the approval of 25 members of the Council is necessary⁴¹. The Council is assigned another major role relevant to the subject in question: it administrates and supervises the *audit system* which verify how States implement ICAO Standards⁴². It is important to underline that a specific audit system is not expressly mentioned in the Convention, but has been “created”, on the legal basis of the substantive provision of art. 54 (j) of the Convention⁴³.

The Secretariat is the ICAO bureaucratic structure. The Secretary General is the chief executive officer of ICAO, and is appointed by the Council⁴⁴.

The Air Navigation Commission (ANC), established by the Council under art. 54 (e) of the Convention, is the main technical body of the ICAO. Its main task is to “consider, and recommend to the Council for adoption, modifications of the Annexes to this Convention”⁴⁵. So its role in the adoption of SARPs is clearly

³⁸ See *infra*, par. 3.2.

³⁹ Art. 54 (l) of the Convention on International Civil Aviation.

⁴⁰ Art. 52 of the Convention on International Civil Aviation.

⁴¹ Articles 54 (l) and 90 of the Convention on International Civil Aviation.

⁴² See *infra*, par. 4.2.

⁴³ Which gives to the Council the task to “[r]eport to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council”.

⁴⁴ Art. 54 (h) of the Convention on International Civil Aviation.

⁴⁵ Art. 57 (a) of the Convention on International Civil Aviation.

crucial, and consequently it's important to highlight the method of appointment of ANC members. Scholars have observed that "[t]hese [powerful democratic] States have long played a disproportionately large role in selecting key personnel to steer international organizations"⁴⁶. The ANC is composed of nineteen members⁴⁷, appointed by the Council in their personal capacity as experts⁴⁸ (not as representatives). Members are chosen from candidates nominated by Contracting States, and the term lasts three years⁴⁹. This short term, the required majority of Members of the Council to appoint the Members and President of the ANC, and the voting by secret ballot⁵⁰ are countermeasures designed to overcome problems regarding the dominant influence of developed countries.

Panels may also be set up by the ANC or the Council, creating small groups of experts, with a relevant role in the adoption of SARPs⁵¹. These *ad hoc* temporary bodies of qualified experts contribute significantly to the tasks carried out by ANC⁵². They are directly appointed by the ANC and act in small groups⁵³, improving efficiency at the expense of a wider participation in the deliberative process.

The appointment and promotion of ICAO Officers is regulated by the ICAO Service Code, which largely reflects principles laid down in the United Nations Staff Regulations and Staff Rules. They ensure the highest standards of efficiency, competence and integrity, and take into account the importance of recruiting staff on as wide a geographical basis as possible⁵⁴. Staff

⁴⁶ E. Benvenisti, *The Law of Global Governance* (2014), 19.

⁴⁷ Since 2005. The number of member of the ANC was originally fifteen.

⁴⁸ Art. 56 of the Convention on International Civil Aviation requires that «these persons shall have suitable qualifications and experience in the science and practice of aeronautics».

⁴⁹ ICAO, Rules of Procedure for the Council, Doc 7559/8, art. 16.

⁵⁰ ICAO, Rules of Procedure for the Council, Doc 7559/8, Appendix D.

⁵¹ See *infra*, par. 3.2.

⁵² Art. 1 of ICAO, Directives for Panel of the Air Navigation Commission, Doc 7984/5, states that "[t]he purpose of a panel of the ANC is to advance, within specified time frames, the solution of specialized problems or the development of standards for the planned evolution of air navigation which cannot be advanced within the ANC or established resources of the Secretariat".

⁵³ 15 to 20 members, according to art. 2.3 of ICAO, Directives for Panel of the Air Navigation Commission, Doc 7984/5.

⁵⁴ ICAO Service Code, art. 4.1.

of the organization are appointed by the Secretary General, but the Council has established a Commission for the Processing of Applications for the Director Level, that operates in accordance with consolidated procedures for the appointment of Directors set out in the ICAO Service Code.

3. Standards And Recommended Practices

3.1. Standards and Recommended Practices adopted by ICAO

The 96 articles of the Convention lay down the principles of international civil air navigation, but they certainly cannot deal with all the provisions relating to air traffic.

Moreover, the more detailed the provisions, the quicker they are subject to technological obsolescence. For this reason art. 54 (1) of the Convention, gives the Council the power to “[a]dopt ... international standards and recommended practices; for convenience designate them as Annexes to this Convention”. Therefore “Annexes” are mentioned in the Convention, but are adopted by the Council in a separate and subsequent manner⁵⁵, and concern, at least at first glance, technical provisions.

There is also another reason that justifies the Annexes. It is the need for uniformity. When it comes to technical rules, it becomes a need shared by all States. For this purpose, the Convention provides a specific obligation for each contracting State to “undertake[s] the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation”⁵⁶. *Uniformity* is therefore intended as a value, something that can ensure a higher degree of *safety*⁵⁷. To ensure uniformity, and therefore safety, is assigned to the ICAO the task

⁵⁵ See *infra*, par. 3.2.

⁵⁶ Art. 37 of the Convention on International Civil Aviation.

⁵⁷ It should be observed, however, that for decades – since the institution of the ICAO – many States did not implement SARPs, and also failed in the duty to notify differences from SARPs in national legal systems. See M. Milde, *International Air Law and ICAO* (2012), 178. It is only since 1995, with the establishment of the ICAO safety oversight program by the Council (see *infra*, par. 4.2), that the perception of the need of uniformity has become sharper.

of issuing Standards and Recommended Practices in all matters that concern, even indirectly, *aviation safety*⁵⁸.

Standards and Recommended Practices are both considered *Annexes*.

A Standard is defined by ICAO as “any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention”⁵⁹.

A Recommended Practice is defined by ICAO as “any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation and to which Contracting States will endeavour to conform in accordance with the Convention”⁶⁰.

It should be underlined that, although the Annexes are not formally inserted within the text of the Convention, the reference made to them in the same text assigns to the Annexes an effectiveness comparable to that of the provisions of the Convention itself.

The provisions of the Convention mention standards, especially in matters of safety, where contracting States must meet certain requirements. Some examples may be mentioned regarding specific provisions of the Convention.

Art. 28, with reference to air navigation system, states that each contracting State must:

⁵⁸ Standards and Recommended Practices can deal with: “(a) Communications systems and air navigation aids, including ground marking; (b) Characteristics of airports and landing areas; (c) Rules of the air and air traffic control practices; (d) Licensing of operating and mechanical personnel; (e) Airworthiness of aircraft; (f) Registration and identification of aircraft; (g) Collection and exchange of meteorological information; (h) Log books; (i) Aeronautical maps and charts; (j) Customs and immigration procedures; (k) Aircraft in distress and investigation of accidents; and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate”, art. 37 of the Convention on International Civil Aviation.

⁵⁹ Assembly Resolution A36-13, Appendix A. ICAO Doc 9902.

⁶⁰ Assembly Resolution A36-13, Appendix A. ICAO Doc 9902.

- provide in its territory airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, “in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention”⁶¹;

- adopt and put into operation the appropriate standard systems of communications procedures, codes, markings, signals, lighting and other operational practices and rules, “which may be recommended or established from time to time, pursuant to this Convention”⁶²;

- collaborate on international measures to secure the publication of aeronautical maps and charts, “in accordance with standards which may be recommended or established from time to time, pursuant to this Convention”⁶³.

Art. 33 sets up a system of mutual recognition of certificates and licenses, based on the standards “which may be established from time to time pursuant to this Convention”. This provision expressly moves from the assumption that standards have a dynamic content, not to be considered definitive, but open to change – to be *established from time to time*. States agree in advance to each other’s level of compliance of ICAO’s safety provisions, even those not yet established in the Convention, but to be introduced in the future by the Council, as the body designated for the adoption and amendment of standards.

Art. 39 (a) states that an aircraft that does not meet the requirements of international standards of airworthiness must declare on its airworthiness certificate any details of divergence from standards. The same rule, according to art. 39 (b) of the Convention, applies to a person holding a license that does not fully satisfy the conditions laid down in international standards for that license. A certificate or license so endorsed prohibits international air navigation, unless approved by the State whose territory is entered⁶⁴. If someone uses a certificate which does not respect international requirements as defined in Standards, a State may ban them from flying in its territory.

⁶¹ Art. 28 (a) of the Convention on International Civil Aviation.

⁶² Art. 28 (b) of the Convention on International Civil Aviation.

⁶³ Art. 28 (c) of the Convention on International Civil Aviation.

⁶⁴ Art. 40 of the Convention on International Civil Aviation.

In all these cases, the text of the Convention expressly refers to Standards and Recommended Practices and establishes relevant legal consequences in case of non compliance (e.g. prohibiting flight in the territory of a member State). The above mentioned examples appear relevant, as long as they expressly mention standards in the text of the Convention. At the same time standards can add specific content to the general provisions of Convention. In those cases, Standards and Recommended Practices are not merely secondary rules, established by the Convention and not necessarily binding for member States which may decide whether to implement them or not; they instead assign effective content to the provisions of the Convention.

ICAO has developed, over the past seventy years, 19 Annexes. Most of them contain both Standards and Recommended Practices. Almost every Annex has been amended.

The content of SARPs is peculiarly relevant with reference to *safety*. Annexes related to safety include:

- Annex 1, regarding *Personnel Licensing*, which sets standards on skill, competence and training of pilots, air and ground personnel, and other requirements to meet in order to be authorized in exercising defined activities;
- Annex 2, regarding *Rules of the Air*, which sets standards on air travel and conditions in which visual flight or instrument flight is allowed;
- Annex 6, regarding *Operation of Aircraft*, which standardizes operational rules on aircraft;
- Annex 8, regarding *Airworthiness of Aircraft*, which sets standards on the airworthiness requirements. Certificates of Airworthiness are issued by contracting States, based on their national regulation (often heavily influenced by SARPs), but respecting SARP requirements ensures recognition of the Certificate in other member States;
- Annex 11, regarding *Air Traffic Services*, which sets standards on air traffic control, flight information and alerting services;
- Annex 13, regarding *Aircraft Accident and Incident Investigation*, which provides international requirements for the investigation of aircraft accidents and incidents;

- Annex 14, regarding *Aerodromes*, which sets standards on the planning of airports, from physical characteristics to airspace requirements;
- Annex 19, regarding *Safety Management*, which is mostly based on existing provisions, consists of the provision of a Safety Management System to re-enforce the role of States in managing safety at national level.

The institutional and regulatory model of ICAO, therefore, relies on Annexes to develop a systematic and integrated framework of rules, able to assign effective content to the provisions of the Convention.

Licenses of Personnel and *Airworthiness* offer clear examples in this direction. Both “are issued or rendered valid by the State in which the aircraft is registered”⁶⁵. So it would appear that the competence to issue certificates and licenses is entirely entrusted to States. In fact States are assigned the role of execution bodies to implement the rules already established and adopted at an inter-institutional level, rather than national.

Indeed, art. 33 of the Convention provides:

“Certificates and licenses issued or rendered valid by the contracting State ... shall be recognized as valid by the other contracting States, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may established from time to time pursuant to this Convention”.

As already noted, minimum standards are established by Annexes, adopted by the Council and not directly and expressly accepted by the contracting States in advance. A single State can decide to implement standards different from those introduced by the Annexes, but in this case other member States can deny recognition to such certificates or licenses issued by that State. In other words: *recognition* of one State’s license in another State is not based on a general principle of *equivalence*, which admits only limited exceptions on a single case comparison of protected interests⁶⁶ (as happens in cases of *mutual recognition* in UE law on the basis of articles 34-36 of the Treaty on the Functioning of the

⁶⁵ Articles 31 and 32 of the Convention on International Civil Aviation.

⁶⁶ See L. Torchia, *Il governo delle differenze: il principio di equivalenza nell’ordinamento europeo* (2006), 53-129.

European Union), but operates on the basis of implementation of specific standards already in use.

Annex No. 13, regarding investigation of accidents and incidents involving aircraft⁶⁷, offers a clear example of the content of SARPs. The “State of Occurrence” (in the territory of which an accident or incident occurs) has a duty to investigate in case of an accident⁶⁸ involving an aircraft registered in another member State, and shall take all reasonable measures to protect the evidence and to maintain safe custody of the aircraft and its contents, for such a period as may be necessary for the purposes of an investigation⁶⁹. If the accident occurs in the territory of a non-member State, the “State of Registry” (of the aircraft involved) should endeavour to institute and conduct an investigation in cooperation with the “State of Occurrence” (of the accident) but, failing such cooperation, should itself conduct an investigation with such information as is available⁷⁰. If the location of the accident or the serious incident cannot definitely be established as being in the territory of any State, the “State of Registry” shall institute and conduct any necessary investigation of the accident⁷¹. SARPs therefore regulate the relationship between the aeronautical authorities involved: this relationship must be based on full cooperation in the exchange of information and documentation, and on disclosure, with other States involved, of evidence collected.

Such a complex and broad set of standards, undoubtedly containing technical prescriptions, cannot just be reduced to a set of *technical rules*, as long as each option is selected comparing substantive interests and expresses a political decision of some sort. E.g.: greater *safety* implies higher costs, while – as already explained⁷² – the model established by the ICAO Air Navigation

⁶⁷ The purpose of this investigation, according to paragraph 3.1 of Annex 13, is “the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability.”

⁶⁸ Which is an occurrence associated with the operation of an aircraft, in which a person is fatally or seriously injured, according to Chapter 1 of Annex 13.

⁶⁹ Paragraph 5.1 of Annex 13.

⁷⁰ Paragraph 5.2 of Annex 13.

⁷¹ Paragraph 5.3 of Annex 13.

⁷² See *supra*, par. 1.2.

Commission⁷³ is not that of an abstract and absolute absence of risk but rather the establishment of “an acceptable level” of risk⁷⁴.

It is therefore crucial to scrutinize how SARPs are approved, whether through a general participation in the decision-making process or within smaller groups, which have different consequences in terms of legitimacy.

3.2. The Adoption Procedure of SARPs

SARPs are adopted by the Council⁷⁵. This important regulatory function is not entrusted to the plenary body (the Assembly), but to a more restricted one. A closer analysis of the procedure highlights how the content of SARPs are actually shaped at an earlier stage than the adoption by the Council⁷⁶.

The procedure is the same for the adoption of new SARPs and for the amendments of already existing SARPs. For many years the number of Annexes remained at 18, and only recently has Annex No. 19 been added, but the existing Annexes have been subject to a continuous process of amending and updating, usually introducing new prescriptions.

Early proposals⁷⁷ regarding SARPs are analyzed first by the Air Navigation Commission. Several consultative mechanisms can be used⁷⁸: meetings, inviting all contracting States; panels of technical experts⁷⁹. As already mentioned, “ANC panels are technical groups of qualified experts formed by the ANC to advance, within specified time frames, the solution of specialized problems which cannot be solved adequately or expeditiously by the established facilities of the ANC and the Secretariat. These

⁷³ It is a Commission established by the ICAO Council, see *infra*, par. 2.

⁷⁴ ICAO Working Paper AN-WP/7699, Determination of a Definition of Aviation Safety, 11 December 2001, paragraph 2.2; ICAO, Doc 9735, Safety Oversight Manual.

⁷⁵ Art. 54 (l) of the Convention on International Civil Aviation.

⁷⁶ ICAO, Making an ICAO Standard, <http://www.icao.int/safety/airnavigation/Pages/standard.aspx>.

⁷⁷ A proposal can be submitted by member States, a body of ICAO and other international organizations.

⁷⁸ L. Weber, *International Civil Aviation Organization* cit. at 28, 189.

⁷⁹ See ICAO Doc 7984/5, Directives for Panels of the Air Navigation Commission.

experts act in their expert capacity and not as representatives of the nominators”⁸⁰.

There are also other bodies with a consultative capacity, such as Air Navigation study groups⁸¹ or Council technical Committees⁸², but “[i]n summary, technical issues dealing with a specific subject and requiring detailed examination are normally referred by the ANC to a panel of experts. Less complex issues may be assigned to the Secretariat for further examination, perhaps with the assistance of an air navigation study group”⁸³.

The first effective version of proposed standards is that drafted by the panel of experts. This proposal is submitted to the Air Navigation Commission for preliminary review, usually limited to controversial issues.

After this phase, the proposals of the panel with eventual amendments by ANC are transmitted to member States to get their comments. Usually States have three months to comment on the proposals. Comments of States are analyzed by the Secretariat, which prepares a working paper to illustrate them.

The ANC makes a final review of the proposed text of SARPs. The Annexes so amended are submitted to the Council for adoption. The final decision on the proposed SARPs rests with the Council.

The Council is given the task of adopting the final text, with a majority of two thirds of its members⁸⁴. There are 36 member States on the Council⁸⁵; a majority of two thirds corresponds to 25 members, while the total numbers of ICAO members is 191⁸⁶; this shows that a very small number of member states is entrusted with the relevant power to adopt the text of the Annexes.

The text so adopted by the Council is submitted to each contracting State.

The Annexes so approved will become effective 3 months after submission to member States, unless within this period the

⁸⁰ ICAO, Making an ICAO Standard.

⁸¹ It assists the Secretariat with advisory functions.

⁸² Established by the Council.

⁸³ L. Weber, *International Civil Aviation Organization* cit. at. 28, 191.

⁸⁴ Art. 90 (a) of the Convention on International Civil Aviation.

⁸⁵ See *supra*, par. 2.

⁸⁶ See *supra*, par. 2.

majority of them register their disapproval⁸⁷. The power of the Council is limited by this procedure, but it must be stressed that since the signing of the Convention, this veto power assigned to the States has never been exercised. Moreover, the large number of members creates a situation where it is difficult to obtain the veto majority requested (more than 90 States) in the short period of only 3 months. The competence of the Council therefore encounters many fewer *de facto* limits than may appear at first sight.

This analysis of the procedure reveals that a relevant role is assigned to panels of experts and technical sub-commissions. The recourse to these technical bodies is aimed at increasing the effectiveness of the decision making process, which it does, but it has two relevant consequences.

First of all it reduces the participation of States in the decision making process, due to its composition and structure. As the groups are intended to be small⁸⁸, a large number of members are excluded.

Moreover, the technical composition of these groups emphasizes the gap between industrialized and developing countries, as it is unlikely the latter will be able to participate effectively on all sub-commissions.

In these cases the gap between democratic legitimacy and effectiveness of global regulators emerges with particular intensity. To overcome those critical issues, it has become common practice for the *Air Navigation Commission*, which must approve the technical standards drafted by the relevant bodies, to notify the result of their activity to contracting States as well, in order to allow comments⁸⁹.

The recourse to proceduralisation is therefore considered a crucial tool, aimed at allowing a wider participation and contribution of States that can't regularly take part in the technical bodies' work. This enables those States to express opinions on the proposed rules at the time of their drafting, even if in a position of

⁸⁷ Art. 90 of the Convention on International Civil Aviation.

⁸⁸ Paragraph 2.1 of the Directives for Panels of the Air Navigation Commission states that "[t]he ANC shall establish panels normally comprising 15 to 20 members, keeping in mind the need for expeditious and efficient handling of panel business."

⁸⁹ J. Huang, *Aviation Safety through the Rule of Law* cit. at 21, 57.

objectively less influence than those of the States regularly present in the technical bodies. The relevance of panels is therefore still crucial. The Air Navigation Commission has proposed, in 2013, a full reform of the panels' organization and functioning⁹⁰, in order to better support the complete air navigation work program and to enhance participation, according to objectives of the Twelfth Air Navigation Conference, held in 2012, confirming the importance of this issue.

4. The implementation of SARPs

4.1. Value of the Standards and implementation by States

SARPs, according to art. 90 of the Convention, "become effective" after a specific procedure⁹¹. Their "entrance into force" concerns only the international level, as there are no indications regarding the legal status at national level. States, in fact, do not have a formal explicit obligation. They have a general obligation, to "collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation"⁹².

The complex system defined by SARPs has therefore to be implemented by States. SARPs are the tools that guarantee uniformity. Implementation, though, may be subject to exception.

Art. 38 of the Convention states that "[a]ny State which finds it impracticable to comply in all respect with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard".

⁹⁰ ANC AN-WP/8735, Modernization of Panels of the Air Navigation Commission.

⁹¹ See *supra*, par. 3.2.

⁹² Art. 37 of the Convention on International Civil Aviation.

So States have the chance to differ their national regulation and practices from standards and procedures⁹³. But this exception has both procedural and substantial limits.

Regarding the substantial limit, it is possible to differ from standards only if it is “impracticable to comply” to them, or if it is considered *necessary* to adopt different regulations. The decision of non-implementation is not subject to the discretionary, sovereign choice of a State. It is instead a choice that must meet specific requirements.

Regarding the procedural limit, a State must notify ICAO, within 3 months, the differences between its own practice and that established by the international standards. This allows the ICAO and other member States to recognize deficiencies in a national air regulation system, and if necessary prevent possible risks. States have therefore the right to differ from SARPs, but must give adequate motivation for non-compliance.

This particular system has led to uncertainty regarding the juridical nature of SARPs. Some authors believe that States have no legal obligation to implement or to comply with the provisions of Annexes, unless they find it ‘practicable’ to do so⁹⁴. But the need to interpret the obligations of member States, bearing in mind the purpose of the Convention, leads to a different conclusion. The main focus of the provisions regarding Annexes⁹⁵, as already highlighted, is not the freedom of action of the member States, but the achievement of uniformity of international standards. In addition, a close look at interests protected by the Convention clarifies that the objectives pursued⁹⁶ shape a normative system which embodies a common interest of all States. Certain safety

⁹³ Art. 38 of the Convention on International Civil Aviation does not expressly refer to “Recommended practices”, although art. 90 states that Annexes (which include also Recommended practices) “become effective” at the end of the adoption procedure. J. Huang, *Aviation Safety through the Rule of Law* cit. at 21, 62 notes, however, “that subsequent ICAO Assembly resolutions have tended to blur the distinctions between standards [and] recommended practices”.

⁹⁴ T. Buergenthal, *Law-making in the International Civil Aviation Organization* (1969), 76.

⁹⁵ The reference is to articles 37 and 38 of the Convention on International Civil Aviation.

⁹⁶ I.e. art. 44, (a) of the Convention on International Civil Aviation, regarding “the safe and orderly growth of international civil aviation throughout the world”.

obligations, therefore, are not to be considered just reciprocal between member States, but for higher aims. The adherence to the international aviation regulatory system is not only linked to the principle of State sovereignty and the freedom of action of States, but also to the duty of cooperation in establishing an international order. This duty implies the implementation of Annexes in domestic legal orders, with exceptions subject to the above mentioned limits. There is also another reason that fosters implementation: non-compliance affects significantly the participation in international air navigation and air transport, and this reduction therefore represents a strong incentive (to give compliance) for States⁹⁷.

States have implemented SARPs through different techniques.

In the Italian system, Annexes are implemented “through administrative tools” (*in via amministrativa*)⁹⁸, and the bodies entrusted are the Ministry of Transportation and ENAC⁹⁹, in accordance with guiding standards of a Presidential Decree¹⁰⁰: among these guiding standards, it must be highlighted the “[t]end[ency] to achieve uniformity of legislation with international regulations”¹⁰¹. Rules regarding issue, renewal, integration, suspension and revocation of licenses are exclusively those of Annex No. 1 of the Convention, due to the express mention in the national rule¹⁰². Presidential Decree July 4, 1985, n. 461, states, in addition, that Standards usually have to be implemented as binding norms, unless it is “impracticable to comply, as ascertained by a motivated decree”¹⁰³. The theoretical choice, in the Italian system, is between implementation or non-implementation, when impracticable. But the approach generally applicable means the Standards have to be implemented in a way to give them binding force.

⁹⁷ M. Milde, *International Air Law and ICAO* cit. at 57, 172.

⁹⁸ Art. 690 of the Royal Decree 30th March 1942, n. 327, “Codice della navigazione”.

⁹⁹ Italian Authority for Air Navigation.

¹⁰⁰ Presidential Decree July 4, 1985, n. 461.

¹⁰¹ Art. 2 of the Presidential Decree July 4, 1985, n. 461.

¹⁰² Art. 731 of the Royal Decree 30th March 1942, n. 327, “Codice della navigazione”.

¹⁰³ Art. 1 of the Presidential Decree 4th July 1985, n. 461.

According to the Australian Air Navigation Act, “[t]he Governor General may make regulations, not inconsistent with this Act, ... for the purpose of carrying out and giving effect to the Chicago Convention, ... any Annex to the Convention relating to international Standards and Recommended practices (being an Annex adopted in accordance with the Convention) and the Air Transit Agreement”¹⁰⁴. In this case implementation is not provided by law, but at a lower level. In Finland, the Certificate of Airworthiness is issued by the Finnish Transport Safety Agency: “[d]etailed regulations on the design, manufacture, equipment, properties and maintenance of aircraft, parts and appliances, as well as on the content and arrangement of inspections and tests required for approval” are adopted by the Finnish Agency, “based on the standards and recommendations referred to in the Chicago Convention”¹⁰⁵.

In developing countries, the inclusion of international safety standards may occur by “mere reference to the title, number and year of issue of such standard or amendment or to any other particulars by which such standard or amendment is sufficiently identified, without quoting the text of the standard or amendment so incorporated”¹⁰⁶ by the Director of the Aviation Agency, reinforcing the idea of a distinct set of rules that does not need further elaboration for the implementation in the national legal system.

The Federal Aviation Administration of United States has, pursuant to art. 83 of the Convention, the power to “exchange with that country [the Administration entitled with air safety regulation functions] all or part of their respective functions and duties with respect to registered aircraft under the following articles of the Convention: Article 12 (Rules of the Air); Article 31 (Certificates of Airworthiness); or Article 32a (Licenses of Personnel)”¹⁰⁷. This provision outlines a normative equivalence in the exercise of regulatory functions of national administration of different States, due to the common ‘normative basis’ shared by these bodies. Furthermore, the Federal Aviation Administration has undertaken, without any express indication by the legal

¹⁰⁴ Art. 26 of the Australian Air Navigation Act, 1920.

¹⁰⁵ Sec. 22 of the Aviation Act, Finland, 2009.

¹⁰⁶ South Africa, Civil Aviation Act, n. 13/2009.

¹⁰⁷ § 44701, Sec. 49, USA Code, 2011.

provisions that regulate its activity, a progressive action, to uniform its framework for “Safety Management” to the ICAO system¹⁰⁸, observing that “FAA supports harmonization of international standards, and has worked to make U.S. aviation safety regulations consistent with ICAO standards and recommended practices”¹⁰⁹.

The result of this summary comparative analysis shows that in most cases internal legislation refers to ICAO Standards, with a procedural mechanism which gives them binding value through the mediation of administrative bodies. No relevance is given to political evaluations. From this point of view, national administrative bodies are no longer acting as an expression of internal politics, but rather as *longa manus* of the international organization.

Art. 1 of the Convention emphatically states that “[t]he contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory”. But this reaffirmed *sovereignty* lacks much of its meaning. It is ‘*diluted*’ in the various subsequent steps, and the rule ‘*produced*’ within the international framework enters the internal legal systems on its own strength.

4.2. Compliance through Universal Safety Oversight Audit Programme

Safety audits are an essential element of ICAO’s work to improve safety.

As has been seen, the Convention imposes several obligations on States, mainly to encourage the highest practicable degree of *uniformity* in regulations and practices, in any matter where it will help and improve air navigation. Therefore, a State that finds it impracticable to comply must notify differences of its national regulation from ICAO Annexes.

These obligations, however, were not always respected by contracting States. Without the filing of differences by states, neither ICAO nor other member States had any clear and objective information on the degree of implementation of Annexes.

¹⁰⁸ Federal Aviation Administration Advisory Circular No. 120-92.

¹⁰⁹ Federal Aviation Administration Advisory Circular No. 150/5200-37.

In 1998, therefore, ICAO established the Universal Safety Oversight Audit Programme (USOAP)¹¹⁰. The Program is founded on the following elements:

- it consists of regular, mandatory¹¹¹, systematic and harmonized safety audits, which shall be carried out by ICAO;
- it is applicable to all member States;
- it aims at ensuring transparency and disclosure in the release of audit results;
- it introduces a systematic reporting and monitoring mechanism in the implementation of safety-related SARPs.

Audits are performed by ICAO teams, composed of experts from the Organization and from member States, other than the audited state. Every member State has signed a Memorandum of Understanding, which gives the consent to audit.

USOAP has gone under several phases¹¹².

In the first phase of audits, almost 180 States were visited and audited.

Between 2001 and 2004 numerous follow-up audits were performed, and the focus shifted to a problem-solving approach, rather than merely highlighting critical areas.

In the third phase (2004-2010), further steps to increase transparency were made, and final audit results are now made available to all contracting States, giving widespread and accessible information on the critical points emerging in the application of ICAO standards in a given State.

Recent developments involve the setting up of a “continuous monitoring approach”, with a continuous data exchange between contracting States and ICAO, regarding implementation of safety-related SARPs and findings of audits.

Such a system does not *per se* increase the binding strength of SARPs, but eases their implementation¹¹³, by highlighting

¹¹⁰ ICAO, Assembly Resolution, A32-11. Establishment of an ICAO Universal Safety Oversight Audit Programme.

¹¹¹ ICAO, Assembly Resolution, A32-11 refers to “mandatory ... audits, to be carried out by ICAO”. The circumstance that almost every Member state signed, with ICAO, a bilateral memorandum of understanding, giving consent to the audit in their country, does not exclude the importance of the expression. As J. Huang, *Aviation Safety through the Rule of Law* cit. at 21, 75 notes, “the ICAO audit practice has customarily developed into a mandatory safety regime in the true legal sense of the word”.

¹¹² See ICAO Annual Report, 2012; ICAO, Safety Report, 2014.

critical points in each national legal system and putting pressure on any State for non compliance by exposing it publicly.

5. Concluding Remarks. A new balance between technical power and political authority

SARPs are the most important tool for the regulation of safety in air transportation. The development and widespread use of standards has several implications.

First of all, national law appears to be an inadequate tool to regulate such a complex sector as aviation safety for two main reasons. It is difficult to keep up with situations that need to be regulated, because in this sector technological development is continuous, and has a great influence on safety: the law is not able to sustain this pace, and something else (namely, standards) must take its place. National laws also lack another crucial factor: *uniformity*. If uniformity is perceived as a value that can promote safety, the space for special rules is decreasing. Instead standards seem a better way to fulfill the need for a 'common framework' of technical rules.

This leads to a significant change in the role of the Nation-state, and alters the importance of national public actors in the global arena. Traditionally, the body that expressed the supremacy of national States was the Parliament, probably the clearest example of exercise of sovereign power. But just as legislative action is losing importance, so are parliaments. A central role is gained by administration, both at national and supra-national level. This role is gained on the basis of an initial transfer of powers. Institutions, however, are inclined to 'expand' the scope of their delegation, in the name of effectiveness, especially if appointed with regulatory functions. National sovereignty, in its parliamentary expression, is losing relevance, while political authority is giving place to bureaucratic power.

This is happening not only at global level, but also in more developed systems such as the European Union. In a recent case, the Court of Justice of the European Union was called to evaluate

¹¹³ See, for data regarding the effective implementation by States, the ICAO Safety Report 2014, 6.

the legitimacy of a provision introduced by an EC Regulation¹¹⁴, which, recurring certain requirements, assigns the European Securities and Markets Authority (ESMA) the power to prohibit or impose conditions on short sale or similar financial transactions, therefore giving ESMA the right to take individual measures directed at natural or legal persons. The United Kingdom contested this delegation of power, arguing that it was lacking a legal basis in EU Treaties. The Court considered, among other reasons, that the delegation of power to ESMA was legitimate, because “the EU legislature, in its choice of method of harmonisation and, taking account of the discretion it enjoys with regard to the measures provided for under Article 114 TFEU, may delegate to a Union body, office or agency powers for the implementation of the harmonisation sought. That is the case in particular where the measures to be adopted are dependent on specific professional and technical expertise and the ability of such a body to respond swiftly and appropriately”¹¹⁵. There are significant differences between the EU legal system and global regulatory regimes, but this functional and technical approach, relevant in this case, is often followed at global level¹¹⁶. What is not formally ‘binding’ seeks implementation through effectiveness, which can be achieved by encouraging participation in the phase of defining standards¹¹⁷, and the reference to a dimension beyond States, which needs uniformity or at least a shared solution through specific professional and technical expertise. This argument is pivotal: this “dimension”¹¹⁸ of international law and institutions that operate within it make it necessary to reconsider interests protected (in this case, aviation

¹¹⁴ Article 28 of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps.

¹¹⁵ Court of Justice of the European Union, JUDGMENT OF THE COURT (Grand Chamber), 22 January 2014, C-270/12, “United Kingdom v. European Parliament and Council of the European Union”.

¹¹⁶ J.G.S. Koppell, *World rule. Accountability, legitimacy, and the design of global governance* (2010), 7, refers to “the triumph of functional global governance”.

¹¹⁷ See, regarding the regulation of the financial sector, M. Moschella - S. Pellizzari, *International Financial Standards: Assessing Effectiveness from the Private Sector Perspective*, 1 Pòlemos, 41-50 (2009).

¹¹⁸ See B. Kingsbury - L. Casini, *Global Administrative Law Dimensions of International Organizations*, 6 Int’l Org. L. Rev. 319-358 (2009).

safety), which are no longer clearly referable to single States. They instead merge together, leading to the concept of “disaggregated sovereignty”¹¹⁹, which emphasizes the relational dimension of public institutions, rather than the affirmation of their supremacy. In fact, the global legal order does not overlap, as another layer, national legal system, but instead the two are inextricably linked, because neither the national nor the supra-national level of government are able to maintain a monopoly of relations with the parties that compose it¹²⁰.

To some extent, States are an essential component for the genesis of the organization, through the adherence to a treaty or international convention, in this case the ICAO. Delegation by national States is in fact one of the most important ways of establishing an international organization, which brings benefits to States who have established it¹²¹.

But once a global regulatory regime is instituted, it establishes its identity and exercises its powers *per se*, providing answers to the challenges of uniformity regulation that lie beyond the national level, challenges that are global by their own nature. As a consequence, the role of States shifts from the law-making process to the implementation phase, due to the ‘domestic’ monopoly of coercive power. But as well as the function, the actors also change, widening powers of national administrative bodies through the reference to the global legal order.

¹¹⁹ A.M. Slaughter, *A New World Order* (2004), 266.

¹²⁰ S. Cassese, *Oltre lo Stato* (2006), 10.

¹²¹ D.G. Hawkins, D.A. Lake, D.L. Nielson, M.J. Tierney, *Delegation under anarchy: states, international organizations, and principal agent theory*, in D.G. Hawkins, D.A. Lake, D.L. Nielson, M.J. Tierney (eds.) *Delegation and Agency in International Organizations* (2006), 13-23 enlighten specialization, policy externalities, collective decision-making, dispute resolution and credibility.