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Domenico Sorace
Leonardo Ferrara
Ippolito Piazza *Editors*

The Changing Administrative Law of an EU Member State

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Editors
Domenico Sorace
University of Florence
Florence, Italy

Leonardo Ferrara
University of Florence
Florence, Italy

Ippolito Piazza
University of Florence
Florence, Italy

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Chapter 1
Introduction: The Changing Administrative Law of an EU Member State—The Italian Case

Domenico Sorace, Leonardo Ferrara, and Ippolito Piazza

This book aims to present the evolution of Italian administrative law in the context of the European Union. The chapters provide an overview of Italian administrative law, focusing on the main changes that have occurred in recent decades.

At the origin of the volume, there is the editors' intention to offer foreign scholars a useful tool to understand the current characteristics of the Italian administration. For this reason, the analysis carried out is based not only on the transformations induced by national dynamics but also, and above all, on the consequences of the European integration process on national administrative law. The authors describe these transformations, with the awareness of how the events have gone elsewhere.

The time horizon of the authors was mostly the last 50 years, approximately. However major changes had been set in motion, on the one hand, by the Constitution of the Italian Republic, entered into force in 1948 (but implemented only after some years and subsequently amended) and, on the other hand, by the European Treaties, starting from the Treaty of 1957 establishing the European Economic Community.

Hence the book shows the modifications on the administrative law imposed by the Constitution and produced by the law of the European Union, mainly by way of regulations and directives and also by means of soft law. These modifications are technically analyzed and some aspects critically discussed.

However, these factors are not the only ones that have been considered in the volume. Some inherent dynamics of the law of public administration are taken also in account, particularly pertaining the relations between administrative law and private law. The evolution of the administrative justice has been thoroughly examined, as well as the expansion of regulation and the increasing legal protection of individual rights. It was necessary to consider even the novelties induced in the law of the public administrations by the growing role of technique: intended both as

D. Sorace · L. Ferrara · I. Piazza (✉)
University of Florence, Florence, Italy
e-mail: domenico.sorace@unifi.it; leonardo.ferrara@unifi.it; ippolito.piazza@unifi.it

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specialized knowledge (think, in particular, of the field of economics), and as a set of technologies capable of influencing the organization and the procedures of public administration. Finally, administrative law is inevitably conditioned by the social and economic pressures for innovation that periodically arise in our societies.

All these factors, of course, generally are not isolated, but more often they are concomitant and complementary. The chapters of the book—while maintaining a legal approach—also consider the influence of these economic, social, cultural and technological factors. That is why this book is not just a handbook of administrative law but offers an in-depth analysis of the most relevant issues for the Italian public administration today.

In the first part, the book covers some general themes: the comparison between the Italian integration of the nineteenth century and the contemporary European integration; the discipline of the procedures and organization of public administrations; the public budgets; the administrative justice; the public services; the digital administration; the process of juridification.

The second part is focused on specific topics instead: the role of law in the construction of cultural identity; public intervention in the economy; regulation of the banking sector; cohesion and subsidiarity; public employment; healthcare management; civil protection; local government.

In the end the last chapters host some comments of non-Italian scholars, stimulated by the reading of previous essays.

The book shows on the whole the picture of a law largely Europeanized that however preserves meaningful national features. This, after all—not the total homologation of the law of the Member States—is to be regarded as the aim of the European Union and that is why the comparison between the law of these states can be quite interesting.

Part I
General Issues

Chapter 2
The Plurality and Diversity of Integration Models: The Italian Unification of 1865 and the European Union Ongoing Integration Process

Roberto Cavallo Perin and Gabriella M. Racca

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Abstract Analysed in this chapter are the characteristics of two main integration processes that Italy has experienced. Firstly, the country's unification as a nation more than 150 years ago. Secondly, and more recently, together with other EU Member States, the constitution of a Legal Order. In both cases, the integration process is not meant to be homogeneous as far as various entities and activities are concerned, nor is it based mainly on general and abstract rules. Rather, it relies on administrative acts and different forms of administrative cooperation.

The administrative integration process involving different contexts within unified Italy as a kingdom, from 1865, shows recurring asymmetry because of multiple levels of integration needed—something which was achieved by involving many different institutions in the process. Likewise, the ongoing European Union integration process is not resulting from one single, but from a number of parallel relationships among various institutions working in different sectors, and pursuing integration by designing and following their own path and timing.

In the newly unified Italy the administrative integration process was not always structural (as for ministries, etc.). Also, it was only functional at times (as for the

R. Cavallo Perin (✉) · G. M. Racca
University of Turin, Turin, Italy
e-mail: roberto.cavalloperin@unito.it; gabriella.racca@unito.it

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authorities of each jurisdiction, central banks, etc.). However, functional integration was arguably no less effective than structural integration. The 1865 Unification Laws of Italy, in fact, have been thoroughly studied and praised, and rightly so, despite the fact that their impact onto the newly unified country was limited because of their abstract definition, which required subsequent asymmetrical activities by administrative bodies to put them into practice, thus make them effective.

Examining the approach adopted by the Italian administrative bodies after 1865 as a case study, we may argue that only closer cooperation between today's national and European institutions would allow them to succeed in pursuing integration as a shared goal. All this regardless of whether that integration should take place through traditional instruments (such as the controls that used to be performed by the Prefect in Italy, but are now a prerogative of the EU Court of Auditors) or network organisations (such as ETCGs, transnational purchasing groups, or cross border central purchasing bodies).

A parallel between the two different administrative integration processes outlined here will be drawn and discussed in this chapter.

2.1 The Integration Process in Italy 150 Years Ago and in Europe Now: Parallels and Asymmetry

Nobody compares the physical ability of a youth with the maturity of an elderly person. Nonetheless, it may be worth taking into account Italy's long and challenging experience of integration with the more recent process being undertaken by the European Union to find similarities and differences through appropriate comparisons.

That is why understanding the relation between two main integration processes that Italy has experienced can bring to the fore the complexity of issues faced in the past and arising in the present. Italy's first integration process stemmed from the birth of the country as a nation in 1861–1865.[1] The second one (more recent and still in progress) involves the participation of Italy as a Member State of the European Union.

Although a lack of complete symmetry among the different sectors and institutions can be observed within the integration processes being discussed here, both of them can be regarded as aimed at meeting relevant needs in the historical periods in which they saw inception.

Over the last 20 years administrative law has seen many sectors and institutions become subject to the EU discipline, and in some cases the integration process is evident. Aside from leading to the creation of the Euro as single currency, the EU discipline—either conceived as a detailed discipline with specific provisions such as

[1] L. 17.03.1861, n. 4761, on the Italian Kingdom, and the law of Administrative Unification: l. 20.03.1865, n. 2248, all. A-F.

directives and regulations, or as a discipline based on principles—has been of great importance for agriculture, the environment, public procurement, health, education, and many activities of general economic interest.

Conversely, undeniable is the inexistence of common provisions on administrative procedure despite the fact that attempts have been made to create them.[2]

The same applies to the effectiveness of administrative acts and norm on public assets.[3] Also evident is the absence of common provisions on contractual obligations.[4] The same applies to European business activities.[5]

All these subject matters would have been relevant also for public administrations.[6]

The absence of a common disciplinary framework for the aforementioned domains is even more noticeable because public and private law (*alias* administrative and commercial law at the heart of public or private law for economics) are generally perceived as the pillars of the juridical unity to pursue within the European market.[7]

The EU single market has always been considered to have a shared juridical culture, deriving either from legislative or judicial sources. Such a single market should thus be ruled by a shared discipline envisaging exemptions and exceptions, but not depending on the nationality of companies, individuals, and/or territoriality.

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[2]The EU Parliament's resolution 15.1.2013 provided recommendations to the Commission for an EU legislation on administrative procedures (2012/2024(INL)). See also the subsequent European Parliament resolution, 9.06.2016 for an open, effective and independent European administration, (2016/2610(RSP)).

[3]Cfr. *ReNEUAL Model Rules 2014* and in particular Hofmann et al. (2014), de Leonardis (2016), Craig (2013), Galetta (2011), Della Cananea (2009), Glaser (2014), Stelkens (2014) and Harlow (2006).

[4]On the unfinished European Civil Code see Alpa (2007), Ciatti (2012), Schulze and Stuyck (2011) and Cámara Lapuente (2003); for a purpose of an "alternative model of the EU's constitution", on common provisions see Dawson and de Witte (2015). For exceptions see the *Vienna Convention on the Sale: United Nations Convention of 11 April 1980*, ratified by law 1.12.1985, n. 765; Directive n. 1999/44/CE, of the European Parliament and the Council 25.5. 1999; Ajani (2012), Alpa et al. (2012), Sánchez-Lorenzo (2013) and Ragno (2008).

[5]On the so-called *Lex mercatoria*, on the sectors see Directive n. 2006/123/EEC of the European Parliament and the Council 12.12.2006, *Bolkestein*; Directive n. 2011/83/EU of the European Parliament and the Council, *on consumers*; Directive n. 2006/112/EEC of the Council 28.11.2006, *on VAT*; art. 54, § 2, TFEU; Directive n. 2012/30/EU of the European Parliament and the Council 25.10.2012, *on the safeguard of shareholders and third parties towards limited companies*; Directive n. 2009/133/EEC of the Council 19.10.2009, *fiscal regime for mergers, divisions, etc and for the transfer of incorporation of SE or SCE*; on anti-discrimination: Directive n. 2000/43/EEC of the Council 29.6.2000 *on race or ethnic group;* Directive n. 2000/78/EEC of the Council 27.11.2000, *on employment and working conditions*; Directive n. 1999/70/EEC of the Council 28.6.1999, *on fixed-term work contracts AGREEMENT CES, UNICE e CEEP*; Directive n. 2011/7/EU of the European Parliament and the Council 16.2.2011, *on delays on commercial transactions*. Finally, see Gnes (2012); for a global perspective on the role of the EU in the global economy, see Alesina et al. (1997); more recently Spolaore (2014) and Jowell (2008).

[6]Cimini (2016) and Craig (2011).

[7]For an historical reconstruction see Alesina et al. (1997).

It should be remarked, however, that the non-homogeneity noticeable at a closer analysis of the integration process in exam, cannot be regarded as a normal feature of any integration process.[8] As already mentioned, since its unification 150 years ago Italy has experienced an integration process seeing many "parallel" interpretations of the same 1865 Civil Code being kept in force for almost 60 years by the High Courts (*Corti di Cassazione*) in Turin, Florence, Naples, Palermo, and Rome, the latter from 1878 (R. d. 24 March 1923, No. 601).

2.2 Administrative Integration and Plurality of Unifications

Similar tools and models recur in the two integration processes under scrutiny.

First and foremost, mention should be made of the designation and greater relevance of the institutions responsible for the implementation and management of a new comprehensive legal order—a phenomenon that could be observed at first in the Kingdom of Italy, and later on in the European Union. In both cases new institutions driving a unification process have been juxtaposed to pre-existing ones.

Meanwhile the transition into the new legal order has been made possible thanks to the 'little steps' forward that were taken by administrative authorities, either in Italy or in the European Union. The reason underpinning that kind of operating mode is essentially structural, and directly owes to the theory of judicial acts of Continental public law.

The effectiveness of Italy's post-unification legal order owes to its concrete definition, which historically pertains to the administrative or judiciary system rather than legislation itself. Being an ensemble of abstract norms, the latter actually follows or precedes the concrete evolution of a legal order dictated by administrative acts or judicial facts.

Actually, the Italian laws on administrative unification followed the unification the Public Administration authorities such as ministries and their central and peripheral bodies, for instance the Ministry of Internal Affairs, Foreign Affairs, Public Works, Agriculture, and Industry and Commerce.[9]

The effective unification of the aforementioned institutions was implemented—following purging or voluntary adhesion—by newly appointing staff who had already been employed in pre-existing states.[10]

Furthermore, local public authorities were subjected to governmental control while embassies were either suppressed or merged. Al this was achieved through

[8]For the identification of the enhanced cooperation procedure (art. 20 TEU and art. 326 ff. TFEU) as an useful tool of differentiated integration: Fabbrini (2013). For a theorical approach see Pierson (1994), Sandholtz and Stone Sweet (1997) and Spolaore (2013, 2014).

[9]Cudia (2016).

[10]Cassese (2014, 2016), Cassese et al. (2017), Melis (2015), Sandulli and Vesperini (2011) and Calandra (1978).

concrete administrative acts, which opened way establishing new ministerial institutions and a new system of local authorities was therefore originated.[11]

Administrative acts thus became tools for the integration of newly appointed personnel once working for the states existing before the unification of Italy. That often entailed relocating people throughout the territory of the Italian Kingdom, which contributed to fostering national identity as well as a sense of belonging to a shared culture.[12] Such a phenomenon appears to have been happening within the European Union too.[13]

From a theoretical standpoint, integration through the administrative system can be regarded as a process driven by institutional relationships, or better by a plurality of unifications of different institutions.[14] Such an interpretation allows us to understand why there is frequent asymmetry within an 'alignment' pursued to implement a comprehensive legal order effectively and timely. Actually, what we can observe is not one single relationship between legal orders, but rather a series of parallel relationships between institutions (and consequently their legal orders).

Each of them experienced a *reductio ad unitatem*, more or less marked as a result of an aim of political and territorial cohesion that may vary depending on the role played by the institutions in question (European Central Bank [ECB], European and national Courts of Auditors, etc.) and the sectors in which they operate (finance, agriculture, etc.), respectively.

Therefore, it may be appropriate to describe unification as a plurality of processes of integration (involving ministries, local authorities, etc.) accompanied by a plurality of *reductio ad unitatem* processes. All this not has not always taken place structurally (as for ministries, etc.), but sometimes only functionally (involving judicial bodies, central banks, etc.) as the latter mode is not less effective than the former.

It should be added that it may not be necessary to define a specific sequence of procedural phases of the integration process in that the legal order arising therefrom

[11]Royal decree (r.d.) 11.1.1861, *Aumento della pianta numerica degl'Impiegati del Ministro dell'Interno*, in *Celerifera*, 2394-2395; r.d. 6.11.1861, *Nuova pianta del Personale del Ministero degli Affari Esteri,* in *Celerifera*, 2179; r.d. 14.02.1861, *Nuova pianta numerica e stipendi degli Ufficiali ed Impiegati nel Ministero della Pubblica Istruzione*, in *Celerifera*, 589-590; r.d. 20.1.1861, *Nuova pianta numerica degl'Impiegati del Ministero di Grazia, Giustizia ed Affari Ecclesiastici,* in *Celerifera,* 490-49; r.d. 21.12.1860, *Pianta organica e Quadro di riporto del Personale del Ministero dei Lavori Pubblici*, in *Celerifera*, 241-245; r.d. 8.3.1861, *Aggiunta alla pianta numerica del Ministero di Agricoltura, Industria e Commercio*, in *Celerifera*, 525-528; r.d. 5.1.1861, *Nuova pianta numerica del personale dell'amministrazione centrale delle Finanze*, in *Celerifera*, 433-435. Iudica (2016), Gagliardi (2009), Chiariello (2016) and Apicella (2016).

[12]Grüner (2016), De Vinci (2016) and Melis (2004).

[13]See EUCJ, 9.9.2003, C-285/01, *Burbaud* c. *Ministère de l'Emploi et de la solidarité*. Gagliardi (2009); annotation of judgements, Kessler (2003), Icard (2003), Pongérard-Payet (2003), Muir (2003), Luby (2004) and Weiler (2012); more precisely, Drumaux and Joyce (2018).

[14]Aside from the aforementioned civil jurisdiction it is worth mentioning the unification of the Italian banks of emission (1893), which, after the unification of the Italian Kingdom, kept into existence five issuing institutions for 32 years. See Luzzatto (1968) and Costa Cardol (1989).

is something original, inextricably linked to the historical period in which it sees inception, and peculiar of the institution it relates to.

Italy's 1865 unification laws are bear witness to the most famous episode of the Italian administrative integration process. Those laws, which would have opened way to configuring the Italian institutions over the years, are still rightfully celebrated although they only provided the abstract definition of unification.[15]

2.3 Asymmetric Effectiveness of Administrative Integration Within Different Relevant Sectors in the EU

In 1971 the EU issued their first Procurement Directives, which in Italy would become a law only 6 years later (law 8 August 1977, No. 584).[16] The complexity of the Italian regulatory system on procurement, however, required a much longer period (more than 20 years) for the effective implementation of the aforementioned directive. Actually, the main changes in the Italian procurement system owe to the European Union Court of Justice (EUCJ).[17]

The EUCJ, in fact, provided an interpretation of the directive and "configured, in accordance with the European legal culture" some important legal institutions (i.e., bodies governed by public law) and concepts (i.e., in-house providing mode, cooperation between public administrations, relevant market; public service and goods providers; construction and/or public service concession, and other). All this with a view to clarify and better define the EU Procurement Directive so that it could be implemented effectively in all the EU Member States.

By providing an interpretation that is reminiscent of the "the best pages in the book of history" of the Constitutional Courts of the EU Member States' National, the EUCJ proved being able of thoroughness and innovativeness, which are necessary to successfully pursue any integration process.

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[15]Benvenuti (1969). See also *Amministrare*, Issue no. 1/2015, entirely dedicated to the administrative unification laws, with contributions by Aimo (2015), Bonini (2015), Tosatti (2015), Mori (2015), Soresina (2015), Merusi (2015), Polsi (2015), Consito (2016), Tigano (2016) and Papadopoulou (2017) regarding the theories that have developed concerning the democratic legitimacy of the European Union. For a critical view of the theory of the triple legitimacy in Europe and its relationship with the participation of the (European) citizen, see Weiler (2017). On the role of citizens, see Van de Walle (2018); Regulation n. 1408/1971/EEC of the Council 14.6.1971, *on social security of workers (employees and self-employed persons) and their families moving within the Community*.

[16]Directive n. 71/304/EEC of the Council 26.7.1971; Directive n. 71/305/EEC of the Council 26.7.1971, later law 8.8.1977, n. 584.

[17]Directive n. 92/50/EEC of the Council 18.6.1992, public procurement of services; Directive n. 93/37/EEC of the Council 14.06.1993, public procurement of works; Directive n. 93/36/EEC of the Council 14.06.1993, public procurement of supplies. Racca (2014b), Racca and Cavallo Perin (2014) and Ponzio (2016).

Indeed, the legislative and judicial integration in question is generally regarded as one of the most successful and advanced, and other sectorial aspects are also praiseworthy. Nonetheless, still low is the percentage of contracts above the EU relevance threshold (20%) in Italy.[18] Furthermore, the EU cross-border participation is also negligible (1.6%).[19]

Far from being structural, the reason underpinning such an outcome depends on the nature of the administrative acts and on the role of the functions in charge of defining the organizational framework of the Member States within the EU legal order: because the EU directives are general and abstract while the EUCJ's judicial acts only apply as case-law, the jurisdiction in question can be implemented effectively only to some extent.[20] The integration process actually depends on the public administrations, managing the procurement process (outsourced) and defining the threshold of each contract (thus deciding whether it is within the scope of the EU directives). Consequently, the implementation of the European single market is impacted by public administration demand and policies. Integration in relevant markets, in fact, essentially depends on the cooperation among national public administrations and EU institutions through administrative cooperation leading for example to the creation of cross border public demand sides and other aggregated public demand strategies.[21]

[18]EU Commission, Commission staff working paper, *Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation*, I, http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/er853_1_en.pdf, 27.

[19]EU Commission, *Communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions*. Making Public Procurement work in and for Europe, COM(2017) 572 final, Strasbourg, 2017, http://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0572&from=EN.

[20]Racca (2015).

[21]For the affirmation of an "obligation to cooperate" on national central administrations (art. 197 TFEU): Directive n. 2006/123/EC of the European Parliament and the Council of 12.12.2006, on *internal market services*, wh. no. 105, art. 29, par. 1°; Art. 17, Regulation n. 450/2008/EC of the European Parliament and the Council of 23.04.2008, *Community customs code*; Racc. 2009/524/EC of the Commission of 29.06.2009, *measures to enhance the functioning of the internal market*. See Lottini (2012), Lafarge (2010) and Sutherland (1992). See art. 298, TFEU on the existence of an "*open, effective and independent*" *European administration*. See D'Angelo (2016) and de Leonardis (2016); European Parliament, *Towards an EU Regulation on Administrative Procedure*?, 2010 in http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/432743/IPOL-JURI_ET(2010)432743_EN.pdf.

2.4 Integration Among Public Administrations: Organizational Capacity and Principle of Subsidiarity

Since the unification of Italy, many institutions and rules have remained nearly the same.[22] In the public procurements sector a European set of rules, not at all standing aloof from the cultures of the Member States, has emerged.

As mentioned earlier, the "in house providing mode", the "administrative cooperation",[23] the "aggregation of public procurement", and the "concession of works and services and all the forms of suppliers selection" all represent continuity in administrative law culture, which stemmed in national contexts yet has flourished in a European field of knowledge.[24]

Indeed, the Public administration's organizational capacity is a key factor in pursuing and achieving the EU cultural goals steered toward integration. Public administrations may also play a significant role in market integration, to some extent, through the innovation of their contractual strategy and the reconfiguration of their purchasing power.[25]

The EU Directive forbidding Member States to prohibit to use the framework agreements of another Member State thus implies the possibility for a national Public administration to apply such provision effectively, and reshape their cross-border procurement strategy.[26] Such a general and abstract provision, however, requires administrative acts to be issued by contracting authorities so as to meet public needs or demand, and define the EU Member States' procurement strategies.

The cooperation among the Public administrations of different Member States can take place in various ways, for example it may be occasional or permanent, convention-based or structural as happens with European Groups of Territorial Cooperation (EGTC).[27] Aside from ECTCs, cooperation is also possible through "other established entities under EU law" or "bodies governed by public law".[28] It should be remarked that this kind of cooperation is likely to require to overcoming legal and language barriers, and also the applicability of a national law which is not

[22]See the "*Europeanization of administrative law*": Schwarze (2012) and Harlow (2006). The purpose is to find common principles and values to create a global administrative law of the EU, which is "generally regarded as the most sophisticated of international political regimes, possessing the most developed transnational legal order."

[23]Artt. 6 and 197 TFEU. Auby and Dutheil de La Rochère (2014a, b), Chiti (2010, 2011) and Bassi (2004).

[24]See Cavallo Perin (2014) and Merusi (2013).

[25]Such as the subdivision in national lots noticed to all the participating undertakings, which are encouraged to search for synergies with others: law 17.2.1884, artt. 3, 38. Rostagno (1887) and Harlow and Rawlings (2007).

[26]Directive n. 2014/24/EU, art. 39, § 2. Ponzio (2016) and Racca (2014a, 2015); D.Lgs 18 April 2016, n. 50, art. 43.

[27]Directive n. 2014/24/EU, art. 39, § 5. Cavallo Perin and Racca (2016).

[28]See the case of the *European Health Public Procurement Alliance—EHPPA*, consortium created under French law in 2013 in order to facilitate cooperation and exchange of information.

that in force where the contract shall be fulfilled.[29] The effectiveness of a legal order and above all its level of integration, therefore, essentially depends on the organizational capacity of the public administrations involved in its sphere of application.[30]

Organizational capacity and the principle of subsidiarity apply as requirements to national and EU public cooperation networks as well.[31] This entails that the competences of each institution that is part of a network shall be defined. And also that the appointment of any institution as subject managing functions or services depends on their suitability, which is to be measured based on the aforementioned principles (Art. 5, TEU; Art. 118, paragraph 2, Constitution of Italy).

In a broader view, the cooperation among different national and/or European public administrations with relevant competences can give shape to networks operating in different sectors of interest. Although to a different extent, integration among Public administration is desirable in every sector, as is the legitimization of the action of each institution involved. The latter shall be regarded as part of a network, defined either by a national legal order or the European one.

A correct assignment of competences underpins the efficiency and efficacy of any action aimed at pursuing public policies. Above all, it actually puts into practice the legal order based on which competences are given, thus determining its effectiveness. Public administrations of the Member States may therefore turn into public organizations under the aegis of the European Union while still being national Public administrations.[32]

It should also be remarked that the effectiveness of the EU legal order, as well as that of every EU Member State, can be achieved with no need to have the same level of integration of public administrations within each relevant sector.[33]

From a juridical standpoint, the EU legal system implies that the capacity and subsidiarity of national organizational structures must be attained in the pursuit of

[29]Directive n. 2014/24/EU, wh. no. 73, recalling Regulation n. 593/2008/EEC, on the applicable law for contractual obligations, so-called Rome I. See. Racca (2014c) and Ponzio (2014). Regulation n. 1082/2006/EEC of the European Parliament and the Council 5.7.2006, in *OJEU*, amended by Regulation n. 1302/2013/EU of the European Parliament and the Council 17.12.2013 (in force from 22.6.2014). Carrea (2012), Cocucci (2008), Dickmann (2006) and Engl (2007).

[30]Racca and Cavallo (2011), Cudia (2016), Portaluri (2016), Primerano and Lamberti (2016) and Dimopoulos (2004).

[31]Case law: i.e., EUCJ, 8.02.2018, C-144/17, Lloyd's of London C. Agenzia Regionale per la Protezione dell'Ambiente della Calabria; EUCJ, 30.01.2017, C-360/15 and C-31/16, College van Burgemeester en Wethouders van de gemeente Amersfoort C. X BV**;** EUCJ, 20.12.2017, C-277/16, Polkomtel sp. z o.o. C. Prezes Urzedu Komunikacji Elektronicznej.

[32]Nigro (1957). On European administration as an "integrated organisation" of national and Union administrations see Saltari (2007), Porchia (2008), Chiti (2013), Franchini (2013) and Cimini (2016). The "administrative capacity" of national administrations "to implement European law" is a "matter of common interest" (art. 197, TFUE); cfr. Chiti (2010).

[33]Agriculture, currency, healthcare, education, consumer protection. D'Angelo (2016), Romeo (2016), Racca (2017, 2018) and Cavallo Perin and Racca (2016).

European Union policies (Art. 5, TEU).[34] The lack of organizational capacity of a national institution justifies the application of the principle of subsidiarity either through the attribution of competence from a specific organization or through EU public cooperation networks.

2.5 Administrative Protection of Fundamental Rights in the Integration Processes[35]

The administrative protection of individual rights is an example of integration among public institutions within the EU that has recently concerned healthcare and education in particular (Charter of Fundamental Rights EU, Art. 14 and Art. 35; Art. 6 TEU).

In the EU the legal and institutional protection of the rights to healthcare and education beyond borders has been regarded as resulting from the freedom of movement within the EU, granted to workers at first, and then to Member State citizens (Art. 45 TFEU and Art. 20 and 21 TFEU).

As mentioned in an earlier paper, it has been argued that the right of EU citizens to access good healthcare and education has been granted by means of legal instruments typical of the "Common Market",[36] no matter whether as an unwanted or unavoidable effect.[37]

The 'freedom of movement' right has been granted to workers and service providers (supply side) applying the non-discrimination principle (demand side).[38] That implied granting those people the right to access healthcare and education in

[34] *Ex multis*, EUCJ, 7.02.2018, C-304/16, The Queen (app. by American Express Company) C. The Lords Commissioners of Her Majesty's Treasury, 43; EUCJ, 20.12.2017, C-81/16 P, Regno di Spagna C. CE, 20; EUCJ, 6.09.2017, C-643/15 and C-647/15, Slovakia and Hungary C. Council, 38 ss.; EUCJ, 2.06.2016, C-27/15, preliminary question, Do. Po., and EUCJ, 8.09.2016, C-225/15, Pi.Pi. C. CRGT.

[35] Donato (2016); See on the concept of irrelevance among legal orders: Santi Romano (1918); for the different individual rights see Habermas (2015), Lehning (2001) and Spolaore and Wacziarg (2009).

[36] *Amplius* Cavallo Perin (2013).

[37] For the overcoming of the *status of* "marketbürger" by the European citizen: Ferrari (2007). The references above are linked to a monumental jurisprudential work—at first by the Court of Justice—which has acknowledged to European citizens the opportunity to get education and healthcare anywhere in the Europe Union. Thus, taking increasing advantage of an Internal Market or of a soft competition not only between institutions but even between the different systems existing in the Member States, according to an institutional occurrence opened to new interpretation the laws of the Treaty on the Functioning of the EU (TFEU, Art. 2 paragraph 5; and Art. 6).

[38] *Inter alia*: Iliopoulou (2007), Gagliardi (2012), Vesperini (2011), O'Leary (2011), Barnard (2010), Spaventa (2007) and Condinanzi et al. (2006).

their Member State of destination.[39] As a result, the "portability of social rights" in the EU territory entitles all European citizens to have accession to the services granted in the Member State where they may move into.[40]

The EU competence on areas of actions such as healthcare and education is limited to "carry[ing] out actions to support, coordinate or supplement the actions of the Member States", as set out in the Treaty on the Functioning of the European Union (TFEU, Art. 6).

Nonetheless, the EU competence should be interpreted as the faculty to put in place anything that is missing—in terms of healthcare and education—in the Member States by supporting them so as to make them able to provide for what they cannot grant on their own, but could do by relying on a network of organizations selected by the EU. In this perspective, the EU competence to provide for support, coordination, and supplement where needed, allows for a selection of institutions to be joining the network.

The Public Administration has been required to improve the effectiveness of their action in new ways. For instance, by ensuring the coexistence of different communities within their territory so as to foster development and enable each and every individual to exercise their fundamental rights.[41] Now as ever, administrative acts building on the analysis of 'big data' and adopted by a good, efficient, and far-seeing

[39] *European Health Strategy*, COM (2007) 630 of 23.10.2007; Art. 22, Regulation n. 1408/71/EEC of the Council 14.6.1971, on social security of workers and their family members; art. 20, Reg. 883/2004/EEC of the European Parliament and the Council 29.4.2004, social security systems; Dir. 2011/24/EU of the European Parliament and the Council 9.3.2011, *rights of patients to transboundary healthcare*. See EUCJ, 28.4.1998, C-158/96, *Kohll* c. *Union des caisses de maladie*; C. giust., 12.7.2001, C-157/99, *Smits e Peerbooms* c. *Stichting Ziekenfonds VGZ e Stichting CZ Groep Zorgverzkeringen*; EUCJ, 16.5.2006, C-372/04, *Watts* c. *Bedford Primary Care Trust*; EUCJ, 19.4.2007, C-444/05, *Stamatelaki* c. *Organismos Asfaliseos Eleftheron Epangelmation (OAEE)*; EUCJ, 5.10.2010, C-512/08, *Commission* c. *France*; EUCJ, 5.10.2010, C-173/09, *Elchinov* c. *Natsionalna zdravnoosiguritena kasa (NZOK)*. See Saitta (2016) and Costamagna (2011); EUCJ, 13.2.1985, C-293/83, *Gravier* c. *City of Liege*; EUCJ, 21.6.1988, C-39/86, *Lair* c. *University of Hannover*. From the affirmation of the economic freedom of movement of goods, capital and persons – the EU supranational legal order, of the Single Market, has certainly created the right of people to obtain everywhere the typical social rights to education and healthcare. Cfr. Conticelli (2012) and Cerrina Feroni (2012); for a first systematic overview on the issue: Consito (2009), Esteban et al. (2012) and Montalvo and Reynal-Querol (2005).

[40] Monti (2010) and Consito (2012). European accreditation affirms a responsibility of the EU for the quality of this recognized services and, consequently, EU provides also for a selection of national organizations capable of ensuring "a high level of human health protection" (TFEU, Art. 168, paragraph 2), "quality education" (TFEU, Art. 165, paragraph 1), "the development of a European dimension of Education" (TFEU, Art. 165, paragraph 2), aimed at "the improvement of public health, the prevention of illness and diseases and the elimination of sources of danger to physical and mental health" (TFEU, Art. 168, paragraph 1, 2nd sentence).

[41] Taylor (2001).

Public Administration can prevent and settle conflicts.[42] That may ultimately lead to actually ensuring the fruition of individual rights.[43]

These days some remarks set forth in the Italian Constitution, therefore, appear as true as ever: to avoid prejudice to the constitutional legal order, the Public administration as a whole and its constituent institutions shall not keep being inadequate for a long time (Const., Art. 118, paragraph I) otherwise maladministration may become systemic (Const., Art. 97, paragraph II). The key role of the Public Administration in protecting fundamental rights must thus be acknowledged: only the potential and concrete effectiveness of Public Administration can lead to the effectiveness of the constitutional legal order as a whole.

It has been affirmed that there is no good Public Administration without a Constitution (Italian Const., Art. 97, paragraphs I and II).[44] Nonetheless, we may also argue that there is no Constitution without good Public Administration, which shall essentially be regarded as a capable and efficient organization turning abstract yet fundamental rights into reality.

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[42]On the State as "protagonist of the 150 years" with the performance of provisions and the exercise of functions "at the service of development": Melis (2015).

[43]Cfr. Ranelletti (1904), Chiappetti (1973) and Benvenuti (1994).

[44]Allegretti (1993, 1996). In the sense which emphasises "the standpoint of the administration as interest to service or anyway as objective result which all offices must strive to achieve" see Trimarchi Banfi (2007). In general, on the right to a good administration see Chevalier (2014), Rabinovici (2012), Trimarchi (2011), Ponce Solé (2011), Galetta (2010) and Chiti (2005).

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Chapter 3
Evolution of the Principles and Rules on Administrative Activity

Carlo Marzuoli

Contents

Abstract The chapter analyses the most significant aspects of the evolution of the discipline of administrative action and relations between public administration and citizens in Italy, over the last 50 years. The changes concern the conception of the public interest and administrative discretion, the implementation of the principle of legality, the centrality of the administrative procedure, the wider use of powers and acts of private law, the rules designed to allow greater efficiency in the exercise of various types of control of private activities, the "new" rights (participation in the

C. Marzuoli (✉)
University of Florence, Florence, Italy

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procedure, transparency of public administration, the right of access), and the civil liability for unfair damages. The author points out that there are still shortcomings and contradictions in Italian administrative law, but that it is deeply changed and improved, because it is more respectful of the values of the Italian Constitution and of European Union law.

3.1 Introduction

The most important administrative laws of the Kingdom of Italy (1861) were issued in 1865. Those were Law No. 2248 of 22 March 1865, including seven attachments, and Law No. 2359 of 25 June 1865, on expropriation on grounds of public utility.

Such laws were the subject of the Centenary Conference held in Florence in 1965. In the past century, two events of great significance took place: firstly, the transformation of the Italian State from monarchy to republic (1946) with the signing of the new Constitution (1948); and secondly, the gradual establishment of European legal systems (1951–1957).

Yet by 1965, 17 years after the new Constitution was introduced and eight since the Treaty of Rome, administrative law, as it concerns powers, acts and activities, remained unchanged from the tradition inherited from the laws of 1865. Regarding the aspects in question, the Constitution was largely bypassed, despite many scholars having highlighted its particularly innovative character. As for Community law, this had yet to gain any significant presence and therefore received little attention.

The next 50 years were characterised by a slow but continuous discovery and penetration of the principles and norms of the Constitution (first) and of European Law (later). There are two basic paths, and they cross often: the reconsideration of the institutions and fundamental notions of administrative law (with respect to administrative power, procedure, relations with citizens and new rights and responsibilities) and the use of private law models for governing the activity of public administrations.

The most influential points of reference are: the principle of legality; the principle of sound administration (Article 97 of the Constitution), the principle of impartiality (also Article 97 of the Constitution); the principle of publicity and the principle of transparency; the principle of due process; the principles of reasonableness, proportionality and reliability; the principles of good faith and of correctness; the principle of subsidiarity; the principle of *neminem laedere* (not causing unjust damage unto others, Article 2043 of the Civil Code); the principles of Community law (today European) to which the fundamental law regarding administrative activity refers, Law No. 241 of 7 August 1990 (*New rules concerning administrative procedure and right of access to administrative documents*).

Many of those principles derive from tradition, but have seen more extensive and incisive developments; others are new or relatively new; some are written (as in the