Essays

Rule of Law: A Normative Ideal and Its Implications for the Italian Public Administration

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Abstract

The article discusses the relevance of the Rule of Law for the Italian public administration. It opens by observing that the Rule of Law is a more demanding notion than usually assumed in the Italian discourse, a normative ideal encapsulating a specific and challenging rationale. More precisely, the rationale of the Rule of Law as a normative ideal is to be found in the beneficial tension between two sides in the organization of legality, both to be considered as in the interest of the community and the citizens: the law produced by political institutions, on the one hand, and some 'other' law beyond the purview of the public power, on the other. Such understanding of the Rule of Law is at times echoed by the reflection of a limited number of administrative law scholars particularly sensitive to legal change. As for the legal institutes usually associated with the Rule of Law, most of them are aligned with such rationale. But it would be appropriate to establish a clear and direct link between the Rule of Law as a normative ideal and its concrete manifestations in the Italian administrative system.

I. The Rule of Law and the Italian administrative State

In the first quarter of the XXI century, the Rule of Law has increasingly gained relevance in the academic, legal and political discourse on Italian public administration. *To begin with*, part of the public law scholarship has recognized since the early 2000s that administrations are no longer subject to legislation only, as assumed by the traditional understanding of the principle of legality. Instead, they are also subject to general principles and secondary rules, as well as to principles and rules laid down by European, international and global sources: a legal development which has been interpreted as implying a redefinition of scope and requirements of the principle of legality and has led to the emergence in the Italian legal order of a wider principle of the Rule of Law (or, for others, *règle de droit*).[1] Second, administrative courts have registered the changing features of legality when taking

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[1] For a clear-cut formulation of such interpretation, S. Cassese, 'Le basi costituzionali', in Id, *Trattato di diritto amministrativo*, *Diritto amministrativo generale* (Milano: Giuffrè, 2nd ed, 2003), I, 174, 220-222; see also M. D'Alberti, *Lezioni di diritto amministrativo* (Torino: Giappichelli, 4th ed, 2019), 38.

into account the 'composite law'[2] governing administrative action, that is the plurality of sources laying down administrative provisions, and addressing the uneasy issue of their prioritization. While it is difficult to find explicit reference to the Rule of Law in administrative case-law, the notion of *Stato di diritto* may have served as a tool to connect the traditional understanding of legality to the new reality of a multiple set of domestic and European, international and global norms providing *ex ante* guidance as to the criteria for administrative action.[3] Third, the Rule of Law has become a key component of the political and institutional debate on administrative reform, for example in relation to anti-corruption strategies and the justice system, also as a result of the influence exercised by the European Union (EU),[4] which recognizes the Rule of Law as one of its founding values, common to the Member States.[5]

Unsurprisingly, such process reflects a wider trend of contemporary Western polities, where the Rule of Law is gaining the status of an overarching principle, based on widely-shared values and directly relevant to the administrative organization and action.[6] The parallel developments in the global governance,[7] as well as the initiatives promoted by several European regimes and societies, such as the Venice Commission of the Council of Europe and the International Federation for European Law,[8] confirm the success of the concept and its potential both for domestic and global administrations.

In spite of the apparently unproblematic nature of the process, however, the growing relevance of the Rule of Law for the Italian administrative State raises a number of uneasy issues. How should the Rule of Law be defined, beyond the loose statements made in the institutional discourse? How has it been operationalized in the Italian administrative system? And which assessment should be given of the current state of affairs?

Such questions are crucial if one wishes to clarify the relevance of the Rule of Law, its significance and meaning for Italian public administrations. But in answering these questions, one must essentially find that the Rule of Law is a more demanding

[2] For such concept, see G. Palombella, 'Theory, realities and promises of inter-legality. A Manifesto', in J. Klabbers and G. Palombella, *The Challenge of Inter-legality* (Cambridge: Cambridge University Press, 2019), 363.

[3] See eg F. Patroni Griffi, 'Giustizia amministrativa: evoluzione e prospettive nell'ordinamento nazionale e nel quadro europeo' 2020, available at www.giustizia-amministrativa.it

[4] Such influence is exemplified by the annual reporting cycle on the Rule of Law, coordinated by the European Commission: see European Commision Comunication COM/2023/800 of 5 July 2023, available at www.euro-lex.europa.eu.

[5] Art 2 of the Treaty on European Union [2008] OJ C115/13.

[6] G. Napolitano, 'The Rule of Law', in P. Cane et al eds, *The Oxford Handbook of Comparative Administrative Law* (Oxford: Oxford University Press, 2021), 421.

[7] M. Macchia, 'The Rule of Law and Transparency in the Global Space', in S. Cassese ed, *Research Handbook on Global Administrative Law* (Cheltenham: Elgar, 2016), 261.

[8] See eg the 'Rule of Law Checklist', adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) and FIDE, 'Mutual Trust, Mutual Recognition and the Rule of Law' (The XXX FIDE Congress in Sofia, Congress Publications, 2023), I.

notion than usually assumed in the Italian discourse, a normative ideal encapsulating a rather specific - and challenging - rationale. While most of the legal institutes usually associated to the Rule of Law are aligned with such rationale, it would be appropriate to establish a clear and direct link between the Rule of Law as a normative ideal and its concrete manifestations in the Italian administrative system.

II. The Historical Roots of a Normative Ideal

As it is known, the birth and development of the *Stato di diritto* across continental Europe in the XIX century was based, among other things, on a rather instrumental and controlled understanding of the administrative machinery. It is not by chance that the famous Weberian[9] representation of the legitimacy of such a 'State' was due to the form itself of legislation as a rational/formal production giving rise to any public power whatsoever. It provided that its branches could only act under predetermined rules of action. What makes the citizen obey the modern State is, according to Weber, the faith in the form of legislation: on one side, 'political', on the other, formalizing, authorizing and channeling public administration.[10] The very logic of the principle of legality lies at the heart of the modern State.

Such continental understanding relied on the 'legislative State', as well as on the related doctrines that had placed legislation at the top of the legal order, so that *la loi* in France or *die Herrschaft der Gesetzes* were the highest, sovereign sources endowed with the monopoly of 'law'. Rights of the individuals, if any, were the product of such sovereign will, as the positivist dogmas established it and could be withdrawn by the same will, no legal obstacle withstanding. Nothing could exist if not through legislation. The Weberian praise to such state of affairs was due to the value of the 'rule by law', which meant yet a progress beyond arbitrariness, unpredictability, uncertainty, of the exercise of public power. The rule by law mirrors very closely our known principle of legality, and of course it does give a basic, necessary ground for the administrative State, which can be anything but the justice by the Kadì,[11] and should point to avoidance of 'material' conflicts and value-polytheism, which would pave the way to arbitrary power.[12]

However, something was missing: the Rule of Law.

When wondering how continental constitutions affect the structure and operation of public administration, one should look at the ways they approximate

[9] See his masterpiece, M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, I (Berkeley: University of California Press, G. Roth and C. Wittich eds, 2013).

[10] A brief reminder and overview of Weberian influence is found in W. Drechsler, 'Good Bureaucracy: Max Weber and Public Administration Today' 20 (2) *Max Weber Studies*, 219 (2020).

[11] M. Weber, *Economy and Society* n 9 above, 139, explains that Kadì justice meant to him 'adjudication according to the judge's sense of equity or according to (…) other irrational means of law-finding'.

[12] More at length on this framing of the European continental State, G. Palombella, 'The Rule of Law as Institutional Ideal' 9 *Comparative Sociology*, 4-39 (2010).

the Rule of Law as a liberal, English, ancient ideal. Once rights and principles other than sovereignty (which includes the democratic will of the People) are enshrined in the higher law, the functioning of the public administration is asked to be subjected to the same principles, whether the sovereign will of the people is actually mirroring them or not.

The Rule of Law conveys the prospect of limiting jurisgenerative, normative power, an idea that is also visible, in its English roots, also through the insight and picture drawn by Albert Venn Dicey.[13] Its sense and scope along the line that links Henry de Bracton (and the coupling of *gubernaculum/jurisdictio*), Edward Coke (cf Bonham's case), the Federalist Papers and eventually the American 'judicial review', expose – beyond various differences – a more general unitary logic. There is a plurality of sources that concur to determine the inherent diversity of the 'law of the land'. While sovereignty is complex and is shared between the Crown, the Lords and the Commons, the law also develops through the common law and the courts.

In assuming the liberal import of the ancient English ideal as a valuable one, that we would wish to adopt, its main, core meaning lies in the idea that the State power (*gubernaculum*) does not monopolize the production of law.[14] Traced back to Bracton and elaborated upon by MacIllwain,[15] the couple *gubernaculum-jurisdictio* reflects the conviction that the sovereign (power) has a right and a duty to govern by law, but that its jurisgenerative strength has to coexist with some other law that he has no legal power to overwrite. The *jurisdictio* includes judicial achievements, judge-made law, established customs and conventions, the common law in general. On the other hand, there is the *gubernaculum* side, bringing about the ethics and the policies legitimately decided by the will of the sovereign, who has the right to honor his duty to govern. It can fairly be said that the tension between these two poles can be protected through institutional devices configuring legality in such a way as to pursue and approximate the ideal of the rule of law, demanding the non-disposability of justice (*jurisdictio*) by the rule of the sovereign. At the same time, the rule of law would prevent the opposite from occurring: it is completely misleading to think that some law of itself can rule by displacing the legitimate directive will of the sovereign (say, through an aristocracy of judges, the infringement of the essential core and scope of political sovereignty by the diktat of, say, some epistemic community). Such an image is not, per se, anything which is proper to the Rule of Law.

[13] A.V. Dicey explained the traits and properties that he deemed typically 'English': that no man can be punished for what is not forbidden by the law, that legal rights are determined by the ordinary courts, and that 'each man's individual rights are far less the result of our constitution than the basis on which that constitution is founded': A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 8th ed, 1915; Indianapolis: Liberty Classics, 1982), *Introduction*, LV.

[14] This understanding of the Rule of Law and its supporting arguments draw on G. Palombella, 'The Rule of Law at Home and Abroad' 8 *The Hague Journal on the Rule of Law*, 1-23 (2016).

[15] C.H. McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press, 1940), 85.

The normative ideal of the Rule of Law, because of its very nature, does not simply promise that some single, eight or more (famously Lon Fuller's)[16] requisites of procedure or substance, shall permanently be part and condition of law. More than that, it asks that law be upgraded as an organizational form structured to exclude the monopoly of one source, and capable of exposing an internal institutional relation as 'duality'. And many of the qualities that are often believed to capture the core of the Rule of Law, like, in the first place, non-arbitrariness, could be better placed within the legal-institutional premises of such a Rule of Law environment: outside of which they would merely prove to be miserable comforters (like it was in the pre-constitutional *Rechtsstaat* and the *Stato di diritto* referred to in the above). Our contemporary constitutional States, by enshrining commitment to rights and principles of equal legal force as the principle of sovereign rule (that is, with us, democracy), that the latter cannot legally conceal and reject, have well approximated such deeper and truer notion, which the public power of administration is today confronted with in its everyday practice.

III. The Rule of Law as Duality

The overall perspective on the Rule of Law more often echoed by the Italian public law reflection has attempted to come to terms with the changing features of the principle legality. In Italy, as in all contemporary legal systems, legality requires legislative authority for any administrative action. That is, admittedly, on the one hand, a complex statement today bearing deeper implication than in the past, and on the other the place for a platitude. Yet, a number of administrative law scholars particularly sensitive to legal change have stressed since the early 2000s that its meaning has become wider and richer over the years. The principle of legality should now be meant, on the basis of the constitutional framework and administrative case-law, as a principle requiring that legislative or secondary law provisions provide *ex ante* guidance as to the criteria for administrative action.[17] Moreover, as an effect of the opening of the Italian legal order to a multitude of regimes beyond the State, starting with the EU order, legality also implies that domestic administrations are subject to non-national norms. In such wise, legality expands the constraints on domestic administrations, which are no longer subject to national law only, but also to European, international and global norms,[18] and turns into a wider and more complex rule of (administrative) law. The need to go beyond the strict boundaries of legality and to rely on the deeper rationale of a limiting normative power lie at

[16] L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), chapter 2, lists generality, publicity, non-retroactivity, clarity, non-contradiction, constancy, and congruity as necessary for the law… to be law.

[17] See the overall reconstruction by S. Cassese, 'Le basi costituzionali' n 1 above, 216-222.

[18] ibid 221. In the non-Italian legal scholarship, see P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' 3 *Public Law*, 467 (1997).

the heart of this innovative and far-reaching reconstruction.

Admittedly, however, two different views co-exist in such framework. One is oriented to recognize the increasing protection against the exercise of public power. What matters, in this case, is administrative law's capability to structure and limit administrative discretion: in the continuous dialectic between power-establishing and power-checking historically inherent to and implied by administrative law, the rise of the Rule of Law is presented as a process of reinforcement of principles and rules aimed at keeping the exercise of administrative power under control and preventing and removing arbitrariness.[19] Another view points to the different 'formats of law'[20] on which the Rule of Law relies. In this perspective, the Rule of Law implies, on the one hand, the exploitation of the power-checking potential of administrative law, on the other hand, the recognition of different formats of law involved in power-checking, namely the law produced by national and EU political institutions and the law which does not necessarily reflect the 'governing' will of the polity but rather other less politicized, goals, like rights' protection.

On this view, the many faces of law interact and coexist that are known to us, like the law as the legal order of a State, the law as a transnational patrimony of common solutions to common problems (the *jus gentium* format that resonates in many international regimes, from human rights to the environment), the law as a multiversum of orders and disconnected sources (the false friend to the medieval organization of legalities), the law as a fabric of regulatory supranational entities, ruling the world from some kind of deracinated standpoints (the supranational and international authorities focused upon by- and labelled as- the Global Administrative Law realities).[21] The more the description of the legal worlds involved in today's legal issues is accurate, the more the Rule of Law, if meant just as a kind of connection between the principle of legality and (as the very form of) our venerable *Stato di diritto*, looks too narrow, one-sided, and all in all, devoid of the required grip on current realities. If one takes the whole scenario of legalities into account, the search for non arbitrariness in the exercise of power remains a fundamental premise. However, should the principle of legality in the domain of the 'legal State' (the notion constructed between the XIX and the XX century) be the notion to consider, then

[19] In a comparative perspective, this point is made by G. Napolitano, 'The Rule of Law' n 6 above, 427, who argues that 'the idea of the rule of law in administrative law always contains a fundamental liberal message. The common idea is that the administration (…) has to remain within the boundaries and respect the constraints established by the law'.

[20] On the concept of 'formats of law' see G. Palombella, 'Formats of Law' n 1 above, 23, stressing the diversity of legal patterns at work in the globalized legal space.

[21] B. Kingsbury, 'The Concept of "Law" in Global Administrative Law' 20 (1) *European Journal of International Law*, 23-57 (2009); Id et al, 'The Emergence of Global Administrative Law' 68 *Law and Contemporary Problems*, 15 (2005); S. Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' 37 *New York University Journal of International Law and Politics*, 663-694 (2006); M. Zurn, 'Global Governance and Legitimacy Problems', in D. Held and M. Koenig-Archibugi eds, *Global Governance and Public Accountability* (Oxford: Blackwell Publishing, 2005), 144.

we must acknowledge that in tackling administrative power, non-arbitrariness was precisely the *acquis*, the given result of that well-ordered state, where no public powers could ever exist lest the State legislation had created them and defined the clear rules of their exercise. Now, our normative target requires much more. That is because the concurrence of multiple legalities and the constitutional progress of our legal orders have led us closer to the core of the Rule of Law, which, as from the foregoing, implies a law capable of limiting the law of the sovereign, and putting forward countervailing normativities; furthermore, the Rule of law implies the shift from the (pre-constitutional) Euro continental understanding as something inherent to the organization 'of the State' (*Stato di diritto*, that is, a form of the State) toward an ideal concerning directly the organization and the 'structure of law', not 'of the State'.[22] Of course, on this conjunction, there is no question of merit, which directly engages with the dispute between formal versus substantive conceptions of the Rule of Law. The institutional organization that structures the law is at stake, not a question of which contents the 'law' has to embody, nor of which formal-procedural requirements are to be in place. although all of these are consequentially included.

With this in mind, the efforts to confine the public administration within the borders of the principle of legality are somehow misleading, since they might severely detract from the appropriate knowledge of the real state of affairs, where problems like non arbitrariness or accountability are still at the forefront, but dwell in a scenario of higher complexities, plurality of sources and orders, multilevel normative rationales, up to the point that the very notion of accountability or arbitrariness needs to be checked and measured by entirely new criteria and more than once, upon diverse levels of reference (for example, the human rights regimes, the European common market, the State constitutional obligations, the international duties, and so forth and so on).

The second of the two views co-existing in the Italian reflection on the emergence of the Rule of law, in other terms, highlights both the evolution of legality and the relevance of more than one format of law in controlling the exercise of administrative power.[23] Indeed, the rationale of the Rule of Law as a normative ideal is to be found in the oscillation, or otherwise the beneficial tension between the defense of the administrative power of the State and the 'other' law that works as a counterpoise, including its judicial[24] counter-majoritarian side, both protecting interests and rights of the citizens. The balance holds together the political issue (and

[22] It is worth mentioning here the words of the political scientist Giovanni Sartori who stressed how the difference that matters is the following: while within the *Stato di diritto*, the State is subject to a law that is its own, with the Rule of Law (as an English setting) it is confronting a law that is not its own G. Sartori, 'Nota sul rapporto tra Stato di diritto e Stato di giustizia' *Rivista internazionale di filosofia del diritto*, 310-311 (1964).

[23] See in particular S. Cassese, 'Le basi costituzionali' n 1 above, 221; M. D'Alberti, *Lezioni di diritto amministrativo* n 1 above, 38.

[24] On which see G. Palombella, 'Access to Justice: Dynamic, Foundational and Generative' *Ratio Juris*,121 (2021).

separation of powers) as well as certain rights of citizens and minorities. However, the Rule of Law controls the two cases, not only the latter. The Rule of Law is the balance, whose ideal prescribes the 'duality' of the sides, by allowing for the right of the government to rule and for 'another law, beyond the purview of the public power', that works on the side of individual protection.[25]

The idea of the duality, the logic of legal counterpoises, have some complexities, that can hardly be overestimated. In order to illustrate this point, one can refer to one among several climate litigation cases, the Italian *Giudizio Universale* case held by the Tribunal in Rome.[26] In this case, the Italian court had something to say about the limits that prevent the judicial branch from overstepping the threshold of its jurisdiction. According to the Tribunal, the action of the State when countering or, worse, omitting the necessary actions to counter climate change belongs in a political realm. Therefore (judicial) ordering something like State's action would be tantamount to infringing the separation of powers. Now, at some higher level of authority and power, there is, admittedly, a thin line between administrative and political acts, since both imply some understanding of the autonomous will of the State. Nuances are relevant here. It eventually matters whether the high administration simply implements a 'political' notion of environmental protection (and the relevant duties) in some disputable way, or it walks on its own, lacking the ends-defining legislative decision on the 'political' level. However, one can safely assume that the assessment of the measures implementing the obligations to fight climate change calls into question the administrative State, at the point where, as noted, the 'line' is blurring. Needless to say, each time the line is blurring, consistency and features of the Rule of Law are in trouble.

Again, the tussle between rights (and interests) of the citizens (including individuals, minorities, and so forth), on one side, and the exercise of power by the 'State', on the other, often sit on an uncertain border. Such circumstances generate the need for a third actor in play, that is, the judicial authority, an actor rightly conceived of as a Rule of Law vigilant custodian. This notwithstanding, the judiciary can be itself abridging the separation of powers, as the Tribunal of Rome has reminded us. Despite the rhetoric on the judiciary as the ultimate safeguard of the Rule of Law, it is true, both in principle and in practice, that the judiciary can undermine the balanced organization of law and power. The question of 'preserving the political autonomy of the sovereign State' is indeed one relevant instance.

When considering the potential or factual limitations affecting the free exercise of the autonomy of the administrative State and its sovereign decision-making, one should understand how the exercise of that 'autonomy' is legitimate and whether 'limitations' to it are themselves to be accepted or otherwise should be rejected, in so far they themselves alter and undermine the rule of law.

In the present legal scenarios, where domestic and supranational legalities

[25] See G. Palombella, 'The Rule of Law at Home and Abroad' n 14 above, 1-23.
[26] Tribunale di Roma 26 February 2024 no35542, avaible at www.dejure.it.

intertwine so deeply and steadily, the proliferation on the supranational sphere of the well-known regulatory administrative entities capable of rule-making, within the remit of global governance, impinges upon the spheres of States. It also detracts from States' political control and jeopardizes the (conditions of) traditional exercise of political sovereignty.[27] Threats to political sovereignty are flourishing in the supranational context, where the icon of the separation of powers should be of even higher concern. Considering the Rule of Law only a matter of domestic balance looks somehow outdated.

Should the separation of powers be considered, as it were, an essential component of a sound understanding of the Rule of Law ideal, then the 'political' sovereignty of the State should be legitimately valued (and protected) both in the extra-State context and in the domestic sphere. While, on the latter, the judiciary could trespass the threshold of political decision making, on the former, the supranational context, it is the external power of foreign, 'deracinated' regulatory authorities to threaten the political sovereignty of the State. One should note that these are both faces of the 'political question', so to say. The political question, be it either a shield against overwhelming external regulatory intrusion or the specious protection of an impenetrable State power is a most significant case in point.

The decision of the Rome Tribunal, regardless of its controversial technicalities, enlightens the old domestic idea with which the 'political question' resonates: in order to save the core of the *Stato di diritto*, the 'power' of the State should not be encroached upon. Where the separation of powers is held to be the case, even judicial authority could be asked to withdraw, and despite the fundamental right to climate (and to healthy environment) might be at issue. However, climate litigation has best proved that the failure of politics, the lack of appropriate policies, the missing exercise of adequate governance on one side can be legitimately addressed by the judiciary, on the other end up into inadequate or wrongful exercise of administrative power (be it through action or omissions).

Judge Aiken in the known *Juliana* case rightly described how that litigation against the 'State' was no ordinary lawsuit:

> 'Plaintiffs challenge the policies, acts, and omissions of the President of the United States, the Council on Environmental Quality, the Office of Management and Budget, the Office of Science and Technology Policy, the Department of Energy, the Department of the Interior, the Department of Transportation ('DOT'), the Department of Agriculture, the Department of Commerce, the Department of Defense, the Department of State, and the Environmental Protection Agency ('EPA')'.[28]

Clearly, one can understand that *Juliana* is a case against the government as

[27] See G. Palombella, 'Theory, realities and promises of inter-legality' n 1 above.

[28] *Juliana and others* v *United States* (2017D Or). Judge Aiken addresses as well the objection from the 'political question doctrine' and resolves against it (see the decision at p 6).

a whole, involving the entirety of its administrative responsibilities. And it is not by chance that in July 2021, it was France's highest Administrative Court (*Conseil d'État*), to rule in the *Grande-Synthe* case,[29] that the government had to take further and better suited measures to pursue effective climate mitigation.

IV. Whose Rule of Law?

Whose Rule of Law - whether the international or the domestic - is a further issue that needs to be taken into account. The *Taricco* case, involving the Italian Constitutional Court and the European Court of Justice can be useful a sample. The Italian Constitutional Court engaged in a delicate confrontation with the Court of Justice. In short, according to the latter, Italian rules on 'prescription' (time-limitation) for tax crimes concerning VAT end up facilitating the commission of such crimes to the detriment of the interests of the European Union. Therefore, where the stipulated 'prescription' limitation period 'proves in a considerable number of cases to be insufficient to repress serious fraud to the detriment of the financial interests of the Union', which depends on the failure to collect VAT in the national territory, the criminal court should proceed in the trial, omitting to apply the limitations of the prescription period.[30]

The Italian Court, wishing to avoid ruling to the contrary, preferred to raise the question for a preliminary ruling before the European Court, essentially submitting to it-but in an interrogative form-its objections, which relate to the sensitive nature of criminal law in the context of a State system.[31] Noting that in the Italian legal order, the statute of 'prescription' limitations has a substantive and not merely procedural character, the Court emphasizes that it is therefore not merely available to the discretion of a judge; therefore, in addition to offering the defendant a higher level of protection of fundamental rights, the 'prescription' remains subject to the principle of legality enshrined in Art 25, para 2, of Italian Constitution with the consequence that the relevant rules must comply with principles of certainty and clarity, and of antecedence to the act committed, whereas the European Court would leave to the judge's determinations on a case-by-case basis and on the basis of a parameter (a 'considerable number of cases') that is entirely vague and uncertain.

Therefore, the Court asked whether it should be understood that what the Court of Justice of the Union requires should apply

> 'even when' the failure to apply the prescription 'lacks a sufficiently determined legal basis'; 'even when in the system of the member State the

[29] Conseil d'Etat, 1 July 2021 no 427301, available at www.legifrance.gouv.fr.

[30] Case C-105/14 *Taricco and others*, Judgment of 8 September 2015, available at www.eur-lex.europa.eu.

[31] With the Order no 24, decided on the 23rd of November 2016, the Italian Constitutional Court raised a preliminary reference before the Court of Justice of the European Union, with regard to the interpretation of art 325, paras 1 and 2 of the *Treaty on the Functioning of the European Union*.

prescription is part of substantive criminal law and subject to the principle of legality';

'even when such failure to apply the prescription's limitation is contrary to the supreme principles of the constitutional order of the member state or to the inalienable rights of the person recognized by the constitution of the member State'.[32]

The Rule of Law here, in so far as it conveys the principle of legality as well as connected guarantees for the individual persons, is under threat because the financial administration of the European Union has to defend substantive European economic objectives which depend on associative obligations of the Member States. The Rule of Law *of the EU* might risk to conflict against the Rule of Law *in a Member* State. The answer from the Court of Justice was precisely avoiding such risk, by accepting the importance of preserving the principle of legality in a member State and the substantive idea of rights' protection (also under a due process principle, and the separation of powers).[33]

It is to be noted that not a 'political question' but a rule of law issue was raised by the Italian Court. The question concerning the European administration and the Member State was discussed, in truth, by appealing to a 'common' ideal of the Rule of Law, even if such a concept was not given any paradigmatic definition.

In this concise excursus, the issue of the Rule of Law, as from the above, does not fully fit the milestone currency in public administrative law: the principle of legality. The transformations in the view and the legal structure of the public administration lead to some different sense, other than the power of legislation under which the public administration founds its generative umbrella.

V. Operationalizing the Rule of Law

It is now appropriate to briefly discuss the way in which the normative ideal of the Rule of Law, as presented so far, is or should better be manifested and operationalized in the Italian administrative system.

A first point to make in this regard concerns the legal institutes usually associated with the Rule of Law. The Italian administrative law scholars engaged in the reflection of the changing features of legality have identified a number of principles and rules which are said to substantiate the *administrative* Rule of Law. Three of them are prominent: judicial review, the duty to give reasons and procedural fairness.[34] They are distinct but inter-connected requirements. Judicial

[32] ibid

[33] Case C-42/17 *M.A.S* and *M.B.*, Judgement of 5 December 2017, available at www.eur-lex.europa.eu.

[34] S. Cassese, *Oltre lo Stato* (Bari: Laterza, 2006), 109.

review developed in continental Europe in the XIX century and represents the first historical manifestation of the Rule of Law, based on the idea that administration must be accountable before courts.[35] In the Italian legal system, it is now formalized in Arts 24 and 113 of the Constitution. The duty to give reasons and procedural fairness were elaborated in the XX century: the former with the view both to facilitating judicial review and to ensuring that the reasons for the action have been appropriately considered by the proceeding administration; the latter to allow defence in individualized adjudications and to reach a correct outcome. In the Italian legal order, the duty to give reasons and procedural fairness have been first established by administrative courts since the early years of the XX century and then envisaged by the Italian Administrative Procedure Act (legge 7 August 1990 no 241).[36] Other reconstructions have further articulated such fundamental framework. In a comparative law perspective, for example, four main dimensions of the rule of law have been listed, namely authorization and guidance, predictability, coherence and justification, procedural fairness, independence and effectiveness of judicial review.[37]

What is important to highlight, however, is that such principles and rules are not *per se* the coherent realization of the normative ideal of the Rule of Law. Their essential rationale is rightly identified as ensuring control over administrative action. In the continuous and dynamic cycle of interaction between power-establishing and power-checking, they aim at structuring and tempering administrative discretion *beyond* the requirements stemming from the principle of legality. Yet, the expansion and reinforcement of power-checking should be considered as a manifestation of the Rule of Law only provided that principles and rules of administrative action, as well as individual rights, are recognized as envisaged not only by legal provisions produced by political institutions, but also by another kind of law *excluding the monopoly of political institutions*.

Admittedly, most of the legal institutes usually associated with the Rule of Law are aligned with its essential rationale, in so far as they are laid down by an eclectic set of legal sources, ranging from domestic and European Union (EU) legislation to non-legislative sources such as European general principles and Treaty

[35] P. Craig, 'Formal and Substantive Conceptions' n 18 above, 467.

[36] See respectively Art 3 and Arts 7-13 of the legge no 241/1990. For a reconstruction of the overall process of judicial elaboration and legislative consolidation of the duty to give reasons and procedural fairness, M. D'Alberti, *Diritto amministrativo comparato* (Bologna: il Mulino, 2nd ed, 2019), 162.

[37] G. Napolitano, 'The Rule of Law' n 6 above, 428-436. In this comparative reading, the requirement of a legal authorization for administrative action, usually grounded in constitutions and declaration of rights, is 'the most important dimension of the rule of law in administrative law' (428), while predictability, coherence and justification concern the quality of administrative norms. As for procedural fairness and judicial review, they refer, respectively, to the quality of administrative decision-making and more precisely to a fair consideration in the procedure of private actors' affected interests, and to the establishment and functioning of an independent and effective system of judicial review.

and constitutional articles. They reflect, in other terms, the duality which is at the core of the normative ideal of the Rule of Law. In the case of procedural fairness, for example, the right to be heard and the other procedural guarantees are not only envisaged by specific legislative provisions, but also derived from non-legislative sources, such as Art 47 of the Charter of Fundamental Rights of the European Union, Art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the overarching principle of the Rule of Law established by the Court of Justice in landmark judgements such as *Kadi I*.[38]

In order to establish a clear and direct link between the Rule of Law as a normative ideal and its concrete manifestations in the Italian administrative system, in any case, two moves would be appropriate. First, the Rule of Law not only should be understood as a normative ideal, but as such it entails consistent incarnations, as those that our European constitutional legal orders have afforded in the process of their further improvements between the XX and XXI centuries. The way the normative strength of the Rule of Law works can depend firstly on its generative use as a 'background principle', one that affects the organization of law in a legal order and that imbues the law-making power as well as shaping more specific principles and rules. Second, the legal institutes that have been previously recalled are to be thought and conceptualized as institutes operationalizing such background principle and normative ideal.

The EU legal system offers an useful starting point in this regard. Although the Treaties do not refer to the Rule of Law as a 'principle',[39] Art 2 TEU stipulates that the Rule of Law is both a value common to all Member States and one of the values on which the EU is founded. Moreover, the Court of Justice held since the 1980s that judicial review and its detailed principles should follow from the Rule of Law. In *Les Verts* v *Parliament*, it famously established that

> 'the European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty,[40] which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions'.

This perspective was then further developed in *Kadi I*, where it was held that

> 'the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a

[38] See Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others* v *Yassin Abdullah Kadi*, Judgment of 18 July 2013, available at www.eur-lex.europa.eu.

[39] See however L. Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law'14 *Hague Journal on the Rule of Law*, 107 (2022).

[40] Case C- 294/83 *Parti écologiste "Les Verts"* v *European Parliament*, Judgement of 23 April 1986, available at www.eur-lex.europa.eu, para 23.

> community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement'.[41]

Beyond legal provisions, the internal dynamism of the Italian legal order is crucial to fill the gap between the rule of law and its manifestations. The key role is obviously that of administrative courts, which should not only enforce the existing legal provisions, but also ensuring a kind of counter-majoritarian protection of interests and rights of the citizens. This could be done by recognizing the importance of the Rule of Law as a principle of the EU legal order and the existence of a number of general principles of EU law established by the European Court of Justice and informed by the Rule of Law. In addition to this, courts should clarify the instrumental relationship existing between particular legal provisions of Italian administrative law and the general principles of administrative law, by pointing to the fact that the legislator has articulated a number of legal institutes rooted in European and national general principles, rather than expressing a purely political will.

Courts, in any case, are not the only institutional actors involved in the process of clarification of the relationship between the Rule of Law and its manifestations. Another key actor is the administration itself. The main challenge faced by domestic administrations is to recognize the Rule of Law rationale in all its richness and to take into account such rationale in a plurality of diverse policy-sectors and policy delivery techniques. Operationalizing the Rule of Law is not simply an exercise in correctly applying the existing legal provisions of administrative law, but a more complex task having two different sides: on the one hand, ensuring power-control in the exercise of concrete and particular types of administrative action, that is, adapting the rationale of power-control to the specific features of the policy and regulation at stake; on the other, substantiating the dual dimension of the Rule of Law, that is, adapting the existing legal provisions in the light of an overarching principle excluding the monopoly of law by the legislative source and rooting individual protection *vis-à-vis* public administration in a plurality of (legislative and non-legislative) sources. In the reality of administrative action, this task raises at least two uneasy issues. The first relates to the identification of the norms that are relevant for the operationalization of the Rule of Law. Such norms may be laid down by a variety of legal sources, legislative and non-legislative, internal and external to the domestic legal order. The second issue concerns the prioritization of the relevant norms, which implies a passage from a composite law to the consequent, specific, context-dependent ordering of the relevant norms.[42] Addressing these

[41] *Kadi I*, n 38 above, para 316.

[42] On the theme of operationalizing the 'composite' law fabric of the case at stake, when the Rule of Law is a matter of multi-orders sources, A. di Martino, 'The Importance of Being a Case. Collapsing of the Law upon the Case in Interlegal Situations' 7 *The Italian Law Journal*, 961 (2021); in this journal see also E. Chiti, 'Administrative Inter-Legality. A Hypothesis', 985; G.

issue has to be an important part of scholarly contribution to the practice of the public administration in the operationalization of the Rule of Law in the Italian administrative system, beyond the loose and, after all, rather inaccurate statement that public administrations are subject to law.

Palombella, 'Inter-Legality: On Interconnections and 'External' Sources', 943.