

ADMINISTRATIVE LAW IN ITALY: AN HISTORICAL SKETCH (*)

BERNARDO GIORGIO MATTARELLA

CONTENTS: 1. The 19th century: development of administrations and the genesis of administrative law. — 1.1. Administrations of pre-unification states. — 1.2. Unification. — 1.3. The Crispi era. — 2. The first half of the 20th century: administrative law of authority. — 2.1. The Giolittian era and the crisis of the liberal state. — 2.2. Fascism. — 3. The second half of the 20th century: administrative law of liberty. — 3.1. Administration in the Constitution. — 3.2. The Republican Age. — 3.3. The age of administrative reform. — 4. The beginning of the 21st century: the «criterion» of administrative law. — 4.1. Administrative law and private law. — 4.2. Administrative law and administrative justice. — 4.3. Administrative law and private law.

1. In the 19th century both the unitary State and the administrative law were born and developed in Italy. The features of the latter were strongly influenced by the unification process and by political events.

1.1. The Italian State, as is widely known, arose through aggregation around one of many states, the modern-day territory of which remained fragmented through to the mid-nineteenth century: the Kingdom of Sardinia, which, until 1861, roughly covered the territory of the modern-day regions Piedmont, Liguria and Sardinia, with Turin as its capital. Following unification, the monarchy ruling this State extended its organizational models as well as its laws over the territories that came to be annexed one by one. It is especially to this, therefore, that reference must be made, given the important influence

(*) To be published in German in A. VON BOGDANDY, S. CASSESE and P.M. HUBER (hrsg.), *Ius Publicum Europeum. Grundlagen staatlichen Verwaltungsrecht in Europa*, Heidelberg, C.F. Müller, vol. III, 2010.

its administration and its laws proved to have upon the development of public administration and administrative law in Italy.

But the other pre-unification states ought to be briefly mentioned as well for several reasons: because the state of their administrations affected the development of national legislation and administration; because a good portion of the Kingdom of Italy's governing class came equipped with administrative experience gained in those states; and because trends arising in the study of public administration within those states were not without influence upon the developments that followed unification. In terms of the first viewpoint, it may be recalled that the initial tendency of unification legislation toward legislative uniformity, independent of the social and economic conditions of many areas of the country, soon gave way to special laws adopted to deal with the particular needs of certain areas. From the second viewpoint, one need only consider that many members of a political and administrative élite, such as the Council of State of the Kingdom of Italy, came from Southern states where many of those members had been responsible for government and had, at times, been persecuted as criminals for their role in bringing about national unification ⁽¹⁾. From the third viewpoint, the spread of French legal literature within the Kingdom of Naples in the first half of the 1800s may well be recalled, as may be figures such as Silvio Spaventa who came from that area ⁽²⁾.

Public administrations in the pre-unification states were organizations of moderate size, designed to perform few duties, prevalently those that concerned the police and the military; indeed the total number of civil servants in the central administrations of the various states did not exceed 60,000 and the greater part of those people worked in administrations handling law enforcement, fiscal affairs and the operation of the postal and telegraphic service ⁽³⁾. In terms of their organization, the administrations of many states showed considerable signs of French influence: Napoleon and his armies had brought into Italy many trends, such as the simplification and rationalization of

⁽¹⁾ This point has been demonstrated by the biographies collected in G. MELIS (ed.), *Il Consiglio di Stato nella storia d'Italia. Le biografie dei magistrati (1861-1948)*, Milan, Giuffrè, 2006.

⁽²⁾ Regarding the vicissitudes of legal doctrine, reference to which shall not be made in these pages, see A. SANDULLI, *Administrative Law Scholarship in Italy*, in this issue.

⁽³⁾ Data and bibliographic references from G. MELIS, *Storia dell'amministrazione italiana*, Bologna, il Mulino, 1996, 15 et seq.

administrative organization and devices like those of administrative litigation ⁽⁴⁾. And if, on a constitutional level, the Restoration meant a return to the past, on an administrative level those tendencies and those devices remained, insofar as they were functional to the characters which the monarchies of the 1800s assumed. The French influence should not be overestimated, however, because many of the typical features of French administration were absent: «administrative uniformity, a powerful administrative «élite», the «Conseil d'État», the prefects» ⁽⁵⁾. The situation of many states was greatly heterogeneous. In some, administrative modernization had given rise to modern organizational rules and to an embryonic legal regime of civil servants in which the principle of merit began to take shape: thus it was in the territories of Lombardy-Venetia under Austrian rule, and also in the Kingdom of Naples. In others, such as the Papal States, rules on organization and on personnel were more difficult to establish.

The institutions of the future Kingdom of Italy, naturally, were destined to be especially influenced by those of the Kingdom of Sardinia, which underwent reform halfway through the century.

On the constitutional level, the Albertine Statute was «granted» in 1848: the only statute, among the constitutional papers that spread throughout Italy after the revolutionary uprisings of 1848, that would outlive the subsequent Restorational tendencies ⁽⁶⁾. This laid the foundation for a form of parliamentary government and articulated several individual rights in regard to public power, but it did not provide efficient measures of guarantee.

On the administrative level, a decisive role was played by the 1853 organizational reform brought about by Cavour ⁽⁷⁾, who lately proved to be the primary author of national unification. This reform, on the

⁽⁴⁾ P. AIMO, *Le origini della giustizia amministrativa*, Milan, Giuffrè, 1990, 7 et seq. On the further development of administrative litigation, M.S. GIANNINI, *Discorso generale sulla giustizia amministrativa*, in *Rivista di diritto processuale*, 1963, 522, 1964, 12 and 217, now in *Scritti*, vol. V, Milan, Giuffrè, 2004, 223; *La giustizia amministrativa*, edited by G. Miele, Milan, Neri Pozza, 1968; P. AIMO, *La giustizia amministrativa dall'Ottocento a oggi*, Rome-Bari, Laterza, 2000. For a critical assessment, F. MERUSI e G. SANVITI, *L'«ingiustizia» amministrativa in Italia*, Bologna, il Mulino, 1986; M. NIGRO, *È ancora attuale una giustizia amministrativa?*, in *Foro italiano*, 1983, V, c. 249.

⁽⁵⁾ S. CASSESE, *Le basi del diritto amministrativo*, Milan, Garzanti, 2000, 31.

⁽⁶⁾ See C. GHISALBERTI, *Storia costituzionale d'Italia 1848-1948*, Rome-Bari, Laterza, 1998, 19 et seq.

⁽⁷⁾ Law no. 1483 of March 23, 1853.

one hand, acknowledged the principle of ministerial responsibility, a principle of English derivation: the minister was placed at the head of the administration for which he must give account before Parliament. On the other hand, it acknowledged the model of uniform administration, compact and centralized, of French derivation. Indeed Article 1 of the law, abandoning the previous «mixed» organizational model, established that «the central administration of the State shall be concentrated in the Ministries. The ministers shall provide the relative services by means of offices placed under their immediate direction. Offices relating to a single branch of administration may be joined together, and constitute general directorates, which shall nonetheless remain an integral part of the ministries». The administrative machine was designed with a pyramidal structure, standing beneath the responsibility of the government. A decree issued by the Government ⁽⁸⁾ brought to full fruition the bill by establishing norms regarding the running of offices and the duties of office staff members, who were to rigorously respect the confidentiality of office matters: control over office personnel was to come from above, from the political heads of the administration who, in turn, were accountable to Parliament. There was no direct control by citizens. Coherently, the regulatory principle governing internal affairs within the administration was that of a hierarchy, which implied the power of the higher office to give orders to the lower office and to substitute it ⁽⁹⁾.

French influence could be seen also in the organization of local governmental bodies, upon which uniformity of organization and of responsibilities had been imposed, regardless of size and of geographic and economic context. In the Kingdom of Sardinia, the law of 1859 ⁽¹⁰⁾ was inspired by these principles, and the legacy of that law was to last

⁽⁸⁾ Royal Decree no. 1611 of October 23, 1853.

⁽⁹⁾ On the original administrative model, C. MOZZARELLI and S. NESPOR, *Il personale e le strutture amministrative*, in *L'amministrazione centrale*, edited by S. Cassese, Turin, Utet, 1984, 157. On the evolution of State organization from the unification to the middle of the 20th century, P. CALANDRA, *Storia dell'amministrazione pubblica in Italia*, Bologna, il Mulino, 1978; the four books on *L'amministrazione centrale dall'unità alla Repubblica. Le strutture e i dirigenti*, edited by G. Melis (I. *Il Ministero degli affari esteri*, edited by V. Pellegrini; II. *Il Ministero dell'interno*, edited by G. Tosatti; III. *I ministeri economici*, edited by L. Giuva and M. Guercio; IV. *Il Ministero della cultura popolare. Il Ministero delle poste e telegrafi*, edited by P. Ferrara and M. Giannetto), Bologna, il Mulino, 1992.

⁽¹⁰⁾ Law no. 3702 of October 23, 1859.

for many years to come. That law imposed upon municipalities and upon provinces alike a governance that mirrored the organization of the State, composed of three branches: an assembly, an executive branch, and a monocratic branch to preside over the executive. Various duties were granted to the municipalities, far fewer to the provinces. Both levels of administration were subject to far-reaching powers of control by the national Government, which could annul their decisions and even remove the holders of their offices.

1.2. Administrative functions and public apparatuses continued to have limited size and sphere of influence even after national unification. The number of civil servants remained limited to a work-force of roughly 50,000 people. The relationship between public administrations and citizens rarely reached beyond police duties and fiscal impositions. The laissez-faire attitude underlying the conduct of governments can be seen in the privatization of public assets and enterprises⁽¹¹⁾ and in the absence of any administration to overseeing business: not until 1878 were the Ministries of agriculture, of industry, and of commerce instituted. Previously the sole administration in charge of the «real economy» had been the Ministry of public works, entrusted with the creation of infrastructures for transportation and communication⁽¹²⁾.

Statutory law too was limited both in material ambit — restricted to few administrative duties — and in quantitative terms. Above all, statutory law did not yet give rise to an autonomous system of legal principles and concepts, distinct from the system of private law⁽¹³⁾. Administrative agencies' organization was regulated by few rules on the legislative level and, to a greater degree, by the self-organizational power of the administrations. Personnel was not covered by a legal regime to thoroughly define rights and duties. Administrative activity gradually became more formalized and took on regular procedures, but these were based on the internal policies of the administrations rather than on norms imposed from without. In the absence of an administrative court, principles and rules for administrations' actions

⁽¹¹⁾ See S. CASSESE, *Aspetti giuridici dello sviluppo economico*, in *Studi in memoria di Angelo Gualandì*, Urbino, Argalia, 1969, 112.

⁽¹²⁾ See *La nuova costituzione economica*, edited by S. Cassese, Rome-Bari, Laterza, 2007, 10 et seq.

⁽¹³⁾ On the legislative tendencies after unification, S. CASSESE, *Aspetti della storia delle istituzioni*, in *Lo sviluppo economico in Italia*, edited by G. Fuà, II, Bari, Laterza, 1969, 165.

were lacking. The activity of public administrations, therefore, was not perceived as different from that of private citizens: there was no doubt as to the private autonomy of administrations; public property was comparable to private property; the working relationship of public servants was based upon a contract no different from that of private workers; expropriation was described as a particular sort of sale; the use of force was considered not as part of «business as usual» of administrations, but as an issue peculiar to actions which — according to an originally French distinction — were defined as «acts of authority» as opposed to «acts of management», tendentially instrumental to the running of the administrations ⁽¹⁴⁾.

Then again, by the late 1800s the need to promote economic development, and to bring about national unification from an economic and social point of view as well, prompted an increase in duties and a greater complexity in administrative agencies' organization and policy-making.

In 1863, uniting analogous structures of the pre-unification states, the *Cassa Depositi e Prestiti* (Savings and Loan Fund) was instituted, the first great public enterprise on a national scale with the job of giving credit to local public bodies. It was, so to speak, the prehistory of administrative fragmentation and of the sort of public intervention in the economy that would come to characterize the history of the 20th century. The fact that public administration undertook activities similar to those of banks called into question the distinction between public tasks and private activities.

The Government then made heavy investments in several public utilities and provided a regulation for them. In the sphere of transportation, noteworthy investments went to the railroad, in which — however — room was initially left to private operators through administrative concessions. In communications, the post office and telegraph systems were developed; the public sector always played a central role in these services. The development of welfare functions brought about important consequences on both the conceptual and the substantial level. In conceptual terms, the bipartition of administrative activities entered a state of crisis: the distinction between acts of authority or of management, as

⁽¹⁴⁾ On these issues, B. SORDI, *Pubblica amministrazione, negozio, contratto: universi e categorie ottocentesche a confronto*, in *I rapporti contrattuali con la pubblica amministrazione nell'esperienza storico-giuridica*, Atti del congresso, Naples, Jovene, 1997, 349.

well as other distinctions based on the former, inevitably gave way to tripartitions because of the difficulty in keeping on equal footing those services performed upon private citizens and contractual activities carried out to ensure the smooth running of administrations ⁽¹⁵⁾. In substantial terms, legislative and jurisprudential developments highlighted the difficulty in clearly distinguishing the sphere of public law from that of private law: the responsibility of public service providers with regard to their clients, for example, was the object of rules of privilege, rules that overrode those of the normal private realm, in contrast to the contractual nature of the relative relationships ⁽¹⁶⁾.

The primary issues of the decades following 1861 ⁽¹⁷⁾ had to do with the completion of national unification, be they issues pertaining to legislation or to administrative agencies' organization and personnel.

Concerning administrative legislation, following the initial extension of the legislation of the Kingdom of Sardinia throughout the entire nation, several important laws were soon passed to standardize regulations in certain matters, such as charitable organizations ⁽¹⁸⁾, and to set up unitary bodies, such as the *Corte dei conti* (Court of Accounts) ⁽¹⁹⁾. But the main moment of unification occurred in 1865 when what would become known as «legislative unification» and «administrative unification» came into being ⁽²⁰⁾. The first consisted of the enactment a new civil code and a new code of commerce. The second consisted of the enactment of six important laws pertaining to public administration: regarding municipalities and provinces, regarding public security, regarding health care, regarding the Council of State, regarding administrative litigation, regarding public works. Formally, the six laws were actually six attachments to a single law which provided for the approval of the six. In fact the laws were drawn up by the Government in accordance with a practice that would often be repeated up to the present day in the case of many important reforms.

⁽¹⁵⁾ See B.G. MATTARELLA, *L'imperatività del provvedimento amministrativo. Saggio critico*, Padua, Cedam, 2000, 99 et seq.

⁽¹⁶⁾ See G. NAPOLITANO, *Servizi pubblici e rapporti di utenza*, Padua, Cedam, 2001, 28 et seq.

⁽¹⁷⁾ A good overview of these issues is presented in *Storia dello Stato italiano dall'Unità a oggi*, edited by R. Romanelli, Rome, Donzelli, 1995.

⁽¹⁸⁾ Law no. 753 of August 3, 1862.

⁽¹⁹⁾ Law no. 790 of August 24, 1862.

⁽²⁰⁾ Respectively, Law no. 2215 of April 2, 1865 and Law no. 2248 of March 20, 1865.

Several of the areas regulated by the laws of 1865 — such as local government and public security — were destined to remain the subject of unitary normative texts maintaining a good order through to the present day: the branch of law pertaining to local government, for example, has always been the object of one general law of the State, replaced roughly every ten years. Other matters — such as public health and public works — were destined instead to undergo a process of complication and fragmentation which would later be partially recomposed only with the codifications of the late 1900s.

Among them, the law annulling the administrative litigation deserves special mention. This law opted for the English model of unity of the judiciary and provided for the end of the departments of administrative litigation that had existed in the pre-unification states. All disputes between administrations and citizens concerning a «civil or political right» were transferred to the jurisdiction of ordinary courts, which were, however — in observance of the principle of the separation of powers — denied the power to annul or modify administrative acts; only the right to not apply those same acts in single cases was recognized. With this provision, albeit in a negative form, in order to limit the power of courts, the notion of the administrative act made its appearance in Italian legislation: the need to apply the new law induced the courts — particularly the Council of State insofar as it served as judge in conflicts between the executive and the judiciary powers — to take a first step towards its precise statement. Also because of the resulting case law, however, the system laid out by the law proved to be inadequate when it came to protecting individuals, especially because upon the administrative act was bestowed not only the effect of limiting the powers of the court but also that of excluding the court's jurisdiction itself, to the advantage of the public administration, to which all «affairs» that did not fall under the jurisdiction of the courts were attributed. The law also specified several rules for recourse to the administrations against their acts: these acts were to be decided «admitting the deductions and observations in written form by the interested parties», the grounds for such decisions having to be explained. This provision incorporated two principles that would take on great importance in administrative law over the following century: the principle of due process and the principle of statement of reasons of the administrative acts. The provision could have been the basis for the introduction of guarantees of participation and transparency in administrative proceedings. These rules were, however, all too modern

for the administrations and courts of the time. The former were not prepared to apply the rules and the latter were not ready to ensure the rules be respected. The rules, therefore, were left unused.

As to administrative agencies' organization, once unification had been accomplished, the model of uniform, compact, and centralized administration already present in the Kingdom of Sardinia was functional with respect not only to the separation of powers but also to the need for consolidation of unity within the Kingdom. Administration was arranged in ministries, and within those ministries were offices, at times joined together in directorates general, that were coordinated by one secretary general. In each ministry, from 1869 onward ⁽²¹⁾, financial tasks were separated from those «of active administration» and entrusted to a financial office, the central general accounts office. The various ministries, moreover, soon developed new organizational forms — secretariats, inspectorates, particular offices — that altered the regularity of the structure set down by the law. A similar phenomenon occurred among the local offices of the State.

The Ministry of the Interior proved to be the spinal column around which the State administrative system was constructed. At the center there was the coincidence of the figure of the Prime Minister and the figure of the Minister of the Interior: a coincidence that turned out to last until the middle of the 20th century. On the local level, the prefects, appointed and removed freely by the Minister, exercised powerful control over the municipalities and over the provinces, at the heads of which sat functionaries appointed by the State Government. The autonomy of municipalities and provinces was thus greatly limited: the principle of uniformity translated into the establishment, on the State's part, both of organizational structures and of administrative tasks; State controls continued to be extremely invasive ⁽²²⁾.

⁽²¹⁾ Law no. 5026 of April 22, 1869.

⁽²²⁾ On the origin and development of local government, A. PETRACCHI, *Le origini dell'ordinamento comunale e provinciale*, Vicenza, Neri Pozza, 1962; *I Comuni*, edited by M.S. Giannini, Vicenza, Neri Pozza, 1967; E. ROTELLI, *L'alternativa delle autonomie. Istituzioni locali e tendenze politiche dell'Italia moderna*, Milan, Feltrinelli, 1978; M. Nigro, *Il governo locale*, Rome, Bulzoni, 1980, 27 et seq.; S. CASSESE, *Centro e periferia in Italia. I grandi tornanti della loro storia*, in this Review, 1986, 594 (also published in English: *The centre and periphery in Italy: major turning points in their history*, in *International Review of Administrative Sciences*, 1991, vol. 57, n. 2, 195); R. ROMANELLI, *Centralismo e autonomie*, in *Storia dello Stato italiano dall'Unità ad oggi*, edited by R. Romanelli, Rome, Donzelli, 1996, 126.

Civil servants, too, served as an instrument to reinforce national unity. They constituted a homogeneous, compact body that was representative of the northern bourgeoisie yet also separate from that social group. Their training did not take place in prestigious universities or government schools as it would have been in France or England, but on job, in the offices themselves. However, the rule of being hired by means of a job competition took root in Italy before doing so in other European countries ⁽²³⁾. There was no complete and well-ordered set of laws concerning the rights and duties of government workers, but there was a strong *esprit de corps*, an unwritten ethical code and system of reciprocal checks ⁽²⁴⁾. Strong osmosis existed between the political class and the bureaucracy with frequent passages from political to administrative jobs, including that of Councillor of State. These features were connected to what was called the «Piedmontization» of the administration: in the first decades following unification and even after the shift of the capital from Turin to Florence and then to Rome, a great number of State workers, especially in the most qualified positions, were from the north — from Piedmont in particular.

1.3. Throughout the administrative history of Italy, there have been some phases in which important administrative reforms reached a high concentration and the evolution of administration and of its laws demonstrated signs of acceleration. One such era was certainly the age that took its name from Francesco Crispi, many times the Prime Minister between 1887 and 1896. During that period new laws were passed concerning central administrative agencies' organization, public security, health, local government bodies, administrative justice, and public charitable institutions ⁽²⁵⁾. Overall, legislation of the Crispi

⁽²³⁾ See S. CASSESE and J. PELLEW, *Il sistema del merito nel reclutamento della burocrazia come problema storico*, in this Review, 1987, 760 (also published in English: *The introduction of merit systems in various bureaucracies: a comparative account*, in *Le système du mérite - The merit system*, Bruxelles, IISA, 1987, 11).

⁽²⁴⁾ On the development of the civil service law, M.S. GIANNINI, *Impiego pubblico (teoria e storia)*, in *Enc. dir.*, XX, Milan, Giuffrè, 1970, 305, now in *Scritti*, vol. VI, Milan, Giuffrè, 2005, 49; M. RUSCIANO, *L'impiego pubblico in Italia*, Bologna, il Mulino, 1978; S. BATTINI, *Il rapporto di lavoro con le pubbliche amministrazioni*, Padua, Cedam, 2000.

⁽²⁵⁾ Respectively: Law no. 5195 of February 12, 1888; Law no. 5888 of December 23, 1888; Law no. 5849 of December 22, 1888; Law no. 5865 of December 30, 1888; Law no. 6837 of May 1, 1890; and Law no. 6972 of July 17, 1890.

era «significantly changed the relationship between society and the State», assigning to the State a role not only of vigilance over private activity but also of «protection, control, regulation, promotion and at times of guiding trends, too» (26).

Administrative duties expanded beyond the police and the military, concerning to a greater degree public works and private business. Public utilities underwent further development and the distinction between the administrative activities governed by public law and those by private law became more difficult to draw: scholars created ever more elaborate distinctions and invented theories such as that of «special private law». The machinery of administration grew and the number of government workers rose, doubling in the span of a decade (27). As administrative legislation grew richer and more complex, it also became less uniform. From 1885 onward, the policy of legislative uniformity gave way to various special laws for the equally numerous underdeveloped zones of the South and the Islands (28).

Among these Crispi pieces of legislation, the law regarding administrative justice deserves special mention. It instituted the Fourth Section of the Council of State. This Section, its duties covering judicial review of administrative acts, was added to the three pre-existent advisory sections. With this law, the Italian legal system left behind the path of unity in jurisdiction and endowed itself with the figure of an administrative Court having a general jurisdiction. Jurisdiction was given to the Fourth Section over «legal recourse for incompetence, for excess of power or for violation of law, against acts and decisions of an administrative authority or of a deliberating administrative body, which have as their subject the interests of individuals or of legal entities» (29): it was the premise for further clarification of the concept of administrative act by case law, which

(26) G. MELIS, *La storia del diritto amministrativo*, in *Trattato di diritto amministrativo*, edited by S. Cassese, II ed., Milan, Giuffrè, 2003, *Diritto amministrativo generale*, 98 et seq. On legislation during Crispi's era, see the four volumes by ISAP, *Le riforme crispine*, Milan, Giuffrè, 1990.

(27) From 1881 to 1891, figures quoted in S. CASSESE and G. MELIS, *Lo sviluppo dell'amministrazione italiana*, in this Review, 1990, 339.

(28) Starting with Law no. 1892 of January 15, 1885 for improvements in the city of Naples.

(29) Art. 3, Law no. 5992 of March 31, 1889. The provision is still in force, in Art. 26 of the current consolidated bill of laws on the Council of State (Royal Decree no. 1054 of June 26, 1924).

would be called in to delimit the range of the acts which could be appealed before the new Court. In fact, the law did more than parcel out jurisdiction; by constructing administrative process as a trial of an act and by conferring upon the Council of State the power to «annul» the act, the law prefigured the system of invalidity of an administrative act. Even though the difference between nullity and annullability was not yet clear during this historical phase, it was evident that the system was based upon annullability, that is, upon provisional production of legal effects. The administrative act was set to become one of the central concepts in the theory of administrative law.

With regard to the central organization of the State, the main innovation was the abolition of the figure of the General Secretary, which prompted in several ministries the unification of offices. Without its work of coordination, offices were placed within directorates general. The directorate general thus became the fundamental organizational unit of the ministries⁽³⁰⁾. In the logic of greater political control over the administration, however, the figure of the undersecretary was introduced, the person who could assist the minister and stand in for him in Parliament. The trend toward setting up new types of offices within administrations was accentuated: particularly noteworthy was the legislative trend to establish bodies of representation of several professional interests, such as superior councils, within the ministries, as well as professional societies as public bodies⁽³¹⁾.

With the reform of 1888, a slightly more accentuated autonomy was granted to local governing bodies. Suffrage was enlarged; elections were required for the topmost bodies within the municipalities and provinces; control by the prefect was loosened; and a new monitoring body was established, the provincial administrative council. Government control over local bodies was no longer exercised through the appointment of local heads but through control of their acts.

2. In the first half of the 20th century administrative law underwent major developments involving the range of administrative tasks, the size of administrations, their organization and their relations with

⁽³⁰⁾ On these developments, see S. CASSESE, *Il sistema amministrativo italiano*, Bologna, il Mulino, 1983, 28 et seq.

⁽³¹⁾ See B.G. MATTARELLA, *Sindacati e pubblici poteri*, Milan, Giuffrè, 2003, 18 et seq.

citizens. Administrative law was still affected by political developments and displayed its authoritarian facet.

2.1. If Francesco Crispi was first and foremost a legislator, Giovanni Giolitti, many-time Prime Minister in a thirty-year span (but especially during the first fifteen years of the 20th century), was a true expert on public administration⁽³²⁾. His action was carried out not only on a legislative level but also through administration, particularly that of the Ministry of the Interior which he ably maneuvered, for the purpose of influencing the electoral body as well.

During this period, there was a marked rise in administrative tasks, an increase that generated what has been defined as the «administrative take-off». Statutory law increased and became more complicated. A process of organizational fragmentation began, spawning new types of administration. Through the work of legislators and courts, a system of administrative law was constructed, as the law of public power, loaded with peculiarity and privilege, which legal scholarship committed itself to describing. In the same period, great social shifts called into question the set-up of the State not only from a constitutional viewpoint but also from an administrative one.

Underpinning many of these changes was the broadening of the Constitutional basis of the State, which translated first into the progressive enlargement of suffrage through to 1913 when universal suffrage among males was granted. This was a true constitutional change, for it transformed an oligarchical constitution into a democratic one⁽³³⁾. Parties of the masses grew up, as did trade unions for workers. By means of the mass political parties, new social classes made their entrance to the democratic circuit; by means of the trade unions, their professional interests were represented before the political bodies and also before the administrations. For this reason, too, even beyond the unprecedented popular demonstrations to which it gave rise, the phenomenon of unionism was perceived at the beginning of the century as subversive to the constitutional order: at times in negative terms by those who defended a model of the State in which there was space only for political representation, at times in positive or problematical terms by those who

⁽³²⁾ G. MELIS, *Storia dell'amministrazione italiana*, cit., 129 et seq.

⁽³³⁾ M.S. GIANNINI, *Parlamento e amministrazione*, in *Amministrazione civile*, 1961, no. 47-51, 145, and *Lo Stato pluriclasse*, in this Review, 1979, 389, both now in *Massimo Severo Giannini*, edited by S. Cassese, Rome-Bari, Laterza, 2010, 79 and 104.

longed for a different form of State, organized around the representation of professional interests⁽³⁴⁾. These ideas, during the Fascist period, were to influence the building of the corporative system. During the Giolittian era, there was only an intensification of the forms of representation of professional interests — including those of the less well-off classes — in public administrations.

The expansion of administrative duties is illustrated, first of all, by the development of public utilities, which were operated through public management following the model of *azienda* (an office of a public body operating as a private business), destined to become very successful: an *azienda* was part of public organization, but it enjoyed a certain autonomy by reason of the productive, rather than bureaucratic, activity that it conducted. This model was consolidated, first on the local level with the 1903 laws on «municipalization»⁽³⁵⁾, which laid out regulations for an increasingly intense phenomenon, that of the taking on of public utilities by municipalities. The law contained a list of services that could be taken on, and it set the *azienda* as the ordinary form of management. Two years later, the model was used for the first time on the national level in the railroad industry⁽³⁶⁾: the State redeemed the railway concessions which had been granted to private operators, and it concentrated the running of the railway service in a new public body. Thus one great administration was formed, outside the traditional organizational model of the ministries. A further two years later, the same model was applied to the telephone industry⁽³⁷⁾.

Yet the increase in administrative duties, particularly those implying services for citizens, was shared in other sectors as well, such as that of social protection. In the final twenty years of the 19th century, the law had already intervened to regulate optional, and later mandatory, insurance for laborers, but the management was left to private companies. In 1912, however, a new public body was established, the *Istituto Nazionale delle Assicurazioni*, in order to run the monopoly for

(34) For more of the debate on the crisis of the State in the first decade of the century, see the writings collected in this Review, 2006, 77 et seq., with an introduction by A. Sandulli, *Santi Romano, Orlando, Ranelletti e Donati sull'«eclissi dello Stato»*. *Sei scritti di inizio secolo XX*. References to the debate on the «trade-union state» are found in S. CASSESE and B. DENTE, *Una discussione del primo ventennio del secolo: lo Stato sindacale*, in *Quaderni storici*, 1971, no.18, 943.

(35) Law no. 103 of March 29, 1903.

(36) Law no. 137 of April 22, 1905.

(37) Law no. 505 of July 15, 1907.

life insurance: thus was born a new form of public business, that of the economic public body — this, too, destined to become greatly successful over the course of the 20th century.

The broadening and diversifying of duties was reflected in the various components of the administrative system: statutory law, organization, and personnel ⁽³⁸⁾. Statutory law in administrative matters was enriched by new important bills: the law and public administrations began to address issues such as job security and safety, emigration, public housing. The tendency to go beyond legislative uniformity for the sake of issuing special laws for single geographical areas was accentuated with intense legislation regarding the South ⁽³⁹⁾. On the organizational side, there was an increasing tendency to establish offices outside of the ministries, with the new types of administration as indicated above. But the structure of ministries, too, became more complex: their numbers grew, and new networks of local offices were created, such as those of financial and educational administrations.

As to personnel, the new duties brought about a true explosion. In 1915 the number of civil servants stood at around 340,000. Their background and training, prevalently legal by nature, still ensured a certain homogeneity of mindset and customs. In 1908, urged also by administrative unionism, Giolitti favored the drawing up of the first general law on civil service, which detailed the rights and duties of civil servants. As a whole, the law reinforced the bureaucratic apparatus with respect to political bodies, but it imposed strong limits on individual workers in terms of their union freedom; in part, it moved toward the codification of the case law that had been laid out by the Fourth Section of the Council of State. 1907 saw the addition of a Fifth Section to the Fourth. Their judicial, and not administrative, nature was by now fully recognized.

More generally, the case law of the judicial sections of the Council of State, interacting with legal science, made a decisive contribution to the establishment of the principles of administrative law and to the identification of administrative law as an autonomous branch of law. An

⁽³⁸⁾ For a comprehensive view of the features and role of public administration in this period, S. CASSESE, *L'amministrazione dello stato liberale-democratico*, in *Quaderni storici*, 1972, no. 20, 243.

⁽³⁹⁾ On this legislation, M.S. GIANNINI, *Problemi dell'amministrazione delle regioni insufficientemente sviluppate*, in this Review, 1962, 552, now in *Scritti*, vol. IV, Milan, Giuffrè, 2004, 847.

administrative system that statutes, courts and legal scholars construed as an unbalanced system based upon the supremacy of public administration: with respect to the administration, the citizen's position was one of weakness and his interests had to yield. Administrative law was the law of the relation of authority/liberty and it was strongly weighted in the direction of the authority. This image certainly corresponded to the reality of a State in which the powers of public administrations were great and the protection of citizens weak, and in which the courts elaborated rules that reflected the prevalence of public over private interests: the power of administrations to unilaterally annul or modify its own decisions, the possibility of forced execution of administrative acts, limitations on the responsibility of bodies running public services, a lack of procedural guarantees, a rigidly hierarchical administrative organization. But it was also the result of the theoretical attitude of the Orlandian school, of the influence of German legal science to which that school looked as a reference point, and, more generally, of the lawyers' adherence to the representation of the State as a sovereign and superior body with respect to private citizens.

The construction of administrative law, however, signalled important steps in terms of the protection of citizens. From the time it was instituted, the Fourth Section had to construct administrative trial on the basis of meagre legislative norms, committing itself, along with ordinary courts, to delimiting its own jurisdiction. At times it applied the norms intelligently but highhandedly, exercising powers that the legislators had never intended to grant the Fourth Section, such as that of pronouncing its decision on the so-called silence of public administration⁽⁴⁰⁾ even though the law granted it the right only to annul express administrative acts. And above all, it developed an ever more refined technique for controlling the contents of administrative acts, acting on the basis of the enigmatic provision of invalidity due to «excess of power», a figure that the Council of State would go on to use for a century in drawing up general rules — obvious but unwritten — of administrative action, such as equality in treatment, logicity, coherence among different decisions, motivation, due process in indictment procedures. In this fashion, the Council of State generated rules for a century, rules which only from 1990 onward would become partially codified.

⁽⁴⁰⁾ Starting from 1902: *Consiglio di Stato*, sec. IV, August, 22, 1902, in *Giurisprudenza italiana*, 1902, III, c. 343.

In administrative litigation, the administrative act «dominated the landscape»⁽⁴¹⁾; as a consequence it was the central concept around which Council of State and the legal scholarship configured the system of administrative law. On the contrary, it would take further decades for the concept of administrative procedure to emerge. It was not that administrative activity was not already proceduralized; the activity of administrations became more formalized and more split into increasingly distinct procedural steps and phases. But this phenomenon had no external relevance: the administrative act alone was the moment of «precise clarification of the authority/liberty relation»⁽⁴²⁾.

2.2. Elements of crisis, already present during the Giolittian age and already signalled by the most forward-looking scholars⁽⁴³⁾, were clearly accentuated by the First World War, which also contributed to the accentuation of several tendencies recorded in preceding years: the intensification of administrative legislation which became ever more detailed and disorderly, the creation of new types of offices, the proliferation of public bodies, the growth of the number of civil servants.

During the twenty years of Fascism, naturally, administrative law was more than ever the law of authority, a tool in the hands of an authoritarian and illiberal government. But many of the tendencies of the administrative system during this time were the continuation of tendencies that had already emerged in preceding decades⁽⁴⁴⁾.

It was a twenty-year period of intense legislative activity, directed towards the regulation of new sectors and towards the penning of new rules for sectors already regulated in previous years. Among public utilities, for example, maritime transportation, air transportation, the postal and telecommunication systems all received systematic regula-

⁽⁴¹⁾ The expression — «campeggiava» — comes from M. NIGRO, *Giustizia amministrativa*, IV ed., Bologna, Il Mulino, 1994, 225.

⁽⁴²⁾ «puntualizzazione del rapporto autorità-libertà». The expression comes from M.S. GIANNINI, *Lezioni di diritto amministrativo*, vol. I, Milano, Giuffrè, 1950, 290.

⁽⁴³⁾ Such as S. Romano; see his *Lo Stato moderno e la sua crisi* (1909), now in *Scritti minori*, vol. I. *Diritto costituzionale*, Milan, Giuffrè, 1950, 379, and in this Review, 2006, 97. On Romano's contribution, R. RUFFILLI, *Santi Romano e la «crisi dello Stato» agli inizi dell'età contemporanea*, in this Review, 1977, 312.

⁽⁴⁴⁾ On the features of administrative law in the 1920s and in the 1930s, *Il diritto amministrativo negli anni Trenta*, Bologna, il Mulino, 1992; *Lo Stato negli anni Trenta. Istituzioni e regimi fascisti in Europa*, edited by G. Melis, Bologna, il Mulino, 2008.

tion; sectors in which there could be found that which would become the regulatory model for the better part of the century, the result of the «original reservation» which took management away from the market, and of the entrusting of the service to a public body or, by concession, to a private company. Many activities that continued to be the object of private business were subject to legislative regulation and administrative control through the introduction of authorization regimes. This is what happened, for example, in the case of credit, insurance, and commerce. The laws that were issued proved to be longlasting, and many of those laws held innovative concepts, as in the case of cultural heritage ⁽⁴⁵⁾ and urban planning ⁽⁴⁶⁾. Other laws showed to a greater extent the authoritarian cast of Fascist administrative law, such as that on civil service ⁽⁴⁷⁾ and that on public security ⁽⁴⁸⁾ (still in force today, though it has been tempered by the provisions of the Republican Constitution of 1948).

Regarding administrative agencies' organization, the ministries increased in number and in size. Mussolini's presence obviously determined a reinforcing of the figure of Prime Minister, who still was the Minister of the Interior as well. However, the 1923 reform of the financial regulations ⁽⁴⁹⁾ placed the central accounting offices, established within the various ministries, under the control of the General Accounts Office operating within the Ministry of the Treasury, thus setting the stage for the central role of the treasury that would emerge in later years.

Yet the larger transformations in administration arose from the multiplication of «parallel» administrations. By the 1920s, a new form of public enterprise had developed in the form of publicly owned joint stock companies ⁽⁵⁰⁾. It was particularly in the 1930s, however, that State intervention in the economy grew in intensity and gave life to a large number of public enterprises. Following the financial crisis at the start of the decade, the Government took on the responsibility of the economic difficulties of many businesses, along with many of the banks

⁽⁴⁵⁾ Law no. 1089 of June 1, 1939.

⁽⁴⁶⁾ Law no. 1150 of August 17, 1942.

⁽⁴⁷⁾ Royal Decree no. 2395 of November 11, 1923, and Royal Decree no. 2960 of December 30, 1923.

⁽⁴⁸⁾ Royal Decree no. 773 of June 18, 1931.

⁽⁴⁹⁾ Royal Decree no. 126 of January 28, 1923.

⁽⁵⁰⁾ With the founding of the General Italian Petroleum Company (*Azienda generale italiana petroli - Agip*) in 1926.

that had financed and were creditors to those businesses, simply by purchasing businesses and banks alike. The relative stock shares were entrusted to a new public body established in 1933, the Institute for Industrial Reconstruction, which would go on to survive much longer than originally foreseen and to steer a complex system of State shareholding. In this manner, a new type of public body was created, the function of which was to serve as shareholder on behalf of the State, which had suddenly become the largest actor in the economy. The phenomenon of the State as shareholder, which would in turn give rise to the establishment of further operational bodies, was another manifestation of the hybridization of administrative law with private law. The performance of administrative duties was carried out with instruments typical of the Civil Code, instruments which from time to time, however, were bent to the logic of administrative law, loaded with special powers and privileges; such was the case of the 1942 Civil Code provision, which allowed for the possibility of reserving for the public shareholder the power to appoint one or more of the company's administrators ⁽⁵¹⁾.

On the local level, the autonomy of municipalities and provinces was strongly constricted. Their heads were once again appointed by the State Government; their functions were reduced; and their governing bodies were no longer elected by the citizens.

Fascism set up a new organization alongside the «classic» administrative agencies' organization that it had inherited from the liberal state. This new system, based on the representation of professional interests, was accompanied by a new bureaucracy, its origins lying in politics and in trade unions. Gathering several ideas for itself from the debate on the «trade union state» of preceding decades, and especially for the purpose of governing and neutralizing industrial conflict, a corporative system was established, intended as a tool of confrontation and synthesis among the interests of opposing professional categories. At the core, however, lay the denial of associative liberty and the conversion of professional associations of workers and employers into public bodies. The corporative system determined, among other things, the inclusion of the labor law into public law: labor law was replaced by «corporative law», a subject often studied and taught by administrative law scholars. But the intercourse between public power

⁽⁵¹⁾ Art. 2449 of the Civil Code, though still in effect, was reformulated in 2008 to bring it in line with European norms.

and professional interests also found other channels, destined to last well beyond the Fascist period: in particular, the establishment of public bodies that were derived from professional associations, privileged bodies through which administrative control was exercised over single productive sectors, yet the bodies were also an expression of the productive categories themselves ⁽⁵²⁾.

The Council of State, presided over from 1929 onward by Santi Romano, the leading legal scholar of that era, took on greater centrality and prestige, partly because of its advisory function not only on administrative matters but also on the Government's legislative activities ⁽⁵³⁾. It made a decisive contribution to the new statutory law, as previously discussed. The allocation of jurisdiction between ordinary courts and the Council of State was still uncertain because of the ambiguity of the provisions on the matter, provisions that had been formed incrementally, provisions from which emerged an improbable criterion for allocation, based upon the legal position — subjective right or legitimate interest — asserted by the private individual. What's more, at the end of the 1920s, a «jurisprudential settlement» favored by Romano and by the President of the Court of cassation (*Corte di cassazione*, the highest ordinary court), Mariano D'Amelio, affirmed the criterion of allocation based on the distinction between lack of administrative power, which determined the nonexistence of the administrative act and the ordinary jurisdiction, and faulty exercise of administrative power, which determined the annullability of the act and the administrative jurisdiction. By 1923, however, the disputes relating to civil service were allocated to the Council of State, in exclusive fashion, inaugurating a legislator's trend which was later extended to other matters.

3. In the second half of the 20th century, many trends which had begun in the former period continued and some of the problems which had arisen in the first half of the century grew more serious. The institutional context, however, was very different. The principles of the

⁽⁵²⁾ See S. CASSESE, *Corporazioni e intervento pubblico nell'economia*, 1969, in *La formazione dello stato amministrativo*, Milan, Giuffrè, 1974, 65; G. MELIS, *Amministrazione e mediazione degli interessi: le origini delle amministrazioni parallele*, in *Archivio Isap*, Nuova serie, no. 3. *L'amministrazione nella storia moderna*, vol. II, Milan, Giuffrè, 1985, 1432.

⁽⁵³⁾ See G. MELIS, *Il Consiglio di Stato*, in *Storia d'Italia. Annali. 14. Legge, Diritto, Giustizia*, edited by L. Violante, Turin, Einaudi, 1998, 821 et seq.

democratic Constitution gradually changed the shape of administrative law, which came to display its liberal facet.

3.1. In many regards, the Constitution of the Republic set out to be, and was, a breaking away from the Fascist period. In reaction to the earlier constrictions on individual rights came a catalogue of fundamental rights, which is a list of limits imposed upon public administration, of *riserve di legge* (matters reserved to the statutory law, which can be traced back to the will of Parliament) and *riserve di giurisdizione* (decisions reserved to the judiciary). In reaction to the earlier constrictions on the protection of the individuals came a bold statement of judicial review of administrative acts, without exceptions. In reaction to the earlier centralization came proclamation of the principle of autonomy, for future regions⁽⁵⁴⁾ and local government⁽⁵⁵⁾, and the principle of decentralization, for State administration. In reaction to the earlier public invasiveness regarding professional associations came declaration of trade-union freedom, which transferred industrial relations back to private initiative and private law. In reaction to the special courts of the Fascist regime came a clear distinction between administration and jurisdiction, along with a prohibition against instituting special judges⁽⁵⁶⁾.

However, many other tendencies which had begun during preceding eras were able to continue: the increase in the administrative duties and in the size of administrations, the strong public presence in the economy, organizational complication and fragmentation, the permeability of administrations to organized interests. These are tendencies which were, in fact, encouraged by Constitutional provisions regarding social-ethical relationships and economic relationships: articles relative to health care, education, work and social protection in particular were the basis for the development of legislation and for the widening of administrative duties, which in the second half of the century would require large administrative structures and would absorb the greater

⁽⁵⁴⁾ On the institution of regions, E. ROTELLI, *L'avvento della Regione in Italia. Dalla caduta del regime fascista alla Costituzione repubblicana (1943-1947)*, Milan, Giuffrè, 1967; R. RUFFILLI, *La questione regionale*, Milan, Giuffrè, 1971.

⁽⁵⁵⁾ On the restitution of local government autonomy, E. ROTELLI, *La restaurazione post-fascista degli ordinamenti locali*, in E. ROTELLI, *Costituzione e amministrazione dell'Italia unita*, Bologna, il Mulino, 1981.

⁽⁵⁶⁾ On the Italian constitutional developments in the Republican age, L. PALADIN, *Per una storia costituzionale dell'età repubblicana*, Bologna, il Mulino, 2004.

part of public finance. With the corporative system abandoned, the idea of confrontation and conciliation between the opposing interests of the productive categories survived with the establishment of the National Council on Economy and Labor, a body set up by the Constitution but destined to suffer substantial irrelevance within the institutional landscape: relations between administrations and organized interests would continue to travel other pathways, less solemn but greatly crowded with governmental bodies and procedural mechanisms.

Public administration and administrative law were not central among the concerns of the Constitution writers, who were more interested in the overall Constitutional structure. The Constitution, for example, laid out norms on the Office of the Prime Minister *Presidenza del Consiglio* ⁽⁵⁷⁾ and on the ministries, but not on the other public bodies. The principles of impartiality and of good administration were stated in reference to the organization of public offices, yet there was silence on the subject of administrative activity. This explains the relatively limited impact of the Constitution upon the principles and general concepts of administrative law, which continued to be construed primarily from the case law of the Council of State.

In the middle and long term, however, Constitutional principles would not fail to produce their effects ⁽⁵⁸⁾. From the 1950s onward, for example, legal scholarship ⁽⁵⁹⁾ and then case law ruled out the forced execution of administrative acts as a general prerogative of public administration, maintaining that the rule of law forbade it in the absence of an express statutory provision. Administrative law was still the law governing the authority/liberty relationship and thus was described in 1950 in a fundamental handbook of administrative law ⁽⁶⁰⁾. But what that handbook defined as the «momentum of liberty» began to gain ground on the «momentum of authority».

⁽⁵⁷⁾ On the historical developments of this Office, from the unification to the Republican age, E. ROTELLI, *La Presidenza del Consiglio dei Ministri*, Milan, Giuffrè, 1972.

⁽⁵⁸⁾ On the slow adjustment of the legal system to the Constitution, M.S. GIANNINI, *La lentissima fondazione dello Stato repubblicano*, in *Regione e governo locale*, I, 1981, 17, now in *Scritti*, vol. VII, Milan, Giuffrè, 2005, 633.

⁽⁵⁹⁾ F. BENVENUTI, *Autotutela*, in *Enc. dir.*, IV, Milan, Giuffrè, 1959, 553; A.M. SANDULLI, *Note sul potere amministrativo di coazione*, in this Review, 1964, 317.

⁽⁶⁰⁾ The quoted *Lezioni di diritto amministrativo*, published by M.S. Giannini in 1950.

In various ways has the Constitution influenced administrative law: providing for administrative duties and requiring that they be carried out; excluding administrative duties and powers; distributing duties among various administrations; laying down general rules for administrations; laying down particular rules for administrations; regulating administrative agencies' organization.

The first hypothesis is that which is intrinsic to various provisions regarding social and economic relations, such as those previously mentioned. Art. 33, for example, states, «The Republic shall lay out general norms on education and shall establish state schools for every grade and level». This provision leaves room for private schools, yet it makes mandatory the presence of public schools. The administration of public education would go on to become, in the second half of the century, the largest employer in Italy, with roughly one million employees.

The exclusion of administrative duties and powers is determined by provisions established in order to protect fundamental rights, as in art. 16, or by provisions devoted to sectors of the economy, as in art. 39. The former, affirming the freedom of assembly, ensures that the right to assembly will not be subject to administrative control, except in the bland form of the requirement of advance notice for gatherings in public places. The latter, affirming the freedom of union organizations and limiting public control over trade unions, imposes the withdrawal of the State from a sphere that had previously been made public.

The distribution of administrative duties is especially regulated by art. 118, which concerns the relation between the State and local structures; this article was entirely rewritten in 2001. The previous wording, which replicated the apportioning of legislative power for administrative functions, endowed the State with all duties neither assigned to the regions (by the Constitution or by State law) nor to local authorities (by State law). The new wording has inverted the criterion of apportionment, stating the principle of subsidiarity, which favors the municipalities and allows for the passage of duties to larger structures (provinces, regions, or State) only in case of the inadequacy of the smaller ones. Compared to the original text of the Constitution, the 2001 revision also marked the moving beyond the principle of uniformity in the distribution of duties to local bodies: the current text states the opposite principle of differentiation between structures of the same type.

The general regulation of administrative functions is, in fact, hidden within many articles that lay out norms of guarantee (such as the *riserva di legge* of art. 23, which reserves to the statutory law the provision of taxes and on any obligation imposed over individuals) or that regulate administrative agencies' organization (such as art. 97, which states the previously mentioned principles of impartiality and of good administration). Yet it is also from the fundamental principles of the Constitution — especially from art. 3, which declares the principle of equality — that the Constitutional Court has drawn various implications relating to the functioning of public administrations. Since 2001, the reference made in art. 117 to the obligations arising from European Union law and from international law has constituted a vehicle for the entry of the principles of European and global administrative law. All this explains why, in recent times, the Court was able to state principles such as that of public information, that of simplification and that of due process, not stated in the text of the Constitution, and it explains how the Court could, in the end, evaluate the legitimacy of laws regarding expropriation for public utility in light of the European Convention on Human Rights.

Special regulations of administrative functions, succinct but likely to be developed by law, are to be found in various articles of the Constitution. Art. 32, for example, does more than state the right to health and guarantee free care to indigents; it further establishes that «no one may be obligated to a certain medical treatment unless required by law» and that «the law may in no case violate the limits imposed by respect for the human person».

Finally, the manner in which the Constitution regulates administrative agencies' organization must also be mentioned. The relevant regulation sets out, on the one hand, to distribute organizational powers, that is, the power to decide upon the organization of offices; and on the other hand, to regulate the relationship between politics and administration.

From the first viewpoint, the distinction should be made between the State, the regions, and the other public bodies. For State organization, organizational powers shall in part be determined by statutory law, by means of the reservation contained in art. 97 and, in particular, in art. 95; beyond that which is to be determined by statutory law, the power of self-organization of the various administrations is to be applied. Regions also have full organizational autonomy within the limits directly imposed by the Constitution, and the *riserva di legge* of

art. 97 applies to regions, which can issue statutes, as well. As for local and other public bodies, power is divided between State law and the bylaws and regulations of the bodies themselves.

From the second viewpoint, two different concepts of public administration are present at the same time within the Constitution: public administration as an apparatus serving the political power and as an impartial apparatus⁽⁶¹⁾. The former is expressed in art. 95, which states the principle of ministerial responsibility and therefore places the administration within the political-representational circuit. The latter is expressed in art. 98, according to which «civil servants are at the exclusive service of the Nation», that is, of the citizens. The two provisions demonstrate the tension between the democratic principle — or, more precisely, the electoral principle — and the principle of impartiality. The balance between the two principles is variable and has suffered strong oscillations in relation to the way in which legislators have chosen to regulate administrative agencies' organization and the working relations of civil servants.

3.2. The middle of the 20th century could be said to have marked a turning point in terms of Constitutional structure and of the concept of administrative law, which, during the second half of the 20th century, gradually shed its authoritarian streaks and its accents of privilege, coming instead to stand first and foremost as a system of guarantees for citizens in their dealings with public administrations. The specialness of administrative law decreased with respect to private law; instead boundaries between private and public regulation merged and overlapped.

Administrative legislation became ever more intense, complex, and detailed, because of Parliament's frequent tendency to administrate through statutes, because of the bureaucracy's complementary tendency to defer administrative decisions to legislators, and because of the method of implementing European Union law, usually through statutory law. While private law scholars highlighted the «decodification» of their own object of study, due to the flight of legislation from the civil code, administrative law — which never had been codified — experienced the far more enormous phenomenon of legislative dispersion and disorder. Only few areas — such as the earlier-mentioned spheres of public security and local government — continued to be

(61) S. CASSESE, *Il sistema amministrativo italiano*, cit., 58 et seq.

ordered and regulated by general statutes. Apart from those statutes, it became increasingly difficult in important fields such as building regulations and public administration contracts to identify the regulations to be applied in actual cases. Administrative law became an ever more esoteric field in the eyes of the uninitiated. In the final quarter of the century, there were frequent complaints about legislative inflation and reordering measures were often called for.

The growth of administrative tasks went on, and so did the multiplication and expansion of administrative structures ⁽⁶²⁾. In the center of the State administrative organization, there was the end of the coincidence of the two figures of the Prime Minister and the Minister of the Interior. Consequently, the Office of the Prime Minister became an autonomous structure, destined to grow progressively larger and to assume its own administrative functions beyond the role of support for the coordinating role of the Prime Minister. Ministries increased in number until there were 22. Some, such as the Ministry of State Shareholding, were constituted in order to augment political control over sectors that had developed. Others, such as the Ministry of the Environment, reflected new public interests and new administrative duties. The local networks of the ministries were expanded and the role of the prefect was further weakened, no longer the controller of local bodies, ever less the coordinator of the various local offices of the State. New types of administration were created, such as the *Cassa per il Mezzogiorno* (the Fund for the South), and then, the first of those which by the end of the century would be defined as independent authorities, such as Consob — the *Commissione nazionale per le società e la borsa* (the National Commission for Companies and the Stock Market) — and Isvap — the *Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo* (the Institute for the Supervision over Private and Collective-Interest Insurances). These two bodies, joining with the Bank of Italy, completed the framework of public control of the financial markets, a framework later to be broadly revised in keeping with the guidelines of European law by the end of the century.

Last among the large public services, the sector of electric energy

⁽⁶²⁾ On the evolution of government structures, D. SERRANI, *L'organizzazione per ministeri. L'amministrazione centrale dello Stato nel periodo repubblicano*, Rome, Officina edizioni, 1979; P. CALANDRA, *I governi della Repubblica. Vicende, formule, regole*, Bologna, il Mulino, 1996.

was nationalized in 1953 with the institution of Enel — the *Ente nazionale per l'energia elettrica* (National Body for Electric Energy). In public utilities, the models that proved most suitable were those of the *azienda* (which was an office of a public body, operating as a private business), the public body and the corporation «in public hands» (*società in mano pubblica*). During the first decades after World War II, it was the system of State shareholding that grew to become the primary avenue of public intervention in the economy: new management public bodies such as Eni — the *Ente nazionale per gli idrocarburi* (National Body for Hydrocarbons) — joined Iri, new shares were purchased, and the system was completed with the above-mentioned Ministry of State Shareholding and an interministerial committee. It was one of the main components of an «administered» economy in which — as contemplated by the Constitution — the public and private businesses drew near each other with equal dignity, and both were «directed and coordinated toward social aims» (art. 41). In the 1960s and 1970s efforts were made to readjust those directions and coordinations as part of the process of planning the economy, a process which proved to be a failure. What enjoyed success, however, were programs to develop individual industrial sectors for which State support was decisive. Private business was sustained and protected by a legislation that offered various forms of incentive: legal scholars spoke of the «financier State» ⁽⁶³⁾.

With the election of their political representatives restored, municipalities and provinces took on new importance as political and administrative bodies. Regions, required by the Constitution since 1948, were not actually established until 1970 when the regional councils were first elected. Questions then arose as to their functions. Their legislative functions were granted by the Constitution and could immediately be carried out, but for administrative tasks the transfer was quite more difficult, as they had always been performed by State offices: these offices were still existing and their personnel did not easily accept to be moved to regions and local bodies, which did not have adequate offices nor enough money to set them up. In 1972, through various governmental decrees, an initial transfer of administrative duties was enacted, yet the insufficiency of those duties was immediately evident. Consequently, five years later a broader transfer

⁽⁶³⁾ D. SERRANI, *Lo stato finanziatore*, Milan, Franco Angeli, 1971.

was enacted through a decree ⁽⁶⁴⁾ that laid out a sort of inventory of the administrative functions maintained by the State and of those transferred to the regions and to local bodies.

The increase in administrative functions, and in particular those regarding welfare, prompted an explosion of civil servants and of public expenditure. From the point of view of the personnel, this boom in numbers was most evident in the fields of education and health care; the former from 1962 onwards, with the introduction of obligatory schooling through the age of 14 years, meaning that middle school was made mandatory; the latter with the 1978 reform to ensure that treatments in public health structures would be free of charge to all citizens (and not only to indigents, for whom free care was already provided under the terms of the Constitution). The number of civil servants reached three-and-a-half million. Civil service became a mass phenomenon and, moreover, a less desirable professional goal for members of the cultured, well-off classes — with the exception of single careers such as those in diplomacy or in the judiciary. For the less well-off classes, public work was often a remedy to unemployment. In 1957, a new consolidated bill, once again drawn up in acknowledgment of several case law trends, laid down the coordinates of a public legal regime for civil servants. But those workers could not be easily distinguished from their private counterparts either by their origins or by their training, nor by their duties nor by their powers. It was thus natural that their relationship with their public employers took on a similar character to private work relations. By the 1970s, forms of collective bargaining spread to the public sector as well. General rules of bargaining were enacted in 1983 through a statute that conferred an intermediary role to the government, which had to issue decrees in order to implement the content of collective agreements.

In terms of expenditure, besides the school and health care systems, social security would come to weigh increasingly not only on workers but also on taxpayers. In the final years of the 20th century and at the beginning of the next, reforms to reduce social security expenses would become necessary.

The features of administrative activity underwent a corresponding evolutionary process. Administrative law corresponded ever less to the image that had been built up based on the functions of maintaining public security; public administrations were far more engaged in

⁽⁶⁴⁾ Decree of the President of the Republic, July 24, 1977, no. 616.

offering services to citizens than in imposing obligations and restrictions upon them. The idea of public administration's supremacy began to be questioned, and the administrative act, around which that idea of supremacy had revolved, started to lose its centrality: in favor of procedure, because finally the gradual formation of administrative decisions came to be appreciated; and in favor of contracts, because it came to be recognized that administrative functions could be carried out through agreements with the concerned parties.

3.3. The final decade of the 20th century was a period of intense administrative reforms ⁽⁶⁵⁾ which embraced all the main spheres of administrative law. The start of this phase can be traced to 1990, the year in which at least four important laws were enacted: on local government, on strikes in public services, on administrative procedure, and on antitrust. The end of the phase can be marked at the time of the Constitutional Reform of 2001. The ensuing years were, in terms of administrative law, a period of stasis and of adjustment ⁽⁶⁶⁾.

Having lost their authoritarian connotations, public administrations had come to be considered as service structures for citizens rather than as bodies issuing commands. At the heart of many trends in reform lay concerns for efficiency and for the quality of the services that public administrations performed for citizens. After the eclipse of the idea of specialness, administrative law came to be described as the meeting ground among principles and public and private regulations: many administrative reforms reflected the mobility and, above all else, the uncertainty of the boundary between public and private. With the

⁽⁶⁵⁾ *The Age of Administrative Reforms* is the title of an essay by S. CASSESE, in *Governing Europe*, edited by J. Hayward and A. Menon, Oxford, Oxford University Press, 2003, 128 (also published in Italian: *L'età delle riforme amministrative*, in *this Review*, 2001, 79). Two documents issued by Cassese himself, as the Minister of public administration, provide an overview of the reform policy in the 1990s: Dipartimento per la funzione pubblica, *Rapporto sulle condizioni delle pubbliche amministrazioni*, Rome, Istituto Poligrafico e Zecca dello Stato, 1993; Dipartimento per la funzione pubblica, *Indirizzi per la modernizzazione delle pubbliche amministrazioni*, Rome, Istituto poligrafico e Zecca dello Stato, 1993. On the reform policy in the former period, G. D'AURIA, *La politica di riforma amministrativa*, in *Le politiche pubbliche in Italia*, edited by B. Dente, Bologna, il Mulino, 1990, 119.

⁽⁶⁶⁾ For an early assessment of the reforms, *L'amministrazione pubblica italiana. Un profilo*, edited by S. Cassese e Franchini, Bologna, il Mulino, 1994; for a more thought over assessment, *Il sistema amministrativo italiano*, edited by L. Torchia, Bologna, il Mulino, 2009.

old conception of administrative law as law of the State consigned to the past, administrative law reflected the pluralism and the openness of national regulation toward supranational law: further trends reflected both the upward and downward erosion of the role of the State.

Public administration and administrative reforms, which in previous eras tended to be an issue reserved for experts in the field, now had become an important topic for political and cultural debate, figuring largely among the concerns of the citizens as well. The size of administrations, the amount of their expenditures, their role in the implementation of every governmental policy, and the widespread perception of their inefficiency justified all this attention. The administrative reform became a public policy in its own right, with its own structures and its own bureaucracy, which was not always efficient. It was a policy that frequently paid the price for the political class's frequent tendency to address problems only on the legislative level, without adequate concern about the implementation of the laws enacted, and further paid for the brief lifespan of the governments that were most active on this front. Paradoxically, the policy of administrative reform proceeded more on the legislative than on the administrative level.

The impetuous legislative output continued in various sectors of administrative law: first through Parliamentary statutes and governmental statutory decrees, later mainly through «financial laws» accompanying budget approval, which in the first years of the 21st century reached abnormal dimensions: laws drawn up hurriedly and incrementally, approved by Parliament without substantial discussion, containing thousands of provisions on the most varied subjects, often without a real connection to the financial maneuver. But the fruits of several operations of simplification and codification could also be seen: initially with regulations for the simplification of single administrative procedures to replace complex legislative texts with simpler, more adaptable guidelines; later with operations of codification, which led to the enactment of numerous codes and consolidated bills, drawn up with the French model of codification *à droit constant*. Thus were the substantive discipline of important sectors reordered, such as civil service, building activity, expropriation for public utility, cultural heritage, insurance, consumer protection, the environment, job security, and the justice system's expenses, among others. New general laws were also passed in areas that had always been already grouped together under single acts, such as local government. In several cases, it was the need to comply with European Union directives that

occasioned normative regulatory reforms: so it was in the cases of public contracts, banks, and private finance. Other times, reforms were largely due to the need to rationalize and contain costs: so it was in the cases of health care and of social security, which would undergo, too, later normative interventions.

The influence of European law was noteworthy especially in regard to governing the economy, where there was a clear reduction in the role of the State. Upon the provisions of the Constitution, which allowed for the planning and guidance of private business, there was now superimposed a model of market economy in which only a regulatory role was assigned to public power; the policy of incentives for businesses was met by a prohibition on State aids; the exclusive rights in public services shifted toward the opening of new markets; and public companies faced a ban on discriminating among the various operators. Many markets, such as those of finance and of national public utilities, were liberalized. The system of State shareholding was dismantled; the great public companies were transformed into joint stock companies and were largely privatized, even though the State remained the sole or majority shareholder in several cases. From 1990 onwards, there has been national legislation on antitrust, with an independent Guarantor Authority active in punishing improper behavior and in soliciting the Government and the Parliament to reform those regulations that showed the least respect for the market. In the mid-1990s, independent authorities regulating the sectors of energy and telecommunications were added alongside the antitrust Authority. The spread of independent authorities in these and other fields (such as that for the protection of personal data) was favored not only by the relevant provisions of European law, but also by the phase of weakness that political institutions went through at the beginning of the decade.

The transformation of public bodies and agencies into joint share companies and the privatization of public utilities gave rise to various problems related to their legal regime: on the applicability of administrative procedural law to those companies, on citizens' rights to gain access to their documents, on the enforceability of administrative controls over those companies, among others. It appeared more evident than ever before that the domain of administrative regulation and the perimeter of public administration were variable, because of the different norms that had to be applied case by case. It was clear that many subjects lay along the boundary line between public and private law and were governed by norms that originated in the public sphere

on some occasions and in the private sphere on others: the qualification of public administration was no longer considered incompatible with that of a private company or business. And, naturally, European law contributed to all this as well, for it extended public regulations — such as those for public procurement — to subjects qualified by internal law as private individuals.

But the crossovers between public and private law were products of other phenomena, too. Their private autonomy rediscovered, public administrations utilized that autonomy — more so than in the past — to slip through public regulations and also to multiply job positions and employment: the proliferation of companies controlled by local bodies was significant in this regard, for those companies were often organized into complex industrial groups headed by single local bodies. Somewhat better forms of cooperation between public administrations and private operators, favored by the Constitution ⁽⁶⁷⁾, were the ones arising from the performance by second parties of administrative functions and instrumental services in various ways: functions of regulation, as in the case of the stock market; of control, as in the case of certifications required of businesses wishing to perform public works; of assistance, in areas such as health and financial matters; of supervision over businesses and professionals, often entrusted to professional associations.

Instruments belonging to private law, therefore, were utilized by public administrations not only to carry out genuinely private activities and businesses, but also to perform administrative functions in such a way as to slip through the restrictions imposed by European Union law (such as the financial stability requirements), Constitutional provisions (such as the principle of hiring personnel by means of job competitions), and legislative norms (such as rules for accounting). Legislators reacted to this tendency by passing special regulations for public companies and, in particular, for those belonging to local bodies. These regulations, which implied the distinction between business operations run by public administrations and the performance of administrative

⁽⁶⁷⁾ Art. 118, as reformulated in 2001, provides that the autonomous initiative of the citizens, single or associated, is to be favored for carrying out activities of general interest, on the basis of the principle of subsidiarity.

functions with private instruments⁽⁶⁸⁾, ended up putting together a special branch of private law for public administration.

The crossovers and the overlaps between public and private law rehegthened the problem of the apportioning of jurisdiction, which also gave rise to evident contrapositions between ordinary courts and administrative courts — among which, since 1971, the regional administrative tribunals had joined the Council of State, which had become a court of second instance. The latter, freed from the weight of civil service litigation which was transferred on to the shoulders of the former, obtained the broadening of their exclusive jurisdiction to areas such as building regulations, urban planning, and public utilities. Jurisprudential contrasts arose over the scope of these areas, contrasts ultimately resolved by the Constitutional Court through correction of the relative provisions⁽⁶⁹⁾. In the meantime, the administrative trial evolved, with the enrichment of proposable actions and of the power of courts, losing the exclusive connotation of reviewing the lawfulness of the singular act⁽⁷⁰⁾.

Regarding institutional set-ups, the most important trend was brought about by decentralization. An important operation of decentralization was enacted in the second half of the 1990s, without amending the Constitution. The result was a statute⁽⁷¹⁾ comparable to that of twenty years prior inasmuch as it contained an inventory of administrative duties of the State and of the territorial bodies. Its most innovative principles were largely transposed to the Constitutional Reform of 2001 to which reference has been made above. Immediately operative and not without flaw, in terms of the division of legislative powers, the new Constitutional provisions proved to be more accurate but were not immediately applicable in terms of administrative duties: what began at the start of the century is a long process of redistribution of administrative duties, a process not yet completed either by the necessary reform of the finances of territorial bodies or by the adequate transfer of human resources to those bodies. The sharing of

⁽⁶⁸⁾ As was clarified by the Constitutional Court with its Sentence no. 326 of 2008.

⁽⁶⁹⁾ Especially through Sentence no. 204 of 2004.

⁽⁷⁰⁾ For an effective description of the evolution of administrative justice, see G. FALCON, *Il giudice amministrativo tra giurisdizione di legittimità e giurisdizione di spettanza*, in *Diritto processuale amministrativo*, 2001, 287.

⁽⁷¹⁾ Legislative Decree no. 112 of March 31, 1998.

expenses among the different levels of government remained substantially unchanged.

Decentralization occasioned the reordering of the State administration, which should have consequently been made lighter. Both the reform of the central administration and that of local offices were indeed put into effect, but both proved difficult to accomplish and underwent subsequent rethinking. For the central administration, 1999 saw the putting into effect at last of the Constitutional provision which reserves for the statutory law the definition of the number, the tasks, and the organization of the ministries: it was the opportunity for a reduction in the number of ministries, which however was belied by the governments in charge during the subsequent two legislatures. The provision setting the number of ministries was modified each time to adapt it to the composition of each government. Moreover, the number of ministries had not corresponded for a long time to that of the ministers, because of the presence of ministers without portfolio — at times a rather numerous presence. These ministers were not placed at the head of ministries, but in practice a bureaucratic structure was always assigned to them — sometimes a structure put together *ad hoc* — within the ambit of the Office of the Prime Minister. This Office had witnessed the considerable growth of its own size, above and beyond the activities of support to the Prime Minister, and it was endowed with notable administrative duties, in the areas of civil protection, for example, and of the publishing world. Several of the departments into which it was divided were remarkably large. Such was the case of the Department of public function, for example, responsible for civil service and for administrative reform. Not always, however, did the Office succeed in ensuring the efficient coordination of the ministries: this did not happen, for example, despite the presence of a Minister, for relations with the European Union institutions.

The number of civil servants remained substantially stable, and their distribution remained largely unbalanced: despite decentralization, the number of employees of the State administration grew, their concentration being particularly accentuated in Lazio, the region of the Capital ⁽⁷²⁾. Because of the «southernizing» of civil service — a phenomenon that had started in previous eras — the density of civil servants in the southern regions was noticeably higher than in those of

⁽⁷²⁾ See A. PETRETTO, *La riforma della pubblica amministrazione in Italia secondo un approccio industrial organization*, in *Mercato concorrenza regole*, 2008, 87.

the north⁽⁷³⁾. The two great aims of reform regarding personnel were, during this phase, the contractualization of the regulation of working relations and the distinction between politicians' responsibilities and those of civil servants. Contractualization had been provided for since 1992 and was brought to completion in the following years. It was largely resolved in the allocation of considerable power of influence to workers' unions. The indeed generous limits imposed by the law upon the scope of collective bargaining were often exceeded and collective agreements spilled over into areas such as administrative agencies' organization, the hiring and duties of employees, which the law had reserved for unilateral and public sources. The distinction between political guidance and administrative management, meant to reconcile the carrying out of political programs with administrative impartiality, was soon betrayed by statutes — improperly labelled as the «spoils system» — which allowed the political heads of administrations to loyalize and to continually influence the administrative directors, placing them in a precarious situation.

The most important legislative reform, however, was certainly the 1990 reform of administrative procedure. Late in comparison to some European countries, early in comparison to others, the Italian legal system endowed itself with a law of principles, drawn up with care by a prestigious ministerial commission, and then by the Council of State, which developed a peculiar and wise approach to legislative regulation of procedure. Aware of the heterogeneity of many types of procedure to which the law would be applied, legislatures were careful not to settle regulations for the different phases of procedure, uniform for all procedures; instead they stated a few fundamental principles and devices. The law, however, imposed upon administrations — which were called upon to set a maximum time-limit and an office responsible for every type of procedure — the obligation to conduct a census of their own procedures and, therefore, to better know their own operations. And because a conclusive act corresponded to every procedure, the law — while shifting emphasis from the act to the decision-making procedure — reinforced the centrality of the concept of the administrative act: identifying the final act was now necessary not only in order to single out those acts which could be appealed before an administrative court but also to apply regulation of proce-

⁽⁷³⁾ See S. CASSESE, *Questione amministrativa e questione meridionale. Dimensioni e reclutamento della burocrazia dall'unità ad oggi*, Milan, Giuffrè, 1977.

ture. Some of the provisions of the law, such as the rule of statement of reasons, reflected case law trends. Others, such as the time limit of the procedure, were new. Some were immediately successful, others had to wait a long time before being put in effect. Among the most successful parts of the law, by means of administrative courts, there was the one granting the right of access to administrative documents, which was, however, a very prudent set of regulations, which afforded access only to the persons whose legal position was recognized as connected to the relative documents after evaluation of his or her interest. Administrative transparency, in fact, was more an instrument for those who wished to put a case before a court than a true form of openness for all citizens or a widespread form of monitoring administrations.

The law on procedure also laid out regulations on administrative simplification, introducing devices such as the *conferenza di servizi* (a meeting of the concerned administrations, which had to substitute for the procedure or for some steps of it) and the *dichiarazione di inizio di attività* (a private party's statement which had to substitute for the agency's authorization required for many private businesses), which would later be replicated in special legislation and widely used in subsequent simplification initiatives. Indeed, the law initiated the policy of administrative simplification, which was to quickly bring about appreciable results.

The law underwent reform in 2005, with the new inclusion of legislative regulation of the administrative act. But this codification was far less important than that of procedure, because the new provisions faithfully retraced rules which had been steadily affirmed in case law.

These developments converged to place at the center of administrative activities the idea of service on behalf of citizens rather than the notion of the administrations' supremacy. Administrative power was no longer considered an expression of the State's sovereignty; instead the component of duty was highlighted. The administrative act was no longer qualified with adjectives such as «imperative» or «authoritarian», it now being evident that the law surrounded it with guarantees and checks, making it more restricted and limited than many private acts.

In the same logic of having moved beyond the idea of supremacy of administrations, and of having recognized the functional nature thereof, two further evolutionary trends can be interpreted, those

respectively relative to administrative controls and to the civil liability of public administrations. The former were reformed many times, in order to overcome the formalistic approach and to introduce more modern forms of monitoring, capable of evaluating the overall functionality of offices and the quality of services performed for the citizens. A highly advanced legislative discipline was introduced, though it proved disappointing when first put into effect, primarily because of many administrations' inability to endow themselves with efficient monitoring offices and to keep the relative results into account. In the sphere of administrations' torts, the case law of ordinary courts, partly because of prompts from national and European Union law, moved beyond — at least in principle — the trend that strongly limited the right to seek compensation on the part of the private individual who had not duly received a favorable act. The civil liability of public administrations tended to fall into line with that of private individuals. At times, the law of torts of public service providers tended to go even beyond the private sphere, with provisions for automatic indemnification, even in the absence of proven damages. Thus, in the discipline of liability, too, administrative law placed itself as a system to protect citizens rather than administrations.

4. The preceding analysis points out the direction of several tendencies over the course of two centuries, tendencies of an object which nonetheless remains imprecise in terms of its boundaries. The extension of administrative law varies from one country to another ⁽⁷⁴⁾ and also within the Italian legal system. At the start of the 21st century, the boundaries of administrative law remain unspecified and there is no agreement on several of its essential features. To use Jean Rivero's well-known term, there is no clarity as to what the «criterion» of administrative law might be ⁽⁷⁵⁾. Uncertainty regarding the perimeters of notions such as those of public administration, public body, administrative act, and public officer reflects an even deeper uncertainty relative to the classification and to the unifying principles of the field. Even though for each of those notions legislators and courts have

⁽⁷⁴⁾ See S. CASSESE, *La costruzione del diritto amministrativo: Francia e Regno Unito*, in *Trattato di diritto amministrativo*, edited by S. Cassese, cit., *Diritto amministrativo generale*, I, 3 et seq.

⁽⁷⁵⁾ J. RIVERO, *Existe-t-il un critère du droit administratif?*, in *Revue du droit public*, 1953, 279.

drawn up definitions and criteria with a view toward specifying their range, from a scientific point of view it remains interesting to examine the factors that influence this uncertainty, just as it is interesting to evaluate how some principles, such as the rule of law, and concepts, such as that of discretionality, have influenced the way in which scholars and practitioners of administrative law have understood their sphere of interest.

The problems of delimiting administrative law may be traced to three main profiles: that of the distinction from private law; that of the correspondence between administrative law and administrative justice and, therefore, of the apportioning of jurisdiction; that of placement within the sphere of public law. This section, as well as the two that will follow, are dedicated to these three profiles.

4.1. Administrative law came to life in distinction to private law and it has always been considered a part of public law. In Italy, as in other European countries, the distinction has been long established between «administrative law systems», such as those of the continental European countries, and «common law systems», such as those of the Anglo-Saxon ones ⁽⁷⁶⁾.

The distinguishing criterion between administrative and private law, however, has always been uncertain. The uncertainty emerges, for example, from the debate over the notion of public body and on the distinction between public and private bodies, which gave rise to many theories and many distinctive criteria. At times the debate focused upon the goals pursued by the body in question, considering as public those bodies created in the pursuit of public interest or in relation to their instrumentality with respect to the State; other times the debate concentrated on the methods through which the goals were pursued, deeming public any body endowed with «powers of authority» over private individuals or privileges and exceptions from the ordinary law. This dualism between goals and methods, between *service public* and *puissance publique*, demonstrates the difficulty inherent in identifying the «criterion» of administrative law. The same difficulty lies at the root of the uncertainties regarding fundamental notions such as that of the administrative act and of administrative procedure and, conse-

⁽⁷⁶⁾ The most complete exposition of this distinction may be found in M.S. GIANNINI, *Diritto amministrativo*, 2nd ed., Milan, Giuffrè, 1988, 15 et seq.

quently, regarding the sphere of application of the relative legal regulations.

No smaller are the problems that have always been met by the effort to distinguish between the different forms of activity of administrative agencies. In the 19th century, a distinction was made between acts of authority and acts of management ⁽⁷⁷⁾, but the definition of act of authority oscillated between the criterion of supremacy, that of public interest, and that of discretionality. Later, bipartitions and tripartitions were proposed, such as the division between legal activities and social activities on the part of the administration, which then required further subdivisions ⁽⁷⁸⁾, and the distinction between acts of authority, acts of management, and merely civil acts ⁽⁷⁹⁾, which showed the difficulty in identifying a single criterion to delimit the purely public sphere.

In the second half of the 20th century, a no-less ambiguous distinction was imposed between the «public law administrative activity», characterized by the enactment of unilateral decisions, and the «private law administrative activity», characterized by the making of contracts. In the first case, the administration placed itself as authority in a position of supremacy; in the second case, it placed itself in a situation of parity with the other parties. According to this distinction, while unilateral acts issued by the administration in carrying out its «powers of authority» are entirely peculiar to administrative law, contracts made by the administration do not substantially differ from those between private individuals; the former are regulated by public law, the latter by private law, albeit with some derogation with respect to the ordinary regime. This distinction ascribes to private law an area strongly characterized by public regulations, such as the matter of public procurement, and, more generally, does not heed the fact that both the unilateral acts issued by public administrations and the

⁽⁷⁷⁾ The most detailed exposition may be found in O. RANELLETTI, *Per la distinzione degli atti d'impero e di gestione*, (in *Studi di diritto romano, di diritto moderno e di storia del diritto in onore di V. Scialoja nel XXV anniversario del suo insegnamento*, vol. I, Milan, 1905) now in *Scritti giuridici scelti*, vol. III - *Gli atti amministrativi*, Naples, Jovene, 1992, 670.

⁽⁷⁸⁾ V.E. ORLANDO, *Principii di diritto amministrativo*, II ed., Florence, Barbèra, 1892, 20 et seq. and 229 et seq.; *Introduzione al diritto amministrativo*, in *Trattato Orlando*, vol. I, Milan, Società editrice libraria, 1900, 66 et seq.

⁽⁷⁹⁾ U. BORSI, *L'esecutorietà degli atti amministrativi*, in *Studi senesi, 1901-1902*, now in *Studi di diritto pubblico*, vol. I, Padua, Cedam, 1976, 37.

agreements concluded by them are not structurally different from the corresponding acts set in place by private individuals, even though they are subject to a set of regulations that is partly different from that governing private individuals. The distinction, nevertheless, is still so widespread that in 2005 it served as the premise of the introduction, in the general law on administrative procedure, of a provision according to which «public administration, in the adoption of acts that are not of an authoritative nature, shall act in accordance with the norms of private law, save when the law provides otherwise». This provision, drenched with pro-private ideology, proved destined to remain a dead letter for the mere fact that the law, when it provides for administrative acts and procedures, always «provides otherwise».

In recent years, ultimately, the distinction has spread more widely between final activity, regarding the performance of duties in the interest of citizens, and instrumental activity, inherent in the inner operations of the administrations. At times, the former tends to be identified with the proper sphere of administrative duties. For the latter, privatization and contracting out are often considered.

4.2. Several of the distinguishing criteria mentioned above are derived from the need to delimit the sphere of administrative courts' jurisdiction, which always has noticeably influenced the perception of the sphere and of the fundamental characteristics of administrative law.

In all the legal systems endowed with administrative courts, these have played an important role for the emergence of administrative law. In Italian law, moreover, they have had especial importance for two reasons: the first is related to its influence on the forms of carrying out administrative activities and on the legal regime of the relative acts; the second is related to the apportioning of jurisdiction, that is, to the distribution of disputes between ordinary and administrative courts.

The first factor lies at the root of an unnatural extension of the model of administrative action based on administrative power and, therefore, on the administrative act. This model, which implies the prevalence of the administration's will over the will of the private individual (and, therefore, of public over private interest), is obviously necessary for activities in which the administration needs to impose a sacrifice upon private individuals, such as expropriation for public utility and administrative penalties, but it is not the case for activities that presuppose the consent of the private individual, such as admin-

istrative concessions and the performance of social security treatments. However, the model of administrative power and of the unilateral act has been used in order — among other things — to grant to private individuals the use of public goods or the management of public utilities, to hire employees and regulate work relations, to perform public services. Naturally, this is not to say that agreement among the parties has been replaced by a unilateral determination; agreement remains, but it is reflected in a unilateral act instead of a contract. The law chooses to place emphasis not on the coming together of will among the parties but on the declaration of the will of one of the parties.

This is a phenomenon connected to ideological and theoretical reasons, and to features of judicial review alike.

The former are reasons connected to the «publicization» of the relationship between administrations and private individuals, the process that unfolded from the end of the 19th century onward, which determined the description of many substantially contractual relations in terms of a public, and therefore, unilateral occurrence ⁽⁸⁰⁾.

As to the latter, of greatest relevance to the issues at hand, it may be observed that the need for protection emerged first for the powers with which administrations could adversely affect the interests of the citizens, and lately for those with which the administration could give benefit to the citizens: in the first place, because, up until the period of the liberal state, administrative functions consisted of activities of the first kind more than of the second; and then because — without yet the idea of administrative activity as a function, that is, as an activity brought into being in the interests of the citizens — it was not the proper performance of administrative tasks that needed to be guaranteed, but only the legal interest of the concerned parties that needed to be protected. And the need for protection appeared stronger in cases of extinguishing or limiting pre-existent individual rights than in cases of inadequate satisfaction of expectations. Because activity of the first type is that which may only be performed with the exercise of powers, it is with reference to the acts with which the powers were exercised that the system of protection was established. This system, in fact, is based on the appeal and on the annulment of illegitimate acts, and therefore presupposes their unilateral nature. When welfare functions,

⁽⁸⁰⁾ See M. D'ALBERTI, *Le concessioni amministrative. Aspetti della contrattualità delle pubbliche amministrazioni*, Naples, Jovene, 1981, 49 et seq.

too, were later expanded and the principle of the judicial protection of the citizen's rights with respect to the administration was generalized, the problem of the forms of protection arose. In part the administrative justice system adapted itself to these functions; in part the functions themselves were adapted to a system designed to protect the citizen in the face of the administration's unilateral decisions.

Overall, the existence of administrative courts, whose jurisdiction remained a jurisdiction of annulment through to the end of the 20th century, imposed a choice between two alternative options: the identification of an administrative act (to be appealed before an administrative court) and the configuration of a relationship as equal (falling under the authority of an ordinary court).

With regard to the identification of the *proprium* of Italian administrative law, the peculiar way in which jurisdiction was apportioned between ordinary courts and administrative ones proved later to be of particular importance. While in other countries apportioning is performed by means of a general provision, in Italy, because of the events of the 19th century mentioned above ⁽⁸¹⁾, it is performed on the basis of a plurality of statutory provisions, which require that distinction be made between two different types of legal position: rights and legitimate interests. The resultant criterion of apportioning, as crystalized in the Constitution, is elusive and has always induced courts to seek other, more practical, criteria, and to dissimulate them with the above-named distinction. These criteria represent as many attempts at distinguishing between public and private disputes and, therefore, between the areas in which public administrations must be subject to private law principles and those in which they must be subject to public law principles, overriding the former.

The application of the criteria for apportioning jurisdiction reflects, in turn, the plurality of the criteria of delimiting administrative law. At times, legal provisions and case law tend to hand over to administrative courts those disputes which relate to hypotheses in which the administration uses «exorbitant» powers, which do not exist in private law; other times, they tend more broadly to hand over to administrative courts all disputes which relate to hypotheses in which the administration acts in the pursuit of public interest (emblematic, in this regard, is the above-mentioned judicial dispute following the 1998

⁽⁸¹⁾ Described in depth by B. SORDI, *Giustizia e amministrazione nell'Italia liberale. La formazione della nozione dell'interesse legittimo*, Milan, Giuffrè, 1985.

provision which handed over to administrative courts disputes in the sphere of public utilities); other times again, on the assumption of correspondence between non-discretionary activity and citizen rights, they tend to hand over to administrative courts disputes in which the administration enjoys a margin of discretionality. This way, the notions of supremacy, function, and discretionality — which have often been used as criteria to define the administrative act — are posed also as criteria to delimit administrative jurisdiction.

4.3. Administrative law has traditionally been considered a part of public law: the body of legal principles and provisions related to those particular public powers that are the public administrations. From this point of view, administrative law has always moved alongside constitutional law and procedural law and, at the same time, has always been distinct from them. It has moved alongside those branches of law insofar as it is a portion of public law: the study of the administrative act, for example has always placed emphasis on its nature as an act of public law, equal to laws and to judgements. It has always remained distinct because of the principle of the separation of powers. This principle, never fully in force in Italian legal system, has often influenced constitutional, legislative, and jurisprudential choices.

The separation of powers has never been a constitutional principle, but only an inspiring rule of legislators and a standard for legal interpretation. There have always been crossovers among the various powers: laws aimed not at setting general rules but at adopting concrete decisions, and rulemaking powers granted to public administrations; administrative duties exercised by judges and contentious proceedings heard before administrative bodies. These crossovers have induced legal scholarship to elaborate the «formal-substantial» theory, intended to distinguish between the proper «substance» (normative, administrative, or jurisdictional) of the duties and the «form» of performing those duties, which depends on the subject and does not necessarily match the substance ⁽⁸²⁾.

One has to distinguish between the relations between administration and norms on the one hand, and the relations between administration and judiciary on the other.

From the first point of view, as in other countries, the progressive widening of political representation as well as the switch to democracy

⁽⁸²⁾ M.S. GIANNINI, *Diritto amministrativo*, cit., 45 et seq.

have influenced the relation between law and administrative activity, heightening the role of guarantees for citizens as performed by the law ⁽⁸³⁾. Regarding the scope of the rule of law in administrative law, there has been no shortage of misunderstandings and ideological influences which have, at times, led to a reading of it unsupported by either the Constitution or by the administrative reality. It has often been affirmed that the law constitutes the necessary foundation and limit of the activities of public administrations. In the famous words of Guido Zanobini, «while an individual may do whatever is not expressly prohibited, an administration may do only what the law expressly permits it to do» ⁽⁸⁴⁾. In reality, the rule of law principle, effectively in force in Italian regulation, should simply be understood as the subjection of administrations to the law, the intensity of which is variable. «The law restricts administrations to a greater degree than it does private individuals. However, this degree may not be definitively established once and for all, but must be determined case by case» ⁽⁸⁵⁾. In this fashion, one may explain the varied incidence of the *riserve di legge* contained in the Constitution and also in statutes, which reserve for the statutory law the regulation of certain fields, articulating in a variable manner the relationship between statutory law and the rule-making powers of the Government and of administrations.

This variable incidence has sometimes been described by distinguishing between the different duties discharged by the rule of law, which serves to steer administrations toward the pursuit of public interests and also to protect private individuals with respect to administrations ⁽⁸⁶⁾. The first duty concerns all administrative activities. The second concerns only activities that adversely affect private individuals and, therefore, are covered by the various *riserve di legge* set by the Constitution (the most general of which is set by art. 23, according to the terms of which no tax or obligation may be imposed over individuals

⁽⁸³⁾ See E. CHELI, *Potere regolamentare e struttura costituzionale*, Milan, Giuffrè, 1967, 47 et seq.

⁽⁸⁴⁾ *L'attività amministrativa e la legge*, in *Rivista di diritto pubblico*, 1924, now in G. ZANOBINI, *Scritti vari di diritto pubblico*, Milan, Giuffrè, 1955, 206 et seq.

⁽⁸⁵⁾ S. CASSESE, *Le basi costituzionali*, in *Trattato di diritto amministrativo*, edited by S. Cassese, cit., *Diritto amministrativo generale*, 216.

⁽⁸⁶⁾ On the distinction between the principle of legality as a protection and that of legality as an aim, C. MARZUOLI, *Principio di legalità e attività di diritto privato della pubblica amministrazione*, Milan, Giuffrè, 1982, 1; D. SORACE, *Diritto delle amministrazioni pubbliche. Una introduzione*, Bologna, Il Mulino, 2000, 31.

unless based on statutory law). The principle of «legality as an aim» covers all administrative duties, whereas the principle of «legality as a protection» corresponds only to cases in which the administration enjoys the prerogative of *puissance publique*. This double-possibilitied perimeter of the rule of law is a further example of the uncertainty and variability of the boundaries of administrative law and of the plurality of legal regimes which that law contains.

Because of the guaranteeing function of the statutory law, which can be traced back to the will of Parliament and therefore to the democratic process, the legal system has always taken pains to define, through *riserve di legge*, areas reserved for legislators, and to prevent administrations from crossing over into those areas. Far more rarely have pains been taken in the opposite direction: the frequent *leggi-provvedimento* (acts possessing the «form» of laws and the «substance» of administrative acts) have generally been deemed legitimate, there being no limits on the areas that legislators may regulate. Only rarely, and especially in reference to administrative agencies' organization⁽⁸⁷⁾, have individual scholars⁽⁸⁸⁾ affirmed the existence of limits and «administration reservations», such as those existent in other countries. In the absence of such limits, statutes — particularly the «financial laws» of recent years, as previously mentioned — often have the contents of administrative acts: legislators administer directly instead of referring concrete decisions to the administrative agencies. The phenomenon is often criticized by scholars, who at times call for a «return to the separation of powers»⁽⁸⁹⁾.

Regarding the relationship between administrations and judiciary, it is well-known that that distinction between the two is the result of a centuries-old process, the starting point of which may be found in the «justicial administration» of the judiciary state⁽⁹⁰⁾. The delineation of this distinction was followed by the progressive affirmation of judicial review of administrative decisions, which served in turn as an instrument of guarantee for private individuals with respect to public administrations. The review became increasingly pervasive, though until

⁽⁸⁷⁾ See M. NIGRO, *Studi sulla funzione organizzatrice della pubblica amministrazione*, Milan, Giuffrè, 1966, especially 175 et seq.

⁽⁸⁸⁾ Recently, S. SPUNTARELLI, *L'amministrazione per legge*, Milan, Giuffrè, 2007.

⁽⁸⁹⁾ F. MERUSI, *Sentieri interrotti della legalità*, Bologna, Il Mulino, 2007, 1 et seq.

⁽⁹⁰⁾ B. SORDI and L. MANNORI, *Storia del diritto amministrativo*, Rome-Bari, Laterza, 2001, 36 et seq.

the middle of the 20th century it was sometimes excluded by law, for some statutes prevented appeal against certain acts. By now the Constitution forbids such exclusions, establishing that judicial protection against administrative acts «may not be excluded or limited to particular kinds of appeal or for certain categories of acts» (art. 113). The Constitution, as implied above, poses a strict separation between administration and judiciary, preventing the existence of intermediate or «quasi-judicial» figures in Italian legal system, figures present in other countries. If an authority is not judicial, it is administrative, and appeal against its acts may be brought before a court.

The legal system takes pains to affirm the prerogatives of courts with regard to administrations. Yet the converse concern, too, arising from the conception of administration as a public power, having an equal footing with judicial power, held great importance in the evolution of Italian administrative law. This concern lies at the root of the above-mentioned provision, dating back to 1865 yet still in force, which prevents ordinary courts from annulling administrative acts; it is the basis, therefore, of the very existence of the figure of the administrative court, which was created as a mechanism for dispute settlement within an administration and has always maintained a certain closeness to the administration itself; and it is the basis of the peculiar appeal structure of the administrative trial and of the limitation of means of evidence and of courts' powers, which in recent years have been gradually attenuated. More generally, this aspect of the principle of separation of powers, as protection of the administration from the judiciary, is historically recessive, inasmuch as administrations increasingly appear on equal footing with private parties before the court.

It should be observed in the end that, during recent decades, the principle of the separation of powers has often been thrust into crisis by the experience of independent authorities, which, in certain sectors — particularly in areas of supervision over private finance and regulation of public utilities — are endowed with rulemaking, adjudication and dispute-settlement duties, thus concentrating the duties inherent in the three traditional powers. Such authorities do indeed remain administrative in nature, but they tend to increasingly perform their functions through rulemaking and have relevant powers to settle disputes. Their powers are provided for and regulated by law but often in very general terms, with provisions that grant to these authorities broad rulemaking powers. Their decisions are subject to control by courts, yet courts often tend to show a certain deference to evaluations made by them.