MASSNAHMEVORSCHRIFTEN AND EMERGENCY POWERS IN CONTEMPORARY PUBLIC LAW

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Abstract: State of emergency, emergency and use of the law in order to regulate individually identified issues, are frequent and physiological in our contemporary legal systems. This article analyses mutual relations between the use of emergency powers in public law and the feature of tailor-made laws in the form of the "Massnahmevorschriften". As the main problem of these norms, the article identifies the avoidance of the judicial control. Further, the intrinsic derogatory and emergency nature of tailor-made laws represent a very deep institutional problem. Being these the fundamental issues, it is not hard to see as the tailor-made law tends to be in contrast not only with the Italian Constitution, but also European law.

Keywords: tailor-made laws, Massnahmevorschriften, emergency powers

I. INTRODUCTION

«*The tradition of the oppressed teaches us that the "state of emergency" in which we live is the rule*».[1] State of emergency, emergency and use of the law in order to regulate individually identified issues, are frequent and physiological in our contemporary legal systems. We are, naturally, all fueled by the idea – of liberal tradition – of Rule-of-Law, we traditionally believe that each decision power has its basis in the law; in the same way, we think that the separation of powers ensures the effectiveness of individual liberties; equally, we are convinced that the constitutional guarantee of liberties and rights should be able to prevent them from being harmed by the authority; we are also used to think that law should be general and abstract, thus providing for the common interest and not for identified individual situations; lastly, we are convinced that some neutral powers will guarantee the balance among centers of power and the inviolable nature of both liberties and the form of democracy.

Essentially, we believe in modern constitutionalism, according to which the command of the authority cannot violate personal liberties, and the democratic form of the State cannot be overwhelmed by those having the responsibility to govern from time to time. This idea, however, in our own time, suffers from a series of contradictions which are difficult to be ignored.

Therefore, it is reasonable to deal with the tailor-made law, given that it seems, since ever, a potential contradiction of that framework. With the tailor-made law, the group which expresses the parliamentary majority subtracts a decision, administrative by its nature, from the guarantees of jurisdiction. From a material point of view, it is an administrative decision, which should have the legal effect of this category of acts and should be subject to the judicial review of courts – and, if illegitimate, annulled; but from a formal point of view, its approval with legal force subtracts it from those guarantees.

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[1] BENJAMIN, W. Über den Begriff der Geschichte. Neue Rundschau. 1950, Vol. 61, p. 560.

It should be admitted that – from an institutional point of view – the tailor-made law does not normally appear as the exercise of a pure parliamentary will; it is rather expression of the will of the political majority – through the cooperation between Parliament and Government – to strengthen a specific decision in order to impose it more vigorously.

We are facing the crisis of the traditional concept of legality, since who holds the majority can take a decision concerning the content of the concepts of security[2] and public order – «*and to treat the party-political opponent*», Schmitt writes, «*as a common criminal*»[3] – can rely on a legality presumption in cases of doubt and make effective its decisions.[4]

Following Benjamin's warning, if we look at our legislation from the point of view of the oppressed, we do not struggle to find a link between the tailor-made law and the emergency, as well as between exercise of sovereign power in the sense of state-of-exception and abuse by the majority. The link between tailor-made law and emergency is decisive. The emergency constitutes, indeed, a typical state-of-exception compared to the ordinary situation; and it is known that the power to declare the exception has been (and it is) considered as the distinctive feature of sovereignty.[5]

The conceptual core in which tailor-made law must be observed is the one who links emergency, sovereignty, crisis of the Rule-of-Law, guarantee of inviolable rights.

II. FUNDAMENTAL ISSUES

Today, this conceptual core appears particularly problematic, due to the remarkable diffusion of emergency powers that involve derogations to ordinary rules. This happens not only through tailor-made laws but also with a regulatory technique which obtains the same result, that is compressing the right to sue.

First of all, it is frequent the use of *stricto sensu* tailor-made laws; hence, it is useful to provide a definition for them. In other cases, the effect is achieved through primary sources that, for classes of pre-determined events, provide the effect of subtracting the administrative decision – envisaged by the law and not directly contained therein – from the ordinary judicial guarantees.

Therefore, it is useful to identify the concepts in question and provide practical examples of their diffusion and significance in the legal system.

Before getting into the merit of the concepts which will be utilized, however, it is helpful to go back to Benjamin's initial quote. Indeed, the alteration of the system of sources for reasons of public emergency and public security, apart from reminding the issue of sovereignty, is (almost) always characterized by a power operation to the benefit of defined interests and to the detriment of others; consequently, it is frequent the alteration of the principle of reasonability, of the ponderation and guarantee of rights, and equality.

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[2] Above all, TROPEA, G. Sicurezza e sussidiarietà: premesse per uno studio sui rapporti tra sicurezza pubblica e democrazia amministrativa. Naples: ESI, 2010.

[3] SCHMITT, C. *Legalität und Legitimität*. Berlin: Duncker & Humblot, 1932.

[4] As a critique, see KIRCHHEIMER, O. *Potere e conflitto. Saggi sulla costituzione di Weimar*. Modena: Mucchi, 2017.

[5] SCHMITT, C. *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*. Belin: Duncker & Humblot, 1922.

It is simple to notice that «*the "state of emergency" in which we live is the rule*» only if we look through it from the point of view of «*the tradition of the oppressed*», *i.e.* from the point of view of who is materially harmed by the legislative use of emergency.

It is not difficult to notice it, given the alteration of the system of sources and of the guarantees of personal liberties which occurs within sectors of the legal system in which the "violence of the majority" is clear-cut; it suffices to think about migrants, penitentiary regimes, health treatments and security in public spaces: these are areas of regulation in which personal liberties are compressed by rules that are built upon classes of alleged human behaviors or even upon representations of the idea of guilt just for the way of being (*Täterschuld*).

In the same way, however, an adequate knowledge of contemporary economic law confirms the feeling that the alteration of the system of sources is frequently consequence of power operations. The recent actions concerning the banking system[6], strategic infrastructures, the exercise of special powers by the Government with respect to the acquisition of strategic companies (*golden power*) and the rehabilitation of polluted sites[7] are frequently accompanied by emergency statements that lead to tailor-made law or – in any case – significant alteration of the system of sources and guarantees.

III. THE *STRICTO SENSU* TAILOR-MADE LAWS IN THE ITALIAN TRADITION

The qualification of a law as a "tailor-made law"[8] shows an anomaly from the very beginning, because it combines a qualification concerning the effectiveness of the public decision (the law) with one that refers to the content (the tailor-made measure), which alters the system of sources of law[9].

The outline of the content recalls the idea of the ordinary generality and abstractness of law, an idea which has been significantly modified with the rise of the welfare state and the crisis of the Rule-of-Law in its classic sense.[10] Here, we already face an issue of uncertainty, because generality and abstractness are not immanent features of the law.

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[6] The case of Law Decree of 8 January 2019, no.1 is symbolic (*Misure urgenti a sostegno della Banca Carige S.p.a. - Cassa di risparmio di Genova e Imperia*).

[7] See, for example, Law Decre 3 December 2012, no. 207, concerning ILVA of Taranto.

[8] In Italy, quite recently, see SPUNTARELLI, S. *L'amministrazione per legge*. Milan: Giuffrè, 2007. The origin of the concept is in CAMMEO, F. Della manifestazione di volontà dello Stato nel campo del diritto amministrativo. In: Vittorio Emanuele Orlando (ed.). *Primo trattato completo di diritto amministrativo*. Milan: SEL, 1907, III, pp. 94; for a critical approach, MORTATI, C. di. *Le leggi provvedimento*. Milan: Giuffrè, 1969; for more recent considerations, SORRENTINO, F. *Le fonti del diritto italiano*. Padua: Cedam, 2009 and SARANDREA, A. Legge-provvedimento. In: Sabino Cassese (ed.). *Dizionario di diritto pubblico*. Milan: Giuffrè, 2006, pp. 3430. On constitutional case law, see CARDONE, A. Il fenomeno delle leggiprovvedimento e la crisi della separazione tra ordine legale e ordine costituzionale: retorica dello strict scrutiny e vuoti di tutela. In: P. Caretti – C. Grisolia. *Lo stato costituzionale: la dimensione nazionale e la prospettiva internazionale. Scritti in onore di Enzo Cheli*. Bologna: Mulino, 2010, pp. 182. In order to see the issue from a different perspective, compare VAIANO, D. *La riserva di funzione amministrativa*. Milano: Giuffrè, 1996; RIGANO, F. Scrutinio di stretta ragionevolezza sulle leggi-provvedimento e riserva d'amministrazione. *Le Regioni*. 1995, p. 521.

[9] Amplius, RESCIGNO, G. U. Leggi-provvedimento costituzionalmente ammesse e leggi-provvedimento costituzionalmente illegittime. *Diritto pubblico*. 2007, No. 2, p. 319.

[10] FORSTHOFF, E. Begriff und Wesen des sozialen Rechtstaates. In: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*. 1954, pp. 8; FORSTHOFF, E. *Rechtsstaatlichkeit und Sozialstaatlichkeit*. Darmstadt: Wissenschaftliche Buchgesellschaft, 1968. For a broad discussion, see COSTA, P., ZOLO, D. *Lo stato di diritto: storia, teoria, critica*. Milano: Feltrinelli, 2002.

The tailor-made law, according to the Constitutional Court – and to part of legal literature – would be compliant with the Constitution,[11] based on the idea that the Constitution neither defined the content of the law (but rather the process of its formation), nor prohibited the delegation or constituted a reserve of administration.

The system of guarantees of individual rights, affected by the tailor-made law, would be secured upon three fundamentals directions.

From a first point of view, the Italian Constitutional Court[12] has basically developed the idea that tailor-made laws can be judicially reviewed by the Constitutional Court in the light of the rules and principles that ordinarily govern the administrative activity,[13] thus replacing the administrative jurisdiction with the constitutional one; the tailor-made law must respect the principles of reasonableness and must provide an adequate balance of all the constitutionally-protected interest; due to its very nature, according to the Constitutional Court the tailor-made law must be subject to a strict scrutiny regarding the constitutional principles of equal treatment, impartiality, good course of Public Administration and legitimate expectation; overall, the Court examines the coherence between tool used and public purpose to be pursued.

In addition, the Court has always highlighted the risk of violation of the principle of equality, which is typical with these derogatory provisions,[14] since it is possible that discrimination against similar subjective situations, not covered by the tailor-made law, occurs; however, also in this case, the Court believes that the right of the individual affected by the tailor-made law is equally protected thanks to the constitutional jurisdiction – although neglecting the fact that the effectiveness of protection is much weaker in this case than in the ordinary one, due to both the formal effectiveness of the law and the lower celerity of protection.

Thirdly, in the perspective of a balance between principles and fundamental rights, the Court considers operating on a case-by-case approach, since criteria of proportionality and reasonableness.

IV. THE DEFINITION AND COMPLIANCE OF TAILOR-MADE LAWS

The first problem to be faced concerns the identification of the concept of tailor-made law.

As already reported, the progressive rise of the contemporary State and the overcoming of the traditional model of the Rule-of-Law (*Rechtsstaat*) has made the equation [law] = [general and abstract rule] very uncertain. Secondly, the transformations of society and market have required the frequent adoption of either singular/urgent or technically complex measures, with a formidable alteration of the traditional scheme of law; legislative regulations, ever-changing and constantly object of derogations, exceptions and modifi-

[11] Constitutional Court. 20 November 2013, no. 275.
[12] Constitutional Court. 25 May 1957, no. 59.
[13] Constitutional Court. 10 October 2014, no. 231.
[14] Constitutional Court, judgment 9 May 2013, no. 85, concerning the decontamination of Italsider of Bagnoli and ILVA of Taranto.

cations, have resulted from the abovementioned transformations; examples are financial law, European law, simplification law and all *"omnibus"* legislative texts in general containing rules concerning multiple topics, often amending or modifying previous laws. Thirdly, the multi-layered nature of the legal system leads to a complex dynamic which ranges from the sources of European law to the national and regional ones, with a frequent use of tailor-made laws by Regions in order to make "law-like" the administrative decisions.

In this complex framework, the tailor-made law is identifiable with the hypothesis in which law applies to a specific case and is not suitable for further applications.[15]

There are law provisions that deal with classes of cases, of subjective positions and events; these are provisions susceptible of application to a non-defined series. These are laws concerning a specific sector, particular and determined. The rules contained therein are not necessarily general and abstract. We will still deal with them, since they can be relevant with respect to problems that here we intend to observe. But these are not tailor-made laws in the proper sense. Conversely, the tailor-made law in the strict sense is the one who prescribe individual or determined cases (as in the example of Constitutional Court, judgement No. 85, 9 May 2013): exactly how happens in administrative acts. We will have tailor-made laws in the proper sense when the provision identifies the specific case to whom it applies.

The constitutional compatibility of the tailor-made law, as defined above, is very critical. Indeed, in substance, this results in a violation of the reserve of jurisdiction:[16] if a law provision is immediately applicable to determined cases, the consequence is the exclusion of the applicative administrative act (not necessary, because directly contained in the law); with the result that the guarantee of judicial review on the decision is subtracted (given that the judge is subject to the law and devoid of power in relation to it).

If the law provided for individuals by limiting rights that would be otherwise guaranteed, there would be a violation of the constitutional rule according to which either the application of law or the power to annul the administrative act, applying the law, belongs to the judge.[17]

The same thing must be said about a law – common case in regional legislation – which incorporates an administrative decision adopted or in ongoing adoption.

The same thing – for violation of the principle of equality – must be said about rules that attribute benefits to individuals, if that simply consists in the execution of what prescribed in previous general and abstract laws.

For the same reason – and for violation of the principle of equality – tailor-made laws that specifically provide for events (about sport, exhibition, infrastructures, strategical as-

[15] E.g. Art. 3 of law decree no. 207/2012, providing that the metallurgic plant of ILVA constitutes a national facility of strategic interest; therefore, the company was admitted taking possession of the goods which were seized by the judicial authority, and to commercialize them.

[16] See RESCIGNO, G. U. *Leggi-provvedimento costituzionalmente ammesse e leggi-provvedimento costituzionalmente illegittime*, p. 319.

[17] Testament of this are, with regard to Italian legislation, some provisions of Law Decree 28 september 2018, no. 109, «*Disposizioni urgenti per la città di Genova, la sicurezza della rete nazionale delle infrastrutture e dei trasporti, gli eventi sismici del 2016 e 2017, il lavoro e le altre emergenze*».

sets, financial institutions, specific corporate operations, etc.) applying or derogating from general rules are not compliant with the Constitution, whereas laws referring to classes of events are not (for example, it would not be illegitimate a rule that provides for earthquakes, whereas it would be illegitimate a provision concerning a specific earthquake, taking decisions that should have been taken with an administrative act instead); exempting a general provision for specific cases or applying it with legal force, results in subtracting the constitutional guarantees, otherwise prescribed for the case in which the decision is taken, with an administrative act. Obviously, it is not always easy to identify the derogatory rule for the specific case.

For the same reason, when the law regulates public power with respect to financial operations, acquisitions of companies owning strategic assets (*golden powers*), the solution of banking crisis or support against economic crisis, this will not result in a tailor-made law; conversely, when the law provides in an applicative or derogatory way for individual cases on these objects, there will be a tailor-made law and that should be considered in contrast with the judicial reserve and the jurisdictional guarantee of the rights of individuals (Articles 24, 113 of the Italian Constitution).

As previously noted, given that the tailor-made law intervenes with the function (or in any case, the effect) of subtracting jurisdictional guarantees, potentially violating equality, the problems of the abuse of the majority, of sovereignty as a power of exception and of social supremacy as a power of derogation, become relevant.

The same issues become relevant also regarding laws that do not show themselves as tailor-made laws but as derogatory rules, having a precise content and aimed at reducing the guarantees system.

Before indicating the criticalities of tailor-made laws from the point of view of European law, it is advisable addressing this second type of rules. This issue should be anticipated both not to deviate from the main considerations and because those criticalities do show themselves also in this second category of rules.

V. ALTERATIONS OF THE GUARANTEES SYSTEM BY LAWS NOT QUALIFIABLE AS TAILOR-MADE LAWS

In order to fully understand the conceptual central role of the relation within *reduction of guarantees, exception* and *emergency*, it is necessary to broaden our vision to other hypothesis – apart from the tailor-made law – whereby the group of power that expresses the Government may restrict the judicial review through law provisions.

Therefore, we enter a wide domain, that for sake of convenience can be collected in two fundamental categories.

Firstly, derogatory regulations restricting (or excluding) the judicial review for classes of cases are increasingly frequent This is, certainly, a widespread and constantly expanding phenomenon. What matters the most, however, is that it focuses on the most important issues concerning economy or society. The answer of politics to the central issues of the Country is, essentially, to adopt derogatory regulations restricting judicial review.

To some extent, it is a significant retraction of the democratic regime, which has, as a characterizing feature, the fact that the decision of power must be reviewed by an independent judge and that the authority cannot compress the fundamental rights (among

which, certainly the possibility to make the public power's decisions reviewed by an independent judge).

I refer to the provisions that – more and more frequently – exclude for the administrative judge the possibility to take emergency decisions or annul the illegitimate act. In essence, these are rules that subtracts the protection of subjective positions, since the right of the individual will be compressed or eliminated and the authority (with public resources) will only pay damages. The political result of these provisions is to make sure that the decision, even if illegal, is implemented.

These are rules which are frequently used, and there are several examples: banking settlement procedures, the localization and implementation of strategic infrastructures (motorways, harbors, airports, gas pipelines, power lines, etc.); the interventions concerning extraordinary exhibition events, such as Expo Milano 2015 or sport events of international importance, like the Olympic games; the admission procedures for migrants.[18]

In all these hypotheses, the competent judge of the administrative decision will not have the power to interrupt its effects and in many cases not even the possibility to annul it, with the consequence that an illegitimate administrative act, compressing individual rights, will obtain its effect and the judge will not be able to stop that. In these hypotheses a compensation for damage could be asked, but the result of these rules is clear: the political choice of the temporary holder of power is achieved, perhaps at public expenses (since the damages will be payed using the public money and with years of delay – and, thus, when the government representatives will be different).

Not less important is the different – but coherent – phenomenon of the reduction of jurisdictional guarantees because of both the emergency and the way the situation is described by the law.

Emblematic, in this regard, is the proliferation of emergency decrees concerning migrants (art. 54, para 4, of Legislative Decree 18 August 2000, No. 267), which have been declared not compliant with the Constitution by the Court with judgement 7 April 2011, No. 115. No less meaningful are the decrees of the Civil Protection, as they materially evolved, not just providing exceptions to laws but also consisting of a scheme of a mother-decree which appoints a delegated commissioner and authorizes him/her to adopt decrees ("sons") derogating from the law provisions mentioned in the mother-decree. The case of the Prime Minister decree, prescribed for Expo Milano 2015, No. 3623 of 18 October 2007 is similarly symbolic: the mayor of Milan was appointed delegated commissioner for the preparation of the necessary interventions for the better application of the city of Milan for Expo 2015; the decree gave the commissioner delegated powers which were typical of the ordinary offices of the Municipality of Milan, authorizing him to deviate from the several provisions contained in fifteen national and regional laws.

In other hypotheses, especially in strategic economic sectors, special powers are provided to the Government, which are triggered as a consequence to situations described

[18] For further considerations, PERFETTI, L. R. Emergenza e svuotamento delle garanzie giurisdizionali. Tendenza dei recenti provvedimenti aventi forza di legge del governo e preoccupazioni per quelli a venire. *Giustamm.* 2016, Vol. 8 [5413].

in such a generic way so that they prevent, in fact, their judicial review; the strategic nature of the involved assets, the typical discretion of economic policy and the frequent invocation of emergency are all aspects that prevent an effective judicial review.

Neither it is uncommon that the two phenomena emerge simultaneously, *i.e.* with law provisions that, while describing in a generic way the powers and their pre-conditions, expressly limit the possibility of a judicial remedy.

VI. THE CONTRAST WITH THE ECHR CASE LAW ABOUT FULL JURISDICTION

The main problem of the tailor-made law is the avoidance of the judicial control. Furthermore, in its intrinsic derogatory and emergency nature resides the deepest institutional problem.

Being these the fundamental issues, it is not hard to see as the tailor-made law tends to be in contrast not only with the Italian Constitution, but also European law.

In particular, on this matter we may remind ECHR, GC, 18 October 2011, Nos. 128/09, 131/09, 134/09 and 135/09, *Boxus et al.*, and CJEU (IV section), 16 February 2012, Nos. C-182/2010, *Solvay et al.*, concerning E.I.A. and infrastructure concessions; the Court undoubtedly states that the national law must provide for the possibility for a court to hear the case also when the project approval is performed by law. Furthermore, there is an issue concerning the compliance with the full jurisdiction principles[19], due to the constant demand for full and effective jurisdictional control.

VII. THE TAILOR-MADE LAW IN THE FRAMEWORK OF EMERGENCY POWERS

As already exposed, the intrinsic derogatory character of the tailor-made law, and the exception to the principle of the administrative decision to be subject to the jurisdictional control, are elements which are enough to link the tailor-made law to the emergency problems and the exercise of sovereignty.

With regard to the first aspect, it is not rare that the tailor-made laws are the answers of the political entities to problem felt like emergencies; may it be a bank crisis, the collapse of a bridge, the prosecution of the activity of a steel mill, the political majority (of the Parliament and, therefore, the Government) will turn itself to the tailor-made law to ensure a problem - in which it sees an emergency aspect – with a solution which will be materially not challengeable before a jurisdictional court. It is not a coincidence that - at least in the

[19] I refer to Art. 6 of the ECHR, stating that: *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*", and Art. 13, which sets forth that: *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*", as well as Art. 47 of the Charter of Nice (Charter of Fundamental Rights of the European Union, 2012/C 326/02), providing that *"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal*", i.e. the case must be subject *"to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law*" and *"everyone shall have the possibility of being advised, defended and represented*".

last decade - tailor-made laws are always adopted in the form of law-decree (whose requirements is exactly urgency). The emergency profile comes almost always with the tailor-made law.

From an intrinsic point of view, furthermore, the tailor-made law is always source of emergency power, since its claim to exempt the normal course of jurisdictional control recalls the power (proper of the emergency-state) of suspension of the rule of law. Therefore, the tailor-made law is substantially both expression and source of the emergency-state. It is apparent that this institute jeopardises the rule of law.

With regard to the second aspect, the rule of law is further jeopardised by the derogatory nature of the tailor-made law.

It is apparent also in this case that the tailor-made law constitutes a derogation, compared to the ordinary legal system, the principle of legality and jurisdictional review of State power; at the same time, since the exercise of legislative power applies (abnormally) to a identified and specific case, and therefore the legislative command becomes applicable to the cases set out in the law provision itself, it is clear that a relationship of particular supremacy is established between the authority and the law's recipient; the result is a derogatory system of special supremacy (*besondere Gewaltverhältnisse*).

In this respect, an even more apparent link exists with derogation and emergency when the legislator intends to reduce jurisdictional guarantees regarding specific situations – albeit this is not the case of a *stricto sensu* tailor-made law.

Emergency and derogatory powers immediately recall the idea of the state-of-exception and its relationship with the exercise of sovereign power. If one makes reference to the idea according to which the sovereign is the one who has the power to suspend the system, it is not difficult to understand that the hypothesis discussed here are rooted in the following: the current political majority intends to adopt – in Italy, within the relationship between the Parliament and the Government – a decision which suspends the system with the intention of both adopting a provision which derogates to ordinary rules, and suspending the application of jurisdictional guarantees with the elimination of a challengeable administrative act, with its absorption in the tailor-made law.

The state-of-exception exists both in the suspension of ordinary applicable rules to the case – through a provision which sets forth a rule applying to a single case – both in the derogation to the jurisdictional guarantees' system.

Hence, the most radical problem is the consistency with constitutionalism.[20] If the essential elements of constitutionalism have long been present in Europe (the existence of a written constitution, a declaration of human rights, the division of powers, a system of constitutional review of the laws), democracies that followed WWII have enriched consti-

[20] For a complete framework, see FIORAVANTI, M. *Costituzionalismo. La storia, le teorie, i testi.* Rome: Carocci, 2018; PINO, G. *Il costituzionalismo dei diritti. Struttura e limiti del costituzionalismo contemporaneo.* Bologna: il Mulino, 2017. For some specific hypothesis or theories, see AA. VV. *Costituzionalismo e globalizzazione.* Naples: Jovene, 2014; FROSINI, T. E. *Sovranità popolare e costituzionalismo.* Milan: Giuffrè, 1997; CELANO, B. *Lezioni di filosofia del diritto. Costituzionalismo, Stato di diritto, codificazione, positivismo giuridico.* Turin: Giappichelli, 2018; AZZARITI, G. *Il costituzionalismo moderno può sopravvivere?* Bari-Rome: Laterza, 2018; FERRAJOLI, L. *Costituzionalismo oltre lo Stato.* Modena: Mucchi, 2017; and FERRAJOLI, L. *La democrazia attraverso i diritti: Il costituzionalismo garantista come modello teorico e come progetto politico.* Bari-Rome: Laterza, 2013.

tutionalism of a new element. We are not concerned solely with the limitations of public power (especially governmental), but also with its legitimization with fundamental rights and, therefore, the impossibility of restraining their minimum content (which makes them, in fact, fundamental). It is not solely about violating rights, but the legitimization of the former only in the light of the former, and, therefore, about the functionalization of authority in favor of the individual, its duty to ensure the full enjoyment of rights.

The fundamental assumption[21] consists in this: fundamental rights and institutional system's basic elements cannot be undermined by the freedom of the political choice, so that the exercise of governmental power does not prevail over them, with the result of denying rights or altering democracy. The demarcation line between fundamental rights and political choices lies here. Since political choices are taken for reasons of convenience, consensus or simple irrational pressure in the face of events, or to benefit a certain majority to the detriment of minorities, it is necessary that political choice is deprived of the control over essential constitutional rights and that the decision about the latter in the case of conflict is assigned to a constitutional review entrusted to not (too) politicized supreme courts[22].

VIII. SOVEREIGNTY AND TAILOR-MADE LAW

This idea become even more radical if one accepts the theory – supported in many occasions[23] – according to which fundamental rights are permanently in the scope of sovereignty and, therefore, are in any case excluded from any political arbitrariness because the institutional process develops inside a system whereby the authority is always thought as functional to the as equal as possible enjoyment of the uncompressible portion of fundamental rights.

The problem created by tailor-made law as an instrument limiting judicial guarantees is that it entrusts the capability of eroding rights and institutions to the political sphere

[21] In this regard, see the not very recent – but well-known – contributions of FULLER, L. L. *The Morality of Law*. New Haven: Yale University Press, 1964; SHKLAR, J. N. *Legalism: Law, Morals, and Political Trials*. Cambridge, MA: Harvard University Press, 1964.

[22] On this topic, see the discussion between NOZICK, R. *Anarchy, State, and Utopia*. Oxford: Blackwell, 1974 and DWORKIN, R. *Taking Rights Seriously*. London: Duckworth, 1977, DWORKIN, R. *Law's Freedom: The Moral Reading of the Constitution*. Cambridge, MA: Harvard University Press, 1996.

[23] PERFETTI, L. R. I diritti sociali. Sui diritti fondamentali come esercizio della sovranità popolare nel rapporto con l'autorità. *Dir. pubb.* 2013, Vol. 19, No. 1, p. 61; PERFETTI, L. R. Discrezionalità amministrativa, clausole generali e ordine giuridico della società. *Dir. amm.* 2013, p. 299; PERFETTI, L. R. Funzione e còmpito nella teoria delle procedure amministrative. Metateoria su procedimento e processo. *Dir. proc. amm.* 2014, p. 53; PERFETTI, L. R. Sull'ordine giuridico della società e la sovranità. In: *Scritti per Luigi Lombardi Vallauri*. Padova: Cedam, 2016, pp. 1153; PERFETTI, L. R. La legalità del migrante. Status della persona e còmpiti dell'amministrazione pubblica nella relazione paradigmatica tra migranti respinti, irregolari, minori trattenuti e potere pubblico. *Dir proc. amm.* 2016, p. 393; PERFETTI, L. R. Discrecionalidad administrativa y soberanía popular. *Revista Española de Derecho Administrativo*. 2016, No. 177, p. 195; PERFETTI, L. R. L'azione amministrativa tra libertà e funzione. *Riv. trim. dir. pubb.* 2017, p. 99; PERFETTI, L. R. Discrezionalità amministrativa e sovranità popolare. In: *Al di là del nesso autorità/libertà: tra legge e amministrazione*. Torino: Giapicchelli, 2017, pp. 119; PERFETTI, L. R. L'ordinaria violenza della decisione amministrativa nello Stato di diritto. *PA Persona e amministrazione*. 2017, Vol. I, p. 3.

for the sake of the effectiveness of the results which it intends to pursue and, therefore, by virtue of a determined vision of the political conflict. These limitations to political action are commonly recognized as necessary to ensure coexistence, to avoid that the political conflict arbitrates what must, on the contrary, be guaranteed in a fair and reasonable way.[24]

From the individual's point of view, whose rights are jeopardized by the tailor-made law, the issue of the authority's decision and its formal effectiveness seems little important. Indeed, if everyone has the fundamental right to judicially challenge the authority's decision, and the authority has the fundamental duty to ensure individual rights, the judge will have to decide the controversy regardless to the decision's formal content (which has a legislative nature) in favor of the material one (an administrative act). This seems to be the approach adopted by the European courts, too.

The fundamental question remains that of sovereignty as the power to decide the state-of-exception. In this perspective, it must be noted that sovereignty is not entitled – at least in the Italian system – to the State, but to the people (Italian Constitution, Art. 1). Since the Italian Constitution recognizes inviolable rights (Art.2), that means that these rights already exist in the moment of the exercise of sovereignty's function, *e.g.* exercising constituent power to approve the Constitution. Sovereignty, therefore, is entitled to the people and is partially held back in it – with respect to fundamental rights. Therefore, it is evident that the State is functional to the sovereign (the people) and that its function is to ensure the fair and equal enjoyment of fundamental rights.

Consequently, about the present issue, a fundamental right will not be legitimately violated only by approving an administrative act by means of an act having legislative force.

As a result, it must be affirmed that the judge shall make prevail the substance over the form, by not applying the law – at least because of an evident contrast with Arts. 6 and 13 ECHR.

[24] With respect to Italian juridical literature, it is worth referring to ZAGREBELSKY, G. *Principî e voti*. Torino: G. Einaudi, 2005, according to whom the guarantees offered by Constitutional (or supreme) Courts ensure a result which is consistent with common and shared fundamental rights, and is not determined by the pursuit of immediate consensus. In Anglo-Saxon literature, see RAZ, J. *Ethics in the Public Domain*. Oxford: Oxford University Press, 1995; HAMPSHIRE, S. *Justice Is Conflict*. Princeton: Princeton University Press, 2001.