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INTEGRATION BETWEEN EU LAW AND NATIONAL ADMINISTRATIVE LEGITIMACY

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1. THE PHENOMENON OF EUROPEAN INTEGRATION THROUGH BOTTOM-UP INTEGRATION. ANALOGIES WITH THE REICH AFTER THE PEACE OF WESTPHALIA

What is new in Italian administrative law following its "contact" with the EU legal system?

It is obviously not possible here to cover all the potential consequences of EU law for the Italian administrative legal system. Such an approach would call for an analysis of the many special delegated powers that have contributed, and are still contributing, to the making of the European Union through a gradual but massive aggregation process. If, in common with most of the literature on EU law, we were to analyse all the "individual trees", we would end up by not seeing the "wood".

This paper focuses on a phenomenon that is gradually moving towards the "wood", one that is ignored or only partially covered by the literature in this field. Given the difficulties in turning the Union into a Federation through ever more complex agreements among States, there has been a conscious or unconscious attempt to achieve unity in Europe through a bottom-up process. This concerns the integration of European substantive administrative law with the administrative law currently in force in specific EU Member States.

Something similar happened in the Reich after the Peace of Westphalia: despite a seemingly slender and weak imperial power, a "common" public law was extended to all the States with a German population and to the multinational Habsburg State. At the end of that process, the institutions of each prince-elector had become more "imperial" than one would have expected from reading *De statu imperii germanici*, written by

Pufendorf under the pseudonym of Severinus de Monzambano, or *Tractatus Juris Publici* by Textor[2].

What is it that is expanding today against the will of the "prince-electors"? The commentators on Severinus de Monzambano[3] point out that this expansion is recreating the "monstrosity" of the constitution of the Reich.

A propos monsters, the analogy with the Reich after the Peace of Westphalia springs readily to mind if we consider two things. First, the "Ioannina compromise" and Poland's demand for voting rights based on the square root of populations (two "monsters", which J. Ziller describes in such an entertaining way[4]; second, the concurrent consolidation of general principles of European integration.

[2] Recently recalled in M. STOLLEIS (ed.), *Staat und Staatsräson in der frühen Neuzeit. Studien zur Geschichte des öffentlichen Rechts*, Frankfurt (Suhrkamp) 1990 (in it, *Stato e ragion di stato nella prima età moderna*, 1998, 103 ff.).

[3] Moreover, *De statu imperii germanici* became a textbook, the subject of commentaries and glosses, of the independent courses in public law established, or "renewed" in the new institutional structure by most universities of the Empire, including those where German was not spoken.

[4] In *Il nuovo Trattato europeo*, Bologna, 2007.

2. THE INTEGRATION OF ADMINISTRATIVE LEGITIMACY IN THE LEGAL SYSTEMS OF MEMBER STATES

But how could the antidote to the indolence of the "prince-electors" become widespread? What is the origin of the manipulation of administrative legitimacy in the Member States through EU regulations?

The phenomenon of the integration and "manipulation" of administrative legitimacy was introduced by the administrative courts in the legal systems of the countries belonging to the EU, and the technique was then transferred to the Court of Justice of the European Union. The Court uses it to ascertain the general principles shared by the administrative law of EU member States. As is often the case in this kind of operation, the Court passes off completely new principles as common general principles. As a result these are introduced into the legal systems of all the member States on the basis of the "federal" principle of the primacy of EU law, irrespective of whether those principles apply in the individual legal systems[5].

There is then another phenomenon, parallel to the one described above but leading to the same results. We refer to the European legislator's wish to make the legislation of the

[5] For more details on the techniques used to mark the predominance of "European federal law", see F. SORRENTINO, *L'incidenza del diritto comunitario sulle categorie del diritto pubblico*, in A. TIZZANO (ed.), *Il processo d'integrazione europea: un bilancio 50 anni dopo i Trattati di Roma*, Turin, 2008, 55 ff. From the point of view of theory, the integration of EU and national administrative law poses a series of problems, recently analysed by S. VALAGUZZA, *La frammentazione della fattispecie nel diritto amministrativo a conformazione europea*, Milano, 2008. Moreover, the first few traces of those problems can be found in the glossators of *De statu imperii germanici…,* and in particular in C. THOMASIUS, mentioned in M. STOLLEIS, *op. cit.*, 105. As regards the EU principles affirmed by the Court of Justice, or imposed by EU legislative instruments, the integration of national law has often been interpreted as an adjustment of national law to EU legislation (the so-called indirect effect of directives) by the Court of Justice and, even more clearly, by the *Marleasing* case (13 November 1990, C-106/89). For more details on the interpretation of EU law, see C. ITZCOVICH, *L'interpretazione del diritto comunitario*, in *Materiali per la storia della cultura giuridica*, 2008, 429 ff.

different EU countries more homogeneous by setting out general principles to be applied to the administrative acts of all Member States by using EU regulations, and, more often, EU directives (which are directly applicable to a national legal order if they are clear, precise and unconditional). Those principles will supplement or replace the laws of individual legal systems, and the national and EU judges may recognise that addition or replacement based on the principle of the primacy of EU law. The consequence is the creation of a circular law-making system, similar to the one previously described and involving only the EU courts and national constitutional and administrative judges. A particular variation may be possible when "international" judges are involved: they do not enjoy the same federal privilege as the Court of Justice of the European Union, but they also introduce general principles that conflict with the administrative law of the EU Member States (as has frequently been the case with the Strasbourg Court of Human Rights and Italy).

For this particular process of integration between substantive and formal law or, if preferred, between legality and legitimacy, several explanations based on general theory have been given.

Certain German scholars have labelled the phenomenon, at both domestic and EU level, as linked to a necessary closing provision existing in all systems of positive law: the principle of legal certainty (*Rechtssicherheit*), which in turn is the source of a series of other principles, the most important being the principle of the protection of legitimate expectations (*Vertrauensschutz*)[6] Others say that the phenomenon represents a form of judicial law-making, direct or indirect (on the basis of general principles to which any kind of legislator (whether EU, constitutional or national) refers, to be considered as a form of survival of common Roman law in codification. This is because the principles ascertained and then applied by judges at different levels are thought to be linked to the legal principles of the Western legal tradition, and ultimately to principles drawn from Roman law.

[6] Cf. the analysis by A. VON ARNAULD, *Rechtssicherheit. Perspektivische Annäherungen an eine idée directrice des Rechts*, Tübingen, 2006, and also, on the protection of legitimate expectations, the monograph by H.J. BLANKE, *Vertrauensschutz im deutschen und europäischen Verwaltungsrecht*, Tübingen, 2000.

Some Italian scholars say that the "guidelines of law" are consubstantial to the legal system (and may be summed up, for example, in the concepts of the rule of law (in Italian, the *Stato di diritto*), and therefore need no explanation: a position that thus recreates the usual separation between "deists and pantheists"[7].

Apart from such general explanations, however, this technique of the interpretation-modification of "statutory" law through general principles, ascertained and applied by case-law, has clearly been used by EU law in trying to achieve the bottom-up creation of a federal law system, so as to circumvent the resistance of those States opposing the top-down creation of a true federal law system. This strategy aimed, consciously or unconsciously, at creating a single law in all the legal systems of the Member States and, through the application of identical laws, making European citizens gradually realise that they are members of a single federal law system, just as the people under the Reich did, in spite of their princes, after the application of imperial law.

3. THE MAIN MANIFESTATIONS OF THE INTEGRATION BETWEEN EUROPEAN SUBSTANTIVE LAW AND NATIONAL FORMAL LAW IN THE ITALIAN LEGAL SYSTEM

But what, in Italian law, are the main manifestations of the integration between substantive law and formal law? Here are some of the most striking examples, which will obviously not be exhaustive!

7 See F. MERUSI, *Buona fede e affidamento nel diritto pubblico. Dagli anni "trenta" all'"alternanza"*. Milan, 2001, and A. VON ARNAULD, *Rechtssicherheit*, op. cit.

We can start the analysis by dealing with the notion of public administration. The EU legislator, well aware of the differences in the organisation of public administration in the Member States and the procedural expedients used to evade EU legislation as well as the more general regulations of public administration, has resorted to a substantive concept based on preset identifying parameters: i.e. the concept of the body governed by public law ("*organismo di diritto pubblico*"). A body governed by public law that has the required parameters is a public administrative authority, whatever its legal form, and its acts are administrative acts. Despite what almost all Italian administrative scholars have repeatedly stated in order to limit the impact of EU legislation, this substantive concept is also valid when it is not associated with EU law on public contracts, in which the concept of the body governed by public law was first introduced. If the concept of the substantive identifying parameter is valid, the tenet *semel publica administratio, semper publica administratio* applies ("once a public authority, always a public authority"). And this applies to other Community fields of action as well, for example State aid. If a subject is identified as a body governed by public law, its grants to companies are considered as State aid and must therefore comply with EU competition law. The problem has emerged, for example, with one of the two kinds of bank foundation that the highest Italian administrative court (the *Consiglio di Stato*, or Council of State) erroneously defined as a body governed by public law, or with the identification, in economic and accounting terms, of the "enlarged public sector". Once the substantive identifying parameter is applied, the identification is valid for any law connected with the notion of public administration. This is what is affirmed by the prevailing administrative case-law, demonstrating the general impact of the integration between substance and form[8].

According to the principle of substantive law, if apparently private law instruments can become administrative acts, these - albeit seemingly vitiated - can then become valid acts. In this case, the conflict between substance and form can be solved

[8] For more details see F. MERUSI, *Sentieri interrotti della legalità*, Bologna, 2007.

through the principle of equivalence. A vitiated act can be considered equivalent to a valid act if the defect is merely formal, or if there is proof that its content could not have been different. By formal defects are meant what should be defined as infringements of the law regulating the form and procedure of the act. As for content equivalence, this can also be determined through the discretionary power of the administration, provided that discretionary elements can objectively be identified and can be used to demonstrate the "inevitability" of the law.

The principle of equivalence, which can justify the substantive legitimacy of the act based on Article 230 of the EC Treaty and the interpretation of that Article by the Court of Justice, and which has also been interpreted in a different way in Italian administrative case-law, has recently been codified in Italian law on administrative proceedings. Accordingly, the impact of the principle now depends on the interpretation of the wording used for its codification. That codification is the result of the well-established process of the legislative generalisation of case-law solutions, which in some cases have not yet become a valid precedent.

Some scholars may not be convinced that the regulations concerning public power can be integrated with general principles having "federal" origins (or having been officially validated at a federal level), and may therefore seek abstruse explanations to deny the validity of the principle of equivalence or to replace it with other principles. But this problem relates to legal theory, not to the reality of the phenomenon[9].

The "irrelevance" of defects of form, however, is not the only manifestation of the principle of equivalence, in the sense of a rule on arriving at the "substance" by obliterating the form. One example is the principle of mutual recognition, which leads to

[9] In Italian law, the principle of equivalence has often been opposed, particularly by certain commentators. For more details, see S. CIVITARESE MATTEUCCI, *La forma presa sul serio*, Turin, 2006, and V. CERULLI IRELLI, *Note critiche in materia di vizi formali di atti amministrativi*, in *Dir. pubbl.*, 2004, 208 ff.

the introduction, in EU Member States, of acts issued under rules that differ from those of the legal system in which they may be effective; in other words, this "conversion" of largely discretionary acts into acts bound by fixed prerequisites means that the original concessions become authorisations[10].

This mutation of discretionary power is probably the most fascinating manifestation, at least for research purposes, of the transition from formal law to substantive law.

The mutation of discretionary power arises from the different role played by fundamental rights in the determination of public interest by the public administration (the term *Gemeinwohl*, which can be translated as the common weal, may more aptly express this idea[11]), following the signing of the Charter on Human Rights by European countries - including those not belonging to the European Union - and also after the signing of the integration of the Treaty on European Union with the Nice Charter and after the Constitutions of many countries belonging to the European Union inverted the relationship between fundamental rights and administrative power, inducing the Court of Justice of the European Union to adopt the same logic in its search for principles shared by the different countries of the Union.

According to that logic, if fundamental rights come before administrative power, freedoms that are unknown to the citizen, and therefore to the judge as well, cannot exist

[10] See the analysis by L. MUSSELLI, *La conversione dell'atto amministrativo*, Milan, 2003.

[11] An even better expression is "public happiness", used in the past by L. A. MURATORI in his treatise (according to his own definition), *Della pubblica felicità, oggetto dei buoni principi*, Modena, 1749.

within that administrative power. There cannot be a substantive defect (*"merito"*) behind excess of power ("*eccesso di potere*"). Power must be subject to interpretation too[12].

Legitimacy may also be made up of undetermined legal concepts, to which there may also be a variety of solutions, and they need to be verified according to the criterion of reasonableness.

Should we therefore completely exclude the idea of discretion as a weighting of interests?

Not necessarily: the function of the power attributed to a public administration can also be that of weighing two or more different interests, as long as these interests are predetermined. In addition, the weighting should be based on a predetermined rule: the proportionality and appropriateness of the decision.

The principle of the integration of environmental regulations, stated in Article 6 of the EC Treaty, can be considered as a prime example of this new perspective of discretion as a weighting of interests.

Clearly, there may also be cases in which this new perspective is incomplete because it is limited to EU influence. For example, in countries having the same legal system as Italy, the inversion in the relation between fundamental rights and administrative power has not been clearly expressed in the Constitution. Rather, certain rights such as the right to property and the right to freely exercise entrepreneurial activities have long been considered as subject to administrative power.

The status of the integration between substantive law and formal law, when power is opposed to fundamental rights, is shown by the repeated rulings against the Italian State

[12] See L. BENVENUTI, *Interpretazione e dogmatica nel diritto amministrativo*, Milano, 2002; ID., *La discrezionalità amministrativa*, Padua, 1986.

that the ECHR has issued on compulsory purchase (*"occupazione acquisitiva"*), even after the highest Italian Civil Court (the *Corte di Cassazione*) and the legislator attempted to provide an unacceptable justification for that law. The abundant case-law produced by the Council of State defines how to interpret the discretion of the powers of independent administrative authorities over market regulation and makes the markets themselves more competitive.

It should be borne in mind that certain phenomena may occur in this integration between substance and form that appear to be completely different from the consolidation of fundamental rights and administrative power. For example, according to the EU authorities, the Member States have general administrative autonomy in their power to annul *ex officio* measures that infringe EU law. While almost all national legal systems have proceeded by placing their autonomy to act under the principle of legitimacy, they have established if, when and how such autonomy may be exercised.

However, such reasoning is valid unless one thinks that only federal law represents good substantive law, and only State law represents bad formal law.

We can mention other examples of substantive law influencing formal law: the effects of the precautionary principle on measures that already comply with the relevant legislation, or the introduction of cost-benefit analysis to assess the legitimacy rather than the appropriateness of an administrative act. However, this is not the place to attempt to list the many expressions of the phenomenon.

It is sufficient here for us to draw attention to the Europe that is being created from the grassroots up, without the States and, often, against the States.

4. HISTORY DOES NOT ALWAYS REPEAT ITSELF. EU LEGAL INTEGRATION AND THE CHALLENGE OF THE NECESSARY INSTITUTIONAL EFFECTS

We could observe that the Second Reich was not the result of such a process, nor was it the case with the Third Reich. But we may feel comforted by the fact that history rarely repeats itself exactly. Perhaps this time law will prevail over politics or, in other words, law in the form of European substantive law will make its crucial contribution to the challenge of a political union determined by economic priorities[13]. And perhaps a union based on administrative law will achieve what a union based on Roman law could not do.

[13] For a more general analysis see G.C. SPATTINI, *Ascesa e declino (eventuale) della nozione di "Costituzione economica" (nell'ordinamento italiano e in quello comunitario)*, in *Scritti in onore di Vincenzo Spagnuolo Vigorita*, Naples, 2007, vol. III, 1465 ff.