GLOBAL AND LOCAL, GENERAL AND PARTICULAR, RULES AND MEASURE: A POST-MODERN REFLECTION ON TAYLOR-MADE LAWS

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Abstract: *The factual use and the scientific studies on the Laws which contain concrete precepts in Italy are ancient, but the attempts to find limits to provisions with force of Law did not always resist the jurisdictional proof; the work tries to summarize the arguments mainly used in this regard, to overview the jurisprudential reaction, and to give an account of those that are still not sufficiently examined. Observing the contemporary behaviors of the government's activities, it notices their considerable complexity, which raises doubts about the appropriateness of the most classical theme of modernity on the nature of the Law, the generality and the abstractness of the norms that it is supposed to be produced by legislation. Using a post-modern approach, the study therefore tries to ask if it could be more effective working on external, expressed constitutional limits for the Law, and on the characteristics of the Judge who is able to sentence on it, of its process, of its judgment.*

Key words: *tailor-made laws; decentralization; Full Jurisdiction*

I. THE ANCIENT QUESTION OF THE "LEGGE-PROVVEDIMENTO" IN ITALY: THE "ADMINISTRATION BY ACTS HAVING THE FORCE OF LAW"

The factual use of the Laws which, instead of disposing in general and abstract terms, contain concrete precepts, or even concern specific subjects, in Italy is ancient, and therefore also scientific studies on the phenomenon date back, so much that the matter possess a sort of title, the epithet "legge – provvedimento",[1] that could sound "Laws – provision", or the like; it therefore have had time to be analyzed with different approaches, none of which, however, succeeded in establishing a distinctive criterion of legislating or regulating with respect to providing, even though the idea that the problem represents one of the forms of the "crisis of the Law".[2]

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[1] The lemma was used for the first time by CAMMEO, F. *Della manifestazione di volontà dello Stato nel campo del diritto amministrativo*. In: V. E. Orlando (ed.). *Primo Trattato di diritto amministrativo*. Milano: 1907, III, p. 94; in his next *Corso di diritto amministrativo*, 1914, reprinted with notes and preface by G., Padova: Cedam, 1960, p. 29, he also carried out a survey of examples: *"In this way, legislative acts with administrative content attributed to the Parliament are the Laws for the classification of National Monuments and public works, concessions for public works and the granting of the exercise of the railways, Laws through the which an inquiry is ordered, Laws that approve administrative acts of any kind, which impose extraordinary new expenses, Laws that approve contracts, Laws that fix the endowment of the Crown, the prerogative of the Princes, the dowry of the Princesses and the fortune of the Queens, the Laws on military and maritime annual lever, Laws of "naturalization", which order the burial in a church of a man worthy of the homeland, Laws that "import variations of Municipal, District and Provincial Territories*" (my translation).

[2] CAENELUTTI, F. La crisi della legge. *Riv. dir. pubbl.* 1930, p. 424; MODUGNO, F. *A mo' di introduzione. Considerazioni sulla ""crisi" della legge*. In: F. Modugno (ed.). *Trasformazioni della funzione legislativa. Crisi della legge e sistema delle fonti*, vol. II. Milano: Giuffrè, 2000, p. 3; CARETTI, P. La "crisi" della legge parlamentare. *Osservatorio sulle fonti*. 2010, No. 2, [2020-01-06]. Available at: <www.osservatoriosullefonti.it>; STAIANO, S. *Crisi della legge e legislazione periodica*. Napoli: Jovene, 2003.

Without going too far back in time, it is necessary to start from the observation that in the Constitution of the Italian Republic there is no definition of the content (or of the limits) of the legal rules, but in it one can find only the Law formation procedure, and the Constitution itself qualifies as Law acts that do not have the character of normative production in a technical sense (the so-called "formal Laws"[3]), and does not contemplate an explicit reservation to the administrative bodies of acts with concrete content, and as I will have to say this has addressed the treatment of the phenomenon so far.

It should be noted, then, that the Art. 77 of the Italian Constitution allows the Government the adoption of "provisional measures with the force of Law", called not by chance "Law Decrees" (Decreti-Legge), which must be "converted" into a Law by the Parliament; and that the Art. 76 allows that Parliament can delegate Legislative capacity to the Government under specifies principles and criteria of guidance, for limited time and for well-specified subjects (adopting "leggi-delega", which produce "decreti legislativi", a sort of "delegated Law Decrees").

Moreover, the Italian Government can always issue Regulations, aimed to rule the execution, implementation and integration of Laws and legislative decrees, the matters in which there is no regulation by acts having the force of Law, the organization and functioning of public administrations according to the provisions of the Law[4]; furthermore, a Government Regulation can be adopted when the Law authorizes it, determining the general norms regulating the matter and providing for the abrogation of the conflicting existing Laws (with effect from the entry into force of the Regulations: authorized or "delegalisation" Regulations). It is relevant, because by that way the matter is lowered in the normative level, so that it remains available to the secondary discipline, proper of Government, even afterwards, and until a "re-legification" eventually occurs.

The most recent literature, then, notes, in the contest of the "crisis of the Law", the enormous increase in presence of the Government, of the Executive, of the executive in the whole legislative function,[5] so much that there are those who discuss about "a new type of Law: the government Law";[6] only to remain in the last full term of the Italian Parliament, which ended in 2018, out of a total of 319 Laws approved, almost the 75% have been adopted upon the Government initiative, 36 have been Delegation – Laws, 83 have been Laws of conversion of Law-Decrees (21,90%), 28 have been budgetary and budget-related maintenance Laws (7,39%); the Government has adopted 100 Law-Decrees, 257 "delegated Law Decrees", 35 authorized Regulations, ad it is notable that 42,34% of the total legal dis-

[3] PALADIN, L. La legge come norma e come provvedimento. *Giur. cost.* 1962, p. 873; MODUGNO, F. Legge in generale (ad vocem). In: *Enc. Dir.*, Vol. XXIII. Milano: Giuffrè, 1973, p. 890; RESCIGNO, G. U. Rinasce la distinzione-opposizione tra legge in senso formale e legge in senso sostanziale? *Giur. cost.* 1999, p. 2013.

[4] CARLASSARE, L. *Regolamenti dell'esecutivo e principio di legalità*. Milano: Giuffré, 1966, p. 45.

[5] CHELI, E. L'ampliamento dei poteri normativi dell'esecutivo nei principali ordinamenti occidentali. *Riv. trim. dir. Pubbl.* 1994; MODUGNO, F. Sul ruolo della legge parlamentare (considerazioni preliminari). *Osservatorio sulle fonti*. 2010, No. 2; RUGGERI, A. *Fatti e norme nei giudizi sulle leggi e le "metamorfosi" dei criteri ordinatori delle fonti*. Torino: 1994.

[6] BILANCIA F. La legge e l'interesse generale: un paradigma per un'etica costituzionale? In: Costituzionalismo.it [online]. 24. 11. 2005 [2020-01-20]. Available at: <www.costituzionalismo.it>, p. 23.

positions issued by the Parliament has been due to converted Law-Decrees, which "weight" is increasing, as their contents passed from an average of 53 paragraphs in 2007, up to an average of 93 paragraphs in 2018.[7]

It is understandable, therefore, that in the last years the doctrine, in order to describe the "Legge-provvedimento" phenomenon, seems prefer to use, instead of the usual formula "administration by Law", the expression "administration by act having the force of Law".[8] It should indeed be considered that the procedures to reach a new norm are today much different, numerous and variegated than in the past,[9] many Countries have new instruments of audit and participation also in order to the legislative initiative, even if never at the level useful and own in the Administrative Action. In contemporary times, it must be admitted, there are in fact rare cases in which a norm is integrally general, that is addressed to a wholly indistinct mass of subjects, and integrally abstract, that is completely indifferent to a concrete case; apart from a few circumstances of purely general and abstract norms, in most cases the norm arises on certain occasions,[10] to correct, induce or prohibit a specific behavior, and is almost always addressed to classes of individuals. The contents and purposes of the Law are nowadays very varied, including sectoral and intersectoral ones, regulatory ones, budgetary and budget-related maintenance ones, abrogation ones, retroactive ones, executive and approval ones; not to mention the derogatory rules, the special ones, the exceptional ones:[11] in short, generality and abstractness are gradable qualities, and therefore except for rare borderline cases, the size of their presence – major, minor, or inexistent – can hardly be excluded from the political discretion inherent in the nature of legislative function.[12]

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[7] Source: Camera dei deputati – Senato della Repubblica. *I temi dell'attività parlamentare nella XVII legislatura*, Roma, 2018; Then must be pointed out some technical expedients that increase the complexity (and crisis) of legislative production, such as the so-called "maxiamendments" and the decree-laws (and conversion laws) so-called "Omnibus"; LUPO, N. Le trasformazioni (e le degenerazioni) dei modi di produzione del diritto: cause ed effetti dei decreti-legge "omnibus". *Il corriere giuridico*. 2005, No. 10, p. 1337; ID. L'impossibile qualità della legge, specie con i procedimenti attuali. In: M. Cavino – L. Conte (eds.). *La tecnica normativa tra legislatore e giudici*. Napoli: Editoriale Scientifica, 2014, p. 229.

[8] LOSANA, M. Questioni ambientali e «amministrazione per atti aventi forza di legge». *Osservatorio Costituzionale*. 2016, No. 2, [2020-02-05]. Available at: <https://www.osservatorioaic.it/images/rivista/pdf/04-Losana%20Nota%20a%20TAR%20Campania.pdf>, see p. 7; CAMMELLI, M. Premesse allo studio delle leggi provvedimento regionali. *Riv trim. dir e proc. civ.*, 1971, had already noted the governmental and non-parliamentary origin of the provision-laws.

[9] MATTARELLA, B. G. *La trappola delle leggi. Molte, oscure, complicate*. Bologna: Il Mulino, 2011, pp. 101 and 145; BOMBARDELLI, M. La semplificazione delle fonti e i suoi riflessi sul diritto amministrativo. In: Associazione Italiana Professori di Diritto Amministrativo (ed.). *Le fonti del diritto amministrativo*. Atti del Convegno annuale, Padova 9–10 ottobre 2015. Napoli: Editoriale Scientifica, 2016, p. 127.

[10] For ZAGREBELSKY, G. *Il diritto mite*. Torino: Einaudi, 1992, p. 44, the law is the result of a "multi-item trial", "by its nature marked by occasional characters".

[11] The most recent investigations on the types of laws that are able to provide can be found in SPUNTARELLI, S. *L'amministrazione per legge*. Milano: Giuffrè, 2007; VIPIANA, P. M. Voce Legge-provvedimento regionale. In: *Dig. IV ed., Disc. pubbl., Agg. IV*. Torino, 2010, p. 250; RESCIGNO, G. U. Leggi-provvedimento costituzionalmente ammesse e leggi-provvedimento costituzionalmente illegittime. In: *Dir. Pubbl.*. 2007, fasc. 2, p. 319; ARCONZO, G. *Contributo allo studio sulla funzione legislativa provvedimentale*. Milano: Giuffrè, 2013.

[12] See more in RESCIGNO, G. U. Leggi-provvedimento costituzionalmente ammesse e leggi-provvedimento costituzionalmente illegittime. In: *Dir. Pubbl.* 2007, fasc. 2, p. 319.

Not surprisingly, among the rules that, since some decades, have tried to elevate the quality of normative production, neither at the Italian national level[13], nor at the European one[14], generality and abstractness are considered element of quality; indeed, on the one hand in Italy is exempted from the duty to carry out the preventive analysis the normative initiative that contains "expected low adjustment costs in relation to individual recipients, taking into account their temporal extension" and that concerns "small number of recipients of the intervention"; and when the analysis is carried out, it must contemplate the "identification of the potential recipients, public and private, of the intervention and definition of their numerical consistency".[15]

II. THE CONSTITUTIONAL PROBLEM OF INVOKING GENERALITY AND ABSTRACTNESS FOR THE LAW

Thus, the knowledge accumulated over the last decades on the subject makes uncertain the possibility of identifying with precision and reliability a "tailor-made law", and therefore also to define the profiles of its admissibility.[16] On the other hand, it must said, the Italian doctrine and jurisprudence of administrative Law recognize this state of affairs, when they note – among the types of "administrative power", and of the acts with which it is typically exercised – those of a "vincolata" nature ("bound"), in which, beyond the variability due to the casuistry, the mechanism is due to the complete regulatory decision, which governs the whole case, leaving the administration to simply detect the fact and, therefore, to apply the consequential measures always provided by the Law, with no discretion.[17]

Moreover, Italian administrative Law has long known the argument concerning Government Acts which, while having an administrative form, express highly political con-

[13] See Article 14 of the Law of 28 November 2005, No. 246, and, finally, the decree of the President of the Council of Ministers 15 September 2017, No. 169, (*"Regulation of the impact of regulation, the verification of the impact of regulation and consultation"*).

[14] See the inter-institutional agreement *"Better law-making*" between the European Parliament, the European Union Council and the European Commission of 13 April 2016, published in the Official Journal of the European Union No. L 123 of 12 May 2016.

[15] See art. 7, 8 decree of the Italian President of the Council of Ministers No. 169/2017 cit.

[16] RESCIGNO, G. U. *Leggi-provvedimento costituzionalmente ammesse e leggi provvedimento costituzionalmente illegittime*, p. 320; MANFREDI, G. Leggi-provvedimento, forma di Stato, riserva di amministrazione. *Il Foro Amministrativo C.d.S.* 2003, p. 1290; the same Italian Constitution provides for constitutional acts (in a technical sense) of an individual nature, such as the appointments for the main political bodies of the Republic: the appointment of the President of the Council and the Ministers by the President of the Republic (art. 92); the appointment and revocation of the members of the Regional Council by the Regional President elected by universal and direct suffrage (Art. 123); the appointment of life-Senators and Constitutional Judges by the President of the Republic (Art. 59 and Art. 135).

[17] See, *inter alia*, FOLLIERI, F. Decisione amministrativa e atto vincolato. *Federalismi*. 2017, No. 7, [2020-01-20]. Available at: <www.federalismi.it>; ID. Correttezza (richtigkeit) e legittimazione del diritto giurisprudenziale al tempo della vincolatività del precedente. *Dir. amm.* 2014, NO. 1-2, p. 265; MONTEDURO, M. *Provvedimento amministrativo e interpretazione autentica. I. Questioni presupposte di teoria del provvedimento*. Padova: Cedam, 2012, pp. 152; FERRARA, L. Motivazione e impugnabilità degli atti atti amministrativi. *Foro amm.-Tar.* 2008, spec. 1197; SCOCA, F. G. La teoria del provvedimento dalla sua formulazione alla legge sul procedimento. *Dir. amm.* 1995, 1, § 14; ORSI BATTAGLINI, A. Attività vincolata e situazioni giuridiche soggettive. *Riv. trim. dir. proc. civ.* 1988, pp. 3; CASETTA, E. Riflessioni in tema di discrezionalità amministrativa, attività vincolata e interpretazione. *Dir. dell'economia.* 1998, pp. 503.

tent. For a long time, also on the basis of a legislation expressed at the beginning of the twentieth century, and moreover in the form of a fascist State, it was considered that they were completely immunized from the jurisdictional scrutiny, and only with difficulty, after the advent of the Republican Constitution, and over a slow reorganization of the legal relationship between politics and administration, a new balance has been reached which offers a Judge also for this type of decision when they infringe legal positions.[18]

If we then add to these materials also the strenuous evolutions on the subject of so-called "administrative merit", or the space of discretion exempt from any judicial censorship for reasons connected, once again, to the division of powers, and therefore to the different characteristics of the respective functions, thin and always discussed,[19] the picture can become clearer.

I would therefore like to try to anticipate a first conclusion of these reflections: the problem at stake is the one of political discretion, which in modern constitutional arrangements is not a full freedom condition, except in constituent moments,[20] so that the limits of this discretion are substantially constitutional ones.

With the consequence that the treatment of the rules that do not regulate but provide, of the *administration by act having the form of the Law*, is physiologically remitted to a substantially constitutional level, or because there is an express provision, or because it can be deduced from a plurality of other provisions or principles drawn from that level.

III. THE ITALIAN ATTEMPTS TO FIND A LIMIT TO PROVISIONS BY LAW

The first and, perhaps, the noblest attempt to find a limit to the provision by Laws was implemented by looking for relevance of a general principle of the State Legal System concerning the "due process"; after a first, highly-cited, ruling in 1962, the Italian Constitutional Court has consistently denied that the due process has the value of a constitutional principle, connected with art. 97 of the Constitution, and therefore never considered it

[18] See, among many others, and only by mention: CARLASSARE, L. L'atto politico tra "qualificazione" e "scelta": i parametri costituzionali. *Giur. cost.* 2016, p. 554; TROPEA, G. Genealogia, comparazione e decostruzione di un problema ancora aperto: l'atto politico. *Diritto amministrativo*. 2012, 3, p. 329; BILANCIA, F. Ancora sull' "atto politico" e sulla sua pretesa insindacabilità giurisdizionale. Una categoria tradizionale al tramonto? *Rivista AIC*. 2012, No. 4, [2020-01-20]. Available at: <www.rivistaaic.it>, p. 1; CERULLI IRELLI, V. Politica e amministrazione tra atti «atti politici» e atti di «alta amministrazione». *Dir. pubbl.* 2009, p. 122; SANDULLI, A. M. Governo e amministrazione. *Riv. trim. dir. pubbl.* 1966, p. 737. It has to be noted that the actual Italian Code for the Administrative Process, statues that "the acts or provisions issued by the Government in the exercise of political power cannot be impugned" (art. 7, par. 1, decreto legislativo 2 July 2010 n. 104).

[19] On the subject, Italian literature is endless; just to stay at the most recent one, see: GILIBERTI, B. *Il merito amministrativo*. Padova: Cedam, 2013; ALLENA, M. Il sindacato del giudice amministrativo sulle valutazioni tecniche complesse: orientamenti tradizionali versus obblighi internazionali. *Dir. proc. amm*. 2012; POLICE, M. Le forme della giurisdizione. In: F. G. Scoca (ed.). *Giustizia amministrativa*. Torino: Giappichelli 2013, p. 99; ROMANO TASSONE, A. Sulle vicende del concetto di "merito". *Dir. amm*. 2008, No. 3, p. 550; MONTEDORO, G. Processo economico, sindacato giurisdizionale ed autonomia dell'amministrazione: la questione del merito amministrativo. In: Aperta Contrada [online]. 6. 10. 2014 [2020-01-20]. Available at: <www.apertacontrada.it>; VILLATA, R., RAMAJOLI, M., *Il provvedimento amministrativo*. Torino: Giappichelli, 2006, p. 165.

[20] RUGGERI, A. La discrezionalità del legislatore tra teoria e prassi. In: *Dir. e soc*. 2007, p. 4.

enforceable against provisions by Law.[21] A second topic line, has concerned a sophisticated matter, the relationship between the legislative function and the jurisdictional one, which could made it possible to identify a limit for the former, in the abstract, "in respect of the jurisdictional function with regard to the decision of the ongoing cases";[22] but, in concrete, the limit seems to concern only what is covered by a *res judicata*,[23] and therefore this sort of "reserve of jurisdiction" seems active just when the jurisdictional function has been exhausted. And in any case in the relevant constitutional jurisprudence the unconstitutionality of the Law under this approach is not assessed solely on the basis of the conflict with the jurisdictional function, but above all in relation to the possible violation of the principle of reasonableness.[24]

The latter limit seems more promising, thought as the needs for judicial protection of subjects affected by some provision by Law;[25] but even here, on the one hand the Constitutional Court was able to affirm that the rights of defense of the citizen are not sacrificed, but are transferred, according to the control regime proper to the-regulatory provision, to constitutional justice[26]: in summary, the form of protection follows the legal nature of the disputed act, so that the Law can be syndicated only by its *natural* judge, that, in Italy, is just the Constitutional Court. Court that, on the other hand, points out that the means of constitutional evaluation connected with the arbitrariness and the manifest unreasonableness of the denounced norms, which can also be deduced from the lack of any evaluation of the elements in relation to the concrete situation on which the Law is called to affect, or by the obvious inconsistency of the legislative provision in relation to the public interest pursued, thus enhancing the significance of the constitutional evaluation of the reasonableness of the Law, in Italian Court's mind even more incisive than the jurisdictional one on the excess of power managed by other Judges, and able to recognize the private a form of protection and an opportunity for defense deemed equal to the one offered by the ordinary judicial review.[27]

The doctrine does not agree on this assumed equivalence of protection. It has been noted that precisely in this area the rust of the indirect appeal to the Italian Constitutional Court

[21] See e.g. Constitutional Court, sent. 21 March 1989, No. 143; 14 October 1988, No. 971; 2 February 1990, No. 40; 4 April 1990, No. 158; 1 June 1995, No. 210; FRANCO, A. Leggi provvedimento, principi generali dell'ordinamento, principio del giusto procedimento. *Giust. Cost.* 1989, II, p. 1041; SCIULLO, G. "Il principio del giusto procedimento" fra giudice costituzionale e giudice amministrativo. *Jus.* 1986, p. 291.

[22] Constitutional Court, sent. 15 July 1991, No. 346, in which, moreover, the limit is considered not violated; the same limit is reaffirmed, and once again considered not violated, with the sent. 4 December 1995, No. 492.

[23] The State Council, for example, considered that the thesis according to which the pending appeal would prevent the adoption of a provision law, would constitute "an inadmissible *vulnus* of the prerogatives of the assemblies having legislative competence, in the introduction of a new limit, not codified, to the exercise of the relative function and in the absolute and unlimited prevalence on the latter of the demands of justice pertinent to a process in progress" (Section IV, sent. 24 March 2004, No. 1559).

[24] Constitutional Court, sent. 2 April 2009, No.94.

[25] So much so that in the opinion of RESCIGNO, G. U. *Leggi-provvedimento costituzionalmente ammesse e leggi-provvedimento costituzionalmente illegittime*, p. 375, *"the reserve of administrative act* (which does not exclude provision-innovative laws that intend to face events or state of affairs) *is a consequence of the reserve of jurisdiction"*.

[26] Constitutional Court, sent. 16 February 1993, No. 62.

[27] See, for an example, Constitutional Court, 30 December 1997, No. 443, which, considering "situations of inequality to the detriment of the citizens of a Member State, or of its businesses, which occur as an indirect effect of the application of Community law", evaluated them pursuant to art. 3 of the Constitution and the principle of equality.

is revealed,[28] that some process paths are more difficult before the Constitutional Court, that there is lack of adequate instruments for the reconstruction of the defects of political discretion analogous to the excess of power used against the administrative one, of a full plurality of actions (not only of a compensation nature, for which the activation of a subsequent ordinary judgment appears to be possible), and of the precautionary protection (except in the main proceedings), like of any kind of appeal procedures.[29] Not to mention the absence of formal motivation in a Law-decision, that deeply influences the judicial review on it.[30]

In this regard, are interesting the instances in which the two types of legal acts, one administrative and one legislative, coexist, and determine a sort of progressive case, with the Law that "approves" and provides force and validity of Law to the provisions of an Administrative Act;[31] only on rare occasions did the Constitutional Court affirmed the principle of the justiciability of an Administrative Act before the Administrative Judge, despite its approval by a (regional, in the case) Law;[32] while in most cases it is the Administrative Judge himself who operates a self-restraint, considering as precluded "any possibility of direct syndication on the disputed act before him, which would be solved, otherwise by opinion, in a removal from the Constitutional Court of his exclusive competence in the scrutiny of legitimacy of acts having the force of Law".[33]

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[28] CAMERLENGO, Q. Legge o atto amministrativo? La Corte costituzionale e il calendario venatorio. In: *Forum Constituzionale* [online]. 2012 [2020-02-05]. Available at: <http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/2012/0005_nota_20_2012_camerlengo.pdf>, p. 3; in the opinion of STAIANO, S. La vicenda del giudizio sulla legge elettorale: crisi forse provvisorio del modello incidentale. *Riv. AIC*. 2014, No. 2, p. 5, "a direct access to which the question before the common judge has been found to be merely instrumental".

[29] GUELLA, F. Le leggi-provvedimento come atti di non mera approvazione: dall'ipotizzata consequenzialità al referendum della legge di variazione delle circoscrizioni comunali alla riserva del sindacato alla giurisdizione di costituzionalità. *Riv. AIC*. 2018, No. 1; FALLETTA, P. Leggi provvedimento e tutela giurisdizionale. *Giur. cost.* 2002, p. 4444; ZANON, N. La legge di sanatoria non è onnipotente. *Giur. cost.* 1998, p. 1659; CRISAFULLI, V. Dichiarazione di manifesta infondatezza e limiti al giudizio della Corte. *Giur. cost.* 1966, p. 1145; PACE, A. Sulla sospensione cautelare dell'esecuzione delle leggi autoapplicative impugnate per incostituzionalità. *Riv. trim. dir. pubbl.* 1968, p. 522; FRANCO, A. Leggi provvedimento, principi generali dell'ordinamento, principio del giusto procedimento. *Giur. cost.* 1989, II, p. 1053. For further considerations, see MODUGNO, F. La giurisdizione costituzionale. *Giur. cost.* 1978, 1253; MALFATTI, E., PANIZZA, S., ROMBOLI, R. *Giustizia costituzionale*. 3rd edition. Torino: Giappichelli, 2011, p. 179.

[30] BOCCALATTE, S. *La motivazione della legge. Profili teorici e giurisprudenziali*. Padova: Cedam, 2008. p. 70; CRISAFULLI, V. Sulla motivazione degli atti legislativi. *Riv. dir. pubbl.* 1937, Vol. I, p. 415; LOMBARDI, G. Voce Motivazione (diritto costituzionale). *Nss. Dig. It.* 1964, p. 954; VENTURA, L. *Motivazione degli atti costituzionali e valore democratico*. Torino: Giappichelli, 1995, p. 111; LUPO, N. Alla ricerca della motivazione delle leggi: le relazioni ai progetti di legge in Parlamento. In: U. De Siervo (ed.). *Osservatorio sulle fonti*. Torino, 2001, p. 67; MATUCCI, G. Sulla motivazione degli atti normativi comunitari. *Il Politico*. 2006, p. 75. In this regard, see the recent sentences of the Constitutional Court No. 106/2009, and No. 40/2012, regarding the motivation of the application of State secrecy which, as clarified by the Court, is required not for the purposes of judicial review but for control by Parliament.

[31] It is an ancient phenomenon: see ROMANO, S. Saggio di una teoria delle leggi di approvazione. In: Il Filangieri, 1898, p. 161; more recently, see: DICKMANN, R. La legge di approvazione di atti amministrativi tra Consiglio di Stato e Corte costituzionale. In: *Giornale di diritto amministrativo*. 2004, Fasc. 11, p. 1213.

[32] Corte Cost. 11 June 1999, No. 225 and 226; These are decisions which, as repeatedly argued by the Council of State (Section IV., 24 March 2004, No. 1559; 19 October 2004, No. 6727), do not contradict the previous consolidated contrary direction.

[33] Council of State, sent. No. 1559/2004; sent. No. 1349/2012; Tar Lazio, Roma, sez. III, sent. No. 11064/2008.

The set of these arguments, then, has constituted the attempt to infer a "reserve of administration",[34] which also has been not very successful; in short, the need for judicial protection, the presence of the (constitutional or general) principle of the due process, and the immanence of the principle of reasonableness (with the proportionality and adequacy), would inhibit Laws replacing provisions.[35]

These canons, however, taken as the sole foundations of the alleged reserve, not only have failed to bring agreement into the dogmatic reflection,[36] but they did not always resist the jurisdictional proof,[37] since the Constitution qualifies the public administration as a servant apparatus, subordinated to the primary norms of the State and to the jurisdiction, and because "no constitutional provision involves a reservation to the administrative or executive bodies of the acts with particular and concrete content";[38] and on the basis of these assumptions, to make a paradigmatic and recent example among many others, the revocation of a managerial task carried out by a (Regional) Law, was not considered invalid.[39]

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[34] VAIANO, D. *La riserva di funzione amministrativa*. Milano: Giuffré, 1996; NIGRO, M. *Studi sulla funzione organizzatrice della pubblica amministrazione*. Milano: Giuffré, 1966, p. 65; BERTI, G. *La pubblica amministrazione come organizzazione*. Padova: Cedam, 1968, p. 29.

[35] See, for example, CERRI, A. Dalla garanzia del "giusto procedimento" in sede disciplinare al criterio della "proporzionalità": spunti problematici e riflessioni a partire da un'interessante sentenza della Corte. *Giur. Cost.* 1995, p. 1469. Then see the case studies, analyzed by VAIANO, D. *La riserva di funzione amministrativa*, p. 152, and RESCIGNO, G. U. *Rinasce la distinzione-opposizione tra legge in senso formale e legge in senso materiale?,* p. 2023, in which, to a general law of discipline of a subject which leaves to the administration the concrete implementation, a subsequent one follows, which assumes on its own the conformation of the concrete relations, instead of administrative, implementation provisions.

[36] DOGLIANI, M. Riserva di amministrazione? *Dir. Pubbl.*, 2000, p. 685; VAIANO, D. *La riserva di funzione amministrativa*, *passim*.

[37] In Italy it is well known the orientation of the Constitutional Court inaugurated with the highly debated sentences. No. 59, 60, 63, 65, 67 of 1957; after a first and, in some respects, historical contrary pronouncement (Council of State, A.P., 20 March 1952, No. 6 and 7. In: *Giur. It.*, 1952, III, p. 65 ss.), the administrative jurisprudence also ended up adapting to it: see, for example, Council of State, IV, 24 March 2004, No. 1559. And the intermittent address of the Court, which sometimes used the aforementioned arguments to sanction, instead, the illegitimacy of laws that directly define concrete relations, rather than releasing them to the administrative relief, failed to stabilize this inclination in the opposite direction: see on the subject of urban planning, Constitutional Court, sent. 19 October 1992, No. 393, with note of MORBIDELLI, G. Urbanistica incostituzionale per abuso di silenzio assenso. *Giur. Cost.* 1992, p. 3410; and in the matter of removal in the public service, Constitutional Court, sent. October 14, 1988, No. 971, with note of ANDREONI, A. *La destituzione di diritto nel rapporto di pubblico impiego (rivisitato)*, *ibidem*, I, 4571.

[38] Constitutional Court, sent. No.143/89

[39] Constitutional Court, sent. 10 October 2014, No.231. It Is also interesting and important the historical case reported by RESCIGNO, G. U. *Leggi-provvedimento costituzionalmente ammesse e leggi-provvedimento costituzionalmente illegittime*, p. 327: "the law of 25 January 1982 No. 17 on secret associations in a first part says what must be understood by secret association and establishes in general who and how it ascertains such a situation and what negative consequences derive from the completed assessment; but in a second part it dissolves itself an association, the Masonic lodge called P2, and that is it executes (pretends to perform and in practice has succeeded in executing) for a concrete case (with respect to that specific association composed by those specific associates) its same general and abstract standardization. In my opinion this second part, in the light of the things now said, was and remains unconstitutional. If, however, the dissolution of the P2 lodge had been deliberated, in the absence of a general and abstract law on the point, by decree-law, the thing would have been admissible because it is the Constitution itself that provides that in cases of necessity and urgency the Government may adopt measures with the force of law (and if the ratio is well understood, if there is need and urgency)".

IV. PROFILES NOT YET SUFFICIENTLY PROBED AND VERIFIED

There are some refinement profiles of this topic, however, not yet sufficiently probed and verified.

The first one concerns the principles regarding legal certainty and the protection of legitimate expectations,[40] surfaced in some arrests of the European Court of Justice,[41] which, however, due to the very nature of its jurisdiction, can only refer to the structure of national Law concerning the forms of the acts with which these principles are respected, in the absence of precise indications of European Law;[42] in Italy, one can find some sentences of the Constitutional Courts that censure the Law which, due to its poor quality, reflects negatively on the good performance and impartiality of the public administration, and can therefore lead to its declaration of unconstitutionality for violation of the art. 97 of the Italian Constitution.[43]

The second one regards instead an explicit provision of the Italian Constitutional Charter, concerning what in the domestic language is defined as *"decentramento*", and which hereby we will call *"decentralization*": Republic, says art. 5 of our Constitution, "adapts the principles and methods of its legislation to the requirements of autonomy and decentralization".[44]

The complexity of this expression in the Italian contest, something that stays between and beyond devolution, de-concentration, de-localization, made it possible, in the past, to begin to speak of the competence – proper, and not precarious or delegated – of the administrative offices to the adoption of real administrative decisions,[45] and an innovative management of the principle of impartiality for the public administration.[46]

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[40] TASSONE, R. Amministrazione pubblica e produzione di "certezza": problemi attuali e spunti ricostruttivi. *Dir. amm.* 2005, p. 867; PAGANO, F. F. Legittimo affidamento e attività legislativa nella giurisprudenza della Corte costituzionale e delle Corti sovranazionali. *Dir. pubbl.* 2014, *passim*; CARNEVALE, P. La tutela del legittimo affidamento… cerca casa. *Giur. cost.* 2011, p. 21; ID. I diritti, la legge, e il principio di tutela del legittimo affidamento nell'ordinamento italiano. Piccolo divertissement su alcuni questioni di natura definitoria. In: *Scritti in onore di A. PACE.* Napoli: Editoriale scientifica 2012, Vol. III, p. 1927.

[41] European Court of Justice, sent. 18 October 2011, Boxus (C-128/09 a C-131/09, C-134/09, C- 135/09); Corte di giustizia UE, Sent. 17 novembre 2016, (C-348/15).

[42] Very interesting is the case of the withdrawal of the concessions related to the construction of high-speed railway sections, with extension of the related effects to the agreements stipulated with the general contractors, carried out by law (art. 13 of the decree-law 31 January 2007 No. 7); invested with the issue, the Administrative Judge (TAR) of Lazio had raised before the Court of Justice of the European Union, pursuant to art. 234 of the TCE (now art. 267 TFEU), the preliminary question concerning the „contrast with the provisions of art. 43, 49 and 56 of the Treaty, as well as with the community principles in the matter of legal certainty and protection of custody "(section I, ordinance 23 May 2007, no. 880). The matter did not come to a decision, because the rule was subsequently repealed, the parties withdrew the appeal to the TAR, and therefore the dispute ceased; but did not prevent the Advocate General from filing his written conclusions (11 September 2008), which, as far as we are concerned, noted that "in the absence of precise indications of Community law, the necessary correction takes place in accordance with national law, without prejudice, however, to the limits set by Community law".

[43] See Constitutional Court, sent. 16 aprile 2013, No. 70; AINIS, M. *La legge oscura. Come e perché non funziona.* Roma-Bari: Laterza, 2010, p. 117.

[44] PALMA G., FORTE P., DI FIORE G. L'amministrazione partecipata e decentrata come valore intangibile per leggi e regolamenti. In: *Annuario dell'Associazione dei Professori di diritto amministrativo.* Milano: Giuffré, 2005, p. 77.

[45] SANDULLI, A. M. Governo e amministrazione. *Riv. trim. dir. pubbl.* 1966, spec. p. 753; PASTORI, G. L'organizzazione della burocrazia. In: *La burocrazia in Italia.* Arch. ISAP, Rome, 1965, p. 4.

[46] ALLEGRETTI, U. *L'imparzialità amministrativa.* Padova: Cedam, 1965, p. 37 ss.

In the concept of decentralization one can therefore see a public decision capable of detecting historical reality, its continuous updating and adaptation,[47] in relation to administrative requirements and needs, not only local, not only social, but also individual.

And in support of administrative decentralization stand, above all, the rules of participatory administration, and therefore those of the procedure, of procedural participation, of the obligation of impartiality, of motivation, etc.; by this way, decentralization can respond to the need, technical and organizational, connected to the distribution of powers among public decision makers, to the distinction between political powers (and responsibilities), and administrative management (and responsibility),[48] and therefore it concerns the definition of the most accurate methods for the public decision.

In one word, decentralization as a constitutional orientation of the Law is aimed at preserving the function of the administration, as a power capable of reading the social reality in constantly updated terms, and the interests in their concrete and actual identity, adapting the measure of the public decisions.

Fixing the administrative decentralization as a constitutional duty for the Law, in short, means accepting that a substantial part of public decisions must be carried out in administrative terms, that is, under the legal parameters and by the officials of the public administration, because by this way it is possible to allow not only the actual and complete individual and social participation – whose support is not sufficient electoral guarantee – and therefore a complete democratic structure, but also the continuous topicality in the balancing of interests.

If decentralizing in an administrative sense means inducing the possibility of an always up-to-date public decision in the entity of the fact on which to decide, the caging that the decision receives from the normative coverage empties this possibility, and unfolding over time, that is to deny the value itself of the administrative decentralization; and if decentralizing means releasing the modality of decision to the administrative method, the Law that provides without these cares mortifies decentralization, since it does not leave sufficient and appropriate space for the participation of interests, which cannot be said to be assured except with the techniques proper to the participatory administrative function; if, furthermore, decentralizing means ensuring the discretionary factual decision, with all its juridical features, the Law that becomes a provision always can deny the value of decentralization, since it has no need for motivation, for preliminary investigation feedbacks, and absorbs in the political responsibility what, instead, the value of decentralization wants to be retained in the area of an administrative responsibility.

As one can see, at the very end the decentralization argument uses the classic topics to defend the administrative reserve, with the notable difference that it is not invoked

[47] ROVERSI MONACO, F. Profili giuridici del decentramento nell'organizzazione amministrativa cit.; BALBONI, E., Decentramento amministrativo. In: *Dig. Disc. Pubbl.* Torino: 1997, p. 515.

[48] PASTORI, G. La pubblica amministrazione. In: G. Amato – A. Barbera (eds.). *Manuale di diritto pubblico*. Bologna 1994, p. 302, who finds "an organization made up of several decision-making centers within the scope of the driving and addressing authority of the top management".

a latent principle, an interpretative reading, an unexpressed provision, extracted from the connection between different, instead, expressed ones but addressed to other duties;[49] a value enclosed in a positive, and constitutional, provision is here used, which explicitly binds the Republican Legislation to decentralization with a clear current, positive text. And the reserve on the grounds of decentralization does not work on the fleeting difference between "generality and abstractness" and "provision", but on the characteristics of the involved functions,[50] of deciding and regulating, using the results of the evolutions that the analyzes on them have produced in the course of the twentieth century; the opportunity of an administrative decision not excessively bound by the Law, even if obliged to respect it, is useful as it ensures a decision-making modality, more than a decision-making power, and often responds better to the needs that the passage of time requires, a greater need more urgent than in the past, in a society with an impressive changes-speed, and that requires a public decision based on a concrete, current assessment, proportionate to the needs of individuals, as well as, albeit cautiously, non-general collectivities.

It is in dependence on the necessity of the administrative decentralization that the norm has to respect and not adulterate the method of a public administrative decision; it is consequential, and consistent with its own juridical regime, that the decision itself can be subjected to a "normal" judicial review, that is conducted with the canons and the rules of access proper of the judgment that establishes the facts and the relationships; and finally, where the Law has already "decentralized", that is has regulated by leaving the administration to implement it, then a subsequent Law which "provides" cannot come into play, since it would "re-centralize" the decision.

V. A CONCLUSIVE PERSPECTIVE: FULL JURISDICTION IN THE JUDICIAL REVIEW OF THE LAW

And so the "Judge in Berlin" for these issues is the one capable of conducting a review of the constitutionality of the Laws (being it, or not, a Constitutional Court), with two consequent macro-assumptions: first of all, it is needed the presence of an explicit constitutional statement for the regulation of the provision in the form of Law, to which this judge is bound, which provides for guarantees similar to those that now surround the administrative decision; and, secondly, the structure of this specific jurisdictional function must be able to examine the fact, the relationships, the urgency, the excess of power up to its extreme limits, to produce ascertainment and condemnation, to define consequences for the decision maker, to have control over his responsibilities, with direct access and the possibility of a second instance.

[49] DOGLIANI, M. *Riserva di amministrazione?,* p. 679, urges "to adopt a radically normative point of view (the existence of a "prohibition" set by law)" for the reserve of administration, since only in this way is possible the affirmation of the principle in a rigid constitutional system.

[50] In the opinion of GIANNINI, M. S. Il decentramento nel sistema amministrativo. In: AA.VV. *Problemi di amministrazione pubblica.* Bologna: 1958, p. 155, now in *Scritti*, IV. Milano: Giuffré, 2004, p. 160, urged to "build on the functions" to understand the principle correctly.

In short, it is perhaps worthwhile to start discussing a *Full Jurisdiction* also for the syndicate of the Law.[51]

Otherwise, we will continue to see singular, provisional acts with the force of Law, to feel the sensation of a substantial unequal treatment with respect to the provisional decision in administrative form, and to provide the political seat with the temptation to resort to the Law to decide drastically, since, ultimately, the assessment of the opportunity to appeal to it, legitimately, is wholly referred to that venue.

[51] On the subject see the remarkable analysis carried out by the the Revue P.A. Persona e Amministrazione. Ricerche Giuridiche sull'Amministrazione e l'Economia, No. 2/2018, Monographic Section I. Available at: http://ojs.uniurb.it/index.php/pea/issue/view/190/showToc; GOISIS, F. La full jurisdiction nel contesto della giustizia amministrativa: concetto, funzione e modi irrisolti. *Dir. proc. amm.*, 2015, p. 546.; FOLLIERI, E. Sulla possibile influenza della giurisprudenza della Corte europea di Strasburgo sulla giustizia amministrativa. *Dir. proc. amm.* 2014, p. 685; ALLENA, M. *Art. 6 CEDU. Procedimento e processo amministrativo*. Napoli: Editoriale Scientifica, 2012; CRAIG, P. The Human Right Act, Article 6 and Procedural Rights. *Public law.* 2003, p. 753; FORSYTH, C. Procedural Justice in Administrative Proceedings and art. 6 (1) of European Convention on Human Rights and Fundamental Freedoms. *Cambridge Law Journal*. 2003, p. 244; FOCARELLI, C. *Equo processo e Convenzione europea dei diritti dell'uomo: contributo alla determinazione dell'ambito di applicazione dell'art. 6 della Convenzione*. Padova: Cedam, 2001.