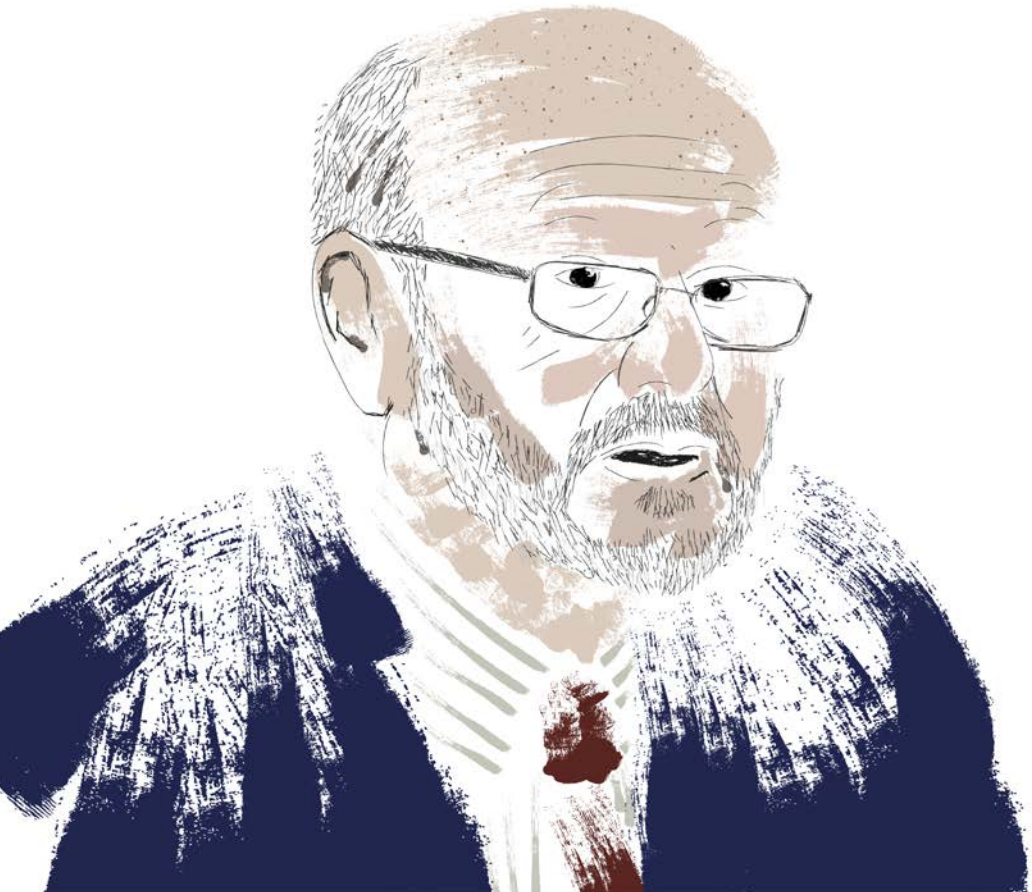
EUI EUROPEAN UNIVERSITY INSTITUTE

Jacques Ziller
a European scholar

Edited by Diane Fromage



Published by
European University Institute (EUI)
Via dei Roccettini 9, I-50014
San Domenico di Fiesole (FI)
Italy

EN PDF	QM-03-22-104-EN-N	ISBN: 978-92-9466-346-7	doi:10.2870/098663
ES PDF	QM-03-22-104-ES-N	ISBN: 978-92-9466-347-4	doi: 10.2870/035530
FR PDF	QM-03-22-104-FR-N	ISBN: 978-92-9466-349-8	doi: 10.2870/705940
IT PDF	QM-03-22-104-IT-N	ISBN: 978-92-9466-348-1	doi: 10.2870/44968

With the support of the Erasmus+ Programme of the European Union

The European Commission supports the EUI through the EU budget. This publication reflects the views only of the author(s) and the Commission cannot be held responsible for any use which may be made of the information contained therein.

EUI EUROPEAN UNIVERSITY INSTITUTE

Jacques Ziller, a European scholar

Edited by Diane Fromage

The book was jointly produced by the Depart of Law and the Robert Schuman Centre

European University Institute, Florence, Italy

Table of contents

Foreword

Diane Fromage

Très cher Jacques,
You retired from the University of Pavia in September 2021 after a long and particularly rich international academic career. Those you inspired, as well as your closest colleagues, have worked together to offer you this collection of contributions on various subjects of comparative and EU law.
Your strong openness to other cultures and your talent for languages are mirrored in the multilingual edited volume we prepared to pay tribute to your rare academic and human qualities.
We hope that you will enjoy readings our reflections and look forward to hearing your reactions to them. We also hope that you will have enjoyed our small workshop!
Most importantly, we wanted to *thank you* for having been an excellent mentor and colleague to us all, and we all wish you all the best for your *retraite*.

Thanks are further owed to the EUI, and especially to Joanne Scott, for supporting this project. Without Ciprian Grumaz's, Francesca Grassini's and Giorgio Giamberini's efficient help, this book and our small workshop would not have been possible.

Diane Fromage, on behalf of all the contributors

1. Recent evolutions in EU Law

1. General principles of law in monetary policy: in the hands of courts?

Joana Mendes[1], Professor of Comparative Administrative Law, University of Luxembourg

Taking as a starting point the controversy over the judicial review of monetary policy that recently shook the European legal world, I focus this short contribution on one of the many controversies it raised: can general principles of EU law that apply daily to the legislative, executive, and administrative action of the EU function as strictures of the ECB's discretion in its monetary policy decisions? In the unprecedented constitutional clash between the German Constitutional Court and the Court of Justice of the European Union (CJEU) over the constitutional claims by Peter Weiss and others on the legality of the PSPP programme, both courts presumed that they can – even if they followed very different approaches and reached radically opposite outcomes.[2]

Focusing on the judgment of the CJEU – largely considered to have applied the only possible standard of judicial review in matters of monetary

1 This contribution for the workshop in honour of Jacques Ziller (2022) has a distant link to the work that I have written under his supervision, as it touches on the ability of law, and in particular of general principles, to control or structure the authority of the EU when acting in an administrative or executive capacity. It contains an analysis with which he is likely to disagree, something that never stopped him from supporting my work, and for which I am very grateful. It sets out a hypothesis that must be developed further and is part of ongoing work.

2 C-493/17,*Weiss*, Judgment of the Court (Grand Chamber) of 11 December 2018(hereafter *Weiss*); BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915 (hereafter *Weiss (BVerfG)*)

policy – I will argue that general principles, specifically the principle of proportionality and the principle of careful and impartial examination, can function as strictures of the ECB's discretion in its monetary policy decisions, but not in the hands of courts. I will make three main points. First, the CJEU deployed general principles of administrative law to review the ECB's monetary policy decisions in such a way that renounced to judicial control. Second, its position recalls the doctrine of political questions or *actes de gouvernement*, but this doctrine cannot and should not apply in EU law. Thirdly – and tentatively – I will argue that, before the type of powers that the ECB has, one must develop ways in which law can and must operate outside (or irrespective) of judicial review. I will therefore advance the possibility that general principles of law be used by parliaments, rather than by courts, when probing monetary policy decisions of the ECB. My argument is not an argument of democracy, but one of accountability which general principles can support, if used by an institution that is not bound by a binary result of legality/breach of legality.

1. Renouncing to judicial review by performing judicial review: the Court and discretion

If one follows the logic underlying the two judgments of the CJEU on the legality of monetary policy measures (*Gauweiler* and *Weiss*) such measures can be probed judicially like any other instance of an exercise of discretion, by asserting compliance with "procedural guarantees" that both balance out the wide discretion of the decision-making and enable the Court to control legality and stray away, to different degrees, from the substantive merits of the contested decisions.[3] In applying them, the Court looks for manifest errors of assessment, that is, it checks whether the institutions have conducted a careful and impartial examination of all the relevant matters of the situation and have given an adequate statement of reasons. If proportionality is invoked in the dispute, it searches also for manifest breaches of proportionality, checking then whether the measure was "manifestly inappropriate" or whether it went "man-

3 Explicitly stated in *Weiss*, *supra* note 2, paragraph 30 (stated in this paragraph as a prelude to the review of compliance with the duty to give reasons: paragraphs 31 to 41).

ifestly beyond what is necessary".[4] As is well known, the Court calibrates this test and the application of the principles of care, proportionality and reasons in different instances of discretion, to allow for varying degrees of intensity.

Yet, if they are to function as tools of *control* of discretion, these principles require an examination of the decision-maker's process that must go beyond an analysis of the facts and arguments brought forward by the author of the measure challenged. They presuppose probing external evidence and assessing alternatives, or at least the processes followed to assess alternatives. Concretely, the principle of care, as a tool of control, presumes that there is some yardstick, external to the measure itself, that allows the court to assess the relevance of the factors considered; the principle of proportionality, in the same vein, requires at least that the adequacy and necessity of the measure be probed in view of possible alternatives. The Court of Justice did neither in its *Weiss* judgment. Cutting through the fog of the many analyses that this judgment has triggered, I would like to highlight here only the reasoning that the Court followed when compounding proportionality and care as general principles that, at the same time, *ground* and *limit* judicial review of discretion.[5] The Court started out by recalling that the legality of the bound-buying programme (PSPP) depended on it being proportional to the objectives of monetary policy, i.e., according to Article 5(4) TEU, the content of the instrument chosen by the ECB to exercise of its monetary policy competence could not "exceed what is necessary to achieve [those] objectives", as set out in Articles 119(2) and 127(1)".[6] The Court, then, examined the terms of the PSPP Decision and the documents submitted to the Court and concluded that the economic analysis that grounded the measure's suitability – the appropriateness of this instrument

4 Proportionality made its entrance in monetary policy with Case C-62/14, *Gauweiler,* Opinion of the Advocate General Cruz Villalón delivered on 14 January 2015,, apparently triggered by the positions expressed then by Poland and Spain, see paragraphs 100, 124 and 159 ("a number of the parties taking part in these proceedings have defended the programme, referring to the constituent elements of the proportionality test").

5 While proportionality is typically not one of the "procedural safeguards" that, following the judgment in Case C-269/90, *Technishes Universität München*, Judgment of the Court of 21 November 1991, are usually associated to the formula mentioned in *Weiss*, *supra* note 2, paragraph 30, it is also a legal principle whose judicial 'bite' varies according to the discretion of the decision-maker (e.g. *Weiss*, *supra* note 2, paragraphs 71 to 73).

6 *Weiss*, *supra* note 2, paragraph 71.

(the means) character to maintain price stability (the end) – was not vitiated by a "manifest error of assessment".[7] While assessing the relationship between the means chosen and the goal that they must serve, the Court appeared to look for errors of assessment, apparently conflating two grounds of review.[8] When then examining whether PSPP went "manifestly beyond what is necessary" to maintain price stability, the Court proceeded in two steps. It begun by situating its examination in the context that justified the measure, as described by the ECB.[9] It proceeded to analyse the characteristics of the programme – the eligibility criteria, its temporary character and the volume of the bonds that can be purchased – that guaranteed that "its effects are limited to what is necessary to achieve the objective concerned".[10] The effects considered – those "limited to what is necessary" – were a general impact on the financing conditions across the Eurozone (as opposed to affecting the financing needs of specific Member States) and a limited impact on the balance sheets of commercial banks.[11] This analysis was made solely within the terms of the ECB's decision. The Court confronted the difficulty of the matter: despite all the limits the ECB set to its bond-buying programme, "the total volume of securities that may be acquired

7 *Ibid*, paragraph 74 ("it follows from recital 3 of Decision 2015/774, from the documents published by the ECB (...) and from the observations submitted to the Court"), paragraph 75 ("it can be seen from the documents before the Court"), paragraph 76 (restating recital 4 of Decision 2015/774), and paragraph 77 (relying on statements of the ECB). The reasoning includes general references to "observations" and "documents" that refer, presumably, to all that can be submitted to the Court according to Article 23 of the Statute of the Court, as well as those that the Court may request according to Article 24 of the Statute.

8 See, in this respect, Kosta, V (2021), *Proportionality and discretion in EU law: in search of clarity*, in ECB Legal Conference 2021, *Continuity and change – how the challenges of today prepare the ground for tomorrow*, April, 2022, pp. 98-102.

9 *Weiss*, *supra* note 2, paragraph 80.

10 *Ibid*, paragraphs 82 and 83 to 92.

11 *Ibid*, paragraphs 82 and 83. The effects of successively renewed short periods are not identified in the judgment (paragraphs 85 and 86); there is only a circular mention to the necessity of the PSPP based on the temporary nature of the programme: "the PSPP has, from the start, been intended to apply only during the *period necessary for attaining the objective sought* and is therefore temporary in nature" (paragraph 84). Similarly, the effects of the limitations placed on the volume of bonds that may be acquired was also not identified (paragraphs 87 to 89); also here one is confronted with a circular reference: "that amount (...) was regularly revised in order to *restrict it to what was necessary in order to achieve the stated objective*" (paragraph 88).

under the PSPP remains substantial".[12] The reason was again provided by the ECB: "the *ECB has made the valid point* that the efficacy of such a programme (...) depends on a large volume of government bonds being purchased and held".[13] Furthermore, if this fact is disputed – and here we arrived at the crux of the matter – this "does not, in itself, suffice to establish a manifest error of assessment on the part of the ESCB".[14] Again, two different tests of legality appear conflated.[15] The Court did not assess the necessity of the measure by examining whether other equally effective means are less restrictive of an underlying protected interest.[16] It examined the measure, its characteristics, against the justification given by the ECB for the means chosen and the ends *as interpreted by the ECB*, and concluded that there was no manifest error of assessment.[17] It did so, mostly, if not exclusively, on the basis of the measure itself, without external references that could serve as normative yardsticks of assessment. That care and proportionality were conflated became clear in an astonishing statement that it had first made in *Gauweiler*: "given that questions of monetary policy are usually of a controversial nature and *in view of the ESCB's broad discretion*, *nothing more can be required* of the ESCB *apart from that it use its economic expertise* and the necessary technical means at its disposal to carry out that analysis *with all care and accuracy*".[18]

The Court did not formally renounce jurisdiction – it could not – but deferred in all line to the expertise of the ECB. In significant passages, it took at face value the information the ECB provided and the arguments it put forward.[19] In the words of the much-criticised judgment of the GCC, it "[accepted] positions asserted by the ECB without closer scrutiny", in a way that cannot prevent a situation in which the ECB gets to "to expand ... its com-

12 *Ibid*, paragraph 90.

13 *Ibid*, emphasis added.

14 *Ibid*.

15 Kosta (2021), *supra* note 8, pp. 102-104.

16 *Ibid*, pp. 105-106.

17 *Weiss*, *supra* note 2, paragraphs 78 and 91.

18 *Ibid*, paragraph 90: Case C-62/14, *Gauweiler*, Judgment of the Court (Grand Chamber) of 16 June 2015, paragraph 75 (hereafter *Gauweiler*).

19 See footnotes 7 to 13.

petences on its own authority".[20] As a result, I argue, the CJEU couched in legal language the decision-making of the ECB – through its reasoning based on proportionality and care – without de facto performing a control.

2. Non-justiciability in EU law?

Against this background, one may ask whether it would be preferable to introduce in EU law an area of non-justiciability. This argument has been advanced by Stefanie Egidy, on convincing grounds. Despite the weaknesses of the control it exercises, the Court perpetuates the image that it is the primary accountability mechanism over measures of monetary policy. Indirectly, it may "crowd out other forms of accountability" and, by endorsing the legality of the policy measures even if on thin grounds, it risks substituting political debate.[21] My critique goes in this direction: the Court used general principles of law as "judicial workarounds" and maintains a fiction of judicial control at least when it comes to its use of these principles.[22] Doing so risks depleting those legal principles and turn them into empty signifiers.

By comparison to the position of the CJEU, the pronouncement of the US Court of Appeals in the 1929 judgment on *Raichle v Federal Reserve Bank of New York* seems preferable.[23] In an oft-cited passage of that judgment, the Court held that:

> "It would be an unthinkable burden upon any banking system if its open market sales and discount rates were to be subject to judicial review. Indeed, the correction of discount rates by judicial decree seems almost grotesque, when we remember that conditions in the money market often change from hour to hour, and the disease would

20 *Weiss* (BVerfG), *supra* note 2, paragraph 142 (in relation to the objectives of the PSPP) and paragraph 156 (in relation to the application of proportionality). Similarly, Egidy, S. (2019), *Judicial review of central bank actions: can Europe learn from the United States?* in ECB Legal Conference 2019, *Building bridges: central banking law in an interconnected world*, April, 2019.

21 Egidy (2019), *supra* note 20, p. 69.

22 The term "judicial workarounds" is taken from Ostrowski, S. (2021), *Judging the Fed*, Yale Law Journal, Vol. 131, No.2, 2021..

23 See further, Egidy (2019), *supra* note 20, pp. 57-58, where the same citation is found.

ordinarily be over long before a judicial diagnosis could be made".[24]

The case pertained to the banks' actions to raise interest rates, for which the plaintiff claimed compensation for damages. That passage indicates that, in matters of monetary policy, experts from the Bank must have the final say. A similar reasoning can apply to gauging the effects of a programme for the purchase of government bonds on the financing conditions and needs of Member States (at stake in *Weiss*), even if the difficulty of leaving such choices straightforwardly in the hands of experts of an independent institution without democratic constrains is clear. The use of instruments of monetary policy raises political questions that are not justiciable. There are strong prudential reasons for limiting judicial review, not least because "questions of monetary policy are usually of a controversial nature".[25] As Justice Lübbe-Wolff stated in her famous dissenting opinion to the *Gauweiler* judgment of the German Constitutional Court:

> "The more judicial restraint is required, the more preferable is it to exercise such restraint by way of refusal to go into the merits (political question doctrine, criteria of admissibility) rather than by way of applying restrained standards of review (recognition of margins of appreciation, substantive obviousness criteria and the like). That is because the former path is the path of greater restraint. Dealing with the substance of the case is altogether avoided here, while *the mere application of restrained standards of review will typically result in some kind of benediction*, although reduced in scope, of the object of judicial review.".[26]

On these grounds, three reasons can be invoked to defend that non-justiciability is preferable to the limited judicial review conducted by the CJEU in *Weiss*. By contrast to limited judicial review, non-justiciability directly assumes that the Court – any court – is not well-placed to conduct a political-economic debate on the role of monetary policy in the Eurozone economy. Further, it also

24 *Raichle v. Federal Reserve Bank of New York*, 34 F.2d 910 (2d Cir. 1929). See, for a recent analysis, Ostrowski (2021), *supra* note 22, pp. 734-736. Also cited in Egidy (2019), *supra* note 20, pp.57-58.

25 *Weiss*, *supra* note 2, paragraph 90: *Gauweiler*, *supra* note 18, paragraph 75..

26 Dissenting Opinion of Justice Lübbe-Wolff on the Order of the Second Senate of 14 January 2013, paragraph 9 (on BVerfG, Order of the Second Senate of 14 January 2014 - 2 BvR 2728/13, ECLI:DE:BVerfG:2014:rs20140114.2bvr272813.

acknowledges that an assessment of legality has its limits and avoids the risk of providing a language that gives a semblance of legality to assessments and that are predominantly non-legal (or a-legal), or at least in relation to which "due to vagueness, the legitimating force of existing legal rules appears feeble".[27] Finally, non-justiciability does not elude the fundamental problem that hides behind the legal controversy: the democratic legitimacy of decisions that are insulated from democratic politics and have a fundamental impact on the national governments' ability to define their fiscal policies.

At the same time, however, important reasons speak against non-justiciability. First, it is obviously no avenue for a meaningful oversight. While it may signal to the political institutions the need to be effective account holders, alone, it is largely unsatisfactory in view of the fundamental constitutional relevance of the political conflict over monetary policy within the EMU. Second, a political questions doctrine that delimits areas of non-justiciability has no place in EU law. It is antithetical in a legal system where every single competence of the EU institutions (no matter how imprecisely defined) presupposes the existence of legal limits and the ability of the Court of Justice to control them. If at all, it could be applied in the areas of executive action that the Treaty exempts from judicial review and that coincide with the conventional scope of application of equivalent doctrines in national law (i.e. international relations). Its transposition to other policy areas would be contrary to the role of the Court in ensuring that the law is observed and to the way its jurisdiction is defined in the Treaties. Where prudential reasons may lead the Court to significantly limit its review, that restraint follows (or should follow) only from a substantive examination of the merits of the case, thereby preserving – so the argument goes – the role of the Court in ensuring that the law is observed. Third – and more importantly, the grounds for non-justiciability have always been political, not technocratic. *Actes de gouvernment* have been those considered to pertain to the political function of the government as one of the highest bodies of the state with legitimacy assets that the ECB clearly does not have. Fourth, it is out of tune with the recent evolution that has seen central banks acquire banking supervision powers and brought them squarely to the realm of the regulatory state; the extent to which these two realms of competence – monetary policy

27 *Ibid*, paragraph 7.

and banking supervision – can be kept separate beyond their respective formal-institutional setting, is unclear.

Finally, non-justiciability *tout court* dismisses an important indication that the Court gave in its judgments on monetary policy: while the Court did not carry out a meaningful judicial review of the monetary programs of the ECB, it has indicated that what was presumably outside of the scope of administrative law principles – monetary policy – *can be* governed also by the principles of care and proportionality. But the question that follows is precisely whether the application of these principles to monetary policy decisions can be consequential. Can it allow a control without substantive interferences that amount to distortions of policy decisions and be detrimental to the ECB's mandate? I argue that those general principles can potentially be deployed to this effect, but not if used as norms of control by courts: those general principles are *legal tools* that, as developed by courts, can be used by parliaments to support a *political scrutiny* of the conditions, criteria and implications of monetary policy acts.

3. When care and proportionality meet the powers of the ECB

Probing whether a measure has been adopted in compliance with care and proportionality by the standards I indicated earlier makes them sharp tools to probe the type of judgments that the ECB needs to make. At the same time, it necessarily entails a degree of substantive interference that the courts are not well-placed to make without further legislative or normative determinations.

Verifying compliance with the principle of care requires assessing whether all relevant aspects that the decision-maker needs to consider were carefully and impartially examined. While this assessment has an undeniable procedural dimension, it implies taking a position on *what counts as relevant*, hence, on the substance of the matter and of the considerations of the decision-maker.[28]

28 On the importance of relevance, see Nehl, H.P. (2019), *Judicial Review of Complex Socio-Economic, Technical, and Scientific Assessments in the European Union* in Mendes, J. (ed) *EU Executive Discretion and the Limits of Law*,Oxford University Press, 2019; In particular, he argues that the duty of care "has a strong connotation of substantive review and legality of the exercise of discretion, because it necessarily implies that the judges make a value judgment on the relevance of the (primary) facts needed for the purposes of the discretionary appraisal" (p. 192).

When the legal disputes pertain to conflicts over whether all relevant factors were considered, the application of the principle of care by the court requires as a minimum that what qualifies as relevant is externally given by the law, if not directly, at least indirectly deductible from it through methods of legal interpretation, and, hence, detached from the specifics of each case and from the decision challenged. But in monetary policy, there is little support in legal norms to devise what are relevant factors that the decision-maker must take into account when adopting a measure. Weighing different policy alternatives under a proportionality control is a process that arguably presupposes legal norms that indicate thresholds of legal protection, or, at least, it presupposes a clear identification of the interests that proportionality is intended to protect.[29] Such legal norms arguably do not exist in monetary policy, and, even if they did, the identification of the competing interests that monetary policy measures affect is bound to be complex and contested process.

The complexity inherent in monetary policy decisions – and the ensuing difficulties of judicial review – is, in part, due to the structural characteristics of the powers of the ECB, which make judicial review of monetary policy particularly difficult.[30] The ECB acts in situations of uncertainty, it reacts to the information that it collects and analyses, and it takes decisions on the basis of prognostic assessments that it is technically and legally competent to undertake. Its mandate is delimited and concretised by resorting to open-textured norms whose meaning depends on the interpretation of evaluative and goal-oriented terms, which only the ECB is technically and legally competent to make. Finally, the long-term effects of its decisions are fundamental for its credibility. These conditions of action enable the ECB to acquire constitutive powers: the ECB gets to construe the legal norms that also ground what it may lawfully do. It defines the meaning of the norms that delimit its mandate, through its own action; at the same time the public interests that it is meant to protect – price

29 On the different meanings of proportionality, see Kosta, V. (2019), *The Principle of Proportionality in EU Law: An Interest-Based Taxonomy* in Joana Mendes (ed), *supra* note 28,On *Weiss*, *supra* note 2, see Egidy, S. (2021),*Proportionality and procedure of monetary policy-making*, International Journal of Constitutional Law, Vol. 19, Issue 1.

30 See, in more detail, Mendes, J., *Constitutive powers and justification: the duty to give reasons in EU monetary policy*", forthcoming in Dawson, M. et al. (eds), *Towards Substantive Accountability in EU Economic Governance*,Cambridge University Press..

stability in support of the economic actions of the Member States –only come to bear through that very same action.[31] Delimiting price stability presupposes an understanding of the concrete aims of executive action that emerges, at each point in time, in the ECB's institutional environment, by reaction to socio-economic and political realities and perceived needs of public action. At the same time, that definition generates and stabilises normative expectations: it sets the terms of what will be considered legally compliant measures.

It is noteworthy that these characteristics are not exclusive to the powers of ECB. They are present in other instances of executive decision-making. But very few, if any, executive body has the ability to control the means of money creation which gives the ECB an immense political power (in the sense of *potentia*). Very few, if any, influences fundamentally the fiscal policy decisions of elected governments. Combined with the constitutive powers, these powers of the ECB make judicial review particularly difficult.

On the one hand, the characteristics and dimension of the ECB's powers should make it subject to stronger – not less – scrutiny on legal-constitutional grounds. On the other, and to use the sharp words of Justice Lübbe-Wolff in the already cited dissenting opinion in *Gauweiler*, "the more far-reaching, the more weighty, the more irreversible – legally and factually – the possible consequences of a judicial decision, the more judicial restraint is appropriate where, due to vagueness, the legitimating force of existing legal rules appears feeble".[32] The conundrum is clear.

The Court has developed the tools that may allow for the stronger scrutiny that the powers of the ECB justify: care and proportionality, as said, are probing tools that can pierce through the complexity of decision-making and tease out the conditions, the criteria and the implications of monetary policy decisions. But they cannot be used by the institution that developed them – the Court – without that scrutiny bringing it too close to a substitution of judgment or to a substantive assessment that are off-limits to the Court. That assessment by the Court can only lead to one of two outcomes: the legality or the illegality of a contested measure. As such, it risks distortions of policy decisions that can be detrimental to the ECB's mandate.

---

31 Mendes, J. (2021), *Constitutive Powers of Executive Bodies: A Functional Analysis of the Single Resolution Board*, Modern Law Review, Vol. 84, No. 6.

32 Dissenting Opinion of Justice Lübbe-Wolff, *supra* note 27, paragraph 7..

4. Care and proportionality: a proposed different use

I have argued that the highly deferential position of the Court of Justice in Weiss provides only a semblance of control that has potentially pernicious consequences, both for the general principles themselves, depleted of their function of control, and for finding alternatives to a stricter accountability of the ECB's monetary policy decisions. At the same time, the solution to the conundrum of judicial review over monetary policy decisions could only *unsatisfactorily* be addressed by recognising an area of non-justiciability, which is particularly problematic in EU law. The constitutive powers of the ECB require a strong scrutiny on legal-constitutional grounds.

EU law has developed tools – the principles of care and of proportionality – that can pierce through the degree of political and technical complexity involved in monetary policy decisions. They can support a control *ex post factum*, if deployed by an institution – the European Parliament – who can pass a substantiated judgment on the merits of the ECB's prior monetary policy decisions, on the conditions of their adoption, on the criteria that led to the specific configurations of a decision or a programme and on its implications, as possibly envisaged at the time of their adoption, without being placed in the difficult position of either endorsing the expertise and the judgments of the decision-maker as a "kind of benediction" (as the Court of Justice did in *Weiss*) or taking a potentially highly disruptive decision of annulment (as the German Constitutional Court did in *Weiss*).

Care and proportionality could be used as a trigger for political debate and contestation, to probe alternatives and to facilitate a substantiated judgment. In this scenario, law would support a process that is essentially political, as much as the Treaty rules that delimit the mandate and the boundaries of the powers of the ECB. It could correct the current weaknesses of parliamentary scrutiny of monetary policy decisions.[33] Arguably, this control can be done without necessarily hindering the independence of the ECB, insofar as passing

33 On those weaknesses, see, inter alia, Dawson, M. et al. (2019),*Reconciling Independence and accountability at the European Central Bank: The false promise of Proceduralism*, European Law Journal, Vol. 25, No. 1.

a substantiated judgment ex post factum does not amount to "seek or take instructions", as prohibited by Article 130 TFEU. However, both my proposal and how it can be reconciled with a degree of independence compatible with the Treaty strictures require further elaboration. Turning parliaments into a relevant institutional actor in matters of monetary policy has challenges that go beyond devising the tools that can serve that purpose.

2. The legal bases for the energy independence of the European Union

Ernesto Bonafé, Senior Research Fellow
Centre for Energy, Petroleum, Mineral Law and Policy, University of Dundee, United Kingdom

1. Introduction

Reducing rapidly the dependence on Russian fossil fuels has become the new driver of the European Union (EU) energy policy as mapped out in the REPowerEU plan presented on 18 May 2022.[34] This is an unprecedented challenge for the EU given the entrenched dependence on Russian imports of fossil fuels: 40% of gas, 27% of oil and 46% of coal.[35] The challenge has abruptly appeared in the context of war in Ukraine, exorbitant energy prices and rampant inflation, which can only worsen in case of energy shortages in winter. REPowerEU

34 European Commission (2022a), *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - REPowerEU Plan*, COM(2022) 230 final, Brussels.

35 European Commission (2022b), *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – REPowerEU: Joint European Action for more affordable, secure and sustainable energy*, COM(2022) 108 final, Brussels.

builds on the Green Deal[36] and the Fit for 55[37] initiative and is multiplying the number of actions and initiatives, including sanctions regimes against Russia, a state aid temporary crisis framework, a winter preparedness package, an emergency intervention to address high energy prices, and more to come. The way for the EU to reduce dependence on Russian fossil fuels is by fast forwarding the clean transition and achieving a more resilient energy system.

This piece looks into the EU legal foundations to deliver 'a real Energy Union', as REPowerEU puts it. The main legal basis for such enterprise is Article 194 of the Treaty on the Functioning of the European Union (TFEU), according to which, the "Union policy on energy shall aim, in a spirit of solidarity between Member States, to: a) ensure the functioning of the energy market; b) ensure security of energy supply in the Union; c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and d) promote the interconnection of energy networks."

According to Article 194 (2) TFEU, those objectives will be achieved through measures adopted by the Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consultation of the Economic and Social Committee and the Committee of the Regions, without prejudice to the application of other treaty provisions. These measures "shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply."

A doctoral thesis at the European University Institute of Florence, directed by Professor Jacques Ziller, showed that a European energy policy started developing even without Article 194 TFEU,[38] although the approach to energy policy became more systematic with the introduction of that provision in the

36 European Commission (2019), *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal*, COM(2019) 640 final, Brussels.

37 European Commission (2021), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Fit for 55: delivering the EU's 2030 Climate Target on the way to climate neutrality*, COM(2021) 550 final, Brussels.

38 Bonafé, E. (2012), *Towards a European Energy Policy: Resources and Constraints in EU Law*, LAP Lambert Academic Publishing, 2012.

Lisbon Treaty.[39] The aim of this paper is to assess the interplay between REPowerEU, Article 194 TFEU and other relevant legal bases, on three fronts: the emergency intervention of energy markets, the decarbonisation of the energy sector, and the financing energy infrastructure. The present analysis is made while the development of a European energy policy is at full speed, and it accounts for the situation as it stands by October 2022.

As a starting point of this research, it must be noted that Article 29 of the Treaty on the European Union (TEU) and Article 215 TFEU were the legal bases to ban coal[40] and oil[41] imports in the fifth and sixth sanctions regimes against Russia. The lack of readiness among Member States to agree on a total ban of gas imports from Russia has led the EU to instead embark on the REPowerEU plan, which aims to phase out dependence on Russian gas well before the end of the decade and already by two-thirds by the end of 2022.

39 Huhta, K. (2021), *The scope of state sovereignty under Article 194 (2) TFEU and the evolution of EU competences in the energy sector*, International and Comparative Law Quarterly, Vol. 70, 2021; Talus, K. and P. Aalto (2017), *Competences in EU energy policy,* in Leal-Arcas, R. and J. Wouters (eds), *Research Handbook on EU Energy Law and Policy*, Edward Elgar, 2017; Haraldsdóttir, K. (2014), *The limits of EU competence to regulate conditions for exploitation of energy resources: Analysis of Article 194 (2) TFEU*, *in* European Energy and Environmental Law Review, Vol. 23, Issue 6, 2014; Johnston, A. and E. van der Marel (2013), *Ad Lucem? Interpreting the new EU energy provision, and in particular the meaning of Article 194(2) TFEU*, *in* European Energy and Environmental Law Review, Vol. 22, Issue 5, 2013; Hancher, L. and F. Maria Salerno (2012), *Energy Policy after Lisbon*, in Biondi, A. et al. (eds), *EU Law after Lisbon*, Oxford University Press, 2012.

40 *Council Decision (CFSP) 2022/578 of 8 April 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine*, Official Journal of the European Union, L 1118 April 2022 and *Council Regulation (EU) 2022/576 of 8 April 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine*, Official Journal of the European Union, L 111, 8 April 2022.

41 *Council Decision (CFSP) 2022/884 of 3 June 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine*, Official Journal of the European Union, L 153, 3 June 2022 and *Council Regulation (EU) 2022/879 of 3 June 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine*, Official Journal of the European Union, L 1533 June 2022.

2. Intervening energy markets

REPowerEU-related initiatives and legislation to date include gas storage, an EU energy platform for joint purchases of gas and hydrogen, gas demand reduction, and market intervention to address high energy prices. This section focuses on the choice of the legal basis to deal with those issues.

The need to urgently ensure gas storage before winter was the purpose of the Commission's proposal of 23 March 2022, which became law as Regulation 2022/1032[42] based on Article 194 (2) TFEU. Gas storage was already being addressed since the end of 2021 by a broader Commission proposal covering internal markets in renewable and natural gases and in hydrogen.[43] Regulation 2022/1032 responded to the need to accelerate the negotiation process and increase the level of ambition in three targeted aspects: a storage filling obligation, storage certification and incentives for gas transmission access. The use of coordinated instruments, such as an EU energy platform for the purchase of gas,[44] can help to meet the filling targets, following the guiding example of the EU-US partnership on energy security.[45]

The provisions of Regulation 2022/1032 will be integrated into the referred regulation on common rules for the internal markets in renewable and natural gases and in hydrogen, which is based on Article 194 (2) together with Article 114 (1) TFEU. The choice of the latter, which deals with the approximation of laws for the establishment and functioning of the internal market, allows to cover a wide range of aspects, form market access to transparency, consumer rights, liquidity of gas markets, and the independence of regulato-

42 *Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending Regulations (EU) 2017/1938 and (EC) No 715/2009 with regard to gas storage*, Official Journal of the European Union, L 173, 30 June 2022.

43 European Commission, *Proposal for a Directive of the European Parliament and of the Council on common rules for the internal markets in renewable and natural gases and in hydrogen* COM(2021) 803 final, 15 December 2021.

44 European Commission (2022c), *Energy Security: Commission hosts first meeting of EU Energy Purchase Platform to secure supply of gas, LNG and hydrogen*, Press release, 8 April2022, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2387

45 European Commission (2022d), *Joint statement between the European Commission and the United States on European Energy Security* (Statement/22/2041), 25 March 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/statement_22_2041

ry authorities. Indeed, Article 114 TFEU, ex-Article 95 of the Treaty of the European Community (TEC), has been used for the past two decades in four consecutive legislative packages on energy. Moreover, Regulation 2022/103 amends two regulations: Regulation 2017/1938 on security of gas supply[46] based on Article 194 (2) TFEU, and Regulation 175/2009 on access to the gas transmission network[47] based on Article 114 TFEU (old Article 95 TEC).

Gas storage is necessary but not sufficient to get ready for winter, which prompted the adoption of the Council Regulation 2022/1369 on coordinated demand-reduction measures for gas.[48] Recital 8 refers to the severe difficulties in energy supply that justify the use of Article 122 (1) TFEU, namely the risk of a complete halt of Russian gas supplies by the end of 2022. Article 122 (1) TFEU enables the Council to decide, on a proposal from the Commission, "upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notable y in the area of energy". Under Council Regulation 2022/1369, Member States have agreed to reduce their gas demand by 15% compared to their average consumption in the past five years, between 1 August 2022 and 31 March 2023, with measures of their own choice. The gas demand reduction is voluntary, but it will become mandatory if a 'Union alert' on security of supply is triggered. The regulation includes some exemptions and derogations to reflect some national circumstances. The coordinated demand-reduction measures require Member States to assist the most affected countries by a disruption of Russian gas supplies, in line with the principle of subsidiarity embodied in Article 122 (1) TFEU and confirmed by the Court of Justice as a fundamental principle of EU law.[49]

Furthermore, the Commission adopted a state aid temporary crisis framework to enable Member States to support the economy in the context of

46 *Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010*, Official Journal of the European Union,L 280, 28 October 2017.

47 *Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005*, Official Journal of the European Union, L 211, 14 August 2009.

48 *Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas*, Official Journal of the European Union, L 206, 8 August 2022.

49 Case C-848/19 P, *Germany v Poland*, Judgment of the Court (Grand Chamber) of 15 July 2021.

Russia's invasion of Ukraine.[50] It provides three types of aid: grants for companies affected by the crisis, liquidity support in form of state guarantees and subsidized loans, and aid to compensate for high energy prices. The framework recognises that the EU economy is experiencing a serious disturbance, and consequently it is based on Article 107(3)(b) TFEU. Initially adopted on 23 March 2022, the state aid temporary crisis was amended on 20 July 2022[51] to extend it to measures accelerating the rollout of renewable energy and measures facilitating the decarbonisation processes.

The EU still faces a serious risk that the situation deteriorates further in case of further disruptions of gas supplies (like the gas leaks in Nord Stream pipelines), a cold winter and the reduced availability of some power plants, driving up the demand for gas and electricity and exacerbating energy prices. All this constitutes a severe difficulty in the supply of gas and electricity within the meaning of Article 122(1) TFEU, on which a new emergency intervention to address high electricity prices is based,[52] touching upon four areas. First, a voluntary overall reduction target of 10% of gross electricity consumption and a mandatory reduction target of 5% of the electricity consumption in peak hours. Second, a cap on market revenues at 180 euros/MWh for electricity generators that use inframarginal technologies (such as renewables, nuclear and lignite), who would have excessively benefited from the price-setting marginal sources (such as coal and gas). Third, a mandatory temporary solidarity contribution on taxable profits of businesses active in the crude petroleum, natural gas, coal, and refinery sectors. Forth, a price for the supply of electricity, exceptionally and temporarily below cost, to support small and medium-sized enterprises struggling with high energy prices. On the other hand, the Presidency of the Council deleted from the draft regulation a provision on incentives for renewable power purchase agreements since several Member States pointed out that it was not in line with Article 122 TFEU.

---

50 European Commission (2022f), *Communication from the Commission - Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia*, C(2022) 1890, Brussels.

51 European Commission (2022g), *Communication from the Commission - Amendment to the Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia*, C(2022) 5342, Brussels.

52 European Commission (2022h), *Proposal for a Council Regulation on an emergency intervention to address high energy prices*, COM(2022) 473 final, Brussels.

3. Decarbonising the energy sector

One of the main pillars of REPowerEU is to accelerate the deployment of renewable energy. This led the Commission to propose a directive amending Directive 2018/2001 on renewable energy, Directive 2010/31 on the energy performance of buildings and Directive 2012/27 on energy efficiency.[53] While these three directives were based solely on Article 194 (2) TFEU, the new directive proposal amending them is based on two legal bases, Article 194(2) TFEU on energy policy and Article 192 (1) TFEU on environmental policy, which requires further attention.

Article 194(2) TFEU is used to raise the level of ambition in decarbonising the energy sector. Directive 2018/2001 was already being amended by a Commission's proposal of 2021 raising the 2030 renewables target from 32% to 40% in the context of Fit for 55, and it is now raised to 45% under REPowerEU. The amendment of Directive 2010/31 obliges Member States to increase the deployment of solar installations on buildings, and the amendment to Directive 2012/27 raises the energy efficiency target for 2030 from 9% to 13% compared to the projections of the 2020 reference scenario.

As said previously, the proposal amending the three directives is also based on Article 192(1) TFEU, which allows to amend the application of the environmental *acquis*. Renewable energy and environmental policies pursue closely interlinked objectives related to tackling climate change, but they may also enter into conflict. In fact, the new proposal aims at futher streamlining the different steps of the permit-granting processes applicable to renewable energy, including potential environmental impact assessments, and on ther other hand, at strengthening the assessment of the effects of certain national plans and programmes on the environment under Directive 2001/42,[54] which is based on Article 175(1) TEC, now Article 192(1) TFEU. The choice of the envi-

53 European Commission (2022i), Proposal for a Directive of the European Parliament and of the Council amending *Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652*, COM(2022) 222 final, Brussels.

54 *Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment*, Official Journal of the European Union, L 197, 21 July 2001.

ronmental legal basis becomes critical since the proposal under REPowerEU provides a framework for permit-granting procedures for renewable projects located in 'go-to areas' and ouside those areas. The tension between energy and environmental polices follows from the need to authorise in a fast and simple manner the majority of renewable projects while ensuring a high level of protection through closer scrutiny of the most problematic projects.

While the new legal proposal under REPowerEU[55] is to give greater certainty to project promotors and investors, Member States are expected to be moving in the direction of speeding up permit-granting procedures and facilitating power purchase agreements in accordance with a new recommendation[56] and accompanying guidance on national good practices.[57] The recommendation is based on Article 292 TFEU, according to which the Council, the Commission and the European Central Bank may adopt recommendations. Recommendations "shall have no binding force" according to Article 288 TFEU, a legal basis that is "intended to confer on the institutions which usually adopt recommendations a power to exhort and to persuade, distinct from the power to adopt acts having binding force", as clarified by the Court of Justice.[58]

REPowerEU is also about boosting renewable hydrogen to decarbonize hard-to-abate sectors, such as aviation and maritime and certain industrial sectors.[59] However, hydrogen production using electricity generation from fossil fuels would undermine the objective to match renewable hydrogen with a corresponding rise in the renewable power production. Therefore, the Commission is working on a regulatory framework for renewable hydrogen, launch-

55 European Commission (2022i), *supra* note 20.

56 *Commission Recommendation of 18 May 2022 on speeding up permit-granting procedures for renewable energy projects and facilitating Power Purchase Agreements*, C(2022) 3219 final.

57 European Commission (2022j), *Commission Staff Working Document - Guidance to Member States on good practices to speed up permit-granting procedures for renewable energy projects and on facilitating Power Purchase Agreements, Accompanying the document to the Commission Recommendation on speeding up permit-granting procedures for renewable energy projects and facilitating power purchase agreements*, SWD (2022) 149 final, Brussels.

58 Case C-16/16 P, *Belgium v Commission*, Judgment of the Court (Grand Chamber) of 20 February 2018 paragraph 26.

59 European Commission (2022k), *Commission Staff Working Document -Implementing the REPowerEU action plan: Investment needs, hydrogen accelerator and achieving the bio-methane targets Accompanying the REPowerEU plan*, SWD (2022) 230 final, Brussels.

ing on 23 May 2022 consultations on two delegated acts, both based on Directive 2018/2001 on the promotion of renewables. The delegated acts are to set the criteria for products that fall into the "renewable hydrogen" category and the methodology to calculate emissions savings. Beyond technical aspects, the French Energy Minister sent on 10 September 2022 a letter to the EU Commissioner for Energy to include nuclear among energy sources for the production of green hydrogen.[60] The letter refers to the need to comply with the principle of technological neutrality enshrined in Article 194 TFEU.

4. Financing energy infrastructure

On 18 May 2022 the Commission also launched a €800-million call for clean energy infrastructure projects to support the REPowerEU plan. The call was open to projects on the 5th Union list of projects of common interest (PCIs) that was published in November 2021 and includes 67 electricity transmission and storage projects, 20 gas projects, six CO2 network projects and five smart grid projects. The framework for the selection and financing of PCIs is provided by Regulation 2021/1153 establishing the Connecting Europe Facility (CEF)[61] and the Regulation 2022/869 on guidelines for trans-European energy infrastructure (TEN-E).[62] Both legal instruments are based on Article 172 TFEU, which says that the guidelines supporting PCIs, particularly through feasibility studies, loan guarantees or interest-rate subsidies, shall be adopted by the Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

In addition to Article 172 TFEU, the CEF Regulation is based on Article

60 Messad, P (2022), *France urges Brussels to label nuclear-produced hydrogen 'green'*, Euractiv, 16 September 2022, available at https://www.euractiv.com/section/energy/news/leak-france-urges-brussels-to-label-nuclear-produced-hydrogen-green/

61 *Regulation (EU) 2021/1153 of the European Parliament and of the Council of 7 July 2021 establishing the Connecting Europe Facility and repealing Regulations (EU) No 1316/2013 and (EU) No 283/2014*, Official Journal of the European Union, L 239, 14 July 2021.

62 *Regulation (EU) 2022/869 of the European Parliament and of the Council of 30 May 2022 on guidelines for trans-European energy infrastructure, amending Regulations (EC) No 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) No 347/2013*, Official Journal of the European Union, L 152, 3 June 2022.

194 TFEU on energy policy, reflecting that renewable project have a cross-border nature and contribute to the EU climate target for 2030. The role of energy from renewable sources, including offshore electricity grids, hydrogen infrastructure and smart grids, is also emphasised by the TEN-E Regulation, which simplifies and accelerates permitting and authorisation procedures, and ends support for new natural gas and oil projects.

Building on Regulation 2021/241[63] establishing the Recovery and Resilience Facility aimed to overcome faster and in a more sustainable way from the Covid-19 crisis, the Commission proposed on 18 May 2022, as part of a dedicated REPowerEU chapter, additional funds for Member States to include in their recovery and resilience plans further reforms and investments to support: renewable energy, energy efficiency, industrial decarbonisation, biomethane in agriculture, electrification of transport, and the deployment of alternative refuelling and recharging infrastructures. Regulation 2021/241 is solely based on the third paragraph of Article 175 TFEU, which provides that, if specific actions prove necessary outside the EU structural funds, such actions may be adopted by the Parliament and the Council in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

By contrast, the Commission proposal on the inclusion of a dedicated REPowerEU chapter in the Recovery and Resilience Plans is based on several treaty provisions, reflecting the need to mobilise all available funding: Article 175 (third paragraph) TFEU on economic, social and territorial cohesion; Article 177 (first paragraph) TFEU to deal with transfers from cohesion policy funds having an impact on the organisation of structural funds; Article 192 (1) TFEU and Article 194 (2) TFEU so as to introduce changes to the emission trading system in order to contribute to security of energy supply; and Article 322 (1) TFEU to set out financial rules for the implementation of the budget

63 *Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility*, Official Journal of the European Union, L 57, 18 February 2021.

by introducing rules on the appropriations with regard to new revenue.[64] Following the Council's general approach of 3 October 2022, the draft regulation includes another legal basis, Article 43 (2) TFEU dealing with the common agricultural policy.

The Commission considers that there is a role for private investment in gas and nuclear activities in the transition path towards climate neutrality, especially while reducing dependence on Russian gas.[65] Therefore, it celebrated the pragmatic and realistic positive vote of the European Parliament on Delegated Regulation 2022/1214 of 9 March 2022 on climate change mitigation and adaptation covering certain gas and nuclear activities.[66] The delegated regulation is based on Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment (EU taxonomy),[67] which was adopted on the basis of Article 114 TFEU with a view to attracting investment thanks to a standard concept of environmentally sustainable investment across the Union. Although the Commission has expressed that the sustainable taxonomy classification does not determine whether a certain technology will or will not be part of national energy mixes, four environmental groups have started legal action against the Commission for including fossil gas in EU's green finance. Moreover, some EU countries, Austria, Luxembourg, and Spain, are reported to challenge the legislation in the EU Court of Justice after the Parliament failed to gather a majority to oppose it.[68]

64 European Commission (2022l), *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulation (EU) 2021/1060, Regulation (EU) 2021/2115, Directive 2003/87/EC and Decision (EU) 2015/1814*, COM (2022) 231 final, Brussels.

65 European Commission (2022 m), *EU Taxonomy: Commission welcomes the result of today's vote by the European Parliament on the Complementary Delegated Act*, Press release, 6 July 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_4349.

66 *Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities*,Official Journal of the European Union, L 188, 15 July 2022.

67 *Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088*, Official Journal of the European Union, L 198, 22 June 2020.

68 Romano, V. (2022), *Brussels sued for including fossil gas in EU's green finance taxonomy*, Euractiv, 19 September 2022, available at https://www.euractiv.com/section/energy-environment/news/brussels-sued-for-including-fossil-gas-in-eus-green-finance-taxonomy/

5. Conclusion

Article 194 TFEU is the legal basis at the centre of the REPowerEU plan to phase out dependence on Russian fossil fuels by fast forwarding the clean transition and pursuing a more resilient energy system and a true Energy Union. But it is not operating on its own, which means that a true Energy Union needs to build on several legal bases. Regarding the emergency market interventions, the gas storage regulation is based on Article 194 TFEU, the state aid temporary crisis framework on Article 107(3)(b) TFEU, while the regulation on gas demand reduction and the regulation on an emergency intervention to address high energy prices are based on Article 122 TFEU. To accelerate the decarbonisation of the energy sector, the proposal for a directive amending the three directives on renewables, energy performance of buildings and energy efficiency is based on Article 194 TFEU and Article 192 TFEU, suggesting that the implementation of energy and environmental policies is complementary in tackling climate change, but there is also a risk of tensions between the two policies that need to be conciliated. Moreover, Article 292 TFEU has been used to supplement the decarbonisation transition on the basis of recommendations. On financing cross-border energy infrastructure, the specific legal basis is Article 172 TFEU, while the inclusion of REPowerEU chapter in the recovery and resilience plans is based on multiple TFEU provisions: Article 175 on economic, social and territorial cohesion, Article 177 on cohesion and structural funds, Article 192 on environmental policy, Article 194 on energy policy, Article 322 on financial rules for the implementation of the budget, and Article 43 on the common agricultural policy. Moreover, it must be noted that the EU taxonomy is based on Article 114 TFEU, and both Articles 194 and 114 are the legal basis for the internal markets in renewable and natural gases and in hydrogen. Finally, the Article 29 TEU and Article 215 play a crucial role in the adoption of sanction regimes.

The legal bases to create a true Energy Union are there in the Treaties, but political and legal challenges arise when trying to display their full potential. Article 194 TFEU, which is a shared competence, requires to act "in a spirit of solidarity between Member States". Furthermore, the measures to implement Article 194 TFEU "shall not affect a Member State's right to determine

the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply". The development of a European energy policy is happening as we speak. What we know for sure is that REPowerEU has one goal, several institutions in Brussels, and 27 Member States. This has not changed with the Lisbon Treaty.

3. The *Polisario* saga: the principle of good administration and the interface between EU law and international law

Alessandro Petti* , Postdoctoral Fellow, University of Oslo

1. Introduction

The *Polisario* cases offer precious insights into the complex interface between European Union (EU) law and international law in the conduct of the EU's external relations. This series of cases has attracted significant scholarly attention. Cremona has pointed out the evolution with respect to *Kadi*[70] on the legal sources for upholding human rights. Whereas in *Kadi* the Court focused

* Ho avuto la fortuna di avere Jacques Ziller come mentore per la mia tesi di laurea magistrale all'università di Pavia. Da allora è stato per me constante punto di riferimento e fonte di preziosi consigli. Questo contributo ha l'intento di portare alla luce alcuni legami tra il diritto delle relazioni esterne dell'UE, che occupa il centro dei miei interessi di ricerca, ed i temi riguardanti la buona amministrazione, a cui Jacques Ziller ha dedicato una parte significativa della sua alacre attività di studioso.

70 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council*, EU:C:2008:461.

on EU law obligations, in the *Polisario* saga,[71] the Court relied on international sources of law.[72] Cannizzaro has highlighted the constitutional significance of the Court's choice to put '*jus cogens* at the forefront of EU foreign relations'.[73] Wrange has brought to the fore the implications that different and interacting regimes of international law may have on fundamental issues as sovereignty and self-determination in Western Sahara, especially with regard to the contentious issue of exploitation of natural resources.[74] The present contribution sheds light on a less explored aspect of the judicial pronouncements. It discusses the role of the principle of good administration in structuring the interface between EU law and international law, especially in handling politically sensitive issues.[75]

The contribution starts by reviewing the main facts under scrutiny in the judicial pronouncements concerning the controversial application of the EU-Morocco agreements to the territories of Western Sahara. The review particularly focuses on the principle of good administration and procedural requirements at the interface between EU law and international law (Section 2). The contribution then reflects on the role of the principle of good administration in embedding political discretion within a procedural legal framework guiding the conduct of the EU's external action (Section 3). Subsequently, it assesses the response of the EU institutions formally extending the contested EU-Morocco liberalisation agreements to the non-self-governing territories of Western Sahara and the unfortunate merging of consultation and consent (Section 4).

---

71 Especially Cases C-104/16P, *Council v Front Polisario*, EU:C:2016:973 and Case C-266/16, *Western Sahara Campaign UK*, EU:C:2018:118.

72 Cremona, M. 'Extending the Reach of EU Law: The EU as an International Legal Actor', in *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (2019), at 79.

73 Cannizzaro, E. 'In Defence of *Front Polisario*: The ECJ as a Global *Jus Cogens* Maker" (2018) 55 Common Market Law Review 569, at 587.

74 Wrange P., 'Self-Determination, Occupation and the Authority to Exploit Natural Resources: Trajectories from Four European Judgments on Western Sahara' (2019) 52 Israel Law Review 3. Interestingly, his reflection is partly based on the considerations made by the Advocate General, referring to observations made by the European Commission, according to whom 'the legal regimes applicable to non-self governing territories and to occupied territories are not mutually exclusive' Opinion of AG, Wathelet, in Case C-266/16, *Western Sahara Campaign UK*, EU:C:2018:1, para 268.

75 For a seminal contribution on the General Court's Polisario case in EU administrative law see Ilaria Vianello, 'EU External Action and the Administrative Rule of Law: A Long-Overdue Encounter' (European University Institute, PhD Thesis, 2016) particularly at 105; 122; 144; 148.

It is argued that the *Polisario* judicial pronouncements and the ensuing response of the EU's political institutions constitute a missed opportunity for upholding a deeper conception of the principle of good administration as a bridge between EU law and international law. On the one hand, the response of the EU political institutions has attempted to artificially detach the socio-economic development strategies, and the ensuing legal instruments and procedures, from their political context. On the other hand, it has tacitly merged the legal/procedural and the political through a superficial reliance on good administration. While premised upon the seemingly neutral procedural requirement of consultation of the people concerned, the extension of the EU-Moroccan agreements to the territories of Western Sahara is based on tacit stances liable to affect the political process for determining the status of the non-self-governing territory at issue. A deeper conception of good administration would be conducive to greater transparency and a more articulated motivation of discretionary choices. This would enhance the legal soundness and the legitimacy resources of the Union's external action.

2. Facts and Judgments

Western Sahara has been a non-self-governing territory pursuant to Article 73 UN Charter since 1963.[76] Following the withdrawal of Spain as a colonial power,[77] Western Sahara was left in an institutional void only partly filled by the 1975 Madrid agreements sanctioning the partition of Sahara between Morocco and Mauritania.[78] After wars and confrontations between the actors involved, Western Sahara is principally contended by Morocco, controlling 80 per cent of the territory, and the Sahrawi national movement SADR (Sahrawi Arab Democratic Republic). Supported by Algeria, the SADR is led by the Polisario Front, which was recognised by the UN as a representative of the Sahrawi

76 UN GA, Report on the Committee on information from non-self-governing territories, Official Records: eighteen session, supplement No.14, UN doc. A/5514, 1963.

77 UN GA, Resolution 2072 Spanish Sahara (XX), 16 December 1965.

78 Declaration of Principles on Western Sahara by Spain Morocco and Mauritania, 19 November 1975 available at https://peacemaker.un.org/sites/peacemaker.un.org/files/MA-MR-ES_751114_DeclarationPrinciplesOnWesternSahara_0.pdf (All web sources last accessed 2 September 2022).

people.[79] In the wake of the ceasefire subsequent to the Morocco-Polisario armistice in 1991, the United Nations Mission for the Referendum in Western Sahara (MINURSO) was established with a view to holding a referendum whereby the people of Western Sahara would choose between independence or integration with Morocco. In the resulting complex diplomatic entanglement, Morocco is attempting to have its sovereignty claims recognised in several fora including the African Union.[80] In turn, Polisario chose to mobilise EU law and international law in EU judicial venues to challenge Moroccan claims to sovereignty.

The issue of the exploitation of Western Sahara's natural resources stands at the core of the *Polisario* cases. In this regard, key passages of the saga revolved around a letter written by the then UN Legal Counsel, Hans Corell, of 29 January 2002. He was asked by the Security Council to give an opinion on whether oil prospecting contracts envisaged by Moroccan authorities with foreign companies in Western Sahara complied with international law. He found that 'while the specific contracts [...] are not themselves illegal, if further exploration and exploitation activities were to proceed in disregard of the *interests and wishes* of the people of Western Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories'.[81]

In case T-512/12 *Polisario v Council*,[82] the Polisario Front brought an action for annulment of the Council Decision on the conclusion of an agreement on reciprocal liberalisation measures on agriculture and fishery products between

79 See further Corrale F. 'Les Origines de La "Question Du Sahara Occidental" Enjeux Historiques, Défis Politiques' in Balboni, M. and Laschi, G. *The European Union approach towards Western Sahara* (PIE Peter Lang 2017), at 53.

80 Morocco is a founding member of the African Union. It withdrew in 1984, following the SADR admission to the Union, and re-joined in 2017.

81 Corell, H. United Nations Security Council, Letter from the Under-Secretary-General for Legal Affairs, the Legal Counsel, Addressed to the President of the Security Council, S /2002/16, 29 January, emphasis added.

82 Case T-512/12, *Front Polisario v Council*, EU:T:2015:953.

the EU and Morocco.[83] It contested the application of the agreement to the territories of Western Sahara. The General Court found that when devising arrangements which facilitate exports to the EU of products originating in the territory concerned, the 'Council must examine carefully and impartially, all the relevant facts in order to ensure that the production of goods for export is not conducted to the detriment of the population of the territory concerned or entails infringements of fundamental rights'.[84]

Moving from the observations of the Polisario Front,[85] the General Court expounded a duty upon the Council to carry out a human rights assessment before giving its authorisation to conclude an agreement possibly entailing the exploitation of natural resources in the disputed territory and liable to infringe the fundamental rights of its population.[86] The General Court annulled the contested decision 'insofar as it approve[d] the application of the agreement referred to by it to Western Sahara' by reason of the Council's failure 'to examine all the elements of the case before the adoption of the contested decision'.[87] The motives for annulment were thus procedural; they concerned legal restraints on the exercise of political discretion in the conduct of foreign affairs.[88] Although not explicitly mentioning it, the General Court premised its reasoning on the principle of good administration.

In the appeal to the *Polisario* case, the Court of Justice moved away from EU administrative requirements at the basis of the reasoning of the General Court, it relied instead on principles of international law. The Court of Justice followed the path traced by the Advocate General (AG), who suggested that the action should be found inadmissible. The AG's key contention revolved around the fact that, under the UN Charter, the territories of the Western

83 Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the EU-Morocco Association Agreement, (2012) OJ L 241, p. 2–3.

84 Case T-512/12, *Front Polisario v Council*, para 228.

85 *Ibid*. para 226.

86 *Ibid*. para 241.

87 *Ibid*. para 246.

88 *Ibid*. para 225.

Sahara enjoy a 'status separate and distinct from the territory of the State administering it'. The agreement at issue could thus not apply to Western Sahara without an explicit extension.[89]

Notwithstanding the shift from EU law to international law, some of the AG's considerations concurred with the arguments of the General Court. In particular, he endorsed the findings that even in cases where the EU institutions enjoy broad margins of discretion, EU Courts must verify whether the institutions have examined 'carefully and impartially all the relevant facts of the individual case'. This is intended to review whether the institutions have committed a manifest error of assessment.[90] The AG thus endorsed the General Court's findings that the Council 'did not comply with its obligation to conduct an examination of all the relevant facts before adopting the contested decision in a field where it enjoys broad discretion'.[91] In a subsequent part of his *Opinion*, however, he derived the Council's duty not from EU law administrative requirements, but rather from international law.[92]

The Court of Justice considered the principle of self-determination, the rules on the territorial scope of the agreement, and the *pacta tertiis* principle.[93] With respect to the principle of self-determination, the Court highlighted that it is 'a legally enforceable right *erga omnes* and one of the essential principles of international law'.[94] Building on this and on the considerations made by the AG,[95] the Court established that the 'territory of the Kingdom of Morocco' to which the association agreement applies pursuant to Article 94 of the agreement 'cannot [...] be interpreted in such a way that Western Sahara is included within the territorial scope of that agreement'.[96]

The Court hence agreed with the Commission in establishing that if

89 Opinion of AG Wathelet Case C- 104/16P, *Council v Front Polisario*, EU:C:2016:677, paras. 75–6.

90 AG Wathelet, *Council v Front Polisario*, para 229, referring to Case T-512/12, *Front Polisario v Council, supra* note 13, para 225.

91 AG Wathelet, *Council v Front Polisario*, para 236.

92 *Ibid*. para 269; 274–6.

93 Case C-104/16P, *Council v Front Polisario*, para 86.

94 *Ibid.* para 88.

95 AG Wathelet, *Council v Front Polisario*, paras 71–75.

96 Case C-104/16P, *Council v Front Polisario,* para 92.

the contested agreement was intended to be applied beyond the territory of Morocco, this would have been explicitly mentioned.[97] The Court of Justice thus found that the distinct status of Western Sahara resulting from the principle of self-determination meant that 'the people of Western Sahara must be regarded as "third party" within the meaning of the principle of relative effect of treaties'.[98] This interpretative construction was based upon the fact that the contested liberalisation agreement is subordinate to the EU-Morocco Association Agreement.[99] While conceding that the EU-Morocco system of tariff preferences might have been actually applied in some cases to products originating in Western Sahara, the Court did not find that this was to be understood as an agreement between the parties in the sense of Article 31(3)(b) VCLT. In fact, such a practice was considered not liable to amend the scope of territorial application of the agreement pursuant to Article 94 EU-Morocco Association Agreement: this would be incompatible with the principles of international law to which the EU is committed.[100] Legal scholars have pointed out the unconvincing nature of such argument, which favours an abstract reliance on 'the normative context' over the 'factual context'.[101] Indeed, the Court disregarded how legal principles of international law formally upheld by the EU were operating in practice, apparently dismissing the possibility of a hiatus between the normative provisions and their actual application. Along similar lines, it has been noted how the Court chose a technique of consistent interpretation using the relevant rules and principles of international law instead of assessing whether the intention and subsequent practice of the parties were actually compliant with those rules and principles.[102]

97 *Ibid*. para 96.

98 Ibid. para 106.

99 *Ibid*. para 112. See EU-Morocco Association Agreement, (2000) OJ L 70, pp. 2–204.

100 *Ibid*. para 123.

101 Cannizzaro (2018), para 578.

102 Dubuisson, F. and Poissonnier, G. 'La Cour de Justice de l'Union européenne et la question du Sahara occidental : cachez cette pratique (illégale) que je ne saurais voir', 2016 *Revue belge de droit international* (2017) 601, at 630; Kassoti, E. 'The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement', *European Papers;* (2019); and Odermatt, J. 'Council of the European Union v. Front Populaire Pour La Libération de La Saguia-El-Hamra et Du Rio de Oro (Front Polisario)', 111 *American Journal of International Law* (2017) 731.

An analogous disputable reliance on international law by the Court of Justice occurred in the related and controversial *Western Sahara Campaign UK* case (hereinafter *WS*).[103] The case revolved around the challenge of the validity of measures which granted fishing licences in the waters adjacent to Western Sahara. The EU-Morocco Association Agreement and the Fisheries Partnership Agreement[104] were among the EU legal acts contested. The case is especially interesting for the divergent findings of the Court of Justice and of the AG. The AG dwelled on the particular wordings according to which the relevant agreements apply not only to the 'waters coming under the *sovereignty'* of the Kingdom of Morocco but to the waters coming under the vaguer notion of the *jurisdiction* of Morocco. A number of elements led the AG to clarify how 'the negotiation and the conclusion with the Kingdom of Morocco of an international agreement applicable to Western Sahara and to the water adjacent thereto' would constitute 'in itself a *de jure* recognition of the integration of 'Western Sahara in the Kingdom of Morocco'.[105] While identifying Moroccan fishing zones provided for in the agreement, he noticed how one of them 'explicitly covers the waters adjacent to Western Sahara.[106] He further qualified the circumstances as 'an official and systematic policy of exploitation of the fisheries resources put in place jointly by the Kingdom of Morocco and the European Union'. [107]

Contrary to the AG, the Court of Justice largely reiterated its previous findings in the *Polisario* case, adopting a significantly more lenient approach when assessing the compatibility of the contested EU instruments with international law and principles. It circumscribed the fishery agreement within the 'body of agreements that is framed by the Association Agreement'[108] and therefore not intended to be applicable to the territory of Western Sahara. It highlighted that the notion of the *de facto administering power* put forward by the Commission and the Council (a concept qualified as non-existent in interna-

103 Case C-266/16, *Western Sahara Campaign UK*, *supra* note 2.

104 2006 EU-Morocco Fisheries Partnership Agreement (n 21).

105 Opinion of AG, Wathelet, *Case C-266/16, Western Sahara Campaign* UK, *supra* note 5, para 194.

106 *Ibid*. para 69.

107 *Ibid.* para 266.

108 *Case C-266/16, Western Sahara Campaign UK*, *supra* note 2, para 59.

tional law by the Advocate General),[109] together with the expression 'waters falling within the [...] jurisdiction of the Kingdom of Morocco' had no relevance in determining the scope of the application of the agreement.[110]

3. The principle of good administration

In this convoluted first part of the saga, both the General Court and the AG Wathelet emphasised the role of procedural requirements with a view to embedding the political discretion of EU institutions within a framework compliant with EU law and international law. The procedural requirements of the principle of good administration are relevant in structuring this framework. In EU law, good administration has a twofold significance that mirrors the distinction between the right and the principle of good administration. As noticed by Azoulai and Clément-Wiltz,[111] on the one hand, good administration is used as a general category encompassing a host of subjective rights intended to limit the arbitrariness of administrative choices. This is the dimension resulting from the right to good administration enshrined in Article 41 of the EU Charter.[112] On the other hand, the principle of good administration engenders precise and specific obligations resulting in a duty of care to impartially

109 *Ibid.* para 223. The notion of *de facto administering power* associated to the relationship between Morocco and the territories of Western Sahara was introduced in the EU's institutional discourse by the European Commission in response to some parliamentary questions: 'Joint Answer given by High Representative/Vice-President Ashton on Behalf of the Commission Written Questions : E-001004/11 , P-001023/11 , E-002315/11 Question References: E-001004/2011, P-001023/2011, E-002315/2011, 14 June 2011'. Then it informed the European Parliament, 'Opinion of the European Parliament Legal Service on the Protocol between the European Union and the Kingdom of Morocco Setting out the Fishing Opportunities and Financial Contribution Provided for in the Fisheries Partnership Agreement in Force between the Two Parties, SJ-0665/13, 4 November 2013'. Corell used the term hinting to the fact that Morocco '*de facto* administered the territory'. Corell, *supra* note 12, at 238.

110 Case C-266/16, *Western Sahara Campaign UK, supra note* 2, paras 64–79.

111 Azoulai, L. and Clément-Wiltz, L. 'La Bonne Administration' in Auby, J.B. and Dutheil de la Rochère, J. (eds), *Traité de droit administratif européen.* (Bruylant 2014).; see also Hofmann HCH, Rowe GC, and Türk H, *General Principles Framing European Union Administrative Law* (Oxford University Press 2011).

112 *Azoulai, L. and Clément-Wiltz, L. 'La Bonne Administration', supra note [add correct reference], p. 692.*

and carefully review the legal and factual elements of the case.[113] In that light, it may be contended that the principle of good administration features a broader scope than the right to good administration.[114]

The wider scope and application of the principle of good administration, not limited to subjective rights, is well captured by the Court's findings in *TU München*. Here, the Court established 'the duty of the competent institution to examine carefully and impartially all the relevant aspects of the case in point'.[115] The broad scope of the principle of good administration has been consistently asserted by the Court, including the findings that the principle can serve as a basis for reviewing the application of association agreements concluded by the EU.[116] In fact, all the decisions of the EU's institutions should be adopted pursuant to the principle of sound administration and the duty of care, after having weighed the interests of all of the parties concerned.[117]

The principle of good administration serves as a guiding framework for the design and conclusion of association agreements,[118] as well as for their judicial review. It has been aptly noted, that the principle of good administration, which finds expression in the duty of care and its procedural dimension, encompasses 'precepts intended to meet the demands of the rule of law in ad-

113 Case C-269/90, *Technische Universität München v Hauptzollamt München-Mitte*, EU:C:1991:438, para 14; Opinion of AG Van Gerven, Case C-16/90, *Eugen Nölle v Hauptzollamt Bremen-Freihafen*, EU:C:1991:233, para 43.

114 Hofmann, H. 'General Principles of EU Law and EU Administrative Law' in Barnard., C. and Peers, S. (eds), *European union law* (3rd edn, Oxford University Press 2020), at 229–30.

115 Case C-269/90, *Technische Universität München*, *supra* note 44, para 14.

116 Opinion of AG Trstenjak, Case C-204/07 P, *C.A.S. SpA*, ECLI:EU:C:2008:175: 'First, it correctly noted that the alleged failures relating to the supervision and monitoring of the implementation of the Association Agreement were to be examined in the light of the Commission's duty pursuant to Article 211 EC and the principle of good administration to ensure the proper application of the Association Agreement' ; Joined cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97, T-217/97, T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99, *Kaufring AG and Others v* Commission, EU:T:2001:133, para 257.

117 Case C-248/99 P, *French Republic v Monsanto and Commission* EU:C:2002:1, para 92.

118 See Vianello (2016), *supra* note 6.

ministrative procedures'.[119] In this procedural dimension,[120] the principle of good administration, also applies to legislative acts, and not only to administrative or executive acts.[121] This consideration is relevant in light of the rather contested legal nature of the Council Decisions on the conclusion of international agreements: in *Polisario*, the General Court questionably contended that Council Decisions for concluding international agreements are to be construed as legislative acts.[122]

The broader scope of the principle of good administration further prompts us to address whether third-country nationals are entitled to a duty of care from the acts of the EU institutions. In particular, the requirement of consultation may be considered as a step conducive to complying with the need to consider all of the relevant aspects of the case. Such an understanding resonates with the Commission's approach in the framework of the Better Regulation initiatives, especially with regard to the consultation procedures. In that regard, the fulfilment of the requirements of good administration, such as a wider participation in EU policymaking, does not necessarily entail judicially enforceable rights. Procedural requirements are, rather, intended to foster an informed procedural framework while providing EU institutions with discretion in the substance of its policy choices.[123]

---

119 Hofmann, H. Rowe, G. and Türk, A. *General Principles Framing European Union Administrative Law* (Oxford University Press 2011), at 192.

120 See Opinion of AG Van Gerven, Case C-16/90 *Eugen Nölle*, *supra* note 44, and the CJEU's findings in the case.

121 Case C-310/04 *Kingdom of Spain* v. *Council of the European Union*, EU:C:2006:521. This approach has been confirmed, *inter alia,* in Case C-343/09, *Afton Chemical Limited* v. *Secretary of State for Transport*, EU:C:2010:419 and Case *C-58/08, Vodafone Ltd and Others* v. *Secretary of State for Business, Enterprise and Regulatory Reform* EU:C:2010:321. See Azoulai, L. and Clément-Wiltz, (2014), *supra* note 42, at 16–17.

122 Case T-512/12, *Front Polisario v Council*, *supra* note 12, para 72, See contra, and more convincingly, Cremona M. and Leino, P. 'Is There an Accountability Gap in EU External Relations? Some Initial Conclusions' (2017) 2 European Papers 699, especially 702. In the recent *Polisario* case (Case T- 279/19, *Front Polisario v Council*, EU:T:2021:639) the General Court circumscribed its previous finding in the context of actions for annulment. It highlighted that 'the applicant's action against the contested decision cannot be made subject to less stringent conditions of admissibility than those applicable to an action against legislative acts, which are not affected by the relaxation of those conditions referred to in the third limb of the fourth paragraph of Article 263 TFEU [...], para 139.

123 Mendes, J. 'Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU.' (2011) 48 Common Market Law Review 1849, at 1865 and ff.

In the Commission's understanding, consultation must include those affected by the policy,[124] irrespective of where they are in the world.[125] In turn, Impact Assessments of EU external policies cannot be undertaken with an internal perspective alone. The Commission's Impact Assessment guidelines hence prescribe that the Commission must 'always include all target groups and sectors which will be significantly affected by or involved in policy implementation, including those outside the EU'.[126] Moreover, regarding human rights impact assessments, the Commission's guidelines envisage that 'consultations [be] as broad as possible, both inside and outside the EU', with a view to ensuring inclusive and balanced participation.[127] In this spirit, the Council devised a strategic framework to include promotion and respect for human rights across the spectrum of EU external activities.[128] Such an approach could increase the legitimacy resources of the Union by taking into account and pondering the externalities of EU's actions and policies.

The principle of good administration could be hence construed as a principle of the EU external action serving as a bridge between EU law and international law. The procedural framework established by the principle of good administration serves to govern the processes leading to the adoption of EU acts. It is based on the consideration of the interests and arguments of the affected persons and entities, also outside the EU. It should be noted that structuring the interface between EU law and international law is not only a procedural exercise: it has also significant substantive implications. This is especially the case in instances where it is hard to disentangle the legal/procedural from the political.

---

124 European Commission, Communication, 'Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission', Brussels, 11 December 2002, COM(2002) 704 final.

125 Korkea-aho, E. 'Evolution of the Role of Third Countries in EU Law – towards Full Legal Subjectivity?' in Bardutzky S. and Fahey, E. *Framing the Subjects and Objects of Contemporary EU Law* (Edward Elgar Publishing, Incorporated 2017) 220.

126 European Commission, 'Annex to Impact Assessment Guidelines, 15 January 2009, COM(2009), 42' 14 <https://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_annex_en.pdf>.

127 European Commission and Directorate-General for Trade, 'Guidelines on the Analysis of Human Rights Impacts in Impact Assessments for Trade-Related Policy Initiatives', Brussels, 19 May 2015.

128 Council of the European Union, 'Strategic Framework and Action Plan on Human Rights and Democracy', 11855/12, Luxembourg 25 June 2012.

Procedural standards ensuing from the principle of good administration are not new in external relations law.[129] In the very *Kadi* series of cases, the principle of good administration has been used to circumscribe the discretionary powers of EU institutions. In this context, della Cananea perceptively highlighted that: 'when confronted with issues of power, the [Court of Justice] is reluctant to follow the traditional ideal of constitutionalism, restraining government. Rather, it uses procedural due process of law as a form of proxy'.[130] As a matter of fact, especially in external relations, the Court of Justice has proved 'reticent (non-interventionist) if not deferential as regards the policy choices of the political institutions in external relations' to safeguard their discretion and room for manoeuvre.[131]

The need for an adequate exercise of discretion can be construed as a consequence of the rule of law.[132] Indeed, as put forward by Shane, the inevitability of discretion should be counteracted with 'a culture of argumentation'[133] whereby 'the critical function of the law in operation is to make manifest a range of interests and concerns that might not otherwise be vigorously articulated, when key decisions are made'.[134] In the deep conception of the principle of good administration, the culture of argumentation nurtures the consequential link between the procedural requirements and the substantive outcomes of discretionary choices.

The General Court's attitude in the *Polisario* case could be read in the context of the framework of administrative requirements applied to the EU's external action. By relying on the findings of the *TU München* case, the General

129 Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v Kadi (Kadi II)* EU:C:2013:518 [116–123]. Hofmann (2020), *supra* note 45.

130 della Cananea, G. 'Global Security and Procedural Due Process of Law between the United Nations and the European Union: Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council', (2009)15 The Columbia Journal of European Law, at 16.

131 Cremona, M. 'A Reticent Court? Policy Objectives and the Court of Justice' in Marise Cremona and Anne Thies, *The European Court of Justice and external relations law : constitutional challenges* (Hart Publishing 2014).

132 Hofmann (2020), *supra* note 45, at 223.

133 Waldron, J. 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' (2002) 21 Law and Philosophy 137, at 156.

134 Shane, P. 'The Rule of Law and the Inevitability of Discretion' (2013) 36 Harvard Journal of Law & Public Policy 21, at 24.

Court premised its reasoning on principles of EU administrative law.[135] In a similar vein, AG Wathelet emphasised the 'EU institutions' obligation under EU law and international law to examine, before adopting the contested decision, the human rights situation in Western Sahara and the impact which the conclusion of the agreement at issue could have in this regard'.[136] The importance of procedural aspects in EU external relations law is an emerging feature also endorsed by the Ombudsman for the conclusion of trade agreements.[137]

4. The response of the EU institutions: the merging of consultation and consent and the recent General Court Cases

In the aftermath of the CJEU's judicial pronouncements, the EU Political Institutions started devising an extension of the EU-Moroccan trade preference regimes to the territory of Western Sahara. In June 2018, the Commission submitted a proposal to modify Protocols 1 and 4 of the Association Agreement to extend the trade preferences granted to Moroccan products to products originating in Western Sahara. The ensuing Decision,[138] to which the European Parliament gave its consent, was deemed by EU institutions to be compatible with the findings of the *Polisario* judgment. It was described as seeking to 'foster the economic development of Western Sahara by treating its exports to the EU

135 Case T-512/12, *Front Polisario v Council*, supra note 13, para 228.

136 AG Wathelet, *Council v Front Polisario, supra* note 20, para 274.

137 European Ombudsman, *Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission*, 26 March 201 , paras 21-22 and Decision in case *1409/2014/MHZ* on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement, 26 February 2016. See further Marise Cremona, 'A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon' (2017) Working Paper no 2 Swedish Institute for European Policy Studies 39.

138 Decision (EU) 2018/1893 of 16 July 2018 regarding the signature of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to EU-Morocco Association Agreement (2018) OJ L 310.

the same as exports of products of Moroccan origin'.[139] Moreover, the EU also concluded a Sustainable Fisheries Partnership Agreement in March 2019 with Morocco 'defined as to include the waters adjacent to Western Sahara'.[140] Not surprisingly, the Polisario Front challenged the Council Decisions intended to extend to Western Sahara the trade liberalisation agreement and the Sustainable Fisheries Partnership Agreement. It hence initiated a new chapter of the saga.[141]

The legal premise of these extensions operated by the EU institutions is the questionable application of the agreements to the territories of Western Sahara without EU recognition of Moroccan sovereignty on the disputed territories.[142] The extension is also grounded upon the fact that Corell's advice did not completely rule out the possibility of exploiting Western Saharan resources. The Court of Justice itself did not exclude that EU-Morocco agreements could be extended to the people of Western Sahara on the condition that the 'third-party' at issue provided its consent.[143]

In the review of the relevant UN Resolutions leading to the finding of

139 European Commission, 'Proposal for a Council Decision Relating to the Signature, on Behalf of the European Union, of the Agreement in the Form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the Amendment of Protocols 1 and 4 to EU-Morocco Association Agreement, Brussels, 11 June 2018, COM(2018) 479 Final. The Proposal resulted in the Council Decision (EU) 2019/217 of 28 January 2019 on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to EU-Morocco Association Agreement, (2019) OJ L 34, p. 1–3.

140 Recital 5 Council Decision (EU) 2019/441 of 4 March 2019 on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement (2019), OJ L 77, p. 4–7.

141 In Case T- 279/19 *Front Polisario v Council*, *supra* note 53, Front Polisario challenged Council Decision (EU) 2019/217, *supra* note 71, the decision was annulled. Besides, in Joined Cases T-344/19 and T-356/19 *Front Polisario v Council,* EU:T:2021:640, Front Polisario challenged Council Decision (EU) 2019/441, *supra* note 72, which was annulled. Instead, Council Regulation (EU) 2019/440 of 29 November 2018 on the allocation of fishing opportunities between the European Union and the Kingdom of Morocco, (2019) OJ L 77, was rejected. It should be noted how in *Case T-275/18* ECLI:EU:T:2018:869, the General Court dismissed the action for annulment by Front Polisario of the Council Decision 2018/146, (2018) OJ, L 26, p. 4 on the EU-Morocco aviation agreement. It found that the contested agreement did not apply to the territories of Western Sahara.

142 A premise that has been expressly ruled out by AG Wathelet See his Opinion in *Western Sahara Campaign UK, supra* note 5, paras 83–86.

143 Case T-512/12, *Front Polisario v Council*, *supra* note 13, para 106. Case T-279/19, Polisario v Council, supra note 53, para 187.

the distinct status of the territory of Western Sahara, the Court of Justice recognised that the Western Sahara people have the '*right* to self-determination, [...] by virtue of [which] they freely determine their *political* status'[144] in accordance with the UN Charter. While qualifying self-determination as an 'enforceable right *erga omnes* and one of the essential principles of international law', [145] the pronouncement of the Court of Justice remained rather abstract in nature: it did not give procedural guidance as to how this right could be exercised. The findings served only to establish that Western Sahara, as a third party to the EU-Moroccan agreements, could not be affected by the implementation of these agreements in absence of the expression of consent by the people of Western Sahara.[146]

It is hardly possible to disentangle the legal and the political in the exercise of the right of self-determination . The progressive framing of the principle of self-determination as a right by the UN was ultimately a political process. In the debates at the General Assembly, it emerged that 'the right to self-determination conflated the political and legal realms. Rights were a local concept with universal application, but ascertaining which groups constituted people and whether they were capable of self-government were political questions'.[147] Against this background, it has been convincingly held that self-determination hardly features as an a 'actively posited norm capable of consequential intervention in a live legal question'[148] and therefore the respect for self-determination largely amounts to the right of the group to be heard and taken seriously.[149]

Yet, the extension of the liberalisation and fisheries agreements to the territories of Western Sahara by the EU institutions occurred through a problematic detachment of legal instruments from relevant political issues. More precisely, the controversial process of extension of the agreements largely subordinat-

144 Case C-104/16P, *Council v Front Polisario*, *supra* note 2, para 24.

145 *Ibid*, para 88.

146 *Ibid*. para 106.

147 Getachew, A. *Worldmaking after Empire: The Rise and Fall of Self-Determination* (Princeton University Press 2019) 88.

148 Walker, N. 'The Sovereignty Surplus' (2020) 18 International Journal of Constitutional Law 370, 404.

149 Klabbers, J. 'The Right to Be Taken Seriously: Self-Determination in International Law' (2006) 28 Human Rights Quarterly 186, 202 and ff.

ed political rights to economic considerations under the thin veil of respect of procedural requirements. The Commission circumvented the knotty issue of identification of the indigenous population by focusing almost entirely on the issue of economic benefits. It stated that: [a]lthough the people of Western Sahara have the right to self-determination, firstly, it is not for the European Union to conduct a census on them, and secondly, the UN documents concerning economic activities in non-self-governing territories also refer to the inhabitants of these regions, in relation to socio-economic benefits.'[150] As powerfully observed by Wrange, the Commission thus 'detached the political aspects from the economic ones and declared the former irrelevant'.[151] Rather problematically, thus, 'consultation with people concerned' was used as a proxy for the expression of consent by the people of Western Sahara.

The consultation was regarded by the Commission as intended to 'exchange views and comments on the potential benefits for the people and the economy of Western Sahara' of extending the liberalisation agreement.[152] It was certainly not envisaged to address issues concerning the 'highly complex and sensitive political context'; in fact, 'the question was not so much the territory's final status, as whether the EU should apply tariff preferences' to Western Sahara extending the EU trade regime.[153] The *consultation* included the Polisario Front, which denounced the fact that it was not involved in formal *negotiations*, albeit it was entitled to representation under international law. It stressed that the EU was upholding the Moroccan stance of '*fait accompli*'. It further reiterated that Moroccan economic exploitation was aimed at modifying the structure of Western Saharan society, anticipating that it would undertake legal

150 European Commission, 'Proposal Amendment of Protocol and 4 EuroMed Association Agreement' (n 189) 5. As for the UN documents, it particularly referred to UN GA, Resolution on economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories, 14 December 2017, Document A/RES/72/92.

151 Wrange, P. 'Western Sahara, the European Commission and the Politics of International Legal Argument' in Duval, A. and Kassoti, E. *The legality of economic activities in occupied territories : international, EU law and business and human rights perspectives* (Routledge 2020), at 190.

152 European Commission, 'Report on Benefits for the People of Western Sahara and Public Consultation on Extending Tariff Preferences to Products from Western Sahara', Commission Staff Working Document, Brussels, 15 June 2018, SWD(2018) 346 Final, at 10.

153 *Ibid*. at 28.

challenges against the extension of the liberalisation regime.[154] Notwithstanding this, the Commission concluded that 'most people now living in Western Sahara', without detailing of which origin or capacity, 'are very much in favour of the extension of tariff preferences to products from Western Sahara under the EU-Morocco Association Agreement'.[155]

The Polisario Front successfully challenged the extension of both the liberalisation agreement and the fisheries agreement to the territories of Western Sahara before the General Court.[156] The General Court stressed the difference between the notion of 'people of Western Sahara', stemming from 'that people's recognised right to self-determination', and the concept of 'people concerned'.[157] The Council submitted that the consultation carried out by the European Union with the representative bodies for obtaining their consent, was consistent with the relevant principles of international law.[158] The General Court, however, pointed out that the 'Council did not take sufficient account of all the relevant factors concerning the situation in Western Sahara and wrongly took the view that it had a margin of appreciation to decide whether it was necessary to comply with the requirement that the people of that territory must express their consent to the application of the agreement at issue, as third party to that agreement, in accordance with the Court's interpretation of the principle of relative effect of treaties in relation to the principle of self-determination'.[159]

The extension of the contested agreements to the territories of Western Sahara was substantiated through an allegedly neutral procedural framework in order to apparently circumvent complex political questions. This framework was premised on some of the procedural precepts elaborated in the context of

154 European Commission, 'Western Sahara Report', SWD(2018) 346 Final, *supra* note 83.

155 *Ibid.* at 31.

156 Case T-279/19, Polisario v Council, supra note 53; Joined Cases T-344/19 and T-356/19, *Front Polisario v Council*, supra note 72.

157 Case T-279/19, Polisario v Council, supra note 53, para 337; see also para 373.

158 *Ibid*. para 368. The Council referred to the criteria of the Convention No 169 of the International Labour Organisation (ILO) Concerning Indigenous and Tribal Peoples in Independent Countries, adopted in Geneva on 27 June 1989, and of the United Nation Declaration on the Rights of the Indigenous Peoples, adopted by the UN General Assembly on 13 September 2007.

159 *Ibid.* para 94; see also paras 371-2.

the Better Regulation initiatives and the Impact Assessment guidelines. Yet, these precepts were applied in a rather acritical manner: a true human right impact assessment was not carried out. Moreover, while the implementation of the extended agreement is liable to significantly affect the 'people of Western Sahara' no formal venues are in place for taking seriously into account this people's view in the implementation of the agreements outside the structures of the EU-Morocco Association Agreement. In fact, the Agreement's Association Council and Association Committees are composed of EU and Morocco officials.

The seemingly politically neutral procedural framework, within which the discretion of the institutions has been exercised, concealed a rather precise political stance assumed by the EU whereby the predominant objective of socio-economic development of Western Sahara could be better achieved within the structures of the EU-Morocco Association Agreement. The discretionary choices behind this stance have not been adequately motivated. Besides, this approach appears to neglect that the EU's chosen path of socio-economic development may have significant implications among the parties involved through a distribution of resources favouring economic entities primarily operating under Moroccan jurisdiction. By influencing the political balance among the parties involved, the extension of the EU-Morocco liberalisation and fisheries agreements is liable to affect the process of determination of the political status of Western Sahara. The tacit and implicit elements of the EU's stance stand in contrast to the culture of argumentation and the genuine consideration of the affected interests that the deeper conception of the principle of good administration requires.

5. Conclusions

In the *Polisario* cases, both the General Court and the Advocate General relied on procedural requirements for structuring the interface between EU law and international law. In particular, the principle of good administration was intended to embed the discretion of the EU's political institutions in a legal framework guiding the conduct of the EU's external relations. By severing the socio-economic benefits and development from the political aspects of self-determination, the EU's political institutions relegated the principle of good ad-

ministration to a rather ornamental role.

The response of the EU political institutions is somewhat paradoxical. On the one hand, the EU institutions have severed the socio-economic and the legal/procedural from the political artificially detaching legal instruments and procedures and socio-economic development strategies from their political context. On the other hand, a rather superficial procedural framework resulted in an acritical merging of procedures and politics, consultation and consent. Significantly, although motivated by the desire to avoid being entangled in contentious political questions, the EU political institutions have taken a defined, albeit implicit, political stance. That stance tacitly endorses the view that Western Sahara resources are largely to be managed within the jurisdiction of Morocco, thus indirectly circumscribing political outcomes theoretically viable in light of the current indefinite status of Western Sahara.

Irrespective of the import of the EU's specific political stance, the detachment of the procedural framework from its context, and its basis on tacit considerations and implicit assumptions, contrasts with the culture of argumentation and transparency that should underpin the exercise of political discretion in EU administrative law frameworks. In the deeper understanding of good administration, the culture of argumentation nurtures the consequential link between procedural requirements and the substantive outcome of the discretionary choices. Adequately motivated choices make the relationship between procedures and political outcomes more transparent thus enhancing the quality and the credibility of the EU actions.

The extension of the EU-Morocco agreements to the territories of Western Sahara in the way done by the EU institutions remains problematic also with regard to the expression of third-party consent. The extension of the liberalisation and fisheries agreements takes place within the EU-Morocco Association Agreement where EU and Moroccan officials are in charge, without a formal representation of the Saharawi people.

In the appeal cases currently pending, the Court of Justice has the opportunity to better delineate the role of good administration in structuring the interface between EU law and international law in politically sensitive domains. Amid a persistent stagnation of the UN-led process, the Court of Justice could engage in an exercise of development of international law by elucidating the procedural and substantive conditions to be fulfilled for expressing third-party

consent in the possible extension of EU liberalisation agreements.

In addition to contributing to the development of international law, this exercise could foster the legitimacy resources of the Union. These include the attempt to address the external or extraterritorial effects of the laws.[160] Indeed, in its deeper conception, the principle of good administration is a prime venue for operationalising the 'all affected interests' principle[161] in the conclusion of EU international agreement with a view to governing the externalities of the EU's foreign policies. This occurs through the requirements of taking into account all the elements of the case, transparency and reasoned motivation. It is worth stressing that the upholding of a deeper conception of the principle of good administration requires EU institutions to devise procedural frameworks capable of taking seriously both the political and socio-economic rights of the people of Western Sahara. Moreover, it entails a greater engagement by EU policymakers in assessing and bringing to the fore the links between paths of socio-economic development and their legal-political implication while elaborating adequate motivation to accompany the exercise of political discretion.

160 Joerges, C. '"Deliberative Supranationalism"—Two Defences' (2002), 8 European Law Journal 133, at 138.

161 This dates back to Roman private law and the Justinian Code (V,59,5,2) '*quod omnes tangit debet ab omnibus approbari*'. See on this Warren, M. 'The All Affected Interests Principle in Democratic Theory and Practice', 2010, Institute for Advanced Studies, Vienna.

4. New developments in AI regulation – remarks on the EU AI regulatory sandbox

Katarzyna Ziółkowska, PhD candidate, University of Warsaw
Marek Wierzbowski, professor ordinarius at Warsaw University School of Law

1. Introduction

Over a year ago, in April 2021, the European Commission published its draft Regulation laying down harmonised rules on Artificial Intelligence (the AI Act) – a legislative proposal aimed at providing a general framework for AI development, distribution, and implementation in the European Union.[162] The draft regulation is the first of its kind, as it will apply to a plethora of AI-based solutions used across various sectors. Importantly, the intensity of restrictions that will be put on a given solution will depend on the risk that the solution is posing. As a result, some technologies will be entirely banned from deployment, and others will only be subjected to minor obligations or not covered by the regulation at all. The development and use of AI will also be placed under supervision by dedicated public authorities at both the EU and national level.

162 European Commission (2021), *Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts*, (COM(2021)206), Brussels, 21 April 2021.

There was a great amount of research and normative work done of the topic both before and after the draft was released to the public. Years before the draft, the European Commission established an expert group to provide guidelines and strategic recommendations. One of its crucial deliverables, published in April 2019 after extensive open consultations, was titled 'Ethics guidelines for Trustworthy AI', which spurred a wider debate on various ethical but also legislative aspects of AI developed and used in the European Union. After the consultations and release of the final version of the guidelines, many more publications on the topic followed. On the same day, the European Commission issued a communication to several other EU institutions on human-centric AI, officially confirming values enshrined in the ethics guidelines.[163]

In 2020, the European Commission also issued a white paper on AI and the same, and next year the European Parliament published six resolutions calling the Commission to take appropriate actions; in the meantime, public consultations and negotiations of the content of the AI Act continued. The European Commission published an extensive impact assessment of the regulation, the text of a new general product safety regulation was proposed, and in November 2021, the Council of the EU published its 'Presidency compromise text of the AI Act', which marked an important step towards final adoption of the AI Act.[164]

2. EU regulatory sandbox on Artificial Intelligence

Among the most recent developments on that path is an announcement by the European Commission of the upcoming launch of the EU regulatory sandbox

163 European Commission (2019), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Building Trust in Human Centric Artificial Intelligence,* (COM(2019)168), Brussels 8 April 2019..

164 Council of the European Union (2021), *Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts - Presidency compromise text*, Interinstitutional File: 2021/0106(COD), Brussels 29 November 2021.

dedicated to artificial intelligence.[165]

Although there is no universally agreed definition of a sandbox as an instrument, as a rule, it is perceived through its role as a 'safe space' for a group of innovative market players to test and develop their digital products for a limited period of time. In the case of a regulatory sandbox, as the name might suggest, they should be safe from regulatory action against them when applicable laws are outdated and not entirely clear. As long as the participants meet certain criteria, follow general rules, and agree to a close oversight by a regulator, their work should be facilitated by lesser regulatory burden or at least eliminating regulatory risks. Such assurances of 'no action' against innovators play an important role as an incentive for them to participate. Regulators, on the other hand, thanks to the possibility of closely observing how technology is developed and used in real life, can draw conclusions on how to best shape legal and regulatory restrictions and enforcement policies. There are therefore two main objectives behind the adoption of regulatory sandboxes: protecting developers from legal risks (and thus promoting the development of innovative products in a regulation-compliant way) and 'educating' regulators about the technology (and thus leading to suitable legislation).[166]

Notwithstanding now quite advanced endeavours to regulate AI in the EU and extensive knowledge already gathered by the institutions engaged in the process, the European Commission declared that together with the Spanish government it wishes to establish such a regulatory sandbox in the EU. In practice, it will be a joint platform through which AI developers (especially start-ups and SMEs) could work on their products and test future restrictions arising from the AI Act, while regulators and policymakers watch them closely to gather additional knowledge and, afterwards, publish guidelines and good practices for the benefit of the entire Union. According to the Commission, it should also bring additional results in suggestions of new standards and norms for the technology.

---

165 European Commission (2022), *First regulatory sandbox on Artificial Intelligence presented*, 27 June 2022, available at https://digital-strategy.ec.europa.eu/en/news/first-regulatory-sandbox-artificial-intelligence-presented Importantly, this initiative differs from the AI regulatory sandboxes as defined in the draft AI Act. According to Article 53 of the AI Act the AI regulatory sandbox is a controlled environment that facilitates the development, testing and validation of innovative AI systems for a limited time before their placement on the market or putting into service pursuant to a specific plan.

166 Ringe, W. and C. Rouf (2020), *Regulating Fintech in the EU: the Case for a Guided Sandbox*, European Journal of Risk Regulation, Vol. 11, Issue 3, at 611-613.

Testing is set to begin in October 2022 and the outcomes of the project are expected to be circulated among interested parties (including all the EU Member States) in the last two quarters of 2023 and in any case prior to the entry into force of the AI Act.

3. AI-related regulatory sandboxes – critical remarks

Regulatory sandboxes, as an example of experimental law-making, are not exactly a new instrument, with first sandboxes being launched in the EU as early as in 2015.[167] Since then, many countries and organisations around the world have often traded certain regulatory concessions for increased transparency and data exchange with high-tech companies. The most prominent area in which sandboxes are widely introduced is FinTech[168] but there are now some examples of adopting this instrument also in transportation (autonomous vehicles), telecommunications (5G deployment), and even healthcare (predictive early detection of diseases).[169]

Now, after more than 60 countries have rolled out their various versions of regulatory sandboxes,[170] the benefits of this instrument are becoming increasingly questioned.[171] Some argue that approaching new technologies from the perspective of regulations – as sandboxes inherently need to have certain restrictions in place – may have inhibitory effect on innovative development. The logic between this argument is that if a safe space for this new set of technology

167 The UK Financial Conduct Authority's Innovation Hub launched in 2015 is considered to be the first example of a regulatory sandbox throughout the world; Blue Innovation Partners (2021), *Regulatory Sandboxes around the world*, July 2021, available at https://sandboxspain.com/wp-content/uploads/2021/07/09.07.21-Regulatory-Sandboxes-around-the-world.pdf

168 Fintech refers to the integration of technology into offerings by financial services companies in order to improve their use and delivery to consumers.

169 European Parliament (2022), *Briefing on the Artificial intelligence act and regulatory sandboxes*, June 2022, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733544/EPRS_BRI(2022)733544_EN.pdf

170 Blue Innovation Partners (2021), *supra* note 6.

171 Attrey, A., M. Lesher and C. Lomax (2020), *The role of sandboxes in promoting flexibility and innovation in the digital age*, Going Digital Toolkit Note, No. 2, available at https://goingdigital.oecd.org/data/notes/No2_ToolkitNote_Sandboxes.pdf, at 12.

is needed in the first place, how strict the rules are to be and how high the risk for the developer is.

On the other hand, there are concerns that the regulatory sandbox can work as a permission to break laws and, as such, raise doubts as to the compatibility with the equal treatment rule.[172] Those included in the framework are essentially guaranteed not to be punished for infringements, which can negatively affect individuals on the receiving end of such shielded services.[173] Anecdotally, the outcry of consumer protection organisations could have been the reason why the initiators of the first worldwide regulatory sandbox did not choose to use that term in the name of the initiative and instead opted for the Global Financial Innovation Network.[174] Moreover, after the sandbox is closed, the incentives to treat tech developers preferentially may remain with may lead to prioritising innovations over market safety or even regulatory arbitrage which happens when policymakers and legislators excessively lower safeguards to attract investors.[175]

Regulatory sandboxes can also hide the fact that those responsible for regulation are unsure how to act. In the case of the European Commission project, there is no legal uncertainty arising from outdated and unclear legislation. The new draft regulation has already been published and submitted for wider discussion, and so creating assurances of 'no action' against participants of the sandbox may be counterproductive. It can send a message of, at best, uncertainty on how to proceed by the regulator or even apprehension on the part of legislature to put forward the designed restrictions. Neither speaks for the 'innovation-friendly' approach.

On top of that, there are also specific issues related to the concept of AI which make it a set of technologies not well-suited to be tested in regulatory

172 Ranchordás, S. (2021), *Experimental lawmaking in the EU: Regulatory Sandboxes*, University of Groningen Faculty of Law Research Paper Series, No. 12, at 7-8.

173 Pop, F. (2021), *Sandboxes for Responsible Artificial Intelligence*, European Institute of Public Administration, available at https://www.eipa.eu/publications/briefing/sandboxes-for-responsible-artificial-intelligence/

174 Quan, D. (2020), *A Few Thoughts on Regulatory Sandboxes*, Stanford PACS, available at https://pacscenter.stanford.edu/a-few-thoughts-on-regulatory-sandboxes/

175 European Parliament (2022), *supra* note 8, at 3.

sandboxes, which is most apparent in comparison to FinTech solutions.[176]

The latter was a new phenomenon which occurred in one specific and highly regulated sector of the market. Artificial intelligence, in turn, is not a novel product. With its roots deep in the 19th century, AI-based solutions have been around for quite some time and are now developed extremely dynamically, which can serve as evidence that the lack of dedicated legal provisions is not an obstacle to innovative growth in that field.

Furthermore, the impact of AI is by no means limited to a single sector. It has at least two major consequences for the potential added value of a regulatory sandbox. AI-related technologies are widely used in all sectors affected by automation and datafication and those sectors have very different level of legal restrictions imposed. On the one hand, it eliminates the main incentive to participate for those developing products intended to be used in less regulated areas of the market. On the other hand, the general regulatory sandbox with its assurances of 'no action' cannot safely cover all different potential implementations of artificial intelligence, which leaves room for abuse, especially in highly regulated sectors. The plethora of technologies which can be considered AI and differences between sectors in which they can be deployed may render any attempts to cover them with one regulatory sandbox futile. Even more so when the regulator side is considered. State or Union regulators usually oversee one or just a few sectors of the market, with the natural consequence that their officials have competences limited to those sectors. Setting up a regulatory sandbox open for a variety of AI-based solutions may attract developers of products dedicated to be used in sectors, in which the authority setting up the sandbox has no knowledge or competences. This may lead to a situation in which the regulator cannot effectively oversee and control some groups of participants, is unable to gather data and knowledge as a result of the sandbox, and, later, cannot propose any reasonable regulations (due to the limited learning opportunities, but also the lack of powers to propose them in other sectors).

Finally, the launch of a regulatory sandbox dedicated to AI calls into question the relevance of a part of the draft AI Act itself – Articles 53 and 54 which provide legal framework for launching AI regulatory sandboxes. It is symptomatic that those draft provisions also received substantial criticism by

176 Ahern, D. (2021), *Regulatory Lag, Regulatory Friction and Regulatory Transition as FinTech Disenablers: Calibrating an EU Response to the Regulatory Sandbox Phenomenon*, European Business Organization Law Review, Vol. 22, Issue 3, at 395–432.

experts in the field for their shortcomings in terms of insufficient liability protection, risks to harmonisation, and data protection rules.[177]

4. Conclusions

Regulatory sandboxes can be an important tool to foster innovation and explore a more consensual and informed approach to introducing new rules and safeguards. When designed adequately, they can bring benefits to both sides of regulation: regulatees can test their idea in a safe environment and have a rare opportunity to consult on an ongoing basis their doubts as to their legal situation, while regulators can learn from the market and experiment prior to adopting new legal regimes.

Regulatory sandboxes are not, however, silver bullets, and their careful design is paramount to achieve the expected results. It is a mistake to target a specific technology, regardless of its use cases. Regulatory sandbox should be a relatively small-scale (with a regulator aware of its unrepresentativeness of the entire market), pilot implementation, focused on a very specific, well-defined sector in need of innovation and with high entry barriers to target true disruptors and to actually help them and see what types of rules and enforcement policies will not stifle them.[178] At the same time, safety of consumers and relevant markets should be a priority. Drawing the scope of a regulatory sandbox too widely may lead to inefficiencies on both sides, which may be especially acute to regulators and public actors who rarely have excess resources to spare.[179]

Although there are not many details available as to the final shape of the future AI regulatory sandbox in the European Union, it is possible that challenges and obstacles will negatively impact its chances of success. It remains to be seen whether AI regulatory sandboxes can truly become 'measures in support of innovation'.[180]

---

177 European Parliament (2022), *supra* note 8, at 4-5.

178 World Bank Group (2020), *Global Experiences from Regulatory Sandboxes*, Finance, Competitiveness & Innovation Global Practice, FinTech Note No. 8, available at https://documents1.worldbank.org/curated/en/912001605241080935/pdf/Global-Experiences-from-Regulatory-Sandboxes.pdf, at 22.

179 Quan (2021), *supra* note 13.

180 Title V of the draft AI Act which includes Article 53 and 54 on AI regulatory sandboxes is titled 'Measures in support of innovation'.

5. The Challenges of AI: a rule of law perspective

Karine Caunes*, Global Program Director, Center for AI and Digital Policy

1. Introduction: why adopt a rule of law perspective?

The rule of law has been the beating heart of democracies in the relative peace since the Second World War, and the beating drum of democracies currently facing authoritarian threats.[182] The rule of law presupposes democracy understood as providing an equal opportunity for individuals in a society to participate in policy-making regarding rules that will impact upon them.[183] Ultimately, they are entitled to an *equal right to determine* the outcomes of the policy-making process. Mechanisms are also created in order to safeguard this right. Individuals can, for example, contest, directly or through their representatives, the validity of the outcome of the policy-making process when it results in binding rules. Individuals are also entitled to a right to an effective remedy when the non- or misapplication of such rules results in violations of their fundamen-

* This is a contribution to the *liber amicorum* and workshop organised in honour of Professor Jacques Ziller, at the European University Institute, in Florence, on 2 November 2022.This is an inception paper on the rule of law in the digital age.

182 See European Law Journal (ELJ) Special issue on the rule of law (2021), *Between Ought and Is: European Integration through the rule of law*', European Law Journal, Vol. 27, Issue 1-3.

183 See Caunes, K. (2021), *Editorial: #IAmPetra; Prologue: The paradoxes of the rule of law in EU context—with special emphasis on the Polish RRP and EAW sagas; In this issue*, European Law Journal, Vol. 27, Issue 1-3.

tal rights. This suggests that the traditional question of political philosophy in relation to the primacy of political rights over civil rights, or vice-versa, is actually secondary; what matters is the acknowledgment of their complementarity. There is indeed a symbiotic relationship between the rule of law (état *de droit*) and the rule of rights (état *de droits*). In sum, the rule of law enables freedom[184] through rights under a condition of equality of opportunity.[185] This egalitarian underpinning also demonstrates that the rule of law necessarily limits freedom.[186]

It follows that the relationship between democracy and the rule of law can be characterised dynamically, as a virtuous cycle. Democracy not only constitutes the condition of possibility of the rule of law. Democracy is also guaranteed by the rule of law in its objective dimension in terms of process, and in its subjective dimension in terms of rights. If one considers Martin Krygier's definition of the rule of law as tempering power,[187] there are two main methods of doing so. On the one hand, power can be tempered through an institutional system of checks and balances. On the other hand, power can be tempered through the equal granting of rights. In both its objective and subjective dimensions, the rule of law is the guiding principle that presides over constitutionalism in democratic context.

From a methodological standpoint, this explains why the lens adopted in this article is that of the rule of law. We do not intend to "surf" on the "digital constitutionalism"[188] wave currently present in scholarship. Although constitutionalism has traditionally been tied with democracy through political liberalism, the expansion of con-

184 See Hayek, F. (1944), *The Road to Serfdom*,University of Chicago Press, Chicago, at 90; Locke, J. (1690), *Second Treatise of Government*, section 137, at 73; Tamanaha, B.Z. (2008), *The Dark Side of the Relationship Between the Rule of Law and Liberalism*, New York University Journal of Law & Liberty, Vol. 3, 2008.

185 See Sadurski S. (2008), *Equality and Legitimacy*, Oxford University Press, Oxford, 2008 and his exploration of three kinds of equality: political, legal and social.

186 See Tamanaha, B.Z. (2004), *On the Rule Law: History, Politics, Theory*, Cambridge University Press, Cambridge, 2004; Tamanaha, B.Z. (2018), *Functions of the Rule of Law*, in Loughlin, M. and J. Meierhenrich (eds), *The Cambridge Companion to the Rule of Law*, Cambridge University Press, Cambridge, 2018. For an emphasis on the limiting aspect in the digital context, see Suzor, N. (2018), *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms*, Social Media + Society, Issue 4; De Gregorio, G. (2021), *The Rise of Digital Constitutionalism in the European Union*, International Journal of Constitutional Law, Vol. 19, Issue 1, at 2.

187 Krygier, M. (2016), *The Rule of Law: Pasts, Presents, and Two Possible Futures*, Annual Review of Law and Social Science, Vol. 12, at 216.

188 See eg De Gregorio, G. (2022), *Digital Constitutionalism in Europe. Reframing Rights and Powers in the Algorithmic Society*, Oxford University Press, Oxford, 2022.

stitutionalism beyond the state, from transnationalisation to privatisation,[189] without mentioning globalisation of law, has loosened such links.[190] As much as constitutionalism can be used normatively to assess what power beyond the State is still lacking in terms of upholding fundamental rights, democracy and the rule of law, it also participates in legitimating forms of power beyond the State. A strand of contemporary "digital constitutionalism" scholarship thus results in validating rather than questioning the transfer of sovereignty to digital private actors.[191] However, when the State is totally removed from the equation, this becomes particularly problematic from a democratic standpoint. The rule of law for its part can hardly be confused with rule by code or rule of the non-digitalised few. The lines between democratically legitimate power and private power can thus become blurred and difficult to differentiate. For this reason, the rule of law appears to constitute a more adapted tool than constitutionalism for the assessment of AI challenges without risk of complacency.

In sum, the triangular relationship between the rule of law, democracy (collective self-determination) and human rights (individual self-determination) highlights that ultimately concrete AI challenges in this framework represent challenges to legitimate governance. They will thus be mapped as such in order to identify potential remedies (section 1). However, the specificity of these challenges is that they are the concrete instantiation of a greater challenge: the sovereignty claim of the non-digitalised few. It is thus of the utmost importance to deconstruct the narratives that support such claim in order to devise a sustainable and comprehensive response from a rule of law perspective (section 2).

189 See Teubner, G. (2012), *Constitutional Fragments: Societal Constitutionalism and Globalization*,Oxford University Press, Oxford, 2012.

190 For an appraisal, see Peters, A. (2014), *Global Constitutionalism*, in Gibbons, M.T. (ed), *Encyclopedia of Political Thought*,Wiley, New York, 2014.

191 See Celeste, E. (2021), *The Constitutionalisation of the digital ecosystem: Lessons from international law*, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 16, For a recent debate, see Mota Delgado, M. (2022), *Reflections on Professor Andrea Simoncini's lecture on constitutional law and technological change*, Symposium on Hitchiker's Guide to Law & Tech, DIGICON – The future of constitutionalism, 27 September 2022.

2. Tackling AI challenges to legitimate governance: a mapping exercise

The interconnectedness between the rule of law and democracy highlights the different legitimacy mechanisms that it crystallises and which compound legitimate governance: input (political) legitimacy, which focuses on political participation and government responsiveness; output (performance) legitimacy, which encompasses both policy effectiveness and outcomes, thus potentially fostering trust and reinforcing in turn input legitimacy; and throughput (procedural) legitimacy, which is concerned with the quality of governance processes, based on the accountability of the policy-makers and the transparency, openness and inclusiveness of governance processes.[192] Although these legitimacy frameworks are usually operationalised to assess governance in its objective dimension, one can perfectly imagine that they could serve as a tool to evaluate governance in its subjective dimension as well. Input legitimacy corresponds with political rights such as the right to vote, whereas output legitimacy corresponds with judicial rights[193] such as the right to an effective remedy and throughput legitimacy with legal rights such as the rights to transparency or non-discrimination.

As conceptualised, the rule of law in both its subjective and objective dimensions is the source of what could be termed *human determinism*. It embodies the right to self-determination, both in its individual and collective dimensions.

The right to self-determination in a democracy can be digitally threatened by two opposite phenomena: not enough or too much public intervention. The former can lead to horizontal AI challenges (1.1.). They consist in threats to the rule of law by some of its subjects, the source of sovereignty, who are acting in breach of equality before the law. The latter can lead to vertical AI challenges (1.2.). They consist in threats to the rule of law by the custodian of sovereignty (e.g. the "State"), the object of the rule of law, acting in breach of liberty.

192 See eg, Schmidt, V. and M, Wood (2019), *Conceptualizing throughput legitimacy: Procedural mechanisms of accountability, transparency, inclusiveness and openness in EU governance*', Public Administration, Vol. 97, Issue 4, 2019.

193 See in this regard, Ely, J.H. (1981), *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press, Cambridge, 1981; Katyal, S.K. (2022), *Democracy & Distrust in an Era of Artificial Intelligence*, Daedalus, Vol. 151, Issue 2, 2022.

2.1 Horizontal AI challenges

As famously argued by Frank Pasquale, major digital firms have transmuted from "market participants" into "market makers, able to exert regulatory control over the terms on which others can sell goods and services. Moreover, they aspire to displace more government roles over time, replacing the logic of territorial sovereignty with functional sovereignty. In functional arenas from room-letting to transportation to commerce, persons will be increasingly subject to corporate, rather than democratic, control."[194] Even more so, digital firms have transformed human experience into the main asset traded on the global digital market they are shaping and in which human data are the raw material and predictions of human behaviour are the product.[195] This definitively confirms that digital firms have the potential to disrupt traditional input, output and throughput mechanisms of legitimate democratic governance. In sum, they have acquired the power to disrupt the rule of law, if not replace it outright.

As for input legitimacy, AI poses a double challenge to collective and individual self-determination. On the one hand, it is almost trite to say that individuals do not have a say in the business model of digital firms and the policies they implement despite their control over ever-broader realms of individuals' lives.[196] The right to consent to terms of services is a far cry from democratic participation. On the other hand, digital firms have the power to impact the results of elections and referendums by influencing voters' behaviour, as exemplified by the Cambridge Analytica scandal with regard to

194 Pasquale, F. (2017), *From Territorial to Functional Sovereignty: The Case of Amazon*, LPE Project, available at https://lpeproject.org/blog/from-territorial-to-functional-sovereignty-the-case-of-amazon/; Suzor (2018), *supra* note 6.

195 See Zuboff, S. (2019), *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, : Profile Books, London, 2019.

196 This is part of the digital divide between digital natives and those in the know, which puts into question the very essence of democracy. See Shoshana Zuboff in Naughton, J. (2019), '*The goal is to automate us': welcome to the age of surveillance capitalism*, The Guardian, 20 January 2019, available at https://www.theguardian.com/technology/2019/jan/20/shoshana-zuboff-age-of-surveillance-capitalism-google-facebook.

Donald Trump's presidential election in the USA or Brexit in the UK.[197] This highlights, by way of example, the necessity of having legal rules ensuring accountability of online platforms regarding illegal and harmful content.[198] In the meantime, collective and individual self-determination, which finds a concrete expression in the right to vote, is at risk of being both constricted and manipulated.

Regarding output legitimacy, one of the main challenges of AI reflects the traditional dilemma between democracy and its perversion through *panem and circences*. Does the end justify the means? For example, does access to digital platforms, services and products justify citizens' surrendering their privacy and data? First, the question is somewhat biased. It assumes an inevitable trade-off between access to commodities and commodification whereas precisely a regulatory approach could prevent such a trade-off by rebalancing the current power asymmetry between digital firms and consumers. Second, studies have shown that individuals actually do care about their privacy.[199] The question is rather one of education[200] and access to knowledge as well as the means to secure them.[201] This is the reason why, for example, ensuring the

197 See Acquisti A., Brandimarte L. and Loewenstein G. (2020), 'Secrets and Likes: The Drive for Privacy and the Difficulty of Achieving It in the Digital Age', *Journal of Consumer Psychology*, at 736; Rosenberg M., Confessore N. and Cadwalladr C. (2018), 'How Trump consultants exploited the Facebook data of millions', *New York Times*, 17 March 2018; UK Information Commissioner's Office (2022), 'Investigation into data analytics for political purposes', *Actions we've taken so far* – until February 2022: see, among others (2018), 'Investigation into the use of data analytics in political campaigns, A Report to Parliament', 6 November 2018; (2018) 'Democracy disrupted? Personal information and political influence?', 11 July 2018; Bartlett J., Smith J., Acton R. (2018), 'The Future of Political Campaigning', Demos Report.

198 See at EU level, European Commission (2020), *Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act)*, COM/2020/825 final, Brussels. See Thierry Breton's comments in European Commission (2022a), *Digital Services Act: Commission welcomes political agreement on rules ensuring a safe and accountable online environment*, Press release, 23 April 2022. See also, for China *Internet Information Service Algorithmic Recommendation Management Provisions*, which entered into effect on March 1, 2022.

199 See Acquisti *et al.* (2020), *supra* note 18.

200 It is rather telling that in the UNESCO recent report, UNESCO (2022), *Here, there and everywhere, AI in education, State of the Education Report for India 2022*, 2022, available at https://unesdoc.unesco.org/ark:/48223/pf0000382661.locale=en: "Ethics of artificial intelligence in education" are mainly discussed with regard to the challenges in the current use of AI in education but not concerning ethics of AI as a compulsory part of curricula. The theme is promoting AI in education rather than education regarding AI.

201 See in this regard, Nemitz, P. (2021), *Democracy through law – The Transatlantic Reflection Group and its manifesto in defence of democracy and the rule of law in the age of "artificial intelligence"*, European Law Journal, Special Digital Issue, forthcoming, available in Early View.

correct functioning of law making as well as the existence of effective remedies through administrative and judicial review are essential. There is thus a clear link between the collective and individual dimensions of the right to self-determination which are reinforcing each other.[202] Needless to say, the rights to privacy and data protection[203] also constitute key assets for remedying wrongdoings by digital firms by limiting their hold on what they consider a mere commodity, and even more so, a free commodity waiting to be seized from digital natives.[204]

With regard to throughput legitimacy, one of the main issues concerns the collective impact of "Filter Bubbles" [205] and "Echo Chambers" which individuals are confined to, more often than not without their knowledge, via their online profiling by digital firms whose business model is based on the harvesting and selling of personal data for advertising purposes.[206] These digital fora play a similar role to, if not replace entirely, public agora in the eyes of citizens whose trust in, and engagement with traditional politics is fading by the day. Without proper regulation ensuring respect for democratic values, the pursuit of economic profit maximisation might lead to online

202 See European Commission (2022b), *Proposal for a Directive on adapting non contractual civil liability rules to artificial intelligence (AI Liability Directive)*, COM(2022) 496 final, Brussels.

203 See in the EU context, Article 7 and 8 of the Charter of Fundamental Rights as well the (other) rights enshrined in *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)*, Official Journal of the European Union, L 119, 4 May 2016 (hereinafter "GDPR"), such as the right to rectification or the right to be forgotten.

204 Although some have argued that the adoption of the "data" narrative is already playing the Big Tech game. See eg Zuboff in Naughton (2019), *supra* note 17.
For another example, see also European Commission (2022b), although so-called "ex-post legislation" has been characterised as inefficient and considered by digital firms as a collateral damage more than as an incentive to change their practices. See D'Cunha, C. (2021), "*A State in the disguise of a Merchant": Tech Leviathans and the rule of law* European Law Journal, Vol. 27, Issue 1-3, at 109.

205 See Pariser, E. (2011), *The Filter Bubble: What the Internet Is Hiding from You*, The Penguin Press, New York, 2011. See also French Data Protection Authority-CNIL (2017), *How can humans keep the upper hand? The ethical matters raised by algorithms and artificial intelligence*, Report on the public debate led by the French Data Protection Authority (CNIL) as part of the ethical discussion assignment set by the Digital Republic Bill, December 2017.

206 Personalisation techniques may take various forms. For a systematisation, see Ørmen, J. (2018), *Testing the Myth of Enclaves: A discussion of research designs for assessing algorithmic curation*, in Eldridge, S. and B. Franklin B. (eds), *The Routledge Handbook of Developments in Digital Journalism Studies*, Routledge, New York, 2018, at 132.

extremisation and partyism.[207] From a democratic standpoint, some of the key questions these practices raise are: "What are the social preconditions for a well-functioning system of democratic deliberation or individual liberty itself? Might serendipity be important, even if people do not want it? Might a perfectly controlled communications universe—a personalized feed—be its own kind of dystopia? How might social media, the explosion of communications options, machine learning, and artificial intelligence alter the capacity of citizens to govern themselves?".[208] Here again the link between collective and individual self-determination plays an important role. As far as individual self-determination is concerned, the black box of AI is a crucial issue even more so when (biased) automated decision-making has a detrimental impact on people's lives. This points to the importance of rights such as the right to transparency and explainability[209] or the right to non-discrimination,[210] adapted to the new,

207 See on the importance of considering "information systems (such as social media recommender systems (...) that may manipulate one's mental traits [as] high-risk systems and must be regulated as such" in the framework of the EU AI Act proposal and in line with the right to mental integrity enshrined in the EU Charter of Fundamental Rights, Russel, S. (2022), *Remarks to the Joint LIBE-IMCO meeting of the European Parliament*, 21 March 2022, available on caidp.org >resources >EU AI Act – Perspectives of Members of CAIDP Global Academic Network (GAN). See also on the risk of extremisation and partyism, Sunstein, C.R. (2017), *#Republic: Divided Democracy in the Age of Social Media*, Princeton University Press, Princeton, 2017, at 10. For another perspective focusing on fragmentation and polarisation of the public sphere, see Stark, B., D. Stegmann, M. Magin and P. Jürgens (2020), *Are Algorithms a Threat to Democracy? The Rise of Intermediaries: A Challenge for Public Discourse*, *Governing Plaftorms*, at 15.

208 Sustein (2017), *supra* note 28, at 5.

209 See for a discussion on whether transparency also includes a "right to explanation" in the EU context based on Recital 71 of the GDPR, De Gregorio G. (2021), 'The Rise of Digital Constitutionalism in the European Union', at 25, supra n. 6. For a positive answer, see Article 29 Data Protection Working Party (2018), 'Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679', 6 February 2018 and (2018) 'Guidelines on transparency under Regulation 2016/679', 22 August 2018. This interpretation seems to be confirmed if the GDPR is interpreted in the light of the 2021 UNESCO Recommendation on the Ethics of Artificial Intelligence, SHS/BIO/REC-AIETHICS/2021, signed by all EU Member States.

210 See most recently, The White House Office of Science and Technology Policy (2022), *Blueprint for an AI Bill of Rights*, 4 October 2022: "Algorithmic Discrimination Protections".

technological reality.[211] Such rights, if properly enforced, could trigger changes in the design of machine learning systems or the circumscription of their use.[212]

These horizontal AI challenges are further strengthened by their global scale, in terms of speed, pervasiveness in all fields of everyday life and geographical scope. The territorial extraneity of digital firms, shielded from the consumers they target, often allows them to evade State control or regulation. The extraterritorial scope of the relevant legislation, such as the GDPR or the proposed EU AI Act, is likely part of the solution in order to close the impunity gap digital firms take advantage of. International cooperation and regulation are also necessary to match the global reach of digital firms. Collective redress mechanisms might also be part of the solution.

2.2 Vertical AI challenges

If digital firms, under a "surveillance capitalism"[213] paradigm, are in competition with States for societal control over individuals and can thus constitute a threat to both collective and individual self-determination, so can State-Big tech collaborations[214] or States themselves. These State practices not only put democracy, fundamental rights and the rule of law at risk, but they also put into question the legitimacy of democratic governance in the three dimensions previously identified. It is enough here to take a few examples of the threats to collective and individual self-determination AI systems may pose when used by States.

As for input legitimacy and the perversion of the democratic model, a straightfor-

211 The fact that the right to non-discrimination typically includes qualifiers such as gender, sexual orientation, religion makes it however not always adapted to encompass differentiations made by machine learning systems. See eg Hildebrandt, M. (2021), *Discrimination, Data-driven AI Systems and Practical Reason*, European Data Protection Law Review, Vol. 7, Issue 3, at 358; Xenidis, R. and L. Senden (2020), *EU non-discrimination law in the era of artificial intelligence: Mapping the challenges of algorithmic discrimination* in Bernitz, U. *et al*. (eds), *General Principles of EU law and the EU Digital Order*,: Kluwer Law International, Zuidpoolsingel, 2020, at 151; Hacker, P. (2018), *Teaching fairness to artificial intelligence: Existing and novel strategies against algorithmic discrimination under EU law*, Common Market Law Review, Vol. 55, Issue 4, at 1146.

212 See Case C-817/19, *Ligue des droits humains*, Judgment of the Court (Grand Chamber) of 21 June 2022, as well Rotenberg, M. (2022), *CJEU PNR Decision Unplugs the 'Black Box'*, European Data Protection Law Review, Vol. 8, Issue 3, 2022.

213 See Zuboff (2019), *supra* note 16.

214 See the use of Clearview AI by law enforcement authorities in Europe, Canada or the US as mentioned in Rotenberg, M., Caunes K. and Hickok M. (2022), *2021 AI and Democratic Values Index*, CAIDP, Washington, 2022.

ward example is that of election tampering through the use of AI.[215] Election tampering refers to various practices that can broadly be covered under the umbrella term of information manipulation.[216] This can range from voter-targeting through advertising[217] to disinformation through bot(net)s during electoral campaigns.[218] Disinformation more particularly involves the use of fake automated social media accounts with the aim being to amplify divisive and polarising content. Information warfare is used by autocracies against democracies which they view as a destabilising threat.[219] The objective is to undermine trust in democracy in return or as a preventive measure. International cooperation among intelligence services, transparency and accountability of providers of online intermediary services and citizens' digital literacy are part of the remedies in this digital equation.[220]

With regard to output legitimacy, AI could facilitate the advent of Bentham's panopticon,[221] as revisited by Foucault.[222] It indeed potentially allows for mass surveil-

---

215 See Venice Commission (2019), *Joint Report of the Venice Commission and of the Directorate of Information Society and Action against Crime of the Directorate General of Human Rights and Rule of Law (DGI), on Digital Technologies and Elections*, adopted by the Council of Democratic Elections at its 65th meeting (Venice, 20 June 2019) and by the Venice Commission at its 119th Plenary Session (Venice, 21-22 June 2019), CDL-AD(2019)016-e.

216 See Jeangène Vilmer, J.-B., A. Escorcia, M. Guillaume and J. Herrera (2018), *Information Manipulation: A Challenge for Our Democracies*, Report by the Policy Planning Staff (CAPS) of the Ministry for Europe and Foreign Affairs and the Institute for Strategic Research (IRSEM) of the Ministry for the Armed Forces, Paris, August 2018.

217 See Schrage, E. (2017), *Hard Questions: Russian ads delivered to Congress*, Meta Newsroom, 2 October 2017; SSCI Research Summary (2018), *An assessment of the Internet Research Agency's US-directed activities in 2015-2017 based on platform-provided data*, Yonder Report, 2016 Disinformation Report, December 2018.

218 See eg the 2016 US presidential campaign, the 2017 French presidential campaign or the 2017 German federal elections. See Report of the Select Committee on Intelligence United States Senate on Russian active measures campaigns and interference in the 2016 US election (2020), Vol I-V, Vol. 2 Russia's use of social media with additional views, Senate Report 116-290, November 2020; Howard P.N., B. Ganesh and D. Liotsiou (2019), *The IRA, Social Media and Political Polarization in the United States, 2012-2018*, Computational Propaganda Research Project, 2019; Aaltola, M. (2017), *Democracy's eleventh hour. Safeguarding democratic elections against cyber-enabled autocratic meddling*', FIIA Briefing Paper 226, November 2017.

219 *Ibid.*

220 For some suggestions, see Jeangène Vilmer *et al., supra* note 37.

221 Bentham, J. (1995), *The Panopticon Writings*, Verso Books, Brooklyn, 1995.

222 Foucault, M. (2019), *Discipline and Punish: The Birth of the Prison*, The Penguin Press New York, 2019.

lance at such scale and with such velocity as was previously unimaginable. Such practices do not take place only within authoritarian regimes.[223] They are exported to democratic countries or are used by democratic countries.[224] On the one hand, it is very telling that EU Member States have pushed for the exclusion of national security from the scope of the EU AI Act[225] and a similar exemption has been sought for in the Convention on AI currently under negotiation at the Council of Europe.[226] On the other hand, this also explains the necessity to prohibit the use of AI for mass surveillance and social scoring as called for in the UNESCO recommendation on the ethics of AI, signed by no less than 193 States. The EU AI Act currently under negotiation will also highly likely contain similar red lines, at least with regard to social scoring, combined

223 See eg about China, Andersen, R. (2020), *The panopticon is already here*, *The Atlantic*, September 2020, available at https://www.theatlantic.com/magazine/archive/2020/09/china-ai-surveillance/614197/.

224 See eg banfacialrecognition.com interactive map; the reclaimyourface.eu campaign. See also European Parliament (2021), *Resolution on artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters*, 6 October 2021; European Data Protection Board (2022), *Guidelines 05/2022 on the use of facial recognition technology in the area of law enforcement*, 12 May 2022.

For various country examples with regard to the use of facial recognition by law enforcement authorities, such as Clearview AI, see Rotenberg, Caunes, Hickok (2022), *supra* note 35, e.g. Sweden. See recently UK Information Commissioner's Office, 'ICO fines facial recognition database company Clearview AI Inc more than £7.5m and orders UK data to be deleted', 23 May 2022.

225 Presidency of the Council of the European Union (2022), *Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts*, Third Presidency compromise text (Title IA, Articles 30-85 and the relevant recitals, Annexes V-IX), 12549/22, 23 September 2022.

226 See the defence and military exemption in the compromise text presented by the Czech Presidency of the Council of the European Union, with reference nonetheless to "public international law, which is therefore the more appropriate legal framework for the regulation of AI systems in the context of the use of lethal force" (*Ibid*, at 15). However for a lack of consensus on a ban on lethal autonomous weapons through a revision of the UN Convention on Certain Conventional Weapons. See CAIDP (2021), *UN Fails to Act on "Slaughter Bots"*, CAIDP Update 2.44, 23 December 2021; CAIDP (2022), *Statement on Russia's Unjustified and Unprovoked Attack on Ukraine*, 11 March 2022.

with a risk-based approach to AI.[227] These examples highlight potential risks for collective and individual self-determination emerging from the use of AI.[228] The transformation of democratic States into totalitarian regimes through digital mass surveillance is nevertheless not the only risk.

With regard to throughput legitimacy and the quality of public decisions, the spread of automated decision-making in public institutions,[229] from school grading systems[230] to childcare allowances[231] or judicial decisions,[232] is also concerning in view of its potential adverse effects on individuals' lives and their trust in democratic institutions.[233] Fully automated individual decision-making constitutes a fundamental encroachment upon the right to self-determination. This explains why it is prohibited as a matter of principle in the EU GDPR.[234] The use of predictive AI is different from human determination in the sense that, apart from potential biases of various forms

227 Note that the Court of Justice of the European Union has so far developed a human-centric case law based on the higher(constitutionally)-ranked EU Charter of Fundamental Rights. See for a recent example regarding the EU PNR Directive, Case C-817/19 *Ligue des droits humains*, *supra* note 33, paragraphs 193-213. Perhaps more puzzling is the adoption by the Council of Europe Ad Hoc Committee on Artificial Intelligence (CAHAI) in its 'Possible elements of a legal framework on artificial intelligence, based on the Council of Europe's standards on human rights, democracy and the rule of law' of a risk-based approach and not a human rights-based approach. See for a nuanced analysis, Mantelero, A. (2022), *Beyond Data. Human Rights, Ethical and Social Impact Assessment in AI*, Springer-Asser, The Hague, at 140 et seq.

228 See reference in the UNESCO Recommendation on the ethics of AI to the principles of "Human oversight and determination" in both their collective and individual dimensions.

229 See for various examples in different countries, Rotenberg, Caunes, Hickok (2022), *supra* note 35.

230 See, e.g. Kolkman, D. (2020), "*F**k the algorithm"?: What the world can learn from the UK's A-level grading fiasco*, LSE Impact Blog, 26 August 2020, available at https://blogs.lse.ac.uk/impactofsocialsciences/2020/08/26/fk-the-algorithm-what-the-world-can-learn-from-the-uks-a-level-grading-fiasco/.

231 Heikkila, M. (2022), *Dutch scandal serves as a warning for Europe over risks of using algorithms*, Politico, 29 Mars 2022, available at https://www.politico.eu/article/dutch-scandal-serves-as-a-warning-for-europe-over-risks-of-using-algorithms/.

232 See eg the Ultima Ratio system in Poland mentioned in Rotenberg, Caunes, Hickok (2022), *supra* note 35,at 335.

233 See eg Kumlin, S., Stadelmann-Steffen I. and Haugsgjerd I. (2017), *Trust and the welfare state*, in Uslaner, E.M. (ed), *The Oxford Handbook of Social and Political Trust*,Oxford University Press, Oxford, 2017, at 385.

234 Article 22 GDPR. See Data Protection Working Party (2018), *supra* note 30, Article 29.

and origins[235] – which raise issues of discrimination and, more broadly speaking, fairness and equity particularly puzzling in a democratic context[236] – its "logic" is not only based on correlation (as opposed to causation) but also on the reproduction of past patterns. However, to only take the example of judicial decisions, the rule of law does not require that judicial decisions follow earlier judgments; it simply requires judicial decisions to be justified on the basis of the law currently in force. Aspects of morality, and its evolution through time, fairness or specific or potential circumstances might lead a judge to depart from existing case law. This also illustrates the difference between code and language: the open texture of the latter[237] renders the future unpredictable yet allows for "automatic" human adaptability.[238] This is also the difference between computation and thinking: understanding, i.e., the question of "why"[239] that guides the "how"[240] and the meaningful selection of relevant factors.

Whether through societal control or decision automation, the untempered digitisation of the State through the un(der-)regulated use of AI might be a source of fundamental rights violations, distrust in democracy and destruction of the rule of law. This calls for a Charter of digital rights, bringing together both rights specific to the digital context as well as classical rights adapted to it, such as those previously

235 For the different possible origins of biases see eg Geslevich Packin, N. and Y. Lev-Aretz (2018), *Learning Algorithms and Discrimination*, in Pagallo, U. and W. Barfi (eds), *Research Handbook on the Law of Artificial Intelligence*, Edward Elgar Publishing, Cheltenham, 2018, at 88. There may also be biased algorithms due to human choices, see Rich, M.L. (2016), *Machine Learning, Automated Suspicion Algorithms, and the Fourth Amendment*, University of Pennsylvania Law Review, Vol. 164, Issue 4, at 883.

236 See eg The White House Office of Science and Technology Policy (2022), *supra* note 31; see also Hildebrandt (2021), *supra* note 32; Zuiderveen Borgesius, F. (2018), *Discrimination, Artificial Intelligence and Algorithmic Decision-Making*, Strasbourg, Council of Europe, Directorate General of Democracy, 2018.

237 See in this regard, Nemitz (2021), *supra* note 22; see also Jackson, B.S. (1985), *Semiotics and Legal Theory*, Routledge and Paul Kegan, London, 1985; McCormick, N. (2005), *Rhetoric and The Rule of Law: A Theory of Legal Reasoning*, Oxford University Press, Oxford, 2005.

238 On the conception of human identity as the product of inherent characteristics and the environment, see Ricoeur, P. (2007), *From Text to Action: Essays in Hermeneutics, II,* Northwestern University Press, Evanston, 2007.This defers from AI which needs regular upgrades. See Nemitz (2021), *supra* note 22.

239 See Pearl J. and D. Mackenzie (2018), *The Book of Why, The New Science of Cause and Effect*, The Penguin Press, New York, 2018.

240 See Katz, Y. (2012), *N. Chomsky on Where Artificial Intelligence Went Wrong*, The Atlantic, 1 November 2012, available at https://www.theatlantic.com/technology/archive/2012/11/noam-chomsky-on-where-artificial-intelligence-went-wrong/261637/.

mentioned.[241] The primacy of fundamental rights protection also entails the full or partial prohibition of, as well as limitations on, the use of AI under conditions of proportionality. The promotion of human-centric AI by design and the introduction of ethical impact assessments as enshrined in the recent UNESCO Recommendation on the Ethics of AI but absent so far from the proposed EU AI Act[242] could also constitute assets in fostering accountability, on top of responsibility translated into redress mechanisms.[243] In this regard, independent monitoring would play a key role.[244] In the meantime, international convergence around shared democratic values[245] translated into key AI principles such as those crafted in the Universal Guidelines for AI would allow States to pledge and renew their commitment to protecting these values with the aim "to maximize the benefits of AI, to minimize the risk, and to ensure the protection of human rights."[246]

A rule of law perspective on the concrete challenges posed by AI for collective and individual self-determination permits a more effective delineation of them. Ultimately, they all relate to the way AI systems are designed[247] and used. However, a deeper understanding of these challenges necessitates putting them into context as well as analysing and assessing the narratives that actually aim to legitimise them to the detriment of the rule of law. Only then will a sustainable human-centric AI uphold its promises.

241 For some recent attempts, see for Portugal (2021), Law no. 27/2021, of 17 May 2021, approving the Portuguese Charter of Human Rights in the Digital Era; for Spain (2021), Charter of Digital Rights, 14 July 2021; The White House Office of Science and Technology Policy (2022), *supra* note 31. The OECD is itself currently exploring the issue of rights in the digital age through the organisation of a series of workshops in 2022, see oecd.org/digital/rights.

242 Note however the possibility that impact assessments end up in the Council of Europe Convention on AI.

243 See also in the literature, eg Reisman, D., J. Schultz J., K. Crawford and M. Whittaker M. (2018), *Algorithmic impact assessments: a practical framework for public agency accountability*, AINow, April 2018. More recently, Mantelero (2022), *supra* note 50.

244 See in this regard, Rotenberg, Caunes, Hickok (2022), *supra* note 35.

245 Note that the US OSTP Blueprint for an AI Bill of Rights could serve as a catalyst for such convergence with the EU among others through negotiations in the framework of the EU-US Trade and Technology Council. It remains to be seen whether the forthcoming Council of Europe Convention of AI, which will be open for signature to any countries in the world, could play a similar role at international level.

246 The Public Voice (2018), *Universal Guidelines for Artificial Intelligence*, 23 October 2018, preamble.

247 See famously, Lessig, L. (2000), *Code is Law – On Liberty in Cyberspace*, Harvard Magazine, January 2000.

3. Tackling the ultimate AI challenge to legitimate governance: on the importance of narratives

Regulation is the "mouth" of the rule of law. Whether one believes that the *raison d'être* of regulation is to ensure the pacification of societal relationships, the ordering of human conducts, the quest for happiness or a good life, regulation translates essentially in the mitigation of risks, the prevention of harmful conducts and their redress. In so doing, regulation reflects and enforces the core values of a society.[248] Words and narratives do matter. They are at the heart of the collective identity of a society or individuals' collective understanding. Narratives often guide collective and individual self-determination. This is one of the main reasons why it is of the utmost importance to decipher AI challenges, including those related to regulating AI, in context. In this regard, three types of digital narratives, as alternatives to the rule of law, can be identified: the "artificial intelligence" narrative characterising artificial input legitimacy (2.1), the "AI opportunities" narrative by way of artificial output legitimacy (2.2.) and neoliberal narratives as a form of artificial throughput legitimacy (2.3). Together they promote a competing artificial governance framework.

3.1 Artificial input legitimacy: the "artificial intelligence" narrative

Let there be AI! The challenge posed by AI to democratic governance in terms of input legitimacy relies on its very depiction as "artificial intelligence". A key question is indeed why do we use the term "artificial intelligence" in the first place?[249] Do the practices mentioned in the previous section fit with the definition of intelligence if

248 See eg the reference to socialist core values in the 2022 Chinese Regulations on the Administration of Algorithm Recommendation of Internet Information Services (Article 1); to not only human but also peoples' rights as well as "African norms, ethics, values, such as Ubuntu, communitarian ethos, freedom from domination of one people by another in Africa" in the African Commission on Human and Peoples' Rights (2021), *473 Resolution on the need to undertake a Study on human and peoples' rights and artificial intelligence (AI), robotics and other new and emerging technologies in Africa*, ACHPR/Res. 473, EXT.OS/ XXXI, (Preamble), to "Union values of respect for human dignity, freedom, equality, democracy and the rule of law and Union fundamental rights" in the draft EU AI Act (Preamble).

249 For a definition see eg AEPD and EDPS (2022), *10 misunderstandings about machine learning*, Joint paper, 20 September 2022. See also, Article 3(1) of the draft EU AI Act.

characterised by understanding? Serious doubts are permissible. Therefore, what is the performative function of this expression?

From a psychoanalytic perspective, one may see in this expression the threat of what Freud called the "omnipotence of thought", whereby the structural conditions of the mind are projected onto the external world. More worryingly perhaps, Freud identifies three stages:

"If we accept the evolution of man's conceptions of the universe mentioned above, according to which the *animistic* phase is *succeeded* by the religious, and this in turn by the scientific, we have no difficulty in following the fortunes of the "omnipotence of thought" through all these phases. In the animistic stage man ascribes omnipotence to himself; in the religious he has ceded it to the gods, but without seriously giving it up, for he reserves to himself the right to control the gods by influencing them in some way or other in the interest of his wishes. In the scientific attitude towards life there is no longer any room for man's omnipotence; he has acknowledged his smallness and has submitted to death as to all other natural necessities in a spirit of resignation."

Depending on the constitutive myths of societies and individuals, the use of the term "artificial intelligence" may lead to the legitimation of the AI black box, through magic thinking, sacralisation or pseudo-scientific techno-determinism or absolutism. AI indeed epitomises or is deemed to represent in its promise the ultimate stage of scientific evolution. To the question, "why permit some specific design or use of AI systems despite their adverse impact on individuals' lives?", the answer is an unquestionable "because". This delegitimises attempts to create the conditions of possibility of a human-centric approach to AI by design. Rights such as the right to transparency and principles such as accountability lose their *raison d'être*. The omnipotence of thought attributed to "AI" has for counterpart the negation of human self-determination. Nevertheless, the use of the term AI is spreading, be it in policy and legal documents such as national AI strategies,[250] international instruments such as the OECD AI Principles or the UNESCO Recommendation on the Ethics of AI, the forthcoming Council of Europe Convention on AI or the proposed EU AI Act.

In this context, if AI has become the commonly accepted expression in science, politics, law and everyday life, its meaning should however not be left unquestioned. On the contrary, AI should be defined and understood from a human-centric per-

250 For examples, see Rotenberg, Caunes, Hickok (2022), *supra* note 35.

spective since it is man-made. The key word in the expression "artificial intelligence" is thus not "intelligence" but "artificial". "Artificial" qualifies "intelligence", which essentially means that "intelligence" does not have a meaning per se, separate from its artificial substrate. An artificially intelligent system is a system which is characterised by its inherent "Canada Dry effect": it at best mimics human intelligence.

To Alan Turing's question,[251] "can a machine think?" with regard to precise tasks and so in terms of inferences from collected data to achieve a certain goal, the answer is probably yes. However, Turing himself acknowledged that the question in abstract terms does not make much sense. The abstract Cartesian *cogito ergo sum* is what sets humans apart from AI systems.[252] The omnipotence of thought, apart from being a very human projection, is the perverted version of the primacy of thinking which in turn points to the primacy of human self-determination and to the limits of AI. A narrative which would emphasise the fantasised inherent superiority of AI over human beings as a justification for a transfer of sovereignty, in terms of power, to the new AI sovereign, as a source of power,[253] is a definite threat to democracy, fundamental rights and the rule of law. In order to prevent such a threat, humans should refrain from artificially conferring input legitimacy to AI. This points to the importance of civic education in digital matters, including the deconstruction of the AI narrative and the discussion of the democratic narrative.

3.2 Artificial output legitimacy: the "AI opportunities" narrative

Another challenge in tackling efficiently the risks posed by AI is "the big data imperative" driven by an economic rationale. Although one could question the use of the term "big data", which somehow presupposes what it wants to achieve, the main threat comes from the associated narrative which consists in affirming that the full potential of AI can only be unleashed through the harvesting of the maximum amount

251 Turing, A.M. (1950), *Computing Machinery and Intelligence*', Mind, Vol.49, 1950, at 433.

252 On the link between Turing and Descartes see Abramson, D. (2011), *Descartes' Influence on Turing*, Studies in History and Philosophy of Science, Vol. 42, 2011.

253 On the different meanings of sovereignty, see Troper M. (2014), *Pour une théorie juridique de l'État*, (Paris: P.U.F.).

of data.[254]

This is in sum an output legitimacy narrative. The extraordinary opportunities AI has to offer come at the expense of human self-determination through the datafication of the "digital natives". However, if self-determination is what defines human beings, can something that destroys it be considered as an "opportunity"? The only possible answer from a democratic standpoint seems to be in the negative. There is no balance either to be achieved between respect for fundamental rights, democracy and the rule of law and AI opportunities branded as innovation. On the contrary, human-centric innovation, whereby AI is at the service of citizens and not the other way around, shall guide the definition of what constitutes AI opportunities in the design and use of AI systems. This is the reason why the design and use of AI ought to be framed by law as the expression of collective self-determination in democratic societies.[255]

"AI opportunities" rhetorical statements are often used as an output legitimacy discourse justifying the business model of digital firms and preventing its questioning or public regulation conceived as an economic burden to be avoided. However, the "big data imperative" is artificial at best. More important are the quality of data and their representativeness.[256] The EU legislator for his part did not follow such economic logic. It favoured a rights-based approach relying on the rights to privacy and data protection as enshrined in Article 7 and 8 of the Charter of Fundamental Rights. Article 5 (1) of the GDPR for its part provides for principles that limit the processing of personal data, such as lawfulness, fairness and transparency, purpose limitation, data minimisation, storage limitation, integrity and confidentiality. This suggests that, contrary to the ideas vehiculated by the "AI opportunities" narrative, AI opportunities can and ought to be interpreted from a human-centric perspective.

254 See eg Fu-Lee, K. (2021), How AI Will Completely Change the Way We Live in the Next 20 *Years*, Time 2030, 14 September 2021. See also for a discussion on the big data mythology, Crawford, K., Milner K. and M. L. Gray (2014), *Critiquing Big Data: Politics, Ethics, Epistemology*, Special Section Introduction, International Journal of Communication, Vol. 8, 2014, at 1666.

255 See Nemitz P. (2021), 'Democracy through law – The Transatlantic Reflection Group and its manifesto in defence of democracy and the rule of law in the age of "artificial intelligence"', *supra* n. 22.

256 See eg AEPD and EDPS (2022), *supra* note 77.

3.3 Artificial throughput legitimacy: neoliberal narratives and Castoriadis' critique of Marxism

The absence of public regulation over AI has fuelled the digital privatisation of power. This phenomenon has also been supported and legitimated by alternative governance narratives. Some of the most influential have been moulded as a web of neoliberal narratives whose common mantra could be described as freedom from government, in lieu of individual self-determination, and self-regulating markets, in lieu of collective self-determination.[257] The reason is twofold. First, and albeit a simplification, the combination, in neoliberalism as a political theory, of the primacy of economic freedom and the rule of free markets "naturally" leads to and justifies market determinism under conditions of free competition. Second, neoliberalism, as a political doctrine, has proved very influential in real-life politics.[258] In terms of narrative adapted to the digital context, the neoliberal tenets have been translated into freedom of our digital self from government (artificial input legitimacy)[259] and the rule of free digital market as the highest public good to be achieved (artificial output legitimacy). This essentially means that a combination of artificial input legitimacy and artificial output legitimacy has conveniently diminished the importance of the question of throughput legitimacy. However, a mechanistic approach cannot replace processes (in a democratic setting). One of the key flaws in this approach applied to real-life politics lies in the absence of consideration for the adverse effects of market determinism on individual freedom due to a conflation, into the notion of public good, of what is good for the individual and what is good for the market. Applied neoliberalism has this in common with applied communism,[260] in that it ultimately suppresses individual and collective self-determination. This explains why the democratic question becomes at best sec-

257 For some interesting accounts tying together informationism and neoliberalism, see eg Neubauer, R. (2011), *Neoliberalism in the Information Age, or Vice Versa? Global Citizenship, Technology, and Hegemonic Ideology*, triple, Vol. 9, Issue 2, 2011, at 195. For a US perspective, see Starr, P. (2019), *How Neoliberal Policy Shaped the Internet—and What to Do About It Now*, The American Prospect. Ideas, Politics and Power, 2 October 2019. For an EU perspective on "digital liberalism", see De Gregorio (2021), *supra* note 6,at 3 et seq.

258 See eg, Harvey, D. (2005), *A Brief History of Neoliberalism*, Oxford University Press, Oxford, 2005,; Stedman Jones, D. (2012), *Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics*, Princeton University Press, Princeton, 2012.

259 See John Perry Barlow's *Declaration of the Independence of Cyberspace*, Davos, 8 February 1996.

260 "Applied" is here used to signify the discrepancy between political theory and political doctrine.

ondary, and at worst obsolete. In the meantime, the rule of law is slowly but surely being replaced by the rule by code or the rule of the non-digitalised few.[261]

This probably also explains why a counter-narrative which would restore the centrality of throughput legitimacy, thus exposing the shortcomings of its artificial version, can actually be found in Castoriadis' critique of Marxism. A theory of history such as the one Marxism aims at is a "closed theoretical system [which] must of necessity posit people as passive objects of its theoretical truth". "This is due to the fact that, on the one hand, it remains almost unavoidably the development and the condensation of experience already acquired, and that, even if it foresees something 'new', this is always in every respect the repetition on some other level, the 'linear transformation' of what has already occurred."[262] This static world imbued with its own truth and rules leading to the deindividualisation of human beings is a perfect metaphor for the world according to AI.[263] (Heteronomous) determinism[264] legitimates the transformation of throughput processes ensuring continuing political participation into digital participation, which some may describe as colonialisation. The democratic throughput legitimacy question becomes superfluous or redundant. In this sense, the heteronomous "artificial" is the opposite of the autonomous social-historical "imaginary" which dynamically articulates both "the union and the tension of instituting society and of instituted society, of history made and of history in the making"[265] and which is key in avoiding alienation of individuals and absolutism of power, in other words, totalitarianism.[266] It is through the constant exercise of individual and collective self-determination that the democratic question emerges and democratic regimes flourish. This is what makes throughput legitimacy an essential component of a theory of democratic governance. It is what needs to be reinvented for the rule of law, democracy and fundamental rights to survive in a digital environment.

---

261 See eg Castoriadis, C. (1987), *The Imaginary Institution of Society*, : Blackwell Publishers, Hoboken, 1987, at 109.

262 *Ibid*, at 69.

263 With the caveat that causation would have to be replaced by correlation.

264 See on determinism, Castoriadis (1987), *supra* note 89, at 29, 42 et seq.

265 *Ibid.*, at 108.

266 See *Ibid*, at 108 et seq. See also, interestingly, Arendt, H. (1979), *Totalitarianism: Part Three of The Origins of Totalitarianism*,Harvest-Harcourt, San Diego.

The deconstruction of some key AI narratives and the examination of some concrete AI challenges from a rule of law perspective show that only if the space for meaningful political deliberation is preserved, can transfer of sovereignty, in terms of power, to the new AI sovereign, as a source of power, be avoided. This is the digital manifesto of citizenship as self-determination. To preserve it is the *raison d'être* of democratically legitimate governance and the rule of law in the digital age.

6. Digital Administration The ReNEUAL Model Rules on EU Administrative Procedure Revisited

Herwig C. H. Hofmann, Professor of European and Transnational Public Law, University of Luxembourg
Oriol Mir, Professor of Administrative Law, Pompeu Fabra University
Jens-Peter Schneider, Professor of Public Law, Freiburg University

1. The use of AI by the EU Administration and the importance of the administrative procedure

The use of advanced algorithms by the EU Administration itself (mainly the European Commission and the various EU agencies) is growing. In particular, the current use and considerations about the possibilities of the use of such algorithms to contribute to the taking of administrative decisions with legal effects on citizens and businesses, be they rules of general scope (non-legislative acts of general application adopted by the Commission, often on the proposal of the agencies) or single-case decisions (administrative sanctions, inspections,

authorisations, product recalls, subsidies, selection of civil servants and contractors, registration of trademarks, etc.). Although the administrative implementation of EU law is primarily the responsibility of the Member States, the Treaties and secondary legislation also give the Commission and the European agencies significant powers to adopt this type of decisions. Further, the EU has developed a unique approach to cooperative federalism linking Member State and EU levels in a multitude of procedural forms of cooperation, often through joint data collections and procedures of the use and re-use of such data.

Against this background, we will discuss whether the ReNEUAL Model Rules, which were proposed as a set of minimum procedural rules applicable to the adoption of such decisions by the EU Administration and were drawn from inspiration from existing sectoral rules and national procedural laws in Member States' administrations, should be reviewed in view of ADM using AI tools. First, we do so with a look at certain characteristics of ADM in EU administrative law (1) before looking (2) at specific case studies of the use of ADM in EU law.

1.1 Characteristics of ADM

In EU administrative law, the development of automated decision making is often linked to the establishment of large-scale information systems. Automated decision making requires large sets of data to be able to provide the quantity and quality of data processing. Large scale data sets require automated decision-making technology to process the data to make use of the advantages of data availability for decision-making.

Some of the most well-known large scale information systems in the EU are in the field of the Area of Freedom, Security and Justice (AFSJ) such as the

Schengen Information System (SIS II).[267] The link between the development of large scale databases and automated decision making technology is explicit in the creation of a single agency (eu-LISA).[268] Other large-scale information systems exist for example in the areas regulating risk in food, animal feed, plant health,[269] human and veterinary medicine products.[270]

Relevant for the introduction of automated decision making with AI approaches is the availability of data. In this context, first, in single market regulation, as well as in data collections pertaining to the AFSJ, interoperability is

267 A large-scale information system for border management in operation in EU and non-EU countries on the basis of *Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals*, Official Journal of the European Union, L 312, 7 December 2018, pp. 1–13; *Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006*, Official Journal of the European Union, L 312, 7 December 2018, pp. 14–55; *Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU*, Official Journal of the European Union, L 312, 7 December 2018, pp. 56–106.

268 The European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) is an agency established under *Regulation (EU) No 1077/2011 of the European Parliament and of the Council of 25 October 2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice*, Official Journal of the European Union, L 286, 1 November 2011, pp. 1–17, replaced by *Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011*, Official Journal of the European Union, L 295, 21 November 2018, pp. 99–137.

269 *Commission Implementing Regulation (EU) 2019/1715 of 30 September 2019 laying down rules for the functioning of the information management system for official controls and its system components (the IMSOC Regulation)*, Official Journal of the European Union, L 261, 14 October 2019, p. 37–96

270 See: Demková, S. (2021, *The Decisional Value of Information in European Semi-Automated Decision Making*, Review of European Administrative Law, Vol. 14, No. 2, 2021.

becoming the norm for connecting different databases established initially for different causes.[271] The principle of interoperability enables interconnectivity of data collections and thereby enlarges the 'data lake' available to processing by automated decision making technology.[272] For example, in the field of the AFSJ, the Electronic Travel Information and Authorisation System (ETIAS)[273] and the Passenger Name Record (PNR)[274] system will become linked with interoperability functions, allowing for searches taking place within these databases to be enriched with data from certain interconnected other databases.[275] It also allows for further integration of automated decision making technologies into decision making procedures by introducing novel technical capacities for matching of available data.[276]

Next to interoperability requirements, relying on the sharing of information across different *systems*, sharing data across EU and Member State administrations is an important approach in EU administrative law to enlarge data

271 The protection of personal data is particularly vulnerable to this because of the principle of purpose limitation of data collection.

272 Quintel, T. (2018), *Connecting Personal Data of Third Country Nationals: Interoperability of EU Databases in the Light of the CJEU's Case Law on Data Retention*, Law Working Paper No. 2/2018, University of Luxembourg, Luxembourg, 2018.

273 *Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226*, Official Journal of the European Union, L 236, 19 September2018, pp. 1–71, pursuant to which visa free Third Country Nationals (TCNs) have to apply for an electronic authorization in order for the risk they pose to be assessed in advance.

274 *Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime*, Official Journal of the European Union, L 119, 4 May2016, pp. 132–149.

275 Vavoula, N. (2020), *Consultation of EU Immigration Databases for Law Enforcement Purposes: A Privacy and Data Protection Assessment*, European Journal of Migration and Law, Vol. 22, Issue 2, 2020, at. 145 and 146.

276 Such novel automated decision making capacities are especially embedded in the shared BMS interoperability tool, see European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (hereafter eu-LISA) (2018), *Shared Biometric Matching Service (sBMS)*, final report, 2018, avaialble at http://op.europa.eu/en/publication-detail/-/publication/10175794-3dff-11e8-b5fe-01aa75ed71a1/language-en.."plainCitation":"eu-LISA, 'Shared Biometric Matching Service (SBMS

availability.[277] Interoperability requirements arose initially from mutual assistance requirements between European administrations.[278] These have, in many areas, evolved towards more integrated informational cooperation following requirements of a single legal space in the EU without internal frontiers.[279] For example, food and non-food mutual warning systems (RASSF or RAPEX)[280] also serve as large-scale storages of information. Imbedding the automated decision-making technology within EU large scale databases aids multi-level, decentralized implementation of EU policies in the context of composite decision-making within administrative networks providing, for example, for information exchange, joint warning systems and structures of coordinated remedies.

277 Schneider, J.-P. (2017), *Information Exchange and its problems*, in Harlow, C., P. Leino, G. della Cananea (eds.), *Research Handbook On EU Administrative Law*, Edward Elgar Publishing, Cheltenham, Northampton, 2017, pp.81-112; see also Schneider, J.-P. (2014), *Basic Structures of Information Management in the European Administrative Union*, European Public Law, Vol. 20, Issue 1, 2014, at 98-106. See in other context, for instance, as part of the EU Digital Strategy Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act), Official Journal of the European Union, L 152, 3 June 2022, pp.1–44.

278 See especially Craig *et al.* (2017), *supra* note 2, Book V; Schneider (2017), *supra* note 13, at 81, and 86-90. For the discussion of the evolution of EU administration Hofmann, H. C. H (2008), *Mapping the European Administrative Space*, *West European Politics*, Vol. 31, Issue 4, 2008.

279 See especially the Craig *et al.* (2017), *supra* note 2, Book VI. See eg information exchange under the European Commission's '*Internal Market Information System (IMI)*' available at https://ec.europa.eu/internal_market/imi-net/about/index_en.htm. Lottini, M. (2014), *An Instrument of Intensified Informal Mutual Assistance: The Internal Market Information System (IMI) and the Protection of Personal Data*, European Public Law, 2014; Demková (2021), *supra* note 6.

280 European Commission, *Safety Gate: The Rapid Alert System for Dangerous Non-Food Products*, available at https://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/alerts/repository/content/pages/rapex/i ndex_en.htm; European Commission, '*RASFF - Food and Feed Safety Alerts*', available at https://ec.europa.eu/food/safety/rasff_en; more generally on duties to inform see Schneider (2017), at 81, 82-83, and 91-94.

Many policy areas allow access by public bodies to privately held or collected data.[281] Travel, communications, banking and financial institutions face certain data retention obligations in order to allow for subsequent access to data by public authorities.[282] But increasingly EU policies also impose reporting obligations or the possibilities of regulatory agencies to demand the provision of relevant information falling within the regulatory ambit of the agencies.[283] These reporting obligations allow agencies to access information regarding the possible necessity for regulatory action by an agency and enforcement.[284]

The composite approach to data collections and the interoperability paradigm also raises challenges concerning the quality and accuracy of data input into decision making – which has in turn effects on accountability in automated decision-making procedures based on such data.[285] Data are collected

281 Buying services – from geolocalisation to cloud storage and associated search services is not uncommon in various areas covering research, environment, farming, fishing and other fields.

282 See Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others*, Judgment of the Court (Grand Chamber) of 21 December 2016; Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others v Premier ministre and Others*, Judgment of the Court (Grand Chamber) of 6 October 2020.

283 Eg in the field of financial regulation see reporting duties established by ESMA and national financial regulators under provisions such as Art. 26a and Art. 99e of *Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions*, Official Journal of the European Union, L 257, 28 August 2014.

284 Eg in the field of data protection, *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)*, Official Journal of the European Union, L 119, 4 May 2016 [hereafter GDPR], in Art. 49(1) third sentence requires that data controllers "shall inform the supervisory authority of the transfer" of data to a third country when acting under the criteria of Art. 49 GDPR.

285 Eg Art. 17, 18 GDPR requires that data must be correct and up-to-date. This requires access to data, and its possible rectification are key in this context. Unauthorized or unlawful processing as well as (accidental) loss must be avoided. Data should not be accessible by non-authorised parties be they internal to an organisation or external. This is a requirement under the principle of data security also codified in data protection legislation. For case law see also Opinion 1/15, *EU-Canada PNR Agreement*, Opinion of the Court (Grand Chamber) of 26 July 2017, paragraph 172: "Similarly, it should be stated that the databases with which the PNR data is cross-checked must be reliable, up to date and limited to databases used by Canada in relation to the fight against terrorism and serious transnational crime." Although this statement relates predominantly to Canadian data cross referenced to EU PNR data, this is a clear statement regarding the necessity of upholding data quality; more generally on data quality concepts see Deißler, L.-S. (2018), *Gewährleistung von Informationsqualität in europäischen Informationssystemen*, Nomos, Baden-Baden 2018.

and processed from various levels and sources (EU and Member State, public and private). In view of this being possibly one of the most crucial aspects of the possibility of successful use of automated decision making and at the same time a topic of high concern for the exercise of individual rights, the use of automated decision making requires supervision of the quality of data-input.[286] The latter concern of quality control is also of extraordinary relevance due to the links between public and private data collections used as bases for automated decision making in some policy areas. Information quality is not just a matter of maintaining up to date and correct data in public databases but also covers the control of information imported from or accessed from private actors. Raising some of these conditions, Art. 10 of the Commission's draft AI Act directs data and data governance in what the draft refers to as "high-risk AI systems".[287] Data sets must meet certain quality criteria including under Art. 10(3) AI Act "shall be relevant, representative, free of errors and complete" and shall have "the appropriate statistical properties".

1.2 The use of AI by the EU Administration: a mapping exercise

In the context of the INDIGO research project, the task of studying the use of AI tools by the EU Administration has been undertaken mainly by the group

286 See eg eu-LISA (2020), *Data Quality and Interoperability: Addressing the Capability Gaps through Standardisation : Eu LISA 12th Industry Roundtable,* 3-5 November 2020*,* Tallinn (Online Event), available athttps://data.europa.eu/doi/10.2857/497949; European Union Agency for Fundamental Rights (FRA) (2019), *Data Quality and Artificial Intelligence – Mitigating Bias and Error to Protect Fundamental Rights*, 2019availabe at https://fra.europa.eu/en/publication/2019/data-quality-and-artificial-intelligence-mitigating-bias-and-error-protect. See also the EU efforts in standardising the data quality requirements, for instance, in the context of biometric data collection and storing in EU AFSJ systems, *Commission Implementing Decision (EU) 2020/2165 of 9 December 2020 on laying down rules for the application of Regulation (EU) 2018/1861 of the European Parliament and of the Council as regards the minimum data quality standards and technical specifications for entering photographs and dactyloscopic data in the Schengen Information System (SIS) in the field of border checks and return*, Official Journal of the European Union, L 431, 21 December2020 and *Commission Implementing Decision (EU) 2021/31 of 13 January 2021 on laying down rules for the application of Regulation (EU) 2018/1862 as regards the minimum data quality standards and technical specifications for entering photographs and dactyloscopic data in the [SIS] in the field of police cooperation and judicial cooperation in criminal matters*, Official Journal of the European Union, L 15, 18 January2021.

287 European Commission (2021), *Proposal for a Regulation of the EP and the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act)* COM(2021) 206 final, , Brussels

from the Pompeu Fabra University in Barcelona. Regarding the EU, only limited information is available. Although there are detailed and interesting reports on national experiences coordinated by EU institutions,[288] no report seems to be published that addresses specifically the use of AI systems by EU institutions or agencies. This contrasts sharply with the situation in the United States, where there is a wealth of information on federal agencies. In fact, the most detailed report on the use of AI tools at the federal level has been commissioned and provided by one of its agencies, the Administrative Conference of the United States (ACUS)[289]. There is nothing similar at the EU Administration level.

Given the limited information available, the main source of information regarding the EU consists of semi-structured interviews carried out with various officials from the Commission and some European agencies. After contacting DG-Connect, the Directorate General of the European Commission responsible for drafting the AI Act Proposal, and after multiple requests to successive potential interlocutors in the Commission and different agencies, interviews were held between July and December 2021 with representatives of DG Agriculture (DG-Agri) and the agencies EFSA (European Food Safety Authority), EUIPO (European Union Intellectual Property Office) and eu-LISA.[290] These interviews were very informative and should be briefly summarised.

288 Of particular interest are those produced by the Commission's Joint Research Centre (JRC), which form part of the AI Watch series. Especially the reports, Joint Research Centre (2020), *Overview of the use and impact of AI in public services in the EU*, EUR 30255 EN, Report by Misuraca, G. and van Noordt, C, Publications Office of the European Union, Luxembourg, 2020.; and Tangi, L., van Noordt, C., Combetto, M.; Gattwinkel, D.; Pignatelli F. (2022), *AI Watch. European Landscape on the Use of Artificial Intelligence by the Public Sector*, EUR 31088 EN, Publications Office of the European Union, Luxembourg, 2022.

289 Engstrom, D. F., D. E. Ho, C. M., Sharkey, M.-F., Cuéllar, Mariano-Florentino (2020), *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, Report Submitted to the Administrative Conference of the United States, 2020.

290 They are Doris Marquardt (DG-Agri, 30.07.2021), Ermanno Cavalli (EFSA, 14.10.2021), Rahul Bhartiya (EUIPO, 30.11.2021) and Aleksandrs Cepilovs (eu-LISA, 22.07.2021 and 14.12.2021), to whom we are very grateful for their excellent cooperation.

1.3 Case 1 (DG-Agri/ESA): the use of AI for satellite monitoring of European crops and compliance with CAP agricultural subsidy rules

The first use case concerns a pilot experiment in the field of the Common Agricultural Policy (CAP) aimed at satellite monitoring of European crops and compliance with agricultural subsidy rules. Currently, Member States are obliged to inspect five percent of subsidised crops on the ground in order to check compliance and prevent fraud. The new system uses machine learning algorithms to improve the recognition accuracy of satellite images[291]. It aims, among other things, to monitor all European fields, including those that are more difficult to access, and to reduce and optimize the number of field inspections, to the benefit of national administrations and farmers themselves, for whom the system can also make it easier to obtain subsidies.

The system, driven by the European Space Agency (ESA) and guided by a steering committee composed of the three Commission Directorates-General involved in the CAP (DG-Agri, DG-Grow and DG-JRC), is being technologically developed by a public-private consortium led by a Belgian university.

The system does not take automated decisions, but merely issues alerts in cases of possible non-compliance. Such alerts are verified by humans through the review or zoom of images or, where appropriate, an on-site inspection, before a legal decision is taken to deny the requested subsidy or to reimburse the previously granted subsidy. Satellite monitoring can therefore form part of the complex procedures for the granting, control and revocation of CAP subsidies. It constitutes an additional means of proof of compliance or non-compliance with the rules and, as such, would form part of the information-gathering phase of the decision-making procedure provided for in Book III of the ReNEUAL Model Rules (Chapter 3, Art. III-10 et seq.). Such satellite monitoring has been admitted and regulated by a Commission Implementing Regulation of 2018,[292] which does not address the technology used and, in particu-

291 Mainly ESA's Sentinel-1 and Sentinel-2 satellites.

292 *Commission Implementing Regulation (EU) 2018/746 of 18 May 2018 amending Implementing Regulation (EU) No 809/2014 as regards modification of single applications and payment claims and checks. See especially the new Art. 40a on checks by monitoring*, Official Journal of the European Union, L 125, 22 May 2018.

lar, the use of AI tools for the analysis of the images taken.[293]

1.3.1 Case 2 (EFSA): the use of AI for the analysis of relevant scientific literature in food risk assessments

The second use case concerns the automation, using machine learning algorithms, of part of the process of analysis of relevant scientific publications carried out by EFSA when performing risk assessments of certain substances or products. This comprehensive review of the scientific literature, known as a Systematic Review, is a fundamental part of the risk assessment performance that characterises EFSA and similar agencies such as the European Medicines Agency (EMA), the European Centre for Disease Prevention and Control (ECDC) and the European Chemicals Agency (ECHA). It consumes a large part of their resources, forcing the experts conducting them to sift through a huge and exponentially growing volume of publications. The process is slow, tedious and often obsolete by the time it is completed.

EFSA has been working on the partial automation of this process for several years now[294]. It already routinely uses automation of the initial phase of selection of relevant publications, which operates on the basis of an analysis of their title and abstract. This selection excludes papers considered irrelevant and normally reduces the number of papers to be studied from several thousands to a few hundreds. This is done using the DistillerSR software marketed by Evidence Partners, and allows one of the two experts usually required for the review to be replaced. In their final report, the experts indicate that they have used the tool.

EFSA would like to automate further stages of the review process, such as the extraction of relevant data from previously selected papers, and even the critical appraisal of these papers to determine their quality. Concerning the data extraction, it is collaborating with the US Environmental Protection

293 For more information on this first use case, see the project's website http://esa-sen4cap.org, as well as European Court of Auditors (2020), *Using new imaging technologies to monitor the Common Agricultural Policy: steady progress overall, but slower for climate and environment monitoring*, Special Report No. 4, 2020, which evaluates this project positively and recommends its promotion.

294 See Jaspers, S., De Troyer, E., Aerts, M. (2018), *Machine learning techniques for the automation of literature reviews and systematic reviews in EFSA*, EFSA supporting publication 2018, EN-1427, 2018..

Agency (EPA) to provide food safety data to train a machine learning programme (Fiddle) developed by Sciome with a grant from the EPA.[295]

The final scientific opinion on the risk assessment is always elaborated by a human expert, although an error in the automated screening of relevant publications may, of course, leave out important scientific papers and evidence that could not be considered in the preparation of that opinion.

1.3.2 Case 3 (EUIPO): the use of AI in the trade mark and design registration procedure

The European Intellectual Property Agency (EUIPO) annually registers around 135,000 trade marks and 100,000 designs, processing applications filed in 23 different languages, so it is not surprising that it has made a significant commitment to the introduction of AI tools aimed at facilitating the work of its employees and applicants.[296]

Among the various tools being introduced, two can be highlighted in relation to the registration procedure. The first is the possibility to search for similar images through the eSearchPlus database, which is available on the EUIPO website for anyone who is considering registering a particular trade mark or design and wants to check whether the one they have in mind is already registered.

The second tool enables an AI based comparison of goods and services that allows EUIPO officials to assess opposition cases (those in which a third party opposes the trade mark sought to be registered) more easily and with better quality. Applicants for a particular trade mark must indicate the goods and services it is intended to cover, and there are trade marks that can cover up to two thousand different goods and services. In case of opposition, officials must undertake a comparison of the goods and services covered by the re-

295 See the EFSA Call for Proposals, *Support for Automating some specific steps of Systematic Review process using Artificial Intelligence*, GP/EFSA/AMU/2020/03, (no longer available on the EFSA website), calling for a grant for the development of such training datasets.

296 Between July 2020 and June 2025, EUIPO is developing a project to implement AI solutions in different areas of its activity with a budget of 2,860,000 euros and 24.5 full-time employees: https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/Strategic_Plan_2025/project_cards/SD3_Artificial_Intelligence_implementation_PC_en.pdf.On the use cases developed by its US counterpart, the US Patent and Trademark Office, see Engstrom *et al.* (2020), *supra* note 25, at 46 et seq.

spective trade marks, which is time-consuming and tedious, as well as complex in the many cases where there is no clear distinction between two goods or services. The implemented AI tool facilitates this comparison by suggesting to the official an answer to the pair of conflicting goods and services on the basis of the thousands of previous decisions issued by the EUIPO. The system even provides the reasons given in the previous decisions, in order to facilitate the drafting of the decision, which is in any case the responsibility of the official(s) of the respective Opposition Division[297]. Such decisions can be challenged by the interested parties before the EUIPO Boards of Appeal, which are also composed of one or three natural persons.[298]

It is remarkable that, contrary to the usual practice, EUIPO is developing these AI tools in-house, without acquiring them from third parties.

1.3.3 Case 4 (eu-LISA): The use of AI for biometric recognition of persons at the EU's borders

The fourth and final use case refers to eu-LISA, the European Union Agency for the Operational Management of Large-Scale IT Systems in the AFSJ. This European agency is responsible for the management of basic information systems for Member States' border and law enforcement authorities, such as the Schengen Information System (SIS II), the Visa Information System (VIS) and the asylum information system (Eurodac). It is also developing new information systems already regulated by EU law, such as the Entry/Exit System (EES), the European Travel Information and Authorisation System (ETIAS) and the European Criminal Records Information System - Third-Country Nationals (ECRIS-TCN), for their forthcoming entry into operation.

AI is used in the first three systems and in the forthcoming EES and ECRIS-TCN for biometric identification and verification of persons at EU borders

297 See EUIPO (2022), *New AI-based comparison of goods and services*, 29 March 2022, available at https://euipo.europa.eu/ohimportal/hu/strategic-drivers/ipinnovation/-/asset_publisher/a1GIL6YlCj79/content/new-ai-based-comparison-of-goods-and-services.

298 *Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark*, Official Journal of the European Union, L 154, 16 June 2017, Art. 66 et seq and Art. 159 et seq.

and within Member States.[299] All of them employ biometric matching systems, which use advanced machine learning algorithms to match facial images and fingerprints taken at the borders with those stored in these information systems. Each system has its own biometric matching service,[300] but the companies developing the EES biometric system are also working on implementing a tool to enable simultaneous search and comparison of biometric data in all these information systems at the same time.[301] This is the shared biometric matching service (sBMS), foreseen and regulated in Art. 12 et seq. of the Regulations that allow interoperability between all these information systems.[302]

These biometric matching systems are not developed by eu-LISA, but by private contractors on the basis of the technical specifications set by eu-LISA, which also tests their proper functioning. The contract for the development of the EES and the sBMS was awarded for 302 million euros to a consortium of European companies.[303] As is well known, an essential aspect of any machine learning system is its training, which must be done with a large amount of quality data for the system's performance to be adequate. The establishment of this training datasets is very costly and is covered by the business secrecy of the contractors, which do not allow eu-LISA to access them. eu-LISA is therefore unaware of the data used by its contractors to train the systems, and whether it suffers from the (mainly racial and gender) biases that have been frequently

299 On the use cases of facial recognition by the US federal border control agency, Customs and Border Protection (CBS), see Engstrom et al. (2020), *supra* note 25, at 30 et seq.

300 eu-LISA (2018), *supra* note 12, , at 5.

301 eu-LISA, Call for Tender - *Framework contract for implementation and maintenance in working order of the biometrics part of the Entry Exit System and future Shared Biometrics Matching System*, LISA/2019/RP/05 EES BMS and sBMS, Executive Summary, at 7 and8.

302 *Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa*, Official Journal of the European Union, L 135, 22 May 2019, and *Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration*, Official Journal of the European Union, L 135, 22 May 2019.

303 *eu-LISA, Estonia-Tallinn: Framework Contract for Implementation and Maintenance in Working Order of the Biometrics Part of the Entry Exit System and Future Shared Biometrics Matching System*, 2020/S 085-200083, 30 April 2020, available at https://ted.europa.eu/udl?uri=TED:NOTICE:200083-2020:TEXT:EN:HTML.

observed in the training of biometric recognition systems.[304] To mitigate this, eu-LISA will carry out independent assessment and testing of the performance of the sBMS, where, among other parameters it will test on possible gender and racial biases.

In any case, the systems that eu-LISA makes available to Member States would be among the most advanced in the world and would have a very high performance, superior to that of the most experienced border official. Their accuracy would have increased tenfold since such systems began to be used by eu-LISA in 2014, and would be facilitated by the controlled environments in which they operate (airports with good cameras, where images are taken without movement, with adequate lighting, etc., as opposed to video surveillance cameras).

The existing EU law governing these biometric matching systems used at EU borders does not address the particularities arising from the fact that they are based on machine learning algorithms, or that they are developed by external contractors. It does establish, inter alia, the quality requirements to be met by the fingerprints and facial images used, the rate of false positives and negatives allowed and the regular (at least monthly) monitoring of the performance of the system to be carried out by eu-LISA.[305]

It is important to note that the other major information system currently being implemented by eu-LISA, ETIAS,[306] does not rely on machine learning algorithms. The Regulation governing it predefines in detail the aspects to be checked by the system when a third-country national applies for authorisation to travel to the territory of the Union.[307] The computerised system will

304 See eg the famous paper by Buolamwini, J., Gebru, T. (2018), *Gender shades: Intersectional accuracy disparities in commercial gender classification*, Proceedings of Machine Learning Research, Vol. 81, Conference on Fairness, Accountability and Transparency, 23-24 February 2018,which led the first of the authors to testify before the US Congress on the impact of facial recognition technology on citizens' rights.

305 See, for the EES, the Annex to *Commission Implementing Decision (EU) 2019/329 of 25 February 2019 laying down the specifications for the quality, resolution and use of fingerprints and facial image for biometric verification and identification in the Entry/Exit System (EES)*, Official Journal of the European Union, L 57, 26 February 2019.

306 The European equivalent of the US Electronic System for Travel Authorization (ESTA). ETIAS will require non-EU citizens from visa-free countries to obtain authorization to travel to the territory of the Union for a maximum period of 90 days. It is expected to come into operation in May 2023.

307 See Regulation (EU) 2018/1240, *supra* note 9,, Art. 20 et seq.

automatically grant the authorisation to travel when these predefined checks produce a negative result. When the result is positive and a hit occurs (eg, because the applicant uses a passport that is in the Interpol database of lost or stolen passports, or is on the ETIAS watchlist as a terrorist suspect, or fits into one of the specific risk indicators to be developed in accordance with Art. 33 of the Regulation), the system will inform Frontex to carry out the relevant verification and, if the positive result is confirmed, transmit the application to the competent Member State to decide the application manually (i.e., via a human) and in a reasoned manner. It is therefore a traditional algorithmic system, perfectly traceable, which is limited to checking that the conditions previously established by the legislator-programmer are met ("if-then" system), without establishing new rules based on correlations that can be extracted from large amounts of data, as is the case with machine learning algorithms.[308]

It is objectionable that AI systems that are integrated into these eu-LISA-operated information systems before 36 months after the entry into force of the proposed AI Act are excluded from the Act,[309] despite being considered high-risk under its Annex III.[310]

2. Some observations resulting from the mapping and the technical considerations

Without prejudice to the more detailed analysis to be carried out in the coming months, some preliminary observations can be drawn from the case studies resulting also in considerations on the general legal framework of automated decision making use of AI tools in EU administrative law.

308 A detailed and critical analysis of the facial recognition and risk assessment algorithms employed by these eu-LISA-operated information systems can be found in Vavoula, N. (2021), *Artificial Intelligence (AI) at Schengen Borders: Automated Processing, Algorithmic Profiling and Facial Recognition in the Era of Techno-Solutionism*, European Journal of Migration and Law, Vol. 23, Issue 4 , 2021, and Derave, C., N., Genicot, N., Hetmanska(2022), *The Risks of Trustworthy Artificial Intelligence: The Case of the European Travel Information and Authorisation System*", European Journal of Risk Regulation, Vol. 13, Issue 3, 2022.

309 Art. 83 of the Proposal, in relation to its Art. 85(2) and Annex IX.

310 Paragraphs 1 and 7 of Annex III to the Proposal.

2.1 Initial observations flowing from the mapping exercise

The mapping exercise shows, first, the limited information available on existing AI use cases within the EU Administration. It is striking that not only is this information not available on the internet, but it is not even available to any centralised EU service. There is an informal network among certain European agencies ("AI Virtual Community") that exchanges experiences on AI use cases, but neither the Commission nor all agencies participate in it. It is questionable that the DG behind the important AI Act Proposal is unaware of the existing use cases at EU level and the problems they may raise. Having such information is essential to adequately assess the impact of the new proposal on the EU Administration itself, as well as to consider possible specific rules applicable to the use of AI systems by public authorities.

It is not surprising, therefore, that the AI Act Proposal practically ignores the specificities of the use of AI by the public sector, and focuses mainly on the private sector. The establishment by Art. 60 of the Proposal of a centralised database within the Commission with the existing use cases in both the public and private sector is a positive step to overcome the current lack of information, but in the case of public authorities it could be extended to all AI systems and not be limited only to those that deserve the (elusive) high-risk qualification. The possible objections of competence that could oppose a regulation by the European legislator of the use of AI by national administrations would not be applicable to the administration of the Union itself: the European legislator can regulate its own administration as it wishes (Art. 298 TFEU).

The mapping exercise also revealed that there is considerable interest and growing use of AI tools by the EU Administration itself. However, its use is still sporadic, and does not respond to a centralised and conscious policy of the Commission, but is the result of the individual initiatives of the different Directorates-General and agencies, sometimes in collaboration with their counterparts in other regions (as witnessed in the case of EFSA and its collaboration with the US EPA). AI is used both by the authorities that have their own decision-making powers (EUIPO, EFSA - as regards the issuing of scientific opinions) and those that provide information systems to the Member States for the corresponding decisions to be taken (DG-Agri/ESA, eu-LISA).

The mapping exercise also confirms the importance of outsourcing in this area, and the limited capacities of the EU Administration to develop its own AI systems. With the notable exception of EUIPO, the other authorities have to rely on public procurement (eu-LISA, for very significant amounts) or non-commercial external partners (DG-Agri/ESA, EFSA) to develop them.[311] As we have seen, this sometimes raises the problem of not being able to access the training data of machine learning systems, which are protected by business secrecy. The access rights for public supervisory authorities to training data of very large online platforms or search engines under Art. 40, 72 Digital Services Act[312] indicate that the legislator would be able to develop a more suitable access and accountability framework also concerning training data for AI tools used for administrative decision making.

The use cases examined also show the great potential that AI can have for improving certain administrative functions, increasing their quality and effectiveness and not only reducing their cost. For some tasks it is already unimaginable, even reprehensible, not to use AI. This is the case for machine translation of texts, in which the Commission is investing large amounts of resources, as confirmed by several interviewees. In the cases studied, AI makes it possible to significantly strengthen the control of agricultural subsidies and EU borders, as well as to speed up the food risk assessment process and to facilitate the consistency of decisions on the registration of trade marks.

2.2 Initial considerations concerning other legal principles

Procedural changes due to that integration of automated decision making technology into decision-making requires specific attention to substantive as well as procedural rights and principles. Criteria for accountability of auto-

311 On the situation in US federal agencies see Engstrom *et al.* (2020), *supra* note 25, at 88 et seq. More than half of the identified 157 AI use cases (53%) were developed in-house by agency technologists, and nearly as many came from external sources, with 33% coming from private commercial sources via the procurement process and 14% resulting from non-commercial collaborations, including agency-hosted competitions and government-academic partnerships.

312 Regulation (EU) of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act), cited after the EP's position adopted at first reading on 5 July 2022 and corrected on 7 September 2022, see especially recital 96.

mated decision making and means for the protection of individual rights in their use must differentiate between, on one hand, the *systemic* questions of the design of the automated decision making procedures, and, on the other hand, questions of *individual* decision-making procedures.[313] This reflects the role of automated decision making systems to pre-define decision-making in a way similar to administrative rule making procedures.[314] Accordingly, the Court of Justice of the EU (CJEU) also requires that automated decision making technology and its working in real life must be subject to regular review.[315] This is a requirement of subsequent ongoing review. It finds that

"...in order to ensure that, in practice, the pre-established models and criteria, the use that is made of them and the databases used are not discriminatory and are limited to that which is strictly necessary, the reliability and topicality of those pre-established models and criteria and databases used should, taking account of statistical data and results of international research, be covered by the joint review of the implementation ..."[316]

Regarding individual rights involved in automated decision making using specific databases, one instance of anticipatory control is the requirement of conducting a Data Protection Impact Assessment (DPIA).[317] Such impact assessment will include questions of the definition of the human-machine interface in semi-automated decision making and will be necessary in the context of all automated decision making systems, which have a potential impact on decision making. The social impacts for the development of automated decision making technology is potentially considerable and thus merits a broad

313 Smith, M., M. Noorman, A. Martin (2010), *Automating the Public Sector and Organizing Accountabilities,* Communications of the Association for Information Systems, Vol. 26, 2010, at 10.

314 Yeung, K. (2019), *Why Worry about Decision-Making by Machine?* in Yeung, K. and M. Lodge (eds), *Algorithmic Regulation*, 1st edition, Oxford University Press 2019, at 41.

315 Joined Cases C-511/18, C-512/18 and C-520/18, *supra* note 18, , paragraph 182 with reference to Opinion 1/15, *supra* note 21,, paragraphs 173 and 174.

316 Opinion 1/15, *supra* note 21, paragraph 174.

317 Additionally, this is necessary for systems under Art. 27 of *Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA*, Official Journal of the European Union, L 119, 4 May 2016 . Under both Art. 35(7)a) GDPR and Art. 39(7)a) EDPR, a "systematic description of the envisaged processing operations and the purposes of the processing" is necessary.

approach, making AI impact assessments much broader than those required for data protection purposes only. Accordingly, the idea of the "Algorithmic IAs" as something different to DPIAs only, for instance including human rights assessment in general, or assessment of wider procedural issues is highly relevant.[318] The European Law Institute has recently provided a set of model rules for such an assessment of impacts on (1.) fundamental or other individual rights or interests, (2.) democracy, societal and environmental well-being and (3.) the administrative authority itself.[319] An important and distinctive aspect of the ELI concept is the combined focus not only on a comprehensive range of risks but also on measures to maximise benefits to be achieved by deploying the system with regard to public objectives as defined in the applicable law. In addition, the ELI Model Rules provide in case of high-risk algorithmic decision-making systems for independent expert audits and public participation. This reflects the sensitivity of public AI systems for a democratic society under the rule of law.

The CJEU has acknowledged that the use of automated decision making technology can de facto intensify limitations to the right to privacy and the protection of personal data.[320] Automated searching and processing of databases may lead to "particularly serious interference constituted by the automated analysis" of data.[321] The extent of such interference "depends on the pre-established models and criteria and on the databases on which that type of data processing is based."[322] Further, in case of automated decision making involving personal data, the GDPR and the EDPR oblige the data controller to provide the data subject with "meaningful information about the logic involved, as well as the significance and the envisaged consequences of" automated decision making - regardless of whether the data was provided by or col-

318 See Joint Research Centre (2020), *supra* note 24, section 3.3.3.

319 European Law Institute (2022), *Model Rules on Impact Assessment of Algorithmic Decision-Making Systems Used by Public Administration*, Report of the European Law Institute, available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Model_Rules_on_Impact_Assessment_of_ADMSs_Used_by_Public_Administration.pdf., see especially Art. 6. One of the authors of this article, Jens-Peter Schneider, served as one of the ELI reporters.

320 See also FRA (2019), *supra* note 22.

321 Joined Cases C-511/18, C-512/18 and C-520/18, *supra* note 18, paragraph 177.

322 Opinion 1/15, *supra* note 21, paragraph 172.

lected from data subject or was brought to decision making from a pre-existing data base.[323] These requirements are information which must be provided regarding the 'system' of data processing. Such requirements must be reflected in the legal basis of an act allowing for automated decision making processing of an EU regulated data base.

Discussing automated decision making tools must also address the interface between human action and information technology. In real-life, automated decision making systems are generally but one tool among several to be relied on by a human decision-maker, who ultimately may bring their judgement to make the final decision themselves.[324] The integration of automated decision making into decision making procedures could in most cases be described as augmented decision making or as "quasi- or semi-automated decision-making".[325] This results in factual changes to conditions of decision making, which in turn have to be understood from a normative point of view.

The mapping exercise discussed above further reveals that the use of AI also poses risks, risks that go beyond the breach of the right to personal data protection. Given that automated decision making does not completely replace humans, who end up making the final decisions, it has been observed that there is no specific regulatory framework or even internal guidelines within each authority aimed at avoiding the occurrence of such risks, establishing, for example, the obligation to carry out an impact assessment before introducing a new AI system,[326] the conditions to be imposed on contractors commissioned to develop it, the tests to be carried out before it is put into operation or the measures to avoid excessive reliance by staff on the automated systems (automation bias).

The mapping exercise in turn confirms the importance of administrative

323 Art. 13(2)(f), 14(2)(g) and 15 GDPR.

324 Cobbe, J. (2019), *Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making*, Legal Studies, Vol. 39, Issue 4, 2019, at 636-638; Auby, J.-B. (2018), *Le droit administratif face aux défis du numérique*, Actualité Juridique Droit Administratif, No. 15, 2018.

325 Council of Europe, Committee of experts on internet intermediaries (MSI-NET), *Algorithms and Human Rights: Study on the Human Rights Dimensions of Automated Data Processing Techniques and Possible Regulatory Implications*, 2018.; Demková (2021), *supra* note 6.

326 European Law Institute (2022), *supra* note 55.

procedural rules to avoid the risks mentioned above. Procedural guarantees inherent to the fundamental right to good administration, make it possible to significantly reduce such risks, at least where the use of AI tools results in the adoption of individual decisions that adversely affect those to whom they are addressed. Particularly relevant are such principles as the right to a hearing, the right of access to the file and the duty to state reasons, deriving from the case law of the Court of Justice and enshrined at the highest normative level in Art. 41 of the Charter of Fundamental Rights of the European Union, as well as the consultation of the public and other authorities provided for by the sectoral rules of secondary legislation.

The right to be heard makes it possible for example for farmers to point out and contest errors in the satellite monitoring system before a subsidy is refused or revoked. Also, the fact that EFSA's scientific opinions are often integrated into procedures where public consultation takes place allows for the detection of any omissions they may contain (such as previous relevant scientific papers that have not been considered in their risk assessment).

In other examples, the duty to state reasons obliges EUIPO staff to substantiate the reasons for their decision to register or not to register a given trade mark and makes it possible for the applicant or opponent to challenge it. Procedural guarantees, far from being seen as a hindrance of an analogue administration that has already been superseded, are fundamental requirements of the new digital administration, and must be maintained and adapted where necessary.

In the debate about AI accountability, these administrative law requirements are often linked to notions of transparency, which has subsequently become an important topic in discussions of accountability of automated decision making systems.[327] One of the central challenges to transparency – as a notion of ensuring reasoning and compliance with the duty of care allowing for review of the legality and proportionality of decision making is *de facto* the recording of operations within a system. Information technology developments for securing information in the form of "tamper-evident record that provides

327 Eg Koivisto, I. (2016), *The Anatomy of Transparency: The Concept and its Multifarious Implications*, Working Papers, EUI MWP, No. 9, 2016.

non-repudiable evidence of all nodes' actions"[328] are becoming increasingly relevant. This would enhance traceability of data across its sources within multi-level information systems. It would also allow the review of its processing within an automated decision making system in a concrete process.[329] Accordingly, demands have been made that in order to "enable third parties to probe and review the behaviour of the algorithm" automated decision making "should be accompanied by a 'datasheet' that records the choices and manipulations of training data and the 'composition, collection process, recommended uses and so on."[330] Providing such data sheet to non-expert humans will however face obstacles by way of providing meaningful explanation in view of potentially formidable technical obstacles (depending on the complexity of an algorithm) as well as some questions of intellectual property rights and state and business secrets.[331]

The Commission's draft AI Act is much less demanding concerning transparency requirements.[332] Art. 11(1) of the Commission's draft AI Act foresees for high-risk AI systems the obligation to maintain technical documentation "in such a way to demonstrate that the high-risk AI system complies with the requirements of the law and to allow supervisory authorities to verify such compliance".[333]

---

328 Huq, A. Z. (2017), *Constitutional Rights in the Machine Learning State*, available at SSRN.Com/abstract=3613282, at 49; Desai, D. R., J. A. Kroll (2017), *Trust but Verify: A Guide to Algorithms and the Law*, Harvard journal of law & technology, 2017, Vol.31, Issue 1, at 10 and 11. One currently increasingly wide-spread approach is based on distributed ledger technology often known as 'blockchain'.

329 Hofmann, H. C. H., M. Tidghi (2014), *Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks*, European Public Law, Vol. 20, Issue 1, 2014. .

330 Huq (2017), *supra* note 64, at 48.

331 Brkan, M. (2019), *Do Algorithms Rule the World? Algorithmic Decision-Making and Data Protection in the Framework of the GDPR and Beyond*, International Journal of Law and Information Technology, Vol. 27, Issue 2, at 120.

332 European Commission (2021), *supra* note 23, Art. 52 requires no specific type of transparency for AI systems that are not deemed to be high risk other than notifications to natural persons that they are interacting with an AI system, unless such is obvious (Art. 52(1)), and that they might be exposed to their data "being processed by an emotion recognition system" (Art. 52(2)) or that their images have been artificially recreated or manipulated (Art. 52(3)) unless this is done for public security or other prevailing public interests.

333 European Commission (2021), *supra* note 23.

A demand of traceability of data movements and data processing by automated decision making, which had been made in legal literature,[334] has found its way into Art. 12 of the Commission's draft AI Act albeit only for high-risk AI systems. The latter requires AI systems to contain record-keeping facilities to log and tracking operations conducted by AI systems. Such record keeping facilities, according to Art. 12 of the Commission's draft AI Act, would need to "ensure a level of traceability of the AI system's functioning throughout its lifecycle" (Art. 12(2)), and the logging capabilities must provide at least "recording of the period of each use of the system ... the reference database against which input data has been checked by the system; the input data for which the search has led to a match" as well as "the identification of the natural persons involved in the verification of the results." This formulation is technology-neutral but some work is being undertaken to harness distributed ledger technology such as blockchain approaches to maintain such tagging and tracking.

The Commission's draft AI Act also foresees that 'high-risk' AI systems must provide for appropriate "human-machine interface tools" so they can be subject to human oversight.[335] Such oversight by natural persons must be ensured through appropriate technical installations.[336] The individuals to whom human oversight is assigned must be enabled to "fully understand the capacities and limitations of the high-risk AI system and be able to duly monitor its operation so that signs of anomalies, dysfunctions and unexpected performance can be detected as soon as possible"[337] and must be trained to resist potential "automation bias".[338] The case law of the CJEU and the legislation on data protection have developed more far reaching human oversight requirements as discussed above. The reason for a relatively limited regulatory content on this in the Commission's draft AI Act may be that such act is addressed at private and public uses of AI at the same time. This is a problematic notion since the use of AI in public decision-making should better be integrated into a general EU administrative procedures act and address specific effects of auto-

334 See eg Hofmann and Tidghi (2014), *supra* note 65, discussing notions of tagging of information.

335 European Commission (2021), *supra* note 23, Art. 14(1).

336 Ibid.

337 Ibid, Art. 14(4)(a).

338 Ibid, Art. 14(4)(b).

mated decision making on decision-making and rule-making procedures.

In view of these requirements, it is actually not surprising that a simpler automated system based on traditional conditional algorithms will often be preferable to an opaque machine learning system in order to grant compliance with the existing legal framework under EU law. This is the case, for example, with the ETIAS system of automated travel authorisation for non-EU citizens, which adequately combines administrative efficiency with guarantees for applicants and the necessary predetermination (by the legislator itself) of the reasons that may justify a negative decision.[339]

3. Digital Administration and the ReNEUAL Model Rules on EU Administrative Procedure

What lessons can we draw for EU rules on administrative procedure? The ReNEUAL Model Rules developed in 2014-2017 had established an outline of a general administrative procedure for the EU and the implementation of EU law. Do the developments we have discussed so far require or inspire a further development thereof? We discuss this from the point of view of information management (Book VI of the ReNEUAL Model Rules), decision making (Book III of the ReNEUAL Model Rules) and rule making (Book II of the ReNEUAL Model Rules).3.1 **Book VI and Book II – Administrative Information Management and Procedures**

As mentioned earlier, the ReNEUAL Model Rules on EU Administrative Procedure already address important topics of digital administration. Namely Book VI on administrative information management provides a first draft for a comprehensive legal framework for inter-administrative data sharing by means of digital information systems including shared databases and early warning systems.[340] Important components of this framework are a clear architecture of functional responsibilities assigned to various actors like competent author-

339 Notwithstanding the risks of errors and discrimination pointed out by Vavoula (2021), *supra* note 44, and Derave et al. (2022), *supra* note 44, which make it advisable to carefully monitor its implementation.

340 See the respective definitions or rules in Craig *et al.* (2017), *supra* note 2, Art. VI-2(3), (4), Art. VI-12.

ities (Art. VI-6), contact points (Art. VI-7), management authorities for IT systems (Art. VI-8) and verification authorities (Art. VI-14) with the support as well as under the control of a supervisory authority (Art. VI-30). This organisational framework is complemented with important substantive provisions on topics discussed in parts I and II. These include safeguards for data quality (Art. VI-10, Art. VI-19), data sharing transparency including traceability by means of data tagging (Art. VI-9) and at least rules indirectly providing interoperability (Art. VI-5, Art. VI-8)[341]. These rules should be evaluated concerning new insights and legislative developments and amended in case of regulatory gaps or other deficits. Probably, quality standards in Art. VI-10 could be refined and interoperability should be explicitly mentioned as a standard requirement of information systems. In addition, the potential of these rules to provide safeguards against accountability gaps caused by wide-ranging contracting out of technical expertise for the design and management of digital information systems should be explored.

Book VI does not provide rules on impact assessments for digital information systems. However, Art. VI-3 requires the adoption of a basic act before an information management activity may be performed. Such a basic act might qualify as a legally binding non-legislative act of general application and thus fall according to Art. II-1 into the scope of Book II and its rules on impact assessments and public participation (Art. II-3 – Art. II-6). Nevertheless, the INDIGO project will discuss whether the impact of Book II could or even should be limited to focus primarily on the enactment or amendment of basic acts and not on the implementation or technical modification of (new) information and decision making systems legitimized by an existing basic act. This debate covers a crucial point as to whether software code underlying an automated decision making system could ever be regarded as a legal, normative text or whether it should merely be understood as a technical tool for implementation. Following the outcome of these considerations an explicit formulation might be added to Art. II-1 to clarify that it would cover also a procedural rule which would subsequently be encoded in software used for an automated decision making application. Also to be debated is whether in such case, Art. II-2 – Art. II-6 of the ReNEUAL Model Rules might require a certain thresh-

341 Ibid., Book VI – Explanations, paragraphs 20 and 31; see also Book V – Introduction, paragraph 6.

old of 'relevance' to not overburden administrations with complex rule-making procedures for mundane small scale automation which either individually or in accumulation with other factors, does not amount to a significant change in procedure. One such possible threshold could be the relevance of the automated decision making in the context of fundamental rights including the protection of personal data and privacy or the possible limitation of property rights and the freedom to conduct a business, all protected as rights in the Charter of Fundamental Rights of the European Union.

Not covered by Book VI are information sharing arrangements among public authorities and private parties. Whether such rules should be integrated into a general codification of EU administrative procedure law is a matter of debate. It might be more appropriate to leave such arrangements to sector-specific law. Another question concerns rules on limits for the use of private data as resources of automated decision making by public authorities, which is amongst others, a matter of assuring data quality for the administration as well as ensuring that the purpose of collection is not unduly changed by the data's subsequent use in public decision-making procedures. So far, however, the use of private data as resource of automated decision making falls outside of Book VI and is only implicitly covered by model rules about administrative decision making either in single cases (Book III) or concerning administrative rule-making (Book II). INDIGO will look into the matter further. The following part will focus on Book III as Book II contains only the already mentioned rules about impact assessments and public participation but no general rules about duties to investigate or to state reasons.

3.1 Book III – Single-Case Decision-Making

In the earlier parts of this paper we highlighted the relevance of automated decision making-tools for the investigation of the case in question by the public authority, for the effectiveness of hearings and the ability of authorities to state the reasons for their decision. Book III covers all of these fundamental topics of administrative procedural law. In the following we present a preliminary review to which extent the ReNEUAL Model Rules provide sufficient safeguards for the specific challenges for these respective procedural principles raised by the digitalisation of administrative procedure.

3.1.1 Principle of investigation

Art. III-10 lays down the principle of investigation:

> "When taking decisions, the public authority shall investigate the case carefully and impartially. It shall take into consideration the relevant factors, including those favourable to the parties, and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration. The public authority shall use such evidence as, after due consideration, it deems necessary in order to ascertain the facts of the case."

These traditional requirements also apply under the condition that the authority decides the case in a fully or semi-automated procedure. The authority is accountable for the compliance with this duty notwithstanding that it might contracted-out the design of the automated decision making-tool or system. Art. III-10 provides at least to a limited extent specific rules for digitalised fact-finding as it refers in para 3 to rules of Book VI.[342] Art. VI-20 establishes a duty to consult and search shared databases as well as to use information supplied by other authorities through such databases. Art. VI-21 provides a duty to independently assess information provided through information systems. These rules are mainly motivated to establish a framework to effectuate composite information management and to protect affected persons against blind trust of competent authorities in data supplied by other authorities.[343] However, they have potential to address also problems of either under-reliance or over-reliance similarly connected with automated decision-making. However, the INDIGO project will need to review the best options to adapt these rules or their background principles to the challenges of automated decision making.

Safeguards for human intervention in case of flawed fact-finding and fact-evaluation or other forms of dysfunctional performance of automated decision making systems are a standard demand for a new digital order. Art. III-10 does not entail an explicit safeguard like for instance § 24(1)3 German Administrative Procedure Act (Verwaltungsverfahrensgesetz) which provides:

"If the authority uses automated equipment for the adoption of adminis-

342 Ibid, Unfortunately, Art. III-10(3) entails an editorial error as it refers to Art. VI-21 and VI-22 instead of Art. VI-20 and VI-21.

343 Ibid, Book VI – Explanations, paragraphs 69-70.

trative acts, it shall take into account factual statements of the participants that are significant for the individual case and that would not be investigated in the automated procedure."[344]

However, this German provision is only a – useful – clarification of requirements which already follow implicitly from the general duty of careful investigation provided in § 24(1)1, (2) German APA.[345] Consequently, this safeguard can also be derived from Art. III-10 ReNEUAL Model Rules. But an explicit provision raises attention to the well-known problems of limits to flexible investigation connected with automated fact finding. Thus, an amendment of Art. III-10 along the lines of § 24(1)3 German APA seems attractive. Of course, the INDIGO project will examine other national APAs in order to identify additional useful provisions and amendments.

3.1.2 Right to be heard

The ReNEUAL Model Rules comprise in Art. III-23 – III-25 a set of rules which develop in detail the constitutional right to be heard as laid down in Art 41(2)(a) EU Charter of Fundamental Rights (CFR). A specific focus of the Model Rules has been the rules about hearing rights in composite procedures (Art. III-24). Art. III-25(3), (4) provides a framework for digitalised online consultations of the interested public.[346] The INDIGO project will review these rules taking into account national rules like the already mentioned § 24(1)3 German APA, which provides that factual statements by affected parties in a hearing will be effectively considered by the competent authority. Additional safeguards for fully or semi-automated hearings may concern problems of digital literacy and other challenges to digital equality.

3.1.3 Duty to state reasons

Art. III-29(1) of the ReNEUAL Model Rules stipulates:

---

344 Translation by the authors; for details of this specific safeguard Schneider J.-P. (2020), in Schoch, F., J.-P. Schneider (eds.), Verwaltungsverfahrensgesetz – Großkommentar, München (Loseblatt), 2020, § 24 paragraphs 50, 133-134.

345 Ibid, § 24 para. 133.

346 See also Craig *et al.* (2017), *supra* note 2, Book III – Explanations, paragraph 92.

> "The public authority shall state the reasons for its decisions in a clear, simple and understandable manner. The statement of reasons must be appropriate to the decision and must disclose in a clear and unequivocal fashion the reasoning followed by the public authority which adopted the decision in such a way as to enable the parties to ascertain the reasons for the decision and to enable the competent court to exercise its powers of review."

Art. 29(2) contains a specification of this duty in cases of composite procedures. For automated procedures such a specification is missing; instead, the general rule in para 1 is applicable. Useful for its application concerning automated decision making is its general language and the clear indication of the objectives of the duty to state reasons. Thereby, the Model Rules would support the application of the fundamental right laid down in Art. 41(2)(c) CFR. For example, it would be no problem according to this rule that the EUIPO AI system (see I.2.c)) even provides possible reasons used in similar cases in order to facilitate the drafting of the decision by the competent EUIPO official.

However, in order to provide more legal certainty with regard to the implementation of advanced automated decision making and the well-known black-box phenomena connected with AI technologies, more AI specific rules and safeguards seem appropriate. Nevertheless, at the recent stage of the development a certain margin of legal flexibility for regulatory learning is important. Otherwise, digital administration might already be blocked at an early stage by too much red-tape and Europe will demotivate homebased innovation. In the result, Europe might lose its digital sovereignty also with regard to technologies on which 21st century authorities increasingly depend on. A good way forward could be regulatory sandboxes providing on the one hand side a defined room for manoeuvre and on the other side a clear accountability structure with duties to monitor and revise wrongful or not acceptable results. Like with regard to the other discussed topics, the INDIGO project will investigate existing or discussed solutions in this matter established in Member State or foreign law as the EU law seems not to contain such provisions.

4. Conclusion: ReNEUAL 1.0 as a promising point of departure for ReNEUAL 2.0

The critical review of Books II, III and VI of the ReNEUAL Model Rules concerning their suitability for today's or tomorrow's advanced automated decision making systems showed that the general framework of the Model Rules provides a solid and flexible basis for adapting EU administrative procedural law to the challenges connected with these new digital technologies. However, the review also revealed certain legal gaps or uncertainties concerning the appropriate application of the ReNEUAL principles to new types of digital administration. Consequently, the INDIGO project should and will explore the most promising ways to update the ReNEUAL Model Rules. In contrast to ReNEUAL 1.0 EU legislation seems to provide much less guidance with regard to best practices – despite the increasingly crowded field of legislative proposals and procedures in the field of data and AI law. Thus, national law and academic work needs to be explored even more carefully. To which extent specific procedural safeguards for AI based automated decision making beyond the already mentioned impact assessments (see II.2) are ripe for codification is another complex and important question. Our proposal is to develop ReNEUAL's specific set of rules and procedures for public decision-making, and not uncritically endorsing 'one size fits all' approaches for both public and private data use sometimes applied in EU legislative projects. The critical review of the ReNEUAL 1.0 rules also will take place against a broad debate on the use and regulation of AI and automated decision-making systems in society more broadly.

7. EU Administrative Law, General Principles of Law and National Autonomy

Paul Craig, Emeritus Professor of English Law, St John's College, Oxford

1. Introduction

It is a very great pleasure to contribute to this publication in honour of Jacques Ziller, who has been a friend and colleague for very many years. He is an excellent scholar, who has made many notable contributions to EU law in general and also to EU Administrative law. We share interests in both fields and this piece is dedicated to him.

This contribution brings together themes that Jacques has considered throughout his career, since it features issues relating both to general EU law and to EU Administrative law. The subject matter also raises intriguing issues concerning the relationship between annulment and damages as mechanisms for holding the administration accountable. These issues came together in the recent decision of the Third Chamber in *Sense Visuele Communicatie en Handel vof v Minister van Landbouw, Natuur en Voedselkwalitei*,[347] preceded by the decision of Advocate General Medina.[348]

347 Case C-36/21, EU:C:2022:556

348 Case C-36/21, EU:C:2022:134.

2. SVC: The Facts

The salient facts in *Sense Visuele Communicatie*, hereafter, *Sense*, were as follows. The claimant sought compensation for loss suffered as a result of erroneous information communicated to it by Netherlands Enterprise Agency, NEA, concerning the application of provisions of Regulation 1307/2013, which established rules for direct payments to farmers under support schemes within the framework of the common agricultural policy. The relevant EU rules mandated that Member States set up a fund, certain allocations from which should be provided to young farmers.

The claimant was a partnership with two partners, which operated a farm fattening pigs. The salient issue was whether it fell within the provisions concerning payments for young farmers. The claimant sought advice from the NEA as to whether it came within age limits for provision of assistance on the ground that one of the partners was under 41. The NEA stated that such payment could be allocated from the national reserve, because one of the partners was under 41 years of age at some point in 2018. The minister, however, rejected the application, because he differed from the NEA as to how the age requirement should be calculated for the purposes of Regulation 1307/2013.

The claimant then brought an action before the Dutch national court, seeking annulment of the ministerial decision and compensation for loss suffered. The issue as defined by the Dutch court was whether in not offering to compensate the claimant, the Minister acted in breach of the principle of the protection of legitimate expectations. It rationalized the case in this manner because it found that the minister's interpretation of the age requirement was correct, with the consequence that the claimant did not fulfil the age requirement laid down in the Regulation. The compensation dimension of the case was grounded on the assumption that the advice given to the claimant by the NEA that it did qualify under the scheme could reasonably have led Sense to believe that it could obtain such entitlements even though the claimant had reached the age of 41 in 2018. On the basis of that information, Sense applied for the allocation of payment entitlements from the national reserve for 2018 and did not purchase any payment entitlements. As a result, it was deprived of the basic payment and the greening payment for 2018 when those payments

could have been granted to it if it had purchased payment entitlements. Sense therefore suffered harm corresponding to the loss of those payments, after deduction of the purchase costs of the payment entitlements.

This factual backdrop set the scene for a 'nice' issue of legal interpretation. It was accepted correctly by the national court that the case fell within the EU principle of legitimate expectations. However, according to CJEU case law that principle cannot be relied upon against an unambiguous provision of EU law, the consequence being that the relevant provision of the EU Regulation was not capable of giving rise to a legitimate expectation on the part of Sense of beneficial treatment contrary to EU law. The national court also inferred from the CJEU jurisprudence that it was not possible in such circumstances to apply the principle of the protection of legitimate expectations recognised by national law, and hence that Sense could not rely on that principle in order to obtain payment entitlements from the national reserve.

This, however, left the following inquiry, as to whether Sense could obtain on the basis of the principle of the protection of legitimate expectations recognised by national law, compensation for the loss or harm suffered as a result of the fact that, on the basis of incorrect information communicated to it, it applied for the allocation of payment entitlements from the national reserve instead of purchasing payment entitlements. This was the foundation for the question submitted to the CJEU.

> Does EU law preclude an assessment, on the basis of the principle of the protection of legitimate expectations under national law, of whether a national administrative body has created expectations contrary to a provision of EU law and has thus acted unlawfully under national law in failing to compensate the injured party for the damage suffered as a result, where the injured party cannot successfully invoke the principle of the protection of legitimate expectations under EU law because it involves an unambiguous provision of EU law?

3. SVC: The CJEU Ruling

The CJEU began in orthodox mode. The principle of the protection of legitimate expectations was part of the EU legal order and was therefore binding on every national authority responsible for applying EU law, including national courts.[349] It followed that when implementing the provisions in Regulation 1307/2013, national authorities were required to observe the principle of the protection of legitimate expectations.[350]

However, the settled CJEU case-law had established that the principle of the protection of legitimate expectations could not be relied upon against an unambiguous provision of EU law. Nor could the conduct of a national authority responsible for applying EU law, which acted in breach of that law, give rise to a legitimate expectation on the part of a trader of beneficial treatment contrary to EU law.[351] It followed that an injured party could not rely on the principle of legitimate expectations under EU or national law for the purposes of being allocated an advantage that was contrary to an unambiguous provision of EU law.

Advocate General Medina had reinforced this conclusion by reliance on more general precepts of EU law. Thus, she held that 'by virtue of the principle of the primacy of EU law, rules or principles of national law cannot be allowed to undermine the effectiveness and unity of EU law on the territory of a Member State'.[352] It followed, said the Advocate General, that the 'full effectiveness of EU law requires that the principle of the protection of legitimate expectations under national law not be employed to circumvent the requirements that must be fulfilled by farmers'[353] under Regulation No 1307/2013. This conclusion was then further reinforced by the observation that to allow reliance on a national principle of legitimate expectations in such circumstances to obtain benefits and rights arising from EU legislation 'could ultimately result in divergences in the application of that legislation in the various Member

349 Case C-36/21, EU:C:2022:556, [26].

350 Ibid [27].

351 Ibid [28].

352 Case C-36/21, EU:C:2022:134, [27].

353 Ibid [28].

States', thereby endangering the 'unity of EU law and its uniform application within the territory of the European Union'.[354] This would in turn lead to 'simultaneous distortions of competition in the Member States due to advantages being awarded to certain individuals and undertakings vis-à-vis others'.[355]

The CJEU accepted this reasoning by Advocate General Medina.[356] It was clear, said the CJEU, that the claimant did not come within the definition of young farmer given the wording of the Regulation. Article 50(2)(b) of Regulation 1307/2013, in so far as it laid down an age condition, therefore constituted an unambiguous provision of EU law, to which the principle of legitimate expectations did not apply.[357]

It might be thought that this would signal the end of the case, but not so. It was at this point that the Court posited the following distinction, which occupied the remainder of the ruling.[358]

> On the other hand, EU law does not preclude such a farmer, by an action for damages based exclusively on national law, from seeking not an advantage contrary to EU law, but compensation for the damage allegedly caused by the national authority entrusted with implementing the provisions of Regulation No 1307/2013 in breach of the principle of the protection of legitimate expectations recognised by national law, in so far as that authority provided him or her with incorrect information as to the interpretation of those provisions (see, by analogy, judgments of 27 September 1988, *Asteris and Others*, 106/87 to 120/87, EU:C:1988:457, paragraphs 19 and 20, and of 16 July 1992, *Belovo*, C187/91, EU:C:1992:333, paragraph 20).

The CJEU held that such an 'action for compensation is based exclusively on the national law of the Member State concerned'.[359] It could not be regarded 'as contrary to EU law for national law, as far as compensation for loss or harm

354 Ibid [29].

355 Ibid [29].

356 Case C-36/21, EU:C:2022:556, [30].

357 Ibid [35].

358 Ibid [36].

359 Ibid [37].

caused by conduct attributable to the national authority entrusted with implementing EU law is concerned, to take into consideration the principle of the protection of legitimate expectations recognised by national law'.[360]

Having fashioned this modality to allow the claimants to succeed, the CJEU then qualified it by stating that 'the principle that the application of national law must not undermine the application and effectiveness of EU law requires that the interests of the European Union also be taken fully into consideration when applying the principle of the protection of legitimate expectations recognised by national law'.[361] This meant that the 'compensation which may be obtained following such an action based on national law must not be equated with the grant of an advantage contrary to EU law, that it cannot be borne by the EU budget and that it must not be such as to give rise to distortions of competition between Member States'.[362]

The CJEU followed the Advocate General in this respect. She countenanced the national damages action provided that it did not 'attempt to assert rights contrary to the EU provision concerned, since that would lead to a scenario where national law stands as the formal basis for awarding the claimant the benefits which EU law bars him or her from obtaining'.[363] The Advocate General felt that this was not problematic in the instant case because the claimant was not seeking the allocation of payment entitlements pursuant to Regulation 1307/2013. Rather, it was 'claiming compensation for the erroneous information provided by the national authority entrusted with the application of EU agricultural rules, which, in the claimant's view, encouraged it to request the allocation of payment entitlements, instead of acquiring them from a third holder, and ultimately motivated the refusal of its request for the basic payment and the greening payment'.[364] There was, moreover, no risk that the effectiveness of EU law would be undermined, 'provided that the action under the national law principle of the protection of legitimate expectations is brought for the purpose of compensating damage and not to assert rights

360 Ibid [38].

361 Ibid [39].

362 Ibid [40].

363 Case C-36/21, EU:C:2022:134, [36].

364 Ibid [37].

contrary to an unambiguous EU law provision'.[365] A further consideration proffered by the Advocate General was that the national action for damages would not lead to allocation of payments pursuant to Regulation 1307/2013, and hence would not encroach on the EU budget, with the compensation coming exclusively from the national budget. Advocate General Medina then offered an interesting more general rationale for allowing the damages action to proceed.[366]

> I might add, in connection with the condition regarding the effectiveness of EU law, that the exercise of an action for damages against a national authority, in circumstances such as those of the present case, is capable, in my opinion, of contributing to improving the regime of shared administration between the Member States and the European Union in policy areas involving the expenditure of EU funds. Indeed, it may have the effect of encouraging national authorities to provide reliable information when requested by individuals and undertakings and, ultimately, lead to a more effective application of EU rules and public spending.

The Advocate General denied that such an action would undermine the unity and uniform application of EU law, or give rise to a distortion of competition in the Member States. This was because an action for damages based on the national law principle of the protection of legitimate expectations would not accord a claimant any right conferred by EU law to the detriment of comparable individuals in other Member States. Furthermore, since the compensation would cover only the damage suffered due to the false assurances provided by the national authority, the claimant would not be granted any advantage over other undertakings in the same sector. There would, therefore, be no risk of distortion of competition between Member States.[367]

The CJEU, as stated above, followed the Advocate General's reasoning. It held that the claimant sought exclusively compensation for loss or harm 'corresponding, in essence, to the amount of direct payments which could have

365 Ibid [38].

366 Ibid [40].

367 Ibid [41]-[43].

been granted to a farmer if he or she had purchased payment entitlements, after deduction of the purchase costs of those payment entitlements, whereas the farmer did not seek to purchase those payment entitlements due to incorrect information provided by the competent national authority'.[368] The compensation would flow exclusively from the national budget.[369] The CJEU duly concluded as follows.[370]

> In the light of all the foregoing considerations, the answer to the question referred is that EU law and, in particular, the principle of the protection of legitimate expectations must be interpreted as not precluding an injured party from obtaining, by virtue of the principle of the protection of legitimate expectations recognised by national law and solely on the basis of that law, compensation for loss or harm resulting from a misinterpretation by a national authority of an unambiguous provision of EU law, provided that that compensation is not equivalent to the grant of an advantage contrary to EU law, that it is not borne by the EU budget and that it is not such as to give rise to distortions of competition between Member States.

4. SVC: Characterisation and Consequence

There are two observations that can and should be made as to the reasoning and result in the *SVC* case.

(a) Unlawful Representations v Unlawful Decisions

The *SVC* decision follows a consistent line of case law, to the effect that unlawful representations do not generate legitimate expectations. In the *CIRFS* case,[371] the ECJ held that a policy document known as the discipline, which was con-

368 Case C-36/21, EU:C:2022:556, [41].

369 Ibid [42].

370 Ibid [44].

371 Case C–313/90 *CIRFS v Commission* [1993] ECR I–1125.

cerned with limiting aid to certain types of industry, was binding. The Commission argued that the discipline had been amended by a decision that sharpened its scope. The ECJ rejected the argument stating that a measure of general application could not be impliedly amended by an individual decision. It then held that the principle of legitimate expectations could not be 'relied on in order to justify repetition of an incorrect interpretation of a measure'.[372] The same reasoning was applied in *Air France*,[373] where the Court of First Instance held that an EU institution could not be forced by virtue of the principle of legitimate expectations to apply EU rules *contra legem*.

Analogous reasoning is to be found in *Thyssen*,[374] where the applicant was fined for exceeding its steel quota. It argued that the fine should be annulled because of a promise that had been made by Commission officials that it would not be fined if it exceeded its quota solely with a view to supplying a specific undertaking. The ECJ rejected the argument, stating that no official could give a valid undertaking not to apply EU law, and therefore no legitimate expectation could be aroused by such a promise, assuming that one had been made.[375]

The EU courts have not surprisingly applied the same reasoning where the conduct of a Member States has been in issue, as is apparent from *Lageder*.[376] The applicants exported wine in 1973, and were told by an Italian public authority that they did not have to pay monetary compensation amounts on the exports because the wine was quality wine and hence exempt from payment under the relevant Regulation. In 1977 a different Italian public body found that the wines could not be designated as quality wines for the purpose of the Regulation and therefore demanded post-clearance payment of the monetary compensation amounts. The applicants resisted the demand, arguing that it infringed legitimate expectations, more especially given the effluxion of time.

372 Ibid [45].

373 Case T-2/93 *Air France v Commission* [1994] ECR II-323, [101]-[102]

374 Case 188/82 *Thyssen AG v Commission* [1983] ECR 3721, [11].

375 See also, Cases 303 and 312/81 *Klockner v Commission* [1983] ECR 1507; Case 228/84 *Pauvert v Court of Auditors* [1985] ECR 1973; Case C213/06 P *EAR v Karatzoglou* [2007] ECR I6733, [33]; Case T-326/07 *Cheminova A/S v Commission* [2009] ECR II-2685; Case T-404/06 P *European Training Foundation (ETF) v Pia Landgren* [2009] ECR II-2841.

376 Cases C-31-41/91 *SpA Alois Lageder v Amministrazione delle Finanze dello Stato* [1993] ECR I-1761.

The ECJ accepted that the Italian authorities were bound by the principle of legitimate expectations when acting within Community law.[377] The practice of a Member State that did not conform to Community law could, however, never give rise to a legitimate expectation on the part of the trader who had benefited from the situation thus created.[378]

It follows that the principle of the protection of legitimate expectations cannot be relied upon against an unambiguous provision of Community law; nor can the conduct of a national authority responsible for applying Community law, which acts in breach of that law, give rise to a legitimate expectation on the part of the trader of beneficial treatment contrary to Community law.

The *SVC* decision would therefore seem to be grounded in good precedent, and so it is if the intellectual horizon is limited to cases concerning unlawful representations. However, the Court has signally failed to state how such case law can be reconciled with that concerning unlawful decisions, where the consistent approach has been that the illegality of the initial decision will not always justify its retroactive revocation. The Court in such cases has consistently adopted a balancing exercise, weighing the illegality on the one hand with the deleterious impact on the individual if no reliance is allowed on the unlawful decision. Rationalization of the two lines of case law in terms of identifying a principled difference between them is not easy or obvious.[379]

This case law has considerable lineage. In *SNUPAT*[380] a scrap metal scheme imposed a levy on such metal, subject to an exception for scrap that resulted from a company's own production. A competitor of SNUPAT, Hoogovens, received scrap from a company in its business group and it was decided that this benefited from the exemption for scrap coming from one's own production. SNUPAT failed to receive a similar exemption for scrap coming from its business group, and therefore asked the administration to revoke retroactively the exemption granted to Hoogovens. This did not happen and therefore SNUPAT sought judicial review.

377 Ibid [33].

378 Ibid [34]. See also Case C-153/10 *Staatssecretaris van Financiën v Sony Supply Chain Solutions (Europe) BV*, EU:C:2011:224, [47]; Case C-568/11 *Agroferm A/S v Ministeriet for Fødevarer, Landbrug og Fiskeri*, EU:C:2013:407, [52]; Case C-516/16 *Erzeugerorganisation Tiefkühlgemüse eGen v Agrarmarkt Austria*, EU:C:2017:1011, [69].

379 P Craig, *EU Administrative Law* (Oxford University Press, 3rd edn, 2018) Ch 18.

380 Cases 42 and 49/59 *SNUPAT v High Authority* [1961] ECR 53.

The ECJ decided that the exemption granted to Hoogovens was unlawful and then considered whether it should be retroactively revoked. The Court stated that neither the principle of legal certainty, nor that of legality could be applied in an absolute manner. Consideration should be given to both principles. Which principle prevailed in a particular case would depend on 'a comparison of the public interest with the private interests in question'.[381] In the instant case the relevant interests were,[382]

> On the one hand, the interest of the beneficiaries and especially the fact that they might assume in good faith that they did not have to pay contributions on the ferrous scrap in question, and might arrange their affairs in reliance on the continuance of this position.
>
> On the other hand, the interest of the Community in ensuring the proper working of the equalization scheme, which depends on the joint liability of all undertakings consuming ferrous scrap; this interest makes it necessary to ensure that other contributors do not permanently suffer the financial consequences of an exemption illegally granted to their competitors.

The ECJ referred the decision on this balance of interests back to the High Authority, although this decision would itself be subject to judicial review. It is, however, clear from later cases that the EU courts are willing to undertake this balancing. They will consider the nature of the illegality, whether the illegal decision gave rise to any legitimate expectations for the person concerned, the impact that retroactive withdrawal of the decision would have on the individual, the effect on third parties and the time that has elapsed between the initial decision and the attempt to revoke it. It is not easy for the individual to succeed, but this has occurred.

In *Consorzio Cooperative d'Abruzzo*[383] the applicant sought the annulment of a Commission decision that reduced by approximately one billion lire the amount of assistance granted from the European Agricultural Guidance and Guarantee Fund. The decision reducing the amount of assistance occurred two

381 Ibid 87.

382 Ibid 87; Case 14/61 *Hoogovens v High Authority* [1962] ECR 253.

383 Case 15/85 *Consorzio Cooperative d'Abruzzo v Commission* [1987] ECR 1005.

years after the earlier decision granting the applicant the higher amount. The Commission argued that retroactive revocation was justified because the earlier decision had been legally erroneous. The ECJ disagreed. It held that withdrawal of an unlawful measure was only permissible provided that the withdrawal occurred within a reasonable time, and provided that the Commission gave sufficient regard to how far the applicant might have been led to rely on the lawfulness of the measure.[384] Retroactive revocation failed on both counts in this case. Two years had elapsed between the initial decision and the later decision reducing the aid. This was not a reasonable period of time, since the Commission could have discovered and corrected its error far sooner. Moreover, the applicant was justified in relying on the legality of the initial decision, since the irregularities were not discernible.

There have been numerous other decisions. Confidence in the apparent legality of the measure is an important factor. By way of contrast, an applicant will fail in the balancing test where it is unable to demonstrate any legitimate expectation flowing from the original measure.

(b) Unlawful Representations v Damages Actions

There is an interesting connection between this and the previous section. We saw that the CJEU in *SVC* stuck to orthodoxy in the form that unlawful representations do not generate legitimate expectations, while at the same time allowing a damages action to proceed in the Member State for losses caused by the unlawful representation. The Court and Advocate General produced various arguments to foreclose the conclusion that they were doing by the backdoor what they had refused to allow via the front door. Limits of space preclude detailed examination of these particular arguments.

Suffice it to say the following. Annulment and damages are two complementary methods of holding public bodies to account. The latter may in certain respects be more potent than the former, by very reason of the fact that the public body has to bear the monetary loss. It is in any event clear that the underlying motivation for allowing the national damages to proceed, was concern for the hardship on the claimant if such an action were not allowed to

384 Ibid [12]; Case C-508/03 *Commission v UK* [2006] ECR I-3969, [68].

proceed. Therein lies the connection with the material in the preceding section, since it is this hardship that has informed the Court's jurisprudence on revocation of unlawful decisions.

8. Il 'terzo' nei procedimenti amministrativi europei

Alessia Monica, Assistant Professor of Administrative Law, University of Milan

The issue of the inclusion of the 'Third parties' in the decision-making process affecting the legal sphere of the 'addressee' with binding effects has attracted the interest of scholars mostly with regard to legal standing, and less so with regard to the participatory involvement in the formation of the proceedings. Mostly, the issue of 'Third parties' participation has been addressed on a sectoral basis, as in environmental law, or with a concern to ensuring the transparency of the decision-making process. Therefore, several questions are still open concerning the protection of persons who may be affected by a decision, even though they are not identified as 'parties' to the proceedings. This already applies in the case of endoprocedural acts, and in the case of composite proceedings. Some reflection will be originated from the case of the 'patient', the 'user' in the market of services (whose supply is subject to the control and exercise of administrative powers), and the 'operator' in AI systems.

1. Introduzione

La problematica del coinvolgimento del 'terzo' nel procedimento di preparazione di decisioni individuali che incidono sulla sfera giuridica del 'destinatario' con effetti giuridici vincolanti è stata oggetto di alcuni approfondimenti dell'unità di ricerca dell'Università degli studi di Pavia coordinata dal prof.

J. Ziller all'interno del PRIN '*La codificazione di procedimenti*'[385]. Tali riflessioni, mosse dal proposito di soffermarsi anche sull'impatto delle norme procedurali sulla posizione del 'terzo', si sono basate sul dato fattuale per cui il diritto dei procedimenti dell'Unione europea si è perlopiù sviluppato su base settoriale e non in modo sistematico. In fondo, come mi ha insegnato il prof. Ziller attraverso numerosi esempi tratti dalle stesse politiche europee, la natura del diritto amministrativo europeo è appunto quella di essere la risultanza del connubio tra i principi propri del diritto europeo e le regole utilizzate dalle istituzioni, organi e organismi dell'Unione, nell'esercizio dei propri compiti amministrativi, nonché il diritto amministrativo proprio di ogni Stato membro. Guardando al diritto amministrativo nazionale, invece, si deve sicuramente richiamare il principio di autonomia procedurale, anche se, sulla scia di quanto sancito dalla Corte di giustizia fin dalla sentenza *Algera* 'per non denegare giustizia ', si deve riconoscere l'esistenza di ormai un corpo organico di principi generali del diritto UE. Di conseguenza, questi ultimi, sono da riferire direttamente all'attività amministrativa che non può più prescindere dall'influenza del diritto europeo stesso[386]. Tuttavia, come più volte rilevato in diversi contributi dal prof. Ziller[387], la problematica della 'tutela del terzo' ha sempre rivestito uno scarso interesse da parte della dottrina, se non per la questione dell'interesse ad agire in caso di contenzioso amministrativo[388]. Motivo per cui, tale analisi è stata perlopiù limitata alle posizioni giuridiche che subiscono un pregiudizio concreto e quantificabile, lasciando nel limbo una serie di posizioni che invocano una qualche forma di tutela (non solo processuale).

Sul piano europeo si riscontrano, infatti, strette condizioni di ricevibilità per la legittimità a ricorrere del 'singolo' qualora quest'ultimo non sia il destinatario diretto dell'atto. Ancor più nel caso di 'atto regolamentare' in cui è nec-

385 Il progetto *La codificazione dei procedimenti dell'Unione europea* - PRIN 2012SAM3KM della durata di tre anni si è svolto dal marzo 2014 al febbraio 2017 coinvolgendo sei differenti unità: Università di Pavia, Università di Firenze, Università di Trento, Università di Roma Tor Vergata, Università degli studi di Milano, Università di Napoli Federico II.

386 Joined Cases 7/56, 3/57 to 7/57, *Dineke Algera et al.*, Judgment of the Court of 12 July 1957.

387 Ziller, J. (2017), *Conclusioni*, in Bassi, N. and J., Ziller (eds.), *La formazione procedimentale della conoscenza scientifica ufficiale*, Giappichelli, 2017; Ziller, J. (2016), *Third Parties Protection in Administrative procedure Law*, in Ruffert, M. (ed.), *The Model Rules on EU Administrative Procedures: Adjudication*, Groningen: Europa Law Publishing, 2016.

388 Corletto, D. (2001), *La tutela dell'interesse al provvedimento e i terzi*, in *Dir. proc. Amm*, No.4, 2001.

essario che venga dimostrato il nesso di causalità tra la situazione individuale del ricorrente e la misura adottata. Tale difficoltà, come si ribadirà in seguito, emerge in relazione all'effettività della tutela in caso di procedimenti compositi laddove l'esito del provvedimento scaturisca anche dall'applicazione di norme di diritto derivato europeo, ragione per cui sovente il giudice nazionale deve ricorrere allo strumento del rinvio pregiudiziale *ex* art. 267 TFUE[389]. Infatti, richiamando la sentenza *Les Verts*, i tribunali nazionali sono tenuti ad applicare il diritto dell'UE e a fornire rimedi (anche se non previsti dal diritto processuale nazionale) per garantire l'applicazione del principio dell'efficacia dei rimedi e l'applicazione uniforme del diritto dell'UE[390].

È pur vero che, negli ultimi due decenni, l'importanza della partecipazione al procedimento da parte del 'pubblico' (in senso lato) è stata progressivamente riconosciuta dal legislatore, complice anche lo sviluppo del diritto ambientale, ambito nel quale, già a partire dall'ordinamento europeo, molto forti sono le istanze di democrazia partecipativa con inevitabili ricadute sugli ordinamenti nazionali. In materia ambientale, dunque, il diritto interno è chiaramente influenzato dal diritto dell'Unione e cedevole rispetto ad esso in virtù *già* del principio del primato[391]. Ad esempio, in tale campo, la partecipazione del 'pubblico' rileva soprattutto non tanto in chiave difensiva (in difesa della propria posizione giuridica), quanto in chiave funzionale, a garanzia di una maggiore trasparenza da parte delle pubbliche amministrazioni nell'esercizio delle proprie attività. La partecipazione, a sua volta, è condizione per l'esercizio effettivo dei diritti

389 Sul punto si rimanda a Chiti, M.P. (1991), *I signori del diritto comunitario: la Corte di giustizia e lo sviluppo del diritto amministrativo europeo*, Riv trim. dir. pubb, No.3., 1991, at 796-831.

390 Gnes, M. (2021), *Administrative Procedure and Judicial Review in the European Union* in della Cananea, G. and M., Bussani (eds.), *Judicial Review of Administration in Europe*, Oxford, 2021, at 47.

391 *Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control)*, Official Journal of the European Union, L 334, 17 December 2010; *Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment*, Official Journal of the European Union, L26, 28 January 201 ; see, Parona, L. (2021), *L'influenza del diritto amministrativo europeo sulla disciplina dei procedimenti amministrativi nazionali*, Riv. Ital dir.pub. com, No.3-4, 2021, at 520.

democratici dei cittadini[392]. Ecco che, ad esempio, già il 'diritto di accesso' riconosciuto quale diritto fondamentale all'art. 42 nella CDFUE, è finalizzato a far sì che le stesse decisioni prese dalle istituzioni europee siano adottate nel modo più trasparente possibile e vicine al cittadino. Ciò, non solo a livello di atti propri delle istituzioni europee (Regolamento 1049/2001)[393], ma anche nel caso in cui le amministrazioni nazionali realizzino un'attività amministrativa in applicazione del diritto europeo stesso. Si pensi, poi, all'istituto del 'diritto di accesso civico generalizzato' tipizzato dal legislatore italiano la cui funzione è, appunto, quella di permettere 'forme diffuse di controllo sul perseguimento delle funzioni istituzionali e sull'utilizzo delle risorse pubbliche e di promuovere la partecipazione al dibattito pubblico'[394] da parte di 'chiunque'. Specularmente, in ossequio al principio di trasparenza e accessibilità ai sensi dell'articolo 15, paragrafo 3, del TFUE, a livello dell'Unione sono sempre più sviluppati e implementati i c.d. 'portali sulla trasparenza' nei vari siti web delle istituzioni e agenzie. Tuttavia, come si dirà nel proseguo, la 'tutela del terzo' non può esaurirsi nell'assolvimento degli obblighi di trasparenza ma deve volgere ad un reale allargamento partecipativo al processo che conduce alle decisioni (amministrative), soprattutto nel caso in cui l'azione amministrativa presupponga un bilanciamento dei vari interessi in gioco (pubblici e privati).

Prima di passare a sottolineare come le scelte legislative a livello di Unione impattino sull'attività amministrativa nazionale e sulla posizione giuridica del 'terzo', pare, dunque, doveroso cercare di dare una definizione di 'terzo'. Solo così si potrà chiarire, attraverso esempi concreti, in quali ambiti e contesti la sua tutela ponga, oggigiorno, numerosi interrogativi sui quali indirizzare l'attenzione degli studiosi del diritto amministrativo.

392 *Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies*, Official Journal of the European Union, L 264, 25 September 2006; Case C-57/16 P, *ClientEarth*, Judgment of the Court (Grand Chamber) of 4 September 2018.

393 *Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents*, Official Journal of the European Union, L 145, 31 May 2001, espresso all'articolo 1, secondo comma, TUE di segnare una nuova tappa nel processo di creazione di un'Unione sempre più stretta tra i popoli dell'Europa, in cui le decisioni siano adottate nel modo più trasparente possibile e più vicino possibile ai cittadini.

394 Art. 5, c.2 Legislative Decree 14 March 2013, n. 33 come sostituito dall'art. 6, c.1 Legislative Decree 25 May 2016, n. 97.

2. La definizione di 'terzo'

Per chiarire meglio il quadro di riferimento, è possibile pensare al 'terzo' come al 'paziente' su cui ricade il costo del ticket quale compartecipazione alla spesa sostenuta dal servizio sanitario nazionale; oppure al 'soggetto fragile' che confida nell'immunità di gregge per meglio proteggersi dalle malattie infettive, ragion per cui l'interesse di quest'ultimo è strettamente condizionato dall'imposizione o meno di trattamenti sanitari obbligatori alla collettività. Oppure, il 'cittadino europeo' nella sua veste di 'risparmiatore' su cui si ripercuotono le conseguenze delle politiche macroprudenziali della Banca Centrale Europea (BCE), benché queste siano indirizzate alle banche centrali di ogni Stato membro, sulla base di quanto sancito dal diritto primario[395].

Si aggiunga che, a livello di diritto europeo, come nei diritti nazionali, il principio della partecipazione del singolo è stato perlopiù riconosciuto nei procedimenti sanzionatori, ovvero nei procedimenti sfavorevoli, quale garanzia del diritto di 'difesa'[396]: '*qualora i provvedimenti della pubblica autorità ledano in maniera sensibile gli interessi dei destinatari, questi ultimi devono essere messi in grado di presentare tempestivamente le loro difese*'[397]. L'art. 41 CDFUE contiene poi la previsione generale del diritto al contraddittorio. Si può poi convenire sul fatto che le discipline di settore, come il diritto dell'ambiente, spesso prevedono momenti specifici di consultazione: esse costituiscono forme di partecipazione ad un atto generale quale un progetto di misure o uno schema di regolazione[398]. Va rilevato però che si tratta, perlopiù, di situazioni ove viene funzionalizzata la rappresentanza degli interessi al fine di un migliore coordinamento tra autorità statali e istituzioni europee, rendendo soprattutto le decisioni più trasparenti

395 La BCE, oltretutto, sconta il fatto di essere un'istituzione le cui azioni e decisioni hanno conseguenze su un vasto numero di cittadini, pur essendo non elettiva e non prevedendo meccanismi decisionali di tipo *bottom-up*. See Fusaro, P. (2021), *Banca centrale europea e comunicazione, un'analisi. Con alcune deduzioni sull'Esecutivo guidato da Mario Draghi*, Rivista CERIDAP, No.2, 2021.

396 Mattarella, B. (2018), *Procedimenti e atti amministrativi*, in *Diritto amministrativo europeo*, Torino, 2018, at 359-361.

397 Case 17-74, *Transocean Marine Paint Association v Commission of the European Communities*, Judgment of the Court of 23 October 1974. .

398 Mendes, J. (2011), *Participation in EU rulemaking: a rights-based approach*, Oxford: Oxford University Press, 2011, at 192-267.

'*al fine di promuovere il buon governo*'[399].

Il ruolo del 'terzo' è sempre più rilevante in alcuni campi di politiche ove le forme di co-amministrazione sono più sviluppate e dove si ravvisa una significativa influenza del diritto derivato sulle regole procedurali che anche le amministrazioni nazionali debbono osservare[400]. È questo il caso delle politiche sanitarie o della regolamentazione dei servizi, laddove permangono regimi di autorizzazione nei singoli Stati membri, nonostante la spinta alla loro progressiva soppressione e alla semplificazione amministrativa[401]. In ultimo, si pensi alla regolazione dell'Intelligenza Artificiale (IA): l'impatto derivante dal ricorso a strumenti di IA in vari campi pone non solo interrogativi di regolazione giuridica, ma 'è anche un fattore di trasformazione degli istituti e come tale incide sulle logiche proprie della giuridicità'[402].

Nei vari frangenti accennati, l'esecuzione del diritto europeo presuppone un'attività di *facere* da parte delle pubbliche amministrazioni cui spetta l'onere di bilanciare concretamente i vari diritti in gioco, nonché, se del caso, le risorse economiche necessarie per l'effettiva realizzazione delle prestazioni, come nel caso dei 'diritti sociali' (es. sanità, istruzione, assistenza, lavoro). Oltre agli interessi delle parti nel caso specifico, vale a dire i 'destinatari diretti o i 'controinteressati', vi sono decisioni amministrative alla cui efficacia ed esecutività possono essere identificati interessi qualificabili come rilevanti nel singolo procedimento e che non devono essere trascurati. Si tratta della posizione di '*chiunque esprima un interesse legittimo al procedimento*', oppure '*chiunque non abbia ancora espresso alcun interesse al procedimento*'[403].

Tuttavia, il dato normativo evidenzia, *rebus sic stantibus*, che l'Unione europea non si è ancora dotata di una normativa generale sul procedimento

399 European Commission (2015), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, Better regulation for better results - An EU agenda*, COM (2015) 215 final, Brussels.

400 Parona (2021), at 501.

401 Monica, A. (2020a), *I regimi di autorizzazione e la libertà di circolazione dei servizi nel mercato unico dell'Unione europea*, in Galetta, D-U. (ed.), *Diritto amministrativo nell'Unione europea*, 2nd edition, Giappichelli,Torino, 2020.

402 Zanichelli, M. (2019), *Affidabilità, diritti fondamentali, centralità dell'essere umano: una strategia europea per l'intelligenza artificiale*, i-lex.it, No.1-3, 2019, at 1.

403 Ziller (2017), at 167.

amministrativo[404]. Da ciò consegue la difficoltà di ricavare una disciplina chiara soprattutto per quanto concerne i 'procedimenti compositi' i quali comportano l'adozione di decisioni da parte di entrambi i livelli dell'amministrazione, nazionale ed europea[405]. Infatti, per individuare il giudice competente '*occorre stabilire a chi spetti il potere decisionale effettivo nel procedimento amministrativo complesso*'.[406]

Riassumendo, grazie anche all'apporto del Libro III del Codice ReNEAUL che affronta la problematica del 'terzo' all'art. III -2 Definizioni:

'Si intende per: [...]

"(3) *«parte», il destinatario della decisione prevista e altre persone cui da essa deriva un pregiudizio e richiedono di essere coinvolte nel procedimento. Le norme settoriali dell'UE possono attribuire la qualifica di parte a persone alle quali non derivi pregiudizio*;

Ne deriva che non solo i destinatari di una decisione sono considerati come 'parte' al procedimento, ma anche altre persone che i) siano lesi dalla decisione e ii) richiedano di essere coinvolti nel procedimento.

Sempre richiamando le Definizioni dell'art. III-2, per: [...]

(1) «decisione», l'azione amministrativa diretta a uno o più soggetti identificati, pubblici o privati, adottata unilateralmente da un'autorità dell'UE, ovvero da un'autorità di uno Stato Membro nei casi in cui si applichi l'articolo III-1(2), per definire uno o più casi concreti con effetto giuridicamente vincolante

(4) «pubblico interessato», ai fini dell'articolo III-25, qualunque persona fisica o giuridica, associazione, organizzazione o gruppo che manifesti il suo interesse in un procedimento amministrativo".

Come chiarito dal prof. Ziller '*Deriva dalle tre definizioni citate che vi sono nel Libro III del codice ReNEUAL quattro categorie di parti rispetto ai procedi-*

404 Oltre ai lavori della rete RENEUAL di cui fa parte anche il prof. J. Ziller, si ricorda la European Parliament*, Resolution of 9 June 2016 for an open, efficient and independent European Union administration*, (2016/2610(RSP)), Brussels, ad opera del Parlamento europeo ai sensi dell'art. 225 TFUE la quale ha ripreso il dibattito interrotto alla fine della legislatura 2014 intorno alla necessità di una codificazione dei procedimenti a livello europeo.

405 Bastos, F. B. (2019), *Judicial review of composite administrative procedures in the Single Supervisory Mechanism: Berlusconi*, Common Market Law Review, Vol. 56, Issue 5, 2019.

406 Case C-219/17, *Silvio Berlusconi and Fininvest*, Opinion of Advocate General Campos Sánchez-Bordona delivered on 27 June 2018, paragraph 60.

menti di decisione individuale: i) il destinatario di una decisione, ii) la persona che, essendo lesa dalla decisione, ha chiesto di diventare parte del rilevante procedimento, iii) la persona che esprime un interesse nel rilevante procedimento, e iv) le persone che non hanno nemmeno espresso un interesse nel procedimento. Così ci sono almeno tre tipi di terzi, a seconda del modo in cui il diritto derivato e la giurisprudenza definiscono una parte al procedimento.' La domanda che rimane in qualche misura aperta nel quadro delle regole del Libro III del codice ReNEUAL, è quella che riguarda lo status di una parte che chiede di essere coinvolta in un procedimento che non porta necessariamente ad una decisione nel senso del citato art. III-2 (1).'[407]

La decisione cui fa riferimento il Libro di ReNEUAL ha quale scopo quello di definire uno o più casi concreti con effetto giuridicamente vincolante, per cui sono esclusi gli atti endoprocedimentali nella formazione dei quali possono comunque risultare rilevanti gli interessi dei terzi. Come infatti ben ricorda il prof. Ziller, in generale, *'la necessità di dover subire un pregiudizio significa che vi sono terzi che potrebbero avere un interesse di qualche tipo in un procedimento però non ne possono diventare parte a tutti gli effetti, a meno che non siano stati identificati come tali dal diritto derivato dell'Unione'*[408].

3. Salute, Intelligenza Artificiale e regimi di autorizzazione nel mercato dei servizi: questioni aperte per la tutela del 'terzo'

Per cercare di concretizzare il discorso sulla posizione del 'terzo' nei procedimenti europei compositi o nei procedimenti nazionali sulla cui formazione ed esiti incide il diritto europeo, è utile riferirsi al ruolo del 'paziente', all''utente' nel mercato di servizi la cui prestazione è soggetta al controllo e all'esercizio di potestà amministrative; nonché l' 'operatore'[409] nei sistemi di IA. Si sono scelti questi esempi sia per l'attualità delle materie coinvolte, sia per il ruolo rilevante rappresentato dal 'terzo'.

---

407 Ziller (2017), at 167.

408 Ibid.

409 European Commission (2021), *Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artifical intelligence (Artificial Intelligence Act) and amending certain union legislative act*, COM/2021/206 final, Brussels, Art.3, 8), lett. e)

Procedendo con ordine, dunque, nell'ambito della garanzia e tutela del diritto alla salute, si prevede un'attività prestazionale pubblica (in senso oggettivo) ove il paziente ricopre il ruolo di 'portatore di un diritto soggettivo alla cura' indipendentemente dal fatto che il potere amministrativo esercitato sia più vincolato o più discrezionale[410].

L'emergenza pandemica, scardinando l'ordinarietà della gestione sanitaria ha acuito situazioni in cui bisogna ponderare il diritto del singolo con il diritto alla salute della collettività. In altre parole, il diritto alla salute individuale impatta notevolmente anche sul diritto dei 'terzi' a partire dall'accesso ai servizi sanitari, al di là delle differenze strutturali e organizzative tra i diversi Stati membri. Ciò, da un lato, ha bene evidenziato come sia necessario garantire una tutela della salute sempre più multilivello dal momento che tale diritto, per essere difeso, ha determinato numerose restrizioni alla libertà personale, incidendo profondamente su vari ambiti di attività e diritti[411]. Sicchè, il tema della tutela della salute ben si ricollega al ruolo del 'terzo', già durante la fase endoprocedimentale: gli esempi in questi due anni e mezzo di pandemia sono molteplici. In linea generale, le norme di legge, ma anche gli atti secondari *science-related* debbono essere 'razionalmente giustificabili in base a dati e argomenti provenienti da fonti qualificate e istituzionalizzate dalla comunità scientifica'[412]. Perciò, , quando vi è incertezza su una situazione potenzialmente rischiosa, il decisore pubblico può avvalersi del principio di precauzione per determinare il 'livello di rischio accettabile'. Ovviamente, il ricorso a tale principio generale del diritto presuppone sempre che venga operato un bilanciamento dialogico con il principio di proporzionalità. Ciò vale anche nel caso dell'attività amministrativa ove il ricorso al sapere scientifico e tecnico deve fungere da supporto alla decisione ultima, spettante proprio all'amministrazione in quanto preposta alla cura dell'interesse pubblico, nella convinzione che

410 Ferrara, R. (2020), *L'ordinamento della sanità*, Giappichelli, Torino, 2020, at 109.

411 La pandemia ha ben evidenziato come "*il diritto alla salute è tanto significativo per la sua caratterizzazione più ovvia e scontata di situazione giuridica soggettiva della persona quanto nella sua oggettiva dimensione di situazione complessa e rilevante perché collettiva*", Ferrara (2020), at 9. See Algostino, A. (2021), *Costituzionalismo e distopia nella pandemia di Covid-19 tra fonti dell'emergenza e (s)bilanciamento dei diritti*, *Costituzionalismo.it*, No.1, 2021.

412 Servetti, D. (2019), *Riserva di scienza e tutela della salute*, Pisa, 2019, at 60.

'*la tecnica condiziona e rafforza il potere amministrativo*'[413]. Sebbene l'attività di valutazione tecnica strumentale alla decisione finale sia strettamente legata all'applicazione di regole tecnico-scientifiche, essa rimane ancorata al giudizio soggettivo riservato all'amministrazione e agli esiti della discrezionalità da essa esercitata[414]. Il vero nodo irrisolto rimane, dunque, l'inclusione dei terzi 'interessati' all'esito dell'attività di valutazione tecnico-scientifica di cui si sostanzia la fase preparatoria della decisione finale. Come già detto, infatti, non vi è una norma 'generalizzata' per il coinvolgimento proceduralizzato, a meno che il terzo non sia portatore, di un interesse 'già qualificato' da una norma. In aggiunta, la tutela della salute, e con essa l'organizzazione e il disegno delle politiche sanitarie, non può più prescindere dall'utilizzo strutturato dei dati sanitari dei singoli pazienti al fine di programmare, decidere, curare concretamente gli interessi dei cittadini in ambito sanitario[415]. L'emergenza pandemica ha ben evidenziato come diventi fondamentale poter ricostruire il profilo di salute di un paziente laddove non sia possibile procedere regolarmente all'anamnesi, o sia necessario programmare interventi di prevenzione su larga scala. È poi noto come i dati sanitari (e le informazioni in esso contenute) alimentino i sistemi di intelligenza sanitaria e, ancora più risaputo, come le 'banche dati' sanitarie siano sempre più fondamentali nella *Data Economy*. Ecco che il 'paziente' non è interessato agli esiti della decisione solo per quanto concerne la tutela della sua salute, ma è potenzialmente interessato (e non in misura minore) a tutelare il suo 'diritto alla riservatezza'. Su questo aspetto il legislatore europeo è continuamente sollecitato visto il rapporto sempre più di interdipendenza tra sanità e ICT e i vari profili problematici della digitalizzazione quali, tra i tanti, il divario digitale, la cybersecurity, la capacità di risposta e adattamento dell'amministrazione sanitaria e, quindi, dell'organizzazione dei servizi anche in chiave transfrontaliera. Nuovamente, dalle scelte operate a livello di Unione dipendono le risposte esecutive delle amministrazioni nazionali e la necessità di un

413 De Pretis, D. (1995), *Valutazione amministrativa e discrezionalità tecnica*, CEDAM, Padova, 1995, at 202.

414 Monica, A. (2020b), *I terzi e l'attività di valutazione tecnico-scientifica*, Giappichelli, Torino, 2020, p. 79.

415 Campagna, M. (2018), *Il Regolamento europeo 679/2016 e l'utilizzo delle banche dati in sanità*, in Balduzzi, G. and A. Monica (ed.), *Governare il cambiamento istituzionale e organizzativo*, Pavia, 2018, at 67.

coordinamento volto a far convergere sempre più i sistemi sanitari, nonché la garanzia dell'effettività del diritto alla salute a livello transnazionale[416] nell'interesse sia del singolo sia della collettività. Non solo. Il riutilizzo dei sistemi di IA che sfruttano il potenziale dei dati sanitari pone problemi di analisi del rischio con importanti rilievi etici: si pensi al 'diritto all'oblio' del malato oncologico[417]. In questo caso, il diritto alla cancellazione dei propri dati, connesso al proprio diritto alla riservatezza, diventa fondamentale per non subire discriminazioni sul piano economico-sociale, in particolar modo per ciò che concerne l'accesso ai servizi bancari e assicurativi i quali, sovente, sfruttano sistemi di IA per attività di pura 'profilazione' dell'utente. Tale prassi ha ricadute non di poco conto sul destino di altri 'terzi', quali famigliari e figli, laddove gli esiti dell'attività profilazione, in qualche modo, possono confluire anche nelle banche dati da cui attingono le pubbliche amministrazioni, e viceversa. Ecco che, la corretta regolazione dei sistemi di IA, di cui si sta facendo carico già l'Unione europea attraverso la Proposta di Regolamento presentata ad aprile 2021[418], aspira ad avere '*vincoli uniformi e direttamente applicabili sul territorio europeo, con lo scopo di creare un quadro comune per gli Stati membri, salvi taluni spazi di autonomia in tema di sanzioni, disciplina delle regulatory* sandboxes e dei codici di condotta'[419]. Perciò, anche nell'impiego di sistemi di IA potenzialmente a basso rischio, sempre più frequenti a livello sistemico nello svolgimento di numerose attività amministrative basate sulle ICT e processi automatizzati, non si può prescindere dal tenere conto delle insidie che possono portare a un trattamento pregiudizievole o sfavorevole di determinate persone, o a favorirne

416 Morana, D. (2022), *Verso un diritto eurounitario alle cure? La direttiva sull'assistenza transfrontaliera tra obiettivi ambiziosi e debolezze competenziali dell'Unione*, *Corti supreme e salute*, No.1, 2022.

417 Senate Act S. 2607, *Disposizioni in materia di diritto all'oblio delle persone che sono state affette da patologie oncologiche*. Francia, Lussemburgo, Belgio, Olanda e Portogallo hanno già adottato una disciplina sul tema. See Campagna, M., A., Candido, M., Paladini (2022) , *Il "diritto all'oblio" del malato oncologico, l'opinione delle libertà,* 4 luglio 2022, available at http://www.opinione.it/societa/2022/07/04/maurizio-campagna-alessandro-candido-mauro-paladini_malato-oncologico-diritto-all-oblio-ddl/

418 European Commission (2021), *European Commission (2021).*

419 Colapietro, C. (2022), *La Proposta di Artificial Intelligence Act: quali prospettive per l'Amministrazione digitale?*, Rivista CERIDAP, 20 giugno 2022.

altre[420]. Sebbene, ai sensi dell'art. 5 della *Proposta di regolamento IA*, siano espressamente vietate attività basate sull'utilizzo di sistemi di IA da parte delle autorità pubbliche, o per loro conto, ai fini della valutazione o della classificazione dell'affidabilità delle persone fisiche che conduca a determinare un punteggio sociale[421], il processo di automazione anche delle attività amministrative non può prescindere da un approccio *by design* orientato a mitigare gli effetti distorsivi (*bias*) derivanti dall'impiego questi strumenti[422]. A tali obblighi sono infatti soggetti tutti gli 'operatori' dei sistemi di IA dal momento che la *Proposta di regolamento I*A ricomprende, in tale definizione, 'il fornitore, l'utente, il rappresentante autorizzato, l'importatore e il distributore'. Di conseguenza, ogni attività di progettazione e di utilizzo di sistemi di IA volti a portare alla cosiddetta 'decisione robotica' deve esser volta a non trascurare, l'interesse potenziale del 'terzo', laddove questo potrebbe espandersi. In tal caso, si renderebbe necessaria una tutela sostanziale della posizione soggettiva che viene così in rilievo. *In primis* il legislatore, ma anche l'amministrazione nella concreta attività provvedimentale, dovrà sempre garantire che *anche* i soggetti privati coinvolti nei processi di messa a punto e gestione ordinaria dei sistemi di IA agiscano nel pieno rispetto dei principi dell'attività amministrativa e dunque, dei diritti fondamentali dell'individuo[423].

In ultimo, non sconnesso dalle tematiche della regolazione delle ICT e dell'impatto che queste hanno sull'attività di regolazione cui sono preposte le amministrazioni, emerge il ruolo del 'destinatario' la cui prestazione da parte dell'operatore privato è subordinata ad un'autorizzazione pubblica. Sempre per riferirsi a situazioni di chiara attualità, richiamando le concessioni demaniali e la riforma del settore in corso, si denota come le 'esigenze del destinatario' assumeranno un ruolo centrale per quanto riguarda la predisposizione stessa

420 Si fa riferimento, ad esempio, al fenomeno del *Reputation scoring* in quanto fenomeno strettamente collegato alla osservazione e valutazione dell'insieme di comportamenti che un soggetto tiene in un ambiente digitale. Per una disamina approfondita see Di Cerpegna Brivio, E. (2022), *Il Reputation scoring e la quantificazione del valore sociale*, Federalismi.it, No. 18, 2022.

421 European Commission (2021), Art. 5, c.1, lett. c)

422 Colapietro (2022).

423 L. 241/90 of 7 August 1990 on administrative procedure and right of access to administrative documents, Art. 1-*ter*.

dei criteri di aggiudicazione della concessione[424] da parte delle amministrazioni locali. Tale ruolo è legato alla determinazione della qualità, dell'appetibilità, nonché la contendibilità stessa del servizio offerto grazie alla concessione del bene pubblico spiaggia. Propulsori dell'importanza sostanziale del destinatario sono sicuramente le tecnologie ICT, le quali hanno contribuito a rendere più trasparente e competitivo il 'mercato del turismo', aggirando numerose asimmetrie informative che invece erano predominanti nel 2006 quando è stata emanata la *Direttiva servizi*[425]. Ciò non vuol dire che non si debba far ricorso al principio dell'evidenza pubblica per assegnare le concessioni demaniali: tale necessità è conseguenza della diretta applicabilità determinata dalla chiarezza delle disposizioni riguardanti i regimi di autorizzazione contenute all'art. 12. Si nota, però, come altrettanti interessi, quali quelli di chi non è qualificabile direttamente come parte del rapporto concessorio (vale a dire 'altri' rispetto all'amministrazione aggiudicataria e al concessionario) debbono inevitabilmente essere degni di considerazione, al fine di garantire un'attività autorizzatoria davvero proporzionale.

4. Spunti conclusivi

Come rilevato nell'introdurre il problema della tutela terzo, è un dato di fatto che la legittimazione a partecipare al procedimento non implichi necessariamente anche la legittimazione ad impugnare il provvedimento finale[426]: ciò vale sia a livello di ordinamento nazionale sia di ordinamento europeo, con profili ancor più critici per quanto riguarda i 'procedimenti compositi'. Ma tutto ciò non risolve il problema della partecipazione effettiva al procedimento, né su un piano formale né tantomeno sostanziale. Ancor di più se si tratta di atti generali ove è difficile dimostrare l'esistenza di un vero e proprio 'rapporto bi-

424 Monica, A. (2022), *Il destinatario e le concessioni demaniali marittime nel mutato contesto del mercato europeo dei servizi*, in Cossiri, A. (ed.), *Coste e diritti*, Edizioni Università di Macerata (EUM), Macerata, 2022, at 181-192.

425 *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market*, Official Journal of the Europea Union, L 376, 27 December 2006.

426 Virga G. (1998), *La partecipazione al procedimento amministrativo*, Giuffrè, Milano, 1998, at 190-193.

laterale'[427] che si instaura tra una persona destinataria dell'atto, e l'amministrazione. Quest'ultimo è infatti l'elemento strutturale che determina anche il riconoscimento di molti diritti endoprocedimentali quali, ad esempio, il 'diritto di essere ascoltati' o il 'diritto di accesso'.

Gli esempi proposti, dal canto loro, sollecitano una riflessione su un concreto accesso in chiave partecipativa alla procedura decisionale: accesso che dovrebbe essere garantito a tutti coloro la cui sfera giuridica sarà modificata dall'attività decisionale in essere. A livello nazionale, nonostante il riconoscimento del principio di tutela giurisdizionale effettiva, la risposta della giurisprudenza amministrativa è perlopiù orientata a negare la possibilità di legittimazione ad impugnare il provvedimento che abbia disatteso le istanze del privato, il quale non sia destinatario o controinteressato dell'atto. Ciò, aldilà delle previsioni volte a favorire la partecipazione al procedimento, quali quelle *ex* art. 10 L. 241/90, oppure introdotte all'articolo 10-*bis* dalla L.15/2015.[428]. Tale chiusura è sicuramente determinata dalla necessità di porre un freno ad azioni popolari che non siano tipizzate dalla legge stessa. La stessa *Direttiva servizi*, dal canto suo, riconosce la tutela degli 'interessi legittimi di terzi' nel caso di procedure di autorizzazione ove si prevede che la pubblica amministrazione conceda l'autorizzazione previo provvedimento espresso, come quando è chiamata a tutelare la salute o l'ambiente[429]. Il che fa presupporre come in simili frangenti, seppure non chiari dalla lettura del testo normativo, sia auspicabile un coinvolgimento al procedimento dei vari portatori di 'interessi legittimi' al fine di condurre ad un corretto e proporzionale bilanciamento di essi da parte delle autorità amministrative, *già* nel corso della fase istruttoria. Tale inclusione è in qualche modo volta anche a soddisfare il bisogno di giustizia da parte del cittadino nei confronti di quella stessa attività posta in essere dalle varie istituzioni e amministrazioni nazionali che compongono lo spazio amministrativo europeo.

In mancanza di chiare disposizioni normative di tipo procedimentale, tanto sul piano europeo quanto sul piano nazionale, lo strumento della *soft*

427 Mendes (2011), at 190. Caranta, R., L., Ferraris, S., Rodriguez, *La partecipazione al procedimento amministrativo*, Giuffré, Milano, 2005, at 18-21.

428 Ibid, at 196 and 197.

429 See *Directive 2006/123/EC, supra* note 41, Preamble paragraph 63; see Ziller (2017), at 163.

law sembra aprire qualche breccia per permettere un effettivo coinvolgimento del 'terzo' in alcuni procedimenti, laddove non vi siano disposizioni *ad hoc* a livello di normativa settoriale.

L'espandersi della *soft law*[430] quale fonte atipica e diversa da quelle primarie e secondarie rappresenta un tentativo di trovare un'alternativa alla legalità procedurale e alle risultanze frutto del controllo delle corti sugli atti[431]. Si tratta di 'norme' giuridicamente non vincolanti, costruite dal basso, sovente ad opera delle stesse amministrazioni, talvolta attraverso anche la partecipazione di vari *stakeholders*. Spesso, tali norme, si pongono l'obiettivo di fornire un'interpretazione *ex-post* di una norma vincolante. La flessibilità di tale strumento è, di conseguenza, strettamente connessa all'informalità dello stesso: atti di *soft law*, quali circolari, direttive, comunicazioni sono spesso utilizzate per affrontare problemi urgenti o nuovi. È anche un dato di fatto che, nella prassi, tali norme diventano spesso vincolanti sul 'terzo'[432]. Addirittura, se un atto di *soft law* (dell'UE o nazionale) fosse rilevante per decidere su una domanda, e l'autorità amministrativa competente decidesse in un modo che non è in linea con l'atto di *soft law* senza motivare tale scostamento, il giudice amministrativo sarebbe in grado di annullare tale decisione per 'eccesso di potere, vale a dire per mancanza di un'adeguata motivazione[433]. Ecco che, oltretutto, tali atti possono determinare legittime aspettative nei confronti dei cittadini dell'UE, delle imprese e degli Stati membri, incidendo sui diritti o sugli obblighi dei singoli o che imponendo di intraprendere azioni che hanno degli effetti sulle posizioni dei singoli.

Perciò, la vera sfida diventa quella di far sì che tali norme non tralascino ancora di più gli interessi sostanziali del 'terzo', laddove invece il suo coinvolgimento potrebbe portare ad un'attività decisionale che operi un effettivo bilanciamento degli interessi in gioco, come nel caso dei regimi di autorizzazione:

430 Per una definizione si rimanda a Senden, L. (2013), *Soft Post-Legislative Rulemaking: A Time for More Stringent Control*, in Europeal Law Journal, Vol. 19, Issue1, 2013.

431 Mazzamuto, M. (2022), *L'atipicità delle fonti nel diritto amministrativo,* Diritto amministrativo, No. 4, 2015; Tropea, G. (2022), *Norme tecniche e soft law*, *Nuove autonomie*, No. 2, 2022.

432 Si tratta degli atti di regolazione di *soft law* emanati dalle autorità di regolazione e ricondotti alla categoria degli 'atti generali di regolazione': see Tropea G. (2022), *ivi*, p. 410.

433 Alberti, J. and M., Eliantonio (2021), *Judges, Public Authorities and EU Soft Law in Italy: How You Cannot Tell a Book by Its Cover*, in Eliantonio M., E., Korkea-Aho, O., Stefan O (eds.), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence*, Bloomsbury Publishing, London, 2021, at 194.

la *soft law* può dunque rappresentare una soluzione in chiave funzionalista, al fine di consentire '*il passaggio dall'amministrazione unilaterale ed autoritaria all'amministrazione consensuale e paritaria*'[434]. Come appreso dagli insegnamenti e dalle numerose riflessioni sviluppate dal prof. Ziller, nonché dall'osservazione dell'azione amministrativa concreta, le incertezze del legislatore relativamente alla partecipazione nei procedimenti da parte dei privati, si ripercuotono, in ultimo, anche sui 'terzi' laddove questi non sono in grado di dimostrare di aver subito un pregiudizio. Ciò è ancor più vero in un contesto ove le amministrazioni sono chiamate a prendere decisioni, dettando anche regole di comportamento specifiche, magari basate su strumenti di IA.

Infine, in tutti gli esempi proposti in questo scritto, gli interessi del 'terzo' sono strettamente correlati alla garanzia di diritti e libertà fondamentali, di per sé non trascurabili, ma davanti ai quali è necessario implementare sempre nuove forme di tutela effettiva.

434 Caranta et al. (2005), at 382.

9. A new common constitutional tradition in Europe? Nemo tenetur se detegere*

Giacinto della Cananea, Professor of Administrative Law,
Bocconi University

1. Introduction

The concept of "common constitutional traditions" in Europe has been the subject of much comment in recent years. My intent here is not to provide a general overview of the topic. My own views on this matter have been set out on an earlier occasion. The aim of this paper is to focus more closely on a tradition that has just been included by the Court of Justice of the EU among common constitutional traditions; that is, which is designated by the maxim *nemo tenetur se detegere*. It raises, however, some doubts about the conclusion reached by the Court. The paper is divided into four parts. The first section will briefly illustrate the emergence of the concept of common constitutional traditions. The following two sections will analyse the legal relevance and sig-

* Paper for the workshop in honour of Jacques Ziller (2022). This is the fruit of research undertaken on the "common core of administrative laws in Europe" (ERC advanced grant no. 694967). I wish to thank Sabino Cassese and Mario Comba for inviting me to join the ELI research on common constitutional traditions, as well as Marta Cartabia and Daria De Pretis for their comments on an earlier draft presented at the ELI workshop in Vienna. I remain, of course, solely responsible for any errors or omissions.

nificance of the maxim *nemo tenetur se detegere* in criminal proceedings and administrative procedure, respectively. This will be followed by an evaluation of the recent ruling of the European Court of Justice (ECJ) in *DB v Consob*. It will be argued that this jurisprudence can help us to understand both why a recognition of this maxim is acceptable in principle and why, nevertheless, such claim should be verified from a scientific perspective.

2. "Common constitutional traditions" in the European Union

It may be helpful for the sake of clarity to make clear how the phrase common constitutional traditions has been used to denote the existence of some fundamental norms of public law which are shared by the legal orders of EU Member States, as well as the consequences that follow from ascribing a certain norm within such traditions.

Although the Treaty of Rome (1957) entrusted the ECJ with the broad mission of ensuring the respect of the law in the interpretation and application of its provisions,[436] it referred to common constitutional traditions for the first time in 1970, when it was asked to assess the legality of European Community (EC) law on a preliminary ruling by a German administrative court. The referring court had hypothesised the violation of the guarantees provided for by German constitutional law, including control over the proportionality of restrictive measures on rights.[437] Advocate General Dutheillet de Lamothe reiterated the constant concern to avoid a misalignment of interpretations concerning EC law. However, he outlined a new perspective, emphasising that the Community order was not limited to the provisions of the founding treaties and those of the secondary sources, but rather included a common substratum of values and legal principles, ultimately attributable to a vision of the person and of society ("*le patrimoine commun des Etats membres*"). Consistent with this perspective, the Court of Justice excluded that the control over the legality of the acts of the Community institutions could be based on this or that national law. However, it stated that such common traditions form part

436 Treaty establishing the European Economic Community (EEC Treaty), Article 164 (1).

437 Case 11/70, *Internationale Handelsgesellschaft*, Judgment of the Court of 17 December 1970

of the principles of which it is required to ensure the observance.[438] It adhered constantly to this orientation in subsequent pronouncements.[439]

A further impulse came from the Maastricht Treaty, which in Article F made reference to both common "constitutional traditions" and the European Convention on Human Rights. That reference was initially mainly in relation to the European Convention on Human Rights. In this, the means to overcome what was perceived as an intolerable deficiency of the European constitution was identified: the absence of a declaration of rights. This reconstruction, however, did not fully grasp what was new and original in the recognition – resulting from case law and codified by the treaty – of the existence of a body of common constitutional traditions. This recognition is of a precise importance for more than one reason. It confirms the double opening of the national legal systems, that is, horizontally and vertically, towards the European order. It reaffirms the existence, alongside the written principles, of the unwritten ones, including those that have been elaborated and refined by the courts. Moreover, Article 6 attributes to the common constitutional traditions the rank of general principles of Union law, which prevail on EU legislation.[440]

438 *Ibid*, paragraph 4. For a retrospective, see Graziadei, M. and De Caria, R. (2017), *The "Constitutional Traditions Common to the Member States of the European Union" in the Case law of the European Court of Justice: Judicial Dialogues at its Finest,* Rivista trimestrale di diritto pubblico, Vol. 56, No.. 4, 2017.

439 Advocate-General Warner referred to "shared patrimony" in Case 63/79, *Boizard v. The Commission*, regarding the protection of legitimate confidence and, in English culture, to estoppel. See also Stirn, B. (2015), *Vers un droit public européen*, LGDJ, 2015, 2nd ed., at 84 (using the expression "*socle commun*", that is, common ground). On the concept of 'constitutional convention', see Marshall, G. (1984), *Constitutional Conventions: the Rules and Forms of Political Accountability*, Clarendon Press, 1984 (for the thesis that conventions are the 'critical morality' of the constitution and they 'will be the end whatever politicians think it").

440 See Cassese, S. (2017), "*The Constitutional Traditions Common to the Member States of the European Union",* Rivista trimestrale di diritto pubblico, Vol. 56, No. 4 2017(observing that traditions are based on history but are not immutable). But see also Fedke, J. (2018), *Common Constitutional Traditions*, paper presented at the workshop organized by the ELI in Turin, on November 2018 (observing that the German version of Article 6 TEU - *gemeinsame Verfassungsüberlieferungen der Mitgliedsstaaten* – is backward-looking). The ELI comparative research has given rise to a document concerning free speech: European Law Institute (2022), *Freedom of Expression as a Common Constitutional Tradition in Europe*, 2022, available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Freedom_of_Expression.pdf.

3. *Nemo tenetur se detegere* in criminal proceedings

Like the maxim *audi alteram partem,* so too does the maxim *nemo tenetur se detegere* originate from criminal law. Both serve to reinforce the individual's freedom against the power of public authority. However, while *audi alteram partem* can certainly be counted among those that are part of the *acquis communautaire,* the other is of more recent recognition.

The nature and effects of the precept designated by the maxim *nemo tenetur se detegere* is a matter on which opinion can differ. Certain predominant lines of thought can, however, be delineated. There is diversity of view as to whether it constitutes either as a manifestation of the right to a due process of law or as an institutional guarantees in the sense indicated by Carl Schmitt in his *Verfassungslehre*; that is, as an institution which receives constitutional protection in order to prevent its "elimination ... by way of simple legislation", due to its connection with the preservation of the *Rechtsstaat*, without being intrinsically related to the idea of liberty, such as the prohibition of criminal statutes with retroactive force and *ex post* facto laws.[441]

With these different views in mind, we can now examine the normative and factual data. The Fifth amendment to the US Constitution has an emblematic value, by virtue of which no one "can be obliged in any criminal case to testify against himself". In the jurisprudence of the Supreme Court, this prohibition – often called privilege against self-incrimination - has acquired a central importance. It has been affirmed by the Warren Court in its famous *Miranda* ruling, in relation to a phase prior to the criminal trial, i.e., investigations carried out

441 Schmitt, C. (1925), *Verfassungslehre*, Eng. transl. by Seitzer, J. (2008), *Constitutional Theory*, Duke University Press, 2008, at 208-219 (including between such institutional guarantees, distinguishable from basic rights, also the independent administration of local affairs, the prohibition of exceptional courts, the protection of civil servants' rights and the 'right of access to ordinary courts'). For a different view of Schmitt's beliefs and ideas about public law, which emphasises his account of the relationship between legality and emergencies, see Vermeule, A. (2009), *Our Schmittian Administrative Law*, Harvard Law Review, Vol. 122, 2009.

by the police.[442] This has been a strongly contested issue in subsequent years, for some argued that such safeguard was essential for a liberal democracy, while others criticized it for its negative impact on the action of police forces aiming at preventing and repressing crimes. It is therefore extremely significant that, in a very different cultural and political climate, a third of a century later, the chief justice Rehnquist stated that the Miranda warnings "have become part of our national culture".[443] This assessment is important in itself, concerning the persisting validify of the *Miranda* doctrine. It is important, moreover, because it confirms that constitutional traditions arise from a complex of elements, also not of a strictly legal nature, extended to culture in a broad sense.

There is a similarity between the interpretation elaborated by the US Supreme Court and an important norm adopted by the international community more or less in the same years in the context of the International Covenant on Civil and Political Rights (ICCPR), a multilateral treaty (1966) that commits the contracting parties to respect the civil and political rights of citizens and other persons, "recognizing that these rights derive from the inherent dignity of the human person", as the preamble affirms. This norm is laid down by Article 14 (3), according to which "everyone charged with a criminal offence shall be entitled to the following minimum guarantees, in full equality: g) not to be compelled to testify against himself or to confess guilt". The meaning of the norm is clear, in the sense that none can be obliged to admit anything that may give rise to criminal sanctions against him or her, and so is its ambit or scope of application, that is, criminal trials.

For all its moral and political significance, the ICCPR is binding only on the States that have ratified it, including those that form part of the EU (but not the UK). The case of Italy can be instructive, as it is in its legal system that the dispute concerning the existence of a constitutional convention has arisen. Article 24 of the Constitution, which recognises and guarantees the right of defence, is inter-

442 US Supreme Court, *Miranda v. Arizona* (1965). For further analysis, see Schauer, F (2013), *The Miranda Warning*, Washington Law Review., Vol. 88; Alschuler, A.W. (1996), *A Peculiar Privilege in Historical Perspective: the Right to Remain Silent*, Michigan Law Reviw, Vol. 94, No. 8, 1996, (arguing that the privilege included in the Bill of Rights in 1791 differed from that enforced by the courts in English law); Thomas, G.C. (1993), *A Philosophical Account of Coerced Self-Incrimination*, Yale Journal of Law & the Humanities philosophy, Vol. 5, 1993(discussing the concept of coercion in the light of various strands in philosophy).

443 US Supreme Court, *Dickerson v. US* (2000), with the dissenting opinion of Justice Antonin Scalia.

preted coherently with the international norm just mentioned. This interpretation appears to be confirmed by the "living law", in particular by Articles 63 and 64 of the Code of Criminal Procedure. Italian courts have had little difficulty in recognizing the existence of a prohibition of any kind of norm imposing self-incrimination. They have, however, shown considerably more reluctance to accept that such prohibition is part of the law outside the field of criminal law. For example, in a proceeding concerning a municipality the Court of Auditors has asserted that the obligation to report financial losses, concerning both public expenditure and revenue, includes that to make all information available to the prosecutors' office.[444] One of the objectives of this paper is to examine whether this reluctance is justified or not, from a European perspective and this requires a brief analysis of the case law of EU courts.

4. *Nemo tenetur se detegere* in administrative procedures: the opinion of European courts

The first case brought before an EU court was *Mannesmanrohren*.[445] The facts were as follows. The Commission initiated an investigation procedure aiming at ensuring the respect of competition rules. It carried out inspections at the premises of some firms. It then sent to one of those firms a request for information in which it asked questions regarding presumed infringements of the competition rules. The firm replied to certain of the questions, but declined to reply to others. The Commission argued that this infringed the duty of cooperation established by EU law. The firm replied that Article 6 ECHR not only enables persons who are the subject of a procedure that might lead to the imposition of a fine to refuse to answer questions or to provide documents containing information, but also establishes a right not to incriminate oneself. The Court of First Instance was reluctant to endorse this argument. It observed that it is essential that the authorities that exercise administrative powers can effective-

444 Court of Auditors, plenary panel, judgment of 30 January 2017, no. 2, on a question of principle referred by the first central appeal section relating to the Municipality of Naples.

445 Case T-112/98, *Mannesmanrohren Werke v. Commission*, Judgment of the Court of First Instance (First Chamber, extended composition) of 20 February 2001.

ly remedy unlawful conduct. Accordingly, those who – in various capacities –are active in the market must cooperate with the Commission. By taking this line of reasoning to its logical conclusion, operators cannot avail themselves of the right to remain silent. In order to reach this conclusion, the CFI had to exclude the existence of an "absolute right to silent".[446] Moreover, being aware of the possibility that the information could be used in criminal proceedings, the Court decided to resolve the problem by stating that the operators have plenty of opportunity to defend themselves there, attaching a different meaning to the attested facts. This was perhaps the least convincing part of an argument for which it is axiomatic that the collective interest has absolute priority over the right of defence and, therefore, prevents the administrative procedure being compared to the criminal trial.

The difficulties and dysfunctional consequences that derive from this argument can be better understood from the perspective of the ECHR. The European Court of Human Rights has followed an interpretative approach very similar to that followed by the Supreme Court. It did so in a dispute concerning the Swiss tax administration, which had ordered a taxpayer to make available the documentation relating to his assets and the relationships with the banks that looked after them.[447] The imposition of a pecuniary sanction was linked to the taxpayer's refusal. The Swiss administrative judge and the federal court had rejected the appeals of the person concerned. The Strasburg Court affirmed the applicability of Article 6 to administrative tax proceedings.[448] It also reiterated that, although Article 6 does not explicitly mention it, the right to remain silent is part of the generally recognised rules of international law that are at the heart of the notion of "due process". It stressed that the recognition of this right prevents the administrative authorities from trying to obtain documents

446 *Ibid*, paragraph 66.

447 , *Chambaz v. Switzerland*, Judgment of the European Court of Human Rights of 5 April 2012

448 *Ibid*, paragraph 39.

through coercion or undue pressure.[449] It distinguished the case under consideration from a previous case, marked by the unlawful conduct of the applicant. It thus came to the conclusion that the respondent state had violated the person's right not to incriminate himself.[450] This conclusion must, however, be qualified. What is incompatible with the ECHR is the use of coercion or oppression that undermines the very essence of the right to remain silent and thus infringes Article 6. But the States retain their margin of appreciation and can thus authorize their public authorities to use evidence obtained without coercion.

The soundness of the interpretation elaborated by the lower EU court was put into doubt by the Italian Court of Cassation, which raised the question whether such domestic legislation, interpreted in that manner, was constitutionally admissible and asked the Constitutional Court (ICC) to judge on its constitutionality. The ICC had two options: it could either decide directly or do so after involving the ECJ, through the preliminary reference. It chose the latter option. Its reasoning was based on both Article 13 of the ICCPR and Article 6 of the ECHR, and raised the issue whether EU norms, as interpreted by the CFI, infringed the right of defence.[451] Before examining the ruling adopted by the ECJ, three quick remarks are appropriate. First, for the ICC as well as for legal scholarship, there is no doubt that the financial regulator is an administrative authority, though characterized by a high level of autonomy, and that its procedure is administrative in nature. The question that thus arises is whether the maxim *nemo tenetur se detegere*, though initially elaborated and applied in the field of criminal law, applies to such procedure. Second, the argument elaborated by the ICC refers to such maxim from the angle of common constitutional traditions, [452] though it is also grounded on the ICCPR. Last but not least, the ICC has chosen to pursue the dialogue with the ECJ, similarly to what it has pre-

449 *Ibid*, paragraph 52, with references to various precedents: *John Murray v. United Kingdom,* 8 February 1996, paragraph 45; *Saunders v. United Kingdom,* Judgment of the European Court of Human Rights of 17 December 1996, paragraphs 68-69; *Serves c. France,* Judgment of the European Court of Human Rights of 20 October 1997, paragraph 46. Later judgments are illustrated in the ruling issued by the Privy Council of the UK, on 17 June 2019, *Volaw Trust Ltd. v. the Comptroller of Taxes (Jersey).*

450 *Ibid*, paragraph 58.

451 Constitutional Court, order no. 117 of 2019.

452 *Ibid*, paragraph 2 and 10.2.

viously done in the *Taricco II* case, with the result of neutralizing an issue potentially disruptive.[453]

The opinion elaborated by Advocate General Pikamae was critical of some of the ways in which the preliminary question was presented, but showed a clear awareness of the relevance of the problems and of the existence of appropriate solutions to remedy them, as well as of the importance of the homogeneity clause in Article 52(3) of the Charter of Fundamental Right.[454] The AG thus suggested that the distinction between natural and legal persons could be helpful to clarify why the privilege against self-incrimination may be invoked by the former, unlike the latter. Following this distinction, in his view, Member States are not required to punish persons who refuse to answer questions put by the supervisory authority which could establish their responsibility for an offence liable to incur administrative sanctions of a criminal nature.

The ECJ endorsed the view of its AG.[455] It then reiterated its holding that, though the ECHR has not been formally incorporated into the EU legal order, the rights it recognizes constitute general principles of EU law and must be interpreted coherently with the meaning and scope they have under the Convention.[456] It was, however, more cautious than the Strasbourg Court, as it pointed out that the right to silence "cannot justify every failure to cooperate with the competent authorities", for example by failing to appear at a hearing planned by those authorities.[457] That said, even though the sanctions imposed by the Italian financial regulator (CONSOB) on DB were administrative in nature, a financial penalty and the ancillary sanction of temporary loss of fit and proper person status, such sanctions appeared to have punitive purposes and showed a "high degree of severity". Moreover, and more importantly, the evidence obtained in those administrative procedures could be used in criminal proceedings.[458] For

453 Case C-42/17, *MAS,* Judgment of the Court (Grand Chamber) of 5 December 2017 in disagreement with the opinion of Advocate General Bot. The case ended with the judgment no. 115/2018 of the ICC.

454 Case C-481/19, *DB v. Consob*, Opinion of the Advocate General Pikamae, delivered on 27 October 2020,

455 Case C-481/19, *DB v Consob*, Judgment of the Court (Grand Chamber) of 2 February 2021.

456 *Ibid*, paragraph 36.

457 *Ibid*, paragraph 41.

458 *Ibid*, paragraph 44.

the Court, this justified an interpretation of EU legislation that does "not not require penalties to be imposed on natural persons for refusing to provide the competent authority with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature".[459]

After this ruling, the ICC found that the Italian legislation was unconstitutional, on grounds that it did not recognize any opportunity for affected individuals to remain silent within the administrative procedure. However, it excluded any contrast with EU law.[460] The case has thus been settled without a conflict between national law and EU law. Both courts have discharged the function which, in a liberal democracy, is proper to them: to actively seek and try to translate into reality all the potential inherent in the constitutional and legislative provisions of which they must ensure the respect. More specifically, the principle which is expressed by the maxim *nemo tenetur se detegere* does not not protect against the making of an incriminating statement per se, but against the obtaining of evidence by coercion or oppression. It is a shield against an invasive power. At a theoretical level, however, the question that arises is whether a common constitutional tradition does exist in the field of administrative law. While the preliminary question sent by the ICC adopted the concept of common constitutional traditions, the ECJ preferred to resolve it on the terrain of EU law and the ECHR. But even if the ECJ had affirmed that the maxim *nemo tenetur se detegere* can be regarded as a common tradition, it would still remain to be seen whether this characterization is convincing.

5. A 'factual' analysis

The question with which we are thus confronted can be summarized as follows: is the maxim *nemo tenetur se detegere*, in one way or another, shared by the administrative laws of EU Member States. The question will be discussed on the basis of the results of a recent comparative inquiry concerning European administrative laws.

One word or two might at the outset be helpful in order to clarify the assumption on which such comparative research is based, the methodology it has

459 *Ibid*, paragraph 55. See also paragraph 58.

460 ICC, judgment of 13 April 2021, n. 84/2021.

employed and its appropriateness in the field of public law. The assumption is that, although in the history of European law several scholars have used either the contrastive and the integrative approach, which emphasize diversity and similarity, respectively,[461] both approaches are incomplete descriptively and prescriptively. The descriptive validity of both traditional approaches is undermined by the fact that it chooses only a part of the real and neglects the other. Prescriptively, the force of the point adumbrated above is even stronger in view of the realization that the supranational legal systems that exist in Europe acknowledge the relevance and significance of both national and common constitutional traditions. Methodologically, the main difference between the traditional approach and the current comparative inquiry is that the latter follows the approach delineated by the American comparatist Rudolf Schlesinger; that is, it is a factual analysis. The distinctive trait of the method elaborated by Schlesinger in the 1960's, with the intent to identify the common and distinctive elements of the legal institutions of a group of States, is precisely this: instead of seeking to describe such legal institutions, an attempt was made to understand how, within the legal systems selected, a certain set of problems would be solved.[462] As a result of this, the problems "had to be stated in factual terms".[463] Concretely, this implied that, using the materials concerning some legal systems, Schlesinger and his team formulated hypothetical cases, in order to see how they would be solved in each of the legal systems selected. And it turned out that those cases were formulated in terms that were understandable in all such legal systems. Last but not least, this method is particularly appropriate in the field of administrative and public law. On the one hand, while the less recent strand in comparative studies put considerable emphasis on legislation (under the aegis of *legislation comparée*), such emphasis was and still is questionable with regard to administrative law, because it has emerged and developed without any legislative framework comparable to the solid and wide-ranging architecture provided by civil codes. The first lines of research have confirmed

461 Schlesinger, R.B. (1995), *The Past and Future of Comparative Law*, American Journal of International Law, Vol. 43, 1995..

462 Schlesinger, R.B. (1968), *Introduction*, in Schlesinger, R.B. (ed), *Formation of Contracts: A Study of the Common Core of Legal Systems*, Oceana, 1968.

463 Rheinstein, M. (1969), *Review of R. Schlesinger, Formation of Contracts: A Study of the Common Core of Legal Systems*, University of Chicago Law Review, Vol. 36, Issue 2, 1969 at 448-449.

the existence not only of innumerable differences, but also of some common and connecting elements concerning, among other things, judicial review of administration and the liability of public authorities.[464] On the other hand, an attempt must be made to ascertain whether there is common ground not only among written constitutional provisions but also among constitutional conventions.

We have thus included a hypothetical case concerning the maxim *nemo tenetur se detegere* in a questionnaire concerning the relationship between general principles and sector specific rules. The hypothetical case is very similar to that which was at the heart of the dispute that arose in Italy. We suppose that a young stockbroker in a top financial firm, during a casual conversation with an old friend, obtains some inside information about the likely increase, in the near future, of the value of a corporation's share. He reveals this information to his boss, who places an order to buy the corporation's shares, making a huge profit. Sometime later, officers from the financial regulatory authority request the stockbroker s to reveal what he knows about these facts. Whilst being ready to collaborate with public officers, the stockbroker affirms that he is unwilling to reveal everything he knows about those facts, because he's afraid that he could incriminate himself. The officers reply that within the sector-specific legislation there is no rule allowing him to keep silent and warn him that, if does so, his license may not be renewed. The stockbroker challenges the order before the competent court. The question that thus arises is whether the court would be willing the existence of a general principle such as a sort of privilege against self-incrimination or *nemo tenetur se detegere* and the like.

Turning from the hypothetical case to the research findings, a mixture of the expected and unexpected can be observed, as is often the case in this type of research.[465] Comparatively, three options emerge. The first is centred on general legislation on administrative procedure. Germany provides an enlightening example, because according to the general legislation adopted in 1976 the

464 See della Cananea, G. and Andenas M. (eds), *Judicial Review* of Administration in Europe: Procedural Fairness and *Propriety*,Oxford University Press, 2021; della Cananea, G. and Caranta R. (eds), *Tort Liability of Public Authorities in European Laws*,Oxford University Press, 2021.

465 Schlesinger (1969), *supra* note 27, at49. On national legal traditions, see Nicola, F.G. (2016), *National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union*, American Journal of Comparative Law, Vol. 64, Issue 4, 2016.

involved persons have to contribute to the gathering of the relevant elements of fact. However, therein there are no duties to reveal those facts which may be susceptible to lead to the imposition of criminal sanctions. Only the sector legislation has established such duties and they are subject to a scrutiny of strict proportionality before administrative courts and the Constitutional Court. The second option is that the maxim *nemo tenetur se detegere* is included among the general principles elaborated by the courts in order to control the exercise of discretionary powers by public authorities.

Thus, for example in the UK, there is a distinction between common law and statutory law. The right to silence exists at common law, unless Parliament expressly legislates to override the right in specific areas or matters. The third option is that no such principle exists. Thus, for example in France, while in the field of criminal law the right to remain silent is said to be included within the *droit de la defense*, in the field of administrative law the existence of such right is uncertain. It has never been recognized as such by the administrative judge. It is even unclear where it might be recognized in certain circumstances. In sum, while there is a wide area of agreement between those legal systems from the perspective of the right of the defense, particularly as regards the other maxim *audi alteram partem*, there is an area of disagreement concerning the possibility to invoke what American jurisprudence and scholarship call the privilege against self-incrimination.

This conclusion should, however, be qualified in more than one way. The area of disagreement is considerably narrowed if one takes into consideration not only the maxim *nemo tenetur se detegere* but also a host of other principles and doctrines, some of which are not limited to the imposition of pecuniary sanctions, but concern more generally the reviewability of any measure adversely affecting the individual, such as reasonableness. If, for example, of two different rules governing similar administrative procedure one affirms that maxim and the other does not, higher jurisdictions may be requested to review their consequences from the viewpoint of the principle of equality. Moreover, the existence of areas of agreement and disagreement should be considered in a dynamic manner, as opposed to a static one. On the one hand, studies concerning fundamental rights regard it as historically demonstrated that certain process rights that initially develop in one field are subsequently generalized, as a result of

the consolidation of process values.[466] On the other hand, as domestic administrative laws are increasingly intertwined with EU law, the contrast between the former may decrease in the light of the jurisprudence of the ECJ examined in the previous section.

6. Conclusion

No attempt will be made to summarize the entirety of the preceding argument. The problem which has been analysed within this paper is one which most legal systems, though not necessarily all, have to tackle; that is, whether the individual has the right to remain silent within an administrative procedure, if it can be reasonably assumed that the consequences that follow from testifying or producing evidence include – at least potentially – the imposition of criminal sanctions. The recognition by both the ICC and the ECJ that there can be cases in which the individual can exercise the right to remain silent within an administrative procedure is to be welcomed and it is to be hoped that this view will be endorsed by other higher courts. However, David Hume's well-known caveat applies, in the sense that it is not correct to derive an 'ought' from an 'is'.[467] In this paper, I have reiterated the reasons that lead to consider as unduly limiting and misleading the theoretical approach which, in examining procedural requirements within the European legal area, overly emphasises – depending on the case – the common or distinctive aspects. The positive indication that can be drawn from these considerations is, above all, that, in order to make the comparison more rigorous, it is essential to take both into account. Moreover, though we cannot hide the difficulties that the full application of the maxim *nemo tenetur se detegere* meets, this needs to be viewed from a dynamic rather than static perspective.

---

466 Fiss, O (1979), *The Forms of Justice*, Harvard Law Review, Vol. 93, Issue 1979 (holding that constitutional values are ambiguous, in the sense that they can have various meanings, and evolve, as they are given operational content).

467 Hume, D (1739), *A Treatise of Human Nature* (1739), Book III, Part. I, Section I (observing that "For as this ought, or ought not, expresses some new relation or affirmation, it is necessary that it should be observed and explained; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it").

10. Multilevel (administrative) cooperation in the EU: the unique case of the Banking Union

Diane Fromage[468], Professor of European Law, University of Salzburg and Affiliated researcher, Law School, Sciences Po

Il y a près de neuf ans, en novembre 2013, je soutenais ma thèse – co-dirigée par Jacques Ziller - sur le rôle des parlements nationaux au sein de l'Union européenne. Au cours des trois années que durèrent ces recherches, Jacques m'a énormément appris, et inspirée. Il m'a inculqué son sens de la rigueur, et m'a transmis son goût pour le droit comparé. Il m'a aussi ouvert de nouveaux horizons, et n'a jamais été avare en conseils précieux ou en recommandations utiles, n'hésitant jamais à me faire profiter de ses contacts et de ses connaissances. Il fait partie des personnes grâce auxquelles je suis parvenue à faire moi-même également une carrière universitaire, et je lui en suis profondément et sincèrement reconnaissante. Merci, très cher Jacques, et que cette période de retraite te soit riche et heureuse.

Si ma thèse portait sur les parlements et le droit comparé, cette brève contribution traite d'un des autres sujets de prédilection de Jacques, le droit administratif européen.

468 The present research was conducted as part of "IMPACTEBU", a project that received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Sklodowska-Curie grant agreement No 895841 (Sept. 2020 – April 2022).

1. Introduction

As is well-known, multilevel administrative cooperation[469] between national and European institutions has always been essential to the good functioning of the European (Economic) Community (E(E)C) first, and to the European Union (EU) since 1992. Indeed, the European Commission has always relied on national administrative systems to implement or (co-)define EU norms and as such, the European integration process has affected the functioning of national administrations even though they may have originally failed to perceive this change.[470] The Banking Union (BU) introduced in 2012 is no exception to the pre-existing practice in that to function properly, it, too, is dependent on the good cooperation between EU and national administrations. In fact, it is 'only the second or third area of full integration in 60 years of existence – after EEC/EC/EU competition law in the founding years of the Community/Union, and, completely diverse in nature, (Euro) monetary policy installed in the Maastricht Treaty' where full integration is understood as 'a term to describe a regional (supranational) legal order both at the legislative and at the administrative level, with directly applicable and fully fledged, self-standing EU regulations, ie not requiring national law or doing so only to a very limited extent, and with an EU institution being responsible for implementation in particular cases, again self-standing and with no significant leeway for discretion by the national authorities which might be called to help.'[471] However, as will be shown in this contribution, multilevel administrative cooperation in the BU is radically different from the more classical patterns of cooperation

469 I am referring here to "multilevel administrative cooperation" as a generic term. See for a discussion on the terminology used to describe this phenomenon: von Danwitz, T. (2008), *Europäisches Verwaltungsrecht*, Springer, 2008, p. 610 et seq.

470 Auby, J.-B. and J. Dutheil de la Rochère, *Traité de droit administratif*, 2014, Bruylant, p. 21. See for a historical account of this evolutionCraig, P. (2018), *EU administrative law*, Oxford University Press, 2018, p. 4 et seq.

471 Grundmann, S. and H.-W. Micklitz (2019), *The European Banking Union and constitution – The overall challenge*', in Grundmann, S. and H.-W. Micklitz (eds)*, The European Banking Union and constitution: Beacon for advanced integration or death-knell for democracy?,* Hart Publishing, 2019, pp. 1 and 2.

within the EU, and is rather unique.[472] This is because of the identity of the institution at the apex of the various mechanisms that compose the BU, because of the role played by national institutions within those composite procedures, and also because of the (next) level to which the BU is taking administrative cooperation within the EU. In the following, these issues are examined in turn.

2. 'Unusual' EU bodies in charge

To date, the BU is composed of two pillars: the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM); the European Deposit Insurance Scheme (EDIS), which would constitute the third pillar, is still missing amid the impossibility for the Member States to agree on its establishment.[473]

The first element that makes multilevel administrative cooperation in the BU unique within the EU is the fact that it is one – independent – institution and one agency, the European Central Bank (ECB) and the Single Resolution Board (SRB), respectively, that are at the apex of the systems of multilevel cooperation whereas traditionally in the EU it is the European Commission that has exercized this function. Put differently, the European Commission has traditionally been in charge of ensuring that Community measures were duly implemented (art. 155 TEC) and it has developed mechanisms of different kinds to reach this objective in cooperation with national authorities.

In the case of the first pillar, it is the ECB that plays this role – and the ECB is also in charge of conducting the EU's monetary policy such that this dual responsibility of the institution also bears consequences on the way in which national and EU institutions cooperate, as detailed below. Within the second pillar, it is the SRB that is mainly in charge. Yet, it is an agency that is in some

472 There is regrettably no space to perform a fully-fledged comparison in this short contribution which will instead contribute to highlight the specificities of the BU.

473 The European Commission issued its proposal for an EDIS in 2015 and discussions have been on-going ever since, see European Commission (2015), Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme, COM/2015/0586 final, Brussels. With the pandemic, and the French presidency of the Council in the first half of 2022, it could seem as though this issue was gaining momentum again. Yet, heads of States and governments now appear to favour other reform proposals including the further harmonization of Deposit Guarantee Schemes.

ways radically different from other EU agencies because powers in the area of banking resolution have been attributed to it (as opposed to its being 'merely' the place for coordination among national institutions or agencies as is, for instance, the case within the European Banking Authority (EBA)).

Further, though related to this, is the fact that in this area of EU law, neither the ECB nor obviously the SRB may adopt secondary legislation: whereas the ECB may adopt the necessary legislation in the field of monetary policy, in supervisory matters it is mostly called to apply norms adopted by the EU legislator or by an agency, the EBA.[474] This distinction matters because it arguably makes the articulation between national and European authorities even more complex as those national authorities also sit on the EBA.

By contrast, in more 'classic' areas of EU law, the Commission proposes the pieces of secondary legislation it is then called to execute, and it defines them together with the EU legislator but without the direct involvement of the national authorities with which it is, however, later bound to cooperate in their execution. This is arguably different in the BU: whereas this holds generally as well, it remains that as already noted, the very same institutions come together under the auspices of the EBA to for instance define the guidelines they will later implement – and in this instance they alone have a voice as neither the SRB nor the ECB may vote (which likely does not however preclude them from being able to influence the outcome of the discussions as they have an observer status within the EBA...)

3. A special and crucial role for national institutions in the operationalization of the BU

Another defining feature of the BU is the special and crucial role played by national institutions, one that had to be clarified by the Court of Justice. This brief account starts with the SSM and then continues to examine the SRM.

Considering that the SSM is headed by the ECB, and that its main organ in charge of monetary policy, the Governing Council, approves supervisory

474 Norms part of the Single Rulebook.

decisions, a full picture of the SSM and its multilevel structure may only be gained by also considering the ECB and the European System of Central Banks (ESCB) as well. Hence, the ECB's organs in charge of monetary policy will now be considered before the structure in charge of supervision is examined.

The Maastricht Treaty – like the Lisbon Treaty still does too – defined three decision-making bodies within the ECB: the Governing Council, the Executive Board and the General Council whereby the former two have, however, a significantly more important role to play within the ESCB. When they participate in the Governing Council, NCB Governors act in their personal capacity. NCBs continue to be national institutions, even if they now belong to the Eurosystem, which is composed of the ECB and the NCBs from euro area Member States and which 'conduct[s] the monetary policy of the Union'.[475] As of consequence of that, (some) of their institutional features are governed by EU rules. Their independence has to be guaranteed,[476] and the duration of the mandate of NCB Governors may not be inferior to five years. Those Governors are also protected from severe national injustices due to their dual status as NCB Governors and members of the Governing Council. The ECB is to be consulted on national legislation in its fields of competence, and it may thus have influence on NCBs by this means.[477]

The Supervisory Board in charge of preparing supervisory decisions is an ECB internal organ established by secondary law[478] (as opposed to the decision-making organs whose basis is found in the Treaties). It is composed of National Competent Authorities (NCAs) representatives (one per participating Member State), but the participation of those NCBs that are not NCAs is also foreseen.[479] Where that is the case, the national representatives involved share the vote allocated to the Member State in question, but two representa-

475 Article 282(1), Treaty on the Functioning of the European Union (TFEU).

476 Article 130 TFEU.

477 Article 127(4) TFEU. See for instance European Central Bank (2020), *Opinion of the European Central Bank of 30 November 2020 on amendments to the Law on Parliament*,2020, CON/2020/30, concerning the Swedish NCB and Opinion of the European Central Bank of 21 July 2020 on the amendment of the appointment criteria of Banco de Portugal's Governor and other members of the Management Board,2020, CON/2020/19.

478 Article 26 SSM.

479 Article 26(1) SSM Regulation.

tives sit at the table. National representation is hence significantly superior to ECB (that is, supranational) representation which is only ensured by the Chair, the Vice-Chair, and the four additional members. The imbalance between national and supranational representation is even more pronounced than in the Governing Council. Board members shall act in the interest of the Union as a whole,[480] thus they do not seek the individual interests of the Member State they represent. It remains the case that, on the one hand, the voting system in place is less supranational than the one in place today within the Governing Council, and that, on the other hand, NCAs' independence is less strictly guaranteed than the independence of NCBs. More generally, the characteristics of their institutional set up are more left up to the individual Member States than those of NCBs which are in part defined in EU primary law. For what concerns the applicable voting arrangements, each member of the Supervisory Board has one vote, and 'decisions shall be taken by a simple majority of its [the Supervisory Board's] members. [....] In case of a draw, the Chair shall have a casting vote'.[481] In contrast to this, each member of the Governing Council has one vote too (so there is no weighing mechanism either in most cases). However, since the total number of members of the Governing Council now exceeds 21, a rotating system is in place.[482] As to the NCAs' requirement of independence and institutional settings, they are defined in Art. 19 SSM Reg. (independence), the ECB Code of Conduct for the Members of the Supervisory Board,[483] and in the Capital Requirements Directive (CRD IV).[484]

The large representation of national interests is also visible in the composition of the Steering Committee, which is tasked with supporting the Supervisory Board's activities.[485] Indeed, it is formed by the Supervisory Board's Chair,

480 Article 26(1) SSM Regulation.

481 Article 26(6) SSM Regulation.

482 Article 10(2) ESCB Statute.

483 Code of Conduct for the Members of the Supervisory Board of the European Central Bank, Official Journal of the European Union,C 93, 20 March 2015.

484 Article 4, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, Official Journal of the European Union, L176, 27 June 2013 (hereafter 'CRD IV').

485 Article 26 (10), SSM Regulation.

its Vice-Chair, one ECB representative and five NCA representatives designated on a rotating basis; the national component is stronger than it is in the Executive Board, which supports the Governing Council, as the latter is composed of six supranational representatives, that is NCB representatives do not take part in it.

In addition to being involved at all the stages of the supranational decision-making process, national authorities also play a key role in the operationalization of the EU's supervisory mechanism as they are in charge of the supervision of the smaller credit institutions, the so-called Less Significant Institutions (LSIs)[486] and as they are part of the Joint Supervisory Teams (JSTs) in charge of, *inter alia*, the conduct of the Supervisory Review and Evaluation Process (SREP) for Significant Institutions (SIs), the participation 'in the preparation of a supervisory examination programme to be proposed to the Supervisory Board', the implementation of said programme and any ECB supervisory decision, the co-ordination with on-site inspections teams in the implementation of the programme, and the liaison with the NCAs.[487]

In sum, the SSM is headed by the supranational (independent) ECB. However, NCAs not only play an important role in its functioning because they are in charge of the supervision of LSIs (under the ultimate control of the ECB). They also play a decisive role in the making of supervisory decisions as they are predominant within the Supervisory Board and its preparatory organ, the Executive Board. They admittedly participate in their own capacity in those instances (and not as representatives of their respective Member States). However, there is little doubt that these features could hardly lead to the Supervisory Board being as supranational as the Commission, which has been commonly heading mechanisms of multilevel administrative cooperation in the execution of EU norms. Put differently the role played by NCAs is larger than the one commonly attributed to national authorities in those instances.

The involvement of the ECB's Governing Council in the SSM only reinforces this trend for it, too, counts with the strong representation of national authorities. NCBs are nevertheless not necessarily in charge of banking super-

486 See for a critical stance on the allocation of supervisory powers between the ECB and the NCAs within the ECB, D'Ambrosio, R. (2019), *Single Supervisory Mechanism: Organs and Procedures*, in Chiti, M. P and V. Santoro (eds), *The Palgrave Handbook of European Banking Union Law*,Palgrave Macmillan, 2019, p. 165 et seq.

487 Article 3 (2), SSM Regulation.

vision, and as shown above, supranational representation and decision-making procedures are more predominant than they are in the ECB instances in charge of banking supervision.

Despite being seemingly similar at first sight – the division between SIs and LSIs that exists in the framework of the SSM is directly transposed into the SRM (art. 7 SRM Regulation (SRM R))–, the form of multilevel cooperation in place in the framework of the second pillar of the BU is significantly different from the one in place in the first supervisory pillar. Reasons for this are the fact that the SRB is an EU agency established on the basis of art. 114 TFEU which is, as such, submitted to the limits set by the Meroni doctrine.[488] The resort to this (EU-wide) legal basis also gave rise to some discussions and controversy as the SRB's scope of action is limited to BU Member States.[489] As a consequence of the SRB's being an EU agency, it normally relies on National Resolution Authorities (NRAs) implementing its decisions. The SRB may substitute itself to the NRAs only if those fail to appropriately implement the SRB's decisions.

The functioning of the SRB is particularly complex. The deliberative organ of the SRB is organised in two sessions: the plenary and the executive one. In the plenary session, representatives of the NRAs come together with the Chair of the SRB and four permanent members.[490] Each member has one vote including the Chair, and decisions are commonly taken by majority (the Chair has a casting

488 This limits the breadth of the competences that may be attributed to the SRB (in this regard, the legality of its applying national law in the rare event that it may be called to substitute itself to an NRA deserves attention).

489 Capolino (2019), The Single Resolution Mechanism: Authorities and Proceedings, in Chiti and Santoro, *supra* note 29, p. 250 and Tuominen, T. (2017), *The European Banking Union: A shift in the internal market paradigm?*, Common Market Law Review, Vol. 54, Issue 4, 2017.This also raises the question of the articulation with Member States in close cooperation (that is those Member States that participate in the BU despite not being part of the euro area). Their participation is governed by specific procedures that differ from those applicable to euro area Member States. They are not examined here because they are likely bound to remain temporary: the two non-euro area Member States that have joined the BU in 2020 did so as part of their road towards the adoption of the euro. Although some Member States including for instance Sweden had contemplated the possibility to join the BU without adopting the common currency, there seems to be no appetite to move in this direction. The same applies to states such as the Czech Republic and Poland. This notwithstanding, it will have to be seen how this situation continues to evolve after the pandemic as it has led to an undeniable trend towards euroization of non-euro area EU economies (this was, for instance, caused by the high(er) levels of inflation which those States were facing, leading to their private actors contracting loans in euro as opposed to loans in their own currencies).

490 Article 43(1) SSM Regulation..

vote in the event of a tie[491]). Both the Commission and the ECB participate as observers (and have access to all documents), and the EBA may, too, be invited as an observer on an ad hoc basis. Where a Member State has designated more than one NRA, the other ones may participate but with an observer status only. The peculiarity of the SRB lies with its executive session. It not only brings together the members of the Board (that is: the Chair and the four permanent members) but also counts with the participation of representatives of the NRA(s) where the entity concerned by a decision is located. As such, the executive session of the SRB is one of variable geometry where the EU-wide interest is embodied by the Board.

Also, in the framework of the SRM the SRB and the NRAs work together closely in the framework of the Internal Resolution Teams (IRTs) which mirror the JSTs constituted in the framework of the SSM. IRTs are found in the SRB decision establishing the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the Single Resolution Board and National Resolution Authorities.[492] Like JSTs, IRTs are composed of SRB and NRA officials and headed by an SRB official. They are to 'support the SRB in the execution of its resolution tasks [...] with regard to entities or groups under the direct responsibility of the SRB'.[493] Although like JSTs they no doubt insufflate some portion of national influence, perhaps the role played by this type of 'teamed-up cooperation'[494] in the articulation of the multilevel cooperation procedures within the SSM and the SRM should not be overstated. It has been found indeed that 'the practice of JSTs and IRTs suggests them to be relatively flexible and informal entities which can therefore not be said to constitute an administrative procedure as such'.

491 Article 52(1) SSM Regulation.

492 Article 24, Decision of the Single Resolution Board of 17 December 2018 establishing the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the Single Resolution Board and National Resolution Authorities, SRB/PS/2018/15, available at https://www.srb.europa.eu/system/files/media/document/decision_of_the_srb_on_cofra.pdf

493 Art. 24-1, Decision of the Single Resolution Board SRB/PS/2018/15.

494 Brito Bastos, F (2021), *Composite procedures in the SSM and the SRM – An analytical overview*, in C. Zilioli, C. and K.-P. Wojcik (eds), *Judicial review in the European Banking Union*, Edward Elgar, 2021, p. 107.

In summary, the SRM operates under the ultimate responsibility of an EU agency, the SRB which, as such, must be overseen by Commission and Council, although it is independent.[495] It is a 'specific Union agency with a specific structure, corresponding to its specific tasks, and which departs from the model of all other agencies of the Union'.[496] It meets in two different configurations. In both of them national authorities (NRAs) play a key role. They clearly outnumber the supranational representatives in the plenary session (5 vs 21) and are strongly represented in the executive session, although they do not have a decisive voting power in case of disagreements. Also, NRAs are eventually in charge of executing SRB decisions in most cases and they are still responsibility for LSIs as well.

As a consequence of these and the characteristics of the SSM described previously, multilevel administrative cooperation within the BU is particularly complex and of a unique character.

4. Unprecedented levels of administrative cooperation within the BU

In addition to being headed by 'unusual' EU bodies, the BU appears to have taken administrative cooperation within the EU to the next level. As summarized by Advocate General Campos Sánchez-Bordona in its opinion to the *Berlusconi and Fininvest* case: 'The EU rules governing the SSM have established various administrative procedures involving the ECB and national supervisory authorities. *Such procedures are not new in EU law: they already existed in areas such as structural funds, agriculture and the appointment of members of the European Parliament, for example. But the use made of them within the banking union is much more intensive and more frequent than in other areas.*'[497]

495 Article 47 SSM Regulation.

496 Recital 31 SSM Regulation.

497 Emphasis added, Case C-219/17, *Silvio Berlusconi and Fininvest,,* Opinion of Advocate General Campos Sánchez-Bordona delivered on 27 June 2018, paragraph 3.

5. Conclusion: Assessment of and lessons learnt from the example of multilevel administrative cooperation in the BU

This brief account of the cooperation between national and European administrations has evidenced that the two pillars of the BU that exist to date rely on effective multilevel administrative cooperation indeed, both in the design of the applicable rules, and in their implementation.

The model of cooperation between national and EU institutions varies from the one that has been more commonly in place since the beginning of the integration process owing to the SSM being headed by the ECB (an EU institution also in charge of monetary policy whose decision-making organs are defined in the Treaties hence the necessity to also involve the Governing Council), and to the SRB – an EU agency – being at the apex of the SRM.

Within both Mechanisms, national institutions play a key role: in the implementation phase but also in the decision-making procedures themselves. In this regard, these Mechanisms differ from the procedures of multilevel administrative cooperation that had existed prior to their establishment: they had been headed by the supranational Commission in which national authorities are not represented. National authorities had been, and still are only involved indirectly via the consultation and/or participation of a Committee or an EU agency.

These unique features, as well as the possible diverging interpretation of primary and secondary norms, raise issues of administrative, democratic and judicial accountability. For instance, in the *Landeskreditbank* case, the Court of Justice was already led to clarify the roles of the ECB and of NCAs within the SSM, a definition, which the German Federal Constitutional Court seems to endorse to some extent only.[498] The mechanisms of democratic account-

498 Case C-450/17 P, *Landeskreditbank Baden-Württemberg – Förderbank v European Central Bank*, Judgment of the Court (First Chamber) of 8 May 2019; and Case 2 BvR 1685/14, *Bankenunion*, Judgment of the BverfG (Second Senate) of 30 July 2019.

ability applicable within the BU are absolutely unique,[499] and the role, which national and European courts of auditors are called to play also deserves attention as much as it requires further definition.[500] Hence, researchers may only be encouraged to continue to witness and critically assess these developments as they continue to unfold.

499 Zilioli, C. (2016), *The Independence of the European Central Bank and Its New Banking Supervisory Competences*, in Ritleng, D. (ed), *Independence and Legitimacy in the Institutional System of the European Union*, Oxford University Press, 2016; and Fromage, D. and R. Ibrido (2019), *Accountability and democratic oversight in the European Banking Union*, in Lo Schiavo, G. (ed), *The European Banking Union and the Role of Law*, Edward Elgar Publishing, 2019.

500 Baez, D. (2021),*Is there an audit gap in EU banking supervision*?, Journal of Banking Regulation, Vol. 23, 2021.

11. EU vs. Poland: Preventing political control over judiciary

Aurélien Raccah, Associate Professor, Director of the International & European Law School (IELS), Law Faculty, Catholic University of Lille

1. Introduction

The European legal doctrine is unanimous: "Dialogue wasn't, isn't and will NEVER be an effective way forward when dealing bad faith actors engaged in an obvious constitutional *coup d'état*"[501]. The 2022 Rule of law Report explicitly recalled that the political and judicial crisis occurring in Poland remains one of the main concerns of the European Union[502]. The four political EU institutions and the Court of justice of the European Union (CJEU) are actively engaged in a judicial battle to tackle Polish political provocations[503].

Since 2018, Poland has been concerned by an unprecedented number of

501 Pech, L. (2020), *Protecting Polish Judges from the Ruling Party's "Star Chamber"*, Verfassungsblog, 9 April 2020, at https://verfassungsblog.de/protecting-polish-judges-from-the-ruling-partys-star-chamber/.

502 European Commission (2022a), *Commission Staff Working Document, 2022 Rule of Law Report Country Chapter on the rule of law situation in Poland, Accompanying the document, Communication from the Commission, 2022 Rule of Law Report - The rule of law situation in the European Union*, COM(2022) 500 final, Brussels..

503 Reynders, D. (2022),, *Respect de l'Etat de droit dans l'Union : outils et perspectives*, Revue de l'Union européenne, No. 657, 2022, p. 201.

CJEU cases focusing on the violation of the rule of law. The Court is pointing out "the existence of systemic or generalised deficiencies so far as concern the independence of the judiciary"[504]. Over twenty cases in four years.

The turning point occurred in 2015, when the national-conservative party Law and Justice (PiS), strongly chaired by Lech Kaczyński, successively won two major elections, the Polish Presidency by Andrzej Duda and the Sejm, getting the majority in both houses and becoming the first single-party government since the end of communism in 1989[505]. Following the elections, the new government led by Beata Szydło performed judiciary reforms in the Constitutional Court introducing a major political crisis around the nomination of five judges. In the following years, the Polish government adopted legislatives changes in the organisation of the justice. From that time, the challenge for the EU is to prevent any political control over judicial decisions in Poland.

The European Commission took first the lead to prevent the political control over judiciary[506]. The announced reforms of the polish judiciary system have provoked serious concerns on threats to the rule of law, overall the independence of the constitutional review and a series of laws approved in 2017 reforming the Supreme Court, the Ordinary Courts Organisation, the National Council for the Judiciary and the National School of Judiciary and Public Prosecution. In 2017, the European Commission invited the Council to adopt a decision on the basis of Article 7 EU[507]. It considered that Poland violates the values of the EU enshrined in Article 2 EU which are "respect for human

504 Case C-216/18 PPU, *LM*, Judgment of the Court (Grand Chamber) of 25 July 2018 ,paragraphs 23, 34, 60, 68, 74, 79 ; Joined Cases C-562/21 PPU and C-563/21 PPU, *X, Y*, Judgment of the Court (Grand Chamber) of 22 February 2022, paragraph 62.

505 Ireneusz Krzeminski, I. (2022), , *Qu'est-il arrivé à la Pologne ?*, Revue de l'Union européenne, No. 657, 2022, p. 207.

506 *Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland*, Official Journal of the European Union, L 217, 12 August 2016); *Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374*, Official Journal of the European Union, L 22, 27 January 2017 *Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 and (EU) 2017/146*, Official Journal of the European Union, L 228, 2 September 2017; *Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520,* Official Journal of the European Union, L 17, 23 January 2018.

507 European Commission (2017), *Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*, COM/2017/0835 final, Brussels.

dignity, freedom, democracy, equality, the rule of law and respect for human rights". Requiring the approval at the unanimity of the European Council, this decision was never adopted due to the support of Hungary. Poland is indeed the tip of the iceberg. Populist movements in Europe have so succeeded to form new types of eurosceptical governments struggling the rule of law and the primacy of EU law in Hungary[508] overall and punctually in other states[509].

To overpass the political stalemate, the Court of justice has pursued the debate on the basis of Article 19 (1) EU providing that "*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*". The first case reshaping the meaning and scope of the rule of law principle has been the *Juízes Portugueses* case[510] that is seen as "belonging to the Pantheon of the most significant ECJ rulings, on a par with *Van Gen den Loos* and *Costa*"[511]. In the same line, the Polish saga started with the *LM* case in 2018 allowing for the first time a Member State not to execute a European Arrest Warrant issued by Poland because there would be "real risk of breach of the fundamental right to a fair trial"[512]. From that case, Poland is facing an unclosed series of judicial actions and interim measures striking the infringements to the independence of justice and the primacy of EU law and raising more recently the regime of conditionality for the protection of the EU budget.

As a provocative answer, pushing forward the door opened by the German *Bundesverfassungsgericht* in the controversial *PSPP* case[513], an additional

508 Komanovics, A. (2022), *Hungary and the Luxembourg Court: the CJEU's Roe in the Rule of Law Battlefield*, EU and Comparative Law Issues and Challenges Series, Issue 6, 2022, p. 122.

509 Ziller, J. (2022), *The primacy of European Union law*, European Parliament Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies of the Union PE 732.474, July 2022; Parra Gomez, D. (2021, *Crisis of the Rule of Law in Europe: The Cases of Hungary, Poland and Spain*, Athens Journal of Law, Vol. 7, Issue 3, 2021.

510 Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, Judgment of the Court (Grand Chamber) of 27 February 2018.

511 Pech, L. and D. Kochenov (2021), *Respect for the Rule of Law in the Case Law of the European Court of Justice*, SIEPS, 2021, Issue 3, p. 12.

512 Case C-216/18 PPU, LM , *supra* note 4, paragraph 79.

513 BVerfG, Judgment of the Second Senate of 5 May 2020, *PSPP* - 2 BvR 859/15, paragraphs 1-237. Following Case C-493/17, *Heinrich Weiss and Others*, Judgment of the Court (Grand Chamber) of 11 December 2018. Cf. for a comprehensive understanding, Ziller, J. (2020), , The unbearable heaviness of the German constitutional judge, SSRN, 6 May 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3598179.

conflict relating to the primacy of EU law has emerged from the Polish Constitutional Tribunal through two rulings of 14 July 2021 and 7 October 2021[514]. On July 14th, it considered that "*Article 4(3), second sentence, EU in conjunction with Article 279 TFEU – insofar as the Court of Justice of the European Union ultra vires imposes obligations on the Republic of Poland as an EU Member State, by prescribing interim measures pertaining to the organisational structure and functioning of Polish courts and to the mode of proceedings before those courts – is inconsistent with the [Polish] Constitution*" [515]. On October 7th, the Polish Constitutional Tribunal judged that "*the European Union authorities act outside the scope of the competences conferred upon them by the Republic of Poland*" and that the interpretation of Article 19(1) EU by the CJEU to review of the organisation of the justice in Poland contradicts the supremacy of the Polish constitution[516]. Considering these two decisions as breaches of Article 19(1) EU and the general principles of autonomy, primacy, effectiveness, uniform application of Union law and the binding effect of rulings of the Court of Justice, the European Commission engaged an action for failure to fulfil EU obligations[517]. On July 15th, 2022, a reasoned opinion has been published[518]. The case shall be soon taken to the Court.

The Court of justice of the European Union is nowadays developing its own concept of "effective judicial protection" to reframe – among others – the polish judicial organisation into EU values (1). That definition will be required to strengthen the enforcement measures (2).

514 Jacques Ziller points out the sole publication of the press releases, limiting the access to legal reasons. Cf. Ziller (2022), *supra* note 9, p. 38. Maurice, E. (2021), *The rule of law in Poland or the false argument of the primacy of European law*, Fondation Robert Schuman, European Issue No. 615, 29 November 2021.

515 Polish Constitutional Court, Decision on 14 July 2021, P 7/20 | 14 VII 2021 (refusal to apply CJEU's interim measures).

516 Polish Constitutional Court, Decision on 7 October 2021, K 3/21 | 7 X 2021 (primacy of the Polish Constitution over EU law).

517 H. (2022), État de droit : nouvelle procédure en manquement contre la Pologne – vers une procédure pilote?, Dalloz actualité, 19 janvier 2022.

518 Reasoned opinion to Poland on 15/07/2022 (INFR(2021)2261).

2. An ongoing definition of the requirements of effective judicial protection

The Court refers to the requirements of an effective judicial protection in the fields covered by EU law. However, that concept is not expressively defined in EU law, but rather stemming from the constitutional traditions common to the Member States. Throughout the case law, the Court is shaping the criteria for a EU concept of "effective judicial protection" in front of national courts.

2.1 Effective judicial protection vs. institutional autonomy of member states

Originally based on articles 6 and 13 ECHR[519], nowadays on article 47 of the Charter of fundamental rights[520], the effective judicial protection has become a general principle of EU law. It requires that any individual must have an effective judicial remedy to ensure that their EU rights are fully implemented in its internal legal order. The current political context in member states led by populist regimes has driven the European Commission to enlarge the interpretation of Article 19(2) EU to review some details of the national judicial systems.

In the Court, two main arguments are opposed. On the one hand, the EU institutions claim that, on the basis of Article 19 (1) EU, the EU is entitled to control "the effective judicial protection in the fields covered by Union law" and thus the compliance of the national judicial systems to EU law[521].

519 Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, Judgment of the Court of 15 May 1986.

520 Case C-76/16, *Ingsteel*, Judgment of the Court (Second Chamber) of 13 July 2017; Case C-271/17 PPU, *Zdziaszek*, Judgment of the Court (Fifth Chamber) of 10 August 2017; Case C-216/18 *PPU*, *LM*, *supra* note 4; Case C-682/15, *Berlioz Investment Fund*, Judgment of the Court (Grand Chamber) of 16 May 2017; Case C-243/15, *Lesoochranárske zoskupenie VLK*, Judgment of the Court (Grand Chamber) of 8 November 2016; Case C-791/19, *European Commission v. Poland*, Judgment of the Court (Grand Chamber) of 15 July 2021..

521 Case C-64/16, *Associação Sindical dos Juízes Portugueses*, *supra* note 10, pragraphs 34 to 37.

On the other side, on the ground of the principles of conferral[522] and institutional autonomy of the member states[523], Poland is mostly answering that the EU lacks competence to control the organisation of the national judiciary. On the basis of Article 4(2) EU, the Court has developed a settled case-law on the principle of institutional and procedural autonomy prohibiting any interference of the EU into the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals[524]. It falls under the discretion of the member states "to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law"[525]. In that perspective, Poland has some arguments to tackle the EU.

However, under the principle of effectiveness[526], the Court always repealed the obligation of results to achieve EU obligations. The conditions laid down by the domestic norms should not make it "impossible in practice to exercise the rights which the national courts are obliged to protect"[527]. The national judges are obliged to give full effect to EU law in good faith. They must set

522 Art. 5(2) TEU: "*Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States*".

523 Art. 4 (2) TEU: The Union shall respect the national identities of the member states, "*inherent in their fundamental structures, political and constitutional [...] their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order*".

524 Case 33-76, *Rewe-Zentralfinanz eG and ReweZentral AG v Landwirtschaftskammer für das Saarland*, Judgment of the Court of 16 December 1976; Case 39/70, *Norddeutsches Vieh und Fleischkontor c. Hauptzollamt Hamburg St Annen*, Judgment of the Court of 11 February 1971; Cases 205/82 to 215/8, *Deutsche Milchkontor e.a. v. Germany*, Judgment of the Court (Fifth Chamber) of 21 September 1983.

525 Case C-425/16, *Hansruedi Raimund*, Judgment of the Court (Ninth Chamber) of 19 October 2017, paragraph 40 ; Case C-224/01, *Köbler*, Judgment of the Court of 30 September 2003, paragraph 47; Case C-93/12, *Agrokonsulting*, Judgment of the Court (Third Chamber), 27 June 2013, paragraph35; Case C-583/11 P, *Inuit Tapiriit Kanatami*, Judgment of the Court (Grand Chamber), 3 October 2013, paragraph 102.

526 Art. 4(3),TEU: "*The Member States shall 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 Union*".

527 Case 33-76, *Rewe-Zentralfinanz eG and ReweZentral AG*, *supra* note 24;Case 199/82, *Amministrazione delle Finanze dello Stato v SpA San Giorgio*, Judgment of the Court of 9 November 1983.

aside any national law which precludes from granting EU rights[528]. From the *Inuit* Case, the CJEU started to ascertain, on the basis of Articles 19 EU and 47 of the Charter, that in any EU law areas, the member states shall establish "a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection"[529]. That interpretation has been the starting point to reshape the organisation of the judiciary in Poland. The Court states constantly that even if the organisation of justice falls in the competences of the Member States, their obligations to comply with EU law allows a review to respect EU values[530].

2.2 Member states shall establish "court or tribunal" by law

The political control over judiciary in Poland has struggled the concept of a "court or tribunal" established by law. Overall the creation of a new Disciplinary Chamber within the Supreme Court in 2017 has been seen has a serious breach to the independence of the judiciary.

From the *Juizes Portugueses* case, the Court recalls that the EU is based on the rule of law "in which the individuals have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act"[531]. The existence of appropriate national proceedings ensuring an effective judicial protection giving access to an independent "court or tribunal" is the core of the rule of law. The Court has distinguished six criteria to assess whether a body is a 'court or tribunal': the body shall be established by law, permanent, compulsory, independent, the proce-

528 C-213/89, *Factortame*, Judgment of the Court of 19 June 1990, paragraph23; Case 106/77, *Simmenthal*, Judgment of the Court of 9 March 1978, paragraph22.

529 Case C-583/11 P, *Inuit Tapiriit Kanatami*, *supra* note 25, paragraph100; Case C-456/13, *P T & L Sugars*, Judgment of the Court (Grand Chamber) of 28 April 2015 , paragraph 49.

530 Joined Cases C585/18, C624/18 and C625/18, *A. K.*, Judgment of the Court (Grand Chamber) of 19 November 2019, paragraphs 75, 82; Case C-619/18, *Commission v Poland*, Judgment of the Court (Grand Chamber) of 24 June 2019,paragraph 52.

531 Case C-64/16, *Associação Sindical dos Juízes Portugueses*, *supra* note 10, pragraph 31, Case C-216/18 PPU, LM, *supra* note 4, paragraph 49.

dure shall be *inter partes*, it shall apply rules of law[532]. The Court applies those criteria in the different Polish case, such as the *WB and Others* case relating to the criminal proceedings in which the Minister of Justice may second a judge to the higher criminal court for a fixed or indefinite period[533]. Further developments of the concept of "court or tribunal" have been also given in the *BN and Others* case concerning the impartiality of a judge appointed during the communist regime[534].

This first check list enable to qualify a "court or tribunal" established by law.

2.3 Guarantee of independence and impartiality

The changes to the constitutional role of the National Council for the Judiciary in safeguarding independence of the judiciary, the invalidation of the appointments to the Constitutional tribunal, the entitlement of the Minister for Justice as Public Prosecutor giving him an active role in prosecutions and a disciplinary role on presidents of courts and the compulsory retirement of judges have been seen as breaches to the independence of the judiciary.

The Court refers to the principles of mutual trust between member states and mutual recognition to recall that the Union is based the expectation that all the member states comply with EU law and ensure a high level of national protection of the fundamental rights[535]. In the *LM* case, if the surrender of a requested person results in inhuman and degrading treatment, the Court stated that it would then affect the trust between member states. Under the third subparagraph of Article 19(2) TEU, the guarantee of independence of

532 Case C-64/16, *Associação Sindical dos Juízes Portugueses*, *supra* note 10, pragraph 38; Case C-503/15, *Margarit Panicello*, Judgment of the Court (Fifth Chamber) of 16 February 2017, paragraph27.

533 Joined Cases C-748/19 to C-754/19, *WB and Others vs. Prokuratura Krajowa*, Judgment of the Court (Grand Chamber) of 16 November 2021.

534 Case C-132/20, *BN and Others*, Judgment of the Court (Grand Chamber) of 29 March 2022.

535 Case C-64/16, *Associação Sindical dos Juízes Portugueses*, *supra* note 10, paragraph 36; Case C-270/17 PPU, *Tupikas*, Judgment of the Court (Fifth Chamber) of 10 August 2017, paragraph 49.

national courts is interpreted as inherent in the task of adjudication[536]. The judicial functions shall be autonomous, without hierarchical constrain or instruction from any other source. The national courts shall be protected from any external intervention or pressure influencing their decisions[537]. The case law of European Court of Human Rights also points out the requirement of separation of powers that courts shall be independent from the executive and the legislature[538].

The Court is mostly referring to the settled case-law of the ECtHR precising that an independent tribunal includes "the mode of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body at issue presents an appearance of independence"[539]. The ECtHR applies a "subjective test" concerning the personal convictions and behaviour of the judges and an "objective test" to ascertain that the composition of the tribunal itself offers sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality[540]. In the *A.K. and Others* case[541], the Court expressed clearly its doubt on the independence of the National Council of the Judiciary (KRS)in the procedure for the appointment of judges.

On July 15th, 2021, the disciplinary proceedings against judges and courts introduced in Poland through the Disciplinary Chamber of the

536 Case C-64/16, *Associação Sindical dos Juízes Portugueses*, *supra* note 10, paragraph 42; Case C506/04, *Wilson*, Judgment of the Court (Grand Chamber) of 19 September 2006, paragraph 49; Case C685/15, *Online Games and Others*, Judgment of the Court (Second Chamber) of 14 June 2017, paragraph 60; Case C403/16, *El Hassani*, Judgment of the Court (First Chamber) of 13 December 2017, paragraph 40.

537 Case C-503/15, *Margarit Panicello*, Judgment of the Court (Fifth Chamber) of 16 February 2017, paragraph 37.

538 ECtHR, *Ninn-Hansen v. Denmark*, Decision of the Court (Second Section) of 18 May 1999, paragraph 19.

539 ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal*, Judgement of Grand Chamber of 6 November 2018, paragraph144 ; ECtHR, 21 June 2011, *Fruni v. Slovakia*, Judgement of 21 June 2011, paragraph141.

540 ECtHR, *Kleyn and Others v. Netherlands*, Judgement of 6 May 2003, paragraph 191 ; ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal*, *supra* note 39, paragraphs 145, 147 and 149.

541 Joined Cases C585/18, C624/18 and C625/18, A. K., *supra* note 30, paragraph142.

National Council have been qualified as a failure to fulfil EU obligations by the CJEU[542]. After some resistance, the Court has forced Poland to delete the Disciplinary Chambers by a historical order fixing a daily penalty payment of EUR 1,000,000[543]. In the meantime, the Polish government complied with that decision but the new disciplinary system is still criticised. Moreover, in the recent 2022 Report on the Rule of Law, the European Commission is still asking to Poland to separate the function of the Minister of Justice from the Public Prosecutor to avoid any interference of government into the prosecution.

2.4 The irremovability status of the judges

The decrease of the salaries of the judges[544], the compulsory retirement, the change of position... are new tools used by populist governments to exclude judges and substitute them by people close to the government.

As a consequence of the infringements to the guarantees of independence and impartiality, the Court added other criteria that shall be taken into consideration "in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it", which are: the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members[545].

Under a new Polish Act of 8 December 2017, the retirement age of judges of the Polish Supreme Court has been decreased from 70 to 65[546] and overall any litigation relating to the status of the judges of the Supreme Court and their performance of their office, their employment and social security and the

542 Case C-791/19, *European Commission vs Poland*, *supra* note 20..

543 Case C-204/21 R, *European Commission vs. Poland*, Order of the Vice-President of the Court of 27 October 2021.

544 The national salary reduction in the case of 27 February 2018, C64/16, *Associação Sindical dos Juízes Portugueses*, *supra* note 10, was linked to financial crisis.

545 Joined Cases C585/18, C624/18 and C625/18, *A. K.*, *supra* note 30, paragraph 123; Case C-216/18 PPU, LM , *supra* note 4, paragraph 66; Case C-619/18, *Commission v Poland*, *supra* note 30, paragraph74.

546 Ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5) ('the New Law on the Supreme Court'), which entered into force on 3 April 2018.

compulsory retirement fell under the jurisdiction of the Disciplinary Chamber.

In 2019, that legislation has been sanctioned. The Court found that Poland had undermined the irremovability and independence of the judges of the Supreme Court and failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU[547]. In the following months, the *A.K. and Others* case concerning three judges complaining to be forced to retire and lose their status of judges, the Court gave interpretation of Article 47 of the Charter to ensure equal treatments to judges and thus disqualify the compulsory retirements[548]. In the *Repubblika* case[549], the Court gives interpretation of Article 19(1) EU as meaning that a national court can control the conformity of appointment of national judges to EU law.

3. Enforcement of the rule of law in Poland

Qualified by Laurent Pech as the "enforcement cocktail"[550], four main legal and judicial means may be distinguished under EU law proceedings to enforce the Rule of law in Poland: Article 7 EU (1), the action for failure to fulfil EU obligations (2), the action for reference for preliminary ruling (3) and more recently the implementation of the conditionality for the protection of the EU budget (4).

3.1 The unrealistic "nuclear option" against populist regimes

In 2017, in response to the risks to breach EU values in Poland, the European Commission initiated a procedure under Article 7 EU[551], followed by a reso-

547 Case C-619/18, *Commission v Poland*, *supra* note 30.

548 Joined Cases C585/18, C624/18 and C625/18, A. K., *supra* note 30.

549 Case C-896/19, *Repubblika v. Il-Prim Ministru*, Judgment of the Court (Grand Chamber) of 20 April 2021..

550 Pech, L. (2019), *Rule of Law Backsliding in the EU: What Is It and What Must Be Done About It?*, Webinar, 3 April 2019.

551 European Commission (2017), *supra* note 7.

lution of the European Parliament[552]. It however never passed neither the step of the majority of four fifths in the Council, nor the one of unanimity in the European Council.

Article 7 EU is organised in three stages. Firstly, one third of the member states, the European Parliament or the European Commission may ask the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, to determine that there is a clear risk of a serious breach by a Member State of the EU values. Secondly, the European Council shall then act at the unanimity to confirm the "existence of a serious and persistent breach". Thirdly, the Council may take, at the qualified majority, may decide to suspend certain rights to the Member State.

President Barroso rightly qualified Article 7 EU as "nuclear option"[553]. Created at the time of the Amsterdam treaty, this very political process is criticised to be extreme and a top down approach against populist regimes that have been democratically elected. It strengthens the eurosceptical feelings in delivering red cards to member states. It was never applied and can't be as long as at least two states protect each other liker Poland and Hungary.

Notwithstanding, in the *LM* case in 2018, the Court used the initiation of Article 7 EU by the European Commission to authorise a member state to suspend a European Arrest Warrant issued by Poland in so far as "there is a real risk of breach of the fundamental right of fair trial"[554]. Even if the explicit reference to Article 7 EU has not been kept in recent similar cases[555], the Court grounds the refusal to surrender a convicted person on the violation of Article 47 of the Charter regarding the right to a fair trial before an independent and impartial tribunal established by law.

---

552 European Parliament (2018), *Resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland*,2018/2541(RSP), Brussels.

553 José Manuel Durão BARROSO, Barroso, J.M.D (2012), *State of the Union 2012*, Strasbourg 12 September 2012, available at https://ec.europa.eu/soteu2012/.

554 Case C-216/18 PPU, LM , *supra* note 4, paragraph 79.

555 Joined cases C-562/21 PPU and C-563/21 PPU, *X, Y*, *supra* note 4.

3.2 The action for failure to fulfil EU obligations for extreme infringements to the Rule of law

For the first time, the Court judged three consecutive times actions for failure against the same member state to fulfil EU obligations. It considered that Poland failed between 2019 and 2021 by adopting new legislations on the organisation of the national judicial system. The three cases are based on the violation of Article 19(1) EU and Article 47 of the Charter.

Articles 258 to 260 TFEU provide an action for failure to fulfil EU obligations led by the European Commission. After warning the member state, the Commission may adopt a reasoned opinion before taking the case to the CJEU.

The first case concerned the immediate applicability of the decrease of the retirement age of the judges appointed to the Polish Supreme Court and the discretion given to the President of the Republic to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age[556]. In the second case, the Court fixed interim measures requiring from Poland to suspend immediately application of four legislations concerning the Disciplinary Chamber of the Supreme Court, the status of judges, the disciplinary liability of judges and the law on the organisation of the ordinary courts prohibiting them to from verifying compliance with the requirements of the EU[557]. The third one concluded that Poland failed to guarantee the independence and impartiality of the Supreme Court, by allowing the content of judicial decisions to be classified as a disciplinary offence involving judges of ordinary courts, by conferring on the President of the Disciplinary Chamber the discretionary power to designate the disciplinary tribunal in first instance and by not guaranteeing that disciplinary cases against judges od the ordinary courts are examined within a reasonable time[558].

Those actions for failure have shown that they are necessary tools to force the change of national legislation but the political context shows some resistance and attempts to avoid the full respect of CJEU's decisions.

556 Case C-619/18, *Commission v Poland*, *supra* note 30.

557 C-204/21 R, *European Commission vs. Poland*, *supra* note 43.

558 Case C-791/19, *European Commission vs. Poland*, *supra* note 20.

3.3 References for preliminary ruling as saving tool for national courts

Among the long list of reforms of the justice, the Polish government amended the law relating to the organisation of the ordinary courts in a way that prohibits them to verify the compliance of national to the EU law relating to an independent and impartial tribunal previously established by law. Any infringement to that new provision would be subject to disciplinary liability of judges.

In the past years, the Polish courts – paradoxically to the political context – have very much used the references for preliminary ruling to give interpretation to EU law in the national context.

Under Article 267 TFEU, the CJEU has jurisdiction to review the validity and the interpretation of EU law when a question is raised by a national court. The preliminary ruling sets up a dialogue with national courts with "the object of securing uniform interpretation of EU law [and] 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"[559]. In the Polish context, the Court has recalled that the interpretation can only be done within the limits of the powers conferred to the EU[560].

However, national courts have full discretion to refer to the Court. The CJEU stated that a national law cannot prevent that discretion and limit the access to the reference for preliminary ruling[561]. Thus, the Polish law could not preclude a court from which there is no appeal to refer a question of interpretation to the CJEU.

Through such references, for example, the Court has precluded a Polish legislation giving rights to the Minister for Justice to second a judge to a higher criminal court for a fixed or indefinite period[562].

The reference for preliminary ruling is a useful tool in the current Polish political context to force the respect of the rule of law.

---

559 Opinion 2/13 (Accession to the ECHR), Opinion of the Court (Full Court), 18 December 2013, paragraph176.

560 Joined Cases C585/18, C624/18 and C625/18, *A. K.*, *supra* note 30, paragraph 101; Case C205/15, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*, Judgment of the Court (Second Chamber) of 30 June 2016, paragraph22.

561 Joined Cases C585/18, C624/18 and C625/18, *A. K.*, *supra* note 30, paragraph; Case C689/13, *PFE*, Judgment of the Court (Grand Chamber) of 5 April 2016, paragraph32 and 33.

562 Joined Cases C-748/19 to C-754/19, *WB and Others vs. Prokuratura Krajowa*, *supra* note 33.

3.4 Conditionality as a condition to allocate EU subsidies

To prevent members states from potential infringements to EU law, from 2013, the EU has introduced the concept of conditionality to allocate EU subsidies without being expressively linked to the rule of law[563]. As Poland is the largest net beneficiary of EU funds, suspending the EU subsidies may be an effective tool to press Poland to respect the Rule of law.

In 2020, after hard negotiations (Poland, Hungary and Slovenia were opposed to apply conditionality to the multiannual financial framework for 2021-27 and Next Generation EU), the EU adopted a new regulation on a general regime of conditionality for the protection of the Union budget providing suspension, reduction or interruption financial commitments in case of breaches of the principles of the rule of law in three cases: endangering the independence of the judiciary; failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities; limiting the availability and effectiveness of legal remedies[564]. The attempts of Poland and Hungary to annul that regulation in the Court have been dismissed[565].

4. Diplomacy, sanctions or withdrawal?

The current options are tied to the Polish democratic expression. The first

563 Article 6, *Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006*, Official Journal of the European Union, L 347, 20 December 2013. Waelbroeck, M and P. Oliver (2018), *Enforcing the Rule of Law in the EU: What can be done about Hungary and Poland? Part II*, blog droit européen, 9 February 2018, available at https://blogdroiteuropeen.com/2018/02/09/enforcing-the-rule-of-law-in-the-eu-what-can-be-done-about-hungary-and-poland-part-ii-michel-waelbroeck-and-peter-oliver/; Laurent PECH and Kim Lane SCHEPPELE, Pech, L. and K.L. Scheppele (2017), *Illiberalism Within: Rule of Law Backsliding in the EU*, Cambridge Yearbook of European Legal Studies, Vol. 19, 2017.

564 *Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget*, Official Journal of the European Union, L 433, 22 December 2020.

565 Case C-157/21, *Poland vs. EP and Council*, Judgment of the Court (Full Court) of 16 February 2022.

option is to pursue the ongoing pressure based on EU diplomacy and judicial actions. The results after seven years are very much criticised[566]. The second option could be to incorporate in the treaties more detailed criteria on the primacy of EU law and values. The third option would be to amend Article 7 EU to overpass unanimity at the European Council or even to include a member state exclusion procedure in the same spirit as Article 50 EU. The next legislative elections on November 11th, 2023 will be decisive for the EU political and judicial agenda.

After seventy years of construction, the EU is shaping the content of its values and its concept of the rule of law. The unwritten criteria defining each of those values are let to the CJEU, which may be seen again as not being the appropriate body to fix the limits between law and diplomacy in the relation between the EU and the member states. Last flagrant example has been the approval of the €35 billion national recovery plan for Poland by the European Commission on June 1st, 2022[567] and the Council on June 17th, 2022[568]. Despite the lack of good faith from the Polish government, the European Commission "has ceded without any good reason, its crucial leverage vis-à-vis the Rule of Law in Poland"[569]. The four main European organisations of judges have engaged an action for annulment against that decision, considering the EU violates the CJEU's decision to unblock Recovery and Resilience funds for Poland[570]. The saga is far from being over...

566 Pech (2020), *supra* note 1.

567 European Commission (2022b), Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland, COM/2022/268 final, Brussels.

568 *Council Implementing Decision (EU) 2022/1003 of 17 June 2022 authorising the Republic of Poland to apply a special measure derogating from Articles 218 and 232 of Directive 2006/112/EC on the common system of value added tax,* Official Journal of the European Union, L 168, 27 June 2022.

569 Wojciech SADURSKI, Sadurski, W. (2022), *The European Commission Cedes its Crucial Leverage vis-à-vis the Rule of Law in Poland*, Verfassungsblog, 6 June 2022, available at https://verfassungsblog.de/the-european-commission-cedes-its-crucial-leverage-vis-a-vis-the-rule-of-law-in-poland/.

570 International Association of Judges (2019), *Four European organisations of judges sue EU Council for disregarding EU Court's judgements on decision to unblock funds to Poland*, , Press Release, 28 August 282022, available at https://www.iaj-uim.org/iuw/wp-content/uploads/2022/08/PRESS-RELEASE-EN.pdf; Kelemen, R. D. and L. Pech (2019) *The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland*, Cambridge Yearbook of European Legal Studies, Vol. 21, 2019.

12. Rule of law, market and EU integration crisis

Eric Carpano, Professor of Public Law
President of the University Jean Moulin Lyon 3

The crisis of the rule of law in Europe reveals a crisis both of political liberalism, of which it is the legal form, and of integration itself. It also highlights the re-definition of the power of the State in a globalized space in which the exercise of public power is a matter of shared sovereignty between the Member States and the European Union. This crisis is more fundamentally a crisis of the integration model based on the rule of law and the market and raises the fundamental question of democracy and the future of EU.

1. The crisis of the rule of law

In Europe, the rule of law has a special significance. It appears as a standard of European constitutional law, the product of a community of values and set up as a standard of normality, with its roots in the European history of the struggle for the rule of law[571]. It is the result of a reticular construction between the national and supranational levels, made up of cross-fertilizations[572]. The rule of law is both a receptacle of European values and the organizational paradigm of European liberal systems that protects the individual and the legal order itself. In the Union, the rule of law is an axiological (values) and functional (integra-

571 Carpano, E. (2019), *La définition d'un standard européen de l'Etat de droit* , Revue trimestrielle de droit européen, April-June, 2019.

572 A, Slaughter, A-M. (1994), *A Typology of Transjudicial Communication*, University of Richmond Law Review, Vol. 29, Issue 1, 1994.

tion) constraint in that it constitutes the transmission belt of integration. The crisis of the rule of law in Europe is therefore also the crisis of the European project and directly affects the development of integration

Twenty years ago, in the early 2000s, the rule of law was a horizon and an ideal. It was a dynamic that oriented the evolution of legal systems in the Western world towards more control by public authorities and more freedom for individuals (Fukuyama spoke of the End of History and of liberal democracy as the ultimate stage of development of human societies[573]). The post-2001 security laws were just beginning to be adopted but were still the object of reluctance on the part of the majority of the political class, of judicial distrust[574] and of disapproval in public opinion.

Twenty years later, the consensus on the rule of law after the fall of the Berlin Wall is eroded, contested and threatened. From Poland to Hungary, through Italy, Austria, the Netherlands, the United Kingdom, Sweden or France, reactionary, populist, identitarian or xenophobic forces have succeeded in imposing a new anti-liberal agenda that upsets the structures of the rule of law and affects the guarantee of rights. The liberal democracies themselves, divided between a rejection of globalization and an adherence to neo-liberalism, are converting to authoritarian liberalism, which tends to impose an economic liberalism outside of political liberalism.

This crisis of liberal democracy, which undermines the structures of the rule of law, is not confined to Europe. It is a global crisis as Yasha Mounk has shown in his book *The People against Democracy*[575]. It is so because of its origins: globalization of exchanges, dilution of politics, fear of social and economic decline, identity crisis, security crisis, environmental crisis. More fundamentally, we are witnessing a transformation of the forms of domination, a "soft tyranny" (Aldous Huxley) of which datacracy (domination by algorithms and the global exploitation of personal data) is the most contemporary form of

573 F. Fukuyama, Fukuyama, F. (1992), *The End of History and the Last Man*, Free Press, 1992.

574 Case *A and others v. Secrectary of State for the Home department*,UKHL 56, 2004 (hearafter Belmarsh case); Case C-402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, Judgment of the Court (Grand Chamber) of 3 September 2008; Case *Abou Qatada v. The United Kigdom*, No 3455, 05Judgment of ECHR of 17 January 2012.

575 Munk, Y. (2019), *The People vs Democracy. Why our Freedom Is in Danger and How to Save It*, Harvard University Press, 2019

questioning the logic and structures of the rule of law and liberal democracy: domination is no longer simply the work of States, it is now also the work of private groups (Google, Amazon, Facebook, Apple) which can influence the democratic choices of peoples. This crisis of liberal democracy is also global in its effects: the rise of populism and illiberal or authoritarian temptations (Brazil, United States, Hungary, Poland, Turkey, Russia), the multiplication of security laws, the restriction of liberties, etc. The figures of the crisis are thus multiple. Some are direct and immediate and are part of an assumed illiberal approach. Poland and Hungary are assuming a backsliding of the structures of the rule of law and liberal democracy[576]. Others are more indirect and latent and affect most European liberal democracies. Generally speaking, the rule of law has entered a phase of weakening in most Western democracies under the effect of post-2001 security policies, populist pressures on migration policies and the neo-liberal mutations of capitalism that impose a new political and social order. The democracies that claim to be liberal are thus also participating in the weakening of the rule of law[577].

This crisis of the rule of law is therefore global. It also questions the balance between the market and democracy (capital rather than the people[578]) under the effect, in particular, of the opening of markets and the financialization of economies in a global space that is increasingly difficult to regulate. According to Gramsci, the crisis is an in-between; an interregnum: the old order is dying and the new one is not yet born, and in this interregnum all the disturbances are born[579]. We are here, as Balibar points out, between the end of the sovereign nation state and the emergence of a hypothetical post-national sovereignty[580]. And what is at stake in this passage is the regulation of a global capitalism liberated from state borders and the classic democratic controls of the nation

576 Pech. L and K.L. Scheppele (2017),*Illiberalism Within: Rule of Law Backsliding in the EU*,Cambridge Yearbook of European Legal Studies, Vol. 19, 2017.

577 Delmas-Marty, M. (2009), *Libertés et Sûreté les Mutations de L'État de Droit* , Revue de Synthèse, Vol. 130, Issue 3, 2009.

578 Streeck, W. (2013), *Was nun, Europa? Kapitalismus ohne Demokratie oder Demokratie ohne Kapitalismus*, Blätter für deutsche und internationale Politik, Vol. 4, 2013.

579 Gramsci, A. (1996), *Cahiers de prison - cahier 3*, Gallimard, Paris, 1996, at *§34*

580 Balibar, E (2001), *Nous citoyens d'Europe : les frontières, l'Etat, le peuple*, La découverte, Paris, 2001, p. 293

state. This tension is not specific to the EU. It is a strong contemporary trend that is accelerated by globalization[581]. But in the EU, this tension is exacerbated by the very nature of the integration process and the constitutional protection of the market despite the regulatory frameworks that have been put in place. The rule of law has been conceived in this deregulated global space as a bulwark against the questioning of the freedoms of economic operators and as a guarantee of the market order, to the detriment of democratic choices where appropriate. This neo-liberalism is a selective liberalism that breaks with the unity of liberalism and aims at dismantling the welfare state: the state refocuses on the three fundamental functions of security, police and justice, and disengages from other areas of intervention such as solidarity, culture or education. Social rights are the victims of this, whereas they can be seen as the condition for the full enjoyment of rights and freedoms[582]. The logic of the market and competition puts the rule of law at the service of capital (Hayek) and this is not the least of the paradoxes: the rule of law was conceived to protect against the oppression of public authorities; through the rule of law, articulated around an economic constitution in a global space without borders, the market takes advantage of the primacy of economic rights over social rights and of their justiciability in order to impose itself[583]. If Poland has focused the attention of the EU institutions, it is also because the questioning of the rule of law was likely to affect the implementation of EU law and therefore the functioning of the market: the rule of law is the best guarantee of the proper functioning of the market, as Hayek said; the rule of law is the legal form of liberalism and the one that allows the market to unfold with the minimum of hindrance, especially when, in a logic ordoliberal, the market is the object of a constitutional protection. In the EU, this tension is exacerbated by the very nature of the integration process and the constitutional protection of the market despite the regulatory

581 Diamond, P. (2018), *The crisis of Globalization: Democracy, Capitalism and inequality in the Twenty-first Century*, I.B. Taudis, London-New York, 2018.

582 A. Supiot, Supiot, A (2010), *L'esprit de Philadelphie. La justice sociale face au marché total*, Seuil, Paris, 2010.

583 B. Dima, F. Barna & M-L Nachescu (2018) Dima, B., F. Barna and M-L Nachescu (2018), *Does rule of law support the capital market?*, Economic Research-Ekonomska Istraživanja, Vol. 31, Issue 1, 2018.

frameworks in place[584]. This is why the Union has a strong interest in preserving and strengthening the rule of law throughout its territory. Basically, this European model of the rule of law reveals, beyond the legitimizing discourse of values, the modalities of realization of the European project: to domesticate the power of the (member) State, through the market and the law, in the name of integration.

2. Market and integration

The Union was built by the market. It is a political choice of integration, functionalist and carried out in a constitutional mode that sets in stone the economic framework of its development[585]. But the single European market is not simply a technocratic program designed to remove obstacles to the free movement of factors of production and guarantee free and undistorted competition. It is also, at the same time, a highly politicized ethical, ideological and cultural choice that conditions all other EU policies, from research policy to environmental policy. Almost 30 years ago, Foucault had already shown that the rationality of the market is extended to all spheres of society[586]; we are thus witnessing a social extension of the market. This neo-liberalism - "which reconfigures all aspects of existence in economic terms"[587] - is the great victory of capitalism by substituting the class struggle with the competition of everyone against everyone, from workers to social systems, through companies to the States themselves.

From this point of view, the European Union carries a neoliberal project both in its object and in its nature, which redefines the relationship between democracy and the market.

---

584 Wilkinson, M (2019), *Authoritarian liberalism in Europe: a common critique of neoliberalism and ordoliberalism,* Critical Sociology, 2019, at 10.

585 Baquero Cruz, J. (2002), *Between Competition and Free Movement: The Economic Constitutional Law of the European Community*, Hart Publishing, Oxford, 2002.

586 Focault, M. (2004), *Naissance de la biopolitique*. *Cours au Collège de France (1978-1979)*, Gallimard, Paris, 2004, p. 183.

587 Brown, W. (2018), *Défaire le dèmos. Le néolibéralisme, une révolution furtive*, Éditions Amsterdam, Paris, 2018, p. 17.

It is a neoliberal project in its object. To classical liberalism, inherited from free trade, the EU in an ordo-liberal logic also imposes a competitive order. This is a real paradigm shift in relation to classical liberalism: the market is no longer conceived solely in terms of exchanges but also in terms of competition, thus breaking with a form of naturalism latent in liberalism; competition is not a given of nature, it is the result of public interventionism that must ensure its regulation; the regulatory action concerns price stability, the control of inflation, the competitive equilibrium and not redistribution, purchasing power or unemployment. The welfare state is dismissed in favor of the regulatory state[588].

The EU is also liberal in its methods of implementation. Let's remember two of them that are dear to lawyers: the principle of direct effect and the principle of mutual recognition, which have allowed for the multiplication of the effects of negative integration[589]. In *Van Gend en Loos* (1963), the Court of Justice revealed one of the fundamental functions of direct effect: the implementation of Community law is based on the "vigilance of individuals in safeguarding their rights", the Court said. By investing private individuals (who are in reality mostly economic operators and in most cases legal persons) with subjective rights, the Court of Justice plays the economic operator against the State: the State is not only controlled by the institutions, but also by the economic operators who act in their name to ensure that their economic rights enshrined in the treaties are respected; this effect is multiplied by the multiple resources offered to economic operators by Union law to enhance their economic freedom. The mechanisms of private enforcement in competition law that the Commission intends to promote are part of the same process of consolidation of the competitive order from below.

The promotion of the principle of mutual recognition based on the *Cassis de Dijon* case is part of the same logic. In the absence of harmonization of national laws, these are deemed to be equivalent. This principle has the effect of conferring a competitive advantage on those who are established in the country with the least restrictive legislation. Free to establish himself wherever he wishes,

588 Majone, G. (1996), *La Communauté européenne: un État régulateur*, Montchrestien, Paris, 1996.

589 É. Carpano, Carpano, E. (2017), *Retour critique sur la liberté économique dans la jurisprudence de laCour de justice de l'Union européenne*, Annuaire de droit de l'Union européenne, Bruylant, Bruxelles, 2017.

the economic operator - natural or legal person - (but also the citizen or the student) can, in the absence of harmonization, choose the legal, social, fiscal or even academic regime that is most favorable to him[590]. This is how a process of normative competition between States is set in motion: the States respond to this competitive pressure from operators - free to move freely within the Union - by lowering their standards to gain in competitiveness. This is a race to the bottom, known in the United States as the Delware effect, which has developed rapidly in the European Union over the last two decades: social competition and tax competition are the main problems[591].

These different elements are part of a deregulatory dynamic[592] that has been widely used by the EU institutions to compensate for the lack of harmonization or simply of European convergence in the redistributive fields. It also contributes to a depoliticization of integration, where public policy choices are dictated at best by constitutional considerations of a competitive, monetary or budgetary nature, and at worst by the arbitration of the Court of Justice, particularly in the context of proportionality control[593].

3. Democracy, Market and Rule of law

And what about the people? There is no need here to return to the old debate on the democratic deficit, which results from a profound misunderstanding of the process of European integration, which has been thought of and assumed as an integration from below, through competition and law. In Europe, the NO DEMOS thesis, a recurrent discourse of European Studies, contributes to legitimizing the depoliticization of the EU and the promotion of the idea that

590 Saydé, A. (2017), *Freedom as a source of constraint: Expanding market discipline through free movement*, in P. Koutrakos et J. Snell (dir.), Koutrakos, P. and J. Snell (eds), *The Law of the EU's Internal Market*, , Edward Elgar Publishing, Cheltenham, 2017, pp. 34-38.

591 Carpano, E., M. Chastagnaret and E. Mazuyer (2016), *La concurrence réglementaire, sociale et fiscale dans l'Union européenne*, Larcier, Bruxelles, 2016.

592 Deakin, S. (2006),*Is regulatory competition the future for Europe integration?*, Swedish Economic Policy Review, Issue 13, 2006.

593 van Apeldoorn, B. (2009), *The contradictions of "embedded neoliberalism" and Europe's multi-level legitimacy crisis: The European project and its limits*, *in* van Apeldoorn, B., J. Drahokoupil and L. Horn (eds), *Contradictions and Limits of Neoliberal European Governance: From Lisbon to Lisbon*, Palgrave Macmillan, Basingstoke, 2009.

there is no alternative to economic liberalism[594]. For neoliberals and ordoliberals alike, the absence of a collective democratic identity is thus a solution rather than a problem, reducing citizens above all to market consumers. By consecrating the competitive order, the economic constitution in fact consecrates the sovereignty of the consumer. This was the true meaning of the notion of social market economy forged by Muller-Armack, which does not mean a market economy with a social corrective, but a system whose explicit objective was to build a democracy of consumers through competition[595]. An economic constitution not only does not need a *demos*, but it can take advantage of it, precisely because in the absence of social solidarity, the demand for redistribution is contained by competition. With one market and one currency, but several peoples and polities, the demand for redistribution across borders becomes difficult if not impossible. How then to build transnational solidarity in a post-national system?

Globalization or Europeanization transforms class conflicts into international conflicts, setting nations against each other, subject to the same pressure of financial markets for austerity. People are being asked to make sacrifices with regard to the sacrifices of other people. The deregulatory dynamic is all the stronger because it is driven, and this is not the least of the paradoxes of post-modernity, by a fragmented and dispersed superstructure of a polycentric and multi-level EU: on the one hand, a European centralization of financial and monetary policies and, on the other, a national decentralization of the redistribution policies that are dependent on it! In the absence of a strong collective identity and effective/efficient political mechanisms to resolve class conflicts at the supranational level with, at the same time, an imperative need for supranational regulation linked to interdependence, technocratic and expertocratic governance progresses (agenciarization, economic governance, etc.). A new form of authoritarian liberalism would then emerge, which Herman

594 Grande, E. (2000), *Post-National Democracy in Europe*, in Greven, M.Th. and L.W. Pauly (Eds), *Democracy beyond the State?*, Rowman & Littlefield Publishers, Oxford, 2000.

595 Fé**v**re, R. (2018), *Denazifying the Economy: Ordoliberals on the Economic Policy Battlefield (1946–50)*, History of Political Economy, 2018, Vol. 50, Issue 4, 2018.

Heller had already identified in the 1930s[596]. This renewed authoritarian liberalism takes the form of "integration through fear", to use J.H.H. Weiler's expression, with the Thatcherite slogan: *there is no alternative*[597].

Thus, the crisis of the rule of law in Europe is also a crisis of the market and of democracy. It is a global crisis of democratic capitalism in the post-national era that liberal democracies must face. The European Union is no longer the island of peace that was thought to be guaranteed by the market, the rule of law and integration. It is not a question of pleading for the end of the Union but for its refoundation around a true European *polity*. We must reintroduce political and democratic deliberation for greater social justice. Let us not forget that the *Pax Europaea* also owes much to the welfare state, which is a conquest of democracy over capitalism. Let us try not to sacrifice it too quickly on the altar of the market at the risk of seeing the old demons that the European project aimed to contain resurface.

---

596 Wilkinson, M.A. (2018), *Authoritarian liberalism as authoritarian constitutionalism* , *in* Alviar Garcia, H. and H. Frankenberg (eds), *Authoritarian constitutionalism*, Edward Elgar Publishing, Cheltenham/Northampton, 2019, p. 331.

597 Weiler, J.H.H (2012), *Editorial: Integration Through Fear* , European Journal of International Law, Vol. 23, Issue 1, 2012.

13. EU law and contestation

Loïc Azoulai, Professor at Sciences Po Law School

I came to know Jacques Ziller at the European University Institute in the late nineties of the last century. I was a young PhD student keen to brake with his former place (France and French academia) and Jacques was the newly arrived French professor at the EUI. Thus he was at first both a point of attraction and a source of defiance. However, he soon became a point of reference. I attended his seminars full of knowledge, ideas and life. At that time, he impressed me as a true erudite, an approachable person who is curious about everything, and, most strikingly, one of the few legal scholars who is essentially international in character, not in the sense of an abstract universality, but as a mind capable of addressing problems as they arise according to the determination of each language and within each local context. I haven't had so many exchanges with him; I've seen him only occasionally. And, yet, I have been discreetly sharing many important things with him along the years: ideas, concerns, projects. Eventually many things of life entered into our relationships.

Jacques Ziller is the less confrontational person I know. Perhaps for this reason, I should like to take this tribute as an invitation to briefly reflect on forms of contestation in today's Europe, and on whether and how these are reflected in EU law. This is also a way of giving him credit for the unique ability he has to grasp what occurs to us in Europe, giving a shape to the course of events as times are changing.

1. Construction, not contestation

In his piece on *"Interdependence and contestation in European integration"*, Floris de Witte remarks that both terms, interdependence and contestation, are *"closely linked"* in the course of European integration.[598] While the extent of economic, social and cultural interdependence between the Member States is the highest ever seen in European history, and as EU law strives to manage both the positive and negative effects of this in a smooth, peaceful and technical way, social concerns and political contestation arise that EU law is unable to fully contain and internalise. As a result, substantive contestation of EU sectorial policies increases and, if not properly addressed outside of the law, this turns into a systemic contestation of the Union as such. De Witte makes salient the problematic character of European integration as a legal construct.

For years we, lawyers, have been occupied with construction, not contestation. How to establish a special type of relationship between states, a "common framework for action" based on the rejection of the old diplomatic system? How to build a new economic and social order that purports to radically transform domestic orders? How to fashion a legal figure of the "European" unburdened with the identification to a nation's people, able to develop multiple affiliations in diverse societies, cultures and jurisdictions? European lawyers engaged in an order-building enterprise. For the first generation of Community lawyers this primarily meant building the "Common Market" through institutional and judicial means. Then, the meaning of the challenge changed: it was to build a constitutional order extending to ever larger areas of national law and deeper sets of socioeconomic sectors. However, from the outset, it was clear that this enterprise met with inherent contradictions.

How to establish a new institutional order while dealing with strong political actors attached with attributes of State sovereignty as well as social actors rooted in domestic processes of social struggle? How to establish a political society without the support of a unified cultural or social system? How to ensure the authority of a body of law that is not supported by a State, deprived of the state's means of coercion and markers of legitimacy? How to build a

598 de Witte, F. (2018), *Interdependence and Contestation in European Integration*, European Papers, Vol. 3, No 2, 2018, 475.

new transnational socio-economic order that largely depends on the financial resources, the legal and the politico-administrative structures of the Member States? How to develop a genuine programme for the social life of European individuals, assigning them roles, rights and identities matching the EU institutional projects, whilst Union citizens were bound to derive their status from state citizenship? We, European lawyers, have come to realise that these insurmountable contradictions and EU law constructions are one and the same. Our job has been to provide the norms, concepts, and techniques aimed at sustaining a process based on inherent contradictions.

Institutional lawyers as well as legal scholars, interchangeably and perhaps confusingly, have been involved in this.[599] This essentially meant two things. One was to provide the means that would protect the institutional structure from the chaotic terrain of power relationships, social conflicts, and ideological struggles. The other was to provide the means to actively deconstruct the many discords generated by the process of European integration. This boils down to the *dispositif* we have come to know as "EU law": a set of concepts such as the autonomy of EU law and structural principles of EU law, methods such as the teleological method of interpretation and autonomous interpretation of EU law notions, techniques such as the argument from transnational effects and proportionality analysis. Relying on this, EU law and its main agent, the Court of justice, have been able to deconstruct most of the sensitive disputes that arose in the course of integration.

As a grammar for dealing with, and dissolving, political and social conflicts, EU law is based on two basic operations. One is to establish a hierarchy, making the domestic legal orders subordinate to the supranational legal order. The other is to embed the national legal systems into a global European system. The original concept of "integration through law" is hierarchical and holistic in nature. Pescatore acutely conceptualised the European Communities and EC law as forming *"a system, that is to say a structured, organised, finalised whole."* For Pescatore, the Communities' institutions embody an *"idea of order to which participants* – i.e. the Member States as well as the main institutional players of integration – *are ready to subordinate their national interests and their national hierarchy of values."*[600] He presented his analysis as a mere

599 See Leino-Sandberg, P. (2022), *Enchantment and critical distance in EU legal scholarship: what role for institutional lawyers?*, European Law Open, Vol. I, Issue 1, 2022, 231.

600 Pescatore, P. (1974), *The Law of Integration. Emergence of a new phenomenon in international relations, based on the experience of the European Communities*, Leiden, Sijthoff, 1974.

descriptive account of *"the experience of the European Communities"*. But, in fact, it was meant to change the perception of the actors on the ground, forcing the "participants" to adopt an internal point of view as parts of a whole. It was meant to frame the course of European integration. Due to a set of historical circumstances, and thanks to the support of heterogeneous political and social forces, this actually worked, at least within the narrow milieu of Community lawyers. We were trained to view European integration as more than a collection of discrete political units, more than a functional machinery. It was to be seen as the institutional framework and epistemic viewpoint allowing us to frame, assess and govern the situation of states and their nationals from above the fray of interstate relations.[601] This original endeavour still resonates in the not-so distant, and remarkably abstract, statement of the Court of Justice that EU law has established itself as *"a structured network of principles, rules, and mutually interdependent relations linking the EU and its Member States, and its Member States with each other."*[602]

The constructive task is still with us today. But it takes on new forms. Significantly, the terminology has changed. It is no longer about the building of a supranational political and socio-economic "order"; it is all about the maintenance and promotion of a wide range of European "ecosystems" (the internal market, the eurozone or the Area of Freedom Security and Justice considered as "ecosystems"). For once, this is not the result of the so-called "competence creep". It is something more fundamental: the EU's conception of life has broadened. The rhetoric of the "defence of the European way of life" has emerged and developed in response to the migration crisis, the rule of law crisis and the war in Ukraine; a concern for the quality of life and life itself has taken shape as a result of the pandemic and the ecological catastrophe. In a time of catastrophe, the EU cannot content itself with ensuring the provision of transnational public goods (the internal market, the free movement area, the common currency, the common policies...) and the protection of common values (those referred to in Article 2 TEU). It is engaged in enabling the transition to more resilient European societies. As our ontological vulnerability and essential dependency on external resources and actors are more exposed than ever, a new form of interdependence emerges. An inter-

601 Of course, this view has been challenged throughout the history of European integration, mainly by lawyers trained in the tradition of national legal dogmatics and attached to national sovereignty or identity. For challenges coming from a "European" perspective, see van Middelaar, L. (2013), *The Passage to Europe*, Yale University Press, 2013.

602 Opinion 2/13 of 18 December 2014, *Accession of the European Union to the ECHR*, para 167.

dependence not just based on a "principle of congruence";[603] it is interdependence in conditions of adversity: an interdependence based on resilience. The EU is reinventing itself as an "infrastructural" entity, re-orientating its fundamental mission towards the maintenance and development of the essential infrastructures of European societies.[604] This concerns basic ecosystems such as the natural ecosystems (forests, wildlife), but also political and technical systems such as the Member States' healthcare systems and energy networks, the European financial system, the European digital and communication infrastructures. Such a move requires structural policy reforms and high-level financial investments. This is illustrated by the *European Green Deal* and climate transition package, supported by a new huge financial plan (*Next Generation EU*) and the creation of a new fund (*Social Climate Fund*).

2. Forms of contestation

The upshot of this is further interdependence as well as broader contestation. De Witte's point is still valid. Yet, it is even reinforced. What emerges is a broader form of conflictuality that widely affects European societies. Increased interdependencies between Member States and increased mobility of persons, in a context of structural dependency, may be experienced as opportunities by discrete groups of people, but they are seen as a threat to processes of identification (collective identity and personal identity) and processes of socialisation (social integration and protection) by large groups of Europeans. This means that the socio-economic benefits of European integration, which are beyond doubt, are not meaningful any longer. What appears meaningful is the cost of integration. It is of two main kinds. First, there are "social pathologies" associated to European integration: the unfair distribution of benefits generated by it, the dismantling of national welfare states, and the desegregation of political institutions. Second, European integration seems to generate new forms of "social anomies": a destabilisation of ways of life rooted in national societies, a threat to collective identities anchored in the consciousness of cultural majorities, and the ex-

603 See de Witte (2018), *supra* note 1, at 479.

604 See Azoulai, L. (2020), *Infrastructural Europe: EU law and human life in times of the Covid-19 pandemic*, Revista de Derecho Comunitario Europeo, Vol. 66, 2020, 343.

clusion and marginalisation of poor citizens and minorities.[605]

This discomfort with European integration is reflected in three forms of contestation. The first is political contestation. It refers to the defense of a certain idea of the state and the political community. It is often framed in terms of claims based on constitutional national identity. On this basis, constitutional or supreme courts develop specific identity reviews of national law connected to EU law. These jurisprudences reflect the notion that the nation-state is a structure combining political and administrative structures, collective values and basic policy choices, as well as a set of organised social systems (the family structure, the market, the education system, the social protection system...), that is endowed with its own idiosyncratic identity. The most articulated version of this contestation is perhaps the case law of the German Constitutional Court declaring that the EU legal order is a derived legal order and the scope of integration is not unlimited. On this view, the German Court itself is the authoritative guardian of the hard core of German constitutional identity based on democracy and self-determination of the German people.[606] In other words, the German Constitutional Court is not part of a compelling "European whole". The Court of Justice has tried to respond to this concern and form of contestation by adjusting its own analytical framework. This is mainly reflected in the balancing of interests exercise carried out as part of the proportionality analysis. A wide margin of discretion is left to the Member States in defining the interest to be protected and the mode of implementation of that interest when it comes to sensitive issues falling under Article 4(2) TEU and the respect for national identities.[607]

Another form of contestation is cultural in nature. It relies on historical compromises or idiosyncratic political ideology enshrined in specific national provisions. This contestation may have a thick culturalist form. The judgement of the Hungarian Constitutional Court of 7 December 2021 responding to the Court of Justice's case law on

605 See de Witte, F. (2021), The Liminal European: Subject to the EU Legal Order, *Yearbook of European Law*, Vol. 40, 2021, 56.

606 BVerfG, 2 BvE 2/08 of 30 June 2009. See further Ziller, J. (2010), *The German Constitutional Court's Friendliness Towards European Law: On the Judgment of Bundesverfassungsgericht over the Ratification of the Treaty of Lisbon*, European Public Law, Vol. 16, Issue 1, 2010, 53.

607 See Timmermans, C. (2022), *Mediating conflicts between national identities and EU law: the potential of Article 4(2) TEU*, Common Market Law Review, Special Issue, December 2022.

asylum rights is a case in point.[608] In this judgement, the Hungarian Court states that *"the values that make up Hungary's constitutional identity comes into existence on the basis of historical constitutional development, they are legal facts that cannot be waived neither by way of an international treaty not with the amendment of the Fundamental Law."* This is constitutional identity again, but not as a political form. Rather, it refers to the cultural identity of the nation. In the Hungarian Court's words, *"Man, as the most elementary constituent of all social communities, especially the State, is born into a given social environment, which can be defined as man's traditional social environment, especially through its ethnic, linguistic, cultural and religious determinants... If foreign populations permanently and massively remain in the territory of Hungary without democratic authorisation, this may violate the right to identity and self-determination of the people living in Hungary."* It is national identity under the guise of democracy, but in truth as a form of ethno-nationalism. Note, however, that the cultural form of contestation needs not be identitarian in character. A more neutral and liberal version of it is provided by the policy on surnames in Austria that refers back to the historical notion of Republic in this state. Confronted by these sensitive cultural and historical claims, it seems that the Court of Justice's effort is to render inoperative the elements that may look too nationalistic or result in the frustration of EU values and rights. Thus, the Austrian policy on surnames is put on balance and seen as contributing to the equal treatment of citizens in the EU. It is a way, in fact, to turn a cultural claim into a political ground. This effort is deemed to failure when it comes to illiberal claims.

A third kind of contestation is societal or "existential." It is a deeper, broader and often silent form of contestation. It has to do with basic processes of identification and socialisation: ways in which individuals develop their personality in society as well as ways in which social groups construct their identities and interact with each other. It broadly relates to a discomfort experienced by people about their own place in society, in the world, or on earth. It is reflected in political and legal claims carrying ecological

608 Hungary's Constitutional Court, Case X/477/2021, Judgment of 7 December 2021. The Constitutional Court responds to ECJ, Case C-808/18, *European Commission v. Hungary*,Judgment of the Court (Grand Chamber) of 17 December 2020..

concerns, religious concerns, and social or discrimination concerns.[609] Such claims are often raised by people who are vehemently depoliticised and highly polarised.[610] As such they are prone to radicalisation and political instrumentalisation. It makes it very difficult to account for them in EU law terms. There is no clear legal framework for this in the Treaty or in the case law.

It should be noted that these different forms of contestation may well collide, combine or overlap in practice. In the *Coman* and *Pancharevo* decisions of the Court of Justice, claims based on the recognition of sex identity meet claims based on national identity and the preservation of the *"social and cultural cohesion of society"*.[611] In the cases relating to religious discrimination at work, claims based on the recognition of religious identity clash with claims based on national identity and state secularism.[612] In the *Vardyn* judgment, claims based on the recognition of ethnic identity meet claims based on national identity and the state's definition of official language.[613] In these instances, it is striking to note that, while political and cultural claims brought by the Member States are clearly articulated as "identity claims", societal or existential claims made by individuals or social groups are not. Rather, the Court frames these in classic EU law free movement or non-discrimination rights. This indicates a certain reluctance from the Court of Justice to engage in societal conflicts and deep questions about fairness, inclusion and otherness.

---

609 See eg concerning ecological claims based on the defense of basic "living conditions", Case T-330/18, *Armando Carvalho & Others v. Parliament and Council*, Order of the General Court (Second Chamber) of 8 May 2019; claims based on religious practices (ritual slaughter of meat) perceived as "imperative", Case C-336/19, *Centraal Israëlitisch Consistorie van België e.a., Unie Moskeeën Antwerpen VZW e.a.*, Judgment of the Court (Grand Chamber) of 17 December 2020; social claims based on the vindication of "basic needs", Case C-709/20, *CG v. The Department for Communities in Northern Ireland*, Judgment of the Court (Grand Chamber) of 15 July 2021.

610 On the phenomenon of affective polarization in European societies and in the context of Brexit, see Hobolt, S., T. Leeper and J. Tiller (2018), *Divided by the Vote: Affective Polarization in the Wake of Brexit*, American Political Science Association, https://s3.us-east-2.amazonaws.com/tjl-sharing/assets/DividedByTheVote.pdf

611 Case C-673/16, *Coman and Others*, Judgment of the Court (Grand Chamber) of 5 June 2018; Case C-490/20, *Pancharevo,* Judgment of the Court (Grand Chamber) of 14 December 2021.

612 Case C-157/15, *Samira Achbita*, Judgment of the Court (Grand Chamber) of 14 March 2017; Case C-188/15, *Asma Bougnaoui*, Judgment of the Court (Grand Chamber) of 14 March 2017; and Joined Cases C-804/18 & 341/19, *WABE*, Judgment of the Court (Grand Chamber) of 15 July 2021.

613 Case C-391/09, *Vardyn*, Judgment of the Court (Second Chamber) of 12 May 2011.

3. Negotiating the non-negotiable

A highly conflictual pattern of relationships among and within European societies seems to be emerging, and its form is, in large part, a legal one. As a result, EU law is confronted to a new language and approach that reject the traditional language and arguments of EU law framed in terms of rights and balancing. It is a language filled with statements such as, *"our way of life is a distinctive one; it is not up for negotiation"*. It is an approach that considers that fundamental interests cannot be made subject to a balancing against other legal interests.

A good illustration of this is the approach recently taken by the French Conseil d'État in the context of the debate on the collection and retention of personal data for security and criminal investigation purposes.[614] This is a highly contentious issue for many Member States. In this case, the Conseil d'État decided to break with its previous case law that basically consisted in accepting to review the constitutionality of a state measure based on EU law only if no equivalent standard of protection existed at the EU level. The French Court used to work on the assumption that it shared common values and common objectives with the Court. However, in the case discussed, it changed its approach. It may be because national security was at stake. As a matter of fact, the French governmental authorities were upset with the case law of the Court on personal data that they considered too protective of individuals and clearly inadequate in operational terms. For the first time ever, the French government suggested a French court an ultra vires review. The Conseil d'État rejected this option.[615] However, it agreed on substance with the government. In its view, the Court's case law on data protection should be reconsidered in light of "the objectives of constitutional value" guaranteed in France.[616]

To be clear, the Conseil d'État assumes that its divergence with the Court of Justice is not simply a matter of diverging interpretation. It is the fact that

614 Conseil d'Etat, 21 April 2021, *La Quadrature du Net,* No 393099. The Conseil d'Etat follows up on the Judgment of the Court (Grand Chamber) of 6 October 2020 inJoined Cases-511/18, C-512/18 and C-520/18, *La Quadrature du Net*..

615 See further Ziller, J. (2021), *The Conseil d'Etat refuses to follow the Pied Piper of Karlsruhe*, Verfassungsblog, 2021/4/24, available at https://verfassungsblog.de/the-conseil-detat-refuses-to-follow-the-pied-piper-of-karlsruhe

616 See further Azoulai, L. and D. Ritleng (2021), « *L'État, c'est moi* ». *Le Conseil d'État, la sécurité et la conservation des données*, Revue trimestrielle de droit européen, Vol. *l. 2,* 2021, 349.

there can be no equivalent protection at the EU level. For, according to the French court, the Court of Justice lives in a world where only fundamental rights matters. In its specific position, the European Court cannot comprehend the state's concern for national security. As a result, the two Courts are deemed to develop distinct points of views about the same realities; these points of view are structurally determined: they are, per force, not reconcilable. This amounts to what may be called a "non-pluralist" or "conflictualist" approach to EU law. This is conflictualism in lieu of pluralism.

Make no mistake. It does mean that the Conseil d'État is willing to break with European integration. It remains open to the process of integration and towards EU law. This is not a form of legal exit. This is a new way to protect state's interests. The Conseil d'État relies on "statehood" and "national security" not as political forms but as structural and existential elements, the conditions for protecting the French population against a polymorphous threat coming from terrorists, extremists, or foreign intruders. This approach assumes a form of separation with EU law. More importantly, there is no prospect for convergence. There is the notion that the EU and its law are structurally incapable of ever meeting the state or society's desire to protect individual and social identities. Arguably, in *Weiss*, the German Constitutional Court broadly relies on a similar argument. German citizens are structurally threatened by EU monetary policy as interpreted by the Court of Justice in its case law.[617] The reasoning of the Court of Justice is "simply not comprehensible": it is unable to apprehend the notion of political community and the necessity to protect it.[618]

If conflictualism is the "new normal" in the EU legal space, and reaches well beyond the case of illiberal states, then the issue is: how to respond to it? If not just state's claims but religious, social, and ecological claims by social groups are presented as imperative and "non-negotiable", how to make these claims negotiable again in a transnational context? This seems to me the problem with which we are struggling now.

---

617 2 BvR 859/15 of 5 May 2020. This is a reaction to Case C-493/17, *Weiss e.a.*, Judgment of the Court (Grand Chamber) of 11 December 2018.

618 See further Haltern, U. (2021), *Revolutions, real contradictions, and the method of resolving them: The relationship between the Court of Justice of the European Union and the German Federal Constitutional Court,* International Journal of Constitutional Law, Vol. 19, Issue 1, January 2021, 208.

4. "European society must be defended"

Under the pressure of external and internal challenges, crises and threats, the Union has recently evolved into a more complex and contested entity. This poses new challenges to EU law, and EU lawyers. The Court of Justice's reaction to this has hitherto been twofold. On the one hand, it has reasserted the basic foundations of the EU legal order, taking refuge in its underlying values and structural principles. On the other hand, it has developed a new concept of "identity of the European Union" and a new concept of "European society".

The first reaction is clearly discernible in the context of the rule of law crisis. In this context, the Court of Justice reinstates its traditional stance on the authority and legitimacy of EU law. The primacy of EU law is provided with a new substantive justification, beyond the instrumental notion of effectiveness of EU law; it is now referred to as a guarantee of the equality among Member States in the Union.[619] More importantly perhaps, faced with the threats on the independence of the judiciary, the Court of Justice not longer shies away from vesting national courts with the power to change their own mandate, allowing them to create a new remedy.[620] The traditional strict separation of EU and national jurisdictional functions is set aside, in a context where the separation of powers within the state is not respected. The Court empowers "friendly" liberal judges operating in illiberal states, by giving them a special power of coercion against the state. Moreover, it reasserts the EU values and rights but in a way that makes them "immutable" values (the independence of the judiciary) and "essential" rights (the right to effective judicial protection), the core of which must not be affected.[621] EU values and rights are not negotiable. This is an authoritative way to deal with disturbing forms of contestation, but one that exposes the Court to challenges concerning illegitimate intrusion into purely internal matters and insensitivity to sensitive local issues.

---

619 See Lenaerts, K. (2022), *La primauté du droit de l'Union et l'égalité des Etats membres devant les traités*, in Dubout, E. (2022), *L'égalité des Etats membres de l'Union européenne*, Larcier, 2022.

620 See eg Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS*, Judgment of the Court (Grand Chamber) of 14 May 2020; Case C-487/19, *W.Ż.*, Judgment of the Court (Grand Chamber) of 6 October 2021.

621 See eg Joined Cases C-585/18, C-624/18 & C-625/18, *A.K.*,Judgment of the Court (Grand Chamber) of 19 November 2019.

The other reaction is to put forward new legal concepts. This may be observed in relation to external contestation and threat. The concept of "European society" has emerged in relation to the implementation of EU sanctions against broadcasters such as *Russia Today France* (RTF) whose action in support of the aggression against Ukraine has been considered as a direct threat to the Union's public order and security. RTF challenged those sanctions before the General Court and applied for interim measures. In its ruling, the President of the General Court stated that the interests of protecting the Union and its Member States against disinformation and destabilization campaigns amount to *"public interests aimed at protecting European society."*[622] In the judgement on the substance of the case, this is reiterated.[623] We are thus witnessing a "Europeanization" of the concept of society that the Court developed in its Union citizenship case law.[624] This means no less than *"society must be defended"*, as in Foucault's words.[625] European society must be defended against a transnational cultural power, *Russia Today*, that puts itself at the service of a third country authoritarian regime which subjugated it. But what exactly is to be defended? It is about the *"foundations of democratic societies"*. It is defined in terms of ethical principles and values. It is the society of Article 2 TEU *"in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail"* and which is characterized by *"respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities"*.[626]

This conception echoes the recent Court's judgments on the validity of the rule of law conditionality Regulation.[627] In these judgments, the Court confirms that the

622 Case T-125/22 R, *RT France v. Council*, Order of the President of the General Court of 30 March 2022, para 61 (my translation from the original French version).

623 Case T-125/22, *RT France v. Council*, Judgment of the General Court of 27 July 2022 – RT France v Council, para 55.

624 See Editorial comments (2022), *The response to the war in Europe: A more power based EU and the challenge of ensuring that it remains rule and value based*, Common Market law Review, Vol. 59, Issue 1, 1.

625 Foucault, M. (2003), *"Society must be defended". Lectures at the Collège de France 1975-1976*, Picador, 2003.

626 On this understanding of European society, see von Bogdandy, A. (2021), *Our European Society and Its Conference on the Future of Europe,* Verfassungsblog, 2021/5/14, available at https://verfassungsblog.de/our-european-society-and-its-conference-on-the-future-of-europe/

627 See Case C-156/21, *Hungary v. Parliament and Council*, Judgment of the Court (Full Court) of 16 February 2022, and Case C-157/21, *Poland v. Parliament and Council*, Judgment of the Court (Full Court) of 16 February 2022.

Regulation is valid: the effective protection of the Union's financial interests presupposes the respect of the rule of law. As a way to support this, it states that *"the values contained in Article 2 TEU (...) define the very identity of the European Union as a common legal order"*. It then draws what seems to be the natural consequence of that statement: *"the European Union must be able to defend those values"*. There is a need to defend the EU's fundamental values against external threats; but there is also a need to defend these values against internal threats, i.e. illiberal practices of Member States' authorities.

5. Conclusion

By putting forward concepts such as the "European society" and the "identity of the European Union", the Court is drawn to suggest that there are practices within the EU that develop outside the "common legal order". The risk with this reaction is that of further contestation and polarisation. It projects an appearance of domination onto the EU legal and social space. In my view, this is not problematic in the context of attacks against democracy and the independence of the judiciary. Abstract liberal values are well suited to the protection of democratic forms of life. However, it may be a problem when it comes to other forms of contestation and genuine social conflicts. A value-based conception of society inevitably carries with it preconceptions about how to live together, who should be part of the social fabric and who should not. By balancing the vindication of idiosyncratic religious, social and ecological claims against the protection of broad European values (animal welfare, religious neutrality...) or the safeguarding of grand ecosystems (the integrity of "the euro area as a whole", the model of "a fair and prosperous society"...), the risk is to neutralise the practices of ordinary people, be they part of minorities or cultural majorities, marginalising them, disconnecting them from their specific form of contestation and inner source of normativity. We, European lawyers, treasuring the values that have found shelter in post-war European institutions, should be ready to pose a question such as: is the legal framework we have developed so far really reflecting Europeans' existential and social concerns that present themselves as non-negotiable, a legal framework that allows to make them negotiable again, to bring them to terms, without, however, yielding to radical identity claims prone to regression and fragmentation in European society?

This question will stand with us, I guess, as long we remain unable to contemplate a European society based on EU law not just through the lens of construction, regulation and values but also in terms of contestation, social practices and mere forms of existence.

2. Some thoughts on comparative law

14. Cambiamento istituzionale e organizzativo: verso un approccio multidimensionale

Giacomo Balduzzi, Università di Salerno

1. Premessa

Ho conosciuto il prof. Jacques Ziller nel 2010, quando entrai come studente nella scuola di dottorato in "Istituzioni, Amministrazioni e Politiche Regionali" (IAPR), di cui divenne coordinatore. Quel percorso di studi e ricerche era caratterizzato da uno spiccato taglio multidisciplinare, poiché in esso confluivano giuristi, economisti, storici, sociologi e politologi. Da quella esperienza ho imparato un modo di guardare all'amministrazione e al suo governo da diverse angolazioni. Su queste strade – a volte tortuose, ma sempre stimolanti – Jacques Ziller non ha mai smesso di camminare con me e con altri ex studenti del dottorato IAPR[628].

628 A tal proposito credo sia opportuno citare l'esperienza del Modulo Jean Monnet *Understanding The European Public Administration: New Challenges*, del quale egli è stato coordinatore scientifico e la dott.ssa Monica *team leader*. Un volume collettaneo rielabora e presenta i risultati di quel percorso di ricerca: Monica, A. and G. Balduzzi (eds.) (2019), *Governare il cambiamento istituzionale e organizzativo nelle amministrazioni europee*, Pavia University Press, Pavia, 2019. Le conclusioni al volume sono a cura dello stesso Jacques Ziller.

In questo contributo provo a riassumere gli esiti di alcune riflessioni comuni e le domande aperte per futuri percorsi di ricerca rispetto al tema del cambiamento istituzionale. Quest'ultimo non può e non deve essere disgiunto, né in chiave analitica né in chiave operativa, dal cambiamento organizzativo e quindi dall'ambiente sociale, economico e culturale di riferimento. Quest'ultimo aspetto apre alla delicata problematica del "contesto", concetto per sua natura eccessivamente vago e sfuggente per essere considerato in qualsiasi modello teorico. Per questa ragione nell'ultimo paragrafo proverò a ricollegare le questioni sollevate, riferite al cambiamento istituzionale e organizzativo, al problema della complessità e della multidimensionalità del contesto sociale, avvalendomi di una rilettura del territorio come processo di istituzionalizzazione riflessiva.

Il tema del cambiamento degli ordinamenti sociali, politici e giuridici è oggi più che mai incalzante e stimolante, vista l'enorme accelerazione delle diverse tendenze al cambiamento verificatasi in tutto il mondo a seguito della pandemia globale di Covid-19 e delle drammatiche conseguenze sociali, economiche e politiche da essa derivate, ulteriormente acuitesi anche a causa della crisi geopolitica innescata dall'invasione dell'Ucraina da parte dell'esercito russo.

Le istituzioni pubbliche sono sfidate da processi di trasformazione di vasta portata. Tra questi vi è il fenomeno delle comunicazioni che sovrastano i territori e non possono essere tenute completamente sotto controllo dagli stati e dagli enti pubblici. Il potere di regolazione si distacca da uno specifico spazio, persone e istituzioni si trovano a confrontarsi con una nuova dimensione, che viaggia nell'istantaneità senza tempo e nella simultaneità senza luogo, quella dell'infosfera, sempre più popolata da agenti intelligenti non soltanto umani, in continua e permanente connessione tra loro. In questo quadro, assistiamo da decenni a una progressiva mutazione del ruolo, della struttura e dell'ordinamento degli stati, immersi in maniera crescente in reti sovrastatali. Il ruolo e la capacità regolativa degli stati appare, altresì, indebolito dalla progressiva concentrazione di potere economico, politico e informativo da parte delle grandi piattaforme digitali private, le quali hanno aggirato qualsiasi regolazione politica rivolgendosi direttamente ai consumatori mondiali, dai quali traggono la preziosa materia prima rappresentata dalla conoscenza dei loro dati personali. Queste grandi imprese da un lato rappresentano un potere sempre più

abnorme e autonomo rispetto agli stati, dall'altro assomigliano sempre più esse stesse a superstati transnazionali.

In un simile contesto, accanto a una moltiplicazione delle fonti normative provenienti dai vari livelli sovranazionali, ma anche dalle autonomie regionali e locali, sono in corso tentativi di ridefinizione del legame politico, con l'emergere di nuove forme di partecipazione ed esercizio della cittadinanza che 'sfidano' le tradizionali sedi della rappresentanza, in evidente crisi di effettività e legittimazione[629].

Al fine di affrontare con sguardo rinnovato i fenomeni emergenti, nei prossimi paragrafi torneremo ai fondamentali delle istituzioni e delle organizzazioni per elaborare e offrire alla discussione un possibile percorso teorico e analitico che consenta di leggere e interpretare il cambiamento nelle amministrazioni pubbliche ai vari livelli delle strutture operative, gestionali e di governo.

2. Istituzioni e organizzazioni

La cosiddetta 'nuova economia istituzionale', portata alla ribalta nelle scienze sociali a partire dagli anni Novanta, enfatizza, com'è noto, il ruolo delle istituzioni come 'regole del gioco' che, generate da un processo politico, costituiscono un sistema di vincoli e opportunità in grado di plasmare e stabilizzare le interazioni tra gli attori sociali, riducendo l'incertezza e le asimmetrie[630].

Il modello teorico consente di ibridare tra loro il filone dell'individualismo metodologico e l'approccio istituzionale. Nel quadro disegnato da questo modello, infatti, le istituzioni condizionano negativamente e positivamente l'azione sociale e le interazioni, influenzano le funzioni di preferenza e strutturano i giochi strategici in modo da creare un sistema di vincoli che limita l'azione volontaria, senza però determinarne né i contenuti né gli esiti[631].

Proprio per questo motivo, in tale chiave teorica, le istituzioni corrispon-

629 Di rappresentanza «sfidata» da diverse forme e strumenti di democrazia partecipativa si parla in Luciani, M. (2016), *Funzione di controllo e riforma del Senato*, Rivista AIC, Vol. 1, 2016, pp. 1-5, at 5.

630 North, D. (1990), *Institutions, institutional change and economic performance*, Cambridge University Press, Cambridge, 1990, at 3; Knight, J. (1992), *Institutions and Social Conflict*, Cambridge University Press, Cambridge, 1992, at 2.

631 Sul punto si rinvia a Parri, L. (1996), *Le istituzioni in sociologia ed economia: «hic sunt leones»?*, Stato e mercato, Vol. 46, No. 1, 1996, pp. 123-155, at149.

dono, per utilizzare la metafora di Douglass North, alle 'regole del gioco', le organizzazioni ai 'giocatori'[632]. Nel primo gruppo si ricomprendono sia le norme formali – come le costituzioni, le leggi, gli statuti, i regolamenti – sia quelle informali – come codici di condotta, norme di comportamento e convenzioni. Nel secondo gruppo, invece, sono da includere i partiti politici, le aziende, le agenzie statali, le associazioni sindacali e imprenditoriali. I giocatori sono individui e organizzazioni che agiscono all'interno di un determinato assetto normativo e, al tempo stesso, tentano di modificare le regole a proprio vantaggio attraverso vari processi di contrattazione e conflitto politico.

L'approccio funzionalista che vede le istituzioni come regole non è privo di qualche vantaggio analitico: studiando le regole possiamo comprendere meglio gli interessi e le esigenze dei loro creatori. Tuttavia, alcuni studiosi hanno segnalato che concependo le istituzioni al pari di '*politically devised rules*' si tende a interpretare il loro cambiamento come il risultato meccanico di un processo esogeno, trascurando le dinamiche endogene di evoluzione e trasformazione dei sistemi[633].

Le regole e i contratti possono risultare più o meno efficaci in base alle scelte degli individui, che possono ignorare le prescrizioni di comportamento ivi contenute. Le regole hanno un impatto se le persone sono motivate a seguirle, sulla base di aspettative, credenze e norme interiorizzate dagli individui. Queste ultime si costruiscono attraverso pratiche, relazioni e interazioni tra attori, all'interno di organizzazioni e reti interorganizzative che, a loro volta, sono anch'esse governate da sistemi di regole formali e informali.

Ne consegue che le istituzioni non sono regole, ma «sistemi di regole che si auto-applicano e, al tempo stesso, credenze, norme e organizzazioni»[634]. Tale definizione ci spinge a pensare le dinamiche istituzionali in un'ottica multidimensionale, tenendo conto delle interrelazioni strettissime tra sistema delle regole, sia formali sia informali, e processi di cambiamento organizzativo. Le organizzazioni hanno una duplice natura, sono componenti delle istituzioni

632 North (1990), *supra* note 3, pp. 4-5.

633 Si vedano Greif, A. (2006), *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade*, Cambridge University Press, New York, 2006; Nee, V. and S. Opper (2010), *Endogenous Institutional Change and Dynamic Capitalism*, Sociologia del lavoro, Vol. 118, No. 1, 2010, pp. 15-39.

634 Greif (2006), *supra* note 6, at402.

e costituiscono le istituzioni. Per studiare l'impatto del sistema legale, infatti, dobbiamo esaminare anche le regole, le credenze e le norme che generano il comportamento tra i membri delle organizzazioni che le formano e tra essi e altri. Le organizzazioni sono dunque elementi delle istituzioni nei confronti della transazione centrale in esame, ma sono anche istituzioni - sistemi di regole, credenze e norme esogene per ogni individuo di cui influenzano la condotta - che generano comportamenti tra i membri dell'organizzazione[635].

In una simile prospettiva, tra le tante possibili cause di cambiamento istituzionale, si possono individuare almeno due tipi principali[636].

Il primo consiste nel tentativo intenzionale di determinare il cambiamento da parte di coloro che ne traggono, o almeno sperano di trarne, benefici. Questo tipo di cambiamento istituzionale può derivare dalla percezione di nuove opportunità, in seguito a processi di apprendimento e relazioni esterne. Il tentativo di introdurre nuove regole e procedure comporta la necessità di superare l'opposizione da parte di coloro che ritengono di poter essere danneggiati dal cambiamento.

Il secondo tipo di cambiamento istituzionale è dato da mutamenti graduali nel tempo che provengono dall'interno, dal disequilibrio generato da un'istituzione che cessa di essere efficace. In questo caso il mutamento delle credenze, delle aspettative e delle prassi a livello di rapporti interpersonali e organizzativi anticipa e precede le risposte istituzionali, le quali possono essere più o meno graduali a seconda di quanto gli attori sono consapevoli del processo di cambiamento. La trasformazione degli orientamenti condivisi e dei modelli di comportamento degli attori si rafforza traducendosi in nuovi schemi e pratiche organizzative (o, in alcuni casi, anche nuove organizzazioni), che possono diventare nuove istituzioni. Lo storico dell'amministrazione Fabio Rugge descrive le dinamiche attraverso le quali la sfera del governo politico fa proprie e/o ricalca le forme di auto-organizzazione della società proprio attraverso simili meccanis-

635 *Ibid*, at 31 and 50.

636 Questa distinzione è ripresa da Greif, A. and C. Kingston (2011), *Institutions: rules or equilibria?*, in Schofield, N. and G. Caballero (eds.), *Political economy of institutions, democracy and voting,* , Springer, Heidelberg, Berlin, 2011 pp. 13-43, at 39 and40.

mi di 'sovrapposizione e sussunzione'[637], attraverso i quali si realizzano molti processi di istituzionalizzazione che ci consentono osservare nel concreto il complesso rapporto tra istituzioni e società.

Gli elementi di continuità e discontinuità, così come le spinte e le resistenze presenti nei processi di cambiamento nelle amministrazioni, dunque, sono influenzati dalle dinamiche sopra richiamate e dai modelli di comportamento, a loro volta influenzati dalle relazioni interpersonali e dalle motivazioni degli attori che si formano all'interno delle organizzazioni e delle reti interorganizzative.

Al fine di chiarire più a fondo tali processi e la chiave di lettura unificata del cambiamento istituzionale e organizzativo, nel prossimo paragrafo tenterò di tracciare la definizione e l'interpretazione teorica che si intende proporre in questa sede, per poi dedurne alcune implicazioni pratiche con riferimento alle problematiche relative alle recenti trasformazioni delle pubbliche amministrazioni accennate in premessa.

3. Le dinamiche istituzionali del cambiamento organizzativo

La locuzione 'cambiamento organizzativo', nel suo significato generale, indica il processo che trasforma, rende diversa l'organizzazione in tutti o molti suoi aspetti, strutturali e relazionali[638].

Il tema del cambiamento si intreccia con quello della complessità dei sistemi organizzativi, composti da processi operativi, relazioni sociali, normative e di potere, culture, linguaggi, tecnologie, autorità, gerarchie, sistemi di coordinamento e controllo, divisione del lavoro, cooperazione, reciproco apprendimento e scambio di conoscenze.

Nello stesso tempo, se da un lato il cambiamento di una singola organiz-

637 Rugge, F. (1989), '*Provincia oeconomica'. Riflessioni sull'identità istituzionale del territorio trentino in età contemporanea,* in Schiera, P. (ed.), *1948-1988. L'autonomia trentina. Origini ed evoluzione tra storia e diritto*, , Consiglio della Provincia Autonoma di Trento, Trento, 1989, pp. 79-100, at 88.

638 Rebora, G. (2016), *Il cambiamento organizzativo: una visione integrata*, in Rebora, G. (ed.), *Il Cambiamento Organizzativo. Pratiche, competenze, politiche*, ESTE, Milano, 2016, pp. 15-57; Butera, F. (2016), *Il change management strutturale: approccio, metodi e casi*, in Rebora, G. (2016), *supra* note 11, pp. 59-82.

zazione pubblica è molto influenzato, nel bene o nel male, dal sistema delle istituzioni in cui è inserito, dall'altro i cambiamenti istituzionali e di sistema possono incontrare problemi di attuazione proprio al livello delle organizzazioni nelle quali poi in concreto vengono implementati e gestiti.

Nello specifico contesto delle pubbliche amministrazioni il cambiamento può innestarsi in tre diversi ambiti: 1) l'assetto istituzionale, che regola gli aspetti generali di funzionamento dei settori pubblici e delle loro organizzazioni; 2) le strutture organizzative dell'amministrazione, che ricomprendono l'articolazione degli uffici e delle specifiche modalità del loro funzionamento; 3) l'assetto manageriale e le modalità operative e di controllo, che amministrano singoli processi, protocolli e procedure.

La tripartizione di questi tre ordini (o livelli) della pubblica amministrazione ci consente di analizzare alcuni dei molteplici intrecci che legano il cambiamento istituzionale e il cambiamento organizzativo.

In genere si pensa di introdurre cambiamenti nelle pubbliche amministrazioni attraverso la modifica, deliberata e intenzionale, di un insieme di norme di riferimento che regolano finalità, assetti gerarchici e procedure operative delle organizzazioni pubbliche, mediata e indotta da un processo politico. Questo schema è valido sia per quanto riguarda i cambiamenti più ampi e radicali, in genere definiti 'riforme', sia per i cambiamenti più incrementali, quotidiani, nelle pubbliche amministrazioni, sovente frutto di input d'indirizzo e coordinamento che vengono introdotti attraverso circolari del Ministero competente, oppure dai dirigenti, magari in seguito a suggerimenti da parte di agenzie di valutazione o consulenza.

Non è difficile intravedere, in questo modo di concepire le innovazioni nel sistema pubblico, l'influsso del modello di cambiamento istituzionale esogeno, ispirato alla metafora delle regole del gioco, presentato e discusso precedentemente in questo contributo.

In tale logica, come abbiamo visto, il cambiamento è la conseguenza di una modifica del quadro regolativo o dell'introduzione di nuove regole ed è visto, più che altro, come un processo di adattamento, nel corso del quale gli attori e le organizzazioni adeguano i propri comportamenti, pratiche, procedure al nuovo assetto istituzionale.

Una simile visione del cambiamento istituzionale porta, assai spesso, a

uno scarto eccessivo tra la riforma, così come pensata dall'attore di governo e la gestione del cambiamento organizzativo delle singole amministrazioni.

Il modo di progettare e gestire modifiche degli assetti istituzionali ha conseguenze su tutti gli aspetti che caratterizzano un percorso di cambiamento, quali il contesto, il contenuto, i processi e i risultati. Per questo, se una riforma impone in una logica *top-down* determinati comportamenti alle organizzazioni, il rischio concreto è quello che si possano creare situazioni di blocco, inerzia o addirittura il fallimento del processo di cambiamento istituzionale inizialmente pianificato.

Quanto visto finora sfida le pubbliche amministrazioni e le pone di fronte alla prova della complessità: come progettare, introdurre e gestire cambiamenti istituzionali, anche radicali, in un contesto in rapida trasformazione, nel quale i livelli e le fonti normative si moltiplicano, i sistemi organizzativi si fanno sempre più articolati e frammentati e, per di più, vi sono sempre più elementi che suggeriscono una progressiva erosione del legame di fiducia tra i cittadini e le pubbliche amministrazioni?

Una prima risposta a questa domanda è avanzata dai modelli partecipativi, che hanno tentato di proporre nuove modalità di pensare, progettare e gestire i processi di cambiamento istituzionale, pensandoli in maniera diversa e, almeno in parte, alternativa alla logica delle riforme *top-down*.

La logica delle riforme fa sì che il cambiamento organizzativo nella pubblica amministrazione sconti spesso problemi di consenso e legittimazione tra coloro i quali dovrebbero poi realizzare le innovazioni nella pratica.

Per questa ragione da più parti, negli ultimi decenni, è stata richiamata l'importanza della partecipazione nella progettazione e nella gestione del cambiamento organizzativo[639]. Quando si parla di approccio partecipativo, soprattutto da parte di studiosi ed esperti di management, ci si riferisce normalmente al coinvolgimento e alla partecipazione diffusa dei membri di un'organizzazione alle fasi di pianificazione e attivazione del cambiamento, opposto a un approc-

639 Bennis, W. (2000), *Leadership of change*, in Beer, M. and N. Nohria (eds.), Breaking the Code of Change, , Harvard Business School Press, Boston, 2000 pp. 113-122; Conger J.A. (2000), *Effective change begins at the top*, in Beer and N. (eds.), *supra* note 12, pp. 99-112; Dunphy D.C. (2000), *Embracing the paradox: Top-down versus participative management of organizational change: a commentary on Conger and Bennis*, in Beer and Nohria (eds.), *supra* note 12, pp. 123-136.

cio *top-down*, che attribuisce solo al vertice la visione, la conoscenza e il potere necessari a pianificare e controllare l'esecuzione dei processi di cambiamento organizzativo.

Numerosi studi empirici hanno individuato proprio nella debolezza della partecipazione e nel basso coinvolgimento del personale uno tra i problemi più rilevanti nell'applicazione dei progetti di innovazione e modifica degli assetti organizzativi. Imporre dall'alto nuovi modelli di comportamento, procedure, modalità di allocazione delle risorse e controllo dei processi operativi non sembrerebbe il metodo più efficace per una corretta implementazione delle riforme e delle innovazioni organizzative. In quest'ottica, progettare il cambiamento significa anche mettere in atto iniziative che favoriscano la partecipazione e lo scambio collaborativo di informazioni e conoscenze tra tutti gli attori coinvolti nel processo di trasformazione organizzativa.

Modelli meno gerarchici e prassi di gestione più aperte e partecipate, peraltro, sono stati spesso enfatizzati all'interno dei principi-chiave e soprattutto, delle retoriche che hanno ispirato formule come quelle del 'New Public Management' e della 'Public Governance', che hanno guidato la trasformazione delle organizzazioni statali e dei servizi pubblici negli ultimi decenni[640]. Per questa ragione, diverse voci critiche in tempi recenti hanno argomentato che principi e prassi della partecipazione, a dispetto di quanti ne enfatizzano le potenzialità trasformative e di democratizzazione dei processi decisionali, abbiano in realtà, paradossalmente, favorito e sostenuto la stabilizzazione di un disegno di stampo neoliberista orientato alla *deregulation*, al progressivo svuotamento della sfera pubblica e allo smantellamento di beni e servizi essenziali[641].

Alain Deneault mostra, riferendosi in particolare al caso della *governance*, su come concetti seducenti e apparentemente innocui possono essere riletti come formule volutamente vaghe, che celano dietro alla loro indeterminatezza semantica la volontà di scardinare il vecchio contratto sociale e 'una gestione del governo che fino ad allora era sempre stata intesa come una pratica al servizio di

640 Christensen, T. and P. Lægreid (eds.) (2001), *New Public Management: The transformation of ideas and practice*, Ashgate, Aldershot (UK), 2001; Rhodes, R. A. W. (1997), *Understanding governance: Policy networks, governance, reflexivity and accountability*, Open University Press, Buckingham (UK), 1997.

641 Moini, G. (2012), *Teoria critica della partecipazione. Un approccio sociologico*, FrancoAngeli, Milano, 2012.

una politica dibattuta pubblicamente'[642].

Le analisi sopra richiamate riconoscono nelle innovazioni in senso partecipativo delle amministrazioni formule teoriche e pratiche volte a instaurare e legittimare i dispositivi e gli stilemi tipici del neoliberismo. Esse colgono molti punti critici ma tendono a omologare tra loro vari tipi di partecipazione. In questo contributo proponiamo, invece, di distinguere tra due diversi approcci: il primo limitato alla sfera dell'organizzazione (partecipativo-organizzativo) e il secondo che, invece, mira a ricomprendere, le dinamiche istituzionali nella loro interezza all'interno del modello (partecipativo-istituzionale).

4. Pubbliche amministrazioni alla prova della complessità

Secondo l'approccio partecipativo-organizzativo, nell'implementazione dei processi di cambiamento è strategico promuovere la creazione e la condivisione di «comunità di pratica», ossia gruppi di attori che, gradualmente e in una logica incrementale, aderiscono al cambiamento in atto, apprendendo e condividendo soluzioni innovative[643].

Tali comunità sono una risorsa imprescindibile, in quanto sono in grado di abilitare il contesto organizzativo a implementare le riforme del sistema istituzionale[644]. Le comunità di pratica sviluppano nuovi linguaggi, stili di lavoro e relazioni, nonché soluzioni agli eventuali problemi ed effetti imprevisti che possono emergere nel corso dell'implementazione di una riforma.

Il processo di sviluppo di simili comunità è difficilmente pianificabile a tavolino, tuttavia non è impossibile che la loro attivazione e costruzione possa essere incentivata e favorita in maniera intenzionale.

Nel caso di cambiamenti istituzionali intenzionalmente attivati attraverso

642 Deneault, A. (2013), *Gouvernance. Le management totalitaire*¸ Lux Èditeur, Montréal, 2013 at13 and14 (trad. it., *Governance. Il management totalitario*, Vicenza, Neri Pozza Editore, 2018).

643 Brown, J. and P. Duguid (1991), *Organizational Learning and Communities-of-Practice: Toward a Unified View of Working, Learning, and Innovation*, Organization Science, Vol. 2, No. 1, 1991, pp. 40-57; Lave, J. and E. Wenger (1991), *Situated Learning: Legitimate peripheral participation*, Cambridge University Press, Cambridge, 1991; Wenger, E. (1998), *Communities of Practice: Learning, Meaning and Identity*, Cambridge University Press, Cambridge, 1998.

644 Butera, F. (2009), *Il cambiamento organizzativo. Analisi e progettazione*, Laterza, Roma-Bari, 2009, at 95.

l'introduzione dall'esterno di nuove regole o la modifica di quelle precedenti, le comunità di pratica possono tradurre in comportamenti quotidiani, che nascono e si sviluppano dal basso, le linee e gli indirizzi che vengono dall'alto, fornendo così modelli di comportamento e protocolli conformi al nuovo assetto istituzionale.

Nei cambiamenti istituzionali che si costruiscono dall'interno, a partire dal mutamento delle credenze, delle aspettative e delle prassi a livello di rapporti interpersonali e modelli di comportamento interiorizzati dagli attori, le comunità di pratica sviluppano archetipi, assetti organizzativi e modalità operative, che, diventando successivamente regole formalizzate, si trasformano in nuove istituzioni.

Quello che abbiamo voluto definire come un approccio partecipativo-istituzionale si spinge oltre le dinamiche e gli assetti gestionali e operativi e non si limita a promuovere la partecipazione dei diversi attori e delle comunità di pratica per implementare singole soluzioni o accorgimenti, bensì sviluppa in maniera sistematica percorsi di co-progettazione e co-decisione con il fine strategico di anticipare e sperimentare i cambiamenti e le innovazioni desiderate. In questo caso gli attori che prendono parte al processo - questo è un punto importante per distinguere i due tipi di approcci partecipativi - dispongono di una quota di potere per influenzare le scelte non soltanto con riferimento a un singolo livello o a una singola fase del percorso, ma in tutti i diversi momenti dell'azione di una pubblica amministrazione: pianificazione strategica, implementazione organizzativa, fase operativa.

Inoltre, le organizzazioni pubbliche sono sempre più caratterizzate da una forte dinamicità e sono interconnesse attraverso reti sociali e interorganizzative all'interno delle quali vi è uno scambio continuo e circolazione di persone, risorse, conoscenze, tecnologie.

Tale rete può essere immaginata come una sfera di vita istituzionale e organizzativa che abbraccia organizzazioni della pubblica amministrazione, fornitori, cittadini-utenti, sindacati, ordini e associazioni professionali. Tali attori, oltre a costruirsi un punto di vista circa i vantaggi e gli svantaggi che possono trarre dal mutamento organizzativo, spesso hanno la possibilità, attraverso i loro comportamenti, di favorire le innovazioni, oppure ostacolarle.

Per tali ragioni, un altro aspetto chiave dell'approccio partecipativo-isti-

tuzionale è il rapporto di collaborazione e co-decisione che le amministrazioni pubbliche riescono a costruire con i soggetti che, pur non facendo parte dell'organizzazione in senso stretto, hanno una grande influenza nel determinare le forme e le direzioni del cambiamento, poiché si muovono all'interno di circuiti nei quali si relazionano una varietà di attori individuali e collettivi direttamente coinvolti nelle trasformazioni in atto.

L'approccio partecipativo-istituzionale favorisce il formarsi di comunità di pratica trasversali alle diverse organizzazioni, in grado di scambiare conoscenze, condividere obiettivi condivisi, sviluppare azioni coordinate e un reciproco apprendimento grazie alla cooperazione e al lavoro comune anche con soggetti esterni all'organizzazione ma determinanti rispetto alla sfera di vita istituzionale di riferimento.

Prendiamo il caso, per esempio, di cambiamenti nelle strutture e nei processi organizzativi che coinvolgono i comportamenti quotidiani sia del personale delle organizzazioni pubbliche sia dei cittadini che accedono ai servizi, come è il caso, per esempio, delle riforme relative alla digitalizzazione.

Gli attori che implementano simili cambiamenti sono almeno di due tipi: organizzazioni e singoli addetti della pubblica amministrazione da una parte, organizzazioni private (imprese, terzo settore, ecc.), famiglie, e utenti dall'altra. Questi ultimi possono essere singoli cittadini, magari organizzati in associazioni finalizzate a promuovere e difendere i diritti e gli interessi di specifiche categorie di utenti della pubblica amministrazione. Una strategia partecipativa per l'implementazione di questo processo di cambiamento, dunque, dovrebbe tener conto di questo dato e promuovere la partecipazione delle organizzazioni pubbliche, delle organizzazioni private e dei cittadini nella progettazione e nella gestione di questi processi, nonché favorire il formarsi di comunità di pratica nelle quali tutti questi attori possano collaborare, scambiarsi conoscenze e informazioni e sperimentare soluzioni adeguate, al fine di garantire il successo del cambiamento.

Si tratta, dunque, di passare da un modello partecipativo all'innovazione organizzativa a un approccio unificato partecipativo-istituzionale, che tenga insieme e integri il cambiamento istituzionale e quello organizzativo.

Un simile approccio richiede un notevole sforzo, come accennato all'inizio, per tenere insieme, oltre che più punti di vista e livelli di analisi, anche diversi

approcci disciplinari. Da questa disamina, tuttavia, sembrano emergere implicazioni importanti sia in chiave analitica sia in chiave operativa, soprattutto rispetto alla capacità di includere la dimensione endogena del cambiamento istituzionale e di interpretare quest'ultimo in relazione alla complessità delle dinamiche e degli assetti strutturali, relazionali e organizzativi.

5. Il territorio come organizzazione sociale e istituzione

Fino a questo momento abbiamo affrontato i temi connessi al cambiamento delle istituzioni e delle organizzazioni senza considerare la variabile dello spazio. Eppure i fenomeni sociali, come sappiamo, sono sempre determinati dal luogo nel quale avvengono. Ma come si intrecciano il cambiamento istituzionale e organizzativo con lo spazio, con i luoghi? Come si rapportano le unità amministrative, i confini delle quali sono stabiliti da un processo politico, con le realtà territoriali, più complesse, in quanto prodotte dall'ambiente, dagli artefatti fisici naturali e artificiali, ma anche dalle relazioni sociali, dalle identità storiche e culturali che si stratificano e si sedimentano nel tempo?

In quest'ultimo paragrafo proveremo ad abbozzare un possibile percorso per iniziare a rispondere a queste domande analizzando l'esperienza dei distretti industriali, che interpreteremo come un caso di istituzionalizzazione del territorio[645].

Le politiche di sviluppo concepite, a partire dagli anni Novanta, sulla base del modello dei distretti industriali possono essere considerate come un caso significativo di sovrapposizione e sussunzione da parte del livello del governo politico delle forme di organizzazione economico-sociale.

I distretti industriali, infatti, si sono manifestati come fenomeno spontaneo di specializzazione produttiva locale e promozione dal basso dello sviluppo territoriale. Il primo a concettualizzare il fenomeno, com'è noto, fu l'economista italiano Giacomo Becattini, il quale definì distretto industriale 'un'entità socio-territoriale caratterizzata dalla compresenza attiva, in un'area territoriale circoscritta, naturalisticamente e storicamente determinata, di una comunità di

645 Balduzzi, G. (2017), *L'avventura dei distretti. Istituzioni e società nel capitalismo territoriale in evoluzione*, Pacini, Pisa, 2017, at 190-192.

persone e di una popolazione di imprese industriali. Nel distretto, a differenza di quanto accade in altri ambienti (es. la città manifatturiera), la comunità e le imprese tendono, per così dire, a interpenetrarsi a vicenda'[646].

I distretti furono 'scoperti' negli anni Settanta e, soprattutto, negli anni Ottanta in alcune aree di regioni italiane come l'Emilia Romagna, la Toscana e il Veneto, che per le caratteristiche del loro modello di sviluppo inizieranno, proprio da quel momento, a essere conosciute come la «Terza Italia»[647]. Il fenomeno distrettuale apparve un'alternativa di successo alla produzione di massa, in fase di evidente crisi per le trasformazioni sociali, tecnologiche e di mercato allora in corso e fu studiato attentamente in Italia e all'estero[648].

I distretti industriali divennero così il punto di riferimento di una nuova stagione di politiche di sviluppo a livello internazionale e soprattutto europeo che, nel tentativo di creare e riprodurre le condizioni di fiducia, cooperazione, condivisione di obiettivi e risorse che avevano favorito il decollo di questi «luoghi economici», segnarono, di fatto, il passaggio da un modello di sviluppo «spontaneo» a uno «costruito»[649].

Nel caso italiano un momento apicale di tale percorso è rappresentato dal riconoscimento giuridico dei distretti, avvenuto attraverso la Legge n. 317 del 5 ottobre 1991. A essa ha fatto seguito il DM 21 aprile 1993 (detto decreto Guarino), che affidò alle Regioni il compito di individuare i distretti sulla base di determinati indirizzi e parametri e dei sistemi locali del lavoro definiti dall'ISTAT.

L'istituzionalizzazione dei distretti presenta alcune palesi difficoltà e contraddizioni forse inevitabili, se si considera il tentativo di regolamentare un fenomeno che fino a quel momento era stato spontaneo, cangiante e molto diversificato, circoscrivendolo entro definizioni rigide e standardizzate, aventi forza di legge.

---

646 Becattini, G. (1989), *Riflessioni sul distretto industriale marshalliano come concetto socio-economico*, Stato e Mercato, Vol. 25, No. 1, 1989, pp. 111-128, at 112.

647 Bagnasco, A. (1977), *Tre Italie. La problematica territoriale dello sviluppo italiano*, Il Mulino, Bologna, 1977.

648 Uno tra gli studi di maggiore impatto internazionale fu il seguente: Piore, M. J. and C. Sabel (1984), *The Second Industrial Divide. Possibilities For Prosperity*, New York, Basic Books, 1984.

649 Zanfrini, L. (2001), *Lo sviluppo condiviso. Un progetto per le società locali*, Milano, Vita e Pensiero, 2001, at 99 et seq.

Tuttavia, risulta egualmente apprezzabile e significativo il fatto di avere riconosciuto e scolpito a livello legislativo norme sociali, comportamenti e prassi che in quei territori erano già istituzioni, in quanto regolavano i rapporti interpersonali e plasmavano l'organizzazione sociale dello e nello spazio. Il processo di cambiamento istituzionale dei distretti, dunque, è da sempre intrecciato alle forme organizzative che stanno alla base delle peculiari forme di regolazione economica e sociale in essi presenti. Il riconoscimento da parte del livello del governo politico fa parte di un processo complesso attraverso il quale quelle relazioni e forme organizzative sono progressivamente emerse e sono diventate consapevoli, fino a divenire formalmente sancite e prescritte a livello legislativo.

Il distretto, che nel suo sviluppo è così influenzato dalle risorse locali, a sua volta dà forma e plasma un territorio. Le peculiari modalità di relazione tra tessuto produttivo, istituzioni locali e forze sociali genera, nel tempo, un processo di organizzazione sociale che ho altrove definito di 'istituzionalizzazione riflessiva' nel quale ha un ruolo il consolidarsi della memoria collettiva, di una consapevolezza crescente nella rappresentazione dell'immaginario locale del distretto stesso[650].

Un simile processo di scomposizione e ricomposizione dello spazio, sulla base di una presa di coscienza degli stessi abitanti di una 'visione' del proprio luogo, rende il distretto un caso molto rappresentativo di come gli abitanti stessi di un luogo possono operare una risignificazione reciproca tra le diverse dimensioni dell'ambiente fisico, delle relazioni sociali e del flusso temporale fino a consentire che il territorio stesso possa farsi istituzione[651].

Il processo di globalizzazione non ha schiacciato la vita sociale in una dimensione 'piatta', priva di spessore, volume ed estensione spaziale, ma, al contrario, ci spinge osservare il territorio non soltanto come il prodotto di un processo politico, corrispondente a unità amministrative dai confini preordinati e ascritti, bensì come una realtà complessa e multidimensionale, che genera e al tempo stesso è generata da un intreccio di cambiamento organizzativo e istituzionale.

---

650 Balduzzi (2017), *supra* note 17, at 45 and46.

651 Balduzzi, G. (2021), *Territori non finiti. Spazio, luogo e società dalla globalizzazione alla pandemia*, Narrare i Gruppi, Vol. 16, No. 1, 2021, pp. 79-100.

15. Le rôle du parlement dans la révision de la constitution. Une comparaison France-Norvège.

Iris Nguyên Duy*, Professeur University of Agder Norvège

La Constitution est le texte fondamental qui fonde l'organisation de l'État et la séparation des pouvoirs et des fonctions et garantit le respect des droits fondamentaux.

Dans les régimes démocratiques, le texte constitutionnel n'est pas immuable. Il peut être modifié afin de prendre en compte le dynamisme et l'évolution de la vie politique et sociale. Mais il est protégé des modifications de circonstance, et de la violation des principes qu'il définit, par une procédure spéciale de révision déterminant les conditions et les organes habilités à y procéder. Idéalement, la Constitution d'un Etat doit être suffisamment souple, mais empêcher que l'essentiel des valeurs ou acquis commun ne soit remis en cause au gré des changements politiques et de ses révisions.

Bien que la Norvège soit une monarchie constitutionnelle dotée d'un

système de gouvernement démocratique et parlementaire monocaméral,[652] et que la France soit une République « semi-présidentielle » avec un Parlement bicaméral (Assemblée nationale et Sénat), il est possible de comparer le rôle joué par le Parlement de ces deux pays dans la révision constitutionnelle. La France et la Norvège sont toutes deux dotées de Constitutions écrites de type « rigide ». Ainsi tant le texte constitutionnel français (article 89 de la Constitution française du 4 octobre 1958) que le norvégien (article 121 de la Constitution du 17 mai 1814) prévoit la possibilité de réviser la Constitution,[653] selon une procédure différente de celle établie pour l'adoption des lois ordinaires.

Cet article décrira l'aspect institutionnel, organique, de la révision constitutionnelle, et le rôle des Parlements français et norvégien, dans ce processus défini comme « le pouvoir, déterminé par la Constitution, d'amender le texte constitutionnel, c'est-à-dire de créer, de supprimer ou de modifier une ou plusieurs de ses dispositions. »[654]

Ce rôle sera examiné de manière critique, afin de mettre en exergue les ressemblances et différences entre les deux systèmes, ainsi que certaines problématiques démocratiques que la participation parlementaire et populaire à la révision constitutionnelle soulève.

Dans les deux constitutions, le Parlement est codétenteur du pouvoir de révision (1), et son rôle est constitutionnellement très encadré (2).

---

* Toute ma gratitude à Jacques Ziller pour avoir dirigé mon mémoire de droit comparé sur « L'intérêt pour agir en droit administratif français et anglais » et ma thèse de droit public sur la souveraineté du Parlement britannique: Nguyên Duy, I. (2011), *La souveraineté du Parlement britannique*, (Paris: L'Harmattan, 2011.

652 Le Parlement norvégien, le Storting, est un monocaméral. Voir Nguyên Duy, I. (2008), *L'abolition du bicamérisme norvégien*, Revue de droit public, No. 3, 2008.

653 Dans les deux constitutions, l'article consacré à la révision est mis en exergue en tant que tout dernier article clôturant le texte constitutionnel. Il peut être considéré comme une « méta-norme qui régule l'existence des autres normes dans la Constitution » (ma traduction). Voir Holmøyvik, E. (2021), *§ 121*, in O. Mestad and D. Michalsen (eds.), *Historisk kommentarutgave 1814-2020*, Oslo: Universitetsforlaget, 2021, at 1359.

654 Le Pillouer, A. (2012), *Le pouvoir de révision*, in M. Troper and D. Chagnollaud (eds.), *Traité international de droit constitutionnel*, tome 3, Paris: Dalloz, at 34.

1. Le Parlement, codétenteur du pouvoir de révision constitutionnelle

Les constitutions française et norvégienne étant écrites et contenant chacune une disposition spéciale consacrée à la révision constitutionnelle, on aurait pu penser que l'identification du/des détenteur(s) du pouvoir de révision était évidente. Cependant, ce qui devrait aller de soi, n'est pas toujours aisé. Et même lorsque la lettre est claire, la pratique peut se révéler différente, avec des conséquences pour le peuple et la démocratie dans ces pays.

1.1 Un quasi-monopole du pouvoir de révision par le Parlement norvégien

1.1.1 Un quasi-monopole du fait de la déférence de l'exécutif

En Norvège, plusieurs acteurs interviennent lors du processus de révision constitutionnelle.[655] Pourtant, assez étonnamment, l'article 121 sur la révision est silencieux sur l'identité du détenteur du pouvoir d'initiative. Il faut lire de manière analogique l'article 76, premier alinéa, de la Constitution, où le concept de « loi » recouvre aussi bien les lois formelles (ordinaires) que les autres décisions parlementaires (*stortingsvedtak*), y compris les lois constitutionnelles, pour trouver une réponse[656] : Tout parlementaire (*stortingsrepresentant*) a un droit d'initiative, et il n'est pas nécessaire qu'un certain nombre ou qu'un certain quota de parlementaires se rassemblent derrière une proposition, comme cela peut être le cas dans d'autres pays. « Le gouvernement par l'intermédiaire d'un membre du Conseil des ministres » (*regjeringen ved en statsråd*) a également le droit d'initiative. En théorie, n'importe qui peut proposer une révision de la Constitution, mais une telle proposition doit être formellement présentée par une personne ayant le droit d'initiative en vertu de

655 Le Roi se contente de promulguer (pas sanctionner) les amendements constitutionnels adoptés en Parlement et signés par le Président et le secrétaire du Storting (2ème alinéa).

656 Smith, E. (2021), *Konstitusjonelt demokrati*, 5th edition, Bergen: Fagbokforlaget, at 89.

l'article 76, premier alinéa.[657]

En pratique, le gouvernement norvégien se tient traditionnellement en retrait en matière de révision constitutionnelle. Il s'abstient de déposer des projets de révision constitutionnelle ou le fait, éventuellement, par l'intermédiaire d'un parlementaire, comme ce fut le cas pour la révision de l'article 100 en 2004.[658] Il donne ainsi au Parlement un quasi-monopole pour initier des révisions constitutionnelles. Mais cela n'a pas toujours été le cas. Cette situation de quasi-monopole du Parlement dans la révision constitutionnelle est en effet le résultat d'une bataille politique et juridique ardue entre le Roi et le Parlement norvégien au 19ème siècle.[659]

1.1.2 Une influence réduite du peuple norvégien sur le Parlement et les révisions constitutionnelles

Le peuple norvégien intervient indirectement, tous les quatre ans, en élisant un nouveau Parlement, à savoir entre le dépôt obligatoire des propositions de révision devant un Storting et leur examen par le nouveau Storting.[660]

Les propositions de révision constitutionnelle sont généralement très succinctement rédigées (en moyenne 2 ou 3 pages, rarement plus de 5 pages) et moins bien préparées que des textes de loi,[661] rendant difficile la compréhension des enjeux politiques et juridiques les entourant. Elles doivent être déposées lors de l'une des trois premières sessions législatives après une élection législative (soit un an avant les élections suivantes). Elles ne font l'objet d'aucun véritable traitement, lors de leur dépôt, autre que leur courte présentation en Storting et leur publication officielle, pour informer les électeurs de leur contenu avant

657 Ce fut le cas d'une proposition initiée par un professeur d'université, Johs. Andenæs. Voir Dok. nr. 12:09 (1991-1992).

658 Voir Taube, C. (2007), *Grunnlovsendringer i Norge: en prosedyre med demokratiunderskudd*, Lov og rett, Vol. 46, Issue 6, at229-231.

659 Voir Holmøyvik (2021), *supra* note 2, at 1364-70.

660 Il peut donc s'écouler entre 1 et 7 ans entre le dépôt d'une proposition de révision et son adoption.

661 Le parlement ne dispose pas des mêmes ressources personnelles et administratives que le gouvernement. Les propositions de révision ne sont généralement pas non plus préparées par des comités d'experts ou par le ministère de la justice. La procédure a été critiquée depuis près d'un siècle déjà et est pourtant pratiquement la même qu'en 1814. Il ne faudrait pourtant qu'une simple modification du règlement intérieur du Storting pour un examen en commission permanente au moment du dépôt, par exemple. Voir Holmøyvik, E. (2018), *Reform av grunnlovprosedyren*, Kritisk juss, Vol. 44, Issue 1, at 31 and32.

les élections. Mais l'effet de ces mesures est limité, en pratique, par l'existence de multiples variantes du texte, ne permettant pas au peuple de savoir lesquelles seront privilégiées par tel ou tel parti politique lors qu'il siègera au Parlement après les élections, d'autant que ces questions constitutionnelles sont généralement tout bonnement ignorées par les partis politiques dans leur programme et lors de la campagne électorale, pour ne pas parler de leur faible couverture dans les médias.[662]

Ce n'est qu'après la tenue de l'élection législative que les propositions seront examinées par la Commission permanente du contrôle et des affaires constitutionnelles et que le nouveau Parlement en débattra et votera à la majorité renforcée des deux tiers des parlementaires présents.

De ce fait, le peuple ne joue donc pas un rôle-clé, encore moins de contre-pouvoir au quasi-monopole de fait du parlement en Norvège dans la révision constitutionnelle.

1.2 Le Parlement français, codétenteur du pouvoir de révision en France

La révision de la Constitution française nécessite l'adoption d'une loi constitutionnelle, selon une procédure spéciale définie par l'article 89 de la Constitution. Toutes les révisions constitutionnelles abouties ont été opérées en application de l'article 89 de la Constitution, à l'exception des deux premières : la révision de juin 1960, selon une procédure dérogatoire de révision concernant les dispositions relatives à la « Communauté » et la révision de 1962, adoptée par référendum en application de l'article 11 de la Constitution. Cette procédure implique l'intervention de quatre acteurs décisifs, le Président de la République, l'Assemblée nationale, le Sénat et le peuple, directement (ratification par référendum) ou indirectement (approbation par le Parlement réuni en Congrès à la majorité des trois cinquièmes des suffrages exprimés).[663]

662 Kierulf, A. (2021), *Hemmelig grunnlovsvalg*, Dagens næringsliv, 17 septembre 2021.

663 Le Premier ministre a plutôt un rôle de « régisseur », « outre la proposition initiale qu'il fait au chef de l'Etat, c'est lui qui inscrit le débat à l'ordre du jour des assemblées et soutient la discussion devant elles, puis devant le Congrès. Il n'a cependant aucun de pouvoir de décision sur la révision elle-même. » - Voir Carcassonne, G. and M. Guillaume (2019), *La Constitution introduite et commentée par Guy Carcassonne et Marc Guillaume*, 15th Edition, Paris: Points Essais,2019, at § 526.

1.2.1 Le Parlement, un acteur décisif, mais neutralisé, en période de fait majoritaire

Comme en Norvège, l'initiative de la révision est partagée entre l'exécutif et le parlement en France. Elle appartient au Président de la République sur proposition (purement formelle en période de fait majoritaire) du Premier ministre (projet de loi constitutionnelle),[664] ou à tout membre du Parlement, aussi bien député que sénateur (proposition de loi constitutionnelle).

Contrairement à la Norvège, le pouvoir d'initiative de la révision constitutionnelle en France a, dans les faits, été dominé par le Président de la République, tout particulièrement en période de fait majoritaire :[665] Les vingt-deux révisions constitutionnelles réalisées selon la procédure de l'article 89 depuis 1958 ont eu pour origine un projet de loi constitutionnelle.[666] Le fait majoritaire,[667] renforcé par l'instauration du quinquennat, l'inversion du calendrier électoral (qui a rendu la cohabitation plus hypothétique) et la maîtrise par l'exécutif de l'ordre du jour, a permis de neutraliser le pouvoir d'initiative du Parlement et son pouvoir d'adoption. En période de concordance des majorités, l'adoption d'un projet de loi constitutionnelle en termes identiques par les deux assemblées du Parlement ne représente qu'une formalité puisque, par définition, dans ces périodes, l'Assemblée nationale est acquise au Président de la République. Enfin, le Président a la possibilité de choisir la voie du référendum

664 Un Président de la République par intérim ne peut pas exercer le droit d'initiative en matière de révision constitutionnelle (voir article 7 de la Constitution).

665 En période de cohabitation, il n'est pas exclu que le premier ministre, voire le parlement (fonction de menace), demandent au Président d'initier une révision constitutionnelle. Voir Ferretti, R. (2001), *La révision de la constitution : les paradoxes d'une évolution*, Revue d'actualité juridique française, 2001, available at http://www.rajf.org/spip.php?article12

666 Les élus parlementaires déposent chaque année entre dix et vingt propositions de loi constitutionnelle. Mais leur examen dépend de leur inscription à l'ordre du jour (en règle générale maîtrisé par l'exécutif) et leur adoption nécessiterait la convocation d'un référendum, ce qui complique la chose.

667 « [Le parlement] peut par l'intermédiaire de ses membres prendre concurremment avec le Président de la République, l'initiative de la révision. Or, la connivence politique qui lie les parlementaires de la majorité au Président les empêche d'emprunter cette voie qui serait perçue comme allant à l'encontre du rôle primordial joué par ce dernier. Et si la conviction politique à la base du phénomène majoritaire ne suffit plus alors la contrainte de la rationalisation aura raison de l'obstination éventuelle de certains. » - Ferretti (2001), *supra* note 14.

ou du Congrès[668] pour l'adoption définitive d'un projet de révision constitutionnelle.

1.2.2 Le Parlement, un acteur incontournable

Le Parlement est néanmoins un acteur décisif incontournable. L'accord de chacune des assemblées est toujours indispensable pour qu'une révision soit opérée,[669] alors que celui du Président ou du peuple, ne l'est pas : si les assemblées s'accordent avec le Chef de l'Etat, la ratification populaire n'est pas nécessaire. Si elles s'accordent avec le peuple, l'intervention du Président de la République n'est théoriquement pas requise.[670] Le seul moyen pour le Président et le peuple de contourner le Parlement serait de passer par la voie contestée du référendum direct de l'article 11, comme l'a fait De Gaulle en 1962,[671] mais cette question ne sera pas abordée davantage dans cet article.[672]

1.2.3 Quelques remarques sur la dialectique « peuple-Parlement » en France : Le Parlement qui « court-circuite » le peuple ou le Parlement « court-circuité » par le peuple ?

L'adoption définitive d'une proposition de loi constitutionnelle (d'initiative

668 Les deux chambres du parlement sont réunies en Congrès à Versailles sur convocation par décret du Président de la République soumis à contreseing. Le Congrès se prononce à la majorité des 3/5ème des suffrages exprimés.

669 Chacune des phases de la révision constitutionnelle d'après l'article 89 (initiative, adoption et adoption définitive) peut relever d'un titulaire différent sauf l'adoption qui appartient toujours aux deux assemblées du Parlement. Le Congrès peut aussi faire obstacle à une révision. Le Congrès n'intervient que pour approuver ou rejeter le texte que les deux assemblées ont séparément adopté. Aucun amendement ne peut être déposé. Mais la majorité requise est renforcée puisqu'elle est des trois cinquièmes. Cette exigence a plusieurs fois conduit le Président de la République à renoncer à la révision : en différant la convocation du Congrès, en n'inscrivant pas le texte à l'ordre du jour de ce dernier ou enfin en annulant sa convocation.

670 Carcassonne and Guillaume (2019), *supra* note 12, § 526.

671 Réviser la Constitution via l'article 11 n'est « ni impossible techniquement, ni improbable politiquement, à moins d'ignorer délibérément l'histoire constitutionnelle de notre pays », surtout lorsque le Conseil constitutionnel refuse, depuis 1962, de contrôler les lois référendaires. Voir Girard, C. and Bottini E. (2022), *Réviser la Constitution par référendum : la pratique peut-elle contredire le texte ?*, The Conversation, 19 avril 2022, available at https://theconversation.com/reviser-la-constitution-par-referendum-la-pratique-peut-elle-contredire-le-texte-181425

672 Voir, eg Conac, G. (1996), *Les débats sur le référendum sous la Ve République*, Pouvoirs No. 77, 1996.

parlementaire) entérinée par les deux chambres du Parlement se fait obligatoirement par référendum. Cette condition procédurale présente une contrainte de poids,[673] mais renforce la légitimité démocratique d'une révision. Et elle est surtout une arme constitutionnelle aux mains de la majorité parlementaire, particulièrement en période de cohabitation, puisqu'elle offre au Parlement, en théorie tout au moins, la possibilité de faire approuver une révision, même contre les souhaits de l'exécutif.

Il en va autrement des projets de loi constitutionnelle. Le Président de la République peut choisir de les faire définitivement adopter soit par référendum, soit par le Parlement réuni en Congrès. Lorsque le Président de la République choisit l'adoption par Congrès, cet organe composé des deux chambres du Parlement, agit non point en tant que Parlement, mais en lieu et place du peuple français souverain. Cette alternative était censée être l'exception à la règle juridique et politique du référendum (voir l'emploi de l'adverbe « toutefois »).[674] Mais « force est de constater que depuis 1963 une véritable coutume constitutionnelle s'est formée faisant du recours au Congrès la procédure de droit commun dans le cadre de l'article 89 ».[675] La participation du peuple à la révision constitutionnelle a donc en pratique été « court-circuitée » au profit d'une adoption définitive par ses représentants.[676] Ainsi, mises à part les deux premières révisions de la Constitution, qui ont été réalisées par d'autres procédures que celle prévue à l'article 89 de la Constitution, toutes les autres révisions constitutionnelles abouties ont suivi la procédure du Congrès (art. 89), à l'exception de celle du 2 octobre 2000 sur la durée du mandat présidentiel, adoptée par référendum. Ce dernier cas illustre la volonté présidentielle de faire

673 Vu les contraintes pratiques d'organisation des referendums, il parait évident que seules les propositions de révision constitutionnelles les plus importantes seront soumises à la ratification du peuple.

674 Michel Debré, devant le Comité consultatif constitutionnel, déclarait que « le référendum est la voie normale de la révision et que le recours au Congrès n 'est envisagé que dans les cas où les circonstances exigeraient une révision rapide ». Quoted by Fouquet-Armand M. (2001-2002). *Les révisions de la Constitution de 1958 : de la Vème à la VIème République ?*, Revue juridique de l'Ouest, 2001-2002, at 196.

675 Waline, J. (1999), *Les révisions de la Constitution de 1958*, in *Mélanges Philippe Ardant. Droit et politique à la croisée des cultures*, Paris: LGDJ, 1999, at 239.

676 La révision de 1962 portant sur l'élection du Président de la République au suffrage universel direct a été soumise directement au suffrage universel, mais sur la base de l'article 11 et non de l'article 89. De Gaulle avait mobilisé l'article 11 pour faire voter le peuple sans passer par le parlement, qui avait fait savoir qu'il était radicalement hostile à la réforme.

intervenir le peuple, avec pour conséquence directe le « contournement du Parlement », afin de renforcer la légitimité démocratique du projet de quinquennat.[677]

Force est de constater que la participation directe du peuple à la révision est, et reste donc très limitée en France, au profit du rôle-clé incontournable joué par le Parlement.

2. Un rôle central et constitutionnellement encadré du Parlement

Le pouvoir constituant dérivé n'est pas souverain dans la mesure où la Constitution fixe les bornes à son exercice. Un examen des limites matérielles et formelles/procédurales permet d'apprécier l'étendue du rôle que peut jouer le Parlement dans la révision de la Constitution. Dans les deux Constitutions, il y a des limites matérielles qui limitent les réformateurs, mais elles ont finalement moins d'impact sur le rôle joué par le Parlement que les limites procédurales.

2.1 Des limites matérielles peu contraignantes

2.1.1 La « souveraineté » du Parlement norvégien sur les « principes » et « l'esprit » de la Constitution[678]

L'article 121 de la Constitution norvégienne interdit la remise en cause de « l'esprit » et des « principes » de la Constitution qui ne sont pas définis explicitement comme dans la Constitution française. A l'exception des premières décennies d'existence de la Constitution (où elle a surtout été utilisée comme protection constitutionnelle du Parlement et de l'indépendance norvégiens contre le pouvoir royal établi à Stockholm), l'interdiction a rarement été interprétée

677 Le Président de la République a justifié le choix du référendum en déclarant, à propos du quinquennat, « qu'il s'agit là d'un problème qui touche au lien entre le Président de la République et les Français. Donc, c'est aux Français de décider », available at https://www.senat.fr/evenement/revision/revision_aboutie.html

678 « Stortingets herredøme over Grunnlovas prinsipp og ånd på 1900-tallet ». Voir Holmøyvik (2021), *supra* note 2, at 1396.

ou considérée comme un obstacle à la révision de la Constitution, même de grande ampleur.[679] Elle n'a pas empêché sa révision plus de 310 fois, et ce, dès 1814.[680] Plus des trois quarts des dispositions constitutionnelles en vigueur ont été adoptées ou modifiées après 1814.

Les limites matérielles constituent donc plus une « question de conscience morale » qu'un obstacle juridique,[681] sa fonction réelle étant probablement d'éviter le changement soudain ou radical des principes les plus fondamentaux de la Constitution que sont la démocratie, l'état de droit et les droits de l'homme.[682] Le même constat peut se faire pour le cas de la France.

2.1.2 Les limites matérielles en France

En France, une révision ne peut être engagée ou poursuivie lorsque la Présidence de la République est l'objet d'intérim (article 7, onzième et dernier alinéa), lorsque l'état d'urgence de l'article 16 est en vigueur (décision du Conseil constitutionnel 92-312 DC du 2 septembre 1992) ou en application de celui-ci. Enfin, il ne peut être porté atteinte à l'intégrité du territoire (article 89 quatrième alinéa) ou à la forme républicaine du Gouvernement (dernier alinéa). Il est néanmoins généralement accepté que ces limitations pourraient être levées si les conditions politiques étaient réunies pour modifier l'article 89 lui-même. Sous ces réserves, le Conseil constitutionnel reconnaît, dans sa décision 92-312 DC du 2 septembre 1992, considérant 19, la souveraineté du pouvoir constituant dérivé.[683]

2.2 Conséquences des limites procédurales actuelles

679 Holmøyvik (2021), *supra* note 2, at 1399.

680 En comparaison, la Constitution française a été révisée 24 fois en près de 65 ans (la dernière fois en 2008).

681 Holmøyvik (2021), *supra* note 2, at 1398 (quoting Finn Gustavsen).

682 Smith E. (2011), *Old and protected? On the supra-constitutional clause in the Constitution of Norway*, Israel Law review, Vol. 44, Issue 3, 2011, at 387 and 388.

683 «19. (...) il lui est loisible d'abroger, de modifier ou de compléter des dispositions de valeur constitutionnelle dans la forme qu'il estime appropriée ; qu'ainsi rien ne s'oppose à ce qu'il introduise dans le texte de la Constitution des dispositions nouvelles qui, dans le cas qu'elles visent, dérogent à une règle ou à un principe de valeur constitutionnelle ; que cette dérogation peut être aussi bien expresse qu'implicite »

Une comparaison des limites procédurales révèle des conséquences très différentes pour l'exercice, par le Parlement, de son pouvoir de révision.

2.2.1 Des limites procédurales qui affaiblissent le rôle joué par le Parlement norvégien

La procédure de révision en deux temps de l'article 121 a été principalement mise en place pour donner aux parlementaires le temps de la réflexion et donner au peuple la possibilité d'influer lors de la nouvelle élection législative.

Cependant, telle qu'elle a été pratiquée jusqu'à maintenant, cette procédure en deux temps n'incite ni à engager un débat de fond, ni à chercher à établir un consensus ou compromis sur certaines questions constitutionnelles. Au contraire, elle neutralise complètement l'intervention parlementaire aussi bien en amont, lors du dépôt, puisque rien n'est débattu à ce moment-là, qu'en aval, lors de l'examen politique par le Parlement suivant, après les élections.

Après la tenue des élections et l'examen en commission parlementaire, les propositions de révision sont débattues, mais le Parlement n'a pas le droit d'amendement : il ne peut que choisir parmi les différentes alternatives qui lui ont été soumises et les adopter ou les rejeter « telles quelles », sans pouvoir corriger d'éventuelles erreurs, ni ajuster le texte afin d'atteindre un compromis politique. Son pouvoir de contrôle de la qualité normative et du contenu politique est donc affaibli,[684] et son rôle, passif.

2.2.2 Des limites procédurales qui rendent les assemblées parlementaires françaises incontournables, mais restreignent leur opportunité d'initier des révisions

La maîtrise par l'exécutif de l'ordre du jour parlementaire a longtemps été un obstacle majeur aux propositions de lois constitutionnelles déposées. Elles ont rarement pu franchir l'obstacle de l'inscription à l'ordre du jour, puisque l'ordre du jour prioritaire prévu par l'article 48 de la Constitution permet au Gouvernement d'écarter les textes qui ne lui conviennent pas. La révision de 1995 a changé la donne, en prévoyant qu'« une séance par mois est réservée par priorité à l'ordre du jour fixée par chaque assemblée », permettant ainsi aux assemblées de maîtriser dans une plus large mesure leur ordre du jour (législatif

684 Holmøyvik (2018), *supra* note 10, at 9-14.

et) constitutionnel.

Si l'on ne peut que constater que l'exécutif français maîtrise la procédure, et a le choix entre plusieurs alternatives, il ne peut néanmoins pas dépasser les « soupapes de sécurité » démocratiques de la Constitution, qu'elles s'incarnent dans la démocratie représentative ou dans le peuple s'exprimant directement par voie de referendum.

En matière de révision constitutionnelle, le projet ou la proposition de loi constitutionnelle doit être voté par l'Assemblée nationale et le Sénat en termes identiques. Paradoxalement, le fait que les Assemblées soient sur un pied d'égalité en matière de révision donne un avantage indéniable au Sénat (à la tendance politique qui détient au Sénat une majorité coutumière). Parce qu'il doit consentir à adopter le même texte que l'Assemblée nationale en vertu d'un bicamérisme parfait, ce dernier dispose en effet d'un véritable « pouvoir d'empêcher la révision »,[685] un pouvoir de veto, qu'il peut utiliser de manière discrétionnaire. De la même manière qu'avec le jeu des majorités une minorité au Parlement peut bloquer la révision de la Constitution, le Sénat français peut refuser de voter en faveur d'une révision ou bloquer un texte en y proposant de multiples amendements.[686] Cette condition procédurale liée au bicamérisme parlementaire permet au Sénat (plus particulièrement à 175 de ses membres) d'agir en contre-pouvoir ou contrepoids au bloc majoritaire, et de faire échec à une révision si tel était son souhait.[687] Mais loin d'être un problème, ce pouvoir de veto doit être compris comme un gage de stabilité de la Constitution et une soupape de sécurité contre une majorité trop entreprenante.

En France comme en Norvège, on a pu observer une certaine normalisation, voire une banalisation de la révision constitutionnelle, que ce soit quantitativement[688] (Norvège) ou dans son esprit (France). Ce n'est plus vraiment un

685 Pierré-Caps, S. (1998), *Les révisions de la Constitution de la Cinquième République : temps, conflits et stratégies*, RDP, No. 2,1998, at 417.

686 Voir des exemples dans Ferretti (2001), *supra* note 14.

687 Fatin-Rouge Stefanini, M. (2013), *Le pouvoir de veto du Sénat français : entre mythe et réalités ?*, Revue québécoise de droit constitutionnel, Association Québécoise de Droit Constitutionnel, 2013, La réforme du Sénat, 2013.

688 Holmøyvik (2018), *supra* note 10, at 15 and 16 ; Pryser Libell, H. (2022), *Grunnloven er et bevegelig mål*, Juridika, 17 mai 2022.

évènement extraordinaire, mais il donne au Parlement un rôle incontournable.

L'examen du rôle joué par les Parlements norvégiens et français dans la révision constitutionnelle aura permis de mettre en exergue la place de l'institution dans le système, mais également certains aspects de déficit démocratique.

Il offre aussi des pistes de réflexion sur la façon d'améliorer la participation démocratique, directe ou indirecte, dans l'amendement du « pacte social », et incitera peut-être à repenser certains aspects de la procédure, tant en France qu'en Norvège.

On pourrait enfin arguer que le renforcement de l'importance accordée à la Constitution, l'inflation du nombre de propositions de révision et les faiblesses des procédures de révision constitutionnelles entrainent nécessairement un renforcement du rôle joué notamment par les cours en Norvège en matière constitutionnelle et par le Conseil constitutionnel en France, en tant qu'interprètes suprêmes du texte constitutionnel (et parfois même en tant qu'initiateurs de nouvelles révisions), créant ainsi un déséquilibre démocratique supplémentaire.

16. De la persistencia de un viejo *dictum*: la STC 89/2022, en contexto

Pedro Cruz Villalón, Professor, Former Advocate General at the Court of Justice

1. Introducción

"*Nada* que concierna al ejercicio por los ciudadanos de los derechos que la Constitución les reconoce, podrá considerarse *nunca* ajeno a este Tribunal"[689]: la rotundidad de este viejo *dictum* del Tribunal Constitucional (TC), frecuentemente citado, sigue pesando como una losa en la jurisdicción constitucional española a la hora de digerir la dura realidad de unos derechos fundamentales que, por más que la Constitución nacional los reconozca y garantice, han pasado a regirse por otro ordenamiento jurídico, el de la Unión Europea (DUE)[690]. Desde esta perspectiva, la cita adquiere capacidad explicativa a la hora de dar razón del extraño modo como el TC da respuesta a un recurso de

689 *Subrayados míos*. Sentencia del Tribunal Constitucional español (STC) 26/1981, de 17 de julio, FJ 14. El pasaje pertenece a una sentencia recaída en un asunto resuelto en Sala de seis miembros, por tanto, no particularmente importante. Pero ahí están los *pesos pesados* de aquel tribunal fundacional: Diez-Picazo (ponente), Rubio Llorente, Tomás y Valiente.

690 Ziller, J. (2006), *L'européisation du droit : de l'Élargissement des champs du droit de l'Union européenne à une transformation des droits des États membres*„ EUI Working Papers, Law 2006/19.

amparo en reivindicación del llamado derecho al olvido frente al gestor de un motor de búsqueda[691].

La extrañeza, sin embargo, no se sitúa en la dimensión sustantiva del caso, es decir, por razón del amparo del derecho al olvido que, por mayoría, la sentencia otorga en un ejercicio de ponderación con la libertad de información. A este respecto, el estado de ánimo de quien suscribe no es de extrañeza sino de respetuosa discrepancia y, por lo mismo, de entera coincidencia con el voto particular que acompaña a la sentencia[692]. La extrañeza en cambio tiene que ver con el modo como la sentencia construye su canon o parámetro de control en una combinación, difícil de seguir, del DUE y del Derecho nacional.

En lo que sigue propondremos explicar esta sentencia como un segundo intento del TC de superar su ya apuntada incapacidad a la hora de enfrentarse a la evidencia de unos derechos fundamentales que han *emigrado* de un ordenamiento jurídico, el nacional, a otro, el de la UE, con la conocida particularidad de que ambos se encuentran imbricados. La cuestión, bien se sabe, no es del todo particular al TC, pero el caso español viene ofreciendo algunas peculiaridades que merecen la pena ser presentadas en un contexto comparado.

2. El punto de partida

En el principio de esta historia se encuentra una Constitución nacional (CE[693]) que nace en 1978 prácticamente ajena al proceso de integración europea y, por tanto, a cualquier necesidad de cohonestar los derechos fundamentales, que son estrictamente constitucionales, con los que habrían de regir en un eventual ordenamiento de integración supraestatal. A fin de situar esta cuestión en un contexto europeo, baste recordar cómo el momento constituyente español de 1977-78 tiene lugar cuando, singularmente en la República Federal de Alemania, rige desde 1974 la doctrina conocida como *Solange I*: el Tribunal Constitucional Federal (TCF) continúa asumiendo la garantía de los derechos fundamentales también frente a actos de los poderes públicos nacionales acae-

691 Sentencia del Tribunal Constitucional español 89/2022, de 29 de junio.

692 Voto particular suscrito conjuntamente por el Vicepresidente Xiol Rios y por la Magistrada Balaguer Callejón, apartado III, puntos 14-17.

693 Constitución Española de 6 de diciembre de 1978,BOE nº 311.1, de 29 de diciembre.

cidos en cumplimiento del Derecho de las entonces Comunidades Europeas[694]. Quiere esto decir que el constituyente español conoce el problema y cómo *Solange I* es un intento de darle respuesta. Pero, de momento, el interés por la cuestión es todavía puramente teórico, hasta tal punto está lejana la incorporación de España al proceso de integración europea.

Lo anterior no implica que el constituyente no fuera consciente de que los derechos fundamentales que la CE va a reconocer y garantizar no existen, por así decir, en la perpetua soledad del espacio nacional. Es un hecho que España ha suscrito la Declaración Universal de Derechos Humanos (DUDH) y, sobre todo, que es inminente[695] la ratificación del Convenio Europeo para la protección de los derechos humanos y las libertades fundamentales (CEDH). Este último es particularmente importante en la medida en que, a efectos de su garantía, funciona en Estrasburgo un Tribunal Europeo de Derechos Humanos (TEDH) ante el que España podrá ser demandada y en su caso condenada: de hecho, no tardará en sufrir la experiencia.

En este contexto se sitúa la decisión del constituyente de insertar en la CE un *mandato de interpretación* de los derechos y libertades que ella misma reconoce de conformidad con la Declaración Universal de Derechos Humanos y los tratados y acuerdos internacionales sobre las mismas materias ratificados por España (art. 10.2 CE). Este precepto será de importancia decisiva a nuestros efectos porque, con apoyo en el mismo, el TC tratará de mantener su competencia de última palabra en el amparo de los derechos y libertades, sin excluir los actos nacionales dictados en aplicación del DUE.

Dicho con toda sencillez: desde 1986, momento de acceso de España a las Comunidades Europeas, el TC asume su jurisdicción de derechos incluyendo a los Tratados fundacionales y, en definitiva, al Derecho originario de la UE dentro de la categoría de "tratados y acuerdos internacionales" en el sentido del referido art. 10.2 CE. En suma, una categoría inicialmente concebida con la vista puesta muy particularmente en el CEDH ve ampliada su utilización por el TC como herramienta básica en su proceso de *digestión* de la integración

694 BVerfGE 37, 271, Sentencia de 29 de mayo de 1974. Cfr. para Italia, en una evolución similar, sentencia de la Corte Constitucional nº 232/1975. Bifulco, R. and D. Paris (2022), *La Corte Constitucional italiana*, in von Bogdandy, A. and J. Martín y Pérez de Nanclares, J. (eds), *La justicia constitucional en el espacio jurídico europeo*, Valencia, Tirant, 2022, p. 485.

695 Concretamente, el 26 de septiembre de 1979.

europea en lo que a los derechos fundamentales se refiere.

Por lo que hace al contexto, conviene señalar que esta operación tiene lugar en un momento en el que el TCF está sustituyendo su doctrina *Solange I* por la que será conocida como *Solange II*[696]. Es esta una doctrina que el TCF mantendrá por una generación completa, hasta ser sustituida por la inaugurada en la sentencia de su Sala Primera *Derecho al Olvido II*[697]. Se trata, dicho pronto, de la también llamada "teoría de la separación", con arreglo a la cual cada ordenamiento, el nacional y el supranacional, es responsable de la garantía de los derechos y libertades en su respectiva esfera. De este modo, la garantía de los derechos y libertades frente a los actos de los poderes públicos nacionales determinados por el DUE caen del lado de la responsabilidad de la Unión y, consiguientemente, fuera de la competencia del TCF como jurisdicción nacional de derechos fundamentales.

Solange II recibe pronta divulgación en España[698]. Pero el *dictum* de 1981, con la rotundidad conocida, sigue pesando. El TC hace como si la dificultad no existiera: al menos, no se ha visto en la tesitura de declarar su incompetencia para dar respuesta a una demanda de amparo por razón de una *minucia técnica* cual sería la circunstancia de que el poder público español hubiera actuado en obediencia del DUE. De algún modo puede decirse que el TC se mantiene implícitamente en una línea equivalente a *Solange I*.

La cuestión, vale reiterar, es que el TC ha llevado a cabo esta operación con el solo instrumento del aludido mandato interpretativo: el DUE, y en particular la CDFUE, en su interpretación por el Tribunal de Justicia de la Unión Europea (TJUE), cumplen la función de simple auxilio interpretativo, al igual que el CEDH y la jurisprudencia del TEDH, en la tarea de declarar unos derechos que son los de la Constitución nacional.

---

696 BVerfGE 73, 339, Sentencia de 22 de octubre de 1986.

697 BVerfGE, 152, 216, Sentencia de la Sala Primera de 6 de noviembre de 2019.Doctrina confirmada un año más tarde, BVerfGE 156, 182, Sala Segunda en su Sentencia de 1 de diciembre de 2020, conocida como *Euroorden III*.

698 El Juez y después Presidente del Tribunal de Justicia, entre otros autores, se encargaría pronto de ello: Rodríguez Iglesias, G.C. and U. Wölker, U. (1987), *Derecho Comunitario, derechos fundamentales y control de constitucionalidad. La decisión del Tribunal constitucional Federal alemán de 22 de octubre de 1986*, Revista de Instituciones Europeas, No. 14, 1987, at 667 ss.

3. Primer intento de superación. La cuestión prejudicial en el asunto *Melloni*

Todo esto hubiera seguido así de no ser por la concurrencia de una circunstancia enormemente singular: la radical doctrina que el TC mantiene desde el año 2000 sobre la proscripción constitucional de las condenas *in absentia*. El tribunal no sólo ha declarado que una condena penal en rebeldía es contraria a las garantías del proceso penal, sino que ha incorporado esta garantía a la categoría, en realidad acuñada con dicha ocasión, del *contenido absoluto* del derecho a un proceso justo[699]. El asunto tiene, por lo demás, una repercusión no despreciable en la Unión, en la medida en que la doctrina supone un golpe a la represión de la criminalidad organizada. Dos años más tarde, el legislador de la Unión aprueba la Decisión Marco que sustituye los procedimientos de extradición en el seno de la UE por un ágil mecanismo de colaboración judicial, la Orden de detención y entrega conocida en España como euroorden. Su regulación concreta permite todavía mantener la doctrina acuñada un par de años antes[700].

Las cosas cambian sin embargo en 2009, meses antes de la entrada en vigor del Tratado de Lisboa. Una reforma de la Decisión Marco hace que, en adelante, y sobre la base del cumplimiento de determinadas garantías, un Estado miembro no pueda negarse a una petición de entrega emitida por otro, aun trayendo causa dicha petición de una condena *in absentia*.[701] Esto situará inmediatamente al TC ante una disyuntiva poco envidiable: o bien abandona espontáneamente su radical doctrina sobre la proscripción de las condenas *in absentia*, o bien sigue adelante con ella, con la consecuencia de situarse él mismo en rebeldía frente al DUE.

---

699 Sentencia del Tribunal Constitucional español 91/2000, de 30 de marzo (asunto *Domenico Paviglianiti*), acompañada de votos particulares, entre otros, uno de quien suscribe.

700 *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, Official Journal of the European Union, L 190, 18 July 2002, p. 1-20.

701 *Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial*, Official Journal of the European Union, L 81, 27 March 2009, p. 24–36, art. 4 bis.

Queda, sin embargo, una tercera opción, para él no menos costosa, pero por la que terminará inclinándose[702]: la de elevar, por primera vez en un cuarto de siglo, una cuestión prejudicial al TJUE en los términos del art. 267 del recién nacido Tratado de Funcionamiento de la UE (TFUE). El momento importa por cuanto el Tratado de Lisboa ha equiparado la CDFUE a los Tratados fundacionales en valor jurídico. Y la CDFUE (art. 53) incluye entre sus disposiciones horizontales la conocida garantía, frente a sus propias disposiciones, de preservación de un eventual nivel superior de protección de los derechos fundamentales nacionales. Entre cuyas dichas disposiciones se encuentra el art. 51.1, en virtud del cual las disposiciones de la Carta se dirigen a los Estados miembros cuando aplican el DUE. Y sin la menor duda tal es el supuesto de la Decisión Marco. En su petición de decisión prejudicial, el TC, aparte de intentar sucesivamente una interpretación de la Decisión marco favorable a su propia doctrina, o alternativamente su declaración de invalidez, hace en último término una invocación de la garantía del superior nivel de protección.

Este es el contexto en el que se sitúa el primer intento del TC de saltar a un enfoque diferente de la cuestión de los límites de su jurisdicción en materia de derechos fundamentales cada vez que está implicado el DUE. Será, desde luego, un intento no precisamente espontáneo, sino más bien obligado por las circunstancias. Pero la trascendencia *objetiva* de este paso no puede desconocerse: el TC está reconociendo que, en su condición de jurisdicción nacional de última instancia, y por supuesto como órgano nacional aplicador del DUE, puede estar obligado a plantear una cuestión prejudicial.

El TJUE responderá a la cuestión prejudicial con tres *noes* sucesivos: rechazando la interpretación propuesta del precepto cuestionado, rechazando su invalidez y, sobre todo, rechazando, en las circunstancias del caso, la operatividad de la garantía del nivel de protección nacional. De otra parte, el TJUE responde a la cuestión[703] haciéndola coincidir en fecha, el 26 de febrero de 2013, con la no

702 Auto del Tribunal Constitucional 86/2011, de 9 de junio, planteando una cuestión prejudicial sobre el art. 4 bis, apartado 1, *Council Framework Decision of 13 June 2002, supra* note 12, , en su redacción vigente dada por *Council Framework Decision 2009/299/*JHA, *supra* note 13..

703 Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, Judgment of the Court (Grand Chamber) of 26 February 2013..

menos famosa sentencia *Åkerberg*[704]. Los coincidentes puntos 29 de *Åkerberg* y 60 de *Melloni*, interpretados *a contrario sensu*, implican que allí donde el legislador de la Unión *no* deja margen de discrecionalidad a los Estados miembros los derechos que cuentan son los de la CDFUE, con el consiguiente desplazamiento de los nacionales[705]. Con ello, el TJUE puede declarar sin dificultad alguna que la regulación de las condiciones de entrega de un condenado en rebeldía respeta el art. 47 CDFUE. Pero, lo que peor será recibido por el TC: tratándose de una normativa que regula exhaustivamente una materia, no cabe oponer la garantía del nivel de protección nacional del derecho. Con esta respuesta, al TC no le queda otra opción que abandonar su radical doctrina sobre las condenas en rebeldía. Cosa distinta es cómo lo haga.

Porque es en este momento cuando se ve frustrado el intento del TC de superar su enfoque tradicional de la cuestión. Se da la circunstancia de que, pocos meses después de la publicación de *Melloni*, se produce una renovación parcial del TC[706], con el resultado de que el tribunal que va a resolver definitivamente el asunto no es, en su composición personal, el mismo que el que tres años antes había formulado la referida cuestión prejudicial. No es seguro que esta circunstancia haya sido determinante de su modo de reaccionar ante la sentencia del TJUE. En todo caso, este TC se toma un año para dictar su propia sentencia sobre el fondo del asunto. Los votos particulares que acompañarán a la sentencia pondrán de manifiesto la intensidad del debate interno.

En definitiva, el TC asumirá que no tiene alternativa al abandono de su doctrina de 2000, denegando consecuentemente el amparo al condenado *in absentia*: Pero lo relevante es que lo hará como si este cambio de jurisprudencia fuera producto de una espontánea decisión suya: eso sí, *inspirado*, entre otras cosas, por la interpretación que del derecho fundamental ha hecho el TJUE[707]. Figuradamente, es como si el TC hubiera pedido al TJUE una 'opinión consultiva' del tipo de la que, en ese momento y en el ámbito del CEDH, se han

704 Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, Judgment of the Court (Grand Chamber) of 26 February 2013.

705 El TC no se dará por enterado de estos puntos cruciales de *Åkerberg* y *Melloni* hasta la Sentencia del Tribunal Constitucional español 89/2022, de 29 de junio.

706 El 12 de junio de 2013.

707 Sentencia del Tribunal Constitucional español 26/2014, de 13 de febrero.

introducido por la vía del Protocolo 16[708]. En definitiva, es un modo de continuar operando con el art. 10.2 CE, con independencia de que *casualmente* se haya intercalado una cuestión prejudicial. En contraste, dos de los tres votos particulares que acompañan a la sentencia lamentan, cada uno a su manera, que el tribunal no haya dictado una sentencia consecuente con la posición de tres años atrás cuando formuló una cuestión prejudicial, y no otra cosa: en definitiva, que asumiera su posición de órgano jurisdiccional en el sentido del art. 267 TFUE[709].

4. Segundo intento de superación: La STC 89/2022

Han debido pasar ocho años desde el final del *episodio Melloni* para asistir a un nuevo intento por parte del TC de reconocer la obediencia de los poderes públicos españoles a unos derechos fundamentales distintos de los declarados en la CE. Es así como debe interpretarse la sentencia de 29 de junio de 2022 que da pie al presente comentario[710]. Por lo que a su ocasión se refiere, no es aventurado pensar que la doctrina formulada en las dos sentencias del TCF de 6 de noviembre de 2019 (*Derecho al Olvido I*[711] y *Derecho al Olvido II*[712]) tiene algo que ver con este segundo intento[713]. Sabido es cómo la doctrina combinada de estas dos sentencias, han supuesto un cambio radical del enfoque que desde 1986 había presidido la posición del TCF respecto de su condición de protector de los derechos fundamentales. Dicho una vez más con toda simplicidad, la mencionada "teoría de la separación" de las responsabilidades respectiva del TJUE y del TCF es sustituida por una teoría de la integración de responsabi-

708 En vigor desde el 1 de agosto de 2018. No ratificado por España.

709 Votos particulares de las Magistradas Asúa Batarrita y Roca Trías.

710 STC 89/2022, *supra* note 3.

711 BVerfGE 152, 152.

712 *Supra* nota 9.

713 Como en su día ocurriera con *Solange II*, también el cambio doctrinal que estas sentencias supone es pronto divulgado en España. Cruz Villalón, P. (2021), *¿Una forma de cooperación judicial no reclamada? Sobre la extensión del amparo a la Carta de Derechos Fundamentales de la UE*, Anuario Iberoamericano de Justicia Constitucional, Vol. 25, Issue 1, 2021, pp. 57-85.

lidades con arreglo a la cual el TCF asume la garantía de los derechos fundamentales europeos bajo el presumible control del TJUE (art. 267 TFUE) en los supuestos en los que la CDFUE desplaza a la Ley Fundamental alemana. En este sentido, el TCF sigue al cabo de siete años los pasos marcados por su homónimo austriaco[714]. Ahora, con estos dos importantes precedentes de tribunales constitucionales europeos con jurisdicción de amparo, cabía interrogarse por el *quietismo* de un TC nacional de las mismas características[715].

Como el TCF en *Derecho al Olvido II*, y como anteriormente en la cuestión prejudicial que está en el origen del asunto *Google Spain*[716], el TC tiene ahora ante sí una demanda de amparo en reivindicación del derecho al olvido frente al gestor de un motor de búsqueda. El TC sabe que el TCF ha asumido su competencia para conocer de una demanda similar sobre la base de abandonar la doctrina *Solange II*.[717] Mientras tanto, él continúa situado en los años anteriores a dicho *Solange II*, en un implícito *Solange I*[718].

En concreto, el TC ha recibido una demanda de amparo del derecho al olvido frente a dos resoluciones judiciales que, sucesivamente, han denegado el referido derecho fundamental en el marco de una ponderación de éste con la libertad de información, todo ello con arreglo a las pautas de la doctrina del TJUE sobre la materia. En una palabra, la jurisdicción ordinaria española ha actuado con toda normalidad en su condición de juez del DUE. En estos términos, se plantea la cuestión de cómo podría el TC ser juez revisor de unas resoluciones judiciales que han aplicado el DUE en el actual estado de su doctrina. Es, sin embargo, lo que va a intentar hacer, sin mucho éxito.

Ya se ha señalado cómo la STC 89/2022 tiene dos dimensiones de las que sólo cabe en esta sede ocuparse de la primera, la que tiene que ver con la plurali-

714 Sentencia del Tribunal Constitucional de Austria, de 14 de marzo de 2012, U 466-11.

715 Cruz Villalón (2021) *supra* nota 25, p. 76 ss.

716 Case C-131/12, *Google Spain and Google*, Judgment of the Court (Grand Chamber) of 13 May 2014.

717 No debe extrañar que las sentencias *Derecho al Olvido (I y II)* del TCF no aparezcan citadas en la STC 89/2022. No ya sólo por las reducidas ocasiones en las que, de manera general, el TC recurre a esta práctica. A la vista del resultado final de la sentencia, habría parecido inoportuno. See Arzoz Santisteban, X. (2022), *La cita de jurisprudencia constitucional comparada por el Tribunal Constitucional español*, Revista española de Derecho Constitucional, No. 125, 2022, pp. 13-44.

718 *Supra* nota 6.

dad de derechos fundamentales en el espacio de la UE. Como se viene diciendo, el TC desarrolla en este punto una argumentación particularmente complicada de seguir. Hay en ella un primer momento en el que todo parece indicar que el tribunal se va a lanzar por la senda de *Derecho al Olvido II*, en tanto que, en un segundo y definitivo momento, el tribunal regresa al enfoque tradicional de la cuestión, es decir, a dar respuesta a la demanda con arreglo al estricto parámetro de la CE con el complemento de la doctrina del TJUE en su condición de herramienta interpretativa de los derechos nacionales.

Por expresarlo resumidamente: el TC comienza constatando que el derecho al olvido es una materia actualmente regulada por el DUE. Al mismo tiempo constata que tiene ante sí unas resoluciones judiciales que, coherentemente, han resuelto el caso aplicando el DUE en la interpretación dada por el TJUE. A la vista de esto, y con idéntica coherencia, el TC concluye que su tarea en las circunstancias del caso consiste en el control de la corrección de la jurisdicción ordinaria de la aplicación del DUE por parte dicha jurisdicción. En este punto, el lenguaje del TC[719] parece reproducción del correspondiente de *Derecho al Olvido II*.[720] Todo lo cual le llevará a hacer un detenido recordatorio de la doctrina del TJUE contenida esencialmente en *Google Spain*[721], *Google G.C. y otros*[722] y *Google CNIL*[723].

La cuestión es que todo este repaso de la doctrina del TJUE, con vistas al examen de la corrección del trabajo de la jurisdicción ordinaria, acaba paradójicamente sin conclusión inmediata alguna. Es como si, en ese momento, el TC se hubiera parado en seco, a un metro del precipicio, es decir, cuando está a punto

719 "...únicamente se cuestiona el juicio de ponderación que se ha llevado a cabo por los órganos judiciales y que ha resultado en la preterición del derecho al olvido en favor del derecho a la libertad de información. Dado que los órganos judiciales han llevado a cabo dicha ponderación aplicando los criterios establecidos en la jurisprudencia establecida por el Tribunal de Justicia, resulta necesario un examen previo de esta última y de sus consecuencias en la ponderación de los límites de los derechos fundamentales en conflicto" (FJ 3).

720 Puntos 111 y ss. Siempre teniendo en cuenta cómo el TCF no entra en el control de la jurisdicción ordinaria en el ámbito del llamado Derecho constitucional *específico*. Vid. punto 65 de esta misma sentencia.

721 Case C-131/12, *supra* note 28.

722 Case C-136/17, *GC and Others* (De-referencing of sensitive data), Judgment of the Court (Grand Chamber) of 24 September 2019

723 Case C-507/17, *Google* (Territorial scope of de-referencing), Judgment of the Court (Grand Chamber) of 24 September 2019

de reconocerse como garante de los derechos fundamentales tal como existen en el DUE. En lugar de ello, el TC vuelve a su esquema tradicional de garantía de los derechos constitucionales con el auxilio complementario del DUE y del CEDH. La impresión general que de todo ello resulta es que el TC o, mejor dicho, la mayoría que va a sustentar la sentencia no ha podido hacer más.

Para comprobar esto último, nada mejor que echar una mirada al voto particular que acompaña a la sentencia en la parte que interesa. Es un voto de sólo dos miembros[724] sobre los 11 que integraron el Pleno, pero no se puede minusvalorar el hecho de que sus autores sean el Vicepresidente del tribunal y la Magistrada que había actuado como ponente en la sentencia de Sala que, sin voto particular en contra, abordaba cuatro años antes, y de manera general, el derecho al olvido[725]. El voto particular es, en síntesis, una enérgica protesta por lo que consideran un desviacionismo del TC o, dicho de otro modo, una reivindicación de la ortodoxia que hasta ahora ha presidido el enfoque de la cuestión por parte de la jurisdicción constitucional española, vale repetir, la consideración de la CDF como mero auxilio interpretativo al mismo nivel que el CEDH[726]. Sobre todo, el voto particular pone de manifiesto hasta qué punto se está vigilante ante cualquier tímido intento de alteración del *statu quo* en materia de garantía de los derechos fundamentales.

Así se cierra el por ahora último intento del TC de configurar su jurisdicción de derechos fundamentales en el contexto de una integración europea avanzada. Si se contrasta con el resultado de *Melloni*, puede palparse un tímido

724 *Supra* nota 4.

725 Sentencia del Tribunal Constitucional español, de 4 de junio. En una situación semejante a *Derecho al Olvido I*, el derecho al olvido se invocaba frente a un órgano de prensa periódica.

726 "Es irrenunciable en la construcción y desarrollo del derecho nacional de los derechos humanos un *constante diálogo* con los órganos encargados de la interpretación del *derecho regional* -en nuestro caso *el TEDH como intérprete del Convenio Europeo de Derechos Humanos* y *el TJUE en relación con la Carta de Derechos Fundamentales de la Unión europea*- e internacional de los derechos humanos. Ahora bien, la idea de diálogo entre tribunales no implica ni la sustitución de la Constitución como referente de los derechos fundamentales cuya protección última está encomendada al Tribunal mediante la jurisdicción de amparo ni la de la jurisprudencia constitucional por la doctrina que puedan establecer otros órganos de interpretación de otros textos de derechos humanos" (apartado I.3, *subrayado mío*).

avance en una evolución doctrinal que nos parece inevitable[727]. La cuestión es, en todo caso, por cuánto tiempo podrá el tribunal aguantar a pie firme en un planteamiento tan ajeno a la realidad y, sobre todo, tan ajeno a la legalidad de la Unión.

5. Conclusión

Llegados aquí, cabe volver al viejo *dictum* con el que abríamos estas sucintas consideraciones. Y es que el TC tiene la posibilidad de preservar su sentido, al menos en el contexto de la integración europea. Sencillamente, puede continuar declarando que nada que concierna al ejercicio de los derechos fundamentales le será ajeno, con tal de que asuma un coste: el de declararse garante de la CDFUE, asumiendo, como es inevitable, su condición de órgano jurisdiccional de última instancia en el sentido del art. 267 TFUE.

727 Todo ello con independencia de que, como en anterior ocasión he señalado, me parezca preferible que la evolución en el enfoque del problema traiga causa de una reforma legislativa. Cfr. Cruz Villalón (2021), *supra* note 25, p. 81

17. Commentary to a multilevel Court Decision for a multilevel Public Law Professor. An Homage to Jacques Ziller

Vasco Pereira da Silva, Full Professor of Public Law in the Law Faculty of the University of Lisbon.

Before the text: a Homage to Prof. Jacques Ziller

I had known Prof. Jacques Ziller. in his written form, for some time when I first met him in person at the founding congress of SIPE, on the island of Crete, in 2004. There I could see that to his brilliant intelligence and his manifold knowledge he also added great friendliness, an exquisite sense of humour and a very French "charm".

At that same Congress, I also met the woman he fell in love with, and later married, Professor Diana Urania Galleta, and both became my friends for life. So, we discovered we have another thing in common, we are both married with a Colleague of Public Law.

From that time on, we met frequently, in Lisbon, in Milano, and always,

year after year, at the city where the SIPE Meeting takes place.

That is why I could not fail to join this book of homage to the Professor, the Man and to my dear Friend Jacques.

1. Climate Change Protection and Environmental Law

Ecology as a community problem, or as a political question, is a reality of our times. Such a "modern" idea dates to the crisis of the welfare state model, which appeared at the end of the 1960s and whose most acute symptoms were felt in the 1970s, with the so-called "oil crisis", which forced a generalized awareness of the limits of economic growth and the depletion of natural resources. The crisis of the welfare state would bring about the emergence of the "ecological question" (just as the "social question" had emerged from the crisis of the liberal state), showing that environmental protection should be seen as a problem of society requiring a political solution.

Nowadays, the environmental theme acquires an even greater "daily relevance" due to the phenomenon of "climate change". For, the (by all) felt instability of the climate, accompanied by the growing awareness that this is due to human action, reintroduces the "environmental issue" in the "daily life" of individuals. Indeed, families who see their beach holidays "ruined" because it rains "all summer", winter sports practitioners who do not find snow in the usual places, travellers who go to a "hot country" and encounter a "polar cold", or to a "cold country" and are surprised by a "tropical heat", people who have got used to "looking at the street" or listening to the "weather report" to know how they should dress, since there is no longer a "proper clothing" for each season, can no longer remain indifferent to environmental problems.

Hence, both the issue of climate change and, in general, all environmental problems have become "must-talk topics", from coffee shops to media news, from films to Hollywood "Oscar" award ceremonies, from school competition awards to the Nobel Peace Prize, from political parties to non-governmental organizations, from local "political agendas" to major international conferences ...

As a matter of fact, climate change is an important part of the "environ-

mental question, responsible to put environmental issues at the agenda day after day. And if, at the beginning, the issue of climate change still gave rise to some scepticism, even among some former environmentalists[728], nowadays it became a scientific fact of decisive importance[729], demanding action against greenhouse gases at local, State, European and global levels.

The non-compliance of global rules, like the Paris agreements, or the European and the constitutional regulations on the environment, as well as the absence or the inadequacy of public policies to avoid climate change, is so serious that it could lead to a "catastrophic outcome" (KEMP). That's because the «climate change could lead to a meltdown of world society and even the eventual extinction of humanity» (says LUKE KEMP, a specialist from the University of Cambridge)[730].

2. Commentary of the Decision of the German Constitutional Court on Climate Change (24/3/2021)

As a law problem, climate change also requires Courts decisions. And recently, many Courts were called to deal with the climate change issue, from the Supreme Court of Brazil to the German Federal Constitutional Court, or to the European Court for Human Rights.

We'll talk now about a pioneer and highly innovative judgement: the Decision of the Federal Constitutional Court of Germany on Climate Change (BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18 -, paras. 1-270). The Court's **conclusion** is that some norms of the Federal Climate Change Act, of 12 December 2019, «*are incompatible with fundamental rights insofar as they lack provisions on the updating of reduction targets for periods from 2031 that satisfy the constitutional requirements*».

Looking to the arguments developed, in my view, this sentence presents

728 Lomborg, B. (1988), *The Skeptic Environmentalist*, Press Syndicate of the University of Cambridge, 1988.

729 Le Roy Ladurie, E. (2009), *Le Réchauffement de 1860 à Nos Jours*, Fayard, 2009.

730 Lewind, F. (2022) *Climat, Le Scénario de l'Accélération*, Le Point, No. 2616, 22 September, 2022, pp. 59.

five key issues, namely:

- A Global Environmental Law Court Decision. Climate change as a global and national State Constitutional issue
- Human and fundamental rights are equal
- There is Protection of the Fundamental Right to the Environment in the German Constitution
- Fundamental right to the Environment as a right of action of public entities
- Right to the environment as a right to/for the future

2.1 A Global Environmental Law Court Decision. Climate change as a global and national State Constitutional Issue

Although it is a decision taken by a national court (the German Federal Constitutional Court) about the unconstitutionality of a German law, everything else seems to be global. The judgment deals with a global issue (the fight against climate change), applies international standards (namely the Paris agreements), establishes a duty for German authorities to act to protect the environment in the international sphere, grants foreign citizens the right to stand before the Constitutional Court to defend their fundamental rights, considering that these rights are also protected by the German constitution. What more do we need to qualify all this as a global legal judgement or a multilevel court decision?

Let us now see what the Court says about two of these global questions posed: a) the constitutional duties of action of the German authorities to protect the environment in global constitutional law order; b) the legal standing of citizens of Nepal and Bangladesh (living in their home country) to act in the German Constitutional Court.

Regarding the duties, the German Federal Constitutional Court says: «*As an obligation to take climate action, art. 20a GG has an international dimension. The fact that no state can resolve the problem of climate change on its own due to the global nature of the climate and global warming does not invalidate*

the national obligation to take climate action. Under this obligation, the state is compelled to engage in internationally oriented activities to tackle climate change at the global level and is required to promote climate action within the international framework. The state cannot evade its responsibility by pointing to greenhouse gas emissions in other states» (Headnotes 2c).

Regarding the legal standing of citizens of Nepal and Bangladesh (living in their home country) to act in constitutional justice, the German Federal Constitutional Court says: *«the complainants can in some cases claim a violation of their fundamental right to life and physical integrity (art. 2-2 GG) and some of them can claim a violation of their fundamental right to property (art. 14-1 GG) (...) because it is possible that the state, in adopting the Federal Climate Change Act, might have taken insufficient measures to reduce greenhouses gas emissions and to limit global warming» (§ 80). And further on he adds: «the complainants are not asserting the rights of unborn persons or even of entire future generations, neither of whom enjoy subjective fundamental rights (...). Rather the complainants are invoking their own fundamental rights» (§109) «Nor are the constitutional complaints an inadmissible actio popularis. The mere fact that very large numbers of people are affected does not exclude persons from being individually affected in their own fundamental rights» (§ 190).*

So, the foreign citizens have fundamental rights guaranteed by the German Constitution, whether living in Germany or not. And what we are talking about is their own fundamental rights (subjective dimension), and not any protection of rights of future generations, nor any popular action (objective dimension). The processual right of standing before the Constitutional Court also means a (possible) titularity of fundamental rights to any person living in the outside world, according to the German constitution.

In my opinion, this is the result of the new global dimension of fundamental rights, and particularly of the fundamental right to the environment. As I wrote before, «since the 70s of the 20th century, it has made sense to speak of green constitutionalism because, on the one hand, the Post-Social State, emerging from the crises of the Welfare State, brought with it ecological issues, transformed into legal values, both as principles and rights established at the highest level of the international and national legal orders; on the other hand, because it is from that moment on that it begins to make sense to speak of

"Constitutional Law without Frontiers", with the affirmation of the constitutional nature of Human Rights (including the "Right to the Environment"), at a global level, and the emergence of the idea of a European Constitutional Law. Today, there is a fundamental right to the environment enshrined in the global, European, and State legal orders (directly or indirectly).

The fundamental right to the environment has its roots in the human dignity of the individuals (as actually considered), and simultaneously presents an objective dimension, corresponding to the protection against public (and private) aggressions in the constitutionally protected sphere, and a positive dimension, creating concrete duties of action or simple tasks, in charge of the public authorities»[731].

2.2 Human and Fundamental Rights are equal

This decision also removes the classic distinction between natural rights (in the international order) and fundamental rights (in the domestic order). Therefore, the German Federal Constitutional Court says: *«Insofar as the complainants are natural persons, their constitutional complaints are admissible» (§ 80).*

I could not agree more. In my view: «before, according to the classical legal logic, both from the point of view of Constitutional Law and of the Public International Law, it made no sense to speak of "international" or "global constitutionalism", since international legal relations had States as exclusive subjects, so they were configured as "external relations", while constitutional issues were placed exclusively at the level of the States, being considered as "internal relations". Now, the traditional assumptions have been changed, with the "internalization" of International Law and the "externalization" of Constitutional Law, which leads to the overcoming of the formalistic distinction between "Human Rights" and "Fundamental Rights", all of which are now transformed into Human/Fundamental Rights.

Nowadays, within the scope of global constitutionalism (S. CASSESE)[732],

731 Pereira da Silva, V.(2022), *Green Constitution: The Right to the Environment*, in Cremades J. and C. Hermida (eds), *Encyclopedia of Contemporary Constitutionalism*, Springer Cham , 2022.

732 Cassese, Sabino (2009), «*Il Diritto Globale. Giustizia e Democracia oltre lo Stato*», Einaudi, Torino; (2008) «*Il Mundo Nuovo del Diritto – Un Giurista e il suo Tempo*», Mulino, Bologna; (2006) «*Oltre lo Stato*», Editore Laterza, Roma / Bari.

in the perspective of the "right to an environment without frontiers", it is understood that individuals are autonomous subjects in the international sphere; that the norms of the international order are directly applicable to concrete legal relations (that is to say, at domestic level), conferring true fundamental rights to all individuals; and that such fundamental rights allow individuals access to international courts for the protection of their subjective rights, even against the State to which they belong (VASCO PEREIRA DA SILVA)[733]».

According to the Constitutional Court, non-German citizens have the right to stand in the German Constitutional Court complaining about the unconstitutionality of a German law, as well as they have fundamental rights protected by the Constitution just because they are human persons. Natural rights and fundamental rights are equal and should have equal protection. I could not agree more.

2.3 There is Protection of the Fundamental Right to the Environment in the German Constitution

In Germany, the fundamental right to the environment is not directly included in the list of fundamental rights, but one may consider it is indirectly protected according to the jurisprudence of the Constitutional Court. In this case, the German Federal Constitutional Court says: «*The protection of life and physical integrity under Art. 2(2) first sentence of the Basic Law encompasses protection against impairments of constitutionally guaranteed interests caused by environmental pollution, regardless of who or what circumstances are the cause. The state's duty of protection arising from Art. 2(2) first sentence of the Basic Law also encompasses the duty to protect life and health against the risks posed by a Refusal of Court to the application of a "fundamental right to an ecological minimum standard of living" or the "right to a future consistent with human dignity" demanded by the applicants – however the consideration of this" as a part of the recognized derived fundamental right could be amissible*».

However, the Court adds: «*A right to an "ecological minimum standard of living" (ökologisches Existenzminimum) is derived among other things from the "minimum standard of living consistent with human dignity" (menschen-*

733 Pereira da Silva, Vasco (2007), «*A Cultura a que Tenho Direito. Direitos Fundamentais e Cultura*», Almedina, Coimbra, p. 62/63.

würdiges Existenzminimum) guaranteed under Art. 1(1) in conjunction with Art. 20(1) GG (cf. BVerfGE 125, 175 <222 ff.>)». So, «(...) Other fundamental rights already make it obligatory to maintain minimum ecological standards that are essential for fundamental rights» (...) «Nevertheless, alongside the duties of protection arising from Art. 2(2) first sentence with regard to physical and mental well-being and from Art. 14(1) GG, a mechanism for safeguarding the ecological minimum standard could indeed acquire its own independent validity if, in an environment transformed to the point of being toxic, adaptation measures (see para. 34 above) would still be capable of protecting life, physical integrity and property but not the other prerequisites for social, cultural and political life. Another conceivable scenario is that adaptation measures would have to be so extreme that they would no longer allow for meaningful social, cultural and political interaction and participation» (§ 114).

In my perspective, the «German Fundamental Law enshrines the environmental protection of the environment, in article 20-a, through an objective norm, which creates a state purpose of objective nature. Jurisprudence and doctrine have, however, admitted control of constitutionality for indirect violation of subjective environmental injuries, either when they take place simultaneously with the damage to other fundamental rights, such as the right to property, freedom of profession, the right to health, the right to life; or when the violation of the fundamental right to the environment guaranteed by international law is at stake (RAINER ARNOLD)[734]. Hence the possibility of considering the fundamental right to the environment as implicitly enshrined, according to the creative jurisprudence of the German Constitutional Court with the support of German constitutional doctrine»(VASCO PEREIRA DA SILVA)[735].

In the present decision, the German Constitutional Court reaffirms the (indirectly guaranteed) fundamental right to the environment and develops its dimension of a «right to an "ecological minimum standard of living". On the other hand, the content of the judgment dismisses all the claims of uncon-

734 Arnold, R. (2020),*Table Ronde : Constitution et Environnement : Allemagne*, in Institut Louis Favoreu (2020), *Annuaire de la Justice Constitutionnelle XXXV 2019* , Presses Universitaires d'Aix-Marseille, Paris, 2020, p. 84

735 Pereira da Silva, V. (2019), *Portugal : Le Vert est aussi Couleur de Constitution*, in Institut Louis Favoreu (2020), *supra* note 6,, p. 455 et seq.

stitutionality based on objective grounds put forward by the applicants, and upholds the arguments based on the subjective dimension of environmental protection. It means that the Constitutional Court recognizes (indirectly) the fundamental right to the environment, without proclaiming it, and at the same time decides the case, according to the fundamental right of the environment.

This could be considered contradictory if it did not point in the right direction, i.e. towards the direct recognition of the right to the environment. Ironically, one could say that this means, from a psychoanalytic point of view, that the court acts according to its unconscious, but has not yet had the opportunity to admit it consciously. A little more "therapy" and the matter is settled.

2.4 Fundamental right to the Environment as a right of action of public entities

Fundamental right to the environment requires action from public entities. About this, says the German Federal Constitutional Court: *«Art. 20a GG obliges the State to take climate action. This includes the aim of achieving climate neutrality» (Headnotes 2)*. And then adds: *«Art. 20a of the Basic Law is a justiciable legal provision designed to commit the political process to a favouring of ecological interests, partly with a view to future generations» (Headnotes 2e)*.

With this traditional formulation, the Constitutional Court considers fundamental rights as negative rights, or rights to an abstention of public entities, but at the same time says that they have a positive dimension, as objective duties of protection. From my perspective, it is difficult to understand why fundamental rights various configurations cannot have, some as rights to an abstention, others as rights to a determined (mandatory and non-discretionary) action, as happens in Administrative Law (where, for example, there are rights to police action). In my opinion, this would be the normal outcome of the modern doctrine of public subjective rights.

From my perspective, «the evolution of the theory of the subjective public

rights, according to the doctrine of the protection norm[736], put an end to the doctrinal "dualism" that had existed until then, which separated "the subjective rights of the Constitutional Law" and the "subjective rights of Administrative Law" (H. BAUER)[737]. And it led to the expansion of subjective public rights in multilateral administrative legal relations based on the Constitution (*mx.* in areas such as the environment, urbanism, consumption, competition, the police).

Thus, there is a unanimous recognition that the dogmatic unification of subjective public rights, based on the rights recognized in the Constitution, has borne "good fruit" in Administrative Law. But if this is the case today in Administrative Law, it is now time to ask why the same has not happened in Constitutional Law? Why the notion of fundamental right, as a public subjective right, continued to be, in practice, restricted only to certain categories of rights (for instance, "first generation rights" or, in Portugal, "rights, freedoms and guarantees") and was not extended to them all?

From my perspective, reaffirming the idea of the unity of all public subjective rights regardless of their origin, it is time to draw all the dogmatic consequences of the conjunction of Constitutional Law and Administrative Law, on a reciprocal basis, considering that the rights in both areas can be both absolute and relative (when the duties of public authorities result from constitutional or legal obligations). Which means that, after having followed the path from Constitutional to Administrative Law, it is now also necessary to follow in the opposite direction, from Administrative to Constitutional Law, to rethink the very notion of fundamental right[738]».

---

736 On the theory of fundamental rights, according to the "theory of the protective norm", in its three different moments, see: (1st, Step) Bühler, Ottmar (1914), *Die Subjektiven öffentlichen Rechte und ihr Schutz in der Deutschen Verwaltungsrechtsprechungen*, Kolhammer, Berlin / Stuttgart / Leipzig, p. 224-225; (2nd. Step) Bachof, Otto (1955), «*Reflexwirkungen und Subjektive Rechte im öffentlichen Recht*», in *Gedächtnisschrift für Walter Jellinek – Forschungen und Berichte aus dem öffentlichen Recht*, 2. ed., Gunther & Olzog, Muenchen, p. 287; (3rd. Stei) Bauer, Hartmut (1992) «*Verwaltungrechtslehre im Umbruch? Rechtsformen und Rechtsverhältnisse als Elemente einer zeitgemässen Verwaltungsrechtsdogmatik*», in *Die Verwaltung – Zeitschrift für Verwaltungswissenschaft*, vol. 25, n. 3 p. 301; (1988) «*Altes umd Neues zum Schutznormtheorie*», in *Archiv des öffentlichen Rechts*, vol. 113, n.4, December.

737 Bauer, H. (1986), *Geschichtliche Grundlage der Lehre vom subjektiven öffentlichen Rechte*, Duncker & Humblot, Berlin, 1986, p. 132.

738 Pereira da Silva (2022), *supra* note 5

2.5 Right to the environment as a right to/for the future

The fundamental right to the environment is a right that is opened to time. As the German Federal Constitutional Court says: «*Under certain conditions, the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations. In their subjective dimension, fundamental rights – as intertemporal guarantees of freedom – afford protection against the greenhouse gas reduction burdens imposed by Art. 20a of the Basic Law being unilaterally offloaded onto the future*» *(Headnotes 4)*.

And for the Constitutional Court the future begins today. Which means to say that: «*Respecting future freedom also requires initiating the transition to climate neutrality in good time. In practical terms, this means that transparent specifications for the further course of greenhouse gas reduction must be formulated at an early stage, providing orientation for the required development and implementation processes and conveying a sufficient degree of developmental urgency and planning certainty*». *(Headnotes 4)*.

The result of this reasoning is that there is the possibility of the unconstitutionality of a norm that does not anticipate the future, due to the lack of application of the precautionary principle. And this unconstitutionality, according to the Constitutional Court, stems from a direct violation of a fundamental right and not of an objective norm. As the Federal Constitutional Court says: «*This risk to fundamental freedoms is not unconstitutional on the grounds of any violation of objective constitutional law. No violation of Art. 20a GG can ultimately be ascertained (III 2 a). «However, there is a lack of precautionary measures required by fundamental rights in order to guarantee freedom over time and across generations – precautionary measures aimed at mitigating the substantial emission reduction burdens which the legislator offloaded onto the post-2030 period with the challenged provisions and which it will then have to impose on the complainants (and others) due to Art. 20a GG and due to the obligation arising from fundamental rights to afford protection against impairments caused by climate change (III 2 b).*» *(§ 142)*.

So, the subjective right to the environment (and not an objective norm) is the way to guarantee the rights of the future generations. The right to the envi-

ronment provides an intertemporal protection that also includes the rights to the future generations. That means there is a need of joining past, present and future to protect the environment, a need for «a dynamic fundamental rights protection» (§ 5). Or, as the court also says, there is a need for a "intertemporal protection of liberty of the future».

What a decision of the German Constitutional Court! And this is not just a rhetorical statement, but a sincere tribute to this decision of the German Constitutional Court, because if I did not agree with the sentence, I could criticise it vehemently (as, in fact, I have already done, on another occasion and subject, joining 27 colleagues, in an initiative to which I was invited to participate by the now honoured colleague Jacques Ziller - see https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments).

Hence my choice to comment on this multi-level decision of the German Constitutional Court, as my way to pay homage to a true multi-level Professor of Public Law, Prof. Jacque Ziller.

18. Justicia administrativa contemporánea desde una perspectiva comparada

Susana de la Sierra, Profesora Titular de Derecho Administrativo, Universidad de Castilla-La Mancha, Doctora en Ciencias Jurídicas por el IUE (2003)

1. Introducción

En marzo o abril del año 1999, viajé en tren desde Bayreuth a Florencia para realizar la entrevista de selección en el Instituto Universitario Europeo. Impresionada, recorrí los pasillos de la Badia Fiesolana hasta llegar a un seminario en el que me esperaba el tribunal. Allí en la puerta, y durante todo el día que permanecí en Florencia en aquella ocasión, pasé momentos de solidaridad y comprensión con personas que meses más tarde serían compañeros y amigos, algunos de los cuales participan también ahora en este homenaje.

Entre los profesores que componían el tribunal se encontraba Jacques Ziller y, por afinidad de especialización, me realizó varias preguntas y observaciones sobre el proyecto de investigación planteado, que no era en definitiva sino un proyecto sobre justicia administrativa comparada en perspectiva europea. Superado el trance, meses más tarde me incorporé al Instituto, donde

desarrollaría mi tesis doctoral bajo la dirección precisamente de Jacques Ziller, así como de Luis Martín Rebollo, en calidad de co-director externo.

Me sentía entonces y me siento ahora muy afortunada por haber tenido la oportunidad de formar parte durante cuatro años de la comunidad fiesolana, especialmente por la fuente de inspiración que han supuesto las personas de esa comunidad en seminarios, conversaciones, comidas. Con Jacques Ziller me formé especialmente como comparatista.[739] Su profundo conocimiento de otros ordenamientos jurídicos y de varias lenguas, su gusto por el contraste entre soluciones jurídicas, sus cautelas ante lugares comunes: todo ello me fue guiando durante esos años formativos y la enseñanza ha permanecido hasta hoy, ya que no me resulta posible afrontar estudios de Derecho Comparado sin evocar esos años.

Esta pequeña contribución con ocasión del homenaje que hemos querido rendirle discípulos y colegas, desde la amistad y el reconocimiento, se centra también en la justicia administrativa y enlaza con la investigación que realicé para la tesis doctoral.[740] Se trata de una reflexión más amplia que se inserta en una línea de trabajo actual, un trabajo en curso que ha sido objeto ya de algunas publicaciones, a las que me remito en este momento.[741]

739 En su día, me resultó especialmente útil su obra Ziller, J. (1993) *Administrations Comparées. Les systèmes politico-administratifs de l'Europe des douze*, Montchrestien, Paris, 1993.

740 Se relaciona, además, con Storskrubb., E. and J.Ziller (2007), *Access to Justice in European Comparative Law*, in Francesco Francioni (ed), *Access to Justice as a Human Right*, Oxford University Press, 2007.

741 Me remito, por todos, a los siguientes trabajos: de la Sierra, S. (2020), *El recurso de casación contencioso-administrativo en el marco de las mutaciones de la justicia administrativa*, in Bustillo Bolado, R.O. (ed), *Partidos políticos y control del poder público*, Andavira, Santiago de Compostela, 2020; de la Sierra, S. (2021), *Die Rolle der ordentlichen Gerichtsbarkeit im Grundrechtsschutz und die Kultur aus verfassungsrechtlicer Sicht*, in Blanke, H.-J., S. Magiera, J.-C. Pielow, J.-C. and A.Weber (eds), *Verfassungsentwicklungen im Vergleich: Italien 1947 – Deutschland 1949 – Spanien 1978*, Duncker & Humblot, Berlin, 2021.

2. Apuntes iniciales sobre la transformación de la justicia administrativa contemporánea

En 1962, Jean Rivero publicaba su exquisita crónica de la visita del hurón al Consejo de Estado francés,[742] que en tono irónico presentaba a este órgano como epítome de la defensa del ciudadano frente a la Administración conforme a la doctrina gala. El sorprendido hurón iba formulando preguntas que, desde la inocencia y el deslumbramiento, deconstruían el recurso por exceso de poder o contencioso-administrativo clásico. La defensa frente a la actuación de la Administración Pública presentaba múltiples fisuras, en un momento en el que las inmunidades del poder[743] campaban por sus fueros.

Si el hurón recibiera ahora una invitación para visitar la cuna del contencioso, su sorpresa sería mayúscula al advertir la evolución de la institución, pero también quizás y de forma no tan paradójica al constatar que los debates de fondo continúan siendo idénticos y giran en torno a una cuestión: quién y cómo ha de controlar el poder público. Sin embargo, el control judicial va más allá, toda vez que forma parte de un sistema en el que el Derecho Administrativo no sólo limita, sino que ha de propiciar la adopción de políticas públicas. Las respuestas varían, eso sí, en función del momento histórico al que vengan referidas las fuentes, del modelo de Estado vigente en cada caso, de la tradición jurídica en unas y otras partes del globo, así como del contexto social y político, cuando no de la ideología personal de quien escriba.

En las líneas que siguen se realizará una aproximación somera – somerísima - a algunos aspectos que podrían estar influyendo en la transformación de la justicia administrativa. Como es lógico, no se pretende aquí realizar un estudio exhaustivo de la materia, sino que se persigue identificar algunos elementos que

742 Rivero, J. (1962), *Le Huron au Palais-Royal ou réflexions naïves sur le recours pour excès de pouvoir*, Dalloz, Chronique – VI, 1962, pp. 37ss. Más adelante, el autor completó su escepticismo en Rivero, J. (1979), *Nouveaux propos naïfs d'un huron sur le contentieux administratif*, EDCE, No. 31, 1979 – 1980, pp. 27ss.

743 En el sentido de García de Enterría, E. (1974), *La lucha contra las inmunidades del* poder, Cuadernos Civitas, Madrid, 1974. Una adaptación contemporánea de las tesis puede verse en García Majado, P. (2022), *De las inmunidades del poder a la inmunidad del sistema jurídico y sus patologías*, Centro de Estudios Políticos y Constitucionales, Madrid, 2022.

más adelante conectarán con algunas de las reformas recientes y por venir en España y en otros Estados. El punto de partida es, así, el ordenamiento jurídico español, heredero en su día del modelo francés del contencioso-administrativo, pero que ha seguido una estela propia contando también con otras influencias, como la del Derecho alemán[744] o, más recientemente, el Derecho estadounidense[745]. En particular, la reflexión surge de la reforma del recurso de casación contencioso-administrativo operada por la Ley Orgánica 7/2015, de 21 de julio, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial. Dicha reforma no es sino la consecuencia de una evolución y ha de entenderse precisamente en el contexto de dicha evolución. Por esa razón, se expondrán algunos elementos en clave histórica que permiten entender el contexto en el que opera la citada reforma.

3. El presupuesto de la jurisdicción: un Derecho Administrativo en continuo crecimiento

El Derecho Administrativo, como institución cultural, es fruto de la historia y el marco social, político y jurídico de cada tiempo. Los mimbres de este contexto se plasman en textos de naturaleza constitucional[746] y responden a consensos, acuerdos, en definitiva, a un contrato social. En este sentido, el Derecho Administrativo que heredamos es fruto de las revoluciones burguesas.[747] Sin desmerecer en absoluto los precedentes ni las teorías doctrinales que durante

744 Por ejemplo, en relación con el sistema de pretensiones de condena, algo inicialmente muy alejado del modelo francés y más afín al alemán, vid. el completo estudio de Huergo Lora, A. (2020), *Las pretensiones de condena en el contencioso-administrativo*, Aranzadi Thomson Reuters, 2000.

745 Así, el modelo estadounidense del *certiorari* habría influido en la reforma del recurso contencioso-administrativo. Cfr. sobre los orígenes de la reforma Francisco Velasco (2013), *Informe explicativo y propuesta de ley de eficiencia de la Jurisdicción Contencioso-Administrativa*, Ministerio de Justicia, 2013.

746 En el ámbito internacional, autores como Sabino Cassese se han preguntado por las bases constitucionales del Derecho Administrativo Global o Internacional. En este sentido, de forma temprana, Cassese, S. (2004), *Tendenze e problemi del diritto amministrativo*, Rivista Trimestrale di Diritto Pubblico, 2004, No. 4, pp. 901ss.

747 García de Enterría, E. (1994), *La lengua de los derechos. La formación del Derecho Público Europeo tras la Revolución Francesa*, Alianza, Madrid, 1994.

algunos siglos fueron sentando las bases del moderno concepto de Estado ni aquellos conatos de control del poder público que podrían considerarse una suerte de embriones de las estructuras propias del Estado moderno, lo cierto es que es esta forma de organización y los principios que la inspiran aquella que determina la gestión de un modelo de control del poder público que surge en el siglo XIX y se va consolidando con el transcurrir de los años.[748]

El concepto de Derecho Administrativo que se construye en España y en otros Estados tanto de la tradición continental como de la anglosajona[749] es un concepto fuertemente vinculado al control judicial o al control con carácter general. Incluso en aquellos Estados que carecen de un orden jurisdiccional contencioso-administrativo en sentido estricto, como el Reino Unido o Estados Unidos, la óptica de estudio tradicional ha sido la propia del *judicial review* o del control de las agencias[750]. En este sentido, tiene lógica que los principios que inicialmente y durante largo tiempo han guiado el contencioso-administrativo y, por ende, el Derecho Administrativo hayan sido principios vinculados con el principio de legalidad, de seguridad jurídica y (más tarde) la tutela judicial efectiva.

Sin embargo, ya hace décadas se complementó esta visión con otra que no sólo presta atención a los controles, sino a la acción administrativa. Como subrayó de forma temprana Alejandro Nieto parafraseando (y desgranando) la Constitución, la Administración sirve con eficacia los intereses generales.[751] La pluralidad de intereses y, en particular, de intereses públicos llevó a autores como M.S. Giannini a articular una teoría del Derecho Administrativo basada

748 Recientemente se ha publicado en España una revisión de la Historia del Derecho Administrativo español a la que resulta imprescindible referirse: Medina Alcoz, L. (2022), *Historia del Derecho Administrativo español*, Marcial Pons, Madrid, 2022.

749 Cfr. en este sentido, entre otros, Barnés, J. (ed.) (1993), *La justicia administrativa en el Derecho Comparado*, Civitas, Madrid, 1993.

750 Cfr. en la literatura en castellano González García, J.V. (1996), *El alcance del control judicial de las Administraciones Públicas en los EEUU*, Mc Graw-Hill, Aravaca, 1996.

751 Cfr. Nieto, A. (1991), *La Administración sirve con objetividad los intereses generales*, in Martín-Retortillo Baquer, S. (ed), *Estudios sobre la Constitución española. Homenaje al Profesor Eduardo García de Enterría*, Civitas, Madrid, 1991, pp. 2185ss. Más recientemente, sobre la eficacia Corso, G., M. de Benedetto, and N. Rangone (2022), *Diritto amministrattivo effettivo. Una introduzione*, Il Mulino, Bologna, 2022.

en esta pluralidad[752] y a la doctrina alemana a profundizar en la noción de interés público con esta perspectiva.[753] Estas construcciones apuntan a la multipolaridad[754] y subyacen a construcciones procesales como la ponderación de intereses en la tutela cautelar o a los litigios entre Administraciones Públicas, donde cada una defiende uno o varios intereses públicos distintos. De hecho, en el proceso contencioso-administrativo se ha producido una ampliación de los sujetos concernidos y en áreas como la contratación pública o la responsabilidad patrimonial de las Administraciones públicas cabe pensar en ciertas circunstancias en litigios *inter privatos*, si bien que en el contexto de una norma de Derecho Administrativo o de un marco jurídico-administrativo.

Estas nuevas aproximaciones han dado lugar a nuevas reflexiones sobre el método en nuestra disciplina[755], reflexiones que en algunas coordenadas se han planteado desde la concepción del Derecho Administrativo como una "ciencia de dirección"[756], que marca el camino a una Administración al servicio de quienes en cada momento cuentan con la mayoría parlamentaria suficiente

752 eg además de otras obras más tempranas y extensas, Giannini, M.S. (1991), *Il pubblico potere. Stati e amministrazioni pubbliche*, Il Mulino, Bologna, 1986 (traducción al castellano con el título *El poder público: Estados y Administraciones Públicas*, Civitas, Madrid, 1991).

753 Häberle, P. (1970), Öffentliches Interesse als juristisches Problem. Eine Analyse von Gesetzgebung und Rechtsprechung, Athenäum Verlag, Bad Homburg, 1970.

754 Autores como Karl-Heinz Ladeur insistieron hace ya un tiempo en la necesidad de prestar atención jurídica detallada a las relaciones multipolares. Ad ex., eg Ladeur, K.H. (1996), *Richterrecht und Dogmatik – eine verfehlte Konfrontation ? – Eine Untersuchung am Beispiel der Rechtsprechung des Europäischen Gerichtshofs* -, Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (KritV), Vol. 79, No.,1996. Más recientemente, en España, Dolores Utrilla ha propuesto la revisión de la construcción dogmática de la relación jurídica a fin de adaptarla a la evolución del Derecho Administrativo y contribuir de este modo a una teoría más ajustada a la contemporaneidad. Cfr. Utrilla Fernández-Bermejo, D. (2020), *La relación jurídica en el sistema de Derecho Administrativo*, Revista de Derecho Público: Teoría y Método, Vol. 2, 2020.

755 En este sentido cabe hacer referencia a los debates en el seno del Seminario de Teoría y Método (STEM), que se celebran dos veces al año, así como a la Revista de Derecho Público: Teoría y Método, que ha surgido vinculada a dichos seminarios y que se encuentra disponible online en abierto: Revista de Derecho Público: Teoría y método (revistasmarcialpons.es).

756 Cfr. Schmidt-Aßmann, fundamentalmente en su obra Schmidt-Aßmann, E. (1998), *Das allgemeine Verwaltungsrecht als Ordnungsidee*, Springer, Berlin, 1998 (traducción al castellano coordinada por Barnés, J. (2003), *La teoría general del Derecho como sistema*, Marcial Pons, Madrid, 2003). Puede consultarse, además, Schmidt-Aßmann, E. (2001), *El Derecho administrativo general desde una perspectiva europea*, Justicia Administrativa, Vol. 13, pp. 5ss. (traducción de Luis Arroyo Jiménez).

para gobernar, y que como es lógico siempre ha de actuar conforme a Derecho.

El Leviatán no ha dejado de crecer desde la infancia del Derecho Administrativo al amparo del artículo 16 de la Declaración de Derechos del Hombre y el Ciudadano.[757] En efecto, "[u]na sociedad en la que no esté establecida la garantía de los derechos ni determinada la separación de poderes carece de Constitución", pero tanto la sociedad como el Derecho como la configuración interna de los poderes y su relación entre sí se han visto modificados. El crecimiento de entes en la órbita de las Administraciones públicas ha sido ingente, dando lugar a la expresión "sector público" para dar cuenta de esta realidad en aumento.[758] Y, en realidad, la sucesión de normas creadoras y reguladoras de la tipología de entes que componen la tradicionalmente denominada Administración instrumental es muestra de estas modificaciones.

Las Administraciones crecen, además, a medida que lo hacen los fines del Estado y las funciones públicas.[759] Los principios rectores de la política social y económica han dado lugar a la adopción de políticas públicas de muy variada índole. Cabe decir que el Derecho Administrativo es, también, el Derecho de las políticas públicas, el que determina su concepción, su configuración y, por supuesto, también su control. Pero no sólo el Derecho es el instrumento de las políticas públicas. También áreas del conocimiento como la economía, la ciencia política, la sociología o, en ámbitos específicos, la ingeniería, la medicina o la física, tienen su impronta en la buena administración[760] de estos sectores de la realidad.

La Administración Pública es participada y requiere ser pensada por especialistas de todas las ramas del saber y de la experiencia, que, además, habrían de disponer de flujos de comunicación entre sí para contar con una cierta visión de conjunto y para tener en cuenta aquellos aspectos que, trascendiendo el propio prisma, sean relevantes para el adecuado desarrollo de las funciones.

---

757 Hoy, el Leviatán presenta otros tintes, que también comprometen al Derecho. Cfr. Lassalle, J.M. (2019), *Ciberleviatán. El colapso de la democracia liberal frente a la revolución digital*, Arpa, Barcelona, 2019.

758 Quizás alguien tiene alguna referencia al respecto; Fuertes, M. (2022), *Metamorfosis del Estado: maremoto digital y ciberseguridad*, Marcial Pons, Madrid, 2022.

759 eg Malaret i García, E. (2008), *Un ensayo de caracterización jurídica de una nueva tarea pública : la regulación económica*, Diritto pubblico, Vol. 14, No. 2, 2008, pp. 535 – 586.

760 eg recientemente Ponce Solé, J., (2022), *Acicates (nudges), buen gobierno y buena administración. Aportaciones de las ciencias conductuales, nudging y sector público y privado*, Marcial Pons, Madrid, 2022.

Una Administración concebida de este modo y unas relaciones administrativas distintas a las propias del siglo XIX explican también – junto a otras razones - que el control se haya ido dotando de nuevos instrumentos. En este marco, las bases constitucionales clásicas del Derecho Administrativo continúan siendo válidas y vienen constituidas, en esencia, por los artículos 24, 103 y 106 de la Constitución Española [CE][761]. La sujeción de las Administraciones Públicas a Derecho, el control judicial de su actuación y la necesidad de garantizar la tutela judicial efectiva de la ciudadanía son baluartes del Estado de Derecho y continúan vigentes hoy como ayer. Sin embargo, principios como el ya mencionado de eficacia o los incluidos en el artículo 105 CE[762], así como los principios rectores ya indicados, amén del artículo 14 CE[763], conectan con las funciones de las Administraciones Públicas y con la necesidad de prestar atención no sólo al control sino también a la actuación de las Administraciones Públicas y a la gestión. El principio de transparencia[764], sin explícito amparo constitucional, pero probablemente deducible de algunos preceptos, resulta clave aquí, así como la visión colectiva de los derechos, plasmada por ejemplo

761 Art. 24.1 CE : "Todas las personas tienen derecho a obtener la tutela efectiva de los jueces y tribunales en el ejercicio de sus derechos e intereses legítimos, sin que, en ningún caso, pueda producirse indefensión"; art. 103.1 CE: "La Administración Pública sirve con objetividad los intereses generales y actúa de acuerdo con los principios de eficacia, jerarquía, descentralización, desconcentración y coordinación, con sometimiento pleno a la ley y al Derecho", art. 106.1 CE: "Los Tribunales controlan la potestad reglamentaria y la legalidad de la actuación administrativa, así como el sometimiento de ésta a los fines que la justifican".

762 Art. 105 CE: "La ley regulará: a) La audiencia de los ciudadanos, directamente o a través de las organizaciones y asociaciones reconocidas por la ley, en el procedimiento de elaboración de las disposiciones administrativas que les afecten; b) El acceso de los ciudadanos a los archivos y registros administrativos, salvo en lo que afecte a la seguridad y defensa del Estado, la averiguación de los delitos y la intimidad de las personas; c) El procedimiento a través del cual deben producirse los actos administrativos, garantizando, cuando proceda, la audiencia del interesado."

763 Art. 14 CE: "Los españoles son iguales ante la ley, sin que pueda prevalecer discriminación alguna por razón de nacimiento, raza, sexo, religión, opinión o cualquier otra condición o circunstancia personal o social".

764 eg Guichot Reina, E. andBarrero Rodríguez, C. (2020), *El derecho de acceso a la información pública*, Tirant lo blanch, Valencia 2020; Martín Delgado, I. (2019), *Transparencia y acceso a la información pública. De la teoría a la práctica*, Iustel, Madrid, 2019.

en la responsabilidad a la que se alude en el artículo 45.2 CE[765].

Mención específica requiere también el artículo 18.4 CE, conforme al cual "[l]a ley limitará el uso de la informática para garantizar el honor y la intimidad personal y familiar de los ciudadanos y el pleno ejercicio de sus derechos".[766] Este precepto ha de ponerse en relación hoy con los procesos de transformación digital de las Administraciones públicas y con la necesidad de articular mecanismos adecuados y suficientes para garantizar los derechos de la ciudadanía en los nuevos contextos. La Administración electrónica, que ha dado paso a la Administración digital, es una Administración que se caracteriza por el uso de nuevos medios y tecnologías de la comunicación y la información. Ello ha implicado no solamente el empleo de nuevos instrumentos, sino también requiere una modificación en las formas de actuar, en el perfil de empleado público necesario para llevar a cabo estas funciones y en el sistema de garantías y controles de esta actuación. También hoy los desafíos para la seguridad son otros.

Las bases constitucionales se han ampliado desde los orígenes del contencioso-administrativo y, con ello, del Derecho Administrativo. Los fines públicos son plurales, los intereses públicos en ocasiones presentan contradicciones y el Derecho ha de ser un instrumento al servicio no sólo del control sino también de la adecuada acción administrativa dirigida a la persecución de los citados fines. La teoría del control es tributaria de esta evolución. El control, en consecuencia, no se ejerce hoy como se ejercía por el Consejo de Estado francés en el siglo XIX o por nuestro Tribunal Supremo en aplicación de la ley de 1888.[767] Por una parte, los sujetos que ejercen control se han ampliado, mientras que la planta judicial y los procesos se han modificado.

---

765 Art. 45.2 CE: "Los poderes públicos velarán por la utilización racional de todos los recursos naturales, con el fin de proteger y mejorar la calidad de la vida y defender y restaurar el medio ambiente, apoyándose en la indispensable solidaridad colectiva".

766 Al respecto se ha de citar la tesis doctoral de Martínez Martínez, R. (2004), *La protección constitucional de los derechos fundamentales frente a los usos de las nuevas tecnologías*, Universitat de València, 2004.

767 Cfr. Martín Rebollo, L. (1975), *El proceso de elaboración de la Ley de lo Contencioso-Administrativo de 13 de septiembre de 1888*, Instituto de Estudios Administrativos, Madrid, 1975; Fernández Torres, J.R. (1998a), *La formación histórica de la jurisdicción contencioso-administrativa (1845-1868)*,Civitas, Madrid, 1998; Fernández Torres, J.R. (1998b), *Jurisdicción administrativa revisora y tutela judicial efectiva*, Civitas, Madrid, 1998.

4. Contexto y características de la reforma en España

En España, el modelo de control jurisdiccional de las Administraciones Públicas se construyó inicialmente sobre la base del referente francés, tal y como se ha señalado, si bien su evolución ha venido determinada también, como se ha indicado, por la influencia de otros ordenamientos jurídicos.

Con la aprobación de la Constitución Española en 1978 y la conformación de España como Estado descentralizado, la planta judicial refleja esa circunstancia. Existen órganos unipersonales, juzgados de lo contencioso-administrativo, para los asuntos de menor cuantía, mientras que en el ámbito autonómico los Tribunales Superiores de Justicia culminan la organización judicial. Aplican e interpretan el Derecho estatal, pero también el autonómico, respecto del cual tienen la última palabra.

La capilaridad creciente del Derecho Administrativo, el aumento de los entes públicos y de la planta judicial, así como el incremento de la litigiosidad han generado una multiplicidad de resoluciones judiciales, en ocasiones contradictorias. Además, la coexistencia de hiperregulación con normas o incluso instrumentos de *soft law* de contenido genérico y escasa densidad jurídica, sitúa a jueces y tribunales en una posición singular.

En el contexto descrito adquiere sentido que un órgano, en este caso la Sala Tercera del Tribunal Supremo, asuma una nueva función – aquella con la que probablemente fue concebido en un inicio – cual es la de sentar jurisprudencia de manera uniforme para guiar la actuación de las Administraciones Públicas y de los órganos jurisdiccionales inferiores. La reforma del recurso de casación contencioso-administrativo operada en el año 2015 responde a esta necesidad y se articula en torno a un concepto, el "interés casacional objetivo", que es el que determina si el recurso es o no admitido a trámite.[768] En la determinación de la concurrencia de tal interés, la Sección Primera de la Sala Tercera del Tribunal

768 Sobre este concepto, Cancio Fernández, R.C. and L.M Cazorla Prieto (2018), *El interés casacional objetivo en su interpretación auténtica. Pautas hermenéuticas y cuestiones procesales en la nueva casación contenciosa*, Thomson Reuters Aranzadi, Cizur Menor, 2018. En general, sobre los momentos iniciales del recurso, Cazorla Prieto, L.M. and R.C. Cancio Fernández (ed.) (2017), *Estudios sobre el Nuevo Recurso de Casación Contencioso-Administrativo*, Thomson Reuters Aranzadi, Cizur Menor, 2017.

Supremo goza de una amplia discrecionalidad. Se ha de señalar, además, que la reforma fue auspiciada desde el propio Tribunal Supremo para un mejor desempeño de la función y una mejor protección del derecho a la tutela judicial efectivo.

La regulación del recurso de casación contencioso-administrativo que surge de la reforma operada por la Ley Orgánica 7/2015, de 21 de julio, podría calificarse de "síntoma" de diversos fenómenos jurídicos y metajurídicos y no sólo una opción técnica del legislador español para dar respuesta a un problema concreto de nuestras coordenadas geográficas. Algunos de los elementos jurídicos que se encuentran en la base de la reforma han sido ya mencionados. En cuanto a algunas de las claves metajurídicas para comprender o contextualizar el recurso, estas podrían ser, sin ánimo exhaustivo y priorizando algunos elementos, los siguientes: (1) la judicialización de la realidad; (2) la creciente complejidad del ordenamiento jurídico, fruto de la creciente complejidad de la realidad circundante; (3) el protagonismo adquirido por los órganos jurisdiccionales – en especial, los órganos jurisdiccionales supremos – en un contexto político caracterizado por el desencanto ciudadano con los mecanismos tradicionales de ejercicio del poder.

La reforma española sigue la estela de otros ordenamientos jurídicos nacionales y supranacionales, donde los denominados "Tribunales de vértice" se rigen por reglas que de modo creciente les permiten seleccionar los asuntos sobre los que van a pronunciarse. Con este tipo de criterios de admisibilidad en los que la discrecionalidad tiene una presencia paulatinamente mayor, la posición institucional de los órganos judiciales muta en cierta forma, al fijar la agenda de los asuntos sobre los que se pronuncian. Se trata de un activismo judicial querido por el legislador, dado que no es sino el artífice del sistema, que requiere ser repensado desde la óptica de la estructura clásica de los poderes y de las funciones que cada uno tiene atribuidos.

19. Comparaison et concepts juridiques : retour sur une étude de cas et ses découvertes

François Lafarge, Institut national du service public Strasbourg, France

J'ai réalisé ma thèse au département de droit de l'Institut universitaire européen sous la direction de Jacques Ziller et je l'ai soutenue en 2003. J'y comparais le rôle de l'Etat dans la protection des biens culturels en droit français et en droit italien.

Dans le présent texte, je reviens sur ce travail de manière réflexive. Mon but est de retracer les comparaisons juridiques que j'ai menées, ou plutôt comment mon travail a été mené par elles. Les comparaisons de régimes et de procédures n'ont pas été les plus compliquées. En revanche, les comparaisons de concepts m'ont posé de grosses difficultés, en particulier celles relatives aux deux concepts les plus importants pour mon sujet, l'intérêt public en matière culturelle et le pouvoir discrétionnaire en matière culturelle. La résolution de ces difficultés m'a amené à ce qui me semblait être des découvertes mais qui n'étaient que des explications. Pour y parvenir, j'ai dû prendre conscience de ma *path dependency* au droit dans lequel j'avais été formé, le droit français, et y remédier ; en d'autres termes, à me décentrer. J'ai dû également, et en même temps, « remonter vers le cœur » des concepts en cause. Je me suis vite rendu compte que parvenir à une découverte/explication me plaçait devant une difficulté conceptuelle successive

que je devais aborder, *mutatis mutandis*, de la même manière que la précédente. Je vais donc tenter de rendre compte d'une part d'un enchainement de remontées vers l'« essence » des concepts et d'autre part de mes décentrements[769].

Sauf exceptions, le présent texte n'est pas accompagné par un encadrement théorique de l'analyse comparée des concepts juridiques relevant d'ordres juridiques différents[770], ni même de références propres aux concepts sur lesquels j'ai travaillé chacun dans son ordre juridique. Je me borne à retracer les étapes de mon cheminement de travail. Pour ces raisons, je préviens le lecteur que ce texte ne correspond pas aux canons de la production académique, tout en retraçant, sous un certain angle, l'évolution d'un travail à visée académique.

1. Les apparences

J'ai commencé ma thèse en prenant note des nombreuses similitudes entre les deux systèmes de protection. Ils relevaient tous les deux de droits administratifs considérés comme assez proches pour des raisons historiques, de rattachement à une même grande famille juridique... en tant que branches ou polices administratives spéciales pour reprendre l'approche française. J'en ai déduit leur comparabilité. Cela a entrainé un certain optimisme quant à la possibilité de la mener rapidement ou du moins dans des délais raisonnables.

Les indices formels de comparabilité étaient nombreux.

En matière de sources, chaque système était structuré autour d'une loi d'Etat ancienne (1909 puis 1939 pour l'Italie, 1913 pour la France) précisée, complétée au fil du temps et finalement codifiée en 2004. Cette source est longtemps restée unique. Par la suite, deux sources nouvelles se sont ajoutées. La première fut le droit international avec, d'une part, le droit conventionnel et la législation de l'Union européenne surtout relatives à l'importation et à l'exportation des biens culturels hors et/ou vers l'Union européenne et, d'autre part, des conventions internationales de plus en plus nombreuses, issues des travaux

769 Je le ferai en écrivant à des temps du passé pour relater une démarche qui remonte à une vingtaine d'années. Mais la plupart des dispositions juridiques décrites sont toujours en vigueur au moment où ce texte est écrit (été 2022).

770 Cela dit, pour garder en mémoire la rigoureuse distinction de M. Troper, je dirai que ma comparaison portait sur des concepts métajuridiques élaborés par la doctrine et non des concepts juridiques *stricto sensu*. Troper, M. (2011), *Le droit et la nécessité*, PUF, Paris, 2011, pp 255-268.

du Conseil de l'Europe et de l'Unesco, qui tentaient d'apporter des réponses à l'épineuse question de la circulation illicite d'œuvres d'art. La seconde évolution fut l'attribution de compétences normatives à des collectivités territoriales, surtout aux régions italiennes qui purent, à la fin des années 1990, adopter des normes relatives aux biens culturels, principalement en matière de mise en valeur. Des *soft laws* de diverses origines prenaient en outre une place croissante dans la conduite des fouilles archéologiques, dans celle des opérations de restauration, dans la déontologie des marchands d'art...

Dans les deux systèmes, la législation faisait l'objet de jurisprudences nationales abondantes, constitutionnelle et administrative en Italie et administrative en France. Deux jurisprudences européennes s'y sont ajoutées. La jurisprudence de la Cour de justice de l'Union européenne portait surtout sur les questions liées à la circulation des objets d'art. La jurisprudence de la Cour européenne des droits de l'homme portait sur les questions liées à l'atteinte au droit de propriété privée qui peut découler des régimes de protection.

Chaque système de protection était mis en œuvre par une administration d'Etat qui bénéficiait d'une très forte légitimité due à son ancienneté et à l'expertise de ses membres recrutés par le biais de concours très exigeants en archéologie, architecture, histoire de l'art...

Enfin, les doctrines respectives étaient riches. Je notais une attitude très proactive de la doctrine italienne. Outre des commentaires de jurisprudences, elle proposait des évolutions aux juges en se basant sur la « logique du système », tout en travaillant également à la construction conceptuelle du droit des biens culturels et parfois même à celle du droit administratif en général. Le juge administratif et le juge constitutionnel la reprenaient souvent à leur compte.

Les indices substantiels de comparabilité étaient également manifestes.

Les deux systèmes reposaient sur un principe commun : la reconnaissance d'un intérêt public dans un bien déclenchait un régime de protection qui faisait plier les autres intérêts publics mais également les intérêts privés qui étaient en jeu, cet intérêt public était qualifié dans ce contexte d'intérêt public culturel pour utiliser une formule synthétique. La présence de cet intérêt était reconnue, aussi bien en France qu'en Italie, lorsque trois critères étaient remplis : un critère matériel (zones urbaines ou paysagères, immeubles, meubles, collections...), un critère temporel (très large) et un critère « de fond » (très large

également) formulé soit en intérêt d'art (intérêt esthétique ou artistique) soit en intérêt d'histoire.

Je relevais que dans chacun des systèmes, deux de ces critères avait fait l'objet, de la part de l'administration compétente puis de la jurisprudence, et enfin de la législation, de deux évolutions parallèles. Premièrement, le critère matériel avait été élargi, avec de nombreuses conditions, à l'immatériel (activités, traditions...). Deuxièmement, le critère esthétique, jugé subjectif malgré un important courant contraire au sein de la doctrine italienne en histoire de l'art, avait été évacué et remplacé par un critère d'histoire de l'art, considéré comme plus objectif.

Sur ces bases, j'élaborais une problématique sur le rôle de l'Etat dans la protection des biens culturels en droit français et en droit italien. Ma thèse était la suivante. En France et en Italie, pour des raisons historiques et symboliques, l'Etat s'était constitué comme l'« unique médiateur du patrimoine ». Il indiquait à la nation ce en quoi elle s'incarnait et contribuait à définir son identité. A ce titre, il s'était reconnu un double monopole juridique : celui de dire le droit des biens culturels (monopole normatif) et celui de l'appliquer (monopole exécutif). J'estimais que ces deux monopoles étaient remis en question par des « concurrences » normatives et exécutives mais aussi et surtout par la transformation de la manière selon laquelle l'Etat disait « son » droit et de la manière selon laquelle il l'appliquait. Les procédures d'adoption étaient renforcées et formalisées en prenant en compte de plus en plus d'autres intérêts.

Comme je comparais l'évolution du rôle d'un acteur, l'Etat, dans les régimes de protection, je n'abordais et donc ne comparais les régimes de protection que dans la mesure où ils me permettaient de percevoir ce rôle. Or, en passant en revue ces régimes, je constatais que des différences notables existaient entre eux, malgré la proximité des deux droits et surtout malgré le principe et les évolutions communes évoqués ci-dessus. J'ai d'abord pensé que ces différences s'expliquaient par des décalages historiques ou des choix contingents relevant de chaque politique de protection nationale. Mais le nombre et l'ampleur de certaines différences me laissait perplexe. Pourquoi la protection était-elle nommée classement ou inscription en France, et déclaration d'intérêt en Italie ? Pourquoi était-il possible de retirer la protection d'un bien en France mais pas en Italie ? Pourquoi le droit italien permettait-il l'application

de plusieurs mesures conservatoires avant même la déclaration de l'intérêt (ce qui était très favorable à la protection des biens culturels par exemple dans le cas de découvertes archéologiques, de lancement de travaux présentant des risques pour ces biens, de projets d'exportation...), alors que le droit français ne le permettait pas, ce qui était donc moins favorable à la protection des biens culturels, et avait, après coup, mené à la création d'une procédure d'urgence compliquée, l'instance de classement? Pourquoi enfin les servitudes découlant de la protection pouvaient faire l'objet d'indemnités en France mais pas en Italie ?

2. Derrière les apparences

Pour saisir la raison de ces différences, je repris de manière plus serrée l'étude croisée de chaque régime. Dans un premier temps, je découvris que « derrière » les apparences de comparabilité, les différences de régime étaient dues à des différences de localisation de l'objet de l'intérêt public culturel et à l'existence d'une catégorie particulière de pouvoir discrétionnaire en Italie.

2.1 L'intérêt public

Il m'a fallu un certain temps pour comprendre que, bien qu'il fût qualifié de la même manière en droit italien et en droit français (les trois critères) et que cette qualification ait évoluée de la même manière (du matériel vers l'immatériel et du critère d'art vers le critère d'histoire de l'art), l'intérêt public qui fondait la protection dans les deux systèmes ne portait pas sur le même objet.

Dans le système français, l'intérêt résidait dans le rapport que la société entretient avec les biens culturels. La loi de 1913 parlait en effet des « immeubles dont la conservation présente (...) un intérêt public ». Si l'intérêt public réside dans la conservation plutôt que dans les biens, cela signifie en conséquence que cet intérêt est celui que les biens revêtent à un moment donné pour la société et non pas l'intérêt qu'ils représentent de tout temps.

Or, en droit italien, l'intérêt résidait principalement dans les choses elles-mêmes. En protégeant les « choses immobiles ou mobiles qui présentent un intérêt » culturel, la loi de 1939 faisait résider l'intérêt culturel directement et

ab initio dans les choses[771]. Tous les biens qui présentaient cet intérêt étaient *ipso jure* protégés selon une gradation en fonction de leur régime de propriété. Les biens privés devaient faire l'objet d'une déclaration d'intérêt mais certains éléments pouvaient s'appliquer avant l'adoption formelle de la déclaration, vu l'« immanence » de l'intérêt public culturel. Les biens publics étaient *ipso jure* protégés. L'administration n'avait alors plus d'une certaine manière qu'à prendre acte de cet état du droit et en tirer, presque passivement, des conséquences. Elle entérinait une réalité qui s'imposait à elle.

La raison pour laquelle j'avais pris conscience tardivement de cette différence était que je ne m'étais pas posé la question de l'objet de l'intérêt public culturel. En me demandant pourquoi je ne l'avais pas fait, je constatais que ni la doctrine française, ni la doctrine italienne n'avaient abordé la question de l'objet de l'intérêt en tant que tel dans leurs travaux sur les systèmes de protection. J'extrapolais peut-être mais il me sembla alors que cet objet était quelque chose de « trop » évident, prégnant et structurant pour chacune des deux doctrines. Pour elles, ce n'était pas un sujet ; c'était peut-être même un impensé.

Une fois les objets respectifs des intérêts publics culturels éclaircis, les différences en matière de régime entre les deux systèmes s'expliquaient de manière cohérente et sans qu'il soit besoin de recourir à des explications liées aux contingences propres à chaque système. La reconnaissance d'un intérêt public culturel s'appelait déclaration en droit italien car l'intérêt n'était que constaté et classement en droit français car il était en quelque sorte créé. Un bien culturel pouvait perdre sa protection en France s'il ne correspondait plus au regard de la société à un moment donné (ce qui était très rare mais qui arrivait) ; c'était impossible en Italie où la nature de bien culturel était en quelque sorte indisponible. Le système italien permettait certaines actions de protection avant même une reconnaissance préalable de l'intérêt culturel de biens privés grâce à l'« immanence » de son intérêt culturel... Enfin, l'indemnisation était refusée au propriétaire en droit italien car l'intérêt que présentait les biens protégés ne naissait pas d'une décision, il était constaté. Cette constatation ne faisait pas changer les biens de nature. L'immédiateté des critère légaux de la protection (en d'autres termes, la qualification par la loi de biens en tant que biens

771 Une littérature italienne assez abondante explique les influences philosophiques ayant abouti à ce choix.

culturels *a priori*) entraînait l'existence de la catégorie homogène et prédéfinie « biens culturels » et justifiait en fin de compte l'absence d'indemnisation des servitudes de protection. Cette boucle, qu'on pourrait qualifier de « cercle magique italien », avait tout d'abord été avancée en doctrine par A. M. Sandulli en 1967[772] avant d'être juridiquement créée par la Cour constitutionnelle dans une sentence de 1968[773].

2.2 Le pouvoir discrétionnaire

Les doctrines française et italienne évoquaient tous les deux le pouvoir discrétionnaire qui était attribué aux administrations compétentes lorsqu'elles classaient un bien en France et lorsqu'elles déclaraient son intérêt en Italie (pour les biens privés). Comme les expressions étaient pratiquement les mêmes (pouvoir discrétionnaire en français et *discrezionalità* en italien), je ne doutais pas dans un premier temps qu'elles recouvrissent, là encore, le même concept, celui que je connaissais, le français. En France, on peut dire (pour aller vite) que l'administration compétente dispose d'un pouvoir discrétionnaire dans l'appréciation de la présence des trois critères de l'intérêt public culturel. Cela est cohérent avec la localisation de cet intérêt qui réside dans le lien entre un bien et la société.

En menant ce que je pensais être une simple vérification du côté italien (j'étais en fait à la recherche d'une confirmation), je constatais cependant des différences. L'attribution de pouvoir discrétionnaire étant rarement explicite dans les textes normatifs, je fis cette constatation là où les symptômes de la présence de ce pouvoir était moins implicites mais indirectes : dans le contrôle juridictionnel. Le contrôle juridictionnel des décisions françaises impliquant la reconnaissance de cet intérêt était plus intense en France que celui des décisions italiennes « équivalentes ». Je trouvais un début d'explication côté italien où la jurisprudence et la doctrine indiquaient que les pouvoirs du juge étaient limités car l'administration disposait d'un pouvoir discrétionnaire qualifié de technique, la *discrezionalità tecnica*. Je découvris alors qu'il existait deux catégories de pouvoir discrétionnaire en droit italien : la *discrezionalità* « tout court » qui ressemble en apparence au pouvoir discrétionnaire français (j'y reviendrai) et

772 Sandulli, A.M. (1967), *La tutela del paesaggio nella Costituzione*, Rivista giuridica dell'ediliza, No. 9, p. 69 and 81.

773 Corte costituzionale, 28 mai 1968, n. 56, *Foro Italiano*, 1968, I, 1361.

la *discrezionalità tecnica* qui se réfère aux décisions que prend l'administration lorsqu'elle examine un cas en ayant recourt à des appréciations techniques et/ou scientifiques. Les constatations qui découlent de cet examen peuvent être objectives si elles proviennent de sciences dites exactes ou plus subjectives si elles proviennent de sciences dites sociales. Dans ce dernier cas elles sont dites *opinabili* (qui peuvent être débattues) expression proche de l'anglais *arguable* mais dont le français *discutable* s'est éloigné en se connotant péjorativement. Néanmoins, la distinction entre les constatations objectives *non opinabili* et les constatations subjectives *opinabili* est délicate. Ainsi, les constatations faites par l'administration chargée des biens culturels sont-elles issues de sciences sociales (archéologie, histoire de l'art, ethnologie...) dont les résultats peuvent être *opinabili* (comme dans certains cas, l'attribution d'une œuvre à un artiste). Mais très souvent, ces résultats sont basés sur des faits *non opinabili* (datation, techniques et matériaux employés...). Malgré des discussions persistantes, ce qui compte, et qui constitue la *discrezionalilità tecnica*, est que le choix de l'administration est conditionné par ce genre de constatations, même si un certain degré d'*opinabilità* est présent.

Le contrôle du juge administratif sur la *discrezionalità tecnica* a longtemps été limité à un contrôle dit formel et extrinsèque portant seulement sur le caractère logique du raisonnement suivi. A la fin du XX° siècle, il a été étendu non pas au caractère *opinabile* des constatations mais à la fiabilité des opérations techniques menées pour y parvenir (respect des procédures propres, règles de l'art...).

En France, depuis plus d'un siècle, le juge administratif, via le contrôle de la qualification juridique des faits, s'était non seulement reconnu le pouvoir de contrôler le pouvoir discrétionnaire attribué à l'administration en matière de biens culturels mais également d'y substituer son appréciation[774].

Cette différence posée, je me suis rendu compte que les pratiques jurisprudentielles convergeaient relativement. Cette convergence était due en France à la pratique du juge qui n'exerçait pas (ou si peu) le contrôle qu'il s'était reconnu sur le fond et en Italie à l'accroissement des pouvoirs de contrôle juridictionnel de la *discrezionalià tecnica* attribués par la loi, en particulier à la suite d'une réforme de 2000.

774 Conseil d'Etat, *Gomel*, 6 avril 1914.

3. Plus loin derrières les apparences

Les recherches que j'avais faites pour comprendre la différence de localisation de l'objet de l'intérêt public culturel d'une part et le concept de *discrezionalità tecnica* d'autre part, m'avaient inévitablement rapproché du « cœur » ou de l'« essence » de ces concepts, à savoir l'intérêt général et le pouvoir discrétionnaire en « eux-mêmes ». A certains indices je me rendis compte que des différences existaient également à ce dernier niveau entre les conceptions française et italienne. Je touchais alors à des différences systémiques ou structurelles qui relevaient des « fondamentaux » de chaque système juridique. Je décidais d'étudier le sens de chacune, persuadé que cela me donnerait les dernières clés nécessaires à la compréhension complète de chaque système de protection.

3.1 L'intérêt public

Saisir la différence de localisation de l'objet de l'intérêt public en matière de biens culturels dans les systèmes français et italiens m'avait fait comprendre les différences de régime de protection entre ces systèmes. Ce faisant, mon attention fut attirée par la constatation suivante. La doctrine italienne ne parlait que d'intérêts publics au pluriel et jamais d'intérêt général au singulier. La doctrine française ne parlait que d'intérêt général et très peu d'intérêts publics au pluriel. Je voulus savoir pourquoi. Mes recherches m'amenèrent aux conclusions trop rapidement synthétisées ici.

En France, la conception de l'intérêt général découle de présupposés politiques selon lesquels l'intérêt de la société est différent des intérêts des membres de cette société ; tout en les englobant, il les dépasse. Elle attribue alors à l'intérêt général trois caractéristiques qui se déduisent successivement l'une de l'autre. Premièrement, l'existence d'un intérêt de la société en soi, d'un intérêt propre, fait que derrière le mot intérêt général se profile une « réalité ». C'est en ce sens que l'intérêt général peut être qualifié de substantiel. Deuxièmement, cette réalité est une donnée *a priori* du système juridique qui n'a donc besoin que de recevoir une formulation. Troisièmement, l'intérêt général est indéterminé. L'indétermination signifie que ce qui importe n'est pas son contenu mais sa fonction. Cette fonction consiste dans l'expression ou la justification de la légalité. On appelle force normative de l'intérêt général cette expression de la

légalité. Théoriquement, la force normative de l'intérêt général ne devrait s'exprimer que par la loi (la formulation). Mais l'examen du droit positif montre qu'elle s'exprime également hors de la loi : dans l'organisation administrative de l'Etat, dans la manière dont l'intérêt général est concrètement identifié par l'administration et enfin dans la jurisprudence où « l'intérêt général est une source directe de la légalité administrative révélée par le juge »[775]. Au passage, je supposais que cette conception rendait difficile de penser la multiplicité des intérêts publics et plus encore les conflits entre eux.

La tradition politique et le positivisme (légalisme) de la doctrine juridique italiens font que l'intérêt général ne peut pas correspondre à un présupposé objectif comme en France. Au contraire, « dans la vie réelle, on ne rencontre que des intérêts publics multiples et divers, alors que l'intérêt public au singulier est seulement une *locuta brevis* pour indiquer l'ensemble des intérêts publics au pluriel ou bien celui d'entre eux qui, dans une circonstance précise, peut ou doit être pris en compte »[776]. L'expression *interesse pubblico* ne désigne donc aucune réalité propre. Elle n'est pas le contenant d'un concept. La seule réalité de l'intérêt public est ce qui est posé par la loi comme étant l'intérêt public dans un cas précis. La doctrine italienne systématisait cette approche en disant que les intérêts publics sont des buts précis d'action publique confiés par la loi à des administrations précises. Je supposais que cette approche permettait naturellement à la doctrine et au droit italiens de mieux concevoir la multiplicité des intérêts publics et de gérer leurs conflits.

De manière synthétique, la conception française de l'intérêt général est substantielle, abstraite et en fin de compte réaliste. Elle correspond à une vision de la société, c'est-à-dire à un invariant, à un principe indisponible, à un présupposé objectif. Sa présence dans une loi n'est donc que son énonciation dans un domaine particulier. La conception italienne de l'intérêt public est formelle et nominaliste. Elle ne voit pas dans l'intérêt public un idéal à concrétiser mais simplement un élément donné par la loi. Sa présence dans la loi est sa formulation même.

---

775 Truchet D. (1977), *Les fonctions de l'intérêt général dans la jurisprudence du Conseil d'Etat*, Librairie générale de droit, Paris, p. 167, note 1.

776 Pizzorusso A. (1972), *Interesse pubblico e interessi pubblici*, Rivista trimestrale di diritto e procedura civile, No. XXVI, p. 457 ss

Cette différence « de principe » entraine d'importantes conséquences concrètes, par exemple dans le domaine de l'organisation administrative. Dans l'administration italienne chaque administration est responsable d'un intérêt public ou de plusieurs intérêts publics proches. Cela signifie que les autorités compétentes pour connaitre d'un recours administratif ne peuvent être que des autorités (supérieures) en charge du même intérêt que l'administration dont la décision est à l'origine du recours. L'intervention d'une autorité en charge de l'ensemble des intérêt publics (qui n'existe d'ailleurs pas en Italie) à quelque niveau administratif que ce soit, comme le préfet en France dont la décision peut se substituer à celle de l'administration spécialisée, est impensable en Italie.

4. Le pouvoir discrétionnaire

En faisant mes recherches sur la *discrezionalità tecnica* pour comprendre les pouvoirs attribués à l'administration italienne compétente, je « côtoyais » nécessairement la *discrezionalità* tout court, vu que la première avait été créée sur la base de la seconde pour distinguer les cas dans lesquels les choix de l'administration étaient plus ou moins dépendants de constatations scientifiques et/ou techniques. Je considérais alors la *discrezionalità* comme un concept *a priori* proche voire équivalent au concept français de pouvoir discrétionnaire. D'ailleurs la doctrine française pouvait s'accommoder d'une définition *a minima* de la *discrezionalità* donnée par la doctrine italienne : « le pouvoir d'appréciation, dans une marge déterminée, de l'opportunité de solutions possibles en fonction de la norme à appliquer »[777].

J'approfondissais alors mon étude de chaque concept. Je fis une double découverte.

Tout d'abord le concept de pouvoir discrétionnaire français était avant tout d'origine jurisprudentielle alors que le concept italien était avant tout d'origine doctrinale. En France selon J.-M. Woehrling « la théorie du pouvoir discrétionnaire a [...] été développée surtout par la jurisprudence et en fonction du contrôle juridictionnel. [...] C'est le commentaire de la jurisprudence par les membres du Conseil d'Etat qui est à la base de la doctrine française du pouvoir

777 Giannini, M.S. (1939), *Il potere discrezionale della pubblica amministrazione. Concetto e problemi*, Milano, Giuffrè, p. 12.

discrétionnaire »[778]. La doctrine italienne apparaissait beaucoup moins liée aux conceptualisations faites par les juges sur la base de leurs propres interprétations. J'assistais même à un phénomène inverse. L'*autorevole dottrinà* conceptualisait et les juges (et même parfois le législateur) reprenaient à leur compte ses conceptualisations. Je l'avais déjà observé avec la construction doctrinale menant à l'absence d'indemnisation des servitudes reprise par la juge constitutionnel. Ce fut aussi le cas pour le concept de *discrezionalità* proposé en 1939 par un auteur, M.S. Giannini, repris par le juge administratif et devenu canonique[779].

Ensuite, les deux conceptions reposaient sur des sources juridiques différentes. En France j'observais une sorte de mise en abîme des sources. Le pouvoir discrétionnaire est certes considéré comme une marge de choix ouverte par la loi mais elle est surtout la marge de cette marge que le juge accepte de ne pas contrôler. Cette approche s'expliquait par son origine contentieuse. Elle a fait l'objet de très nombreux commentaires et « raffinements » mais sans que la source jurisprudentielle ne soit remise en cause. Sa capacité à expliquer le droit positif, qui sans doute était discutable dès son origine, « s'épuise » désormais et est dénoncée aujourd'hui[780]. En Italie, M.S. Giannini a mené une réflexion en trois mouvements. Il a tout d'abord replacé la loi au centre de la théorie italienne comme seule source de la *discrezionalità* (en réaction à l'approche française). Il a ensuite reconnu que la loi conférait un pouvoir de choix à l'administration. Mais surtout, il a « démonté » puis précisé la nature de ce choix. Selon lui, que le choix soit le résultat de l'appréciation discrétionnaire est une chose mais ce qui importe est le contenu ou le comment de cette appréciation. En d'autres termes, M.S. Giannini ne se résout pas à laisser le choix et surtout l'appréciation impensés comme c'était le cas auparavant. S'appuyant sur la conception pluraliste des intérêts publics, il définit l'appréciation discrétionnaire comme

778 Woehrling, J.-M. (1999), Le contrôle juridictionnel du pouvoir discrétionnaire en France , La Revue administrative, No.7, p. 75.

779 C'est aussi un courant doctrinal qui a dégagé la différence du pouvoir discrétionnaire technique par rapport au pouvoir discrétionnaire. Il a convaincu le juge qui a retenu la distinction. Il n'a toutefois pas convaincu l'ensemble de la doctrine.

780 Vautrot-Schwarz, C. (2015), *Avons-nous encore besoin de la théorie du pouvoir discrétionnaire ?* , Mélanges Truchet, Dalloz, pp. 639-650.

l'identification des intérêts publics en présence puis leur pondération (une évaluation contextualisée) suivie, le cas échéant, de la recherche d'un compromis dans la marge reconnue par la loi. Cette conception structure la doctrine, la jurisprudence et la législation depuis bientôt un siècle. Elle a en outre amené la doctrine, la jurisprudence et la législation à progressivement aborder et formaliser la procédure d'adoption des actes administratifs comme moment où les intérêts en présence se manifestent ou sont identifiés.

Ces dernières découvertes sur la *discrezionalità* italienne avaient peu de conséquences sur mon sujet, qui impliquait surtout la *discrezionalità tecnica*, mais en me permettant de comprendre le lien et la cohérence entre les concepts italiens d'intérêts publics et de pouvoir discrétionnaire, elles me donnaient une petite satisfaction intellectuelle.

Une dernière étape, que j'épargne au lecteur, fut de rassembler l'ensemble de ces découvertes de manière opératoire pour ma thèse. Je dus indiquer le sens des concepts à l'œuvre dans les systèmes de protection que j'étudiais et le faire d'une manière qui ne réduise pas l'un au détriment de l'autre, c'est-à-dire qui permette de présenter à la fois le sens français, le sens italien et leurs différences. Je dus trouver des catégories englobantes pour cela. L'enjeu était, selon moi, de faire comprendre la comparaison et de présenter les conséquences concrètes des différences observées.

20. A propos des surprises linguistiques et conceptuelles que réserve la pratique du droit administratif comparé. *Livre en hommage à Jacques Ziller*

Jean-Bernard Auby, Emeritus Public Law Professor of Sciences Po Paris

1. Cette contribution à l'ouvrage dédié à l'ami Jacques Ziller n'a aucune prétention théorique ou méthodologique. Elle entend simplement partager avec Jacques et les autres lecteurs quelques sujets d'amusement ou/et d'étonnement glanés dans un relativement long itinéraire au pays du droit administratif comparé et qui ont trait à ce va-et-vient que la pratique de celui-ci fait faire constamment entre le même et l'autre.

Le droit comparé est un exercice assez profond à divers égards : comme l'écrit quelque part George Steiner à propos de la traduction, il nous fait toucher à l'universel. Il a aussi ses aspects ludiques : du même genre que ceux que nous

réservent les voyages physiques lorsqu'ils nous offrent la découverte de lieux plaisants ou celle d'êtres intéressants.

Parmi les surprises qu'il nous offre, il y a ce que l'on peut caractériser comme des asymétries inattendues, c'est-à-dire des hypothèses dans lesquelles la même catégorie juridique, la même construction juridique, se trouvent désignées, analysées, ou pratiquées différemment dans deux ou plusieurs droits administratifs.

Je voudrais ici simplement donner quelques exemples de ces hypothèses, autour d'une typologie grossière, qui va des surprises linguistiques aux dissymétries affectant la pratique de la même institution en passant par divers décalages conceptuels affectant la même réalité juridique lorsqu'elles franchissent les frontières d'un système national.

Quelques exemples seulement, une liste personnelle, que l'expérience de Jacques serait évidemment capable de fortement enrichir.

2. Ce n'est certainement pas le plus important, mais il y a d'abord les cas d'asymétrie typiquement linguistique, c'est-à-dire dans lesquels la même réalité juridique se trouve désignée par des expressions différentes sans que cela recèle quelque différence perceptible dans son analyse, dans son mode de conceptualisation.

Il me semble que deux bons exemples sont fournis par d'assez incompréhensibles écarts que le vocabulaire du droit administratif français fait par rapport à toutes les langues juridiques voisines sans que cela semble refléter quelque originalité substantielle véritable.

Là où toutes les langues voisines emploient le terme globalisation -*globalization* en anglais, *globalizacion* en espagnol *globalizzazione* en italien, etc...-, la langue doctrinale du droit administratif français préfère souvent l'expression « mondialisation » -et donc celle de droit de la mondialisation- sans que cela reflète une orientation spécifique cernable de l'analyse.

De la même façon, là où les littératures des droits administratifs voisins sont parties à la recherche des secrets du droit de l'administration digitale – à peu de choses près le même adjectif en anglais, espagnol, italien...-, celle du droit français est prisonnière de l'habitude nationale qui a été prise de désigner plutôt ces phénomènes sous l'appellation de numérique.

Ces asymétries purement linguistiques ne sont évidemment pas ce qu'il y

a de plus intéressant. Elles sont plutôt des sortes de frottements désagréables, gênants en ce qu'ils peuvent laisser supposer qu'ils abritent des différences de théorisation.

3. Plus intéressants sans aucun doute sont les cas dans lesquels on observe qu'un concept, une construction intellectuelle, se repère dans ou tel droit administratif et ne se retrouve pas dans d'autres alors que les mêmes réalités juridiques sous-jacentes sont en fait présentes ici et là.

3.1 Un premier cas de figure est celui dans lequel un lot de mécanismes juridiques fait l'objet, dans certains droits administratifs, d'une théorisation spécifique que l'on ne retrouve pas dans d'autres droits administratifs où les mêmes mécanismes sont pourtant présents. En voici trois exemples disparates.

Dans le droit administratif espagnol comme dans l'italien, la possibilité pour l'administration de revenir sur un acte unilatéral qu'elle a émis est conceptualisée dans une théorie de l'auto-tutelle (« *autotutela* » dans les deux langues), dont l'équivalent, par exemple, ne se retrouve pas dans le droit administratif français. Pourtant il s'agit bien de quelque chose de commun, qui a trait à la possibilité de modifier, abroger ou retirer une décision administrative. Mais le droit administratif français traite la question sous un biais essentiellement pratique, au travers d'un lot de solutions qui concernent ce que l'on a l'habitude de caractériser comme ayant trait à l'application des actes administratifs dans le temps : des solutions bâties historiquement par la jurisprudence de manière pragmatique, sans référence à la théorisation d'un pouvoir spécifique de l'administration et qui aujourd'hui sont pour l'essentiel placées dans le code des relations entre le public et l'administration sans plus d'habillage théorique.

L'administrativiste français trouve un autre exemple d'étrangeté dans la distinction que le droit administratif italien fait entre « *procedimento* » et « *provvedimento* ». Bien sûr, il comprend très bien la différence qui peut exister entre la procédure administrative et l'acte administratif qui peut en naître , mais son faible intérêt historique pour la première ne lui rend pas évident le lien théorique entre eux.

Voici un autre exemple, très différent. Récemment, ont émergé -notamment à l'initiative de collègues néerlandais et espagnols- des travaux théoriques tournant autour de l'idée selon laquelle l'un des attributs essentiels de l'administration est qu'elle est, parfois, en position de distribuer des ressources rares.

Approche originale et certainement féconde, qui ne se retrouve pas – pas encore- dans les droits administratifs voisins.

3.2 Dans d'autres hypothèses, on constate que certains droits administratifs proposent une théorisation particulière pour analyser un groupe de mécanismes qui, ailleurs, se trouvent simplement englobés dans une conceptualisation plus large, sans y faire l'objet d'une construction intellectuelle spécifique. En voici également trois exemples.

Au sein des questions que d'autres droits administratifs rattachent toutes au concept de légalité, le droit administratif italien fait une distinction entre ce qui relève de la « *legittimità* », et qui concerne la possession de la compétence, et ce qui relève de la « *legalità* », qui concerne l'exercice du pouvoir.

Une question spécialement importante à l'époque actuelle est celle de savoir par quels biais, sur la base de quels pouvoirs, ou à l'intérieur de quelles obligations, les administrations se procurent des informations sur la société, l'économie, etc... Dans certains droits administratifs, cette fonction de l'administration et les pouvoirs correspondants ne font pas l'objet d'une conceptualisation particulière, mais ils sont analysés spécifiquement dans d'autres et par exemple dans le droit administratif américain au travers de la notion d' »*administrative investigation* ».

L'analyse que le droit administratif italien fait du pouvoir discrétionnaire le conduit à y distinguer un sous-ensemble qui est relatif à la « *discretionalità tecnica* », c'est-à-dire aux hypothèses dans lesquels l'autorité administrative est conduite à fonder ses appréciations sur des connaissances techniques ou scientifiques à caractère spécialisé. Dans d'autres droits administratifs, ce sous-ensemble ne sera pas isolé, même si les juges y sont généralement conduits à une réserve particulière face aux appréciations administratives fondées sur des données scientifiques ou techniques.

3.3 On peut ajouter ici des hypothèses dans lesquelles un concept admis dans certains droits administratifs est difficile à transposer dans d'autres en raison de réflexes doctrinaux qui y exercent leur influence.

Il en va ainsi du concept de « droit de la ville », au sens de composé des éléments qui gouvernent le fonctionnement juridique des villes. Admis sans difficulté dans certaines doctrines, il peine à se frayer un chemin dans d'autres, et par exemple dans celle du droit administratif français. La raison en est imput-

able à la vision typiquement positiviste qui imprègne celle-ci : aussi longtemps que le « droit de la ville » n'est consacré en tant que tel ni par les textes ni par la jurisprudence, la doctrine administrativiste française rechigne à le reconnaitre comme un objet d'analyse légitime.

4. Aux situations précédentes, il faut ajouter celles dans lesquelles des concepts, des constructions intellectuelles, se retrouvent bien dans plusieurs droits administratifs, mais n'y ont pas le même sens ou/et la même portée.

Elles peuvent naître de ce qu'on va, dans tel ou tel droit administratif, utiliser un concept international en lui donnant un sens partiellement différent de celui qu'il revêt dans d'autres droits administratifs. Un bon exemple me parait fourni par l'usage que la doctrine française dominante s'est déterminée à faire de la notion de régulation. Là où la réflexion internationale sur le sujet la perçoit comme une théorie générale de l'intervention publique, la doctrine française tend à en réserver l'usage à la désignation des formes nouvelles de régulation que produisent les autorités administratives indépendantes.

Elles peuvent procéder de ce que, tout en retenant le même concept, en lui donnant a priori le même sens, des droits administratifs divergent dans la portée qu'ils lui donnent. Voici un exemple sous forme d'anecdote. Ayant à participer à un travail collectif sur la notion de puissance publique, dirigé par un collègue espagnol, j'ai réalisé que nous ne nous entendions pas tout à fait bien sur ce que l'on pouvait considérer comme des manifestations de la puissance publique. C'est ainsi que, pour la doctrine espagnole impliquée dans ce projet, le développement du mécanisme contractuel dans l'action administrative apparait comme un symptôme de renforcement de la puissance publique : alors que la doctrine française tend au contraire à lire ce phénomène comme le signe de ce que l'administration tend à renoncer de plus en plus souvent à l'usage des instruments de puissance publique.

Il arrive aussi que des constructions juridiques a priori identiques se révèlent être articulées de manière différente en raison de la manière dont les textes ou la jurisprudence en organisent la mise en œuvre concrète. Une assez bonne illustration me parait être fournie par la façon dont les différents droits administratifs façonnent le contrôle par les juges de l'administration des questions de droit et de fait. La plus étonnante asymétrie, ici, se fait voir entre les pratiques de la « *judicial review* » anglo-saxonne, notamment américaine,

dans laquelle les juges se montrent réservés dans leur contrôle des appréciations juridiques portées par l'autorité administrative et d'autres traditions -parmi lesquelles la française-, dans lesquelles les juges se sentent pleinement aptes à vérifier les bases juridiques des décisions administratives, alors qu'ils se montreront volontiers plus timides que leurs homologies anglo-saxons dans leur vérification des questions de fait.

Ajoutons, pour terminer, les cas dans lesquels le même groupe de mécanismes, grosso modo conçu de la même manière, se trouve avoir une portée pratique différente d'un droit administratif à l'autre. On peut faire cette observation à propos des enquêtes publiques sur les projets d'infrastructure selon que l'on se trouve au Royaume-Uni ou en France. La procédure correspondante est juridiquement organisée de manière assez similaire dans les deux pays et pourtant sa résonance concrète y est assez différente : là où l'enquête publique britannique revêt une physionomie quasi-judiciaire et pèse d'un poids très lourd sur les décisions finales, la française demeure en général assez superficielle dans sa procédure et n'a habituellement pas un impact très lourd sur les choix finaux.

Le droit comparé est un art florentin : sa pratique exige une sorte de souplesse déterminée face à la complexité du réel. On en apprécie véritablement les charmes dans la même mesure où on est heureux de se trouver au milieu des senteurs sophistiquées de jasmin et de chèvrefeuille qui flottent au printemps sur la colline de Fiesole. Cette colline sur laquelle l'Institut Universitaire Européen a eu la bonne idée de s'installer. Et a eu cette autre bonne idée de confier pendant une longue période son Département de Droit à la férule conviviale autant qu'experte de notre ami Jacques Ziller.

Publications Office of the European Union

EN PDF	QM-03-22-104-EN-N	ISBN: 978-92-9466-346-7 doi:10.2870/098663
ES PDF	QM-03-22-104-ES-N	ISBN: 978-92-9466-347-4 doi: 10.2870/035530
FR PDF	QM-03-22-104-FR-N	ISBN: 978-92-9466-349-8 doi: 10.2870/705940
IT PDF	QM-03-22-104-IT-N	ISBN: 978-92-9466-348-1 doi: 10.2870/44968

With the support of the Erasmus+ Programme of the European Union