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TABLE OF CONTENTS

EDITORIAL

ARTICLES

SHORT ARTICLES

NOTES

BOOK REVIEWS

EDITORIAL

CHALLENGES FOR PUBLIC AUTHORITIES IN A UNIFIED EUROPE

*Giacinto della Cananea**

A prominent strand of academic debate within the European Union, in the first years of the Twenty-first century has been the challenge to the legitimacy of EU institutions. The debate has been vigorous and wide-ranging. Both lawyers and political scientists have drawn on arguments concerning input legitimacy in framing their remarks concerning the asserted inadequate legitimacy of the EU. Fewer observers, including Giandomenico Majone, have highlighted that there was a preliminary question of standards, in the sense that the critics commonly reason by analogy from legitimacy discourses within national frameworks. It is therefore questionable whether the institutions and processes of the Union should be assessed on the basis of the same standards that are used for the States.

Ten years later, it is interesting to seek to take the debate forward by considering two more recent challenges for the EU. There is, first, a challenge of general application, in the sense that it is relevant to both the Union and its Member States. This challenge regards output legitimacy; that is, the capacity of public institutions to deliver the 'goods' that are relevant for their constituencies. There is another challenge that is of general application but in another sense. It concerns the role of 'regional' judicial and non-judicial institutions, viewed as constraints to national actors and processes in order to ensure the respect of the Rule of law and of fundamental rights.

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The first challenge is to consider the performance not only of EU institutions, but also of public authorities. Most critics have focused on the inadequacy of the measures taken by EU institutions after the great economic and financial crisis emerged. Some recent reports published by the Court of Auditors of the EU show, in particular, that the Commission failed not only to elaborate a coherent strategy to face the crisis, but even to treat all Member States alike.

In contrast with this, little thought has been given by those critics to the performance of national institutions. Consider the problem of order. In a Hobbesian perspective, not only authority is simply necessary for order, but it must be effective. In a democratic perspective, the achievement of the goals set out by the electorate is not less important. But after especially in the last few years what is being contested, particularly in some Member States, is the adequacy of present structures of public authority to the emerging threats posed by transnational terrorism and migrations. Although the two phenomena are often associated, they must be kept distinct. Citizens' confidence in the capacity of public authorities to effectively prevent and contrast transnational terrorism has been undermined by several recent terrorist attacks and it is hard to see how such capacity can be improved without a more effective co-ordination of national police authorities. It is hard, likewise, to see how national structures of authority can cope with the unprecedented rise of migrations without a common policy of borders control. While some members of the EU seek to achieve such common policy and to use a variety of incentives, including better information about the risks for migrants and money for their governments, others look inclined to rely more and more on force to maintain order at their borders. However, this replacement of authority by force is typically a symptom of weakness, that cannot be hidden by the argument that this is what "the people" wants.

There is a second challenge facing public lawyers and other social scientists concerned with the functioning of our governments. After the fall of the Berlin wall, considerable efforts have been made to convince the drafters of the new European constitutions of the advantages associated with a set of institutional arrangements, including a bill of rights protecting minorities and constitutional review of legislation. The rationale

for the former, often regarded as being self-evident (we all live better if our rights are protected from misuses and abuses of power), had important consequences for the latter, given that at the roots of constitutional review of legislation there is some kind of rights-based theory of public law. While the discussion continues between theorists about the preferability of stronger or weaker versions of constitutional review, there is evidence that in some countries of Central and Eastern Europe what is being contested is not the type, but the existence of an independent constitutional court. This confirms the validity of the warning of the precarious nature of institutional arrangements aiming at protecting the Rule of law and fundamental rights and, more generally, about the tendency in political life towards an excessive concentration of power. At the same time, within traditional liberal democracies what is increasingly being contested by some political parties or movements is not only the judicial review exerted by EU courts, but also the legal rights-based claims of the kind grounded in the European Convention of Human Rights. The contestability of some of its provisions is not what matters here. Nor is it the fact that the courts are not the only means of obtaining relief. What really matters is the growing dissatisfaction with these legal limitations to national rulers.

Public lawyers are increasingly aware of these challenges. However, thus far their response has been partial and their conclusions not always enlightening. Whether this depends on received ideas about the primacy of representative institutions or on the need to give them more margin of maneuver in the current phase of globalization is another question and by no means an unimportant one. The *Italian Journal of Public Law* intends to keep a sustained focus on such question, as well as on the legal realities of our epoch, by publishing studies on issues such as popular referenda on European issues and the protection of rights within and beyond the borders of the EU.

ARTICLES

BUILDING SUPRANATIONAL IDENTITY: LEGAL REASONING AND OUTCOME IN KADI I AND OPINION 2/13 OF THE COURT OF JUSTICE

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Abstract

This article offers a comparison between the Kadi saga and Opinion 2/13 in light of what identity studies suggest. More specifically, this work looks at the case law of the Court of Justice of the European Union (CJEU) in order to explore its role as interpreter of the constitutional identity of the EU. To this aim, I shall divide this work into three parts: In the first part I shall introduce some key concepts borrowed from political philosophy in order to apply them to the Van Gend en Loos and Costa/Enel jurisprudence. In the second part, I shall explore the Kadi saga, paying particular attention to the shift occurred in the legal reasoning of European courts, from heteronomy to autonomy. Thirdly, I shall look at Opinion 2/13, trying to emphasize how its legal reasoning is quite similar to that employed by the CJEU in Kadi I. At the same time, although the techniques used in the legal reasoning are comparable, the outcome, in terms of impact over the protection of fundamental rights, is radically different. Finally, some conclusive remarks will be presented**.

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TABLE OF CONTENTS

1. Introduction

The discussion on national constitutional identity in EU law has been fostered by the entry into force of the Lisbon Treaty, thanks to Art. 4(2) TEU. On the contrary, the topic of the supranational constitutional identity in the case law of the Court of Justice has been explored by scholars to a much smaller extent. This article tries to fill this gap by offering a comparison between Kadi and Opinion 2/13 in light of what identity studies can suggest. More specifically, this work looks at the case law of the Court of Justice of the European Union (CJEU) in order to explore its role as interpreter of the constitutional identity of the EU. To this aim, I shall divide this work into three parts: In the first part I shall introduce some key concepts borrowed from political philosophy in order to apply them to the Van Gend en Loos and Costa/Enel jurisprudence. In the second part, I shall explore the Kadi saga, paying particular attention to the shift occurred in the legal reasoning of European courts, from heteronomy to autonomy. Thirdly, I shall look at Opinion 2/13, trying to emphasize how its legal reasoning is quite similar to that employed by the CJEU in Kadi I. At the same time, although the techniques used in the legal reasoning are comparable, the outcome, in terms of impact over the protection of fundamental rights, is radically different. Finally, some conclusive remarks will be presented.

In order to compare the legal reasoning followed by the CJEU in Kadi I and in Opinion 2/13 I shall insist on the following factors:

1. The key role played by the concept of autonomy in both the decisions;
2. The effort made by the CJEU to underline the continuity between these decisions and its foundational case law;
3. The constitutional jargon employed in the text of these decisions;
4. The identification, in both cases, of an untouchable core of values that may not be jeopardized;
5. The polemical and unilateral (in De Búrca's words "chauvinist and parochial"[1]) spirit of these decisions.

2. **Building Identity: Definition and Identification**

According to Gattini Kadi I[2] would be "a direct, if late, offspring of the Van Gend en Loos[3] and Costa/Enel jurisprudence"[4]. Starting from this idea this section aims to make a comparison between Van Gend en Loos and Kadi II[5], taken as emblematic of two different stages of the EU constitutionalisation process. The connecting thread between the two cases is represented by the idea of autonomy of a legal order, constructed in two different manners by the Court of Justice[6], and by the attention paid to the "individual", conceived as the holder of a set of rights stemming from European sources.

However, while in Van Gend en Loos the idea of autonomy was used to construct the narrative of the *sui generis* nature of the Community legal order, in Kadi autonomy was employed to justify the intervention of the CJEU to protect some fundamental goods belonging to the EU fundamental core, even in cases of

[1] G. de Búrca *The European Court of Justice and the International Legal Order After Kadi,* 51 Harv. Int'l L.J. 1 (2010).

[2] Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission [2005] ECR, II-3649.

[3] Case 26/62, Van Gend en Loos [1963] ECR 3.

[4] A. Gattini, *Joined Cases C–402/05 P & 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, judgment of the Grand Chamber of 3 September 2008*, 46 Comm. Mkt. L. Rev., 213 (2009), 224.

[5] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Commission, Council, United Kingdom v Yassin Abdullah Kadi, available at: www.curia.europa.it

[6] On the principle of autonomy of EU law see R. Barents, *The Autonomy of Community Law* (2004).

unclear jurisdiction of the Court. In order to develop a comparison between these two decisions, this chapter is based on the distinction between *definition* and *identification*. "Definition" comes from the Latin word *finis* (border, boundary) and refers to the act of making something distinct from something else, constructing, this way, identity in a negative manner and emphasizing what makes a subject different from the interlocutor (according to the logic "I recognize myself as other than you").

One could describe this concept through the image of the "wall-identity"- frequently employed by scholars in identity studies-, whereas the other crucial step, consisting of the positive identification of some common elements through a moment of self-reflection, has been described with the formula "mirror-identity"[7]. Both "definition" (corresponding to the "wall-identify" moment) and "identification" (corresponding to the "mirror-identity" phase) are classical in any process of identity-building. These two metaphors describe any kind of identity-building process, but they can be very helpful to study the recent evolution of the case law of the Court of Justice. The Court seems to be eager to clarify which elements make its legal system different from other forms of public international law, thus completing the revolution started in Van Gend en Loos. These elements only

[7] F. Cerutti, *Political Identity and Conflict: A Comparison of Definitions*, in F. Cerutti and R. Ragionieri (eds.), *Identities and Conflicts* (2001). "Furio Cerruti has, in a text dealing with group identities and political identities, suggested two metaphorical concepts that can be used as analytical tools: the mirror-identity and the wall-identity. The mirror identity is dependent on the values, normative principles, life forms and life styles, within which a group recognises itself. This process essentially consists of the group members recognising or mirroring themselves in those values, and through this mirroring they form their image as a group 'Self', as something that gives sense to their behaviour as a group. The mirror identity creates a 'we' but it does not create an 'other'. The wall-identity, on the other hand, is more ambivalent. A wall gives support; it gives consistency to a group, preventing disintegration in times of political or social crises. A wall is also enclosing; it separates the group from other groups; it efficiently shuts out the Other. Which of the two walls will dominate or prevail depends on the wall's constitutive elements (universal integrative or self centred-exclusive) as well as on the trials (e.g. existential or political threats) to which the group is subjected", K.G. Hammarlund, *Between the Mirror and the Wall: Boundary and Identity in Peter Weiss' Novel Die Ästhetik des Widerstands*, in K.G. Hammarlund (ed.), *Borders as* Experience (2009), 117. From a constitutional perspective see also M. Rosenfeld, *The Identity of the Constitutional Subject* (2009).

partially correspond to those listed in Art. 2 TEU, since that provision includes values shared by the EU and its members States (as the Union is based on them, and they are "common to the Member States"[8]). In other words, Art. 2 does not exhaust the set of elements which compose the EU constitutional identity, since some of them can be seen as exclusive to the EU and thus not shared with the member States. This means that the Court of Justice plays a role in adding or making explicit the other elements of the supranational identity, and this intuition justifies the attention paid to its case law in this article. When trying to apply this dichotomy to the case law of the CJEU one could say that in a first moment the Luxembourg Court clarified what "Community law is not", while in a second moment it tried to show what "Community law" is by means of some elements that are treated as an "indicator" of its speciality, because they are supposed to belong to its unchangeable core. According to this reading, Van Gend en Loos was on the definition of the Community legal order as *sui generis* and autonomous, while Kadi was more on the identification of the untouchable core of this special legal order[9].

Indeed, Van Gend en Loos, Costa/Enel and many other decisions of the foundational period marked the existence of a difference (by the means of a kind of *actio finium regundorum*), but they did not clarify the "content" of such a special legal order. This happened later, when the CJEU progressively paid attention to fundamental rights issues, conceiving the constitutionalisation process no longer as a mere shift from the categories of public international law to something else (either expressly definable as constitutional or not), but also as a legal phenomenon characterised by some principles aimed at protecting fundamental

[8] Art. 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

[9] For a similar point see: D. Sarmiento, *The EU's Constitutional Core*, in A. Saiz Arnaiz and C. Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration* (2013). N. Lavranos, *Revisiting Article 307 EC: The untouchable core of fundamental European constitutional law values*, in F. Fontanelli, G. Martinico and P. Carrozza (eds.), *Shaping rule of law through dialogue: international and supranational experiences* (2010).

goods, like human rights. This way the Court of Justice filled the empty and ideological box of autonomy. An evidence of this can be also found in the language employed by the Court in these two decisions.

Although scholars normally refer to Van Gend as a decision of "constitutional" relevance, a closer look at its text reveals that the label "constitutional" was not in the text of the decision. On the contrary, on that occasion the reference to international law came with no sign of a constitutional vocabulary. In fact, the Court of Justice used a much more ambiguous formulation to separate the destiny of its own community from that of the other international organisations, since it described the system of the Treaties as "a new legal order of international law for the benefit of which the states have limited their sovereign rights"[10]. As I shall try to underline, while, originally, the doctrine of autonomy did not need the constitutional language, more recently the constitutional terminology has represented an important ally used by the Court of Justice to reaffirm the *sui generis* nature of EU law.

When commenting on these lines Franz Mayer argued that: "The formula used by the Court to describe the European construct, however, has evolved over the years, replacing the reference to international law with a reference to constitutional law"[11]. In other words, the constitutional "vocabulary" did not come (at least immediately) together with the ideology of autonomy[12]. This ambiguity (neither fully international nor fully constitutional) is at the essence of the *sui generis* narrative of supranational law and was probably unintended at that time. Yet, it has thrived over the years also for strategic reasons, to afford the Court an escape from the straightjacket categories of public international law and, at the same time, spare it from being subject to the laws of the Member States[13]. However, in Van Gend en

[10] Case 26/62, Van Gend en Loos [1963] ECR 3

[11] F. Mayer, *Van Gend en Loos: The Foundation of a Community of Law*, in M. Poiares Maduro and L. Azoulai (eds.) *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (2010), 20.

[12] D. Curtin, *The Shaping of a European Constitution and the 1996 IGC: Flexibility as a Key Paradigm*?, 50 *Aussenwirtschaft* 237 (1995).

[13] On this process see M. Avbelj, *The Pitfalls of (Comparative) Constitutionalism for European Integration*, Eric Stein Working Paper (2008), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334216.

Loos, the Luxembourg Court proclaimed the autonomy of Community law, but did not exhaust the revolutionary moment.

As Mayer again pointed out, this concept was not defined in an isolated moment by the CJEU. This has happened over time, through a long series of decisions: for instance in Costa/Enel the Court slightly changed the terminology, by describing Community law in the following terms: "By contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply"[14]. Going even beyond, in *Les Verts*, it finally employed the constitutional language: "It must first be emphasized in this regard that the European economic community is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty"[15]. However, from the beginning many authors have described Van Gend en Loos as characterised by a constitutional afflatus[16] and there is no doubt that, because of this impact over the history of EU law, this decision can be defined as foundational and, therefore, constitutional in the etymological sense of the word (constitution from *constituere* = to found, to establish), despite the absence of a constitutional terminology.

In order to solve this terminological *impasse*, it is maybe useful to recall that "constitutonalisation" has traditionally been used in two ways by EU law scholars. Normally by the formula "constitutionalization" of the EU legal order, authors[17] mean the progressive shift of Community law from the perspective of an international organisation to that of a (quasi) federal entity.
To this aim, the idea of direct effect (Van Gend en Loos) and primacy (Costa/Enel) have been crucial in "federalising"

[14] Case 6/64, Costa/Enel [1964] ECR, 1141.
[15] Case 294/83, Parti Ecologiste "Les Verts"v Parliament [1986] ECR 1365.
[16] D. Halberstam, *Pluralism in Marbury and Van Gend*, in M. Poiares Maduro and L. Azoulai, *The past and the future*, cit. at. 11.
[17] For example, M. Cartabia and J.H.H. Weiler, *L'Italia in Europa* (2000), 73. About the ambiguity of the notion of constitutionalisation in EC/EU Law see F. Snyder, *The unfinished constitution of the European Union*, in J.H.H. Weiler and M. Wind (eds.), *European constitutionalism beyond the state* (2003).

Community law, making national judges the key actors of this process of integration.[18]

However, "constitutionalisation" in the EU context might be also employed to refer to the progressive "humanisation" (i.e. the progressive affirmation of the human rights issue at supranational level) of the law of the common market.[19]

Of course these two meanings are related[20] and connected to a broader process of polity building (even in terms of politicization of the Union), but it is possible to say that the foundational jurisprudence of autonomy implies a move in constitutional terms understood *lato sensu*, while the post-Internationale Handelsgesellschaft[21] case law implies a move in constitutional terms understood *stricto sensu*.

3. The Kadi Saga

As we saw, the *sui generis* narrative created by foundational decisions like Van Gend en Loos and Costa responds to the need for a demarcation from the rest of international law without the need to further label (at least, not immediately) its nature as "constitutional" and without the effort to determine the very peculiar content of this new legal order. As said, I shall look at the Kadi saga - paying particular attention to Kadi I of the CJEU - in light of five factors (the way in which autonomy was used by the CJEU; the continuity between these decisions and its foundational case law; the constitutional jargon employed by the Court; the identification, in both cases, of an untouchable core of values; the polemical and unilateral approach endorsed by the CJEU). Almost unanimously, Kadi I has been seen as a perfect representation of the jurisprudential boldness of the CJEU, as it was very rich in

[18] On this idea of constitutionalisation as federalisation see E. Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 Am. J. Int'l. L. 1 (1981); P. Hay, *Federalism and Supranational Organizations. Patterns for New Legal Structures* (1966); P. Hay, *Supremacy of Community Law in National Courts. A Progress Report on Referrals Under the EEC Treaty*, 16 Am. J. Comp. L. 524 (1968).

[19] On this process, see K. Lenaerts, *Fundamental rights in the European Union*, 25 Eur. L. Rev. 575 (2000).

[20] J.H.H. Weiler, *The Transformation of Europe*, 100 Yale L.J. 2403 (1991)

[21] Case 11/70, Internationale Handelsgesellschaft [1970] ECR 1125.

"constitutional intimations"[22] and "constitutional symbolism"[23]. Kadi I also recalled the idea of a community based on the rule of law and, more concretely, that of a complete and coherent system of judicial protection[24] (all elements retaken from the Les Verts doctrine). These references marked the continuity with the jurisprudence of the foundation of Community law[25], in particular with Van Gend en Loos, as Gattini and others aptly pointed out:

"On the one hand, one cannot but welcome the unbending commitment of the European Court of Justice to the respect of fundamental human rights, but on the other hand the relatively high price, in terms of coherence and unity of the international legal system, that had to be paid in order to arrive at the conclusion of the invalidity of the contested Regulation, is worrying. Of course, one might argue that the ECJ was all too willing to pay that price, and that it could have even felt it as no price at all, but as a golden opportunity to bring a step further the proclaimed 'constitutionalization' and autonomy of the Community legal system. The Kadi judgment is a direct, if late, offspring of the van Gend en Loos and Costa/Enel jurisprudence, and, without wanting to sound too rhetorical, one might even venture to say that similarly to those decisions it will be a landmark in the history of EC law".[26]

In this section I shall focus on the Kadi saga by showing its "added value" in the history of EU law.

The Kadi saga responds to a double logic: on the one hand, it develops from a strong perception of EU law autonomy, while on the other hand it reflects the idea of the existence of a mature system in terms of fundamental rights protection. These ideas of autonomy and maturity have been used by the CJEU as a fundamental premise to justify its intervention in a rather sensitive case from a legal (and geopolitical) point of view. Indeed, at first sight, the Kadi saga seems to feature a progressive "appropriation" of a question that was originally presented as an

[22] N. Walker, *Opening or Closure? The Constitutional Intimations of the ECJ*, in L. Azoulai and M. Poiares Maduro, *The past and the future*, cit. at 11,. 333.
[23] N. Walker, *Opening or Closure?,* cit. at 22, 333
[24] See the contributions by K. Lenaerts, *The Basic Constitutional Charter of a Community Based on the Rule of Law*; J. P. Jacqué, *Les Verts v The European Parliament*; A. Alemanno, *What Has Been, and What Could Be, Thirty Years after Les Verts/European Parliament*, all included in L. Azoulai and M. Poiares Maduro, *The past and the future*, cit. at 11.
[25] F. Mayer, *Van Gend en Loos: The Foundation of a Community of Law*, L. Azoulai and M. Poiares Maduro, *The past and the future*, cit. at 11.
[26] A. Gattini, *Joined Cases*, cit. at 4, 224.

issue regulated by an external set of norms belonging to public international law (i.e. one can perceive in this saga the progressive efforts made by the Court of Justice at "internalising" the legal questions at stake)[27].

In Kadi I the former Court of First Instance admitted the possibility of reviewing the regulation that implemented the UN resolution only in case of violation of *jus cogens*, that is to say a *corpus* of norms originally alien to the body of EU/ law[28]. This was a consequence of the approach chosen by the Court of First Instance, which adopted as point of reference a set of norms that do not belong to the EU legal order understood *stricto sensu*, i.e. norms of international law. On the contrary, moving to the Opinion of Advocate General Maduro in Kadi I[29], one can realise that his point of departure was very different, since he focused on stressing the potential violation by the UN resolution of some norms peculiar to EU law. By following a similar line Kadi I of the Court of Justice constantly referred to the autonomy of EU law[30],

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[27] For a similar approach see: M. Cremona, *European Law and international law after Kadi*, speech given in Bristol University on 3 November 2008, available at: http://denning.law.ox.ac.uk/news/events_files/European_Law_and_international_law_after_Kadi.pdf

[28] Case T-315/01 Kadi v Council and Commission, [2005] ECR II-3649, par. 226: "None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible". See also par. 213-215.

[29] Joined Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat, Opinion of Advocate General Poiares Maduro [2008] ECR I-6351, especially at par. 34: "The implication that the present case concerns a 'political question', in respect of which even the most humble degree of judicial interference would be inappropriate, is, in my view, untenable. The claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights. This does not detract from the importance of the interest in maintaining international peace and security; it simply means that it remains the duty of the courts to assess the lawfulness of measures that may conflict with other interests that are equally of great importance and with the protection of which the courts are entrusted".

[30] See for instance par. 282 of Kadi I of the Court of Justice: "It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive

but the Court went even further on that occasion. Indeed, the issue of the autonomy of EU law was more emphasised, as the Court neglected what was an essential step in the Opinion of the Advocate General: the analysis of the question from the viewpoint of former Art. 307 TEC[31].

Starting from former Art. 307 TEC, the Advocate General in Kadi I attempted to stress that no obligations envisaged therein can be interpreted "so as to silence the general principles of Community law and deprive individuals of their fundamental rights"[32]. Coherently with this reconstruction, it was fundamental to find the right way for the European order to interact with the international legal order's obligations and judges.

It is not a coincidence that the Advocate General devoted several lines of his Opinion to recall the importance of judicial deference in the relationship between the Court of Justice and other judges.

This deference, though, must find a limit in the possible risk for the fundamental values of the EU legal order: "Consequently, in situations where the Community's fundamental values are in the balance, the Court may be required to reassess, and possibly

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jurisdiction conferred on it by Article 220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community (see, to that effect, Opinion 1/91 [1991] ECR I-6079, paragraphs 35 and 71, and Case C-459/03 Commission v Ireland [2006] ECR I-4635, paragraph 123 and case-law cited)".

[31] Former Art. 307 TEC (now Art. 351 TFEU) read: "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States". On this see N. Lavranos, *Revisiting Article 307 EC*, cit. at 9.

[32] Opinion of Advocate General Poiares Maduro, cit. at 29, par. 34.

annul, measures adopted by the Community institutions, even when those measures reflect the wishes of the Security Council"[33].

In the Advocate General's own words, these values represent "the constitutional framework created by the Treaty"[34]. In its reasoning, the CJEU seemed to pay more attention to the peculiar nature of the EU legal order than to its relationship with international law. This can be noticed by looking at the use of the idea of autonomy employed in the decision. Thus, one could say that the Court of Justice's initial assumptions were more unilateral, since they were not centred around the terms of the relationship between international and EU law, but rather around the constitutional and peculiar nature of EU law. This is also proved by the fact that the Court of Justice missed the opportunity to clarify the scope of former Art. 307, for example, specifying "its position on the consequences if the 'appropriate steps' of Member States remain unsuccessful"[35].

In sum, in Kadi I the Court of Justice disregarded former Art. 307 TEC following a precise argumentative strategy: first it contextualised the question of the relationship between international and Community law within the boundaries of its own legal order, second, it gave the question an "internal answer" by insisting on the values of its own "order".

This also explains why the Kadi saga is a *summa* of many of the traditional arguments employed in the "Classics" of the Court of Justice[36] (Van Gend en Loos, Costa/Enel[37], Les Verts[38], Opinion 1/91[39] etc.). I think that Kadi II[40] can be read coherently with Kadi I of the CJEU, although the two decisions differ for some reasons,

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[33] Opinion of Advocate General Poiares Maduro, cit. at 29, par. 44.

[34] Moreover: "The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community", Opinion of Advocate General Poiares Maduro, cit. at 29, par. 24.

[35] A. Gattini, *Joined Cases*, cit. at 4, 235.

[36] L. Azoulai and M. Poiares Maduro, *The past and the future*, cit. at 11.

[37] Case 6/64, cit. at 14.

[38] Case 294/83, cit. at 15.

[39] Opinion 1/91, Draft agreement relating to the creation of the European Economic Area [1991] ECR I-6079.

[40] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, cit. at 5.

first of all for the language employed by the Luxembourg Court in Kadi II.

Indeed, it is evident from initial analysis that Kadi II does not present the powerful rhetoric contained in Kadi I. The adjective "constitutional" was employed 14 times in Kadi I (including the summary of the judgment), while "constitutional" is recalled just twice in Kadi II and it should be stressed that in the first of these 2 citations[41] the CJEU was summing up the decision held in 2008. Another evident difference in the terminology employed by the CJEU is the absence of the word "autonomy" in Kadi II. These remarks might lead to considering Kadi II as different from Kadi I, but when looking at the substance of the decision it is possible to find strong continuity[42].

In Kadi II, the Court rejected the argument according to which the challenged Regulation enjoyed immunity from judicial review. It did so relying on its previous decision and borrowing the same reasoning, since "there has been no change in those factors which could justify reconsideration of that position" (par. 66). As a consequence, all EU acts must be reviewed for compliance with fundamental rights (par. 67). It also confirmed that the intensity of the review, in principle, must be full, thus standing by its precedent. The CJEU also showed not to suffer from the pressure coming from an international context and academic circles, as it was not afraid of the possible impact of this decision over similar delisting cases. It constructed the controversy as a "domestic" case for at least two reasons: firstly, because the issue concerned an EU act, secondly, because it was about a possible violation of some fundamental rights protected by the EU legal order.

Thus, the CJEU confirmed the approach followed in Kadi I and the idea of autonomy stemming from that decision. In conclusion, the first way to read Kadi II by the CJEU is therefore the asymmetry existing between the form of this decision (which seems to abandon the constitutional language used in Kadi I) and the substance of the judgment which maintains its approach towards public international law. Despite the different

[41] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, cit. at 5, par. 21-22.

[42] *Contra* see N. Lavranos and M. Vatsov, *Kadi II: Backtracking from Kadi I*?, in M. Avbelj, F. Fontanelli and G. Martinico (eds.), *Kadi on Trial. A multifaceted analysis of the Kadi judgment* (2014).

terminology employed, if one goes beyond form and looks at the substance one can see that the confirmation of the idea "in principle full review" confirms the strong claims of Kadi I.
In order to do so, the CJEU even defended the core of the decision taken by the General Court (former Court of First Instance) in Kadi II[43]. On that occasion the General Court had accepted to revise its previous decision and to comply with the decision of the Court of Justice, serving as a "loyal soldier", despite the many doubts it had on the decision of the CJEU[44].

This is evident in those passages where the General Court wanted to recall the decisions of other courts or tribunals which had shared the original position of the former Court of First Instance[45]. In Kadi II the CJEU defended the core of the decision of the General Court endorsing the idea according to which the EU presents an untouchable nucleus of principles that may not be jeopardised by international law, not even by the UN Charter[46].

4. Reading the Kadi saga in context: the CJEU between definition and identification

In this section, I seek to show that Kadi II belongs to a new generation of decisions in which the CJEU does not merely

[43] Case T-85/09 Kadi v Commission [2010] ECR II-5177.

[44] Case T-85/09, cit. at 43, par. 121.

[45] "It should be observed, as an ancillary point, that, although some higher national courts have adopted a rather similar approach to that taken by this Court in its judgment in Kadi (see, to that effect, the decision of the Tribunal fédéral de Lausanne (Switzerland) of 14 November 2007 in Case 1A.45/2007 Youssef Mustapha Nada v Secrétariat d'État pour l'Économie and the judgment of the House of Lords (United Kingdom) in Al-Jedda v. Secretary of State for Defence [2007] UKHL 58, which is currently the subject of an action pending before the European Court of Human Rights (Case No 227021/08 Al-Jedda v United Kingdom), others have tended to follow the approach taken by the Court of Justice, holding the Sanctions Committee's system of designation to be incompatible with the fundamental right to effective review before an independent and impartial court (see, to that effect, the judgment of the Federal Court of Canada of 4 June 2009 in Abdelrazik v Canada (Minister of Foreign Affairs) 2009 FC 580, cited at paragraph 69 of the UK Supreme Court judgment in Ahmed and Others)", Case T-85/09, cit. at 43, par. 122.

[46] At the same time, the CJEU recognised that the General Court had erred in law in pa.138 to 140 and 142 to 149 but also confirmed that these errors did not vitiate the validity of the decision under appeal.

proclaim the EU law autonomy from both national and international laws, but sets out to identify a constitutional core of principles whose violation justifies its intervention even in cases of dubious jurisdiction.

As Rosas and Armati pointed out: "in Kadi, the ECJ confirmed and made more explicit a tendency discernible in previous case-law according to which the EU constitutional order consists of some core principles which may prevail over provisions of the Treaties and thus of written primary law".[47]
This is evident from the wording of Kadi I, whereby the Court of Justice maintained that: "Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, which include the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union" (par. 304).

When doing so, the Court of Justice acts as many Constitutional Courts do: in fact, in these cases the CJEU selects a group of principles which may not be jeopardised because their violation would imply the denial of the axiological bases on which the EU legal order is founded. At national level, constitutional law scholars call this set of principles in different ways – "Republican form" ("*forma repubblicana*"[48]) in Italy, eternity clause ("*Ewigkeitsklause*"[49]) in Germany [50] -, but in the concrete task of identifying the principles that may be traced back to such an untouchable core a primary role has always been played by constitutional judges. Thus, it is no coincidence that some interesting contributions in this field come from research focusing on amendments in EU law[51].

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[47] A. Rosas and L. Armati, *EU Constitutional Law. An Introduction* (2011), 43.
[48] Art. 139 of the Italian Constitution.
[49] Art. 79 par. (3) of the Basic Law (*Grundgesetz*-GG) for the Federal Republic of Germany.
[50] For an overview of these claues see F. Palermo, *La forma di stato dell'Unione europea. Per una teoria costituzionale dell'integrazione sovranazionale* (2005).
[51] R. Passchier and M. Stremler, *Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision*, 5 Cambridge Journal of International and Comparative Law forthcoming, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561209

This has happened with particular regard to human rights, whose language has been codified by national constitutions more or less since the end of World War II.

This codification of rights has made those norms aimed at protecting rights constitutional principles, and the rights protected by such constitutional principles have become fundamental rights, i.e. meta-norms of many contemporary legal orders. "Fundamental rights are to be understood as encompassing those selective and substantive criteria which, together with others, enable judgments of 'validity': the recognition of belonging to a legal order, legitimacy, compatibility of institutional behaviour and norms within a given legal-political system"[52]. Other evidences of this approach may be found in the case law of the CJEU. For instance, in some cases the CJEU has acknowledged the existence of a group of rights that cannot be subjected to any form of balancing, i.e. absolute rights. An example of this way to proceed is Schmidberger[53] where the Court of Justice distinguished between two groups of fundamental rights: the absolute rights (which admit no restrictions) and other fundamental rights. Concerning the second category of rights, the Court of Justice admitted the necessity to evaluate, through a case-by-case approach, the proportionality of their possible restrictions[54]. By doing so, the Luxembourg Court paved the way for the creation of a hierarchy of principles (and rights).

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[52] G. Palombella, *From Human Rights to Fundamental Rights. Consequences of a conceptual distinction*, EUI Working Paper LAW No. 2006/34 (2006), available at: http://cadmus.eui.eu/bitstream/handle/1814/6400/LAW-2006-34.pdf;jsessionid=57A331FDFF3245D221C04E57E8469D36?sequence=1

[53] Case C-112/00 Schmidberger [2003] ECR I-5659.

[54] "Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed", case C-112/00, cit. at 53, par. 80.

Many scholars were sure that another decision like that was hardly possible but the CJEU reiterated its message to the international community, confirming the boldness of the Court[55].
This leads me to my last point. Kadi I (but the same applies to Kadi II) has been accused of being conducive to systemic conflicts, of being "blind" from a diplomatic point of view.[56]
However, when accepting the point that in Kadi I and II the CJEU assumed a constitutional approach, these considerations lose appeal and the conclusion repeated by the CJEU becomes coherent with the premises of the decision (the existence of a strong axiological core in EU law). In this sense one should look at Kadi II as an emblematic judgement that goes beyond the particular situation of Mr. Kadi. A confirmation is given by the choice of the Court to face the question frontally in spite of the occurred delisting of *Kadi*[57] and of the very different approach suggested by Advocate General Bot. It is now to be seen whether Kadi I and II will influence the long list of pending cases in this field, but probably the CJEU thought it necessary to send a strong message to the UN, just to make clear the bases of a future convergence. It would not be the first time in the history of the EU and even on a comparative level it is possible to detect similar decisions rendered by domestic courts. Especially in federal systems, domestic courts have insisted on the need to preserve constitutional rights at the domestic level in order to "justify" the breach of some international obligations (like in Kadi)[58] allowed

[55] Compare, for a different approach, the decision of the CJEU with the Opinion given by AG Bot to Kadi II.
[56] On this debate see J. Larik, *Two Ships in the Night or in the Same Boat Together: How the ECJ Squared the Circle and Foreshadowed Lisbon in its Kadi Judgment*, 13 Yearbook of Polish Eur. St. 149 (2010).
[57] One might argue that the Court has deliberately chosen not to exercise its discretionary power to discontinue the case for having become "devoid of purpose" in light of Art. 149 of the Rules of Procedure for instance. On this see the considerations made by F. Fontanelli, *Kadieu: connecting the dots – from Resolution 1267 to Judgment C-584/10 P: the coming of age of judicial review*, in M. Avbelj, F. Fontanelli and G. Martinico (eds.), *Kadi on Trial*, cit. at. 42.
[58] For instance Madras High Court, Novartis v. Union of India & Others., Judgment of 6 Aug. 2007, available at: http://judis.nic.in/judis_chennai/qrydispfree.aspx?filename=11121: "We have borne in mind the object which the Amending Act wanted to achieve namely, […] to provide easy access to the citizens of this country to life saving drugs and to discharge the [legislature's] Constitutional obligation of providing good

the federal intervention in a State domain (like in Rottmann[59] or Zambrano[60]) on the basis of the necessary preservation of those homogeneity clauses through which the federal constitution limits the fundamental charters of its Member States [61].

5. Opinion 2/13: The Problematic Relationship Between Autonomy and Fundamental Rights

Opinion 2/13 was triggered by the European Commission in light of Art. 218.11 TFEU[62]. On that occasion the CJEU concluded that: "The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms". With reference to the consequences of this Opinion, Art. 218.11 TFEU reads that: "Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties [of the EU] are revised". Other authors have tried to present some additional options to overcome this *impasse*, suggesting the possibility of interpretative

health care to its [sic] citizens." (par.19)". On this see E. Benvenisti and G.W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 *European Journal of International Law* 72 (2009). More recently (on 1 April 2013) even the Supreme Court of India ruled on the case, available at: http://supremecourtofindia.nic.in/outtoday/patent.pdf.

[59] Case C-135/08 Rottmann [2010] ECR I-01449.

[60] Case C-34/09 Ruiz Zambrano, available at: www.curia.europa.eu. For a parallelism between Zambrano and Kadi see D. Sarmiento, *The EU's Constitutional Core*, cit. at 9 and G. Martinico and A. M. Russo, *Is the European Union a Militant Democracy? The Perspective of the Court of Justice in Zambrano and Kadi*, 21 Eur. Publ. L. 659 (2015).

[61] For instance Art. 28 of the Basic Law for the Federal Republic of Germany. On this see F. Palermo, *La forma di stato dell'Unione europea*, cit. at 50.

[62] Art. 218.11 TFEU: "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised".

declarations[63] or, even, the adoption of a notwithstanding protocol (hypothesis which seems to me very problematic[64]). There is no need to recall the details of this very long Opinion[65], whose essence can be found in the last eight to nine page, as Douglas Scott pointed out. Rather, I shall focus on the legal reasoning followed by the CJEU. As we will see the reasoning of the Court resembles that of Kadi I[66].

In a nutshell, the CJEU concluded that the Agreement conflicted with the EU Treaties for the following reasons:

1. Relationship between Art. 53 of the Charter of Fundamental

[63] P. J. Kuijper, *Reaction to Leonard Besselink's*, ACELG Blog (2015), available at https://acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks%E2%80%99s-acelg-blog

[64]L. Besselink, *Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13* (2014), available at: http://verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213-2/ "Seeking inspiration in clauses of national constitutions of some of the Member States that provide a constitutional way out of constitutional divergences for the sake of further European integration, I propose solving the matter with a 'Notwithstanding Protocol'. It should read: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, notwithstanding Article 6(2) Treaty on European Union, Protocol (No 8) relating to Article 6(2) of the Treaty on European Union and Opinion 2/13 of the Court of Justice of 18 December 2014.' In this manner the Treaties have been amended fully in accordance with the requirements of the Court as well as Article 218 (11) of the TFEU. All of the several objections of the Court are covered by such a Protocol".

[65]Opinion 2/13, available at: www.curia.europa.eu. On Opinion 2/13 see, at least, R. Alonso Garcia, *Análisis crítico del veto judicial de la UE al CEDH en el Dictamen 2/13, de 18 de diciembre de 2014*, WP IDEIR 26 (2015), available at: https://www.ucm.es/data/cont/docs/595-2015-11-25-Binder1.pdf; F. Fabbrini and J. Larik, *The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights*, 35 Yearbook of European Law 1 (2016).

[66]"Much of the Court's Opinion considers the arguments made by EU Institutions and Member States. Indeed, only just over one quarter of the judgement, about 8 web pages, actually sets out the Court's own position on compatibility of accession with EU law", S. Douglas-Scott, *Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice* (2014), available at: http://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/

Rights[67] and Art. 53 of the ECHR[68]. In this sense, the Agreement was not compatible with the EU Treaties because "there is no provision in the agreement envisaged to ensure such coordination"[69].

2. Principle of mutual trust[70], being the accession, as designed by the Agreement, a menace for the equilibrium inspiring the European horizontal cooperation.
3. Protocol n. 16 to the ECHR, which is not part of the Agreement but which could call into question the direct relationship between the CJEU and national judges[71].

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[67] Art. 53 CFREU: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

[68] Art. 53 ECHR: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party".

[69] Opinion 2/13, cit. at 65, par. 190.

[70] "In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law. However, the agreement envisaged contains no provision to prevent such a development", Opinion 2/13 cit. at 65, par. 194-195.

[71] "In the third place, it must be pointed out that Protocol No 16 permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto, even though EU law requires those same courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU. It is indeed the case that the agreement envisaged does not provide for the accession of the EU as such to Protocol No 16 and that the latter was signed on 2 October 2013, that is to say, after the agreement reached by the negotiators in relation to the draft accession instruments, namely on 5 April 2013; nevertheless, since the ECHR would form an integral part of EU law, the mechanism established by that protocol could — notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR — affect the autonomy and effectiveness of the preliminary ruling

4. The possibility of bypassing Art. 344 TFEU: there is the risk that Member States can resort to the ECtHR by bringing to Strasbourg issues connected with EU law or with a potential impact over the interpretation and validity of EU law[72].
5. The corresponding mechanism which might lead to the breach of the distribution of competences between the Union and its Member States[73].

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procedure provided for in Article 267 TFEU. In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties. By failing to make any provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU, the agreement envisaged is liable adversely to affect the autonomy and effectiveness of the latter procedure", Opinion 2/13, cit. at 65, par. 196-199.

[72] "Consequently, the fact that Member States or the EU are able to submit an application to the ECtHR is liable in itself to undermine the objective of Article 344 TFEU and, moreover, goes against the very nature of EU law, which, as noted in paragraph 193 of this Opinion, requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law. In those circumstances, only the express exclusion of the ECtHR's jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope *ratione materiae* of EU law would be compatible with Article 344 TFEU", Opinion 2/13, cit. at 65, par. 212-213.

[73] "A decision on the apportionment as between the EU and its Member States of responsibility for an act or omission constituting a violation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of EU law governing the division of powers between the EU and its Member States and the attributability of that act or omission. Accordingly, to permit the ECtHR to adopt such a decision would also risk adversely affecting the division of powers between the EU and its Member States. That conclusion is not affected by the fact that the ECtHR would have to give its decision solely on the basis of the reasons given by the respondent and the co-respondent. Contrary to the submissions of some of the Member States that participated in the present procedure and of the Commission, it is not clear from reading Article 3(7) of the draft agreement and paragraph 62 of the draft explanatory report that the reasons to be given by the respondent and co-respondent must be given by them jointly. In any event, even it is assumed that a request for the apportionment of responsibility is based on an agreement between the co-

6. The so-called "prior intervention", established in order to preserve the CJEU's monopoly over EU law norms. This mechanism, at the end of the day, was perceived as dangerous for the interpretative monopoly of the CJEU, since it might give the ECtHR the possibility of interpreting the case law of the Luxembourg Court, and allowing, this way, Strasbourg to have a sort of "meta-interpretative" function (as said in par. 239: "To permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court of Justice"). Moreover, the Agreement also "excludes the possibility of bringing a matter before the Court of Justice in order for it to rule on a question of interpretation of secondary law by means of the prior involvement procedure"[74].
7. Jurisdiction of the ECtHR in the area of the Common

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respondent and the respondent, that in itself would not be sufficient to rule out any adverse effect on the autonomy of EU law. The question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of EU law and be subject to review, if necessary, by the Court of Justice, which has exclusive jurisdiction to ensure that any agreement between co-respondent and respondent respects those rules. To permit the ECtHR to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility would be tantamount to allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter's exclusive jurisdiction. Having regard to the foregoing, it must be held that the arrangements for the operation of the co-respondent mechanism laid down by the agreement envisaged do not ensure that the specific characteristics of the EU and EU law are preserved", Opinion 2/13, cit. at 65, par. 230-235.

[74] Opinion 2/13, par. 243. "The interpretation of a provision of EU law, including of secondary law, requires, in principle, a decision of the Court of Justice where that provision is open to more than one plausible interpretation. If the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law. Accordingly, limiting the scope of the prior involvement procedure, in the case of secondary law, solely to questions of validity adversely affects the competences of the EU and the powers of the Court of Justice in that it does not allow the Court to provide a definitive interpretation of secondary law in the light of the rights guaranteed by the ECHR", Opinion 2/13, cit. at 65, par. 245-247.

> Foreign and Security Policy. Here one can clearly see the reluctance of the CJEU which does not accept that the ECtHR (a body which is external to the EU judiciary) can have jurisdiction in an area belonging to EU law but where the Luxembourg Court itself does not have competence[75].

To understand Opinion 2/13 it is necessary to look at the premises used by the CJEU from the very first lines of its text. Like in Kadi, in this Opinion the CJEU makes reference to its most important decisions, trying to emphasize the continuity between the Opinion and its glorious jurisprudence: from Van Gend en Loos to Kadi, also recalling some recent (but already well known) decisions, like Melki[76] and Melloni[77], among others. In this sense, there is a decision which is crucial in order to get the logic followed by the CJEU: Haegeman[78].

According to the Haegeman doctrine, the agreements concluded by the European Communities' institutions (and now by the EU) benefit from a kind of "automatic treaty incorporation"[79] into EU law, since the provisions of these agreements "form an integral part of Community law"[80]. This mechanism has allowed, over the years, the CJEU to transform itself into the "gatekeeper"[81] of the effects of the international agreements concluded by the EU, giving the Court the possibility of opening or closing the doors of direct effect in EU law. In other words, once these agreements are concluded they are part of the interpretative garden of the Luxembourg Court.

Now, this approach can perhaps work with those international agreements which are not "provided" with an

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[75] "The Court has already had occasion to find that jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU", Opinion 2/13, cit. at 65, par. 256.

[76] Joint cases C 188/10 and C 189/10 Melki [2010] ECR I-5667.

[77] Case C-399/11 Melloni, available at: www.curia.europa.eu

[78] Case 181/73 Haegeman [1974] ECR00449.

[79] On this see M. Mendez, *The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, 21 Eur. J. Int'l L. 83 (2010).

[80] Case C-181/73 Haegeman cit. at 78, par. 5.

[81] F. Snyder, *The gatekeepers: the European courts and WTO law*, 40 Comm. Mkt. L. Rev. 313 (2003).

authentic interpreter but actually one of the main features of the ECHR is the presence of an interpreter of the Convention. This perspective explains how the Luxembourg Court has read the issues behind the Accession as a question of judicial politics and why in defending the autonomy of its legal order the CJEU has also protected its interpretative monopoly. It is not the first time, in fact, that the CJEU has presented itself as a jealous judge, worried about not losing the interpretative monopoly of EU law and its direct relationship with national judges[82].

If seen this way, Opinion 2 is tremendously coherent with its previous case law (Mox Plant, Melki, Melloni) because what the CJEU did was: 1) preventing Member States from using the ECHR and the case law of the ECtHR in order to avoid complying with supranational obligations; 2) preventing the ECtHR from affecting the interpretative monopoly of the CJEU, taking into account the number of corresponding provisions in the Charter of Fundamental Rights and the ECHR; 3) raising some specific points (like that concerning the limited jurisdiction of the CJEU in the area of the Common Foreign and Security Policy, CFSP) that can be connected to the concern of guaranteeing its interpretative monopoly[83].

As it did in Kadi I, the CJEU first identified the pillars of its autonomy, considered them as the untouchable core of its legal system, and did not disregard what makes its legal system special. See for instance par. 159 et seq.[84], where after having recalled what

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[82] See Case C-459/03, European Commission v. Ireland (Mox Plant) [2006] ECR I-4635. N. Lavranos, *Jurisdictional Competition. Selected Cases in International and European Law* (2009).

[83] Similarly, R. Alonso Garcia, *Análisis crítico del veto judicial*, cit. at 65.

[84] "Thus, first of all, having provided that the EU is to accede to the ECHR, Article 6(2) TEU makes clear at the outset, in the second sentence, that '[s]uch accession shall not affect the Union's competences as defined in the Treaties'. Next, Protocol No 8 EU, which has the same legal value as the Treaties, provides in particular that the accession agreement is to make provision for preserving the specific characteristics of the EU and EU law and ensure that accession does not affect the competences of the EU or the powers of its institutions, or the situation of Member States in relation to the ECHR, or indeed Article 344 TFEU. Lastly, by the Declaration on Article 6(2) of the Treaty on European Union, the Intergovernmental Conference which adopted the Treaty of Lisbon agreed that accession must be arranged in such a way as to preserve the specific features of EU law", Opinion 2/13, cit. at 65, par. 160-162.

these conditions that the Accession must respect[85], the CJEU regained the rhetoric of the *sui generis* nature of the EU legal order and then moved to the "specific characteristics arising from the very nature of EU law" (par. 165). The CJEU started by recalling the principle of EU law autonomy, making it the premise of its discourse, then moved to the existence of an untouchable core of principles that may not be jeopardized:

"In particular, as the Court of Justice has noted many times, EU law is characterised by the fact that it stems from an *independent source of law, the Treaties*, by its primacy over the laws of the Member States [...]. These essential characteristics of EU law have given rise to a *structured network of principles, rules and mutually interdependent legal relations* linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'. This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU"[86].

[85] Art. 6.2 TEU: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties". See also Protocol 8 relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms: Art. 1: "The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "European Convention") provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to: (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention; (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate". Art. 2: "The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof". Art. 3: "Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union".

[86] Opinion 2/13, cit. at 65, par. 166-168.

In a second moment, and this is what I called "identification" in the first part of this article, the CJEU listed the factors composing this untouchable core:

"That premiss implies and justifies the existence of *mutual trust* between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected. Also at the heart of that legal structure are the *fundamental rights recognised by the Charter* (which, under Article 6(1) TEU, has the same legal value as the Treaties), respect for those rights being a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU [...] *The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU* [...]. As regards the structure of the EU, it must be emphasised that not only are the institutions, bodies, offices and agencies of the EU required to respect the Charter but so too are the Member States when they are implementing EU law [...] The pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of *fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy***.** Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is the *raison d'être* of the EU itself. Similarly, the Member States are obliged, by reason, inter alia, of the *principle of sincere cooperation* set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In addition, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure *fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU*" [87].

Among these factors, a special role is played by the direct relationship existing between national judges and the Luxembourg Court, thanks to the preliminary ruling mechanism:

"*In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law***.** In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law [...]. *In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU*, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the

[87] Opinion 2/13, cit. at 65, par. 168- 173.

Member States, has the object of securing uniform interpretation of EU law [...], thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties".

Finally, fundamental rights' protection is also seen as part of the untouchable core but it does not seem to be premise of the reasoning of the Court. On the contrary fundamental rights - as guaranteed by the EU Charter- are somehow made functional to the EU law architecture as one can infer from the following line:

"*Fundamental rights, as recognised in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with the constitutional framework* referred to in paragraphs 155 to 176 above" [88].

Like in Kadi I one can find in Opinion 2/13 the following key elements in the legal reasoning of the Luxembourg Court: 1) the instrumental use of autonomy; 2) the persistent recalling to its precedents; 3) the emphasis on the existence of an untouchable core of principles; 4) the constitutional jargon and 5) a unilateral and polemical approach. The word autonomy was employed 16 times throughout the text of the Opinion and also the constitutional jargon was recalled by the CJEU without forgetting that Kadi was mentioned 5 times.

Perhaps the toughest point made by the CJEU was that concerning its limited jurisdiction in the area of CFSP, since it makes the accession to the ECHR very hard, being necessary to amend the EU Treaties to overcome it and nowadays Member States seem to have other priorities. Moreover this point makes Opinion 2/13 very different from Kadi in terms of outcome. While Kadi, at the end of the day, made the protection of fundamental rights an essential point of its concept of autonomy, here, between autonomy and possible increase of the fundamental rights protection, the CJEU seem to consider the former as the prevailing interest (although in its decision the protection of fundamental rights is part of the untouchable core identified in par. 169 of the Opinion). This point has been made clear by Kuijper. In his own words:

"All the beautiful words of the Court on this subject cannot hide that here the emperor is naked. The Court has no jurisdiction except in two well-

[88] Opinion 2/13, cit. at 65, par. 177.

circumscribed cases and that is it. That the Court in Strasbourg will have something to say about upholding fundamental rights in the CFSP can only be welcome news. Just as it has always been welcome news that in countries, where there is no constitutional review of the laws passed by Parliament in the light of the bill of rights (as in the Netherlands), there is at least the Court in Strasbourg that will uphold a minimum level of human rights in these countries. I fail to see why that would not be the case for the CFSP, in a situation where there is no constitutional review in part of CFSP 'law' and why the Court of Justice should not be able to live with that, if the Supreme Courts of some Member States have been able to live with that".[89]

It is impossible not to agree with those lines and not to recognize that, in Opinion 2, the logic "Thou shalt have no other courts before me"[90] has prevailed unless one does not want to conceive this Opinion as a sort of blackmail to oblige Member States to reinforce the protection of fundamental rights by giving more jurisdiction to the Luxembourg Court.

6. **Final Remarks**

This article tried to stress the importance of identity in EU law, looking at Kadi and Opinion 2/13. These two important pronouncements of the Luxembourg Court emphasized, once again, the difference between the EU legal system and other international regimes. However, as I argued, these two cases should be seen as emblematic of a recent trend in which the Court seems to be eager to clarify and make explicit some of the elements belonging to the EU untouchable core, thus completing the revolution started in Van Gend en Loos. When doing so it employed some techniques that characterized its legal reasoning, *in primis* the use of the constitutional jargon. This strand of research aims to confirm the importance of constitutional interpretation in this ambit, since the list of values present in art. 2 TEU should not be seen as exhaustive. On the contrary, the values of the EU seem to go beyond that unavoidable basis represented by the letter of the Treaties and they need to be interpreted and elaborated by the Court. We also saw that in forging the core of its constitutional identity, the Court does not refrain from building it

[89] P. J. Kuijper, *Reaction to*, cit. at 63.
[90] W. Michl, *Thou shalt have no other courts before me* (2015), available at: http://verfassungsblog.de/thou-shalt-no-courts/

in a polemical way, by using conflicts to construct its untouchable core. In this sense, those who criticise Kadi I and II may have forgotten the importance that conflicts have traditionally had in the development of the EU legal order. It is sufficient to think of the genesis of Article 6 of the TEU - codifying the human rights commitment of the EU - to find proof of this.

Indeed, Article 6 was the indirect consequence of a long confrontation between Constitutional Courts and the Court of Justice, started in the '70s after the delivery of Internationale Handelsgesellschaft[91] which triggered the reaction of the national constitutional guardians with the well-known *Solange*[92] and counter-limits[93] doctrines. Without entering the debate on the similarities (and differences[94]) existing between Kadi and *Solange*[95], the *Solange* and the counter-limits doctrines are a perfect example of the importance of constitutional conflicts for the development of the EU legal order. They represented a potential crisis of the European process which actually served as a turning point, opening a new season in the case law of the CJEU and of the Constitutional Courts.

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[91] Case 11/70, *Internationale*, cit. at 21, par. 3, whereby the Court of Justice stated: "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure".

[92] BVerfGE (German Constitutional Court) 37, 271 (Solange I); English translation at 2 Comm. Mkt. L. Reports 540 (1974); 73, 339 (Solange II); English translation at 3 Comm. Mkt. L. Reports 225 (1987). See also *BVerfGE* 89, 155, *BVerfGE* 102, 147.

[93] This formula has been introduced in the Italian scholarly debate by P. Barile, *Ancora su diritto comunitario e diritto interno*, in *Studi per il XX anniversario dell'Assemblea costituente*, VI (969), 49. For this doctrine see Corte Costituzionale (Italian Constitutional Court), Decision No. 183 of 18 December 1973; see also Decision No. 170 of 5 June 1984 and Decision No. 232 of 13 April 1989, available at: www.cortecostituzionale.it

[94] "The difference, however, is that the ECJ, in its own understanding, is not such an international supervisory body [a human rights supervisory body] but a juridical body analogous to a domestic court", A. Gattini, *Joined Cases*, cit. at 4, 234-235.

[95] See A. Tzanakopoulos, *The Solange argument as a justification for disobeying the Security Council in the Kadi judgments*, in M. Avbelj, F.Fontanelli and G.Martinico (eds.), *Kadi on Trial*, cit. at. 42.

This does not mean that after that season of confrontation conflicts faded away. On the contrary, judicial clashes are still frequent in the life of the multilevel legal order. This is consistent with the explanations given by scholars interested in conflicts[96]: although the actors operating in this arena now share the necessity to respect fundamental rights conceived as constitutional goods according to the multilevel case law, it is always possible to have interpretative disagreements. I think this is the description which best explains the current state of the relationship between Constitutional Courts and the CJEU: they are competitors and antagonists, but this is not pathological at all, as it also occurs in other contexts[97].

More in general, conflicts belong to the life of constitutional polities. This has been demonstrated by scholars in sociology and political science (mainly with regard to social conflicts[98]), but conflicts also belong to the essence of constitutionalism as such which has a "polemical" (and not irenical) nature being funded on a never-ending friction between liberty and power, as Luciani wrote[99]. In this sense Kadi is the manifestation (at its best) of the "polemical" spirit of European constitutional law[100]: it is likely

[96] C. Mouffe, *The Return of the Political* (1993); C. Mouffe, *The Democratic Paradox* (2000); C. Mouffe, *On the Political* (2005).

[97] D. Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States* in J. Dunoff and J. Trachtman (eds.), *In Ruling the World? Constitutionalism, International Law and Global Governance* (2009): "In one important sense, however, the relationship between the European Union and its Member States is, of course, different from that between the United States and the several states. In the United States, the relationship between federal and state law, and, in particular, between the federal Supreme Court and the state judiciary, are fully ordered…In the European Union, by contrast, the relationship between the central and component state legal orders is fundamentally unsettled".

[98] J. Knight, *Institutions and Social* Conflict (1992); A. Pizzorno *Le classi sociali* (1959); A. Pizzorno, *Le radici della politica assoluta* (1993); C. Crouch and A. Pizzorno, *Conflitti in Europa* (1977); R. Dahrendorf, *Toward a Theory of Social Conflict*, 2 The Journal of Conflict Resolution 170 (1958); R. Dahrendorf, *Essays in the Theory of Society* (1968).

[99] M. Luciani, *Costituzionalismo irenico e costituzionalismo polemico* (2013), available at: http://archivio.rivistaaic.it/materiali/anticipazioni/costituzionalismo_irenico/index.html

[100] G. Martinico, *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe* (2012), 107-162.

that, even after the Kadi, conflicts - as expression of interpretative disagreement - will not magically disappear. Perhaps the Kadi saga will pave the way for a new season of contestation and, hopefully, for an improved protection of fundamental rights at the international level. The *Schrems*[101] case shares the same spirit (and indeed Kadi was mentioned in the text of the judgment). On that occasion the CJEU declared Decision 2000/520 invalid since it breached, among other things, "the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter)" (pár. 94). As said, Kadi was mentioned at par. 60 in order to recall that settled case law "according to which the European Union is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights". As Sarmiento pointed out *Schrems* tells us that "privacy is a super-fundamental right that reigns supreme above all other rights"[102] and together with other decisions it gives us the impression of a court which is very eager to protect fundamental rights and to use the Charter of Fundamental Rights[103].

It is much more difficult to trace Opinion 2/13 back to this trend, since therein the CJEU focused on the idea of autonomy, creating uncertainty about the "place" of fundamental rights within the identity of the EU as a constitutional subject. Moreover,

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[101]Case C 362/14 Maximillian Schrems v Data Protection Commissioner, available at: www.curia.europa.eu

[102] D. Sarmiento, *What Schrems, Delvigne and Celaj tell us about the state of fundamental rights in the EU* (2015), available at: http://verfassungsblog.de/what-schrems-delvigne-and-celaj-tell-us-about-the-state-of-fundamental-rights-in-the-eu/

[103] Case C-92/09 and C-93/09, Volker und Markus Schecke e Eifert, [2010] ECR I-11063; Case C-293/12, Digital Rights Ireland, available at: www.curia.europa.eu. "The Court is proving to be an active guarantor of fundamental rights when it comes to the scrutiny of EU action. When the Court faces general or individual EU acts, it is generally applying a high standard of fundamental rights protection, certainly a higher one than the one it seems to be using for Member States. Thus the judgments in Markus Schecke, Test Achats, Digital Rights Ireland or, more recently, Schrems. These cases, like many others, concern the validity of EU acts in light of the Charter, and there the Court has proved to be enthusiastic to develop a robust and intensive degree of fundamental rights scrutiny", D. Sarmiento, *What Schrems,* cit. at 102.

in a declaration released in the plenary session of the FIDE conference the (at that time) President of the CJEU said that: "The Court is not a human rights court: it is the Supreme Court of the Union"[104]. These are the words of a Court which is not comfortable with its own Bill for Rights, the Charter of Fundamental Rights of the EU (whose scope of application is still unclear after decisions like Fransson and Siragusa[105]). This factor is not secondary at all; on the contrary, it is very telling about the recent difficulties encountered by this Court. In this sense the Opinion can be seen as part of a broader crisis of values which has put the application of Art. 6 in question. Moreover this Opinion can be read in conjunction with other decisions of many national courts opposing the activism of the ECtHR and in this sense I agree with those colleagues who argued that the word "autonomy" in Opinion 2 should be understood as equivalent to "sovereignty"[106].

Against this background, the words pronounced by the former President of the EctHR, Spielmann, who recalled that the victims of this situation will be the citizens of the EU, are very emblematic:

"Let us not forget, however, that the principal victims will be those citizens

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[104] Reported by L. Besselink, *The ECJ as the European "Supreme Court": Setting Aside Citizens' Rights for EU Law Supremacy* (2014), available at: http://verfassungsblog.de/ecj-european-supreme-court-setting-aside-citizens-rights-eu-law-supremacy/

[105] Case C-617/10, Åklagaren v Hans Åkerberg Fransson (2013) available at: www.curia.europa.eu. Case C-206/13 Siragusa (2014), available at: www.curia.europa.eu. On this: F. Fontanelli, *Implementation of EU Law through Domestic Measures after Fransson: the Court of Justice Buys Time and 'Non-preclusion, Troubles Loom Large*, 39 Eur. L. Rev. 682 (2014).

[106]"Structurally, the ECJ seems to understand autonomy in a similar way as national constitutional courts conceive of sovereignty: EU law should reign supreme in its jurisdiction and any encroachment by another authority must be put under the ECJ's check. This comes in the form of various instruments safeguarding the ECJ a place, which is quite unparalleled to that of any constitutional court of the parties to the Convention. It shall be remembered that the ECJ asked for these safeguards in a 'discussion paper', by which it became involved in the drafting process of the Accession Agreement in a way unthinkable in any European constitutional system", J. Komárek, *It's a stupid autonomy* (2014), available at: http://verfassungsblog.de/its-a-stupid-autonomy-2/

whom this opinion (no. 2/13) deprives of the right to have acts of the European Union subjected to the same external scrutiny as regards respect for human rights as that which applies to each member State".[107]

Without any doubt this Opinion is the product of a Court which does not know how to handle the axiological part of its constitution (the Charter of Fundamental Rights) and understands the ECHR as a source of problems rather than an added value. This has clear consequences on what we could call the jurisprudence of the EU constitutional identity. The CJEU has had an approach which could appear schizophrenic at a first look. Yet, such an approach is extremely coherent once seen from the perspective of a court which has always been interested in protecting the autonomy of its legal system and, thus, its interpretative monopoly.

[107] D. Spielmann, *Annual Report 2014*, *Foreword* (2015), available at: http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf

THE ITALIAN FREEDOM OF INFORMATION ACT 2016. WHY TRANSPARENCY-ON-REQUEST IS A BETTER SOLUTION(*)

Diana-Urania Galetta(**)

Abstract

The relationship between Public Administration and Transparency is often misunderstood and misrepresented, especially in the political science discourse. While most part of administrative action gives rise to the issuing of individual acts and measures, with either favourable or unfavourable effects, the 'deliverable' most political scientists have in mind when addressing transparency issues is rather administrative rule-making, if not even primary and secondary legislation. In the latter case, while referring to citizens-administration relationship, it is rather the elected-voters relationship the background idea political scientists have concretely in mind. This leads to all sorts of misunderstandings and false expectations as to the concrete 'deliverables' of FOI policies. The paper, first of all, refers only to the activity of Public Administrations when issuing individual acts and measures and or administrative rule-making. Secondly, it takes into consideration and compares the two possible FOI's options: information released pro-actively and information released upon request, to express a positive judgment on the choice made with the Italian FOIA 2016, rather in favour of information released upon request. Indeed, only information released upon request - and with the possibility of the applicant to concretely interact with a public administration's officer - can turn transparency from just a 'manifesto commitment' to a concrete reality in the citizens-public administration relationship.

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TABLE OF CONTENTS

1. Introduction

FOI regulations are certainly a wonderful tool used by demagogical politicians in order to win the favour of naïve voters: but they do not automatically produce the desired change in the reality of citizens-public administration relationship.

According to a widespread opinion Freedom of Information (FOI) is rooted in the Enlightenment idea that information is the 'oxygen' of democracy[1].

In this specific 'cultural perspective' FOI regulations are often put forward as 'the solution' to the problem of democracy that is simply 'not democratic enough'[2].

When analysing national FOI regulations it appears that the principles they most commonly refer to are transparency, accountability, public participation and informing citizens[3]. FOI regulations are meant to increase transparency and openness, to

[1] B. Worthy, *More Open but Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government*, 23 Governance: An International Journal of Policy, Administration, and Institutions 562 (2010). The international human rights NGO, Article 19, Global Campaign for Free Expression, has described information as "the oxygen of democracy". See at: https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf.

[2] A. Giddens, *Runaway World: How Globalization is Reshaping our Lives* (2000), 61.

[3] T. Mendel, *Freedom of Information: A Comparative Legal Survey* (2008), 141.

increase accountability, to improve the quality of government decision-making, to improve public understanding of decision-making, to increase public participation, to increase public trust[4].

The relationship between Public Administration and Transparency is nonetheless often misunderstood and misrepresented, especially in the political science discourse. While most part of administrative action gives rise to the issuing of individual acts and measures (adjudication), with either favourable or unfavourable effects, the 'deliverable' most political scientists have in mind when addressing transparency issues is rather administrative rule-making, if not even primary and secondary legislation. In the latter case, while referring to citizens-administration relationship, it is rather the elected-voters relationship the background idea political scientists have concretely in mind[5].

This leads, in my opinion, to all sorts of misunderstandings and false expectations as to the concrete 'deliverables' of FOI policies[6].

In the following paper I will therefore, first of all, refer only to the activity of Public Administrations (Agencies in the USA) when issuing individual acts and measures and or administrative rule-making.

In this specific context I will then take into consideration the two possible FOI's options: information released pro-actively (open data policies) and information released upon request (access to administrative documents).

Starting from this specific perspective I will explain the Italian FOI legislation, both before and after the recent legislative

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[4] B. Worthy, *More Open but Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government* 2010, cit. at 1, 564.

[5] Cfr., for instance, the authors quoted in the previous notes.

[6] Foia4Italy - a network of more than 30 civil society organizations that campaigned for the adoption of an Italian FOIA and logged 88,000 names on a petition for it - commented positively on the final result, while underlining some critical points. The strongest criticism was, however, based on such a misunderstanding as the one I have just referred to: as Foia4Italy essentially complains about the absence, in the Italian FOIA, of a participatory process concerning the *legislative reform* of the Italian Public Administration. It is therefore, in my opinion, a rather senseless criticism. See at: http://www.foia4italy.it/.

reform adopted by the *Renzi* Government, in order to highlight its essential contents and the most recent developments.

Contrary to widespread opinion which aprioristically identifies the pro-active disclosure model of FOI regulation as the best one, I will then argue that the recent Italian choice, rather in favour of information released upon request, is a good step forward, in the direction of real transparency. Indeed only information released upon request - and with the possibility of the applicant to concretely interact with a public administration's officer - can turn transparency from just a 'manifesto commitment' to a concrete reality in the citizens-public administration relationship.

2. Access to administrative documents and to public sector information in Italy before and after Law No. 241/90 on administrative procedure

According to Art. 97 of the Italian Constitution public offices shall be organized in such a way as to ensure efficiency (or, rather, a good performance: *buon andamento*)[7] and impartiality of Public Administration. To this regard it was previously pointed out in the reports of the Italian Constituent Assembly of 1946-48, that a general law on public administration was required also to regulate the possibility for citizens to view and obtain copies of administrative documents in order to "counter the bad habit prevailing in the public administration to hinder such knowledge"[8].

The constitutional background of the rules on access to documents is in any case wider than just the provisions of Art. 97 and Art. 98. It includes, first of all, the principles of democracy, protection of personal rights and equality set under Art. 1, 2, and 3 of the Italian Constitution; secondly, the general guarantee of those freedoms that provide a democratic connotation to the

[7] There isn't, in fact, a proper English translation for the term "*buon andamento*" which is in translated either as "efficiency" or as "proper conduct", depending on whether the emphasis is placed on the administration's performance, or on the relationship with the citizen.

[8] F. Cuocolo, *Commento all'articolo 22,* in V. Italia, M. Bassani (eds.), *Procedimento amministrativo e diritto di accesso ai documenti (Legge 7 agosto 1990, n. 241 e regolamenti di attuazione)* (1995), 527.

citizen/authority relationship, most notably freedom of information, which is guaranteed under Art. 21 of the Italian Constitution but, moreover, by the entire Italian Constitution[9]. Further constitutional grounds supporting access to administrative documents are to be found also in Art. 24 and 113 of the Italian Constitution due to the broader guarantee that the right of access to administrative documents provides to the judicial protection of the rights and interests set forth therein[10].

After several failed attempts made in the previous decades, only in 1990 the Italian legislator finally succeeded in adopting a general regulation on administrative procedure (Italian APA - Law No. 241/90[11]), which implements also the above mentioned principles. Legal scholars agreed that, with the provisions on the right of access set forth under Art. 22 of Law No. 241/90, the principle of secrecy in administrative activities had finally been overturned in favour of the opposite principle of transparency[12].

Indeed, in its original version, Art. 22 of Law No. 241/90 explicitly provided that "[i]n order to ensure transparency in the administrative activities and to facilitate impartiality thereof, anyone who may be interested therein for the protection of legally relevant situations is granted the right to access administrative documents pursuant to the formalities established under this law." However, in the years following the introduction of the above-mentioned legislation, a restrictive interpretation approach began to widespread commonly in court rulings[13], aimed at equating the interest to gaining access to administrative documents to the so-called interest to bring a legal action. The

[9] B. Selleri, *Il diritto di accesso agli atti del procedimento amministrativo* (1984), 24.
[10] A. Sandulli, *La riduzione dei limiti all'accesso ai documenti amministrativi*, in Gior. dir. amm. 535 (1998).
[11] Law No. 241 of 11 August 1990 setting new rules concerning administrative procedure and the right of access to documents, published in the Official Gazette of 18 August 1990, No. 192.
[12] See A. Sandulli, *La riduzione dei limiti all'accesso ai documenti amministrativi*, cit. at 10, 535, who underlines the overcoming of the idea of secrecy as a subjective predicate (a document is secret just because it is of the public administration), for a transition to a concept of secrecy as an objective requirement of the document, rather related to the substance of the information contained therein.
[13] Italian Council of State, IV, 10 June 1996, No. 1024; VI, 7 December 1993, No. 966; VI, 19 July 1994, No. 1243; IV, 26 November 1993, No. 1036. See F.C. Gallo, S. Foà, *Accesso agli atti amministrativi*, in Dig. disc. pubb. 6 ss. (2000).

consequence of this was that the applicant was required to provide evidence of a *direct, concrete, and actual* interest to access administrative documents as is required, in the Italian system of administrative judicial protection, of anyone who wants to bring a legal action[14].

Later on a new piece of legislation was introduced, in 2005 (hereafter the 2005 Reform)[15], that radically changed the provision of Art. 22 of Law No. 241/90 and adopted the above mentioned restrictive interpretation established in court rulings. Therefore, the 'classical' right of access[16] is now granted – pursuant to Art. 22.1, letter b), of Law No. 241/90 – only to the stakeholders, who are to be understood as "all private parties, including stakeholders representing public or widespread interests, who have a direct, concrete, and actual interest corresponding to a legally protected situation that is linked to the document to which access is requested".

A new provision was also introduced (in Art. 24.3), according to which "no requests of access made with the intention of generally monitoring the work of public administrative bodies shall be accepted".

Under the new legal regime a request of access under Art. 22 of Law No. 241/90 must therefore be duly motivated so as to show the qualified interest that is now necessarily required in order for the right of access to be granted.

According to widespread opinion this means that, with the 2005 Reform, transparency has been *de facto* expunged from the right of access provided for by Law No. 241/90[17].

However, the provisions of Art. 22 of Law No. 241/90 do not prevent the possibility to introduce a broader right of access in special sectorial legislations. This is the case, for instance, of

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[14] R. Villata, *Interesse ad agire (Diritto processuale amministrativo)*, in XVII Enc. giur. Treccani 3 (1989).

[15] Law No. 15 of 11 February 2005 that introduces Amendments to Law No. 241 of 7 August 1990, relating to general rules on administrative action, published in the Official Gazette of 21 February 2005, No. 42.

[16] As distinct from what we will later on refer to as 'public access' (*accesso civico*). See *infra*, para. 3. ss.

[17] See E. Carloni, *La "casa di vetro" e le riforme. Modelli e paradossi della trasparenza amministrativa*, in 3 Dir. pubbl. *passim* (2009).

Legislative Decree No. 195/2005[18] on the environment, which makes environmental information available to anyone who applies for it, with no need to state or qualify his or her interest (*accesso ambientale*). And it is the case, also, for the public access to administrative documents (*accesso civico*) provided for now by Legislative Decree No. 33/2013 (see *infra*, para. 3. ss.).

3. The following step: from access to administrative documents to transparency developed as an "Open Data Policy"

Before describing the above mentioned new piece of legislation on public access to administrative documents (Legislative Decree No. 33/2013), and in order to correctly understand its origin and its innovative content, it is necessary to shortly retrace the evolutionary path leading to its adoption.

In 2003 the European Union adopted the so called Public Sector Information Directive[19] (hereafter the PSI Directive). Although the aim of the PSI Directive was only to establish a minimum set of rules governing the re-use (for private or commercial purposes) of existing documents held by public bodies of the Member States, and although the Directive aimed at building on the existing access regimes in the Member States, without changing the national rules on access to documents,[20] it did represent a starting point for the adoption of open data policies in many Member States, including Italy[21]. In fact, while it merely aimed at providing a minimal harmonization and did not pose any obligation to allow re-use of documents, *de facto* it encouraged a broader availability of public sector information

[18] Legislative Decree No. 195 of 19 August 2005, "Implementation of Directive 2003/4/EC on public access to environmental information," published in the Official Gazette of 23 September 2005, No. 222.

[19] Directive 2003/98/EC of the European Parliament and Council of 17 November 2003 on the re-use of public sector information, which was recently amended by Directive 2013/37/EU of the European Parliament and Council of 26 June 2013. See at: http://www.eurlex.eu.

[20] Directive 2003/98/EC cit., recital No. 9.

[21] Even in its 2013 amended version the adoption of 'open data' is not is not what the PSI Directive prescribes. Cfr. M. Van Eechoud, *Making Access to Government Data Work*, in 29-2016 Amsterdam Law School Legal Studies Paper Research 79 (2016).

with the idea that such an extended availability would represent some sort of added value also for the public body itself, by promoting transparency and accountability[22].

Following this Open Data Policy trend, in 2009 and in 2013 the Italian Government adopted two legislative decrees bearing the paradigmatic headings: "Optimization of productivity of public work and efficiency and transparency of the public administration" (Legislative Decree No. 150/2009[23]) and "Reorganization of the rules concerning the obligations of publicity, transparency and dissemination of information by public authorities" (Legislative Decree No. 33/2013[24]).

In this general Framework Art. 11 of Decree No. 150/2009 expressly stated that "transparency has to be understood as *full accessibility*, including publishing information on the institutional websites of the public administration bodies." Furthermore, it expressly specified that, contrary to the above mentioned provision of Art. 24.3 of Law No. 241/90 - which in its version post 2005 expressly excludes access to such a purpose -, this provision aims "at fostering widespread forms of monitoring, so as to make sure that the principles of efficiency and impartiality are complied with" (Art. 11.1).

As far as the pursued goals are concerned, transparency – as regulated by the legislator in 2009 – can be considered to be aimed at two main goals, i.e. the efficiency of the public administration, which is pursued through transparency on the performance of public administrations and public services, and prevention of corruption, which is pursued through transparency of the procedure and of the organization[25].

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[22] See now Directive 2003/98/EC as amended by Directive 2013/37/EU quoted above, recital No. 4.

[23] Legislative Decree No. 150 of 27 October 2009, published in the Official Gazette of 31 October 2009, No. 254.

[24] Legislative Decree No. 33 of 14 March 2013, published in the Official Gazette of 5 March 2013, No. 80.

[25] In accordance with the provisions of Art. 9 of the United Nations Convention against corruption, stating that "taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate".

The second goal was actually the focus of the subsequent Legislative Decree No. 33/2013, whose specific aim was to prevent and eradicate illegality in the Public Administration.

More specifically, Legislative Decree No. 33/2013 - in its version prior to the legislative changes of 2016 - obliged all public administration authorities to comply with the transparency requirements set forth in it and applicable to all of their activities, mainly by using the "institutional website" of each individual administration.

Information regarding the activity and the organization of the public bodies had therefore to be published on the home-page of the institutional websites in the section on "Transparent Administration", in order to allow citizens to have access to this information (and only to *this* information) without having to go through an authentication process or being identified in any manner[26].

Accordingly public administrations had to guarantee the quality of the information published on the institutional websites in compliance with the duty of disclosure established by the law, and had to ensure that such information is intact, currently updated, comprehensive, timely, user-friendly, easily understandable, easy to access, true to the original documents held by the administration, and indicate its origin and re-usability[27].

In this regard, section VI of Legislative Decree No. 33/2013, which governs the supervision of the implementation of provisions and sanctions, is particularly important. Indeed, the Italian legislator was stricter here than in the past as it introduced sanctions in case of failure to comply with the applicable rules, which provide for disciplinary, management, and administrative responsibilities, as well as the application of administrative sanctions, publication of the relevant measures, and cancellation of resources previously allocated to agencies or bodies[28].

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https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf. Accessed on 10 June 2014.

[26] Specific restrictions to transparency are obviously provided for in order to guarantee a possible balance between the transparency obligation and the need to protect privacy.

[27] Art. 6 et seq. of Legislative Decree No. 33/2013.

[28] See Art. 46 et seq. of Legislative Decree No. 33/2013.

The transparency officer - instituted *ex novo* under Decree No. 33/2013 - is the key subject and in charge of monitoring that the public administrations comply with the applicable provisions[29].

The applicable sanctions apply both to the transparency officer, with reference to his/her specific duties, and to the managers of the Public administration and political bodies that are required to supply data in order to finalize the publication. In addition to the sanctions that are applicable to individual subjects, there are sanctions that are applicable to the relevant administrative decision, thus making it ineffective[30].

The regulatory framework described thus far shows - in my opinion rather clearly - that in this first version of Legislative Decree No. 33/2013 transparency was understood, primarily and essentially, as an "Open Data Policy", while totally neglecting the other aspect of transparency: namely the kind of transparency-on-request provided for by old Art. 22 of Law No. 241/90 on the right of access to administrative documents (see *supra*, para. 2).

There was nevertheless a rather peculiar exception to this general rule: old Art. 5.1. of Legislative Decree No. 33/201, which provided for a for a remarkably peculiar sanction and stated that "the obligation established under the legislation in force for the public administration to publish documents, information, or data implies the right for anyone to request such documents, information or data in case of failure to publish them". Which means that it implied a right to public access to such documents, information or data which had to be published but had not been!

It is, therefore, in this rather peculiar way that the so-called public access (*accesso civico*) finds its way into the Italian legal order. And, as I will explain in the following paragraphs, apart from this first paragraph of Art. 5 (which has remained

[29] The duties of this subject included: the obligation to update the Three-Year Programme for transparency and integrity (which also provides specific monitoring measures on the fulfilment of transparency duties and further measures and initiatives aimed at promoting transparency in coordination with the Anti-Corruption Plan) and to report any failure or delay in complying with the disclosure duties to the policy-making body, the Independent Assessment Body (*Organismo indipendente di valutazione* – OIV), the National Anti-Corruption Authority, and, in the most severe cases, the disciplinary office. See Art. 43 of Legislative Decree No. 33/2013.

[30] See Art. 15.2; Art. 26.3; Art. 39.3 of Legislative Decree No. 33/2013.

unchanged even in its wording) this is exactly the part of Legislative Decree No. 33/2013 which has recently undergone the most extensive revision, concerning both the meaning of public access and its scope of application.

4. Transparency and Public Access to administrative documents after the "*Madia* Reform": The Italian Freedom of Information Act

With an important Law of August 2015 (Law No.124/2015) the President of the Italian Council of Ministers, *Matteo Renzi*, together with the Minister for Public Administration, *Marianna Madia*, launched a general reform of the Italian Public Administration.

Law No.124/2015 (the so called "Madia Law")[31] - which was widely glorified in the press as a revolutionary law - contains important provisions concerning also the topic of access to administrative documents and to public sector information.

Such provisions, although they leave certainly enough room for future improvement (see *infra*, para. 5.), involve a fundamental change of perspective of the Italian legislator as to access to administrative documents and, as a matter of fact, state (for now) the victory of the transparency-on request approach (of which I am a strong supporter) over the transparency-by-pro-active-release-of-information approach, which had become quite fashionable among Italian scholars in recent times[32].

According to its Art. 7, "without prejudice to the obligations of publication", freedom of information through the right of access to data and documents held by public authorities, also by electronic means, shall be granted "to anyone, regardless of ownership of a legally protected situation", except in cases of secrecy or prohibition of disclosure provided for by law and within the limits necessary for the protection of public and private interests. The aim shall be to "promote widespread forms of control over the pursuit of official duties and the use of public

[31] Law of 7 August 2015, n. 124, published in the Official Gazette of 13 August 2015, and entered into force on 28 August 2015.

[32] See E. Carloni *L'amministrazione aperta. Regole strumenti limiti dell'open government* (2014), 17 ss.

resources"[33].

The above mentioned provision certainly deserves a positive comment. As I already underlined in a previous paper of mine[34], the current restriction contained in Art. 22, para. 1b (of Law No. 241 of 1990 on administrative procedure) of the right of access to administrative documents *only* to private parties having a "direct, concrete and existing interest corresponding to a legally protected situation that is linked to the document to which access is requested" is widely disappointing. Especially for those scholars like myself who believe that it would be more consistent with the very meaning of the right of access to administrative documents to provide for a right of access connected to the need for informational-social control of the administrative action, regardless of the participation in a specific administrative procedure, or of the link with the adoption of an administrative decision in which the person is individually involved[35]; and believe therefore that, in this respect, the provision of Legislative Decrees No. 150/2009 and No. 33/2013 in their original versions certainly did not match the desired change.

A Legislative Decree on transparency dated 25 May 2016, n. 97[36], whose aim is to implement the above mentioned provision of the Madia Law, has recently been passed (hereafter the Italian FOIA)[37].

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[33] So Art. 7.1, letter h) of Law No. 124/2015.

[34] D.-U. Galetta, *Transparency and Access to Public Sector Information In Italy: a Proper Revolution?*, in 6 I.J.P.L. 231 ss. (2014).

[35] See G. Pastori, *Il diritto d'accesso ai documenti amministrativi in Italia*, in 1 Amministrare 147 ss. (1986); G. D'Auria, *Trasparenze e segreti nell'Amministrazione italiana*, in 1 Pol. Dir. 111 ss. (1990); M. D'Alberti, *L'accesso ai documenti amministrativi*, in Id. et al. (eds.), *Lezioni sul procedimento amministrativo* (1992), 122; A. Pubusa, *L'attività amministrativa in trasformazione. Studi sulla l. 7 agosto 1990, n. 241* (1993), 134 ss.; A. Romano Tassone, *A chi serve il diritto di accesso. Riflessioni su legittimazione e modalità di esercizio del diritto di accesso nella legge n. 241 del 1990*, in Dir. amm. 318 ss. (1995).

[36] With Decision no. 251/2016 of November 25, 2016 (ECLI:IT:COST:2016:251) the Italian Constitutional Court has recently declared part of "Law Madia" to be unconstitutional. As a consequence, it has deprived of legal basis some of the legislative decrees adopted on its basis. This Decision does not affect, however, the FOIA Decree.

[37] Legislative Decree 25 May 2016, No. 97, Review and simplification of the provisions on prevention of corruption, openness and transparency, amending Law of 6 November 2012, No. 190 and Legislative Decree of 14 March 14, 2013,

A part from the unchanged Art. 5.1., Legislative Decree No. 97/2016 operates a radical modification of the provisions of Decree No. 33/2013 concerning public access (*accesso civico*). While, in fact, in the original provisions of Art. 5 of the Decree No. 33/2013 public access was limited only to those documents, information, or data which the public administration are obliged to publish and was meant (and designed) as a mere sanction in relation to the infringement of this 'obligation to publish', the Italian FOIA operates here a true revolution. The new Art. 5.2 of the Decree states in fact that "In order to promote widespread forms of control on the pursuit of the institutional functions and on the use of public resources and to promote public participation in public debate, everyone has the right to access data and documents held by the public administrations, additional to those which are subject to publication in accordance with this decree". Public access to data and documents held by the public administrations is therefore to become the default rule. Restrictions are nonetheless possible when they appear necessary "for the protection of legally relevant public and private interests" (new Art. 5.2, last paragraph - see *infra*, para. 5.).

It is, in my opinion, a real 'paradigm shift' in the Kuhnian sense[38]: as the Italian FOIA designs now transparency as freedom of access to the data and documents held by public authorities guaranteed firstly, through a general public access to such data and documents (*accesso civico*); and, (only) secondly, through the publication of documents, information and data.

Public access (*accesso civico*) to data and documents held by public authorities is therefore to become the main instrument to achieve transparency understood mainly as transparency-on-request, and is not to remain relegated, as it was till now, in the role of a mere exception to the general rule stated in Art. 22 of Law No. 241/90. A rule which - as I have already underlined (see *supra*, para. 2) - after the 2005 Reform clearly designs access to documents as a peculiar right granted only to the stakeholders and with the sole purpose of ensuring the defense of a subjective

No. 33, in accordance with Article 7 of Law of 7 August 2015, No. 124, on reorganization public administrations, published in the Official Gazette of 8 June 2016, No. 132.

[38] See in Stanford Encyclopedia of Philosophy at: http://plato.stanford.edu/entries/thomas-kuhn/

legal position which could be adversely affected by the decision of a public authority.

The Italian FOIA states on the contrary that, in addition to the 'classical' right of access for stakeholders, provided for in Law No 241/90 (and which remains totally unchanged)[39], a general public access (*accesso civico*) to data and documents held by public authorities shall be granted for the future.

Indeed, according to Art. 6 of the Italian FOIA an applicant requesting public access does not need to possess a so called "qualified interest" and does not even need to give reasons for his/her request for access to documents.

Furthermore, according to the provisions of the FOIA Decree the application may be transmitted electronically and the release of information or documents in electronic or printed form is totally free: except for the possibility - which is not likely to be used by the public administrations[40] - to ask for reimbursement of the cost actually incurred (and duly documented by the administration) for the reproduction of data and documents on material supports.

This change of perspective also allows Italy to comply with the EU standards concerning transparency; as EU law recognises that there is a fundamental connection among transparency, good governance, and the right of access to public documents.[41]

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[39] See to this regard D.-U. Galetta, *Accesso civico e trasparenza della Pubblica Amministrazione alla luce delle (previste) modifiche alle disposizioni del Decreto Legislativo n. 33/2013*, in 5 Federalismi.it 15 s. (2016), in part. para. 10.

[40] One wonders, in fact, how the single administration can and/or should document its "actual cost" and if the activity seeking to document such cost will not represent a further burden on the recipient administration, such as to push the latter to desist from claiming repayment from the applicant.

[41] Already the first European Ombudsman, Jacob Söderman, had on several occasions stressed the fundamental connection linking transparency, good administration and the right of access to administrative documents. In his first special report to the EU Parliament – based on an investigation he began upon his own initiative in 1996 - he had already focused on public access to documents possessed by Community institutions and bodies. And the conclusion of this investigation was: "On the basis of the above analysis, the Ombudsman concludes that failure to adopt and make easily available to the public rules governing public access to documents constitutes an instance of maladministration." Consequently, in addressing the institutions and bodies forming the object of the investigation, the Ombudsman recommended the adoption of "... rules concerning public access to documents" specifying that

This emerged clearly already in the Commission's White Paper of July 2001 on European governance[42]. And was confirmed by the adoption, also in 2001, of EC Regulation no. 1049/2001 on public access to the documents of the institutions[43].

In this same vein, while Art. 15.1 of the Treaty on the Functioning of the European Union (TFEU), provides that "In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices, and agencies shall conduct their work as openly as possible", its third paragraph reiterates the provisions of the old Art. 255 TEC, according to which "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices, and agencies, whatever their medium"[44].

In this respect, before the adoption of the Italian FOIA, there was a clear discrepancy between the approach concerning access to documents chosen by the Italian legislator and the one adopted by the European Union according to which "in principle, all documents of the institutions should be accessible to the public" and therefore "The applicant is not obliged to state reasons for the application"[45].

"The rules should apply to all documents that are not already covered by existing legal provisions allowing access or requiring confidentiality". See D.-U. Galetta, *Transparency and Administrative Governance in European Law*, in M.P. Chiti (ed.), *General Principles of Administrative Action* (2006), *passim*.

[42] Communication from the Commission of 25 July 2001 "*European governance - A white paper*" - COM(2001) 428 final - Official Journal C 287 of 12.10.2001.

[43] EC Regulation no. 1049/2001 of the European Parliament and of the Council of 30 January 2001, concerning public access to documents of the European Parliament, Council and Commission, GUCE, 31 May 2001, n. L. 145, 43.

[44] See also J. Ziller, *Origines et retombées du principe de transparence du droit de l'Union européenne*, in G. Guglielmi, E. Zoller (eds.), *Transparence, démocratie et gouvernance citoyenne* (2014), *passim*.

[45] So Recital no. 11 and Art. 6 para. 1 of EC Regulation no. 1049/2001 cit. See further on this point D.-U. Galetta, *Alcuni recenti sviluppi del diritto amministrativo italiano (fra riforme costituzionali e sviluppi della società civile)*, in XI Giust. Amm. 1-6 (2014).

5. Continued. Restrictions to Public Access in the Italian FOIA: the Legislator leaves the floor to the National Anti-Corruption Authority (ANAC)

This new, extended right to public access provided for by the Italian FOIA is, anyhow, by no means designed as an unlimited right. On the contrary, it is surrounded by a vast number of possible restrictions, aimed at protecting a wide number of public and private interests.

Alongside the 'classical' access restrictions, aimed at protecting public interests such as the ones relating to public safety and public order, national security, defense and military matters, international relations, policy, financial and economic stability of the State, investigations on crimes and their prosecution, inspections, there is also a rather long list of other possible restrictions concerning the protection of private interests. This includes the protection of personal data, secrecy of correspondence, as well as economic and business interests of a natural or legal person, including intellectual property, copyright and corporate secrets[46].

It is a rather long list which includes many different restrictions to public access - which can concretely lead to access denial, to postponement of access or to limiting access only to certain parts of the requested documents - even if they aim at protecting the core of legitimate public and private interests, it appears to be a bit too broadly defined[47]. Therefore, in order not to risk to unintentionally expand the area of activities of the public administration which are not subject to the requirement of transparency and "raise doubts about the practical effect" of the FOIA's provisions, they certainly need further concretization[48].

In fact, in the absence of further concretization by the national legislator, it remains necessarily a discretionary decision of each single public administration to identify the actual content of such potentially unlimited restrictions to public access; or it will

[46] See Art. 6 of the Italian FOIA.

[47] D.-U. Galetta, *Accesso civico e trasparenza della Pubblica Amministrazione alla luce delle (previste) modifiche alle disposizioni del Decreto Legislativo n. 33/2013*, cit. at 39, 9 ss.

[48] Cfr. Opinion of the Italian *Consiglio di Stato* n. 515/2016, at: http://giustizia-amministrativa.it, p. 85 et seq. (Council of State, Consultative Section for Normative Acts, 18 February 2016, No. 515)

be up to the administrative courts to finally decide: if concrete restrictions to public access are challenged by their addressee[49]. What is nevertheless sure is that such restrictions, although broadly defined, are in any case to be interpreted in the light of the principle of transparency, "meant as total accessibility of information about the organization and activities of public administration, in order to protect citizen's rights, promote the citizens' participation in administrative activity and promote widespread forms of control over the pursuit of institutional functions and the use of public resources" (Art. 1.1. of Decree No. 33/2013 in the version modified by the Italian FOIA). It is thus to be understood as a real freedom of access (*libertà di accesso di chiunque*), in the line of reasoning put forth by the American FOIA[50].

In order to address the above mentioned problem the FOIA legislator has in the end chosen to 'leave the floor' to the National Anti-Corruption Authority (hereafter ANAC). In the final version of the Italian FOIA a new provision has suddenly appeared (Art. 6.11 of the Italian FOIA). This brand-new provision integrates Art. 5-bis of the Decree No. 33/2013 with a sixth and last paragraph, according to which it will be up to the ANAC (in agreement with the Authority for the protection of personal data and after consultation with the Joint Conference of State, cities' and local governments) to adopt guidelines (*linee guida*) containing 'operational indications' for the purpose of defining the exclusions and limitations to civic access.

There is at present a great debate in Italian academic literature - involving also the Council of State in its advisory role[51] - regarding the legal nature of guidelines adopted by an Independent Agency such as the National Anti-Corruption

[49] Up to now the most delicate issue regarding accessibility of documents has concerned the relationship between the right of access and privacy protection and the Italian administrative courts that took a rather wavering position on the issue of the actual balance between access and privacy. See eg. Italian Council of State, V, 28 September 2007, No. 4999.

[50] Cfr. D.-U. Galetta, *Accesso civico e trasparenza della Pubblica Amministrazione alla luce delle (previste) modifiche alle disposizioni del Decreto Legislativo n. 33/2013*, cit. at 39, 7 ss.

[51] See to this regard the opinion delivered by the Italian Council of State on the scheme of the Public Contracts Code (opinion of 1 April 2016, No. 855, at: http://www.giustizia-amministrativa.it).

Authority. It is, actually, kind of a 'soft law' that will produce a very hard outcome: i.e. concretely define the real substance of public access redesigned by the Italian FOIA.

It is obviously not possible to further investigate the matter here[52]. I therefore limit myself to raise doubts about the appropriateness of entrusting also this competence to an Independent Agency such as ANAC, whose aim and nature is that of working as an 'anticorruption watchdog'. In fact, the choice made by the Italian legislator to this regard is based on the assumption, that it is possible to identify a clear and unambiguous link between public access, transparency and combating corruption. The existence of such an unequivocal link remains instead, in my opinion, yet to be proven.

6. Why transparency-on-request is a better solution: Conclusions

The adoption of an 'Italian FOIA' has been a manifesto commitment of the *Renzi* Government since the very beginning. On the day of its definitive approval the Minister for Simplification and Public Administration, *Marianna Madia*, gloriously stated as follows: "We have kept that promise. With the decree implementing the public administration reform, finally approved, Italy has adopted a law on the Freedom of Information Act model. Citizens have now the right to know data and documents held by the public administration, even without possessing a direct interest"[53].

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[52] See to this regard C. Deodato, *Le linee guida dell'ANAC: una nuova fonte del diritto?*, published on 28 April 2016 at: https://www.giustizia-amministrativa.it/cdsintra/wcm/idc/.../nsiga_4083067.docx, 1-22; G. Morano, *Le linee guida ANAC nel sistema delle fonti del diritto*, in Diritto.it 1-8 (published on 11 May 2016 at: http://www.diritto.it/docs/38202-le-linee-guida-anac-nel-sistema-delle-fonti-deldiritto).

[53] See at: http://www.funzionepubblica.gov.it/articolo/riforma-della-pa/16-05-2016/foia-e-trasparenza-ora-e-legge. Furthermore these are, in the opinion expressed by Minister Madia, the central points of the Italian FOIA:
1) requesting a document will be free of charge;
2) an administration that refuses to issue a document will have to motivate its refusal in a clear manner;
3) the citizen who has been refused by an administration to release information will be able to contact the transparency and anticorruption officer (responsabile

As a matter of fact, while confirming the obligation of public administrations to publish a certain amount of documents and data on their institutional websites[54], the Italian legislator has opted, with the FOIA, for transparency understood as free-access-on-request to data and documents held by public administrations. It is exactly that "transparency-on-request" option referred to in the title of this paper. And it means a quite fundamental (and in my opinion very positive) change of perspective of the Italian legislator as to access to administrative documents.

However, this choice of the Italian legislator to move away from the idea of transparency understood just as pro-active disclosure of information (transparency as an "Open Data Policy") and embrace the transparency-on-request solution has also attracted major criticism, thus requiring me to provide some concrete reasons why it is, in my opinion, a very happy choice. I will just therefore now try to concisely explain the three most important reasons.

1) First of all, it is not true that transparency as an "Open Data Policy" is simply more transparent[55]. Transparency understood as pro-active disclosure of information implies, on the contrary, that the choice on *what and when* an information has to be rendered public remains totally in the hand of the public power. As German scholars have very well underlined, a transparency which is "*anbieterorientiert*"[56] (and where it is for the public authority to choose whether or not to render certain documents public) is in fact a much less satisfactory transparency than the "*nachfrageorientiert*"[57] transparency, where it is for the 'adult citizen' (in the metaphorical sense) to decide whether or not to

della prevenzione della corruzione e della trasparenza) or the ombudsman and, in any case, to appeal to the competent Regional Administrative Tribunal (TAR).

[54] To this regard the Italian FOIA introduces also a significant rationalisation, by reducing excessive burdensome obligations to publish. See D.-U. Galetta, *Accesso civico e trasparenza della Pubblica Amministrazione alla luce delle (previste) modifiche alle disposizioni del Decreto Legislativo n. 33/2013*, cit. at 39, 17.

[55] See to this regard, for example, in the Web-Site of the Sunlight Foundation, at http://sunlightfoundation.com.

[56] Literally translated: "Provider-oriented".

[57] Literally translated: "demand-driven".

request access to certain documents[58]. Thus, consciously or unconsciously, open-data-policy supporters have a conception of citizens as kind of 'eternal minors' who should be guided and protected by a public authority, which will decide in their place what is useful for them to know (and is therefore to be published) and what it is not (and is therefore neither to be published, nor to be asked for via access to documents).

Nonetheless this is in fact still the feel-good reading of the whole story about "*anbieterorientiert*" transparency. Obviously there is also a non-good reading, i.e. a more cynical one, according to which pro-active disclosure of information essentially aims to generate a so called "opacity for confusion" rather than transparency. Because - as it has been well highlighted in academic literature - information overload may just cause disorientation[59]: the useful information, the interesting one, is perhaps made available; but it is mingled together with a plenty of other information devoid of any interest, thus producing "opacity for confusion" [60].

2) On the other hand, even if we decide to stick to the feel-good reading, it has to be clear that a serious Open Data Policy perforce involves the risk of neglecting data protection.

Indeed, as I have already underlined in another paper of mine, pro-active transparency, when it is genuinely meant, implies that public administration won't be able to operate those evaluations and case by case decisions which alone can ensure an adequate balance between the conflicting interests at stake. Interests - and this should be absolutely clear - that are all the expression of fundamental constitutional values: transparency, on the one hand, and the privacy of individuals and the protection of their personal data, on the other[61].

So, while transparency of the Public Administration is certainly an important issue for modern democracies, it still

[58] G. Wever, *Wundermittel Transparenz? Über Informationsfreiheit und Transparenzgesetze*, in Informationsfreiheit und Informationsrecht 62 (2014).
[59] M. Fenster, *The Opacity of Transparency*, in Iowa Law Rev. 921 ss. (2006).
[60] E. Carloni, *La "casa di vetro" e le riforme. Modelli e paradossi della trasparenza amministrativa*, in 3 Dir. pubbl. 806 (2009).
[61] D.-U. Galetta, M. Ibler, *Decisioni amministrative "multipolari" e problematiche connesse: la libertà di informazione e il diritto alla riservatezza in una prospettiva di diritto comparato (Italia- Germania)*, in 9 Federalismi.it 17 ss. (2015).

cannot be understood as a value in itself and its consistency with other founding values, such as privacy and data protection, has to be guaranteed at all times.

3) The opinion expressed a long time ago by a U.S. Supreme Court Justice, *Louis Brandeis*, in favour of transparency, as a useful tool to fight again the abuses of the 'Money Trust', is often quoted by open-data-policy supporters.

The well-known quote "A little sunlight is the best disinfectant"[62] has been used by plenty of authors in plenty of papers addressing transparency issues. It is nevertheless a pity that they always omit to quote the second part of Brandeis' sentence, according to which, if "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman". And electric light, unlike sunlight, is not dependent on the weather; but it certainly needs someone to turn it on.

This someone can solely be - in my opinion and to conclude my plea in favour of transparency-on-request via access to document - the public authority possessing the data or document itself: to which citizens have to turn to with their concrete request for access.

To this regard it should be recalled here, that the Italian APA includes from the very beginning an important (and at the same time innovative)[63] provision concerning the duty of the public authority to appoint an official responsible for managing each administrative procedure. Such responsible official (*responsabile del procedimento*), which is actually the one who is entrusted with the task to take care of the concrete relationship between citizens and public administration[64], shall easily be entrusted also with the task of serving as a link between public administration and citizens asking for transparency: as such

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[62] L. Brandeis, *Other People's Money - and How Bankers Use It* (1914), Chapter V: *What Publicity Can Do* (at https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-by-louis-d.-brandeis).

[63] See now also European Ombudsman - The European Code of Good Administrative Behaviour, Art 14 (2). See also the European Parliament resolution for an open, efficient and independent of 9 June 2016. With this resolution, the European Parliament called on the Commission to adopt a general Regulation for an open, efficient and independent European Union administration.

[64] Arts 4-6 of Law No. 241/90.

citizens shall not just expect to be allowed to see/watch (according to the Turatian glasshouse metaphor[65]) everything that happens inside the public administration; they shall rather wish to be enabled to understand it, at least to a certain extent, thanks to help provided by the responsible official.

To sum up, it seems incontrovertible to me that, in any case, access to documents and data held by the public administration, if it is to produce effective outcomes in terms of useful information[66] (and not to turn out into a simple disclosure of plenty of incomprehensible data and documents), must be, more often than not, accompanied by the concrete support of an administrative officer, able to 'shed light' and decrypt useful information for the citizens.

Furthermore (but this would open a new chapter), I would like to give (it seems rather sensible to me!) a public officer the possibility to concretely check requests for access and, in case, exclude (on his own responsibility, involving also that of the transparency and anticorruption officer, as is correctly stated in the Italian FOIA)[67] access requests that are not guided by the desire to learn about and participate in administrative activity, but rather by the desire to create obstacles to the proper functioning of public administrations (and are therefore in contradiction with Art. 97 of the Italian Constitution)[68].

To conclude, the new direction in which the 'Italian journey' towards transparency has recently moved towards is, in my opinion, the right one: from a very restrictive regime of access to administrative documents (the one designed by Law No. 241/90, which is however still applicable for those documents and data which are excluded from public access) - lately accompanied by a rather demagogical obligation imposed on public

[65] The Italian Politician Filippo Turati is the first one who referred to the idea of public administration as a "glass house" that anyone should be able to look at from the outside: F. Turati, *Intervento*, in *Atti del Parlamento Italiano, Camera dei deputati*, session 1904-1908, 17 June 1908, 22962.

[66] The distinction between data and information comes from the language of informatics and is a very important one. As Kock puts it: "data will only become information or knowledge when they are interpreted by human beings". N. Kock, *Systems Analysis & Design Fundamentals: A Business Process Redesign Approach* (2006), 4.

[67] See Art. 43 ss. of the amended Legislative Decree No. 33/2013.

[68] See *supra*, para. 2.

administrations to disclose a set of information in the context of so-called open data policies[69] - Italy has moved forth to the hoped-for[70] transparency-on-request approach.

Indeed, allowing free public access to data and documents held by public administrations seems to me to be the most correct way to implement the principle of transparency. To do it the other way round - i.e. by obliging public administrations to publish an increasingly large amount of incomprehensible and, in themselves, meaningless documents and data - has in fact very little to do with making information not only downloadable to citizens, but also useable and meaningful[71].

Last but not least, the transparency-on-request approach does not seems to me to be at odds with the position of those who argue that public bodies hold information not for themselves, but as custodians of the public good and that "In this respect, right to information laws reflect the fundamental premise that the government is supposed to serve the people"[72]. It is, on the contrary, a choice that is exactly consistent with that idea!

[69] On this point, see specifically F. Patroni Griffi, *La trasparenza della pubblica amministrazione tra accessibilità totale e riservatezza*, in 8 Federalismi.it para. 2 (2013).

[70] See D.-U. Galetta, *Transparency and Access to Public Sector Information In Italy: a Proper Revolution?*, cit. at 34, 234.

[71] See P. Canaparo, *La via italiana alla trasparenza pubblica: Il diritto di informazione indiffeRenziato e il ruolo proattivo delle pubbliche amministrazioni*, in 4 Federalismi.it para 10 (2014); G. Napolitano, *L'attività informativa della pubblica amministrazione: 'less is better'*, in F. Manganaro, A. Romano Tassone (eds.), *I nuovi diritti di cittadinanza: il diritto d'informazione* (2005). But also Raines, commenting on the most innovative US Transparency Act (DATA): J. Raines, *The Digital Accountability and Transparency Act of 2011 (DATA): Using Open Data Principles to Revamp Spending Transparency Legislation*, in 57 N.Y.L. Sch. L. Rev. 342 (2012-2013).

[72] T. Mendel, *Freedom of Information: A Comparative Legal Survey*, cit. at 3, 4.

THE REGULATION OF ENVIRONMENT IN THE ITALIAN LEGAL SYSTEM*

*Annalaura Giannelli***

Abstract

The paper examines the concept of environment, which has traditionally been considered by three different perspectives: the environment as a constitutional principle, the environment as a juridical issue and the environment as a legal asset. Each of these three perspectives led the legal system towards greater awareness of environmental protection. None of these perspectives has, however, eliminated the problem of finding the legal core of the concept of environment. This complicates the balance, that must be accomplished in the case law and also by the legislation, between environmental protection and fundamental rights.

TABLE OF CONTENTS

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1. Introduction: the recent discovery of the environment by the jurist

A survey of understanding of the concept of environment is a good way of examining the processes underlying the development of the continuing tension between legal and pre-legal concepts. Empirically "environment" can be understood simply as "the outside world", i.e. the external context in which a human being lives, establishes relationships and fulfils his/her potential.

Western thought is firmly rooted in the dialectic between the inner and the outer world, and because environment is the highest expression of this dialectic, and tends to assign to the first a sort of primacy. No wonder then, that the Ancient World - that is the Greek and Roman civilisations - intellectual achievements in philosophy, art and politics were considerable, whilst the development of scientific thought was much less impressive. The centrality of humans, both as individuals and in their social role, contrasted with the general disinterest in nature, which was mostly seen as providing a backdrop to human events, sometimes aesthetically appealing, sometimes rather inhospitable.

This topic certainly deserves more sophisticated analytical tools than those available to the writer; however we want to highlight that the regulation of the environment is a phenomenon far from obvious.

The recognition of the legal relevance of the environment in the Italian legal system was not, therefore, the result of a spontaneous evolution of the law, as it may have been in the case of other new-generation legal interests, such as privacy, transparency and legitimate expectations.

Moreover, the discovery of the environment by legal science was not the result of a sort of cultural syncretism of legal traditions[1].

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[1] The importance of the South American constitutional provisions for the protection of the environment is known. The Brazilian Constitution of 1998 defined a "Green Constitution", which dedicates an entire chapter to the environment, is particularly notable. The main feature of the Latin-American approach to environmental issues is a distinctly eco-centric perspective, which considers the environment as a legal interest in itself, regardless of its utility to humans; this is a better indication of the priority accorded to the environment than the quantitative data on constitutional provisions devoted to environmental protection. Among the most interesting consequences of this perspective, which is anti-

It has been brought, rather, by an acknowledgment of the growing risks of uncontrolled pollution and hence the emergence of the environment as a *problem*[2]. In other words, it was a historical event, even if not exactly situated in a chronology, that opened a breach in the deep-rooted indifference of law towards phenomena not immediately related to human inter-relationships such as the protection of the environment.

Pollution, as everyone knows, is an unwelcome consequence of recent industrial, and thus economic, development. But this statement has implications on two levels.

The first and most immediate, relates to the fact that the industrial progress of the last quarter of the 20th century has led to an undeniable increase in abuse of the environment, including pollution. However, it cannot realistically be claimed that the contemporary era represents a "starting point": considerable environmental damage accompanied the so-called industrial revolutions. What characterises our times is, rather, the willingness to take action to prevent, or at least contain, pollution. This is the result of a diffused state of richness, which laid the cultural and "psychological" premises to direct attention, including the legislator's one, to environmental issues.

Although the empirical and cultural perspectives on pollution are related they must be carefully distinguished. A relevant witness of it was provided by the today's economic crisis, which has not been accompanied by any reduction of pollution. The crisis has brought a critical review of the environmental issues, which, risk to lead to unusual situations of social injustice.

The legal reflection on the environment has traditionally developed in three directions, dealing with the environment as a constitutional principle, as a juridical issue and, finally, as a legal

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thetical to that still prevailing in the so-called "developed West", is the idea of nature as an entity *entitled* to rights, rather than as an object to which the rights of humans make reference. This is well-illustrated by the Ecuadorian Constitution of 2008, and in particular see Art. 71 (included in Chapter VII, entitled "Rights of nature") which states that nature has a legal right to respect for its existence and to the maintenance of its vital cycles, its structure, its functions and its development. See also Bolivian law no. 71 of 2010, whose title, "*Ley de Derechos de la Madre Tierra*", is significant, makes similar provisions.

[2] Cass. SS.UU., 6 October 1979, n. 5172, in I Foro it., 2302 (1979); Corte Conti, 18 September 1980, n. 868, III Foro. it., 167 (1981); Cass. Sez. I, 1 September 1995, n. 9211, in I Giur. civ., 777 (1996).

asset. The relationships between these perspectives are many and complex, as shown in the next paragraphs.

2. Regulation or regulations? Introductory remarks

There is an inherent ambiguity to the concept of regulation. It can be interpreted in different ways. At the most basic level "regulation" may be treated as a synonym for "making a legal rule". Such an approach would, however, be reductive and formalist[3]. Even civil law jurists seem to recognise that the analysis of legal phenomena does not need to be limited to the analysis and interpretation of law. One cannot, therefore, neglect the contributions that both doctrine and case law can make to the attraction of the object from time to time considered in the legally relevant area. This is particularly true in the case of the environment; as we have already seen there is no ontological predisposition to regulation of the environment, but there is a relatively recent need for such regulation. In many cases jurists played a more effective and timely role in ensuring environmental regulation than the legislature.

The ambiguity of the concept of regulation also affects its inherent characteristics. To consider an "object" as a legal asset it is not sufficient that the "object" appears in legal language - both in current doctrine and in case law. The crucial distinction between legal and pre-legal is the attitude of the object taken into consideration to be terminal for precise and recognisable subjective situations, actually enforceable in a court of law, too.

This last aspect is, of course, the most important, and represents a kind of culmination. With reference to the environment, the attempt to be taken into account is therefore to verify the level of the regulation, and in particular the actual overcoming of the purely nominalistic stage of the regulation process.

The environment poses particular problems for the lawyer, because the legal system has considered it from different perspectives.

3. Environment as a constitutional principle

3.1 The lack of a precise reference to the right to a healthy

[3] G. Teubner, *Law as an Autopoietic System* (1993), 69.

environment in the Italian Constitution

Both doctrine and case law agree that environmental protection is an issue of constitutional importance, but this does not rest on positive law. In fact, the Italian Constitution does not make specific reference to environmental protection in the section dedicated to fundamental principles, and this is not surprising. When the Constitution entered into force neither of these developments had unfolded completely; not in the national context nor in the broader European context. The original Constitutions of the main European countries[4] did not mention protection of the environment as a founding principle of their respective statutes. Similarly, European law, which represented the main driving force behind environmental law until 1986 and the signing the Single European Act, did not include environmental protection as a goal.

On the domestic front, the absence of specific constitutional provisions relating to the environment did not prevent the case law of the second half of the last century from affirming without hesitation the constitutional principle of the need for environmental protection. The articles cited in support of this principle were Art. 32 of the Italian Constitution, which deals with health protection, and Art. 9 of the Constitution, which deals with landscape protection.

In one sense this choice is not surprising: both the right to health and the need for landscape protection unquestionably encompass important aspects of the environmental protection issue.

From another perspective, however, the anchoring of the principle of environmental protection in these constitutional pro-

[4] The French Constitution (1958) makes no reference to the environment. It was not until 2005 that the environment entered the Constitution, following the adoption of the *Charte de l'environnement adossée à la Constitution*. See C. Cans, *La Carta costituzionale francese dell'ambiente: evoluzione o rivoluzione del diritto francese dell'ambiente*, in D. De Carolis, E. Ferrari, A. Police (eds.), *Ambiente, attività amministrativa e codificazione* (2006); D. Marrani, *The Second Anniversary of the Constitutionalisation of the French Charter for the Environment: Constitutional and Environmental Implications*, in Envtl. L. Rev., 9 (2008). In Germany, however, the environment was included in the Constitution in 1994, following the introduction of Art. 20a, already in Chapter II of the Constitution, into the programmatic principles of the State. The European constitutions, which in their original version already contained significant references to the environment, are quite recent: Greek Constitution dated 1975, the Portuguese one dated 1976 and the Spanish one dated 1977.

visions was not entirely predictable. Many foreign legal systems have opted for different solutions; the most significant examples of this come from the case law of the ECHR. Despite the lack of a precise reference to the right to a healthy environment in the Charter the ECHR has developed the notion that it is implicit in the right (enshrined in law) to respect for private and family life and the inviolability of the home[5]. This approach ensures a sort of anticipation of the limit of the protection of an "implicit" environment right, that is a protection that can also be accessed when the damage to the environment does not become a real or potential injury to public health or, even less, can compromise the physical integrity of such citizens[6]. The corollary of this, however, is a conception of environment calibrated on the right of ownership, whose main feature is the so-called *ius escludendi*, not compatible with the collective enjoyment that characterises environment as a whole.

On the national front there were also attempts to define environmental damage as damage arising from disturb, thus exploiting the provision of Art. 844 civil code on releases[7], before explicit

[5] ECHR case law granted legal protection against the damage caused by pollution, without consideration (which might have been expected) of article 2 of the Convention (right to life) or Article 3 (right to physical integrity), instead relying on Article 8, which deals with the right to privacy and family life. The most significant judgment was that of 9 December 1994, in *López Ostra* vs. *Spain*. A more recent similar judgment was that of January 10, 2012, in *Di Sarno* vs. *Italy*.

[6] The decision on the significance dated June 29, 1996, *Guerra ed altre* vs. *Italia*, has to be considered in from the perspective of the advancement of protectability, guaranteed by the choice in favour of Art. 8 (and therefore the right to private and family life) as a vector of legal regulation of the healthy environment right. In this decision the Court (although asserting the irrelevance of the question on the grounds that the remedies offered by domestic law had not been exhausted) pointed out that an action on the environment based on a claim of infringement of Art. 2 (and hence of the right to health) could be examined in the light of Art. 6 of the Convention which provides, amongst other things, a right to a private life, rather than in the light of Art. 2.

[7] The legal systems of other European states have seen similar developments. In France, for example, the legal significance of the environment, and thus the protection of indirect and direct rights related to it (see *infra* in the text), was based on a large body of case law on *troubles de voisinages*. The concept of "neighbourhood" has been gradually extended until contiguity between the damaged area and the source of the damage is no longer necessary. See F. Nicolas, *La protection du voisinage,* in Rev. trim. dr. civ., 683 (1976); J.B. Blaise, *Responsabilité et obligations coutumières dans les rapports de voisinage*, in Rev. trim. dir. civ., 275 (1965).

regulations on environmental damage came into force. This topic will be explored in more detail below, in the section V which deals with the environment as a legal asset. Now we want to point out that the attempt in question only responded to the need to identify a possible model for the protection from the hypothesis of environment prejudice, as well as to individuate the relating judge, in the absence of *ad hoc* rules. This attempt, however, lacked solid constitutional foundations. Rather than representing the placing of environmental protection in the field of the constitutional right of ownership, it was a means of overcoming what appeared to be a gap in the legal system. This is clear from the fact that it was constitutional case law that, before the introduction of the rules on environmental damage, urged the overcoming of a protection model based on ownership[8].

The creation of a constitutional link between environmental protection and the right to health and landscape protection was, therefore, not inevitable; it highlights, once again, the tendency to person-centred interpretations of the Constitution.

This situation, however, may not be sufficient to clarify whether the relevance of environmental protection is related to the

[8] Corte Cost., 23 July 1974 n. 247, in I Foro it., 18 ss. (1975). In this judgement the Court was asked to rule on the constitutionality of Art. 844 of the civil code (hereafter "c.c."), which the referring judge had contrasted with Arts. 32 and 9 of the Constitution, referring to its inadequacy as a guarantee of legal protection against the injury caused by pollution. The referring judge remarked particularly ob the inadequacy of the criterion of "normal tolerance", foreseen in the discipline on the emissions (art. 844 c.c.), to be an effective limit to polluting activities carried with reference to the constitutional right of economic initiative. The Court did not endorse this position, stating that Art. 844 c.c. could not be considered, and thus scrutinised, as a setting out an environmental protection: the consideration that the principles contained in art. 844 c.c. do not constitute an appropriate tool for the solution of the serious problems created by pollution is certain exact. The rule is in fact intended to resolve conflicts between neighbouring landowners caused by the negative effects of activities carried out in their funds. It is also clear that the criterion of normal tolerance refers exclusively to the ownership right and cannot be used to judge the legality of releases of substances prejudicial to human health or to the integrity of the natural environment. See also: Cass., 10 October 1975, n. 3241, in Foro it., (Rep. 1975,) voce *Proprietà* n. 34; id., 19 May 1976, n. 1796, in Giur. it., 412 (1978); id, 13 December 1979, n. 6502, in Giur. civ. mer., 12 (1979); id.,10 March 1980, n. 1593, in I *Foro it.*, 2197 (1980); id., 18 August 1981, n. 4937, in Foro it., (Rep. 1981), voce *Proprietà*, n. 21; G. D'Angelo, *L'art. 844 Codice Civile e il diritto alla salute,* in F.D. Busnelli, U. Breccia (eds.), *Tutela della salute e diritto privato*, 420 (1978).

recognition ruled by Art. 9 and 32 of the Constitution.

This answer is negative, for at least two sets of intimately connected reasons.

The first set concerns the extent of the security granted by the two articles in question, the second set deals with the indirect nature of that protection. The first set of reasons is based on a strongly anthropocentric perspective on the relevance of environmental protection, as derived from the two above-mentioned articles. This stresses human well-being, with environmental integrity considered purely insofar as it is instrumental to human well-being. The consideration of landscape is not too different: even after the overcoming of the typical aesthetic conception of the so-called "pietrificazione"[9], the landscape is identified as a visual data usable by man. Landscape, therefore, could be inviolate in spite of a severe impairment of certain environmental elements. There is, therefore, an important shadow cone between health and landscape, which, precisely, is the preservation of the environment in itself, i.e. regardless of the direct implications for the human well-being. Biodiversity, animal welfare and protection of non-populated areas (such as wetlands and glaciers), for example, are not covered by the constitutional provisions on the right to health and landscape protection[10]. The consequence of it is obvious: the Constitutional guarantee of environmental protection is limited to indirect protection, i.e. cases in which damage to the

[9] A.M. Sandulli, *La tutela del paesaggio nella Costituzione*, in II Riv. giur. ed., 62 (1967); E. Casetta, *La tutela del paesaggio nei rapporti tra Stato, Regioni e autonomie locali*, in Le Reg., 1182 (1984).

[10] The draft of constitutional law A.C. 4307, prescribing to introduce the following paragraph before Art. 9 of the Constitution: The Republic recognises that the environment, its ecosystems and its biodiversity are of primary value for the preservation and development of quality of life; it ensures their protection and promotes respect, on the basis of the reversibility precaution and responsibility principles, and in the interests of future generations; it protects the needs and welfare of animals as sentient beings. This draft deserves to be remembered as an attempt to introduce the notion of direct protection of environment. Before it was abandoned this draft underwent many changes. In parliamentary debate it was suggested that the above text, which is rather redundant, with a new third paragraph to be added to Art. 9 of the Constitution. This would have stated that the Republic protects environment and ecosystems, including in the interests of future generations, and protects biodiversity and requires respect for animals. However the proposals for constitutional reform were not enacted.

environment also damages other legal interests[11].

This conclusion may appear devoid of tangible effects". Since the European Union acquired the competence to deal with environmental protection it has enacted several detailed regulations[12] that leave legislators little discretion with respect to implementation. In many cases these interventions have been directly relevant to environmental protection, i.e. without implications for safeguarding human health or landscape (see, for example, the Habitats[13] and Birds Directives[14]). To this body of regulations we should add the massive number of very detailed international rules whose relevance here is that they aim to impose a non-mediated environmental protection (see, for example, the Ramsar Convention[15] on wetlands, that are not habitable and have no landscape value).

It is, therefore, very difficult to argue that the lack of reference to environment in the fundamental principles of the Constitution has actually hindered the development of environmental law based: the obligation to transpose and/or harmonise with the supranational norms has, in effect, acted as a substitute for such reference. Nevertheless, the lack of a basic rule on environmental protection was not totally irrelevant.

The most significant effects of this lack are those relating to the content and structure of the review by the Constitutional Court.

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[11] Cass. SS.UU., 9 May 1979, n. 1463, in I Giur. civ., 695 (1980). The Court pointed out that the right to a healthy environment can be considered as a subjective right only when it is connected to the exclusive availability of an asset in the case of which preservation of the potential to provide benefit to the subject is inseparable from the preservation of environmental conditions.

[12] M. Renna, *Ambiente e territorio nell'ordinamento europeo*, in Riv. It. Dir. Pubbl. Com., 649 (2009).

[13] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

[14] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

[15] The Convention was signed in Ramsar, Iran, on 2 February 1971 and ratified in Italy under law no. 448 dated March 13, 1976. The object of the Convention was to ensure the protection of wetlands, defined as permanent or temporary expanses of marshes, bogs or natural or artificial waters regardless of whether the water is stagnant or running, fresh, brackish or salt and including marine waters whose depth at low tide does not exceed six metres.

3.2 The structure of the Constitutional Court's review of environmental protection legislation as a consequence of the absence of a basic rule on the environment

The absence e of a basic rule on the environment has deprived the legal system of parameters by which to assess the legality of the primary discipline dedicated to the environment protection directly, i.e. free from effects on health and landscape. This is best illustrated by the issue of compensation for environmental damage regardless of whether the damage has any deleterious effects on human health or landscape integrity[16]. The Italian law has assigned the locus standi only to the Ministry of Environment, in

[16] In Italy the introduction of the institute of environmental damage occurred before the transposition of Directive 2004/35/EC. The law that established the Ministry of the Environment (law no. 349 dated 8 July 1986) was the first provision for liability for damage to the environment regardless of the repercussions for related issues of health property etc. In other European countries, however, the adoption of Directive 2004/35/EC has been a real breakthrough. Until this Directive was transposed into French law, in France liability for damage to the environment was decided on the basis of the law governing the damage done by neighbours. Although supported by a courageous and creative case law (see above, note 6), this interpretation still remained placed in the perspective of inter-private law relations. In Germany the model of environmental liability that applied before the transposition of Directive 2004/35/EC (which only occurred in 2007, when the *Gesetz zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über Umwelthaftung Vermeidung und zur Sanierung von Umweltschäden* came into force) was based on the law on civil liability for environmental damage (*Umwelthaftungsgesetz*) dated 10 December 1990, which remains in force. This law provides that where the release of a substance into the environment by one of the plants listed in Appendix 1 of the law results in death or injury to the body or health or property of a subject, the plant owner must compensate the subject appropriately (par. 1). This meant that only injuries relating to assets already protected by civil law were subject to compensation, not those connected with a "new" asset, as the environment could be. This is despite the fact that the 1990 law specifically relates to environmental liability, which should have increased the scope of its protection beyond that traditionally afforded by civil law. See, ex multis, *Manβnahmen des Wohnungsamts* (1952) 6 BGHZ 270, 278; M. Raff, *Private Property and Environmental Responsibility – A comparative study of German Real Property Law*, in The Hague, 121 (2003); J.P. Byrne, *Property and Environment: Thoughts on an Evolving Relationship*, in Harv. J.L. & Pub. Pol'y, 28, 679 (2004); E. Ferrari, *Le bonifiche dei siti contaminati come attività amministrative di ripristino*, in 5 Riv. giur. ed., 199 (2015); R.J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, in U.C.L.A. L. Rev., 703 (2000).

order to start the judgment of compensation[17]. This means that local authorities, environmental groups and, *a fortiori*, ordinary citizens have no locus standi for liability action. This choice could find an obstacle, or at least an *ex post* parameter of prudent evaluation, in a basic rule that categorised environmental protection as a right/duty of which each citizen is the imputation centre. It is difficult, of course, to discuss the potential effects of a hypothetical rule. Now we would like to highlight how provisions relating to environmental damage have developed into an incomplete constitutional framework because of their links to the concept of direct protection. This has prevented the most controversial rules and, such as that on locus standi[18], from being taken into consideration

[17] The Spanish legal system, for example, recognises the *locus standi* of individuals and associations (see, in this regard, Art. 41, par. 1, of the law no. 26 dated 23 October 2007, which suggestions that an action for environmental responsibility can be started *ex officio* following the operator's request or the instance of any interested person). This provision is not surprising; it is in keeping with a legal system that allows individuals, as stakeholders with a general interest in constitutional legality, to have direct access to constitutional justice. Moreover, the text of Art. 45 of the Spanish Constitution, which is dedicated to environmental protection has to be taken into consideration as contextualisation element of the rule on the *locus standi* with respect to environmental damage. This article considers a healthy environment to be a right of all citizens, rather than of the object of a general state duty of protection by state institutions («everyone has the right to enjoy an environment suitable for personal development, as well as the duty to preserve it. The public authorities shall safeguard rational use of all natural resources in order to protect and improve the quality of life and preserve and restore the environment, relying on the indispensable collective solidarity. Those who are shown to have violated the provisions of the previous paragraph within the time allowed by the law on criminal or administrative sanctions, as appropriate, shall have an obligation to repair the damage caused»). See B. Pozzo, *Il recepimento della direttiva 2004/35/CE sulla responsabilità ambientale in Germania, Spagna, Francia e Regno Unito,* in 2 Riv. giur. amb., 207 (2010).

[18] As far as the *locus standi* to defend the right to healthy environment is concerned, some fairly old statements by the Supreme Court about the right to health are of interest. The Court stated indeed that the perspective that there is legal protection only in cases of exclusive link between an asset (or a fraction of it) and one particular individual, or a group of them - and then assimilated to the individual - is conditioned by a patrimonial setting of legality and, because of conditioning, risks to limit the irresistible trend to actionability of claims which is a cornerstone of our Constitution (Cass. SS.UU., October 6, 1979, n. 5172, in Foro it., 2302 [1979]). The decision to assign the Ministry the exclusive locus standi for the environmental damage seems, instead, the result a patrimo-

on the basis of an authoritative paradigm as that represented by the Constitution[19].

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nial conception of environment, somewhat discordant from the current constitutional provisions (see the note below).

[19] In the sentence no. 641 dated 30 December 1987 the Supreme Court dealt with the issue of *locus standi* with respect to environmental damage, governed at the time by Art. 18 of the law establishing the Ministry of the Environment (among the many comments on this decision see particularly the critical approach of E. Ferrari, *Il danno ambientale in cerca di giudice e…d'interpretazione: l'ipotesi dell'ambiente-valore*, in Le Reg., 525 [1988]). The judgment, however, was not focused on the illegitimacy of individuals and environmental groups, but on the issue of jurisdiction. In other words, called upon to judge the constitutionality of the attribution to jurisdiction on environmental damage, the Court focused on whether the legitimacy of the Minister (at the time and also of the local authorities) could shift the focus of jurisdiction to outside the sphere of ordinary jurisdiction and, in particular, whether jurisdiction over such cases could be assigned to the Court of Auditors. In its judgment the Court stated that the right of action, which is attributed to the State and to the local institutions, is not related to the costs they may have incurred to repair the damage or the economic loss they may have suffered; instead it is due to their responsibility to protect the public and the communities in their area and in the interests of balancing the ecological, biological and sociological factors affecting the territory concerned. For the private citizen an environmental damage would be unjust to the extent that it assumes significance. However the protection of the citizen who has suffered a prejudice from an environmental damage is stated. The Constitutional Court, therefore, considered the question of legitimacy to be judged as unfounded on the grounds that environmental damage is not comparable to the loss of revenue, even in the abstract sense, and that no patrimonial matter was involved. The Court stated that the environment is "public" in that it exists for the collective enjoyment of the community, but it cannot be purchased in the perspective of *jus escludendi*: in other words the environment cannot be considered "public" in the sense that it belongs to the public bodies, although it should be "for the collective and appropriate use of the public, in the public interest" (on these issues, see M. Renna, *La regolazione amministrativa dei beni a destinazione pubblica* [2004]). The premises of the development of the concept of common goods - which is still controversial - can be found here. Common goods are things that express functional utility to exercise fundamental rights and the free development of the person. The commons must be protected and safeguarded by the legal system, also for the benefit of future generations. Regardless of whether the holders of common goods are public or private legal entities, the collective use of common goods (subject to the limitations and conditions imposed by law) must be guaranteed (in this sense the law draft enabling the Government to review the Chapter II of Title I of Book III of the Civil Code prepared by the so-called "Rodotà's commission"). Though still not made a legal rule, the category of common goods is still of relevance to case law (see Cass. SS.UU., 14 February 2011, n. 3665 stating that, where a property, regard-

Another effect of the lack of reference to environment in the fundamental principles of the Constitution concerns the structure of the Constitutional Court's review of environmental protection legislation. The review focused on the distribution of legislative powers in the environmental field. This was not just about the phase following the reform of Title V: even before 2001 environmental legislation - which was much less extensive than it is today - had been subjected to review by the Constitutional Court about the most relevant issues of the allocation of legislative, and sometimes administrative, competences. The situation has become even more significant when environment was contemplated by the Constitution in the article dedicated to the distribution of legislative powers between State and regional administrations[20].

The meaning of the concept of environment, as we will see, has long involved the Constitutional Court. Before dealing with this issue, however, it seems worth noting that, partly because of the absence of a basic rule on the environment (aiming, of course, to protect the environment *directly*), the "construction" of the concept in question by the Constitutional Court mostly occurred in a structured judgment designed to address the issue of who is competent to make decisions about the environment, rather than the scope and basis of such decisions.

This had a least two significant implications.

The first concerns a certain confusion between the profiles related to the allocation of legislative powers and those concerning the exact content of the rules reviewed by the Constitutional Court. In many instances, as we will show, disputes between State and regional administrations relate to the legitimacy of regional rules that, based on the (controversial) principle of the maximisation of protection, rose up the environmental protection standards as they were stated in State law. The issue of the legitimacy of such rules is a very difficult one as it involves the same identity of the environmental protection principle, i.e. its absolute or (more or

less of its ownership, is attributed to the implementation of the welfare state due to its intrinsic features, particularly those relating to the environment and landscape, such goods shall be considered outside of the outdated perspective of Roman dominium and of code-relating "common" property, that is, regardless of the property as instrumentally connected to the realisation of the interests of all citizens.

[20] G. Rossi, *Diritto dell'ambiente*, 44 (2010).

less) topics interrelated with neighbouring and sometimes potentially conflicting. We will deal with this in depth in the following section. Now we would like to highlight the inadequacy, or at least redundancy, of the judgment in relation to a similar question, that of the constitutionality of the "incremental" logic typical of some regional administrations.

As known, in this kind proceeding the only basic rule that can be considered by the Court is the rule relating to the allocation of legislative powers. It follows that the Constitutional Court has not been able to point out the intrinsic reasonableness of the hyper-regulatory logic expressed by the regional administrations, but it was inexorably limited within the logic scheme of legislative power allocation.

This has sometime produced surprising results.

For example, the proceedings which take into account State laws on the establishment of precise threshold values of electric field as basic rules[21]. This idea is not meaningless. The sense is to limit the regional administrations' hyper-rigorist trends without formally putting into question the incremental principle. These judgments asserted that the discipline of the threshold values of the electric field was not a part of the State law governing environment, but rather of the matter competing with energy and communication system; the regional rules that increased the State standards were ruled illegitimate as these standards were defined as basic rules and therefore irrevocable (not even *in melius*) by the regional legislative power.

We will explore the principle of incremental legitimacy in more detail later. Now we would like to stress the logical forcing by the Constitutional Court: to reduce the hyper-control by the regional administration the Court has paradoxically preferred to go beyond the boundaries of the State regulation on environment and took the concurring competences into consideration. That in accordance with a basic principle (see next paragraph): the idea that in the environmental field, the principle of enhanced protection is always in force and hence the easiest way to control the regional administrations trends would be to avoid considering environment as a matter.

The contribution of the Court to assessing the constitution-

[21] See Corte Cost., 7 October 2003, n. 307, in 2 Riv. giur. amb., 257 (2004).

ality of the incremental principle would probably have been more meaningful if it had also been reflected in the form of an interlocutory judgment. If it had been possible to review the legitimacy of the regional "incremental" law in the light of a basic rule on environmental protection then perhaps today we would not be dealing with the ambiguities that characterise constitutional case law on the division of competence in environmental matters.

The introduction of a basic rule on environmental protection might have the benefit of reducing the "drama" of the Constitutional Court's review of the assignment of legislative powers.

It is also relevant that the Constitutional case law on environment has mostly been expressed in terms of the allocation of competences to the State and the regional administrations because - as the Constitutional Court has pointed out repeatedly - this decision relates only to the holders of legislative power[22]. This means that private citizens that cannot participate in the proceeding. The same is true for environmental associations, although the Aarhus Convention[23] and its implementing regulations[24] do grant them the right to access justice in relation to environmental matters.

All this is particularly problematic because of the peculiarly detailed nature of environmental regulations, which often take the form of *ad hoc* provisions (the case of the decree that "saved" the Ilva of Taranto is a good example of this)[25]. The protection of private bodies, even in their possible associated forms, appears to be

[22] Corte Cost., 24 July 2009, n. 250, in 4 Riv. giur. edil., 1047 (2009); id., 23 July 2009, n. 233, in 6 Riv. giur. amb., 941 (2009); id., 24 July 2009, n. 250, in 4 Riv. giur. edil., 1047 (2009); id., 18 June 2008, n. 216, in Ragiusan, 65 (2009); id., 17 March 2006, n. 116, in 6 Giur. it., 1372 (2007).

[23] See the Aarhus Convention on access to information, public participation in decision-making and access to justice on environmental issues in the EU, signed on 25 June 1998 and ratified as law no. 108 dated 16 March 2001. See also: Z. Szende, K. Lachmayer (eds.), *The principle of effective legal protection in administrative law*, (2016), M. Pallemaerts, *Access to Environmental Justice at EU level: Has the Aarhus Convention Improved the Situation*, in M. Pallemaerts (ed.), *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, Europa Law, 312 (2011); ECJ, joined cases C-401/12 P, C-402/2012 P and C-403/2012 P, *Council and others/Vereniging Milieudefensie and Stichting Stop Luchverontreiniging Utrecht*.

[24] For discussion of the impossibility of entities other than holders of legislative power participating directly in the Supreme Court proceedings see Corte Cost., 2 December 2013, n. 285, in I Riv. giur. edil., 1, 39 (2014).

[25] See Corte Cost., 9 May 2013, n. 85, in 3 Giur. cost., 1424 (2013).

weakened: the protection will be available when the *ad hoc* provisions would be followed by an implementing administrative rule, to be challenged urging the judge to introduce the incidental question of the review by the Constitutional Court (relating to the rule prior to the contested provision).

However, the review by the Constitutional Court as incidental question cannot rely, as we have seen, on a basic rule specifically governing environmental protection and possibly concerning the *an* and the *quomodo* of the balance between the principle in question and those ones potentially conflicting. The consequence is quite predictable: the increasing use of *ad hoc* provisions combined with the absence of a basic rule on environmental matters from the Constitution mark an alarming trend that risks causing the collapse of the regime of wide justiciability provided by the Aarhus Convention on environmental protection.

4. Environment as a matter

As mentioned above, the issue of the allocation of powers, although no doubt relevant to the development of environmental law has ended up somewhat monopolising the attention of interpreters of the law.

The issue of the delimitation of the matter "environment" is closely linked to the recognition of the constitutional principle relating to the environment. We have already noted that the lack of a constitutional basic rule has sometimes compromised the debate on the allocation of legislative powers, resulting in constitutional case law characterised by some logical-conceptual forcing. The kind of interference that has been found between the environment intended as a principle or as matter is not the only one. Analysis of the constitutional case law of the last decades is useful here: whilst the absence of a basic rule has increased the number of the disputes on the allocation of powers it is the recognition of the constitutional principle relating to the environment (though not governed by any specific constitutional provision) that has allowed the Court to reconstruct the issue of the an allocation of powers as characterised by a particular fluidity and by a strong decisional polycentrism.

At least until 2007 the Court advocated what interpreters have defined as the "de-materialisation" of the environment: ac-

cording to the line of the Constitutional Court's interpretation, the latter should not be intended as a real matter, but rather as a constitutional principle that applies wherever there is a requirement for environmental protection. The main consequence of this point of view became evident in the aftermath of the reform of Title V of the Constitution, which - as is well-known - introduced the term "environment" into the text of the Constitution, thereby giving the State exclusive competence to legislate on environmental matters. The new provision was received with considerable scepticism[26] since it was considered an expression of an anachronistic centralising logic. This logic conflicted both with current legal trends (and in particular with the federalist basis of the law no. 59 dated 1997 to which, according to some doctrine, Constitution law no. 3 dated 2001 was intended to give a constitutional value) and established constitutional case law that had brought environment with the jurisdiction of concurrent State-regional administrations (on the grounds that Art. 117 of the Constitution, previously in force, had not covered this matter)[27]. From this widespread scepticism a substantial "neutralisation" of the constitutional amendment. The Constitutional Court did not hesitate to point out that "with regard to environmental protection, the existing plurality of legitimacy reasons through direct regional interventions aiming to simultaneously meet (…) more needs than those of unitary character (as defined by the State) had not to be eliminated"[28]. This meant that despite the unequivocal nature of the amendment introduced by Art. 117 Cost., the State's role in the environmental protection would be limited to the identification of "uniform standards of protection throughout the country".

The resulting interpretation is thus not so different from the

[26] See G. Manfredi, *Standards ambientali di fonte statale e poteri regionali in tema di governo del territorio*, in Urb. app., 296 (2004).

[27] See Corte Cost., 22 May 1987, n. 183, in Quad. reg., 1399 (1987); id., 29 December 1982, n. 239, *ivi*, 213 (1983); id., 21 December 1985, n. 359, in I Rass. avv. Stato, 223 (1986); id., 27 June 1986, n. 151, in Foro amm., 3 (1987); id., 20 December 1988, n. 1108; id.,15 November 1988, n. 1029, in Riv. giur. amb. (1989). For a critical interpretation of post-reformation case law, see G. Manfredi, *Tre modelli di riparto delle competenze in tema di ambiente*, in Ist. fed. (2004).

[28] Corte Cost., 26 July 2001, n. 407, in Giur. cost., 2940 (2002). See also Corte Cost., 28 March 2003, n. 96, in Ragiusan, 198 (2003); id., 24 June 2003, n. 222, in Riv. giur. amb., 1002 (2003); id., 4 July 2003, n. 227, in I Foro it., 2882 (2003); 7 October 2003 n. 307, in Giur. cost., 5 (2003).

pre-reform interpretation, in which - as we have seen - environment was attributed to the concurrent jurisdiction. This result, namely the effective neutralisation of the constitutional reform, has been pursued by the Court taking into account the environment intended as a constitutional principle. The syllogism expressed by the Court can be summarised in the following terms: matters have predetermined and precise boundaries, whereas constitutional principles have inherently unstable borders; the protection of the environment is a principle of constitutional importance, therefore it is not a real matter[29].

This conclusion is certainly interesting, first because of its apparently paradoxical nature: as we have seen, the Constitution does list environmental protection among its fundamental principles and although the Constitution refers explicitly to the environment in the article dedicated to the distribution of powers, through a kind of historico-legal contortion the Constitutional Court denies that environment is a "matter" on the grounds that it is intrinsically a principle[30]. This, however, is not too surprising, as it stresses the overcoming of some positivist principles, first of all that one concerning the identity of legislation and right. The less persuasive aspect of the Constitutional Court's position is the main premise of the above-mentioned syllogism, namely the intrinsic incompatibility of legal principle and matter. This incompatibility seems excessively peremptory[31] and, ultimately, too strong. If it were generally accepted that every time a constitutional principle is considered relevant it is impossible to identify a corresponding matter, Art. 117 of the Constitution would have to be regarded as a kind of empty box. Ultimately, this would imply that in most cases the distribution of powers between State and

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[29] F. Benelli, R. Bin, *Prevalenza e "rimaterializzazione delle materie": scacco matto alle Regioni*, in Quad. cost., 1185 (2009); F. Benelli, *La smaterializzazione delle materie. Problemi teorici ed applicativi del nuovo Titolo V della Costituzione*, (2006).

[30] R. Ferrara (*La tutela dell'ambiente fra Stato e regioni: una storia "infinita"*, in I Foro it., 692 [2003]) highlights that the Constitution explains the reference to the environment « no matter it can be considered as a "principle", too».

[31] In a critique G. Cocco, A. Marzanati, R. Pupilella (*Ambiente: il sistema organizzativo e i principi fondamentali*, in M.P. Chiti, G. Greco (ed.), *Trattato di diritto amministrativo europeo*, 209 [2007]) state that «it is one thing to enhance the cross-sensitivity of X in relation to ecology, but another thing to misunderstand that at least the attention to essential environmental factors (air, water and soil) has finally drawn to a self-sufficient and self-referring content».

regional administrations is an impossible task.

This scenario was, however, averted by a drastic change to constitutional case law, which since 2007 has begun to "take seriously"[32] the provisions of Art. 117 of the Constitution on the State's competence in the field of environment. The undisputed constitutional value of the protection of the environment has ceased to be an obstacle to recognising the protection of the environment as a matter.

So what the new recognition of environment as a matter of legislation begun. This process, however, had no disruptive effect: in other words, it was not the recognition of the environment as a matter (and, therefore, as a State matter) that resulted in the marginalisation of the regional administrations.

There are at least two sets of reasons for this.

The first set concerns the increased importance of the principle of loyal cooperation to constitutional case law. The Court has used this principle to assert that whenever the State interferes in matters that fall under the jurisdiction of regional administrations (in this case we speak of competence combining or overlapping, which in the case of environment very often concerns the neighbouring matter of territorial government), it is necessary "to adopt measures implementing the same interventions and involving, through appropriate forms of cooperation, the regional administrations in whose territory the measures are intended to be realised"[33]. The instruments of cooperation are numerous: the most common are agreements between unified State-Regions or State-Regions-local autonomy Conferences. By finding suitable administrative tools through which it can exercise its decision-making powers the Court has managed to mitigate the centralization of the matter of the protection of the environment and, conse-

[32] G. Manfredi, *Sul riparto delle competenze in tema di ambiente e sulla nozione di ambiente dopo la riforma del Titolo V della Parte seconda della Costituzione*, in Riv. giur. amb., 1008 [2003] is critical of the Supreme Court's case law and irrespective of the reform of the Constitution.

[33] Corte Cost., 29 January 2005, n. 62, in Ragiusan, 170 (2006); id., 20 November 2009, n. 307, in 6 Giur. cost., 4623 (2009). See also Corte Cost., 21 December 1985, n. 359, in Giur. cost., 2552 (1985); id., 27 June 1986, n. 153, in Riv. giur. urb., 16 (1987); id., 15 May 1987, n. 167, in I Foro it., 331 (1988); id., 28 May 1987, n. 201, in Riv. giur. amb., 639 (1987); id., 29 October 1987, n. 344, in Giur. it., 1466 (1988); id., 30 December 1987, n. 617, in Riv. giur. amb., 113 (1988); id., 10 March 1988, n. 302, in Giur. it., 611 (1989).

quently, of all the matters for which they interrelate, although formally of shared or regional competence.

The second reason why reform of Title V can be considered a kind of Copernican revolution concerns the increasingly influential role of the supranational rules on environmental protection. Most environmental protection regulations are derived almost wholly from very detailed and precise European or international sources. This should help to defuse the debate about the allocation of powers to the State and the regional administrations whilst also improving understanding of the problem of the allocation of powers in a more complex and articulated system. In a context where environmental rules are mostly written off by national borders and take hyper-detailed contents, the focus of the problem of the allocation of powers is in relation with the incremental principle (namely that the environmental standards set by the legislation can be raised from lower levels of government from that one generating the *in melius* derogated rule).

The value of this incremental principle also concerns both the relationship between the national and European legal system and the relationship between national and regional legislation.

In the first case the idea widespread among the jurists refers to the presence, within the European law in force on environment, of the principle of a more stringent protection always accordable by the Member States. Some of the reasons for this belief are to be found in Art. 193 of the Treaty of the Functioning of the European Union (ex Art. 176), which provides that "the protective measures adopted under Art. 192 (i.e. in order to protect environment) do not prevent any Member State from maintaining or introducing provisions designed to provide greater protection. These provisions must be in accordance with the treaties. They shall be notified to the Commission". The rule in question, in fact, makes no mention of a general incremental principle[34].

In fact, it does not prejudge whether Member States can increase environmental protection according to two conditions.

The first condition is that the increase should not be con-

[34] M. Renna, *Il sistema degli 'standard ambientali' tra fonti europee e competenze nazionali*, in *L'ambiente nel nuovo Titolo V della Costituzione*, in B. Pozzo, M. Renna (eds.), in Quaderni della Rivista giuridica dell'ambiente, 15 (2004). See also M. Mazzamuto, *Diritto dell'ambiente e sistema comunitario delle libertà economiche*, in Riv. it. dir. pubbl. com., 1571 (2009).

trary to the UE Treaty rules protecting potentially conflicting values and guaranteeing freedom of movement. The second condition is that the European Commission must be informed about this increase. EU law cannot, therefore, be considered as establishing the principle of incremental protection.

Moreover, taking into account matters other than environment one may conclude, from a general and systemic perspective, that the evolution of European law is not inspired by a blind incremental logic; on the contrary it appears to be based on the idea that there should be a balance between potentially antagonistic principles. The most obvious example is the rules governing the public tenders, which are certainly necessary or the effective implementation of the principle of free competition and the four European basic freedoms. As far as tenders are concerned[35], the Commission warned Member States about the risks of hyper-regulation (sometimes called "gold-plated regulation"), which is often associated with the refusal of principles close to that one directly protected. In the case of procurement, for example, the directly protected interest concerns the accessibility to the tenders and non-discrimination against operators from other Member States. Ultimately, the European Union seems more and more inclined to prefer the principle of balance to the more primitive notion of incremental protection and this necessarily has implications for environmental protection regulation.

As far as the relationship between State and regional administrations in domestic law is concerned, there is an extensive[36] and somewhat contradictory body of constitutional case law dealing with the legitimacy of the incremental principle[37]. This princi-

[35] European Commission, Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market (COM [2011] 15); also a document dated 3 March 2010 entitled Europe 2020 - A strategy for smart, sustainable and inclusive growth. On these issues see also the Opinion of the European Economic and Social Committee on the Green Paper from the Commission on policy options for progress towards a European contract law for consumers and businesses - (COM [2011] 15).

[36] The Court's decisions defined the principle in question was defined as red line with respect to the environment. See A. Romano Tassone, *Stato, Regioni ed enti locali nella tutela dell'ambiente*, in Dir. amm., 114 (1993). For a critical perspective on the incremental principle, see F. Fonderico, *La tutela dall'inquinamento elettromagnetico*, 105 (2002).

[37] Some Constitutions state this (controversial) principle explicitly. This applies,

ple began important for the constitutional case law around the late 1980s in a series of decisions relating to rules on hunting in which the Court declared some regional rules reducing the number of huntable species (in order to strengthen environmental protection) unconstitutional. Given the specifics of the case in which this ruling was made it does not appear to pose any problems: if personal and ethical beliefs are left to one side it seems indisputable that the right to hunt is not an expression of a constitutional principle that may be unfairly prejudiced by a regional intervention that strengthens the system of wildlife protection established by the State. The alarming aspect of these early judgments was that State legislation on environment has always been minimalist, representing a baseline on which regional administrations could build to strengthen protection, because of the constitutional principle of environment protection[38].

This idea has also established itself in more complex areas than that of the hunt[39], resulting in a jurisprudential trend characterised by an absolutisation of environmental principle.

The issue certainly deserves further study, in addition to this contribution. On the principle of incremental protection, we would like to point out that the recent constitutional case law began to carry out a reversal from its original approach: many

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in particular, to the Spanish Constitution, which in Art. 149 no. 23 states that the State has exclusive competence with respect to basic legislation on environmental protection subject to the right of the Autonomous Communities to enact additional safeguarding rules.

[38] Corte Cost., 7 October 1999, n. 382, in Le Regioni, 190 (2000); id., 5 November 2007, n. 378, in www.cortecostituzionale.it; id., 14 aprile 2008, n. 104, ivi; id., 22 February 2010, n. 67, ivi. *Contra*: Corte Cost., 6 February 1991, n. 53, in I Foro it., 3000 (1991). In these decisions on air pollution the Supreme Court recognised as constitutionally legitimate the national legislation (i.e. the DPR no. 203 dated 1988), which specifies that only the State can set minimum and maximum release values (with regional administrations only permitted to set more stringent limits in the case of "particularly polluted areas" or due to "environmental needs"). This ruling was based on the assumption that the central authority has better access to scientific expertise than the regional administrations and the need to ensure uniformity of treatment of the various competing plants. See also Corte Cost., 7 November 2003, n. 331, in Giur. cost., 3511 (2003).

[39] Corte Cost., 7 November 1994, n. 379, in Giur. cost., 342 (1994); id., 25 May 1987, n. 192, in Cons. Stato, 858 (1987); id., 30 June 1988, n. 744, in Giur. cost., 3403 (1988); id., 27 July 1992, n. 366, in Dir. e giur. agr., 24 (1994); recently id., 29 October 2002, n. 407, *cit*.

judgments related to the electro-smog threshold values, in which a strong awareness of the interrelation with the environmental protection principle confirm it. This principle cannot, under any circumstances, be regarded as a super-principle that overrides other constitutional principles, such as freedom of economic initiative or - perhaps especially - those relating to the use of essential public services (such as electricity).

We hope that this new approach is not hampered by incorrect, ideologically biased approaches based on the principle of incremental protection[40]. We are referring to Art. 3 *quinquies* of the Environment Code, which states that the regional administrations have the authority to adopt more stringent legal forms of environmental protection than the State provides, but only if the particular situation of their territory demands it and subject to the condition that such additional protection does not entail any arbitrary discrimination[41]. From an objective point of view this Article appears to be a real obstacle - certainly it is not a sort of *laissez-passer* - for the supporters of the incremental logic[42]. In fact this

[40] Unfortunately the Constitutional Court seems to have made a sort of "reversal" in a recent judgment. In judgment no. 58 dated 29 March 2013 (in 2 *Giur. cost*., 892 [2013]), which states that «Art. 3-quinques reflects the principle affirmed by this Court according to which the regional legislature is permitted to increase environmental standards if doing so does not compromise the balance between opposing needs specifically identified by the State law». It is notable that the decision, which endorses the incremental principle, specifically ascribes the matter to the competing legislature rather than to the State legislature. This is contradictory: if, in fact, the incremental principle is fundamental to our legal systems and that, in particular, has been devoted by the above mentioned Art. 3-quinquies, then logically it should apply to matters governed by the State, in order to overcome the rigid allocation of a competence belonging to the State power.

[41] See D. de Pretis, *Il codice dell'ambiente e il riparto delle funzioni tra Stato e Regioni*, in AA. VV., *Studi sul codice dell'ambiente*, M.P. Chiti, R. Ursi (eds.) (2009).

[42] Even if it is assumed that Art. 3 *quinquies* actually states the so-called "incremental principle", such a norm, being a primary rule, cannot give any complying power in comparison with the national and regional legislation. In other words, it cannot be used to determine the constitutionality of State and regional regulations on environmental questions. Further confirmation of the effectiveness of the provision in question (assuming that it is erroneously interpreted as the foundation of incremental principle) is that the rule in question does not apply to extra-code areas, such as noise, electromagnetic and light pollution although these areas are clearly related to the environment (all sectors, however, where the use of quantitative threshold values is widespread and which

rule provides a mechanism for restricting regional administrations' protectionist initiatives as it requires them to limit such initiatives to situations where there are demonstrable territorial peculiarities that demand a more stringent level of protection than the State provides. An ecologically minded regional administration cannot, therefore, adopt hyper-cautious regional rules that depart from the standards set by the national legislator. Nor can the regional legislature rely on an individual interpretation of the principle of precaution to raise the level of protection beyond that provided by the State law. The role of the sub-state source of law is, therefore, far from being strengthened by the standard code-related regulation mentioned above.

A similar perspective also applies to the sectoral rules in the Environmental Code, in which the logic of the incremental protection would seem, at first glance, confirmed respect to a specific case. This is best illustrated by Art. 271, par. 4, which provides that air quality plans and programs set specific release limits and stricter requirements than those contained in the Code (...), as long as they are necessary to pursue the aims concerning the air quality. Even in this case, in our opinion, the incremental logic is not implemented: the presence of a sectoral rule authorising the *in melius* derogation confirms the absence of a general principle of protection maximisation[43]. If the law recognised a general principle of protection maximisation there would be no need for specific provisions, such as the one cited.

It follows that the logic of incremental protection, and its implicit premise - the over-primary nature of environmental interest and the impossibility of comparing it with other constitutional values - are not a part of the legal system in the field of environment.

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the regional hyper-cautionary logic focuses on).

[43] A similar assertion can be made with reference to pre-existing par. 10 of Art. 281 of the Environment Code, which provides that in adopting plans or programs and in granting authorisations to deal with particular health risks or areas requiring special environmental protection, the regional and autonomous provincial administrations may set release threshold values and requirements more stringent than those set out in this title, if this is necessary to achieve the threshold and the target values for air quality. This rule, now repealed, supported through a series of stringent restrictions the regional intervention aimed to raise the overall standards of environmental protection, so as to interpret the hypothesis of an "upside" redefinition of the same standard.

This conclusion is also supported by an argument about uncertainty management. If the constitutionality of the incremental principle is questionable then we cannot neglect the possibility for the legislator to regulate, in environmental field, phenomena whose potential implications he doesn't know fully. In these cases the precautionary principle[44] (Art. 191 TFEU and Art. 301 of the Environmental Code) - which requires the competent authorities, including the legislature, to take appropriate measures to prevent damage to the environment based not just on firm scientific evidence about risk but also potential risks - can be invoked. It is, obviously, an extremely "complex" principle. Misapplication, for example adopting measures designed to protect against remote or hypothetical risks, poses a real risk to the development of certain economic-industrial sectors. As far as the State-regional administrations relations, if the logic of incremental protection is endorsed, dangerous synergies with the precautionary principle could be determined. The incremental protection advocated by the regional administration may, in fact, easily rely on a high number of situations of scientific uncertainty and introduce levels of adjustment which systematically go beyond the State's standards and thus undermine the unity of national environmental regulation framework, which has implications for the relative economic and industrial competitiveness of different areas of the country.

5. Environment as legal issue

The last problem we will discuss is probably the most complex: the configurability of the environment in terms of actual legal right. It could be argued that this topic should have been discussed first, due to its importance and the sense in which this is a preliminary issue, but our decision to postpone the analysis was not taken lightly. We wanted to highlight a fundamental issue,

[44] B. Marchetti, *Il principio di precauzione*, in M.A. Sandulli (ed.), *Codice dell'azione amministrativa*, 149 (2010); F. Trimarchi, *Principio di precauzione e «qualità» dell'azione amministrativa*, in *Riv. it. dir. pubbl. com.*, 1673 (2005); F. De Leonardis, *Tra precauzione e ragionevolezza*, in 26 Federalismi.it (2001); Id., *Il principio di precauzione nell'amministrazione del rischio* (2005). See also, *ex multis*, B. Wiener, *Precaution*, in D. Bodansky, J. Brunnee, E. Hey (eds.), *Oxford Handbook of International Environmental Law* (2012).

namely that the debate on unity of the environment from the perspective of the law (on its material or immaterial nature and ultimately on its real existence was actually quite far removed from the practical problems in the filed of the protection of environment.

The positions expressed by the literature on controversial identity of the concept of environment represent a valuable legal heritage. There was a deep and very broad process of reflection; it has often involved extra-legal issues, such as the still relevant dialectics between supporters of the anthropocentric interpretations and those ones who would prefer its overcoming, that is the affirmation *of* an environment law (i.e. where the same environment is, in some way, the metaphorical "owner") instead of a right *to* the environment.

It is not possible to report the debate in full here as it is characterised by a great heterogeneity not only about content, but also the related methods of investigation. We will confine our discussion to the positions that had most influence on the debate about the environment and on the elaboration of legal institutions that today form the existing law.

The traditional idea to which contemporary interpreters still need to respond, is represented by what is termed somewhat misleading "pluralist" theory. Pluralist theory derives from research by Massimo Severo Giannini[45] in which the environment was denied the dignity of uniform legal right, rather recognising in it the merely verbal summary of a number of legally relevant profiles, referring to the known triad: landscape, urban planning and health. On the basis of this premise, a good part of twentieth-century doctrine was an attempt to find the balance between the above polarities, assigning each time one of them a prominent leading role[46]. Giannini's pluralist premise (which might more appropriately be referred to as the "denier" premise) therefore had a strong feedback from the doctrine.

The premises of pluralist theory were the features of the legislation then in force and, in particular, the silence of the Con-

[45] M.S. Giannini, *Ambiente: saggio sui diversi suoi aspetti giuridici*, in Riv. Trim. Dir. Pubbl., 15 (1973); A. Predieri, *Paesaggio*, in Enc. dir., XXXI, 507 (1981).
[46] E. Capaccioli, F. Dal Piaz**,** *Ambiente (tutela dell'),* in Noviss. Dig. it, Appendice, 257 (1980).

stitution about the protection of the environment, the fragmentary nature of the sectoral legislation *latu sensu* relating to environmental issues and, lastly, the absence of an administrative body institutionally aiming to environmental protection.

These circumstances have been overcome thanks to a series of decisive reforms, in good part enhanced by European Union.

Before examining the impact of these reforms on the so-called pluralist interpretation, it should be stressed that although the pluralist interpretation has been enjoyed by the literature, it has had little impact on constitutional case law.

Even before 2001 (when textual reference to environment was introduced into Art. 117 of the Constitution.) the environment was recognised as a right of great constitutional significance in constitutional case law. This was not, however, reflected in detailed study of the legal matrix characterising that right. The Constitutional Court was mostly engaged in underlining the cross-cutting nature of the environment concept (and hence the related legislative and administrative powers), which clearly did not help to identify a common definition of the notion.

As we have noted above, the jurisprudential debate on the environment focused on the difficulties surrounding allocation of legislative and administrative powers. There are many reasons for this. In our opinion one reason was the absence of a constitutional provision that could have represented a parameter on which to build a reflection aimed to understand not "who" decides on the environment, but "what do we mean when we talk about environment".

It was not, therefore, the Constitutional Court case law to have started the crisis of the so-called pluralist theory. This crisis was, however, caused by the legislative reforms that have come into force in the last few decades. This statement needs to be clarified.

The pluralist/denier thesis suffers from a structural fallacy involving the investigative perspective on which it is based, namely the idea that the legal value of the concept of environment can be denied or affirmed in accordance with the degree of "firmness" of regulations and the setting prepared by the legislation providing for the protection of the environment.

The approach underlying the positivist argument supported by Giannini is affected by the evolution of positive law, as

a result of which the reference to the environment has "entered" the Constitution, the approval of the Environmental law Code and the establishment of a Ministry for environmental protection.

These three new provisions have not, in fact, resolved several critical issues affecting environmental law. The formal Constitutional treatment of the environment is somewhat unsatisfactory, as we have seen. The fact that the only reference to the environment is in the norm dedicated to the allocation of legislative powers has decisively influenced the Constitutional Court's review and reducing the attention paid to the substantial features of the environmental discipline and to the internal and external limits of the legislature's discretion.

The Environmental Law Code was inspired and supported by a strong intent to systematisation[47]. Nevertheless it has not given particular characteristics of rationality to the system. Many important sectors, such as electromagnetic and acoustic pollution, did not deal with the Code. The same can be said about the organisation of administrative functions[48], representing a highly problematic area of environmental law, in which, ultimately, the strongly interrelated nature of the environment law.[49].

Finally, although awareness of the imperative for efficient, coordinated management of environmental problems may have prompted the establishment of the Ministry of Environment this

[47] In this regard, the decision no. 3838 dated 5 November 2007, in which the State Council has clarified how the corrective decree no. 4 dated 2008 has resulted from the aim to make the current legislative decree a real code, provided with a systematic character and a core of common principles, is to be taken into consideration. he Environmental Code has certainly been an important factor in the implementation of environmental protection and its matrices. This also because of stepped positivization of important principles, most notably that of sustainable development. This, however, was not enough to mitigate the consequences of the failure to explicitly reference the right to a healthy environment in the Constitution. These consequences consist, as has been shown, in the indirect kind of the protection granted by the legal system to the environment, which still "passes" through the protection of different fundamental rights as everyone is entitled.

[48] F. Fracchia, *Introduzione allo studio del diritto all'ambiente. Principi, concetti e istituti*, 89 (2013). Similarly, Id., *Amministrazione, ambiente e dovere: Stati uniti e Italia a confronto*, in D. De Carolis, A. Police (eds.), *Atti del primo colloquio di diritto dell'ambiente*. Teramo, 29-30 aprile 2005, 119 ss. (2005).

[49] M. Renna, *Vincoli alla proprietà e diritto dell'ambiente*, in Dir. econ., 715 (2005).

has not completely resolved the highly fragmented organisation[50] of administrative functions relating to the environment, which is characterised by overlap, particularly in relation to activity-planning at regional level.

If Giannini's methodological theory - based on the legislator's silence to deny the legal relevance of the environment right - is accepted, then the numerous and important legislative initiatives of recent decades mean that anachronistic character of the revisionist thesis must be also be acknowledged.

The latest legislation has not eliminated the problem of finding the legal core of the concept of environment, but it has affected the terms of the debate. Attention has moved from the problem of the existence and unity of the environment to the more complex issue of the categorisation of subjective situations concerning it and to the techniques through which the legal system assure protection to these situations.

Clarification of this point is needed here. The shift away from the traditional debate on environmental right from the *an* to the *quomodo* of its protection should not be represented as an underestimation of the complex nature of the issue under debate. The critical point relates to the different levels on which the empirical and legal matter is situated. There is no doubt that from an empirical point of view the environment is not a unique right; rather it is entailed in a delicate balance of components, each of which in turn is likely to be qualified and treated as a single right. Indeed, even before, always from a purely phenomenal point of view, it is not even arguably true that for humanity the environment necessarily represents something to be enjoyed; on the contrary, it often proves inhospitable and sometimes aggressive. It is enough to recall the literary trope of the stepmother nature, which from Lucretius onwards has been one of the favourite subjects of Western poetry.

None of this has much to do with the problem of environmental qualification as a *right*. From an empirical point of view, a right can be seen as consisting of several entities, as in the case of a

[50] The objectives stated by the legislation in hand put conservation and recovery of the environment corresponding to the fundamental interests of society and quality of life and to the preservation and enhancement of the national heritage and the defence of natural resources from pollution within a systematic framework (Art. 1, paragraph 2, law establishing the Ministry of Environment).

company or an inheritance.

This means that the unity character in law is not compromised by the multiplicity of the asset-component that is found empirically. In order to define the environment as a legal right the various components must be united by a specific legal regime, this would result in the recognition and protection of subjective legal situations related to the right in the context of legal procedures and possibly trials.

The doctrinal conflict affecting recognition of legal situations is cultural, rather than legal. The conflict is between those who consider the environment to be a "terminal" of active legal situations (which show their nature of *rights* when they are considered by the legal system as accomplished and absolute situations and as "*interesse legittimo*" when placed in a dialectical position with the discretional power) and those who are oriented to represent the environment as a source of only *duty* situations, in turn attributed to the solidarity duty provided by Art. 2 of the Constitution[51].

The second approach is completely out of step with current thinking, and not only in relation to the environment. The contemporary jurist instinctively associates legal rights with active situations. Often, adopting an remedial approach, the rights are even recognized *ex post*, taking into consideration the need to give juridical protection under certain circumstances. For example, the still-ambiguous concept of chance was recognized this way.

The "duty oriented" thesis, however, tends to reverse this paradigm and to suggest a different interpretation: the reconstruction of the legal right starting from a passive situation, precisely that of duty, provided by Art. 2 of the Constitution.

Of course we take a very different position to Giannini, who denied the legality of the environment legal right on the basis of (temporary) lack in the positive law; however this idea implicitly denies the relevance of the abundant legislation on the environment and directly reconnects the legal significance of that legal right to a general principle such as that of solidarity.

This approach, however, raises some questions.

The principle of solidarity becomes a source of non-dialoguing duties with specular active situations and, therefore, is

[51] F. Fracchia, *Introduzione allo studio del diritto all'ambiente,* cit. at 48.

ultimately not ontologically distinguishable from a moral duty. The principle of social solidarity, on which the theory in question is based, can turn into a dangerous regulation of extra-legal concepts, according to the idea of an ethical State.

If a legal asset is only interested by duty situations (indeed provided by a very general provision as Art. 2 of the Constitution) an uncontrolled proliferation of legal rights could develop.

In our opinion, the role that Art. 2 of the Constitution can play in environmental matters is antithetical to that reported above: this rule seems to act as a provision of non-relinquishability of certain fundamental rights (including that to a healthy environment) rather than a source of duties. We will deal with this issue in detail later.

At this point it is interesting to consider the implicit premise of the thesis assuming that in the positive law there would not be issues more stringent than Art. 2 of the Constitution from which to infer the existence of *active* situations involving the environmental protection. The arguments for this premise are unconvincing. Whilst the rules on the environment still do not represent an organic and consistent *corpus*, despite the gaps underlined by Giannini having been addressed, it is also true that some legal institutions presupposing the existence of subjective situations different from the duty and included in active situations can be found

At least two starting points can be detected.

The first relates to environmental damage, which - it is acknowledged - entered national law through European law. The main characteristic of this right is that it establishes in terms that are completely new to the domestic legal system, a direct duty to repair environment damage. Therefore, the protection of the environment has lost any instrumental connotation: environmental damage was a source of compensatory obligations to the extent that it had contributed to injury to an additional, independent legal right, mainly health or property.

As long as the compensatory mechanism has developed in the terms described above, the environment has not been recognised as an asset. The introduction of legislation on environmental damage has given the system a significant change: the compensation it guarantees is no longer related to the damage that the polluted environment has caused to the health or property of a par-

ticular subject, but to the damage suffered by the environment itself. Thus the environment was implicitly recognised as legal right in itself: the provision of the compensation has, in other words, shown - but perhaps it would be more correct to say that, at least in part, *determined* – the juridification of the environment as a specific asset.

The regulations on environmental liability are far from perfect. The exclusive State locus standing, and thus the perspective of the ministry as a single *advocate* of the rights of individuals, can be challenged. Such provision (the exclusive State locus standi) could have found an obstacle in a constitutional rule consecrating the right to a non-polluted environment, thus becoming a criterion of the legality for all regulations relating to the environment, including that one that prevents subjects other than the ministry to have a jurisdiction. All these questions show clearly how difficult the environmental damage and, possibly, its perfectibility, still is. In an analysis focused on regulations, is to be considered as relevant is the creation of a system of rules in which the environment is able to be considered apart from its links with different and already protected asset.

The second aspect to be considered is the role played by the procedural rules governing the public choices' impact on the environment. At present the numerous rules on the *quomodo* of public decisions concerning the environment are a sort of magnifying glass on the juridification achieved by the notion of environment as well as on the type of legal relationship between environment and human beings,.

It must be stressed that the rules applicable to environmental administrative proceedings are significantly different from State law no. 241 dated 1990; they mark a strengthening of the guarantees of participation which, of course, correspond to active legal situations for individuals (apart from the reconstructive options in terms of rights or "interessi legittimi"). The special procedure for access to environmental information that, led by international and European laws and today considered as a characterising element of the environmental right[52], shows special character of the rules governing the environmental law.

Another example is the significant gap that exists between

[52] Reference to the Italian decree no. 195 dated 19 August 2005.

the current regime and that foreseen in the general law on access under three different points of view: the greater wideness of the notion of information if compared with to that of the document, the higher number of passive subjects of the compulsory information and, above all, the largest legitimacy allowing access to information "to anyone can ask for it, without declaring his/her own interest"[53].

A similar observation can be made about the right to participation,[54]. At this subject, the consultation[55] in the strategic environment assessments and environment impact assessments and the (possible) public inquiry (that can occur in the first of the two aforementioned procedures[56]), both inspired by an in-the-procedure conception of the right to response definitely broader than that which characterises the standard set by the State law no. 241 dated 1990, is to be considered.

Something similar applies to the procedural rules (which have also been influenced by international and European laws[57]), as they are characterised by an emphasis on objective jurisdiction[58]: the most significant aspect, in this sense, was the active procedural legitimacy accorded to environmental associations identified by the ministry[59]. Objective jurisdiction, by definition, re-

[53] Art. 3, par. 1, decree no. 195 dated 19 August 2005.

[54] Tar, Lazio, Roma, sez. III *quater*, 10 January 2012, n. 389, in www.federalismi.it

[55] Art. 14 and 24 of the Environment Law Code.

[56] Art. 24, paragraph 6, of the Environment Code.

[57] The Convention was signed on June 25, 1998 (ratified by Italy through the Law no. 108 dated 16 March 2001 and adopted through the Council Decision dated 17 February 2005 (2005/370/EC).

[58] A. Police, *Il giudice amministrativo e l'ambiente: la giurisdizione oggettiva o soggettiva?,* in D. De Carolis, E. Ferrari, A. Police (eds.), *Ambiente, attività amministrativa e codificazione*, cit. at 4, 320. They are particularly explicit about the fact that the distinctly subjective feature of the jurisdiction endorsed by many European countries risks jeopardising the effectiveness of European law (see ECJ, 12 May 2011, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen, C-115/09, in Dir. Proc. Amm., 91 (2012) commentary by F. Goisis, *Legittimazione al ricorso delle associazioni ambientali ed obblighi discendenti dalla Convenzione di Aarhus e dall'ordinamento dell'Unione Europea*, in Dir. Proc. Amm., 91 (2012).

[59] Not only the associations recognised by the Ministry have the necessary locus standi: the judge in charge of the case evaluate each case the existence of legitimacy of the association (Cons. St., Sec. VI, 13 September 2010, n. 6554, in 9 Foro

quires an *object*, which is a legal right which the law considers should be given a special protection. This special protection, however, is expressed through the recognition of a specific legal active situation, i.e. the right to action, whose peculiar aspect is not being "hooked" to any basic subjective legal situation.

This specific features demonstrate the inherent legality of the concept of environment (such juridical "strong" as having somehow "deformed" many systematic categories, as seen above), meaning that in our opinion there is no need to cite the principle of solidarity as a crucial factor in legal regulations applying to the environment; however it also reflects a concept of the legal system monopolised by duty profiles.

The recognition of the legal regulation of the environment concept doesn't deny the special extent of vagueness that characterises many of the concepts that "populate" the environmental legislation: this is amply demonstrated by the continuing ambiguity of the concept of waste and the serious consequences of this, especially in criminal law. Although the *quality* of the legislation is questionable this does not affect the legality of the protected right, about which there is now little doubt.

6. Conclusion

The arguments we have made thus far have led us to believe that today, despite the continued absence of a basic constitutional provision governing the environmental protection and the consequences of this for the core of the Constitutional Court's review, is not difficult to call into question the constitutional relevance of environmental protection, as well as the configurability of the environment as unique legal right which subjective legal situations are referred to.

This implies a change: debate about the existence of a legal concept of environment and the possible existence of subjective legal situations referring to it seem to have given way to the ur-

amm., 1908 [2010]; id., Sec. VI, 13 May 2011, n. 3170, in III Foro it., 19 [2012]). In a comparative perspective: M. Delsignore, *La legittimazione delle associazioni ambientali nel giudizio amministrativo: spunti dalla comparazione con lo standing a tutela di environmental interests nella judicial review*, in Dir. Proc. Amm., 753 (2013). See also: J. Wates, *The Aarhus Convention: A Driving Force for Environmental Democracy*, in J. Envtl. Planning L. 2 (2005).

gent problems posed by the special character of environmental guidelines, particularly the potential conflict with the fundamental principles of our general program (see the principles applying to civil liability, right to access and the right to judicial protection, which have been revisited - as we have seen - in the light of rules on environmental damage, access to environmental information and access to justice in environmental matters respectively).

Today the conflict affects not only the regulation of individual rights but also the upper level of the dialectic between opposing interests.

The traditional view is that environment protection is exists in a strong dialectic tension with economic and industrial development governed by Art. 41 of the Constitution. As we have already shown, the Constitutional Court mostly focused on this conflict, although in its review of the allocation of legislative powers it has considered the need for a prudent balance between the above two conflicting values.

This view now seems rather simplistic in that it only addresses the needs of a small segment of society - what would, in nineteenth-century historiographic terminology, be referred to as the "bourgeoisie". The economic crisis has given us a new and complex framework: today the right to a healthy environment seems to be potentially antagonistic to some social rights, such as the right to work or to own a house, rather than to the freedom of to conduct business. This is best illustrated by the well-known Ilva-case (Taranto, Italy), which involved a dramatic conflict between the victims of pollution (not the polluters) and the institutions protecting them from the consequences of that pollution. The criminal judge had ordered the seizure of the plant because of non-compliance with the *Autorizzazione Integrata Ambientale* (AIA) (authorisation complying with the *integrated pollution prevention and control* (IPPC) system as prescribed by the European Union).

These events can obviously be considered from a philosophical, sociological or political perspective rather than a strictly legal perspective.

Nevertheless, the jurist has to overcome the conceptual paradigm that includes in the "genetic code" of environmental law the tension between those who attack the environment and those who are affected by the consequences of such aggression. The questions to investigate seem to have changed somewhat. To

what extent is there a right to pollute? Also to what extent is there is a right to consent to being polluted?

The issue of the existence of the right to be damaged is certainly not new to modern doctrine. The prohibition on "selling one's body" is an example of it. The famous case on dwarf-tossing[60] which dealt with the claimant's freedom to submit to a practice generally considered detrimental to his/her own dignity can also be considered under this framework. On that occasion the French Council of State affirmed the principle that every individual has a duty of social solidarity towards others, and a corresponding duty to him or herself. There is not, therefore, an unlimited freedom to "see one's own rights denied"; in the dwarf-tossing case the right concerned was the legal right to personal dignity.

This topic has traditionally been the province of experts on private law, philosophy and general law theory[61].

The explanation for this is that the cases tend to involve the concept of self-determination, which in turn is the base of valid and effective negotiations. Moreover, it is no accident that the term "human dignity" only appears in the Constitution in the second paragraph of Art. 41, which limits private economic initiative[62].

Today's news leads, however, to consider the idea that the problem of the undeniability of certain fundamental rights should also be studied in the perspective of public law and, as noted

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[60] Cons. État Ass., 27 October 1995, *Commune de Morsang-sur-Orge*, in *Dalloz*, 257 (1996). The case in question was subject to review by the administrative judge because the administrative decision of the local authority, which prohibited all late-night entertainment venues from permitting such activities, was contested by the "victims" of the game of the launch. The applicants alleged the illegality of the prohibition by declaring themselves satisfied with their jobs, which gave them an economic stability to which they might not otherwise had access, partly because of their disability. Called upon to balance some very important constitutional values against each other, the Council of State decided that there can be no restrictions on the preservation of human dignity (in turn interpreted as an essential component of public policy), not even at the instigation of the individual concerned or in order to preserve other fundamental rights such as the right to work or the freedom of economic initiative.

[61] See C. Cricenti, *Il lancio del nano. Spunti per un'etica del diritto civile*, in Riv. crit. dir. priv., 21 (2009); A. Massarenti, *Il lancio del nano e altri esercizi di filosofia minima* (2006).

[62] See G. Azzoni, *Dignità umana e diritto privato*, in Ragion pratica, 75 (2012).

herein, also referring to the issue of the right to a healthy environment.

The possible answers to the question of whether there is a right to consent to pollution range between two extremes. The first holds that recognition of the freedom to abdicate one's right to a healthy environment in favour of another right to which one accords higher priority would demonstrate that law is distinct from morality. The second, however, is that allowing individuals to "opt out" of fundamental rights would mark a crisis of the legal system, as it would in effect be an admission that it was unable to balance conflicting interests.

Of course this is not the right forum for evaluating the subtleties of these positions or describing the positions lying between these extremes. What we would like to emphasise in this discussion of legal regulation is the new framework for dealing with the problem of the definition of the boundaries between legal and meta-legal issues.

In our opinion, one should not ignore the fact that the right to an healthy environment although often cited in the legal system, is destined to remain merely virtual as long as other basic rights, such as the right to work or own a house (which ultimately contribute to emancipation from need), are not adequately satisfied.

The principle of social solidarity, in this sense, necessarily plays a decisive role, not only as an abstention duty (in this case from disrespectful behaviour towards environment), but also as link between the fundamental rights that, if considered in isolation, risk to be relegated in the mere "ought to be" perspective.

SHORT ARTICLES

MEASURING CULTURE AND DEVELOPMENT: UNLOCKING THE UNESCO INDICATORS' POTENTIAL

*Paola Monaco**

Abstract

In recent years, the multifarious possible connections between culture and development have become a hot issue in the global debate. One of the most important actors in this debate is the United Nations (UN) agency responsible for culture, i.e. the United Nations Educational, Scientific and Cultural Organization (UNESCO). The present paper focuses on the role that UNESCO plays, and might play, in understanding and strengthening the relationship between culture and development, especially by means of its Culture for Development Indicators (CDIS).

TABLE OF CONTENTS

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1. Introduction.

In recent years, the multifarious possible connections between culture and development have become a hot issue in the global debate. One of the most important actors in this debate is the United Nations (UN) agency responsible for culture, i.e. the United Nations Educational, Scientific and Cultural Organization (UNESCO). [1] The present paper focuses on the role that UNESCO plays, and might play, in understanding and strengthening the relationship between culture and development, especially by means of its Culture for Development Indicators (CDIS).

After a brief review of the legal instruments used by UNESCO to pursue its objectives, special attention will be devoted

[1] According to Article I (Purposes and functions) of the UNESCO Constitution (adopted on November 16, 1945 and available at http://en.unesco.org/), '[t]he purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education, science and culture'. Similarly, Article 1 of the Charter of the United Nations (available at <un.org/en/charter-united-nations>) defines UNESCO as the agency which contributes to the UN mission to promote peace and security worldwide by fostering collaboration among nations through education, science, culture and communication, on the assumption that respect for and tolerance of cultural diversity is fundamental for guaranteeing the maintenance of peace among different cultures and societies. Today, UNESCO has 195 Members and 10 Associate Members. Its headquarter is in Paris, France.
As Article I (Purposes and functions) of the 1945 UNESCO Constitution (cited above) makes clear, the preservation and management of culture has been at the core of UNESCO's work since its very foundation. In pursuing its mission, UNESCO adopts the broadest possible view on what culture is. As enshrined in the Preamble of the 2001 UNESCO Universal Declaration on Cultural Diversity (available at <unesdoc.unesco.org/images/0012/001271/127160m.pdf>), UNESCO conceives culture as 'the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs'. On this definition of culture, and on its limits, cp. M. Bussani, *The (Legal) Culture of Cultural Property*, in J.A. Sánchez Cordero (ed), *La Convención de la UNESCO de 1970. Sus nuevos desafíos/The 1970 UNESCO Convention. New Challenges/La convention de l'UNESCO de 1970. Les nouveaux défis*, 401 (2013); I. Kozymka, *The Diplomacy of Culture: The Role of UNESCO in Sustaining Cultural Diversity,* 10 (2014); B.C. Sax, *Introduction: Truth and Meaning in Cultural History*, in P. Schine Gold and B.C. Sax (eds), *Cultural Visions: Essays in the History of Culture*, 3, 4-5 (2000). On the dependency of the concept of culture on the category of cultural phenomena on which one focuses as well as on the temporal, geographical and social context in which one makes the inquiry: M. Bussani, *The (Legal) Culture of Cultural Property*, cit. at 1, 402.

first to the set of hard and soft law devices that UNESCO commonly resorts to in this field (paragraph 2). Then I will survey the new quasi-legal tools that UNESCO has developed for guiding countries in the collection of cultural statistics and in the production of cultural indicators (paragraph 3). Sketching out what these tools are will enable me to analyse, more in depth, the most advanced initiative of UNESCO on cultural indicators; the UNESCO's CDIS (paragraph 4). As we will see, the aim of the CDIS is to highlight how culture contributes to development at a national level, and to measure the extent to which culture fosters economic growth and helps individuals and communities expand their life choices and adapt to change. The scrutiny of how the CDIS are built and implemented (paragraph 5) will allow me to draw some conclusions about their strength and weaknesses, and to investigate their potential as quasi-legal instrument for the promotion of culture and development (paragraph 6).

2. UNESCO's Hard and Soft Law Instruments.

To understand the potential of UNESCO's cultural indicators, it is necessary to briefly review the legal instruments that are at UNESCO' disposal for achieving its mission.

According to Article I of UNESCO's Constitution,[2] the primary tool for UNESCO's activity is the development of international agreements. The second part of the Article makes clear that to realize its purposes the organisation will 'collaborate in the work of advancing the mutual knowledge and understanding of peoples, through all means of mass communication and to that end recommend such international agreements as may be necessary to promote the free flow of ideas by word and image'.[3] Article IV, Paragraph B.4 of the Constitution, specifies the two instruments – conventions[4] and

[2] See supra n 1.

[3] UNESCO Constitution, Article I, 2 (a).

[4] Conventions are not defined by the Constitution, but have the usual meaning specified by Article 2 of the Vienna Convention on the Law of the Treaties of 1969: 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. On sources of international law see among others H. Thirlway, *The Sources of International Law* (2014).

recommendations[5] – that the General Conference[6] of the organisation can adopt and submit for approval to Member States. In addition to these tools, UNESCO's practice has developed a further means not mentioned in the Constitution, that is, international declarations.[7]

While conventions, once approved by Member States, become binding upon their signatories (but only upon them), recommendations and declarations notoriously belong to the category of international soft law, since UNESCO has no coercive power over the behaviour of Member States.[8] Yet, given UNESCO's competence and authority in the field, Member States

[5] Within the UNESCO system, recommendations are instruments in which 'the General Conference formulates principles and norms for the international regulation of any particular question and invites Member States to take whatever legislative or other steps may be required in conformity with the constitutional practice of each State and the nature of the question under consideration to apply the principles and norms aforesaid within their respective territories' (Article 1 (b) of UNESCO's Rules of Procedure concerning recommendations to Member States and international conventions covered by the terms of Article IV, para 4, of the Constitution). Both conventions and recommendations are drafted according to the *Rules of Procedure concerning Recommendations to Member States and International Conventions*, available at <unesco.org/en/ev.php-URL_ID=21681&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

[6] UNESCO's General Conference is formed by one representative for each UNESCO's Member State, irrespective of the size of the latter, or of the extent to which it contributes to the budget. The General Conference meets every two years, and Member States and Associate Members can take part in it, together with observers for non-Member States, intergovernmental organisations and non-governmental organisations (NGOs). See http://en.unesco.org/about-us/unescos-governing-bodies. Article IV, Paragraph B.4 of the UNESCO's Constitution clarifies that '[t]he General Conference shall, in adopting proposals for submission to the Member States, distinguish between recommendations and international conventions submitted for their approval'. The General Conference decides from time to time whether to adopt a convention or a recommendation. UNESCO, *General introduction to the standard-setting instruments of UNESCO*, available at <portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html#name=1>.

[7] Declarations 'set forth universal principles to which the community of States wished to attribute the greatest possible authority': UNESCO, *General introduction to the standard-setting instruments of UNESCO* (n. 13).

[8] I. Kozymka, *The Diplomacy of Culture: The Role of UNESCO in Sustaining Cultural Diversity,* cit. at 1, 18.

usually hold recommendations and declarations in high regard,[9] with the result that what starts as a soft law instrument often hardens with time, sometimes transforming it into a convention.

A good illustration of the continuum between UNESCO's soft and hard law power comes from the field of cultural diversity. In 2001 the approval by UNESCO of the Universal Declaration on Cultural Diversity was a major step towards the recognition of cultural diversity as a key factor of sustainable development,[10] whereby by 'development' UNESCO means 'the process of enlarging people's choices [that] enhances the effective freedom of the people involved to pursue whatever they have reason to value'.[11] As such, the Declaration became a condition precedent for the adoption of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.[12] The text is the first international treaty defending cultural activities, goods and services in both their economic and social dimensions, that is, both as a means to provide jobs and

[9] K. Matsuura, *Foreword,* in A.A. Yusuf (ed), *Standard-setting in UNESCO. Normative Action in Education, Science and Culture*, I, 12 (2007).

[10] The full text is available at <http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html>. One year before, and along the same lines, the UN General Assembly passed two soft law instruments – Resolutions 65/1 and 65/166 – stressing the crucial role of culture for the development process.

[11] World Commission on Culture and Development, *Our Creative Diversity - Report*, (UNESCO 1996), 14 http://unesdoc.unesco.org/images/0010/001055/105586e.pdf.
Like the notion of 'culture', the concept of 'development' is still unsettled: see, among others, D.D. Bradlow, *Differing Conceptions of Development and the Content of International Development Law*, in A.F. Munir Maniruzzama et alii (eds), *International Sustainable Development Law*, I, 1 ff. (2010); M. Bussani, *Il diritto dell'Occidente. Geopolitica delle regole globali*, 48 ff. (2010); A. Bigsten, *Development Policy: Coordination, Conditionality and Coherence*, in A. Sapir (ed), *Fragmented Power: Europe and the Global Economy*, 94 ff. (2007); B. Rajagopal, *International Law from Below. Development, Social Movements, and Third World Resistance*, 146 (2003). On the use of indicators in the field of development cooperation, see M.A. Prada Uribe, *Development through data? A case study on the World Bank's performance indicators and their impact on development in the Global South*, 5 (2012).

[12] This is not the place to survey in detail the contents and the significance of the 2005 Convention. For a summary of the Convention's themes and merits, see, among others, S. von Schorlemer and P.T. Stoll (eds), *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions – Explanatory Notes* (2012).

revenues, drive innovation, and enhance sustainable growth, and as platforms for conveying identities, fostering social inclusion and nurture a sense of belonging.[13] As this history shows, the Convention represents the final segment of a long process of diplomatic consensus building that transformed the protection of cultural diversity from a mere soft law obligation into a binding commitment.[14]

The 2005 Convention is significant for our purposes for an additional reason. Article 13 of the Convention is the most important UNESCO text highlighting the specific link between, on the one hand, the protection of diversity in cultural expressions, and, on the other hand, countries' sustainable development.[15] Believing that culture is not only an effect of, but also a means for development, and that culture is a missing factor in many policies for development, Article 13 states that 'parties shall endeavour to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions'.[16] As we will see,[17] Article 13 is the legal basis on which the UNESCO CDIS are built.

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[13] UNESCO, *Re-shaping Cultural Policies - A Decade Promoting the Diversity of Cultural Expressions for Development*, 3 (2015).

[14] J Wouters and M Vidal, *UNESCO and the Promotion of Cultural Exchange and Cultural Diversity,* in AA. Yusuf, cit. at 8, 168. In particular, signatories States are under a duty to adopt technical measures to place cultural diversity at the service for sustainable development: C. De Beukelaer and R. Freitas, *Culture and Sustainable Development: Beyond the Diversity of Cultural Expressions*, in C. De Beukelaer et al. (eds), *Globalization, Culture, and Development. The UNESCO Convention on Cultural Diversity*, 214 (2015).

[15] Sustainable development 'meets the needs of the present without compromising the ability of future generations to meet their own needs': World Commission on Environment and Development (WCED), *Our Common Future - Report*, (1987) 15, available at <un-documents.net/our-common-future.pdf>.

[16] Article 13 (Integration of culture in sustainable development) of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

[17] See infra para 3.

3. Quasi-Legal Competences.

Besides conventions, recommendations and declarations, UNESCO has developed a wide array of other means of interventions that, although not fitting in the traditional set of legal tools, are nevertheless of legal significance. Among these means, that we will call 'quasi-legal' ones, there is UNESCO's guidance of Member States in their national efforts to collect statistics and draft cultural indicators, that is, data purporting to represent the past or projected cultural performance of a country.[18] As an example of UNESCO's contribution to national statistical campaigns, one could think of the Framework for Cultural Statistics,[19] first proposed in 1986 and established in 2009 for providing a conceptual foundation and an operational methodology for the production and dissemination of comparable cultural statistics.[20] More recent is UNESCO's turn to indicators, the best illustration of which comes from the UNESCO's initiative on CDIS. The CDIS –as we will see in more detail in the next paragraph – aim to support countries' self-assessment of how culture contributes to development at a national level, as prescribed by Article 13 of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.[21]

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[18] Paraphrasing the seminal definition of 'indicators' given by K.E. Davis et al., *Introduction: Global Governance by Indicator*, in K.E. Davis et al (eds), *Governance by Indicators. Global Power through Quantification and Rankings*, 3, 6 (2012). See also K.E. Davis et al. *Introduction: The Local-Global Life of Indicators: Law, Power, and Resistance*, in S.E. Merry et al (eds), *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law*, 4 (2015); R. Urueña, *Indicators as Political Spaces Law, International Organizations, and the Quantitative Challenge in Global Governance*, 1, Int. Org. L. Rev., 12 (2015); S.E. Merry, *Measuring the World: Indicators, Human Rights, and Global Governance*, 52, Curr. Anthr., 83 (2011); M. Green, *What we talk about when we talk about indicators: current approaches to human rights measurement*, 23, Hum. Rts. Q., 1065 (2001).

[19] H. Sung *UNESCO Framework for Cultural Indicators*, in A Michalos (ed), *Encyclopedia of Quality of Life and Well-Being Research*, 6768-6772 (2014).

[20] General Conference, *The 2009 UNESCO Framework for Cultural Statistics (FCS)* (UNESCO 2009) 1. The long gestation is evidence of the difficulties in the development of cultural indicator frameworks: E. Blomkamp, *A Critical History of Cultural Indicators,* in L. MacDowall et al., *Making Culture Count: The Politics of Cultural Measurement*, 12 (2015); H. Horowitz *The UNESCO Framework for Cultural Statistics and a Cultural Data Bank for Europe*, 5 J. Cult. Ec., 1 (1981).

[21] See supra para 2. Similar initiatives have been carried out at the national level: see E. Blomkamp *A Critical History of Cultural Indicators,* cit. at 20, 12-13.

Underlying both the Framework for Cultural Statistics and the Culture for Development Indicators there is the assumption that, given the close link between culture and development, getting reliable data about culture is a fundamental step for understanding and promoting development policies. What should be underlined in our perspective is that, in spite of their being allegedly 'pure' descriptive, statistics and even more so indicators contribute to strengthening UNESCO's grip on States' management of cultural resources. By deciding what should be measured and how, UNESCO explicitly and implicitly conveys a set of targets and best practices that reinforces the obligation of States under Article 13 of the 2005 Convention to include culture in national plans and policies, and helps normalize particular visions of what should be attained, by whom, and through what means. In this light, the collection of statistics and the drafting of indicators under the guidance of UNESCO can be best understood as a tool for the socialisation of States[22] within UNESCO's global community, rather than as a neutral occasion for data reporting. What might result from UNESCO's activism is the absorption at the national and international levels of the legal standards implicitly issued by UNESCO itself – an absorption that might be equally, if not more compelling than the traditional legal measures of hard or soft law[23].

Statistics and indicators can therefore be seen as a 'technology of global governance'[24] employed by UNESCO in the

[22] Socialisation is the 'general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture': D. Jinks *How to Influence States: Socialization and International Human Rights Law*, 54 (2004), Duke L. J. 626. More generally, on the many forms that processes of State socialization may take, see R. Goodman and D. Jinks, *Promoting Human Rights through International Law* (2013).

[23] M. Infantino *Global Indicators,* in S. Cassese (ed), *Research Handbook on Global Administrative Law*, 356 (2016); R. Urueña, *Indicators as Political Spaces Law, International Organizations, and the Quantitative Challenge in Global Governance,* cit. at 27, 5 ff.

[24] D. McGrogan, *Human Rights Indicators and the Sovereignty of Technique*, 27 Eur. J. Int'l L. 400 (2016); K.E. Davis et al. *Introduction: The Local-Global Life of Indicators: Law, Power, and Resistance*, in S.E. Merry et al (eds), , cit. at 18, 1; M.A. Prada Uribe, *The Quest for Measuring Development: The Role of the Indicator Bank*, in S.E. Merry et al (eds), cit. at 18; S Cassese, and L. Casini *Public Regulation of Global Indicators*, in K. Davis et al. (eds), *Governance by Indicators: Global Power through Quantification and Rankings*, 467 ff. (2012); K. Davis et al, *Indicators as a*

field of culture. UNESCO's unique competence allows it to spread its authority to set legal standards of culture in the public discourse, and to govern through technical instruments the legal duties and expectations of those who interact with the organisation.[25] The transformative effects of this technology go beyond the mere circle of the actors who strictly participate in collecting statistics and preparing indicators network, that is, the target-states. UNESCO's culture of statistics and indicators provides a platform where other international organisations and other states, but also civil society, minorities, and non-governmental organisations can transact and communicate through the common language of numbers and data.[26]

The most advanced example of these 'quasi-legal' tools are the UNESCO's CDIS.

4. Culture for Development Indicators (CDIS).

Article 13[27] of the 2005 UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* calls for the integration of culture in development policies at all levels.[28] In order to help the implementation of this obligation, UNESCO, with the (only) support of the Spanish Agency for International Development Cooperation (AECID),[29] launched in 2009 its CDIS

Technology of Global Governance, 46(1) Law & Soc'y Rev., 81 (2012); S.E. Merry, *Measuring the World: Indicators, Human Rights, and Global Governance*, 52 Curr. Anthr., 83–95 (2011); D. Kaufmann and A. Kraay, *Governance indicators: where are we, where should we be going?*, 23, The World Bank Research Observer, 1 (2008); A. Rosga and ML Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27, Berkeley J. Int. L. 255, (2009).

[25] J.E. Alvarez, *International Organizations as Law-Makers*, 120 (2005); M. Infantino *Global Indicators*, cit. at 23, 352.

[26] M Infantino, *Human Rights Indicators across Institutional Regimes*, 12, Int. Org. L. R (2015), 152-3; S Cassese, and L. Casini *Public Regulation of Global Indicators*, cit. at 24, 467 ff.

[27] See supra para 2.

[28] UNESCO, *Culture for Development Indicators*, at <unesco.org/new/en/culture/themes/cultural-diversity/cultural-expressions/programmes/culture-for-development-indicators/>.

[29] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators – Methodology Manual* (UNESCO 2014) 7. This situation is criticized because it makes the CDIS depending on a single, Western donor: C. De Beukelaer and R.

initiative, to propose a novel methodology to measure the role of culture in national development processes.

Officially, the scope of UNESCO in this project is neither to furnish the 'definitive' picture of culture in the considered countries, nor to draft policy guidelines and recommendations tailored to the context of those countries. Instead, the CDIS aim to offer Member States, especially middle- and low-income ones,[30] a learning tool to illustrate how culture can represent a sustainable mean of achieving key development goals. But this is not all. Through the implementation of the CDIS, UNESCO is trying to document culture's contribution to development in economic and non-economic terms, and to raise global awareness of the virtuous cycle between culture and development.[31]

It goes without saying that the project itself is thought of as no more than a step in the long process of unveiling culture's potential for development and fully integrating culture in development strategies.[32] In UNESCO's words, the goals of the CDIS are to

> contribute to the operationalisation of the culture for development agenda by offering countries an advocacy and policy tool intended to demonstrate, with quantitative and qualitative data, how culture and development interact; assess the environment in place for sustaining and enhancing cultural assets and processes for development; reinforce capacities in data collection and an analysis related to culture and

Freitas, *Culture and Sustainable Development: Beyond the Diversity of Cultural Expressions*, cit. at 14, 214.

[30] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators,* cit. at 29, 13.

[31] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators,* cit. at 29, 12; see also id., *UNESCO Culture for Development Indicators – Implementation Toolkit,* 5 (2014). To this purpose, the CDIS consider culture not only as a sector of human activity, but also as values and norms that orient human action: see G. Alonso and M. Medici, *UNESCO Culture for Development Indicators,* cit. at 29, 5.

[32] G. Alonso and M. Medici, *Analytical Framework*, *UNESCO Culture for Development Indicator Suite*, 3, 9 (2011).

development; and promote an evidence based process of policy formulation and implementation.[33]

To gain a vision encompassing the many benefits that culture might produce in economic and non-economic terms, the CDIS embrace seven key policy dimensions of culture as forms of interaction between culture and development. Some dimensions are directly related to the impact of culture on development process, while others concentrate on the role that culture can have in creating an enabling environment for development. The seven key policy dimensions of culture and development are:

1) economy, on the contribution of culture to economic development;

2) education, on the place given to culture within the educational system;

3) governance, which focuses on the national ways of governing the cultural system;

4) social participation, which observes the impact of culture practices, values and attitudes on social progress;

5) gender equality, on the role of culture in promoting both real and perceived gender equality;

6) communication, about the conditions for diffusion and access to diverse cultural content;

7) heritage, which assesses public frameworks for protecting and promoting heritage sustainability.[34]

To highlight the interrelated role of culture in national development processes, every dimension contains some (from one to five) specific core indicators, that are identified and summarized in the so-called CDIS matrix. The core indicators are, in total, 22.[35]

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[33] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators,* cit. at 29, 10.

[34] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators,* cit. at 29, 27, 46, 62, 82, 103, 116, 130. Some have criticized UNESCO's choice of putting 'economy' as the CDIS first dimension, believing that this choice was contrary to the (implicit) guideline of the 2005 Convention to give equal weight to all cultural dimensions: C. De Beukelaer and R. Freitas, *Culture and Sustainable Development: Beyond the Diversity of Cultural Expressions*, cit. at 14, 214.

[35] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators,* cit. at 29, 47. The 22 indicators, divided for each 'dimension', are: contribution of

We will now see the specific methodology set up by UNESCO to guide countries in working with the indicators.

5. CDIS Methodology.

Under the CDIS, the drafting of the indicator is a country led process, which requires the participation of relevant national stakeholders both to ensure the efficiency of data collection and analysis, and to strengthen the long-term impact of the initiative on the national policy landscape[36]. To assist countries in the implementation of the CDIS, UNESCO designed a Methodology Manual and a Toolkit.[37] These tools are the result of a four-year process of applied research involving the participation of UNESCO experts, international experts, and most importantly, the stakeholders directly affected by the project.[38]

The Methodology Manual is a sort of guide for the construction of the 22 core indicators, which give detailed instructions to the Member countries on how to process the CDIS

cultural activities to GDP; cultural employment; household expenditure on culture (Economy dimension); inclusive education; multilingual education; arts education; professional training in the culture sector (Education dimension); standard-setting framework for culture; policy and institutional framework for culture; distribution of cultural infrastructures; civil society participation in cultural governance (Governance dimension); participation in going-out cultural activities; participation in identity-building cultural activities; tolerance of other cultures; interpersonal trust; freedom of self-determination (Social participation dimension); gender equality objective outputs; perception of gender equality (Gender equality dimension); freedom of expression; access and internet use; diversity of fictional content on public television (Communication dimension); heritage sustainability (Heritage dimension). See G. Alonso and M. Medici, *UNESCO Culture for Development Indicators,* cit. at 29, 19, 45, 61, 81, 101, 115, 129.

[36] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators – Implementation Toolkit,* cit. at 31, 2.

[37] They are both available at UNESCO website.

[38] Among others, took part in the construction of the methodology statics institutes, ministries of culture, planning organisations, social affairs and education, civil society organisations, academics, and bilateral and multilateral development agencies of 11 countries (Bosnia and Herzegovina, Burkina Faso, Cambodia, Colombia, Ecuador, Ghana, Namibia, Peru, Swaziland, Uruguay and Viet Nam): G. Alonso and M. Medici, *UNESCO Culture for Development Indicators,* cit. at 29, 5.

in their national context.[39] The declared features of the methodology are (i) pragmatism, because the indicators aim to take into account the specific characteristics of the involved countries; (ii) adaptability, because of their flexible contents; (iii) broad participation, due to the fact that the construction of the CDIS should involve not only national public administrations from key development fields (culture, economy, social, gender, communication), but also national statistics and research institutes, as well as civil society organisations; (iv) multidimensionality, due to their multiple variables and transversal analysis; (v) capacity-building and policy impact, insofar as the final indicator offers itself as a research and statistical tool for policy purposes.[40] By emphasising these features, the CDIS methodology is designed to overcome traditional problems of cultural statistics, such as their limited (not to say, null) context-dependency, their technocratic mode of production, their confined focus on a narrow dimension of what culture is and what it has an influence on. [41]

The implementation process of the CDIS at the national level is coordinated by the national leading partner,[42] which has to identify and select the local contractor(s) responsible for collecting – preferably on the basis of national sources[43] – and analysing the data on which the indicator is based.[44] Obviously, the circumstance that national actors are essentially self-evaluating

[39] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators,* cit. at 29, 5.
[40] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators,* cit. at 29, 13-14.
[41] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators,* cit. at 29, 14.
[42] A leading partner, for example, can be a UNESCO Field Office, a government ministry, a research institute, a national institute of statistics or a development agency: G. Alonso and M. Medici, *UNESCO Culture for Development Indicators – Implementation Toolkit,* cit. at 31, 2.
[43] The CDIS approach has a strong preference for national sources, because the CDIS makers think that they are more reliable, up to date, and offer more opportunities for disaggregation by demographic variables. When no national data are available, global sources can be used: G. Alonso and M. Medici, *UNESCO Culture for Development Indicators – Implementation Toolkit,* cit. at 31, 5-6.
[44] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators – Implementation Toolkit,* cit. at 31, 2-3.

their own state produces an internal conflict of interest in the making of the indicator, because those actors might have an incentive not to adequately report the actual situation. Yet, this shortcoming is counterbalanced by at least two benefits. If having indicators implemented by national actors makes 'objectivity' a problem, the fact that these indicators are country-specific and drafted by subjects who are in close contact with the situations examined minimizes the risks of de-contextualisation of the data gathered.[45] Moreover, as anticipated above, the aim of the CDIS is not only to provide 'neutral' and 'objective' data, but also to socialize states in a global discourse about the relationship between culture and development. In this light, the participation of states in the CDIS is a success in itself, no matter whether, and the extent to, states are sincere in data reporting.

In addition to the Manual, UNESCO provides countries with a Toolkit to help make clear the sequence of actions for constructing the indicators and for achieving results at the national level that could be compared with the result of countries.[46] Besides defining the roles of key partners and stakeholders, the Toolkit proposes a four-stage implementation, starting with the launch of a participative process ('preparatory' phase), proceeding then to the 'data collection' and to the 'analysis' phases, and ending with a 'results sharing and advocacy' phase, where informed dialogue and selection of policies are supposed to take place.[47] The goal of the Toolkit is to give countries advice on logistical, administrative and institutional arrangements to let them implement the CDIS in their own way as opposed to a common methodological framework.

Similar to the Methodology Manual, the Toolkit keywords are pragmatism and adaptability. For instance, the Toolkit offers no one-size-fits-all formula, since solutions that work in one place might be less appropriate, or not appropriate at all, in other

[45] G, de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, 77, N. J. Int. L. 28-31 (2008); M Infantino, *Comparative Law in the Global Context: Exploring the Pluralism of Human Rights Indicators*, 2, Eur. J. Com. L. & Gov., 164 (2015).

[46] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators,* cit. at 29, 3.

[47] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators,* cit. at 29, 1.

contexts. Moreover, if a country cannot collect data on one or more core indicators, or have data available on topics related to, but not covered by, the CDIS, it may propose alternative or additional indicators to those included in UNESCO's set.[48]

6. Results So Far Achieved.

According to the Toolkit, the CDIS, when implemented at the national level, allow to detect the national 'Culture for Development DNA'.[49] As the human DNA represents the sequence of information for building and maintain an organism, the CDIS DNA contains, in a single but complex picture, the entire range of data about the relationship between culture and development in a given country.[50]

The CDIS DNA consists in a visualisation scheme enabling a transversal analysis of indicators and a multidimensional reading of culture and development at the national level. It is formed by 22 barcodes, summarising the results at the national level for the 22 indicators. Each dimension is characterized by a colour, and indicators from the same dimension are grouped by the same colour. Then, the bar is coloured in grey if the indicator could not be constructed.[51]

Far from mapping the pace of change or identifying causal relationships, the CDIS DNA visualisation provides a snapshot of the situation of implementing countries, and thus may reveal correlations and trigger national and global debates.[52] Moreover, the CDIS DNA facilitates the comparability of results among countries, but at the same time does not end up in a global ranking.[53] Awareness of each country's specificity and the desire to avoid the common shortcoming of global rankings, that often promote states' rank-seeking behaviour, rather than efforts to

[48] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators,* cit. at 29, 6.
[49] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators – Implementation Toolkit,* cit. at 31, 12.
[50] Ibid. See infra para 7.
[51] Ibid 12.
[52] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators – Implementation Toolkit,* cit. at 31, 15.
[53] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators – Implementation Toolkit,* cit. at 31, 12. See infra para 7.

improve actual performances have led UNESCO to refuse recourse to rankings.

As of now, the CDIS have been fully implemented in 12 countries: Bosnia and Herzegovina, Burkina Faso, Cambodia, Colombia, Ecuador, Ghana, Montenegro, Namibia, Peru, Swaziland, Uruguay and Viet Nam.[54] In the last two years, many other South-Eastern European countries have joined the initiative and started to implement the CDIS.[55] Where the CDIS have been totally implemented, it has been noted that after their implementation there was a change in the perception of culture that helped justify budgets on cultural activities[56] and a reinforcement of states' capacities of data collection and analysis

[54] The Global Database is available at <http://en.unesco.org/creativity/development-indicators/toolbox>.

[55] Croatia, Republic of Moldova, Serbia and Albania started the implementation in 2015. Montenegro started in February 2015 and presented the preliminary results in April 2015. Both the validation of the indicators and the finalisation of the report are ongoing. Bosnia and Herzegovina completed the implementation CDIS during the pilot phase in 2013: UNESCO OFFICE IN VENICE, 'Countries in South-East Europe in new drive to promote culture for development' (UNESCO, 24 June 2015) <unesco.org/new/en/venice/about-this-office/single-view/news/countries_in_south_east_europe_in_new_drive_to_promote_culture_for_development/#.V0x70fmLTIU>.
Some countries of South-Eastern Europe (Montenegro, Croatia, Republic of Moldova, Serbia, and Albania) are presenting in these months their preliminary results during regional meetings organized by UNESCO to share the (partial) results of the implementation and to promote the extension of the activities to other countries of the same region. The meetings are also an occasion to monitor and eventually improve the framework of the implementation toolkit: UNESCO, *Countries in South-East Europe share experiences on culture and development* (UNESCO, 11 April 2016) <unesco.org/new/en/member-states/single-view/news/countries_in_south_east_europe_share_experiences_on_culture_and_development/#.V3FFmPmLTIU>.

[56] T.D. Nkambule, *UNESCO Culture for Development Indicators. Technical Report – Swaziland*, 1 (2013). For instance, the result of CDIS led to discussions between UN agencies and their commitment to integrate culture in the next UNDAF (United Nations Development Assistance Framework) for Ghana: UNESCO, *UNESCO Culture for Development Indicators. Ghana's Analytical Brief* (UNESCO 2013).

in the formulation and implementation of informed cultural policies and development strategies.[57]

It should however be noted that, even if the CDIS initiative is conceived of as a tool of implementation under Article 13 of the 2005 Convention, countries where they were implemented and where pilots were taken are all 'developing' ones, while the main funder of the project was a Western European state. As it has been rightly pointed out, this situation implicitly creates and reinforces the assumption that developed countries do not need the CDIS because they already have fully functional links between culture and development – an assumption that is clearly far away from being unquestioned.[58]

7. Cultural Indicators and Their Promises.

Mainstream praise and criticism aside, what is certain is that the initiatives taken so far are too few and too young to allow one to assess the long-term efficacy of the CDIS in the collection of relevant data and in the promotion of culture as a development enhancer. Yet a comparison with other global indicators projects allows us to draw some final remarks about the structure and the methodology adopted by the CDIS.

Amidst global indicators, the CDIS are unique in their struggle to achieve a compromise between the need for uniformity and neutrality of data on the one hand, and consideration for local specificities and participation on the other hand. The majority of indicators are top-down and drafted by a single organisation –

[57] UNESCO, *UNESCO Culture for Development Indicators. Namibia's Analytical Brief* (UNESCO, 2013) 29 available at <acpculturesplus.eu/sites/default/files/2015/06/18/cdis_analytical_brief_namibia.pdf>. Just to give some examples: after the CDIS experience, the Colombian Development Department of the Ministry of Culture launched a national project (Cultural Diagnosis of Colombia: Towards the construction of a cultural development index) to measure the contribution of culture to development and to serve as a tool for cultural management analysis (UNESCO, *UNESCO Culture for Development Indicators. Colombia's Analytical Brief* (UNESCO 2014)), and in Swaziland culture was included in national surveys such as the Multiple Indicators Cluster Survey (2014-2015) (UNESCO, *UNESCO Culture for Development Indicators. Swaziland's Analytical Brief* (2013)).

[58] C. De Beukelaer and R. Freitas, *Culture and Sustainable Development: Beyond the Diversity of Cultural Expressions*, cit. at 14, 214.

sometimes by small teams of people[59] – with no or little involvement of other actors, including those which the indicator refers to. More often than not, global indicators end up in a numbered ranking that exceedingly oversimplifies hardly measurable issues and transforms them into simplified quantitative information difficult to unpack (not to say criticize) by users of the indicators.[60] Moreover, rankings are well-known for inducing perverse rank-seeking effects, with the subject of indicators focusing more on strategies to improve their rank, rather than on actual change of their behaviour.[61]

Against this picture, the CDIS are an ongoing lesson for the drafters of the indicators. The methodology for the construction of the indicators follows a bottom-up system, since the interested Member States are directly involved in the processing and building of their own indicators.[62] In addition to that, the CDIS indicators do not end up in a single number, but rather in the cultural DNA of a country.[63] The CDIS DNA – composed by a matrix of policies, measures trends, and permits comparisons, but at the same time does not imply a ranking of countries.[64] True, the final output is a product that might provide a not overtly reliable picture of each country's state of the art in the field of culture and development. Yet, that product serves other goals. It contributes to raising states' awareness – that is to say, to 'socialize' them – about the links between culture and development, and to improve states' often limited statistical capacity in the collection of cultural statistics, providing precious data to the global debate in this regard.[65]

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[59] For instance, the team working on the International Finance Corporation's Doing Business Reports is made up of 56 persons in total: *Meet the Doing Business Team* (Doing Business) <http://www.doingbusiness.org/about-us/meet-the-team>.

[60] K.E. Davis et al, *Introduction: Global Governance by Indicator*, cit. at 19, 10.

[61] Ibid.

[62] See *supra* para 5.

[63] See *supra* para 5.

[64] G. Alonso and M. Medici, *UNESCO Culture for Development Indicators,* cit. at 29, 15.

[65] This is indeed a common feature of UNESCO's indicators – and, to a limited extent, of human rights indicators in general: M. Infantino *Global Indicators*, cit. at 23, 348.

If the implication of culture in the development process is a global problem, the spreading of cultural indicators could represent a part of the solution. Without the experience of the UNESCO Culture for Development Indicators, even this part of the solution would be a much harder job to do.

THE PERPETUATION OF AN "ANCIENT PREJUDICE": PUBLIC SERVICES AND LOCAL GOVERNMENT IN ENGLAND

*Chiara Feliziani**

Abstract

The article deals with public services in England. More specifically, moving from an analysis of both the legal foundation and the main features of public services, the article gives an overview of the area's evolution from its origins until the present day. In so doing, the research pays particular attention to the role played by local government in both the management and supply of public services. To this end, the waste-management service has been chosen for a case study.

Indeed, the study highlights that local authorities have been gradually losing their powers, while the central Government has augmented its role and expanded its powers. The analysis therefore confirms the endurance of an ancient "prejudice against localism" that, as the legal theorists show, has its roots in the United Kingdom's constitutional tradition.

TABLE OF CONTENTS

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1. Preliminary considerations

From an Italian administrative-law perspective, the English experience of public services is of interest because it presents peculiar and anomalous features when compared with the domestic and, more generally, the continental European experience[1]. More specifically, the main difference between the English and the Italian approach to public services stems from the absence, in England, of both a legal theory and a general legislative framework, directed, respectively, at defining and regulating the subject-matter[2].

However, these "lacunae" are not so marked as to justify a negative opinion of the English system of public services. On the contrary, in many respects (e.g. the distinction between regulatory activities and supply activities, or the spread of the Citizens' Charters), England constitutes a sort of pioneer among the European Countries. Indeed, it has been able to anticipate trends that have emerged only several years later not just in Italy but also in other EU Member States and even the European Union[3].

It would therefore be fairer to say that most of the peculiarities in the English system of public services are closely linked to certain features of England itself, such as its constitutional tradition[4] and the role traditionally accorded local

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[1] G. Morbidelli, *Introduzione: i servizi pubblici locali in Europa*, 3, Dir. pubbl. comp. eur., 783 et seq. (2001). More generally, with regard to the importance of a comparative study of administrative law, see G. della Cananea, *Administrative Law in Europe: a Historical and Comparative Perspective*, 2, IJPL, 162, (2009).

[2] See, *inter alia*, C. Graham, *Regulating public utilities. A legal and constitutional approach* (2000); C. Harlow, *Public service, Market Ideology, and Citizenship*, in M. Freedland – S. Sciarra (eds.), *Public services and citizenship in European Law*, (1998); L. Bonechi, *Il servizio pubblico locale in Gran Bretagna,* Dir. pubbl. comp. eur., 3, 788 (2001) and R. Rinaldi, *Citizen's Charter e servizi pubblici in Inghilterra*, in A. Torre – L. Volpe (eds.), *La Costituzione Britannica*. Atti del convegno dell'Associazione di Diritto pubblico comparato ed europeo, Bari, 29 – 30 May 2003 (2005).

[3] T. Prosser, *Regulation, public service and competition law*, P. Chirulli – R. Miccù (eds.), *Il modello europeo di regolazione. Atti della giornata di studio in memoria di Salvatore Cattaneo* (2011).

[4] First of all, see A. V. Dicey, *Introduction to the study of the law of the Constitution,* 10 ed. (1985). See also, more recently, A. Biondi, *Principio di supremazia e "Costituzione" inglese*, in www.forumquadernicostituzionali.it (2003); C. Harlow, *Disposing of Dicey: from legal autonomy to constitutional discourse*, in Political Studies, 356 (2000); C. Harlow – R. Rawlings, *Law and Administration*, III ed.,

government[5], as well as the country's approach to the process of European integration[6].

This paper therefore seeks to study English public services in a manner that takes these peculiarities fully into account. More specifically, moving from an analysis of both the legal foundation and the main features of public services, the article will give an overview of the area's evolution from its origins until the present day. In so doing, the research will pay particular attention to the role played by local government in both the management and supply of public services. To this end, the waste-management service has been chosen for a case study, as analysis can clearly demonstrate the parabolic trajectory traced by local government in England over the last few decades.

(2009); P. Leyland, *The constitution of the United Kingdom: a contextual analysis*, (2007); A. Torre, *Regno Unito* (2005) and Id., *Interpretare la Costituzione britannica* (1997).
Moreover, the distinction between public and private law is also closely connected to the English constitutional tradition. In this respect see, for instance, C. Harlow, *"Public" and "Private" law: definition without distinction*, MLR, 241 (1980); M. Taggart, *The peculiarities of the English: resisting the public/private law distinction*, P. Craig – R. Rawlings (eds.), *Law and Administration in Europe*, 107 (2003).

[5] S. Troilo, *Il* local government *britannico: l'ente locale tra rappresentanza della comunità e amministrazione dei servizi pubblici* (1997). See also, R. Hazell – R. Rawlings, *Devolution, Law–making and the Constitution* (2005).

[6] As pointed out by A. Biondi et al. (eds.), *EU Law after Lisbon* (2012), the United Kingdom joined the EEC only in 1972, by way of the European Communities Act. Moreover, as regards the most current aspects of the relationship between the UK and the European Union see, for instance, M. P. Chiti, *Il tramonto della sovranità europea? Il caso esemplare dell'*European Union Act 2011 *britannico,* 11, Giorn. Dir. Amm., 1228 (2011); M. Elliott, *Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution,* 10 Eu. Const. Law Rev., 2, 379 - 392 (2014) and E. A. Imparato, *Il rapporto tra fonti interne ed europee nel British context: luci e ombre della sovereignty of Parliament nella visione giurisprudenziale inglese in alcune note di comparazione con l'Italia, Federalismi.it* (2015). Finally, see also *Dossier sui rapporti tra il Regno Unito e l'Unione europea,* in Federalismi.it (2015); M.E. Bartoloni, *La disciplina del recesso dall'Unione europea: una tensione mai sopita tra spinte "costituzionaliste" e resistenze "internazionaliste"*, 2, RivistaAIC (2016); C. Curti Gialdino, *Oltre la Brexit: brevi note sulle implicazioni giuridiche e politiche per il futuro prossimo dell'Unione europea*, 13, Federalismi.it. (2016); B. De Witte, *The United Kingdom: Towards exit from the EU or towards a different kind of membership?,* 3, Quad. cost., 581 (2016); A. Torre, *In difesa del Parlamento. La High Court of Justice britannica entra in campo sul Brexit*, 53, Eticaeconomia (2016).

Indeed, the study highlights that local authorities have been gradually losing their powers, whilst the central Government has augmented its role and expanded its powers. The analysis therefore confirms the endurance of an ancient "prejudice against localism"[7] that, as the legal theorists show, has its roots in the United Kingdom's constitutional tradition[8].

2. Public service: its legal foundation, features and consequences

Although the term "public service" (and "public utilities" even more so)[9] has long been used in the British legal world, it has no juridical value and is, according to the scholars, merely descriptive,[10]. This is because (and in this it differs from the Italian concept of "*servizio pubblico*"[11]) it has no legal theory underpinning it[12]. This means that "the idea of public service as a basic legal

[7] L. J. Sharpe, *Regionalism in the United Kingdom. The role of social federalism*, H. Wollmann - E. Schroter (eds.), *Comparing the Public Sector Reform in Britain and Germany* (2000).

[8] L. J. Sharpe, *Regionalism in the United Kingdom. The role of social federalism*, cit. at 7. See, also, P. Leyland, *Introduzione al diritto costituzionale del Regno Unito* (2005) and A. Torre, *Regno Unito*, cit. at 4.

[9] For a definition of both "public service" and "public utility" see L. Bonechi, *Il servizio pubblico locale in Gran Bretagna*, cit. at 2 and H. Wollmann – G. Marcou, *The Provision of Public Services in Europe. Between State, Local Government and Market* (2010).

[10] D. Minussi, *Affidamento* in-house *di servizi pubblici locali: Regno Unito e Italia a confronto,* 4, Dir. Pubbl. Comp. Eur., 1661 (2012) and I. Harden, *The Contracting State* (1992).

[11] See, first of all, A. De Valles, *I servizi pubblici* and G. Zanobini, *L'esercizio privato di pubbliche funzioni*, V. E. Orlando (ed.), *Trattato di diritto amministrativo* (1920). See, in addition, G. Miele, the entry "*Servizio pubblico"*, Enc. it. (1936); R. Alessi, *Le prestazioni rese ai privati* (1956); U. Pototshing, *I servizi pubblici* (1964); F. Merusi, *Servizio pubblico*, Noviss. Dig. It., XVII (1970). See also more recently, L. De Lucia, *La regolazione amministrativa dei servizi di pubblica utilità* (2002); G. Piperata, *Servizi pubblici locali*, S. Cassese (ed.), *Dizionario di diritto pubblico* (2006); E. Scotti, *Il pubblico servizio. Tra tradizione nazionale e prospettive europee* (2003); Id., *Servizi publici locali*, Dig. disc. pubbl., updated version (2012).

[12] G. Marcou, *I servizi pubblici tra regolazione e liberalizzazione: l'esperienza francese, inglese e tedesca*, 1, Riv. It. Dir. Pubbl. Comunit., 342 (2000). See also P. Birkinshaw, *Servizi pubblici e diritto nel Regno Unito. La fornitura di servizi essenziali di natura economica e non economica. Servizi di interesse generale*, E. Ferrari (ed.), *Attività economiche e attività sociali nei servizi di interesse generale,* 179 et. seq. (2007); P. Craig, *Constitution, Property and Regulation*, 3, Public Law, 110 (1991);

concept can be found only in French [and Italian] public law"[13]. In England, on the other hand, "the wording «public service» is not used in legal language and it has a merely descriptive significance. «Public service» indicates the civil service, or its ethics (e.g. the ethics of public service)"[14].

Nevertheless, from the nineteenth century onwards and like the majority of the other European countries, England has witnessed the emergence and spread of public services. Indeed, according to British scholars, public services "have been developing faster and more incisively than in other European States where the concept has been studied in depth (...)"[15]. But, unlike the experience of the continental EU Member States, in England public services have mainly been understood in a "material sense"[16], meaning simply services provided for the benefit of citizens. Furthermore, citizens have no rights in relation to whether a service is provided, simply being allowed to criticize the way in which a given service is supplied[17].

Such a concept of public services has at least three consequences. First of all, the British system of public services is highly flexible. According to some scholars, it is this flexibility that has made possible England's greater predisposition for "sweeping changes concerning the organization, functioning, purposes and (....) even the very existence of services"[18].

Secondly, the role of citizens in their engagement with public services has never been properly placed within the public-

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T. Prosser, *Regolazione dei servizi di pubblica utilità: l'esperienza anglosassone*, G. Tesauro - M. D'Alberti (eds.), *Regolazione e concorrenza* (2000) and R. Rinaldi, *Citizen's Charter e servizi pubblici in Inghilterra*, cit. at 2.

[13] G. Marcou, *I servizi pubblici tra regolazione e liberalizzazione: l'esperienza francese, inglese e tedesca*, cit. at 12.

[14] G. Marcou, *I servizi pubblici tra regolazione e liberalizzazione: l'esperienza francese, inglese e tedesca*, cit. at 12.

[15] R. Rinaldi, *Citizen's Charter e servizi pubblici in Inghilterra*, cit. at 2.

[16] G. Marcou, *I servizi pubblici tra regolazione e liberalizzazione: l'esperienza francese, inglese e tedesca*, cit. at 12.

[17] G. Di Gaspare, *Quadro economico del diritto dell'economia tra* Common Law *e* Civil Law, G. Falcon (ed.), *Il diritto amministrativo dei Paesi europei tra omogeneizzazione e diversità culturali* (2005).

[18] G. Marcou, *I servizi pubblici tra regolazione e liberalizzazione: l'esperienza francese, inglese e tedesca*, cit. at 12.

law framework[19]. Indeed, the citizen is usually qualified as a consumer, i.e. a "customer" who has expectations about the purchased service, especially as far as both its quality and efficiency are concerned. This way of understanding the relationship between citizens and public services is probably the main reason why England was able to draw up the Citizens' Charters so much earlier than the other Member States or even the European Union itself[20].

Finally, the main features of public services have been defined in purely functional terms, in keeping with a vision that focuses on their material nature. Thus the distinction between a public service and a private activity usually lies "in a political choice of the Westminster Parliament: an activity can be considered «private» if its existence depends on «consumer sovereignty» (...); whereas the same activity must be qualified as a «public service» if it is carried out by virtue of an «authoritative decision»"[21].

The foregoing would therefore explain the fact that, in England, public services have never had "a unitary legal framework, nor general legislation conferring powers, nor measures directed at establishing general principles for the management of services". On the contrary, they have been regulated by autonomous Acts of Parliament that establish and govern every single service separately, on the basis of similar principles (such as efficiency, a high level of quality and safety, etc.), but without creating identical provisions[22]. Moreover, until

[19] G. Di Gaspare, *Quadro economico del diritto dell'economia tra* Common Law *e* Civil Law, cit. at 17.

[20] R. Rinaldi, *Citizen's Charter e servizi pubblici in Inghilterra*, cit. at 2. See, in addition, M. Calabrò, *La Carta dei servizi italiana e la Citizen's Charter britannica. Due modelli a confronto,* 3, Dir. Proc. Amm., 823 – 830 (2014); G. Drewey, *Citizen's Charters: Service quality chameleons*, 7 (3), Publ. Manag. Rev., 321 (2005) and, as far as the Italian experience is specifically concerned, F. Giglioni, *Le garanzie degli utenti dei servizi pubblici locali,* 2, Dir. Amm., 353 – 389 (2005); Id., *Le carte di pubblico servizio e il diritto alla qualità delle prestazioni dei pubblici servizi, Pol. del dir*., 405 – 431 (2003).

[21] D. Minussi, *Affidamento* in-house *di servizi pubblici locali: Regno Unito e Italia a confronto,* cit. at 10. See, in addition, L. Bonechi, *Il servizio pubblico locale in Gran Bretagna,* cit. at 2.

[22] L. Bonechi, *Il servizio pubblico locale in Gran Bretagna,* cit. at 2; C. Graham, *Regulating public utilities. A legal and constitutional approach*, cit. at 2. On the relevance of principles in English public law, see, for instance P. Cane, *Theory*

the European Union required its Member States to define the scope of the concept of "service of general interest", national provisions have only very rarely defined the tasks that a service is required to ensure, since such subject-matter falls within the public administration's discretion[23].

In fact and as pointed out by the legal theorists, the need to "ensure that services were available to all members of society, including the most vulnerable, on the basis of fair conditions"[24] has only been considered since the 1990s. Therefore, an awareness that social duties attach to the supply of every public service has led England also to formalize the concept of social solidarity in the Citizens' Charters[25] and has, at the same time, helped to reduce the gap between the English and the continental idea of a public service a little[26]. In fact, both in Italy and in the majority of the

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and values in Public Law and P. Craig, *Theory and values in Public Law: a response*, P. Craig – R. Rawlings (eds.), *Law and Administration in Europe. Essays in honour of Carol Harlow*, 3 and 23 (2003).

[23] P. Craig, *Constitution, Property and Regulation*, cit. at 12. Moreover, concerning the concept of "service of general interest" and the influence of the EU policy on the national legal orders, see *amplius* E. Ferrari, *I servizi pubblici in Europa* and M. Vanrey, *Servizi di interesse economico generale e regolazione nel Regno Unito*, E. Ferrari (ed.), *Attività economiche ed attività sociali nei servizi di interesse generale,* cit. at 12.

[24] T. Prosser, *Regolazione dei servizi di pubblica utilità: l'esperienza anglosassone,* cit. at 12. See also C. Graham, *Socio-economic rights and essential services: a new challenge for the regulatory State*, D. Oliver – T. Prosser – R. Rawlings (eds.), *The regulatory State: constitutional implications*, 157 (2010).

[25] See, for instance, M. Calabrò, *La Carta dei servizi italiana e la Citizen's Charter britannica. Due modelli a confronto*, cit. at 20 and T. Prosser, *Regulation and Social Solidarity*, 33, J.L. Soc'y, 3, 364 (2006).

[26] T. Prosser, *Regulation, public service and competition law*, cit. at 3. Moreover, according to the A.: "even the economic regulators established on privatization of the public utilities have some social responsibilities set out in their secondary statutory duties, and have been expected to undertake regulation which is clearly social". And, then: "I mentioned [the] principle of social solidarity. This is similar to the Continental concept of public service; rather than starting from individual rights, this principle starts from the duty of the community to secure inclusiveness, resting both on a moral sense of equal citizenship and on a more prudential goal of minimizing social fragmentation. One function of this principle in regulation is to create and support the essential social underpinning of trust which is necessary for markets to function; (….). The second role is to prevent or limit the socially fragmenting role of markets. (…) As I mentioned above, with the development of something resembling public

other European countries, the purpose of responding to a community's need constitutes the core of the institution of public service and it is the main reason why Governments originally took upon themselves the task of providing services for the benefit of their citizens[27].

3. Local government

The centrality of Parliament (clearly expressed in the wording *the Crown in Parliament*)[28] - and, more generally, England's peculiar constitutional regime[29] - also influenced both administrative organization and the allocation of functions between the different levels of government[30].

Such fact has had two main consequences.

First of all, "for centuries, no territorial form of government operated at the middle level, between local government and central government. This means that, traditionally, «regionalism» has never been successful either in England or, more generally, in the United Kingdom"[31]. Nor have greater successes resulted from the recent attempts at devolution[32].

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service law in the UK solidarity has become a legal as well as political norm, once more influenced by Continental European developments".

[27] See, first of all, A. De Valles, *I servizi pubblici,* cit. at 11 and R. Alessi, *Le prestazioni amministrative rese ai privati*, cit. at 11. See, also, M. Nigro, *L'edilizia popolare come servizio pubblico,* 1, Riv. Trim. Dir. Pubbl., 118 (1957) and - more recently - G. Caia, *L'organizzazione dei servizi pubblici locali. Figure, regimi e caratteristiche*, 9, Foro amm., 3167 (1991) and E. Scotti, *Servizi pubblici locali,* cit. at 11.

[28] A. Torre, *Regno Unito*, cit. at 4.

[29] A. V. Dicey, *Introduction to the study of the law of the constitution,* cit. at 4, but also P. Carrozza – A. Di Giovine - G. F. Ferrari (eds.), *Diritto costituzionale comparator* (2013); I. Jowell – D. Oliver, *The Changing Constitution,* 7th ed. (2011); P. Leyland, *The constitution of the United Kingdom,* cit. at 4; A. Young – P. Leyland – R. Rawlings, *Sovereignity and the Law* (2013) e A. Torre, *Interpretare la Costituzione Britannica* (1997).

[30] S. Troiolo, *Il local government britannico tra devolution interna e integrazione europea,* A. Torre – L. Volpe (eds.), *La Costituzione Britannica*, Atti del convegno dell'Associazione di Diritto pubblico comparato ed europeo, cit. at 2.

[31] A. Torre, *Regno Unito,* cit. at 4. See also, G. Caravale, *Unelected, unacccountable and unloved. Il fallimento del regionalismo inglese,* Federalismi.it (2012).

[32] See *amplius* R. Hazell – R. Rawlings, *Devolution, Law-making and the Constitution,* cit. at 5; P. Leyland, *La* Multi-Layered Constitution *e il tentativo di* devolution *nelle Regioni inglesi*, 1, Le Regioni, 10 (2006); Id., *L'esperimento della*

Secondly, as a result of a sort of "prejudice against localism"[33], the Government has traditionally tried to maintain a very centralized control, only allowing the existence of local authorities closely dependent on the central Government and lacking any "general administrative competence"[34] or form of co-ordination between themselves[35].

More specifically, English local authorities came into being spontaneously, as mechanisms of self-government for local communities[36]. In the very beginning, therefore, they enjoyed some degree of autonomy[37]. In fact, lacking any constitutional basis, they came into being principally to meet the concrete needs arising at a local level and their functions could not properly be said to have been "devolved from or delegated by" the central Government. Thus, their history was, for some time, marked primarily by pragmatism and their evolution driven mainly by events, without following any clear constitutional blueprint[38].

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devolution *nel Regno Unito: uno sconvolgimento dell'assetto costituzionale*, 2, Le Regioni, 2, 341 (2000); I. Ruggiu, *Aspetti recenti della* devolution *nel Regno Unito: uno Stato territoriale "a metà" tra occasionalismo riformista, asimmetria e pax partitica*, 6, Le Regioni, 1157 (2005); R. Rawlings, *Delineate Wales: Constitutional, Legal and Administrative Aspects of National Devolution* (2003); A. Torre, "On Devolution". *Evoluzione e attuali sviluppi delle forme di autogoverno nell'ordinamento costituzionale britannico,* 2, Le Regioni, 203 (2000). Moreover, as far as Scotland is concerned see, *inter alia*, G. Caravale, *La devolution in Gran Bretagna: il caso scozzese,* Federalismi.it (2002); G. Poggeschi, *La* Devolution *in Scozia,* 3, Ist. Federalismo, 937 (1998); E. Mainardi, *Il referendum in Scozia: tra devolution e indipendenza,* Federalismi.it (2014); I. Ruggiu, *Le politiche della* devolution *scozzese: unus rex, unus grex, una lex?,* 6, Le Regioni, 1267 (2004); A. Torre, *Scozia:* devolution*, quasi-federalismo, indipendenza?,* 2, www.rivistaaic.it (2013). Finally, for a comparative study, see M. Mazza, *Federalismo, regionalismo e decentramento nella prospettiva della comparazione tra i sistemi di amministrazione (o governo) locale,* 4, Ist. Federalismo, 829 (2012).

[33] L. J. Sharpe, *Regionalism in the United Kingdom. The role of social federalism*, H. Wollmann – E. Schroter (eds.), *Comparing the Public Sector Reform in Britain and Germany*, cit. at 7.

[34] S. Troilo, *Il local government britannico tra devolution interna e integrazione europea*, A. Torre – L. Volpe (eds.), *La Costituzione britannica,* cit. at 2.

[35] J. A. Chandler, *Local Government Today*, III ed. (2001). See, also, D. Wilson – C. Game, *Local Government in the United Kingdom*, IV ed. (2006).

[36] A. Torre, *Regno Unito,* cit. at 4.

[37] A. Torre, *Regno Unito,* cit. at 4.

[38] G. G. Sturmeck, *Il nuovo welfare locale: dal Compulsory Competitive Tendering al Best Value Regime*, 2, Le Regioni, 209 (2007) and S. Troilo, *Il local government*

Fairly early on, however, the principle that local authorities should draw their legal legitimacy from the Crown (i.e. Parliament) came to prevail[39]. Local authorities consequently became increasingly dependent on the central Government. Furthermore, this gradual process of centripetal attraction went hand in hand with a slow but inevitable reduction of the functions originally performed by the local authorities, including decision-making regarding expenditure[40]. That divestment became even more significant in the mid-twentieth century, when a series of reforms aimed at rationalizing the system of local government[41] were launched.

Thus, from the seventeenth century onwards, both "the lack of a constitutionally based autonomy and the subjection of local authorities to the law of Parliament gradually resulted in the inability of local government to decide autonomously what organizational arrangements were necessary for the meeting of a local community's needs"[42]. And this assertion still holds true

britannico: l'ente locale tra rappresentanza della comunità e amministrazione dei servizi pubblici, cit. at 5.

[39] A. Torre, *Interpretare la Costituzione britannica,* cit. at 29.

[40] F. Guella, *L'autonomia finanziaria del* Local Government *nel Regno Unito. Un'evoluzione dei modelli giuridici di controllo, standardizzazione e responsabilizzazione della spesa pubblica,* 1, Dir. Pubbl. Comp. Eur., 145 (2014). In addition, as far as the financing of local government is concerned, see S. J. Bailey, *Local Government Finance in Britain*, R. Paddison - S. J. Bailey (eds.), *Local Government Finance*, 230 (1989); F. Ciatara, *Cronache dai Paesi europei: i sistemi di finanziamento delle Amministrazioni locali in Francia, Germania federale e Regno Unito*, 1, Econ. pubbl., 118 (1981); A. Fraschini, *Il finanziamento degli enti locali: il caso inglese,* 2, Riv. Dir. Fin. e scienza delle finanze, 318 (1987); A. Lucarelli, *La finanza locale in Gran Bretagna. Decentramento, politiche redistributive e Welfare State*, V. Atripaldi - R. Bifulco (eds.), *Federalismi fiscali e costituzioni*, 316 et seq. (2001); D. Parker, *Recenti sviluppi nella politica finanziaria degli enti locali nel Regno Unito,* 2, *Eco. pubbl.*, 2, 305 (1991); T. Travers, *An Honourable Draw? Local versus Central Government in the 1970s and 1980s,* in Public Money, 1, 48 (1986) and, more recently, S. Cimini, *Politiche di coesione e finanziamento degli enti locali nel Regno Unito*, S. Cimini - M. D'Orsogna (eds.), *Le politiche comunitarie di coesione economica e sociale*, 79 et seq. (2011).

[41] A. Torre, *Regno Unito,* cit. at 4.

[42] L. Bonechi, *Il servizio pubblico locale in Gran Bretagna,* cit. at 2. See, also, M. Hill, *Understanding Social Policy*, VII ed, (2003).

today, since both the «compulsory and permissive functions» of local authorities need to be provided for by Acts of Parliament[43].

It therefore follows (as certain scholars have stated) that the wording "*servizio pubblico locale* (local public service)" loses any specific legal connotation in the British legal environment and acquires a non-technical, all-encompassing descriptive value. That is to say, a meaning capable of referring indiscriminately to all the services provided to a local community, regardless of how the competences are distributed between the different levels of government (...)[44].

4. Local government and public services

For the purposes of an in-depth study of the part played by local government in the management of public services, it must first be observed that if the nineteenth century was a sort of "golden age" (especially as far as autonomy regarding expenditure is concerned[45]), the beginning of the twentieth century marked the onset of a gradual decline. Indeed, the "centralist spirit" referred to above acquired great force around the 1930s and even more so around the 1940s, when a process directed at the nationalization of several sectors of public interest[46]

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[43] S. Troilo, *Il local government britannico tra devolution interna e integrazione europea,* cit. at 34.

[44] L. Bonechi, *Il servizio pubblico locale in Gran Bretagna,* cit. at 2.

[45] H. Wollmann, *Local Government Reforms in Great Britain, Sweden, Germany and France: Between Multi-function and Single-purpose Organisations*, 4, Local Government Studies, 643, (2004). See, also, A. Lucarelli, *La finanza locale in Gran Bretagna. Decentramento, politiche redistributive e* welfare state, V. Atripaldi – R. Bifulco (eds.), *Federalismi fiscali e Costituzioni* (2001) and F. Guella, *L'autonomia finanziaria del* Local Government *nel Regno Unito,* cit. at 40, 145.

[46] Including, for example, the energy sector. In 1947, the Electricity Act passed the powers and the structures that until then belonged to a plurality of subjects to a single industry owned by the central State. In 1957, the Central Electricity Generating Board was established with the purpose of creating a single system for the production and supply of energy across the entire British territory. *Amplius*, see P. D. Cameron, *Legal Aspects of EU Energy Regulation. Implementing the New Directives on Electricity and Gas Across Europe* (2005); T. Prosser - N. Boeger, *United Kingdom*, M. Krajewski et al. (eds.), *The Changing Legal Framework for Services of General Economic Interest in Europe*, 357 – 382 (2009); E. Wollaman - G. Marcou, *The Provision of Public Services in Europe,* cit. at 9, exp. pp. 168 et seq. and, finally, C. Feliziani, *The Impact of EU Energy Policy on Member States' Legal*

was launched in England and many other countries, including Italy[47].

The turning point came after the Second World War, when the Government firmly changed tack and set course for a model of the *welfare state*. Local authorities consequently lost most of their powers in the field of public services, whilst the central Government and the political bodies most closely connected to it, increased theirs[48]. At the same time, however, local authorities' duties were extended in relation to education and housing[49]. Thus, according to certain scholars "they moved from being producers of public utilities to being providers of social services", and, in so doing, to supporting and reinforcing political decisions adopted by the Government[50].

As far as the management of public services is specifically concerned, this initially took the form of a sort of anticipation of "in-house providing". It was called *Direct labour organisation* or *Direct service organisation,* according to whether the service consisted "in building (or maintenance) works or the supply of a service"[51].

At the end of the 1970s, however, when the Conservative Party took over the country's government, the "in-house model" was replaced by measures aimed at opening up the sector to competition. In fact, inspired by the goal of minimizing public expenditure, the new era of English Government was characterized by certain public-sector reforms directed both at reducing the role of the State in the economic field and leaving more room for the market[52].

Orders. State of Art and Perspectives of Renewable Energy in Italy and Great Britain, 5 Rev. Eur. Studies, 2, 67- 81 (2013).

[47] M. S. Giannini, *Diritto pubblico dell'economia* (1988).

[48] M. Loughlin, *The demise of Local Government*, V. Bogdanor (ed.), *The British Constitution in the Twentieth Century* (2003).

[49] See S. Troilo, *Le funzioni*, Various Authors, *Il Governo locale in Francia, Gran Bretagna e Germania*, in Arc. Isap, 258 e ss. (1998).

[50] H. Wollman - G. Marcou, *The Provision of Public Services in Europe. Between State, Local Government and Market,* cit. at 9.

[51] D. Minussi, *Affidamento* in-house *di servizi pubblici locali: Regno Unito e Italia a confronto,* cit. at 10.

[52] G. Di Gaspare, *Quadro teorico del diritto dell'economia* tra common law *e* civil law, G. Falcon (ed.), *Il diritto amministrativo dei Paesi europei tra omogeneizzazione e diversità culturali* (2005); A. Gamble, *Privatization, Thatcherism and the British*

Thus, in 1980, the legislator imposed the use of Compulsory Competitive Tendering (CCT)[53], i.e. an instrument designed to break the local authorities' monopoly in the supply of public services by gauging the competitiveness of the services they provided[54]. According to some scholars, the CCT was a means by which the Government tried to regulate the action of local authorities[55].

The abovementioned pro-competition principles were subsequently reaffirmed in the Local Government Act 1988[56]. Then, through the 1993 Regulations[57], they were applied to all public services provided by local authorities. Thus, by virtue of that legal framework, whenever a local authority decided not to outsource a service it was obliged to hold a tender competition directed at verifying the efficiency, competitiveness and effectiveness of its choice by "a comparison between direct management and the market"[58].

Despite criticism[59], Compulsory Competitive Tendering was applied for about two decades. Then, in 1997, the newly

State, A. Gamble - C. Wells (eds.), Thatcher's Law (1989); T. Prosser, *Law and the Regulators* (1997) and R. Rhodes, *The hollowing out of the State: the changing nature of the public service in Britain*, 12 *Political Quarterly*, 2, 138 (1994).

[53] D. Minussi, *Affidamento* in-house *di servizi pubblici locali: Regno Unito e Italia a confronto,* cit. at 10.

[54] J. Fenwick – K. Harrop, *Servizi pubblici locali nel Regno Unito. Privatizzazione e concorrenza*, 1, Dir. Econ., 55 (2000); see, also, R. Rinaldi, *Citizen's Charter e servizi pubblici in Inghilterra*, cit. at 2.

[55] R. Rinaldi, *Citizen's Charter e servizi pubblici in Inghilterra*, cit. at 2. In a similar sense, see also, J. Fenwich – K. Harrop, *Servivi pubblici locali nel Regno Unito. Privatizzazione e concorrenza*, cit.; C. Graham – T. Prosser (eds.), *Waiving the rules. The Constitution under Thatcherism* (1988); M. Guicciardi, *La struttura del governo locale in Gran Bretagna: individuazione delle linee teoriche di tendenza e delle loro prospettive politiche,* 3, Dir. Soc., 443 (1985) and S. Troilo, *Il local govenrment bitannico tra devolution interna e integrazione eruopea,* cit. at 34.

[56] M. Radford, *Competition rules: the Local Government Act 1988*, 51 Modern Law Rev., 747 (1988).

[57] P. Vincent Jones, *The Regulation of Contractualization in Quasi-markets for Public Services*, 2 Publ. Law, 314 (1999) and K. Walsh, *Competitive Tendering for Local Authority Services: Initial Experiences* (1991).

[58] L. Bonechi, *Il servizio pubblico locale in Gran Bretagna,* cit. at 2.

[59] T. Prosser, *The Limits of Competition Law. Markets and Public Services* (2005). See, also, P. Vincent Jones, *The Regulation of Contractualisation,* cit. at 57 and G. Jones, *Local Government in Great Britain,* J.J. Hesse, *Local Government and Urban Affairs in International Perspectives,* (1991).

elected Labour Government introduced the "Best Value Regime"[60], a new system designed to promote the efficiency and cost-effectiveness of services and one that was based on principles quite different from those underpinning CCT.

In fact, the Best Value Regime "was designed to guarantee not only the efficiency and good value, but also the effectiveness and - above all - the quality of services. Moreover, it aimed at restoring the local authorities' autonomy (...)"[61]. For this reason, "the Government's power of intervention, although still extensive, now tend[ed] not to suppress [*in toto*] the local authorities' discretionary power regarding both evaluation and choice"[62] insofar as it related to the management of services[63]. In fact, working on the assumption that "*what matters is what works*"[64], the Labour Government did not express any aprioristic preference for either the privatization or the direct management of public services (i.e. *in-house providing*).

This programme went through several rounds of consultation and was finally defined in a White Paper entitled "*Modern Local Government: In Touch With People*". The Paper focused principally on three important themes: 1) community leadership; 2) democratic renewal; and 3) improving performance[65]. As far as the latter point is specifically concerned, the Government outlined the need to modernize the English local

[60] R. Footitt, *From Competitive tendering to Best Value for Local Government Services*, 2, Riv. Trim. Dir. Pubbl., 515 (1999); G. Gosetti, *Il nuovo welfare locale: dal* Compulsory Competitive Tendering *al* Best Value regime, 1, Le Regioni, 209 (2007); F. Guella, *L'autonomia finanziaria del* Local Government *nel Regno Unito* cit. at 40; C. Painter, *Public Service Reform from Thatcher to Blair: A Third Way*, 52, Parliamentary Affairs, 94 (1999).

[61] L. Bonechi, *Il servizio pubblico locale in Gran Bretagna,* cit. at 2. See, also, T. Prosser, *The Limits of Competition Law. Markets and Public Services,* cit. at 59.

[62] L. Bonechi, *op. ult. cit. Ex multis*, see P. Vincent Jones, *Central-Local Relations under the Local Government Act 1999. A New Consensus?,* 12, The Modern Law Rev., 1, 84 (2000).

[63] For a different opinion, see R. Rinaldi, *Citizen's Charter e servizi pubblici in Inghilterra,* cit. at 2.

[64] G. G. di Sturmeck, *Il nuovo* welfare *locale: dal* Compulsory Competitive Tendering *al* Best Value Regime, cit. at 38.

[65] *Amplius*, cfr. G. G. di Sturmeck, *Il nuovo* welfare *locale: dal* Compulsory Competitive Tendering *al* Best Value Regime, cit. at 38.

government system as, in its opinion, "modern local authorities can play a vital role in improving citizens' quality of life"[66].

The Local Government Act 1999 was the first piece of legislation to implement this programme which, in theory, "should have offered considerable advantages in terms of local-authority autonomy"[67]. Nevertheless, some scholars immediately pointed out a continuity with the previous system[68] and others have since pointed out that the new model did not concretely produce the desired results[69].

Thus, under the Labour Party's reform, local authorities did not regain their autonomy[70]. On the contrary, from the 1990s onwards, they have progressively lost more and more of their powers and not even the most recent reforming legislation (e.g. the Localism Act 2011) has succeeded in strengthening their role[71]. And yet, at least in principle, the importance of local authorities continues to be emphasized: they are seen as the best vehicle for

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[66] V. J. Stewart, *Modernising British Local Government. An Assesment of Labour's Reform Programme*, 1 (2003).

[67] G. G. di Sturmeck, *Il nuovo* welfare *locale: dal* Compulsory Competitive Tendering *al* Best Value Regime, cit. at 38 and P. Leyland, *The Modernisation of Local and Regional Government in the United Kingdom: Towards a New Democratic State?,* C. Bologna (ed.), *Europa, Regioni ed Enti locali in Italia, in Spagna e nel Regno Unito* (2003).

[68] P. Vincent Jones, *Central Local Relations under the Local Government Act 1999: A New Consensus*?, cit. at 62.

[69] G. G. di Sturmeck, *Il nuovo* welfare *locale: dal* Compulsory Competitive Tendering *al* Best Value Regime, cit. at 38 and S. Troilo, *Il local government britannico tra devolution interna e integrazione europea,* cit. at 34.

[70] S. Troilo, *Il local government britannico tra devolution interna e integrazione europea,* cit. at 34.

[71] P. Leyland, *The Localism Act: Local Government Encounters the "Big Society"*, in *Ist. del federalismo*, 2012, 4, 767. In addition, for a comment on the *Localism Act* see F. Guella, *L'autonomia finanziaria del* Local Government *nel Regno Unito,* cit. at 40 and A. Layard, *The Localism Act 2011: what is "local" and how do we (legally) construct it?,* 14, *Env. Law Rev.*, 134 – 144 (2012). In particular, the latter author wrote: "analyzing the legal provisions demonstrates that the Localism Act is as much about philosophy as concrete change".
Furthermore, before considering the *Localism Act 2011,* one should mention the "Local Government Act 2000" and the "Local Govenment Bill of 2003". As regards those pieces of legislation, see *amplius* S. Cimini, *Politiche di coesione e finanziamento degli enti locali nel Regno Unito,* cit. at 40, 93; V. Jenkins, *Learning from the Past: Achieving Sustainable Development in the Reform of Local Government,* 1, Public Law, 138 (2002), P. Leyland, *Introduzione al diritto costituzionale del Regno Unito,* cit. at 8.

guaranteeing both the efficiency of public administration and the meeting of citizens' needs. Such fact is proved, for instance, by the programming documents regarding waste management published on the Government's official website[72].

In short, it may be said that the English local authorities have been subjected to two opposing forces since the mid-1990s. The first, centripetal, has sought to give them back their autonomy. The second, centrifugal, has sought to drive the provision of public services onto the market and subject it to free competition. That is mainly because the European Union considers public services to constitute a relevant sector in the construction of the single market[73].

However, it may be that since the reforms adopted between the 1970s and 1980s, aimed at "shifting the service-provision duties to the local level, whilst keeping the regulatory functions at the central level"[74], they irreparably "compromised the idea of local administration as a self-sufficient entity (...)"[75]. Thus, on the basis of the then-existing legal framework, it is arguable that the European push towards liberalization has prevailed[76].

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[72] See the "Government Waste Policy Review" available at www.defra.uk.

[73] G. Marcou, *I servizi pubblici tra regolazione e liberalizzazione,* cit. at 12; but also M. Varney, *Servizi di interesse economico generale e regolazione nel Regno Unito,* cit.. Moreover, on the relevance of public service in the construction of the European single market, see M. Clarich, *Servizi pubblici e diritto europeo della concorrenza: l'esperienza italiana e tedesca a confronto,* 1, Riv. Trim. Dir. Pubbl., 91 (2003); E. Picozza, *I servizi pubblici locali e le loro forme di gestione con riguardo al regime di diritto comunitario, nazionale e regionale,* N. rass. leg., 1005 (1995); G. M. Racca, *I servizi pubblici locali nell'ordinamento comunitario*, G. Pericu - A. Romano - V. Sapgnuolo Vigorita (eds.), *La concessione di pubblico servizio* (1995); E. Scotti, *Servizi pubblici locali e ordinamento comunitario*, S. Mangiameli (ed.), *I servizi pubblici locali* (2008); D. Sorace, *I servizi "pubblici" economici nell'ordinamento nazionale ed europeo alla fine del primo decennio del XX secolo,* 1, Dir. Amm., 8 (2010).

[74] S. Troilo, *Il* local government *britannico tra* devolution *interna e integrazione europea,* cit. at 34.

[75] L. Bonechi, *Il servizio pubblico locale in Gran Bretagna,* cit. at 2. The same opinion is also expressed by P. Craig, *Constitution, Property and Regulation,* cit. at 12.

[76] T. Prosser, *The Limits of Competition Law. Markets and Public Services,* cit. at 59. See, also, Id., *Public Utilities*, www.ius-publicum.com (2011), where the Author writes: "the public utilities in the UK are different from those in many other countries. They had been publicly owned, but under the Thatcher and Major Governments from 1979 -1997 were privatized; now the only substantial

Furthermore, according to some scholars, the prevalence of this process of deregulation has been to the detriment of other principles (social solidarity, first and foremost)[77]; principles that, as the European and continental concepts of public service also testify, are deemed to be core principles of public-service provision.

In other words, having undertaken the liberalization journey before other European countries, England has been a pioneer[78] and (in some respects) even a source of inspiration to the European Union. Thus, it is clear that the EU found a "fertile ground" in England when, at the end of 1980s, its institutions began to press for a reconsideration of State intervention in the economic field[79].

As some scholars have observed, such fact demonstrates that, in Europe, "the answer to the challenge of opening up markets to competition has depended on the legal system

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enterprises in public ownership are the Royal Mail and Scottish Water, and the former is now being prepared for privatization. Government has not retained any shareholdings in the privatized enterprises, and regulation takes place through the independent regulatory authorities (…)".

[77] T. Prosser, *The Limits of Competition Law. Markets and Public Services,* cit. at 59; Id., *Regulation and Social Solidarity*, 33, J. Law & Society, 364 (2006), and more recently Id., *Regulation, public service and competition law,* cit. at 3. See, also, C. Graham, *Regulating public utilities. A legal and constitutional approach,* cit. at 2; Id., *Socio – economic rights and essential services: a new challenge for the regulatory State, cit*. and R. Rawlings, *Law, society and economy* (1997).

[78] S. Troilo, *Il* local government *britannico tra* devolution *interna e integrazione europea,* cit. at 34. See, also, T. Prosser, *Regulation, Public Service and Competition Law,* cit. at 3, according to which: "it was the British use of [independent regulatory agencies] as a means of regulating the public utilities that really brought the role of the agencies to the forefront of European legal and political debate. (…) The general success of the UK model of independent regulator is, of course, a major influence on a broader European model of regulation. (…) We can see the influence in both national systems, including of course Italy, and at the European Union level".

[79] T. Prosser, *Regulation, Public Service and Competition Law,* cit. at 3, and, more recently, Id., *The Economic Constitution* (2014). Furthermore, on the role of the State in the economy at the end of the twentieth century from the Italian perspective, see F. Bilancia, *Modello economico e quadro costituzionale* (1996); R. Caranta, *Intervento pubblico nell'economia*, Dig. disc. pubbl., updated version, (2000); S. Cassese, *La nuova Costituzione economica* (2012); R. Miccù, *Lo Stato regolatore e la nuova costituzione economica: paradigmi di fine secolo a confronto*, P. Chirulli - R. Miccù (eds.), *Il modello europeo di regolazione*, cit. at 3, 140.

operating in each country". Of course, it has also depended on the "domestic" understanding of the idea of "public service"[80] and precisely this point is one of the main reasons why the study of public services is still relevant today.

5. A case study: the waste-management service

The local authorities' parabolic trajectory may be clearly inferred from an analysis of the waste-management service.

For the purposes of regulating management of the urban waste service, the Environment Protection Act 1990 identified three *ad hoc* categories of authority: a) the "Waste Regulation Authorities"; b) the "Waste Disposal Authorities" and c) the "Waste Collection Authorities", to which must then be added the "Waste Disposal Contractors".

The first category, i.e. the "Waste Regulation Authorities", carried out administrative and regulatory functions at a "regional" level, although in compliance with national provisions, especially as far as the environment and urban planning[81] were concerned.

Subsequently, however, the Environment Act 1995 abolished the "Waste Regulation Authorities" and replaced them with two newly established national bodies: a) the "Environment Agency", which has competence in relation to England and Wales, and b) the "Scottish Environment Protection Agency" (SEPA)[82],

[80] G. Marcou, *I servizi pubblici tra regolazione e liberalizzazione,* cit. at 12 and E. Ferrari, *Attività economiche ed attività sociali nei servizi di interesse generale,* cit.. Moreover, as far as the case law in concerned, see Supreme Court of the United Kingdom 9 November 2011, *Brent London Borough Council and a.* c. *Risk Management Partners Limited* and Italian Constitutional Court Judgment. no. 325 of 3 November 2010. For a comment, see D. Minussi, *Affidamento* in-house *di servizi pubblici locali: Regno Unito e Italia a confronto,* cit. at 10.

[81] The first British urban planning Act dates back to 1909 and is entitled "*Housing, Town Planning &c. Act"*. However, it is only thanks to the *Town and Country Planning Act 1947* that homogenous planning criteria were established. Nowadays - as far as England and Wales are concerned - the legal framework is mainly represented by the *Town and Country Planning Act 1990* which amended and replaced the 1947 Act. As regards the link between planning and waste management service, see *amplius*. D. Pocklington, *The Law of Waste Management,* (1997).

[82] *Amplius* in http://sepa.org.uk/.

which carries out the same activities as the Environment Agency, but in Scotland[83].

Since the mid-1990s, therefore, the tasks of drawing up waste-management plans, granting permits or planning any waste-related activities are no longer performed at a regional level by the "Waste Regulation Authorities". On the contrary, all these activities have been carried out at a central level by the newly created national Authorities[84].

At the same time, however, and in accordance with the Environment Protection Act 1990, the "Waste Disposal Authorities" are still responsible "for the disposal of the controlled waste generated within their area"[85] and collected by the "Waste Collection Authorities"[86]. However, the latter bodies' tasks are sometimes carried out by "Waste Disposal Contractors", who may be either an "arms-length" company established by the WDAs or a private-sector company[87].

Recently, the abovementioned legislative framework was partially modified by the Waste (England and Wales) Regulations 2011[88]. These transposed the European directive on waste (Directive 2008/98/EC)[89]. As far as the distribution of functions is concerned, the new Regulations have nevertheless confirmed the key role of national authorities in waste management.

Such fact is demonstrated by several of the Regulations' provisions. First of all, under Reg. 3 (1) "in these Regulations, appropriate authority means a) in relation to England, the *Secretary of State*; b) in relation to Wales, the *Welsh Ministers*".

Secondly, as far as England is concerned, under Reg. 4 (1) the Secretary of State must "establish one or more programmes of

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[83] D. Pocklington, *The Law of Waste Management,* cit. at 81, esp. p. 231.

[84] T. Prosser, *Regulation, public service and competition law,* cit. at 3, argues: "in the UK, outside the area of regulation of public utilities, we also have a large number of other independent regulatory bodies which are responsible for aspects of social regulation, some of them much older than the regulators of the public utilities. Examples would include (…) the Environment Agency (…)".

[85] D. Pocklington, *The Law of Waste Management*, cit. at 81

[86] D. Pocklington, *The Law of Waste Management,* cit. at 81, esp. p. 233.

[87] D. Pocklington, *The Law of Waste Management*, cit. at 81, p. 231.

[88] D. Pocklington, *The Law of Waste Management*, cit. at 81.

[89] E. Scotford, *The New Waste Directive – Trying to Do It All … an Early Assessment*, 11 ELR, 1, 75 (2009).

waste prevention measures"[90] and, in so doing, he must ensure that such programme(s) meet all the requirements listed in Reg. 5[91].

Finally, in accordance with Article 28 of Directive 2008/98/EC[92], Reg. 7(1) states, "the appropriate authority [i.e. the

[90] According to Reg. 4 (3), "In this regulation, "waste prevention measures" means measures taken before a substance, material or product has become waste that reduce:
(a) the quantity of waste, including through the re-use of products or the extension of the life span of products;
(b) the adverse impacts of generated waste on the environment and human health; or
(c) the content of harmful substances in materials and products".
In the same sense, see Art. 29, Directive 2008/98/EC, named "Waste Prevention Programmes".

[91] According to Reg. 5 "The appropriate authority must ensure that a waste prevention programme:
(a) is compatible with the objectives in paragraphs 1 and 2 of Schedule 1;
(b) has as its purpose a contribution towards breaking the link between economic growth and the environmental impacts associated with the generation of waste;
(c) is expressed in writing and: (i) sets out the objectives of the programme and a description of existing waste prevention measures; and (ii) if it is integrated into a waste management plan or other programme, clearly identifies the programme's waste prevention measures.
In the same sense, see Art. 29, Directive 2008/98/EC, named "Waste Prevention Programmes".

[92] Art. 28 of the Waste Directive 2008/98/EC is entitled "Waste Management Plans". Its paragraph 1 posits that "Member States shall ensure that their competent authorities establish, in accordance with Articles 1, 4, 13 and 16, one or more waste management plans. Those plans shall, alone or in combination, cover the entire geographical territory of the Member State concerned".
Moreover, paragraphs. 3 and 4 subsequently indicate the requirements that plans "shall" or "may" contain. More specifically, according to paragraph 3 "The waste management plans shall contain, as appropriate and taking into account the geographical level and coverage of the planning area, at least the following:
a) the type, quantity and source of waste generated within the territory, the waste likely to be shipped from or to the national territory, and an evaluation of the development of waste streams in the future;
b) existing waste collection schemes and major disposal and recovery installations, including any special arrangements for waste oils, hazardous waste or waste streams addressed by specific Community legislation;
c) an assessment of the need for new collection schemes, the closure of existing waste installations, additional waste installation infrastructure in accordance with Article 16, and, if necessary, the investments related thereto;

Secretary of State] must ensure that there are one or more plans containing policies in relation to waste management in England or Wales, as the case may be" and Reg. 9 states that such authority may give directions to the Environment Agency to that end[93].

Thus, an analysis of the provisions currently in force demonstrates that the English legislator has not left any room whatsoever for local authorities in the matter of waste management; at least as far as policy choices are concerned.

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d) sufficient information on the location criteria for site identification and on the capacity of future disposal or major recovery installations, if necessary;
e) general waste management policies, including planned waste management technologies and methods, or policies for waste posing specific management problems".
Under paragraph 4 "The waste management plan may contain, taking into account the geographical level and coverage of the planning area, the following:
a) organizational aspects related to waste management including a description of the allocation of responsibilities between public and private actors carrying out the waste management;
b) an evaluation of the usefulness and suitability of the use of economic and other instruments in tackling various waste problems, taking into account the need to maintain the smooth functioning of the internal market;
c) the use of awareness campaigns and information provision directed at the general public or at a specific set of consumers;
d) historical contaminated waste disposal sites and measures for their rehabilitation".

[93] More in detail, Reg. 9 posits: "1) The appropriate authority may give directions to the Environment Agency requiring it: (a) to advise the authority on the measures or policies which are to be included in a waste prevention programme or waste management plan; b) to carry out a survey or investigation into any other matter in connection with the preparation of such a programme or plan or any modification of it, and report its findings to the authority.
2) A direction given under paragraph (1)(b): (a) must specify or describe the matters which are to be the subject of the survey or investigation; (b) may specify bodies or persons to be consulted before carrying out the survey or investigation; and (c) may make provision in relation to the manner in which:
(i) the survey or investigation is to be carried out; or
(ii) the findings are to be reported and made available.
3) The Environment Agency must comply with a direction given under paragraph (1).
4) Where a direction is given under paragraph (1)(b), the Environment Agency must also consult any body or person that it considers appropriate but is not specified in the direction.
5) The Environment Agency must make its findings available to the bodies and persons it consults".

Nevertheless, the "*Government Waste Policy Review*" - a document of programmatic value published on the DEFRA website to explain the main goals of the 2011 Regulations - seems not only to acknowledge but also to emphasize the importance of local authorities for urban waste management.

In fact, in that document the Government declares its willingness "to work in partnership with local authorities and business in all parts of the economy to encourage and spread best practice in waste prevention and resource management, and so reap the economic and environmental benefits for society and the economy. [Consequently] the Government will only intervene where necessary, where there are clear market failures and barriers (...)"[94].

Moreover, "the Coalition Government wants to empower local communities as part of a power shift away from central Government, reinvigorating local democracy, understanding, accountability and participation. We want to ensure that the barriers to participation are removed and that community and civil-society engagement - the *Big Society* - can occur unhindered"[95].

Finally, the Review states that, for local authorities, "waste services are a matter of developing fit-for-purpose local solutions"[96]. Thus, one section of the Review is wholly dedicated to explaining the actions that the Government would like to put in practice in order to "[empower] [both] local communities"[97] and citizens. In fact, in the same document the Government holds that guiding individuals' actions in a virtuous direction makes it possible to achieve more and better results (including from the

[94] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69401/pb13540-waste-policy-review110614.pdf.

[95] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69401/pb13540-waste-policy-review110614.pdf. See also, specifically concerning the "Big Society", P. Leyland, *The Localism Act,* cit. at 71, 767.

[96] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69401/pb13540-waste-policy-review110614.pdf.

[97] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69401/pb13540-waste-policy-review110614.pdf.

economic point of view) than would be achieved by imposing controls and sanctions. Hence the appropriateness of involving civil society in waste management so as to "turn common problems into common opportunities"[98].

It remains to be seen, however, whether the intentions expressed in these statements of theory will actually be achieved in practice.

6. What is left of local government?

This article has sought to investigate the English approach to public services and the role of local authorities in their management, in particular.

It has taken the notion of public service as its starting point and has offered a brief overview of the phenomenon's evolution from its origins to the present day. Such analysis has shown, first of all, that there is a close connection between the English constitutional tradition (especially as regards the role of Parliament, i.e. the *Crown in Parliament*) and the main features of public services. Secondly, the study has highlighted that such a connection is especially reflected in the role that local government has traditionally played in the management of services. The paper has further outlined that, in spite of the local authorities' potential, their role appears to be increasingly circumscribed. In order to prove this assertion, the article has chosen the waste-management service as a case study.

In the light of the considerations set out above, the paper has argued that the ancient "prejudice against localism" is still alive and kicking in the English administrative system, even if the reasons for it differ from those of the past.

Indeed, if that prejudice once had a "constitutional" basis[99], nowadays it is mainly economically motivated[100]. In other words, the idea that local authorities should derive their legitimacy from an Act of Parliament in order to ensure the unity of the Nation (i.e.

[98] See "*Government Waste Policy Review*" p. 52.
[99] See, *inter alia*, A. Torre, *Interpretare la Costituzione britannica,* cit. at 29.
[100] G. Di Gaspare, *Quadro economico del diritto dell'economia tra Common Law e Civil Law,* cit. at 17.

the *Crown in Parliament*[101]) has evolved into an instrument for regulating the economy; at least in the sector in question.

In fact, from the Government's reforms at the end of the 1970s and the 1980s onwards, it has become the trend to "shift the service-provision duties to the local level, while keeping the regulatory functions at the central level"[102]. This trend has not been reversed subsequently, not even as a result of the European integration process. And this - according to some scholars - is probably due to the fact that "the European administrative system under construction" has clear points of similarity with the tendency just described[103].

Thus the present study has sought to emphasize that, in England, local authorities have been re-created as bodies entrusted with the daily management of a good number of administrative functions, but (...) without any power to pursue policies that differ from the national ones"[104], especially as far as the economic regulation and environmental standards of public services are concerned[105].

In other words, it has been argued that the ability of English local authorities to act as a link between European and national requirements, on the one hand, and civil society, on the other, has not been fully exploited. At least, not as far as the management of public services[106] and environmental protection[107] are concerned.

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[101] A. Torre, *Regno Unito,* cit. at 4. See, also, A. Mastropalo, *La comunità ricomposta. Alle origini dell'idea di nazione nell'Inghilterra del Seicento,* 2, Dir. Pubbl., 427 (2005) and A. Young - P. Leyland – R. Rawlings, *Sovereignty and the Law,* cit. at 29.

[102] S. Troilo, *Il local government britannico tra devolution interna e integrazione europea,* cit. at 34.

[103] S. Troilo, *Il local government britannico tra devolution interna e integrazione europea,* cit. at 34.

[104] S. Troilo, *Il local government britannico tra devolution interna e integrazione europea,* cit. at 34.

[105] See, for example, the recent article by E. Scotford - J. Robinson, *UK Environmental Legislation and Its Administration in 2013 - Achievements, Challenges and Prospects*, 25, JEL (2013), which holds that "there are now important questions to be asked about the nature and the legitimacy of the process by which guidance and policy documents are issued".

[106] See, for example, R. Rinaldi, *Citizen's Charter e servizi pubblici in Inghilterra,* cit. at 2.

One of the main reasons for this "inability" is the long-felt need (real or alleged) to reduce local authorities' public expenditure[108]. In this respect, the financial crisis that has affected the world's most developed economies for several years has prevented any possibility of a rapid change in direction.

Indeed, this crisis has also involved European public finance, having significant effects on Member States[109] and entailing a series of transformations at an institutional level[110]. Several of these changes are specifically affecting local authorities. In some cases (e.g. the Provinces in Italy[111]), they have been

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[107] See F. de Leonardis, *Politiche e poteri dei governi locali nella tutela ambientale,* 4, Dir. Amm., 775 (2012).

[108] F. Guella, *L'autonomia finanziaria del Local Government nel Regno Unito,* cit. at 40.

[109] *Amplius*, R. Baratta, *Legal issues of the Fiscal compact. Searching for a mature democratic governance of the Euro,* 3, Dir. Un. Eur., 647 (2012); F. Bilancia, *La nuova governance dell'Eurozona: alla ricerca del demos*, F. Angelini - M. Benvenuti (eds.), *Il diritto costituzionale alla prova della crisi economica* (2012); E. Chiti, *Le istituzioni europee, la crisi e la trasformazione costituzionale dell'Unione,* 6, Giorn. Dir. Amm., 783 (2012); Id., *Le risposte alla crisi della finanza pubblica e il riequilibrio dei poteri nell'Unione,* 4, Giorn. Dir. Amm., 311 (2011); M. P. Chiti, *La crisi del debito sovrano e le sue influenze per la governance europea, i rapporti tra Stati membri e le pubbliche amministrazioni,* 1, Riv. It. Dir. Pubbl. Comunit., 1 (2013); G. della Cananea, *L'ordinamento giuridico dell'Unione europea dopo i nuovi accordi intergovernativi,* 1, Comunità int., 3 (2012); S. Peers, *The Stability Treaty: Permanent Austerity or Gesture Politics,* 3, Eu. Const. Law Rev., 404 (2012); A. Spadaro, *I diritti sociali di fronte alla crisi (necessità di un nuovo modello sociale europeo: più sobrio, solidale e sostenibile),* 4, Rivista Aic (2011).

[110] N. McGarvey, *Inter - Municipal Cooperation: The United Kingdom Case,* 3, Ist. del federalismo, 523 (2012). Moreover, as far as Italy is concerned, see, *inter alia*, P. Bilancia, *L'associazionismo obbligatorio dei Comuni nelle più recenti evoluzioni legislative,* Federalismi.it (2012); G. Falcon, *La crisi e l'ordinamento costituzionale,* 1, Le Regioni, 9 (2012); F. Merloni, *Il sistema amministrativo italiano, le regioni e la crisi finanziaria,* 3, Le Regioni, 599 (2011); G. Piperata, *I poteri locali: da sistema autonomo a modello razionale e sostenibile?,* 3, Ist. del federalismo, 503 (2012) and L. Vandelli, *Crisi economica e trasformazioni del governo locale, Libro dell'anno del Diritto* (2011).

[111] *Amplius* G. Clemente di San Luca, *Il vero irrinunciabile ruolo della Provincia e le sue funzioni fondamentali,* Federalismi.it (2013); F. Manganaro, *La riforma delle Province,* Giustamm.it (2014); G. M. Salerno, *Sulla soppressione - sostituzione delle Province in corrispondenza all'istituzione delle città metropolitane. profili applicativi e dubbi di costituzionalità*, *Federalismi.it* (2014); G. Vesperini, *Il disegno del nuovo governo locale: le città metropolitane e le province,* 8-9, Gior. Dir. Amm., 786 (2014) and, finally, C. Feliziani, *Le funzioni amministrative di Province e Città*

abolished or transformed, whilst in others (such as the English one), they have lost most of their powers[112].

For all these reasons, it would appear that English local authorities are currently only being given the task of providing public services in accordance with the central Government's indications (especially regarding the opening up to competition and environmental protection). Of course, in so doing, local authorities should appropriately combine those indications with the needs of citizens,[113] perhaps by way of new organizational models.[114]

metropolitane nella legge Delrio e nel quadro della riforma costituzionale in fieri, Giustamm.it (2016).

[112] See, *inter alia*, P. Leyland, *The Localism Act,* cit. at 71. More generally, on the impact of the financial crisis in England, see T. Prosser, *The Economic Constitution, cit.*.

[113] C. Graham, *Socio Economic Rights and Essential Services: a New Challenge for the Regulatory State*, D. Oliver - T. Prosser - R. Rawlings (eds.), *The Regulatory State: Constitutional Implications* (2010) and T. Prosser, *The Limits of Competition Law. Markets and Public Services,* cit. at 59.

[114] N. McGarvey, *Inter - Municipal Cooperation: The United Kingdom Case,* cit. at 110.

NOTES

SHORT AND QUICKLY DELIVERED, YET QUITE FULL OF MEANING: THE INTERNATIONAL CRIMINAL COURT JUDGMENT ABOUT THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE IN TIMBUKTU

Federica Mucci[*]

Abstract

The judgment rendered by the International Criminal Court (ICC) on 27 September 2016 in the case Al Faqi Al Mahdi was much awaited for and – for better or for worse – will be remembered as the first decision of an international criminal tribunal in a case completely dedicated to acts directed at cultural heritage[1]. The Nuremberg Tribunal and the International Criminal Tribunal for ex Yugoslavia (ICTY) included in their judgments very important findings about acts directed at cultural properties, evaluating them in connection with other kinds of charges, they never handed down, though, a sentence solely on those grounds[2].

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[1] International Criminal Court, Trial Chamber VIII, Judgment and Sentence in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (Situation in the Republic of Mali), 27 September 2016 (No. ICC-01/12-01/15).

[2] The Charter of the International Military Tribunal of Nuremberg included the plunder of public or private property among war crimes; Alfred Rosenberg was sentenced to death for, *inter alia*, the systematic plunder of cultural objects (see A. Chechi, *The Settlement of International Cultural Heritage Disputes* (2014) 268). The jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has more than once taken into consideration attacks directed at cultural heritage, as relevant in the assessment of crimes against humanity, particularly as elements of the crime of persecution and evidence of the *mens rea* of genocide, and *per se* as war crimes (see specifically the Tadić case, the Kordić & Cerkez case, the Jokić case and the Krstić case, F. Mucci, *La diversità del patrimonio e delle espressioni culturali nell'ordinamento internazionale. Da ratio implicita a oggetto diretto di protezione* (2012) 289.

TABLE OF CONTENT

1. The crime charged

Since the suspect has admitted guilt and cooperated with the Prosecutor, this concise ICC decision – barely fifty pages – has come just one year after the opening of the case and after only three days of trial[3]. The choice of the ICC Prosecutor to charge a brigade commander – not the highest echelons of Ansar Dine[4] – 'only' with committing the attacks at the monuments, while there could be reason to believe that Al Mhadi also committed sexual crimes, could be criticised[5]. On the other hand, thanks to the huge amount of evidence of the facts (the destructions and related declarations had been filmed and facts were agreed by the defense and the Prosecutor) and to the transferral of Al Mahdi by the authorities of Niger into the custody of the ICC, this choice has led to a quick judgment, adopted at the same time as the sentence, that has immedietely been executed. Considering that crimes of attacking cultural properties undoubtedly constitute a contemporary emergency, this result is extremely significant and «the decision of the International Criminal Court is a landmark in gaining recognition of the importance of heritage for humanity as a whole and for the communities that have preserved it over the

[3] The warrant of arrest was issued on 18 September 2015, Al Mahdi was transferred to The Hague on 26 September 2015, the decision on the confirmation of charges was adopted on 24 March 2016 and the trial was concluded in three days (22-24 August 2016).

[4] A. Whiting, *The First Case for the ICC Prosecutor: Attacks on Cultural Heritage*, in *Just Security*, 29.9.2015, at https://www.justsecurity.org/26453/mali-icc-attacks-cultural-heritage/.

[5] V.V. Suhr, *The ICC's Al Mahdi verdict on the destruction of cultural heritage: two steps forward, one step back?*, in Wölkerrechtsblog, 5.11.2016, at https://voelkerrechtsblog.org/the-iccs-al-mahdi-verdict-on-the-destruction-of-cultural-heritage-two-steps-forward-one-step-back/.

centuries. (…) [It] is a crucial step to end impunity for the destruction of cultural heritage»[6].

2. The sentence and the facts

Al Mahdi is convicted of the war crime of attacking protected objects as a co-perpetrator under articles 8(2)(e)(iv) and 25(3)(a) of the ICC Statute, his sentence is to nine years of imprisonment, to which the time already spent in detention will be deducted. The destroyed protected cultural objects are, as reknown, nine mausoleums and the door of the Sidi Yahia Mosque in Timbuktu, Mali. They were attacked between 30 June 2012 and 11 July 2012 upon decision of the leaders of two armed groups (Ansar Dine and Al-Qaeda in the Islamic Maghreb) that had taken control of Timbuktu following the retreat of Malian armed forces. The destruction was decided to stop the frequent visits of the residents to the mausoleums, commonly perceived as places of prayer and, for some, places of pilgrimage. Such practices of the Timbuktu population were unacceptable, according to the fundamentalist religious approach of the armed groups that were administering the territory. Al Mahdi was the leader of the morality brigade "Hesbah"; though agreeing on the theoretical reasons prohibiting any construction over a tomb, he had recommended not destroying the mausoleums, so as to maintain relations between the population of Timbuctu and the occupying groups, but he then conducted the attacks without hesitation when the instruction was issued.

3. Specific elements of interest

Several reasons concur to convey the attention of the international community on this case: the acts at issue are of wilful, programmed destruction; the destroyed cultural sites are of recognised outstanding universal value (OUV), since most of them

[6] UNESCOPRESS, Timbuktu Trial: «A major step towards peace and reconciliation in Mali», 27.09.2016, at http://www.unesco.org/new/en/media-services/single-view/news/timbuktu_trial_a_major_step_towards_peace_and_reconciliati/#.V-xp0CgrKUl

are inscribed in the well known UNESCO List of World Cultural and Natural Heritage; the accused has admitted guilt and cooperated with the Prosecutor during the whole trial, spontaneously expressing remorse for his acts and calling on people not to become involved in the same acts "because they are not going to lead to any good" for humanity.

The interest of this case is evident, particularly considering that similar acts of wilful destruction of OUV cultural sites have been perpetrated in Syria and in Iraq and, to a lesser extent, in Libya by other fundamentalists, thus it is perceived as a possible leading case. Even though Iraq, Syria and Libya haven't ratified the ICC Statute, a sufficient precondition to the exercise of jurisdiction by the Court is that the State of which the person accused of the crime is a national is a Party to the ICC Statute[7]. Hence, foreign fighters having the nationality of a Party to the Statute could be submitted to the jurisdiction of the Court even if the State where the facts occurred is not a Party, unless, in compliance to the principle of complementarity, the case is being investigated or prosecuted by a State which has jurisdiction over it.

4. Main issues in the reasoning of the Court

A first substantial part of the judgment is about the procedural peculiarities following from the admission of guilt and subsequent cooperation of Al Mahdi. His spontaneous admissions have helped to allow a swift resolution of the case. In the Agreement regarding the admission of guilt, in fact, the Prosecutor and the defense have included a common document, presenting the factual basis of the admission of guilt[8]. It touches on all the elements to be proven, namely: that Al Mahdi directed an attack, that the object of the attack was one or more buildings dedicated to religion or historic monuments which were not military objectives, that Al Mahdi intended such buildings to be the object of the attack, that the conduct took place in the context of and was associated with an armed conflict not of an

[7] ICC Statute, Article 12; one of the two preconditions – ratification by the State where the fact has happened and ratification by the State of which the person accused is a national – is sufficient to establish juridiction by the Court. Syria has signed the Statute, but then never ratified it.

[8] ICC-01/12-01/15, February 2016, Annex A.

international character and that Al Mahdi was aware of factual circumstances that established the existence of an armed conflict.

The Court, in its reasoning, recalls some crucial steps that have led to the adoption of the Rome Statute, reminding how article 65 on the proceedings on an admission of guilt is the result of intense technical negotiations, that have taken into consideration both common and civil law approaches. The Court considers the final text of the article "not dissimilar to the traditional common law 'guilty plea'", since the accused is afforded an opportunity to make an admission of guilt at the commencement of the trial, but also "more analogous to a summary or abbreviated procedure traditionally associated with civil law systems", because it requires the Chamber to conclude that the admission is "supported by the facts of the case", specifically requiring it to consider both the admission of guilt "together with any additional evidence presented"[9]. Al Mahdi's admission of guilt (a pilot case at the ICC, hence of great interest) together with his cooperation and spontaneous declaration, could hopefully have an amplified deterrent effect in relation to other acts of intentional destruction of cultural heritage and more generally encourage other subjects to cooperate with the Court.

Not only the facts were not contested (on the contrary, several circumstances could be better ascertained thanks to the cooperation of the accused), Al Mahdi had also accepted that all charged modes of liability (co-perpetration, soliciting and inducing, aiding and abetting and contributing in any other way) were established. The Court considered that the accused could be convicted of only one of the modes of principal liability (i.e. those listed in Article 25(3)(a) of the Statute), otherwise he would be punished twice for the commission of the same crime. It also added that to conclude otherwise "contributes little to the fair labelling of the responsibility of the accused". So co-perpetration was chosen as it best reflected Al Mahdi's criminal responsibility[10].

Another interesting part of the judgment is about the evaluation of the gravity of the crime. The Court found five mitigating individual circumstances and no aggravating one,

[9] On art. 65 see paras. 21-28 of the Judgment and Sentence.

[10] See paras. 29-63 of the Judgment and Sentence.

mainly because it had already evaluated the aggravating elements when assessing the gravity of the crime, as indicated by Article 78 of the ICC Statute[11]. On one hand, the crime is deemed to be of lesser gravity than crimes against persons, on the other hand, it is anyway deemed to be "inherently grave", by reason of the extent of the damage caused and the nature of the unlawful behaviour.

With regard to the fact that the crime has been deemed to be less grave than crimes against persons, just as if it were a 'simple' crime against property, scholars have highlighted that "cultural heritage has been relegated to a subset of property offences", suggesting that "destroying a cultural heritage site that has stood for centuries, and is an important part of a group's social glue, is about as bad as destroying a modern hospital", not considering that "while both buildings play important roles, one is much harder to replace than the other"[12]. In fact, this is a consequence of the "retrograde attitude" taken by the ICC Statute to crimes against cultural heritage, following a 'civilian-use approach' instead of the more innovative and appropriate 'cultural-value oriented approach'[13]. On the other hand, though, the Court clearly states that, being all the sites but one UNESCO World Heritage sites, "their attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community"[14].

In a way, it seems that the Court has thus tried to re-balance its assessment of the gravity of the crime. A similar effort of re-balancing could be inferred from other circumstances assessed by

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[11] The Chamber correctly notes that it "cannot "double-count" any factors assessed in relation to the gravity of the crime as aggravating circumstances and vice versa" (see para. 70 of the Judgment and Sentence).

[12]See L. Lixinski and S. Williams, *The ICC's Al-Mahdi ruling protects cultural heritage, but didn't go far enough*, 19th October 2016, at http://www.law.unsw.edu.au/news/2016/10/icc%E2%80%99s-al-mahdi-ruling-protects-cultural-heritage-didn%E2%80%99t-go-far-enough.

[13] The more innovative approach is followed in the Second Protocol to the 1954 The Hague Convention on the Protection of Cultural Property in Times of Armed Conflict; see M. Frulli, *The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: the Quest for Consistency*, in *European Journal of International Law*, 203-217, 210 (2011).

[14] See para. 80 of the Judgment and Sentence.

the Court. The fact that the discriminatory religious motive invoked for the destruction of the sites has been deemed to be "undoubtedly relevant" as a circumstance increasing the gravity of the crime is particularly interesting, considering that the discriminatory intent is a typical element of some crimes against humanity (namely, persecution and genocide). Establishing this 'conceptual link' could be *per se* considered as an indication of 'upgrading' of this crime, if it is true that crimes against humanity are more serious than war crimes[15]. In addition to this, the Court also "considers that the fact that the targeted buildings were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu is relevant in assessing the gravity of the crime committed", so admitting that attacking those cultural heritage sites was tantamout to attacking the identity, the dignity and the feelings of the people of Timbuctu[16].

5. What the judgment doesn't say and possible future developments

In spite of its very limited length, the judgment touches on several interesting issues, such as the significance of the admission of guilt and the gravity of the crime, briefly commented above. On at least two intertwined main issues, though, it is limited to apodittical statements and cryptical hints.

The first is the applicability of the war crime when the attack is carried out after an armed group has taken control of a territory. The Court does not spell out the reason for this conclusion. It says that the Statute makes no distinction as to whether the attack was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group and that the jurisprudence of the ICTY is of limited guidance on this issue. The only substantial reason to which it makes reference before concluding that what is required by the Elements of

[15] See M. Frulli, *Are Crimes Against Humanity More Serious than War Crimes*, in Eur. J. Intn'l L., 329-350 (2001).

[16] The people of Timbuctu, it is to be remembered, are the direct – not the only – victims of the crime, since the whole international community is affected by the destruction of the sites.

Crimes[17] "is not a link to any particular hostilities but only an association with the non-international armed conflict more generally" is that the Statute "reflects the special status of religious, cultural, historical and similar objects", and that 'special status' is the reason why "international humanitarian law protects cultural objects as such from crimes committed both in battle and out of it"[18].

This 'special status' is the reason why cultural heritage must be protected from intentional destruction both in time of peace and of war, and independently of the exact legal qualification of the conflict, as spelled out in the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage. The most effective way of doing so under international criminal law would be to add the conduct of attacking cultural properties to the list of crimes against humanity. Voices have been raised both in doctrine and at the institutional level to call for such an inclusion[19]. The European Parliament, in a resolution of 30 April 2015, explicitly requested to add not properly 'cultural genocide' but 'cultural cleansing' to the list of crimes against humanity of the ICC Statute ("calls on the European Union to take the necessary steps, in collaboration with UNESCO and the International Criminal Court, to extend the international law category of crimes against humanity so that it encompasses acts which wilfully damage or destroy the cultural heritage of mankind on a large scale").

The next review conference of the Rome Statute of the ICC is due in 2017; it could engage in this issue and offer new elements to infer that "the development of the rules of customary international law as also affirmed by the relevant case-law, related to the protection of cultural heritage in peacetime as well as in the event of armed conflict"[20] has progressed. The establishment, in

[17] Namely, that "the conduct took place in the context of and was associated with an armed conflict not of an international character".

[18] See paras. 15-18 of the Judgment and Sentence. This conclusion may be controversial when referred to non-international conflicts; see R. O'Keefe, *Protection of Cultural Property*, in A. Clapham and P. Gaeta, *The Oxford Handbook of International Law in Armed Conflict* (2014) 516.

[19] Cfr. F. Francioni-J. Gordley (ed.), *Enforcing International Cultural Heritage Law* (2013), 63. A. Green Martínez, *Destruction of Cultural Heritage in Northern Mali: A Crime Against Humanity?*, J. Intn'l Criminal Justice, 1073-1097 (2015).

[20] In the words of the 2003 UNESCO Declaration.

2016, of UNESCO 'task forces', mechanisms for the rapid mobilization of national experts within the *Strategy for Reinforcing UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict,* is already a relevant development in international practice, together with action directed to the protection of cultural heritage included in Security Council resolutions adopted on the basis of Chapter VII of the Charter[21]. This judgment is another step forward in that direction.

[21] Resolutions about Iraq (2003), and Iraq and Syria in connection with international terrorism (2015), tackle with the specific issue of international traffic of cultural objects and the mandate of the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) included since its inception, in April 2013, the support for cultural preservation; see F. Mucci, *Intentional destruction of cultural heritage by ISIS: the reaction of the International Community against this specific aspect of the aggression to peace and human rights*, in Peace Processes Online Rev., 1-15 (2016).

IS THE EUROPEAN LEGAL ENGLISH LEGALESE-FREE?

Patrizia Giampieri[*]

Abstract

The European Union institutions are expanding their legal and authoritative powers in many sectors and fields. Therefore, their legislative and judgement activities have increased. This paper focuses on European legal English in order to explore whether it is hallmarked by the technicalities and verbosity that characterise the legal jargon, also known as legalese. Legalese encompasses lexical terms, phraseology and syntactic structures that make it incomprehensible to the layperson. Literature reports that the European legal language is also hallmarked by abstruse and archaic words. This paper will analyse European legal English and explore whether, and to what extent, the Euro-language can be a source of legalese or of plain legal terms. In order to do so, a corpus analysis of legalese will be carried out. The terms will be sourced from some European corpora, namely the European Constitution corpus; the Treaty of Lisbon; the European Parliament Proceedings corpus and the Bononia Legal corpus (only in the European Directives and Judgements sub-corpora). The paper findings will highlight that, to some extent, European legal English is free from the most pedantic forms of archaism, although some verbosity can still be found. What one may hope for the future is that European legal drafters and judges will continue to implement plain English in order to obtain a boundary-free legal language that could be used across Europe.

TABLE OF CONTENTS

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1. Introduction

Legal English is a difficult language, made of different genres and hallmarked by a technical, system-specific jargon. Its phrases and expressions are the result of a mix of Latin, French and Anglo-Saxon, which are still largely used[1]. Furthermore, the legal English language is characterized by embeddings, subordinations, syntactic discontinuities, passive constructions, nominalizations, negations and archaic, complex prepositions or constructs. These features can make it very difficult and far from general English. Such a legal language is referred to as "legalese" in literature[2]. Legalese therefore encompasses abstruse and archaic terms, which are "alien to 'outsiders' in the legal discourse community"[3]. Several scholars have carried out research and written papers in order to explore the features of legalese. In particular, some researchers have proposed a list of legalese terms and law Latin[4]. Others have analysed many legal texts issued in different countries and outlined to what extent legalese is widespread[5]. In particular, Williams and Milizia carried out a comparison between the English and the Italian version of the

[1] C. Williams. *Changes in the verb phrase in legislative language in English*, in B. Aarts, J. Close, G. Leech & S. Wallis (eds.), *The Verb Phrase in English: Investigating Recent Language Change with Corpora* (2013); P.M. Tiersma, *Legal Language*, (1999); C. Williams. *Legal English and Plain language: an update*, 8 ESP 139 (2011).

[2] C. Williams, *Legal English and Plain Language: an introduction*, 4 ESP 111 (2004); P.M. Tiersma, *Legal Language*, cit. at 1; J. Kimble, *A modest wish list for legal writing*, 79 Mich. Bar J. 11 (2000); J. Gibbons, *Taking legal language seriously*, in J. Gibbons, V. Prakasam, K.V. Tirumalesh, H. Nagarajan (eds.), *Language in the law* (2004); C. Williams, & D. Milizia, *How (un)readable is the European Constitution? A comparison of the English version and the Italian version*, in A. Cannone (ed.) *Studi in Onore delProf. Vincenzo Starace* (2008); K.L. Bhatia, *Textbook on legal language and legal writing* (2010).

[3] C. Williams, & D. Milizia, *How (un)readable*, cit. at 2.

[4] K. Laster, *Law as Culture* (2001); K.L. Bhatia, *Textbook on legal language*, cit. at 2.

[5] C. Williams. *Changes in the verb phrase in legislative language in English*, cit. at 1; V.K. Bhatia, *Drafting Legislative Provisions: Challenges and Opportunities*, 3 J. Comm. Ass. Leg. C. 5 (2010); C. Williams, *Vagueness in legal texts: is there a future for shall?*, in M. Gotti, V.K. Bhatia, J. Engberg & D. Heller (eds.), *Vagueness in Normative Texts* (2005); C. Williams, *And yet it moves: recent developments in plain legal English in the UK*, 60 Clarity 11 (2008); C. Williams, *Legal English or legal Englishes? Differences in drafting techniques in the English-speaking world*, 1 www.federalismi.it 1 (2008); C. Williams. *Legal English and Plain language: an update*, cit. at 1.

European Constitution. They analysed the two versions of the Constitution to pinpoint which one seems more comprehensible to the layperson. To this aim, they focused their research on how dubious "shall" can be and on other "technicalities", such as compound words or lexical phrases like "without prejudice to", "by way of derogation from" and many others[6]. In 2011, Williams argued that "the English version of the European Constitution of 2004 bore many of the hallmarks of a traditional style of drafting"[7]. Although addressed to the whole EU community, the European legal language can be abstruse and pedantic. In contrast, one may assume that EU legal translators should have already faced all the challenges emerging from the different European legal systems, and resolved the related linguistic and translation issues[8]. Put in this way, European legal English should be a user-friendly language. However, it is claimed that at the dawn of the EU enlargement, the EU institutions were still confronted with "the continued rise of bad English as the Commission's *lingua franca,* and the massive influx of new staff who naturally adopted the prevailing in-house style, rather than trying to reform it"[9]. Therefore, it is worth exploring whether the European legal language encompasses features of legalese[10].

In light of the above, this paper is aimed at verifying whether the EU legal documents and acts (hence, not only the Constitution) are still mined by technicalities, legalese and abstruse words, which make their comprehension difficult for the average person. Therefore, it will be interesting to explore whether the legal Euro-language is as pedantic as legalese, or it has eventually changed into a comprehensible *lingua franca*[11]. Literature is in fact rich with examples of the language of law,

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[6] C. Williams, & D. Milizia, *How (un)readable*, cit. at 2. See also C. Williams, *Vagueness in legal texts*, cit. at 5 and D. Milizia, *A linguistic investigation of the Lisbon Treaty* (2010).

[7] C. Williams. *Legal English and Plain language*, cit. at 1, 140.

[8] See S. Šarčević, *Legal Translation and Translation Theory: A Receiver-oriented Approach*, in J.C. Gémar (ed.), *La traduction juridique, Histoire, téorie(s) et pratique* (2000); E. Wagner, *Why does the Commission need a clear writing campaign*, in A. Pereira (ed.) *Languages and Translation: Clear Writing, European Commission Directorate-General for Translation* (2010).

[9] E. Wagner, *Why does the Commission need a clear writing campaign*, cit. at 8, 4.

[10] M. Asprey, *Plain Language for Lawyers* (2010).

[11] C. Williams, & D. Milizia, *How (un)readable*, cit. at 2.

which can be defined as "problematic" for the layperson. The advocates of the Plain English movement[12], for example, highlight the main features of legalese. Laster suggests a list of Law Latin still in use in English-speaking countries[13]. Bhatia provides an interesting list of plain English terms[14]; Kimble and Asprey pinpoint the legal terms that can replace archaisms[15]. Therefore, in order to explore whether the EU legal jargon is "affected" by legalese, the following corpora will be taken into consideration: the European Constitution corpus[16], the Treaty of Lisbon[17], the European Parliament Proceedings corpus[18] and the Bononia Legal corpus[19] (only in the European Directives and Judgements sub-corpora). It is assumed that these types of corpora will suffice. Literature reports in fact that legal discourse "often does not require a large corpus to determine its linguistic frequencies"[20]. A corpus analysis will be carried out and research will be organised on two levels: Latinisms will be searched at first; the other types of features (i.e. pedantic formulae, archaisms, negations and nominalizations) will be then analysed. Therefore, the following

[12] P.M. Tiersma, *Legal Language*, cit. at 1.
[13] K. Laster, *Law as Culture*, cit. at 4, 246.
[14] K.L. Bhatia, *Textbook on legal language*, cit. at 2, 26.
[15] J. Kimble, *A modest wish list for legal writing*, cit. at 2 and M. Asprey, *Plain Language for Lawyers*, cit. at 10.
[16] Treaty on European Union (TEU), Maastricht 1992.
[17] The Treaty of Lisbon (2007) amends the Treaty on European Union and the Treaty establishing the European Community (TEC), Rome 1957.
[18] Sourced from the OPUS multilingual search interface. The Euro-Parliament parallel corpus is extracted from the proceedings of the European Parliament. It includes versions in 21 European languages.
The texts composing the corpus were collected from April 1996 to November 2011. http://www.statmt.org/europarl/
[19] The Bononia Legal Corpus - BoLC - is the result of an on-going research project. It is aimed at the construction and analysis of a multilingual comparable legal corpus. It is being developed at the University of Bologna. It is intended to compare legal texts, representing on the one hand the common legal system of the European Union, and on the other, the various legal systems and cultures developed by nation States. It is aimed to take into account both the emergence of a standard legal system at European level and the plurality of national legal systems existing within the area of the European Union. http://corpora.dslo.unibo.it/bolc_eng.html
[20] V.K. Bhatia, N. Langton & J. Lung, *Legal discourse: opportunities and threats for corpus linguistics*, in U. Connor & T.A. Upton (eds.), *Discourse in the Professions: Perspectives from Corpus Linguistics* (2005).

Latin words and expressions will be firstly searched in the corpora mentioned above: *a fortiori, ab initio, conditio sine qua non, de jure, ex parte, ex officio, inter alia* and *ipso facto*. The following legalese terms and expressions will then be searched: *aforesaid*, *by virtue of, covenant and agree, forthwith, give devise and bequeath, henceforth, in compliance with, keep and maintain, make an examination of, make mention of, make payment, notwithstanding the fact that, now therefore, null void and of no effect, place a limitation, subsequent to, terms and conditions* and *whosoever.*

Furthermore, plain English terms will be searched in order to verify whether they could replace their legalese counterparts. As stated above, in fact, literature abounds in examples of plain English words that could replace both Latinisms and legalese words and expressions[21].

2. Analysis

The pages that follow will basically try to provide an answer to the following questions: "Is it possible to rely on European, legalese-free legal English as a *lingua franca*?"; "Is the Euro-language representative of its multi-systemic legal environments and free from archaisms?". In order to answer these questions, some of the verbose terms suggested in literature will be searched in the corpora mentioned above and will be reported in tables. The tables will show how many concordance lines can be found in the corpora. In this way, the tables will highlight whether the European legal jargon makes use of legalese and, at the same time, whether plain English counterparts are available. As stated above, this paper is in fact aimed at verifying whether the European legal jargon is free from abstruse constructs. If so, it would be proper to share it with the European citizens and use it as a legal reference language for non-English speaking countries, still considering the peculiarities arising from each different national legal system.

[21] J. Kimble, *A modest wish list for legal writing*, cit. at 2 and M. Asprey, *Plain Language for Lawyers*, cit. at 10.

3. Latinisms

In order to explore whether the EU legal documents and acts still relies on Latinisms, some of the Latin words listed in literature will be searched in the mentioned corpora (the European Constitution corpus, the Treaty of Lisbon, the Bononia Legal corpus and the European Parliament proceedings corpus). Afterwards, their plain English counterparts will be searched, in order to verify whether non-legalese terms are already used in EU legal documents and acts[22].

Table 1 reports the concordance lines found in each corpus. Below each Latin word or expression, a corresponding equivalent in plain English is reported, as suggested by Laster[23]. The last column reports the plain English equivalents, if any. Omissions of the Latin word are also reported in the last column and are underlined.

Words	Const	T. of L.	BoLC	Parl	Plain Eng. equivalents
a fortiori = with stronger reason	0	0	201	12	a fortiori, even more so, all the more, therefore, consequently, far less by, less so to, what is worse, omission
ab initio = from the beginning	0	0	12	2	as from the outset
conditio sine qua non = prerequiste	0	0	3	15	conditionally from the start, condition necessary for, conditio sine qua non, a requirement for, prerequisite, essential condition, set in stone, sine qua non
de jure =	0	0	29	30	de jure, automatically, in law, in legal terms,

[22] K. Laster, *Law as Culture*, cit. at 4, 246

[23] *Ibidem*.

in law					competent
ex officio = by virtue of an office or position	0	0	2	4	ex officio
ex parte = an application to a court by someone in the absence of another	0	0	67	1	the former part, ex parte
inter alia = among other things	8	3	1.890	484	amongst others, among other things, amongst other things, inter alia, omission, partly, to name but a few, also, for example, such as
ipso facto = by the mere fact	0	0	35	11	in fact, thereby, the very fact that, ipso facto, omission

Table 1: Words of Latin origin

In light of table 1, some observations can now be inferred. Firstly, the European Constitution and the Treaty of Lisbon are almost entirely free from Latinisms. What is only abundant in European Parliament proceedings, Directives and Judgements is the Latin expression "*inter alia*". However, it can be noticed that many are the legal substitutes, as it can be seen from the wide array of plain English terms (such as: "amongst others", "among other things", "partly", etc.). Many are also the plain English substitutes of the abstruse Latin expression "*conditio sine qua non*", such as "conditionally from the start", "condition necessary for", "a requirement for", "prerequisite" and "essential condition". Secondly, it is possible to notice that, apart from "*ex officio*", which

is a very peculiar term, many plain English terms substitute for archaisms. As a consequence, it may be argued that in the corpora analysed, the European legal language is almost free from Law Latin and a good deal of replacement words can be found.

4. Legalese

The other research revolves around legalese terms. Table 2 has been implemented by drawing upon the list provided by Bhatia and on the basis of the legalese features underpinned by Tiersma and by Coulthard and Johnson[24]. Legalese is characterised, amongst others, by the following features: nominalizations (i.e., verb+noun constructs instead of plain verbs, such as "make an agreement" instead of "agree"); repetitions ("null and void"); negations ("not incorrect"), and complex and archaic prepositions ("notwithstanding the"). Therefore, the table below reports different sub-sections, on the basis of the elements listed above. Below each legalese term or expression, is a corresponding plain English equivalent, where the word "omission" refers to the suggestion of omitting the term itself. Each term is searched in the European Constitution corpus, the Treaty of Lisbon, the Bononia Legal Corpus and the European Parliament proceedings corpus. As in the search carried out for Latinisms, plain English terms are searched in order to verify whether they are already in use in EU legal documents and acts.

Words	Const	T. of L.	BoLC	Parl	Plain Eng. equivalents
made provision = provided	4	0	128	229	introduce, call for, planning, anticipate
make an examination of = examine	0	0	0	0	-
make	0	0	0	5	mention, concentrate

[24] K.L. Bhatia, *Textbook on legal language*, cit. at 2, 26; P.M. Tiersma, *Legal Language*, cit. at 1, 203 and M. Coulthard & A. Johnson, *The Routledge Handbook of Forensic Linguistics* (2010).

mention of = mention					on, review, highlight, point out
make payment = pay	0	0	17	1	pay
place a limitation = limit	0	0	0	0	-

Table 2: Legalese sub A): Nominalizations

In light of the table above, some interesting findings come to the fore. First of all, EU drafters and judges have avoided using too many nominalizations. As a matter of fact, a wide array of plain English substitutes can be found in their place (e.g., "mention", "concentrate on", "review", "highlight" and "point out" instead of "to make mention" and "introduce", "call for", "plan" instead of "make provision").

Words	Const	T. of L.	BoLC	Parl	Plain Eng. equivalents
covenant and agree = agree	0	0	0	0	-
give devise and bequeath = give	0	0	0	0	-
keep and maintain = maintain	0	0	8	0	-

null void and of no effect = of no effect	0	0	0	0	-
save and except = except	0	0	0	0	-
terms and conditions = terms	11	6	85	147	regulations, legislation, procedures, rules, conditions
will and testament = will	0	0	0	0	-

Table 2: Legalese sub B): Repetitions

As far as repetitions are concerned, the specificity of certain legal matters comes into play. As a matter of fact, not all the legal lexical phrases reported in Table 2 sub B) can be found in European acts and documents. These terms pertain in fact to specific legal cases. For example, "give devise and bequeath" and "will and testament" clearly pertain to the field of testamentary succession. Therefore, they can hardly be found in EU legal texts. The same occurs to "keep and maintain", which characterises lease agreements and to "null void and of no effects", which frequently refers to contracts. The only repetitions that can be found (i.e., "terms and conditions") are often replaced by plain English synonyms, such as "regulations", "procedures", "rules" and "conditions". The other repetitions mentioned in literature (such as "covenant and agree"; "save and except") are instead missing in the EU corpora. This proves that European legal texts are free from unnecessary repetitions.

Words	Const	T. of L.	BoLC	Parl	Plain Eng. equivalents
not inappropriate	0	0	0	2	not out of place, not inappropriate, not undesirable, not such a bad thing
not incorrect	0	0	0	2	-
not insignificant	0	0	3	57	significant, substantial, major
not uncommon	0	0	0	20	fairly common
not unusual	0	0	3	51	often, not unusual, not rare, not uncommon

Table 2: Legalese sub C): Negations

Negations might be another source of confusion for the layperson. It is interesting to notice that they are not very frequent in EU legal texts. From the subsection C above, in fact, this is self-evident and plain legal terms can be found in their place, such as "significant", "substantial" and "major" instead of "not insignificant", or "often", "not rare" instead of "not unusual".

Words	Const	T. of L.	BoLC	Parl	Plain Eng. equivalents
by virtue of = under	9	2	2.706	373	according to, through, in line with, in accordance with, pursuant to, by means of, under, what is meant to happen with, as to
forthwith = immediately	2	0	1.683	91	in the near future, (very) soon, (very) quickly, as soon as possible, with all due haste, promptly, without delay, immediately

henceforth = from now on	0	0	125	268	henceforth, from now on, now, in the future, here and now
in compliance with = comply	22	11	264	299	in accordance with, in line with, as evident in, according to, subject to
notwithstanding the fact that = although	0	0	71	22	despite the fact that, in spite of the fact that, although, despite the, in view of the fact that, without compromising the, given that
now therefore = omission	0	0	1	22	in the first place, firstly, first, above all, primarily, therefore
subsequent to = after	2	0	282	44	following the, echoing the, since, after

Table 2: Legalese sub D): Complex or archaic prepositions

Unfortunately, complex and archaic prepositions are widely used. Terms such as "by virtue of" and "forthwith" are in fact very frequent in Directives, Judgements and in European Parliament proceedings, where also "henceforth" and "in compliance with" come to the fore. Nonetheless, a wide spectrum of plain English equivalents come into play, which is reassuring. For example, as suggested in literature[25], it is possible to notice that "forthwith" is substituted by "in the near future", "(very) soon", "(very) quickly", "as soon as possible" and "immediately". In the same way, "by virtue of" is often replaced by more common words, such as "according to", "through", "under", and so on. "In compliance with" is replaced by "in accordance with" or "according to". "Henceforth", which would perhaps be more

[25] K.L. Bhatia, *Textbook on legal language*, cit. at 2. 26.

difficult to understand for the layperson, has plain alternatives in "from now on", "now" and "in the future".

Words	Const	T. of L.	BoLC	Parl	Plain Eng. equivalents
aforesaid = omission	0	0	878	69	already mentioned, aforementioned, this/these, above mentioned, mentioned earlier, omission
hereinafter hereafter = from now on	224	11	4.25058	58	now, following, from now on
the said = the	17	18	4.474	182	this/that, the..in question, the
whosoever = omission	0	0	2	4	them, who, anyone, those

Table 2: Legalese sub E): Cohesive archaisms

Finally, there are some other forms of archaism, which must be taken into account, such as those encompassing cohesive pronouns and past participles[26]. In this respect, it is worth mentioning that, for instance, "aforesaid" is often replaced by cohesive adjectives or pronouns such as "this" or "these"; "the said" is also replaced by more common cohesive elements, such as "this", "that" or "the". "Here(in)after" is substituted by "now" and "from now on"; "whosoever" has equivalents in "them", "who", "anyone" and "those", which are all plain cohesive terms.

[26] R.C. Wydick, *Plain English for Lawyers* (1978); S.C. Abbate, *Il documento legale anglosassone* (1998); C. Williams. *Legal English and Plain language*, cit. at 1, 141 quoting C. Williams, & D. Milizia, *How (un)readable*, cit. at 2, 2220.

In light of table 1 and 2, it can be stated that legalese still hallmarks European legal jargon. However, many plain English equivalents have also come to the fore, and they often replace their archaic counterparts. Above all, the European Constitution and the Treaty of Lisbon are almost free from legalese.

5. "False" legalese

This paper cannot be considered exhaustive without some final considerations on "false" legalese. Literature reports in fact some other archaic and pedantic terms, which are, amongst others: *accordingly, as a result of, consequently, each and every, et al, fails to, implement, in order to, in respect of, in the event of, prior to, provided that* and *pursuant to*[27]. I argue that these terms can be considered as pertaining to a day-to-day jargon, whose meaning can be easily inferred by the layperson. In order to show how frequent these terms are, Table 3 reports the concordance lines of five different corpora. In addition to the three English corpora analysed above, the British National Corpus (BNC) and the Corpus of Contemporary American English (CoCa) are in fact taken into account. In these two additional corpora, a generic term search is carried out. Therefore, no sub-corpus is selected, in order to make the search broader. In table 3 below, the words with highest frequencies are written in bold.

Word	Bol	EurParl	EurConst	T. of L.	CoCa	BNC
Accordingly	1.843	1.452	7	20	**5.556**	2.270
As a result of	2.317	5.518	9	4	**13.425**	5.085
Consequently	2.535	1.494	1	1	**7.924**	2.472
Each and every	3	528	0	0	**1.735**	214
Et al	74	15	0	0	**67.621**	2.723
Fails to	393	1.195	5	2	**3.844**	1.224
Implement	1.244	7.907	36	11	**9.097**	1.516

[27] K.L. Bhatia, *Textbook on legal language*, cit. at 2. 26.

In order to	10.807	30.896	70	36	**44.732**	11.860
In respect of	**9.142**	3.353	55	19	244	2.913
In the event of	1.757	**1.940**	18	9	1.638	1.043
Prior to	1.787	1.179	10	4	**15.618**	3.079
Provided that	**3.217**	1.167	10	2	893	1.103
Pursuant to	**6.785**	1.520	93	58	816	428

Table 3: "false" legalese

Some clarifications are firstly necessary as far as "each and every" and "et al" are concerned. These are, perhaps, the only terms that might not pertain to legal matters, as they may refer instead to colloquial language and academic jargon respectively. As a matter of fact, their frequency in the European corpora is the lowest. This finding, however, should be corroborated by further research. Secondly, apart from expressions like "in respect of", "provided that", "pursuant to" and, to some extent, "in the event of", which all hallmark legal texts, the other terms are very likely to pertain to different domains. As it can be clearly seen, in fact, the majority of the words with the highest frequency can be found in the CoCa, which, in this case, is used as a generic corpus. Therefore, it can be inferred that the average person may have encountered the above terms in fields other than the legal one, and eventually become acquainted with them. In light of the above, the terms in Table 3 may not be labelled as legalese, archaic or abstruse. Moreover, it can be asserted that the European Constitution is, again, the text that makes less use of a "complex" jargon.

6. Limits of the analysis

Some final remarks are now compelling, before drawing conclusions. This paper has relied heavily on the concordance lines of the corpora mentioned above. It should be pointed out

that a corpus can only tell us "what is or is not present" in it[28]. Therefore, the findings of this paper can only be valid within the corpora analysed and it would not be possible to generalize them, at this stage. Moreover, further analysis is called for. In particular, the use of "shall" could be taken into account. In this respect, scholars have already argued that in the European Constitution and in the Treaty of Lisbon modality is not always used clearly[29]. Therefore, further research would be required in order to verify whether this also occurs in Parliament proceedings, Judgements and Directives. Furthermore, no analysis has been carried out as far as syntactic discontinuities and the passive voice are concerned. Further actions would therefore be required on these instances, in order to undertake a thorough analysis of how the European legal language is understandable to the layperson.

7. Conclusions

Legalese is defined in literature as a legal language that is very difficult to understand for the layperson, especially because of its complex syntactic structures, its pedantic formulae and archaic constructs. This paper was aimed at verifying whether European legal texts make use of legalese and, if so, to which extent. A list of legalese terms was sourced from literature, which abounds in instances and in providing plain English equivalents[30]. Legalese terms were then searched in some EU corpora, namely the European Constitution corpus, the Treaty of Lisbon, the European Parliament proceedings corpus and the Bononia Legal Corpus (European Directives and Judgements only). The above research provided some interesting insights. First of all, it brought to the fore that European documents and acts are not always free from legalese; secondly, that, to some extent, plain English

[28] G. Bennet, *Using corpora in the Language Learning Classroom: Corpus Linguistics for Teachers* (2010).

[29] C. Williams, & D. Milizia, *How (un)readable*, cit. at 2; D. Milizia, *A linguistic investigation of the Lisbon Treaty*, cit. at 6.

[30] K. Laster, *Law as Culture*, cit. at 4, 246; K.L. Bhatia, *Textbook on legal language*, cit. at 2, 26; V.K. Bhatia, *Drafting Legislative Provisions*, cit. at 5; M. Coulthard & A. Johnson, *The Routledge Handbook of Forensic Linguistics*, cit. at 24.; C. Williams, *Legal English and Plain Language*, cit. at 2; C. Williams. *Legal English and Plain language*, cit. at 1; C. Williams. *Changes in the verb phrase in legislative language in English*, cit. at 1.

equivalents can however be found. One could hence hope that plain English equivalents will be used more extensively in the years to come. This could be what the future might hold, providing that efforts were made in order to abandon legalese and make further space to plain English substitutes. The corpus analysis has in fact brought to the surface that European legal English tends to be user-friendly and that the European drafters, judges and members of the European Parliament try to avoid pedantic and archaic forms. The use of Latinism is in fact limited and complex prepositions or constructs (such as "notwithstanding the fact that") are rarely used. Therefore, the European legal language should continue to evolve and become an effective alternative to legalese. In this way, it could be a valid and reliable source of plain legal English for non-English speaking countries. In the future, opportunities to replace legalese with plain European legal English could be in sight. At present, however, further actions and efforts from the European drafters is called for, in order to make the Eurojargon simpler and eschew verbosity or unnecessary archaisms[31]. It will imply to have "the needs of the reader foremost in mind" and adapt legal texts to the multiculturalism Europe is proudly made of[32].

[31] C. Williams, & D. Milizia, *How (un)readable*, cit. at 2.
[32] M. Asprey, *Plain Language for Lawyers*, cit. at 10, 12.

BOOK REVIEW

TONY PROSSER, THE ECONOMIC CONSTITUTION, OUP, OXFORD, 2014, 304 PP.

Francesco Bilancia[*]

If one needed to prepare a programme for an advanced course of *Diritto pubblico dell'economia* in an Italian University he or she could easily wonder why there is not in Italy a book like *The Economic Constitution*. By dealing with the relationship between constitutional law, public law and economics, it offers an economically well informed constitutional analysis, looking at theoretical and epistemological concepts useful both for analysing law and economics, and so on. What seems most relevant in Prosser's analysis, in this book as in many other articles and essays, is his focusing mainly on methodological issues. One merit of the book is, indeed, its critical approach to the analysis, which is the very questions the author deals with.

In the short space of this review I will not be able to consider all the issues the book deals with, such as taxation and borrowing, public expenditure, regulation of financial services, government shareholdings and industrial policy, public procurement, and so on. I shall limit myself to just a few critical comments on those issues which let us see in the best light some of the methodological perspectives I find theoretically outstanding: 1) the concept of "economic constitution" as recently elaborated in the British legal culture; 2) the monetary question, that is to say the role of currency and monetary policies within the economic constitution; 3) spending review as a form of regulation. In fact, my specific aim is to show that Prosser's critical approach is extremely useful in setting out a perspective which we could call, borrowing some words by Terence Daintith, a "legal analysis of economic policies" [*Legal Analysis of Economic Policy*, in *Journal of Law & Society*, 9/2 (1982), 191].

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Let us start from the title of the book: "*The Economic Constitution*". This is truly a key concept. As we know, this expression gained wider currency in scholarly discourse outside Germany only at the beginning of the 90's [K. Tuori, K. Tuori, *The Eurozone Crisis. A Constitutional Analysis*, (2014), 13]. The original term "economic constitution", very important in the Italian legal culture too, stems indeed from the particular legal-political culture which upheld the Weimar Constitution of 1919, thanks to the Freiburg's School and the ordoliberal school of legal and economic thinking. As we are immediately going to see, in Prosser's analysis this term is used with more neutral connotations, which distances his approach from the market-liberal economic thought. Prosser does not use this concept as synonymous of "decision", as a voluntarism approach does (*Gesamtentscheidung*, as in Carl Schmitt and Franz Böhm *Wirtschaftsverfassung*). To be fair, in the British legal culture this term is not very popular, as a search for bibliography in which this term is employed confirms. British scholars are more familiar with such expressions as "public regulation", "regulation and the Constitution", possibly even "Constitutional regulation", especially dealing with the British Constitution and economic issues, which is also becoming more rule-bound or, as they use to say, more and more jurified during the last few years.

Hence, the expression "economic constitution" in Prosser's book is detached from any link to a specific model or doctrine about economics, because on the contrary it seeks the more interesting interrelation between constitutional law and economics. We could probably not say the same about a notion such as the European economic constitution [again K. Tuori, K. Tuori, *The Eurozone Crisis*, cit. 13] where the market economy based on free competition is the very constitutional model and where the so-called Fiscal Pact seems to impose "a particular model of economic management on European member States".

I suggest that in Prosser's approach the use of the expression is more neutral because the British constitution does not seem to reflect a distinctive model of economic doctrine. His analysis, then, appears to be focused on the role of the UK Government as an actor of the economic management, "the way in which the modern UK government manages the economy" being at stake. This is why he takes on important questions such as

legitimacy, accountability, transparency and distributional justice, namely to understand "how regulation should seek to achieve constitutional legitimacy" (7). In this sense the author embraces a "normative analytical approach" – especially by dealing with institutional and procedural values after the decline of constitutional scrutiny on governmental action by the Parliament – based on constitutional grounds and not on brute facts.

As for monetary policy, it is worth briefly comparing the British situation with the one in the Euro Area. It seems quite clear to me that by speaking about currency and financial stability after the recent financial crisis, we are using the concept of "economic constitution" in a very different way from above. We traditionally refer to the economic constitution in a microeconomic dimension by using words such as regulation, competition, market or free-movement of workers, goods, and so on. But after the Maastricht Treaty entered into force, we have to cope with a "constitution of macroeconomics" and to deal with aggregate economic objectives [I am here in debt to the analysis of K. Tuori, K. Tuori, *The Eurozone Crisis*, cit., but see also the essays collected in M. Fichera, S. Hänninen, K. Tuori, edrs., *Polity and Crisis. Reflections on the European Odyssey* (2014)]. Although the economic constitution of the Euro Area is very different from the non-Euro Member States (like the UK), the macroeconomic dimension of the concept is about the same. We need to handle such notions as anti-inflationary monetary policy, stability of currency, exchange-rate fluctuations, conjunctural policy, economic and financial imbalances to fulfil the convergence criteria, and now about all the consequences of Brexit.

In this context, within the Common Market, the more the system leaves the Member States with the responsibility of the management of financial stability problems caused by asymmetric, country-specific, and economic shocks, the more important the part of the book dedicated by Tony Prosser to "government spending and borrowing" becomes. In so far as the need for fiscal adjustment to manage general government deficit and debt and to fulfil deficit and debt stability within the Single Market arises, and in so far as redistribution targets among member States are at stake, this part of Prosser's analysis becomes relevant and useful. This is especially true when he expounds how

revenues (taxes) and expenditures (welfare spending) are to be altered in order to achieve counter-cyclically policies.

A short diversion regarding the extraordinary measures of monetary policies laid down by the ECB is opportune. As to this, very clever remarks are made by Tony Prosser as regards the decision by the German Federal Constitutional Court which requires financial scrutiny of expenditure by the Bundestag's Budget Committee. This should be a relevant form of parliamentary scrutiny in any member State, while it is now lacking, as he notes, in the UK and, I would add, in the Italian system too.

Moving back to the main question and to the UK monetary system, Prosser's analysis deeply looks into the actual role of the Bank of England and the Treasury and stresses how they are able to lay down policies which improve liquidity and boost market confidence. A considerable space remains for flexibility and national discretion on monetary policies by which a distributional impact of the public budget and exchequer bonds can be devised, even though they still have to cope with risks of systemic effects which are derived from developing new financial instruments.

As Prosser notes, in the EU context there are many more restrictions, in the form of constitutional constraints, on economic decision-making powers, as for instance budgetary constraints. And this is an "extreme contrast with UK flexibility" (83), especially after the sovereign debt crisis. Since these restrictions can lead to even more imbalances among member States within the Single Market [see N. Acocella, *Signalling imbalances in the EMU*, in B. Dallago, G. Guri, J. McGowan (eds.), *A Global Perspective on the European Economic Crisis* (2016)] – which the Brexit process can further worsen – they could be seen as "one of the greatest inconsistencies of the Euro as a whole" (243). On the other hand, the new centrality given to the reduction of public deficit, through cuts of public expenditure as the main goal of economic policies, remains a question common to both the EU and the UK (84).

We come now to the final question, "the use of spending review as a means not just of allocating resources but of changing the direction of policies" (6), as a means both of regulation and to reach deficit and debt stability. In Prosser's view, the spending review process is not only important to achieve value for money –

as he puts himself "no area covered in this book is of greater importance than scrutiny and control of public expenditure" (110) – but it is now "at the very centre of British politics". The book contains a detailed historical and technical analysis of rules and procedures of spending review in the British legal system. It should lead, in the end, to achieving measurable effects in the macroeconomic dimension of its implementation. This could be the very conclusion, from a theoretical point of view, of this specific issue, at least speaking about Italy, instead: to consider the effects of expenditure cuts not only to reduce deficit and debt, but to improve the macroeconomic performance of public regulation. As to say to reduce public borrowing, to eliminate structural current deficit, to reduce public sector debt by increasing the gross domestic product through a well oriented spending review. Trying not to reduce any question of spending review to the so-called "expansionary contractions", the well-known "austerity question". While the analysis is also oriented by what Prosser calls "equality duties", moving from the cumulative effects of separate measures of spending review on the same subjects.

But this is a different, important direction of his analysis we cannot deal with in the short space of this review. Neither we will able to discuss the similarly important question of the regulation of financial services, connected to the plan of keeping retail and investment banking separate, in order to avoid the need for State rescue if the latter fails. Focusing once again on the methodological approach of this study, this is another relevant question, as it is looked from a systemic point of view, the macro economical layer of constitutional rules. This just to conclude with the same remark pointed out at the beginning, about the approach of Tony Prosser's analysis.

TONY PROSSER, THE ECONOMIC CONSTITUTION, OUP, OXFORD, 2014, 304 PP.

*Paola Chirulli**

Tony Prosser's *The Economic Constitution* is in my view a seminal reading for anyone interested in the constitutional dimension of public intervention into the economy.

The concept of economic constitution adopted in the book, on which the author declares in the foreword being inspired by Sabino Cassese's *La nuova costituzione economica* (2005), has a different meaning from the one which is usually found in the literature: here the author, rather than questioning the foundation of public intervention in the economy, explores the constitutional arrangements which preside over direct economic management by central government, therefore challenging from a different point of view the legitimacy of government's decision-making powers and actions.

The author has already deployed this concept of the economic constitution and regulation in an article on *Spending Review as Regulation* [*Public Law*, 596 (2011)], but here the whole management of the economy is taken into consideration and carefully assessed.

Such an attempt is unique in the existing literature and therefore particularly valuable.

In his previous books, *Law and the Regulators* (1998), *The Limits of Competition Law* (2005), and *The Regulatory Enterprise* (2010[1], the author has extensively analysed the relationship between public powers and the market, exploring its different dimensions (particularly the European one) and focusing on the essence, the different goals and limits of regulation and regulatory authorities, hereby dealing with the economic constitution seen more as the way to find an harmonic composition between social

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[1] Other books include *Nationalised Industries and Public Control* (1986), not to mention book chapters and articles, among which see for example *Models of Economic and Social Regulation*, in D. Oliver, T. Prosser and R. Rawlings (eds.) *The Regulatory State. Constitutional Implications* (2010).

values, such as that of public service, and the principle of free market and economic initiative [see f.e. *The Limits of Competition Law* (2005), where the author writes that "the world described in this book...has a complex mixture of competitive markets, competition law, and public service values" and highlights the development of a public service law in the United Kingdom]. These previous works challenged from different perspectives what might be called a more traditional idea of economic constitution, such as the one given by the ordoliberalist theories, and were focused on the external limits of state action in the economy, especially through the use of regulatory powers, of which he extensively examined and critically assessed the legitimacy, tasks, way of operating and accountability.

Here, the focus shifts to the other side of the spectrum, which is the way public powers manage the economy, resting on the premise that the "idea that the state could withdraw from the economy had already been proved illusory"(2), but rather neglected had been the fact that, especially in recent years, "governments have been called on to intervene in ways which are far deeper, and far more costly" [on the "great regenerative power of the state", see for example C. Harlow, *The "Golden Paw" of the State*, in *A Simple Common Lawyer. Essays in honour of M. Taggart*, (2009)]. Hence, the need to explore the "internal" dimension of the economic constitution, which is perhaps less ideology-oriented and does not question the rightness of public intervention in the economy, but rather, moving from its necessity and/or strong presence, critically analyses its various forms, principles and constitutional foundations and constraints.

The meaning of economic constitution is, thus, extremely far-reaching and yet a challenging one, since it leads the author to undertake an assessment of how the government uses its economic powers by getting, managing and spending money: in a word, employing its "dominion" capacity.

The importance of Prosser's analysis emerges even more when we move to the contents of the analysis, which is exceptionally rich, since it covers taxation, monetary policy, public borrowing, share-holding and investment powers, state aids, public expenditure, procurements and the regulation of financial markets, thus offering an all-encompassing and tightly sealed

study of areas which are rarely put together, and are rather left to single, sector-specific studies.

I think this is one of the main merits of the book: the attempt to offer a comprehensive overview of the different areas of public action which affect the role of the government as an economic actor and still are subject to constitutional constraints and accountability duties.

A second remarkable aspect of Prosser's analysis is its methodology: each chapter explores an area of government management of the economy by using the constitutional parameters in a very broad meaning. First of all, the author takes into consideration not only the national (and sometimes the local) legal context, but also the international and especially the European one, as fundamental parts of the overall legal framework of public decision-making powers in the economy.

Although dealing with a distinctive area of economic management, each chapter follows a similar methodological pattern, whose common feature is the adoption of some key constitutional "indicators", the most remarkable of which are: institutional design, form and intensity of parliamentary scrutiny, consultation and participation procedures, balance between legislative and soft-law measures, accountability instruments and amenability to judicial review. In the way the chapters develop, there is always a right balance between an accurate description of how each sector works, and the critical assessment of its constitutional "fitness", which is then conveniently summarised in the conclusions of each chapter.

These examples clearly show how here the word "constitution" is given a broad meaning, as a complex set of principles, rules, practices and even relationships which shape economic decision-making, therefore spanning from the overarching public law and human rights principles (which are very often taken into consideration by the author) to administrative procedures and practices, or to auditing systems aimed at assessing good value for money (f.e. there is an extensive coverage of Memorandums of Understanding and a focus on formal and informal relationships between the government and other public actors).

This methodological choice seems to me particularly successful, since it gives the book a coherent structure, and allows

the reader first to get acquainted with the main institutional aspects and legal framework, and then to be guided into a critical evaluation of its dynamics.

The book ends with a short conclusive chapter on the "plural constitution", where the author argues that the complex system of economic management which has hitherto been described points to a plural array of instruments rather than to a single constitutional pattern.

Moreover, the author stands for a less ideologically oriented vision of the economic constitution, which deploys procedural more than substantive instruments, quite differently from what both ordoliberalism and the "new constitutionalism" have been bringing forward, by depicting the constitution as a substantive constraint, a sort of straitjacket aimed at limiting the economic intervention of the state in the market.

The concept of the constitution as a point of arrival, rather than a starting point, and the idea of an economic constitution, which encompasses a political, a legal and an administrative dimension is an interesting achievement, which well deserves being further developed.

I find it extremely useful especially when it describes the aim of the economic constitution as a final and collective goal, to which the different instruments of management and accountability can contribute. This idea, which can also be found in other recent studies on the constitution [see f.e. N. Bamforth and P. Leyland (eds.), *Accountability in the Contemporary Constitution* (2013)], should be taken more seriously by Italian scholars.

The Italian system (and legal scholarship) tends to rely heavily on judicial review and on the courts as the main guardians of public accountability, even in the field of public management of the economy. Interestingly, our author does not overlook the importance of judicial scrutiny, and highlights important areas where judicial review has been (and can be) used as a means to put under scrutiny the use of "dominion power" by public-interest-spirited associations of taxpayers and citizens (as in the *Pergau Dam* case). Yet, the analysis clearly shows how judicial control - which has an important role to play, especially when fundamental rights are at stake - must be complemented, and sometimes replaced, by other instruments, such as parliamentary

committees, fair procedures and - or may be first of all - by better institutional design and relationships. This is in my view the most important lesson we can learn from the book, and I am sure that it paves the way to further research achievements in the field.

TONY PROSSER AND THE NORMATIVE APPROACH TO THE STUDY OF THE "*ECONOMIC CONSTITUTION*"

*Giacinto della Cananea**

Although the concept of "economic constitution" is relatively new in legal studies, given that it has been introduced at the beginning of last century's third decade, it has become an increasingly important concept in legal and economic studies. It could be said, therefore, that there is nothing novel about the choice of this concept for an analysis of the interaction between law and economics (it ought to be stated at the outsed that, for current purposes, in use of these terms there is no reference to the school of thought known as "law and economics", which has obtained consent but has also met criticism on both sides of the Atlantic). But this would not be true and the first step of this review will be, therefore, to explain the novelty of the approach followed by Professor Prosser. As a second step, this review will focus on the controversial nature of the "economic constitution", especially after the greatest economic and financial crisis - after that of the 1930's - hit Europe. Not only the discontents of certain public policies, but also some of the more relevant political and social forces would agree that the economic constitution, particularly with regard to the Economic and Monetary Union, must be substantially revised. Prosser's book is thus very timely.

The book is based on the author's previous studies, but it is important as a whole. It is at the same time an institutional analysis of the legal framework that governs the economy, a theoretical analysis, and a critical analysis. From the first point of view, after the introductory chapter in which Prosser clarifies his theoretical framework, the following eight chapters examinee a number of policy areas that are particularly relevant from the perspective of public law, including taxation and public borrowing, public expenditure and monetary policy, the regulation of financial services and government contracts.

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From the theoretical point of view, Prosser's analysis differs from others, first, in that he identifies the object of this study by using the concept of 'economic management', as distinct from that of 'regulation', that is generally and sometimes generically used in scholarly literature and, second, because his study focuses on the 'economic constitution'. This requires some clarification not only because this concept is "rather unusual in the UK" (Javier Solana, *Review of Tony Prosser, The Economic Constitution*, 2014, 35 Legal Studies, 2015, 186), but also because of the author's explicit choice of a normative approach. In the first chapter, Prosser stresses that he "will be adopting a normative approach to economic management on constitutional grounds rather than simply describing the nature of the arrangements which are in operation" (p. 16). The importance of this choice becomes still more evident when Prosser notes that other accounts of the same facts, in particular those of Dantith and Page, deny that such a normative constitutional task is meaningful. Their underlying assumption, he continues, is that the principles and values may not form part of the '*positive constitution*'.

For the sake of clarity, it ought to be said that Prosser does not follow other social scientists, such as Buchanan and Hayek, both concerned with the protection and promotion of specific "substantive" values or interests. Indeed, he observes that the constitutionalization – and, *a fortiori*, the prioritarization – of such values or interests raises serious issues from the viewpoint of democratic legitimacy. Suppose, for example, that a choice must be made between keeping a certain level of public deficit or financing some policies. This is neither a technical nor a neutral decision about the allocation of public resources. It is, rather, a decision which gives a particular direction to a set of interests which emerge from the economic and social sphere: a decision that is intrinsically political and depends on value judgments. According to Prosser, such judgments, which impinge on the collective welfare, are for the political process, where public officials are elected and accountable to the public, at least within liberal democracies. This brings us to the author's main concern. It regards another type of values or interests, which he calls "process values". Such values include "legitimacy, deliberation, and

accountability" (p. 17). These are – together with due process - traditional values of public law in the whole European legal space.

It is on the basis of such values, for example, that some decisions taken by the Commission with regard to Greece public debt and deficit have been criticized by the EU Court of Auditors on grounds of lack of accuracy and due process for all the Member States involved. These are important critical remarks, that should be taken into consideration at least by public lawyers, while they are less easily known by the general public than the ideological critique to the asserted "neo-liberal" bias of EU institutions. It is precisely because of his choice of an approach that is not centered on the principles and standards that are used in order to promote certain economic or social values, but emphasizes 'process values' that Prosser does not follow that widespread opinion that the economic Constitution of the EU systematically aims at protecting the property and power of some economic groups, frustrating the democratic will of legislative majorities. It is on the basis of the same values that Prosser looks at how the national institutions perform the functions and exercise the powers that have been attributed to them, interact with each other, and can be held accountable for action or inaction. In particular, he devotes very interesting remarks to the uses and misuses of the financial resources allocated by the UK budget. For examples, his analysis of the *Pergau Dam* case are very reasonable and deserve attention by those public lawyers who study public finances.

In this respect, the book is an interesting example of the growing literature on the interconnection between the economic constitution of the European Union and that of its Member States and, in so doing, draws attention to several legal institutions that are of common interest, including privatizations, public expenditure and monetary policy. "Common interest", obviously, does not mean sameness of approach, because scholars working in different contexts may accord a different role or significance to the same legal institutions. However, the use of the same terminology – "economic constitution" in this case – can be viewed as a significant manifestation of the emergence of a European debate. Whether such debate will be affected by *Brexit* and, if so, how is another question and by no means an unimportant one.