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The Rulemaking Power of Administrative Agencies: Crisis of Legality, Rule of Law and Democracy

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ABSTRACT The actual role of the fourth branch in the triggering of the current economic and financial crisis, together with the recent case law and theoretical developments in the area of regulation, are compelling evidence that a reflection on the powers of independent administrative agencies is critically needed. The importance of such reflection is no less linked to the duties of the regulatory State vis-à-vis the constitutional State – a case in point is when the agencies take on quasi-judicial and quasi-legislative power.

Laying special emphasis on this latter aspect, the present study deals with the questions concerning the rulemaking power of regulatory agencies. It reflects the most recent trends in administrative law, and includes an analysis of the relations between the normative layers of contemporary legal systems, the emergence of new regulative frameworks, the loss of the traditional territorial scope by administrative rules, the strengthening of the fourth branch, the balance between consensus and command-and-control, and the dialectics between politics and law.

The adopted comparative law perspective intends to profit from the Americanization of European legal systems and the evolution of the U.S. administrative state. Regulations, which are regarded as policy tools of the regulatory state, clearly express the recent mutations in constitutional and administrative law.

The significance and scope of regulatory discretion shall be discussed first and then it will be contextualized within the trend toward delegalization. After considering the meanings, forms and expressions of delegalization as well as its consequences to the administrative rulemaking power, the limits of regulatory discretion will be addressed. The A. concludes that the rulemaking power of agencies is now confronted with the very foundations of the constitutional State: Rule of Law, separation of powers, and democracy.

KEYWORDS: administrative agencies, regulation, rulemaking power, democracy, rule of law.

Introduction

The changes which have affected administrative law over the last twenty years transmuted it into a troubled – or at least into a *more* troubled – area of law. The war against terrorism, at first, and the world economic crisis, at last, provided the need and the opportunity for reviewing the agenda of national States and the modes of action in Public Administration. Such strong link between administrative law and the social and political transformations show the accuracy of Professor Hauriou's (1900, at 50) century-old statement: "Our State is being changed." [1]

Notwithstanding the differences that still keep the European (German-French or Anglo-Saxon) and the North-American

[1] Equally drastic, see Lawson, 1994, 1231: "[t]he post-New Deal administrative state is unconstitutional, and its validation by the legal system is nothing less than a bloodless constitutional revolution".

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administrative systems apart, there is evidence showing the increasing connection between those models:[2] one of those elements is precisely the establishment of regulatory agencies to which the legislature accords large competences, namely the rulemaking power. If in the United States the agencies' origins can be traced back to the 19th century,[3] in Europe they only emerge in the last decade of the 20th century, mainly owing to influence from U.S. Law.

The rise of European regulatory agencies occurred side by side with a trend toward deregulation, privatization, market liberalization and good governance. The traditional model of organization of public utilities – founded in public ownership, command-and-control system and assignment of oversight functions to bodies (directly or indirectly) dependent on central government – has been gradually replaced by a new paradigm of State. Once liberalized and privatized, public utilities are subjected to competition law, which inaugurated a new era in policy-making marked by an articulation of deregulation with re-regulation. Far from being left to the "invisible hand," the market is now shaped by public action, in order to promote competition and to ensure public utilities.[4] Furthermore, market regulation is now assigned to regulatory agencies, usually independent[5] from direct governmental control and economic operators alike.[6]

The weight of regulatory agencies is due to European Union Law.[7] In other words, the creation of regulatory agencies in the context of European administrative systems is a symptom of the Europeanization of administrative law in the organizational field. In addition to the "institutional-organic integration" (Saltari, 2007, 202) that springs from European supranational administrative agencies,[8] the European Directives require the institution of national regulatory agencies in several economic sectors (energy – electricity and gas –, communications, transport infrastructures) and such agencies often work under EU coordination.

Viewed from the Rule of Law, separation of powers and democracy perspective, the significant powers accorded to agencies cause considerable constitutional perplexities. The globalization of public law made such perplexities a problem not only to U.S. Law but also to the European constitutional and administrative law. The discussion about the meaning, scope and limits of agencies' powers proves of crucial importance in the present conjuncture, since many authors, despite disagreement among them on the role of regulation to the emergence of the economic crisis, they do not shy away from regarding regulation as one of the co-conspirers toward the global economic crisis. Under one line of analysis, the crisis is a result of excessive public regulation: in spite of allowing for diversity in the market behavior, the

[2] On the comparison between U.S. administrative law and European administrative law, and on the reciprocal opportunities for improvement, see, e.g., Geradin, 2005, at 11; Rose-Ackerman, 1994a, at 1206, 1207; Shapiro, 1997, at 276.

[3] The ICC, created by the Interstate Commerce Act, has been traditionally identified as the first regulatory agency. See Breger and Edles (2000, at 1117-1119); Rabin (1986, at 1194-1196); However, this position is not unanimously held, for, as Jerry L. Mashaw argues, "the first regulatory agency established outside of any executive department at the national level was not the ICC; it was the Patent Office, created ninety-seven years earlier". See Mashaw (2012, at 5); On the origins and evolution of the American regulatory system, see also Law and Kim (2011, at 116-125).

[4] *See* Christian Koenig (2009, at 1082).

[5] It must be remarked that regulatory agencies in Europe are not the only type of independent administrative bodies. Along with them, there are independent administrative bodies whose functions consist of protecting civil rights against public powers. See generally Chapus (2001, at 229), Merusi and Passaro (2003, at 61), Moniz (2012, 756-762).

[6] On the origins of European agencies, see Majone (1996, at 47); Stoffäes (1998, at 25-34, 38-49); *Cf.* also Finger (2011, at 13, 116-125). Nevertheless, it is understandable that, in Europe, the predecessors of modern regulatory agencies were found in 19th century Britain (*see* Breger and Edles (2000) at 1119-1122), even though modern British legislation on this was passed only in 1948 (Craig, 2012, Administrative Law 11-003). The first theorization on privatization/liberalization of public utilities and regulatory agencies is due to a British economist too. In the twenty-ninth Wincott Memorial Lecture, on October 14th, 1999, Stephen C. Littlechild, drawing upon his experience as Director General of Electricity Supply with responsibility for the Office of Electricity Regulation, argued the possibility of converting public utility monopolies into privately owned but regulated industries (Littlechild, 2000, 18). As far as public utilities served by infrastructure networks are concerned (e.g., in the energetic sector), the solution would consist of separating the network of supply from that of transmission and then create an independent public regulatory agency which would promote competition in supply and transmission activities, without ties to the political conjuncture. To this purpose might contribute both the creation (even if artificial) of a competition for/in the market and the provision of rights of access to the network (*see id.* at 22-33). Within this scenario, regulatory agencies would have two essential duties: to promote competition and to protect the interests of customers (*see id.* at 35). Concerning the future of regulation, the Author argues that the development of competition would progressively reduce government powers and increase regulatory independency until the ultimate goal of reducing the role of regulation is achieved (*see id.* at 41).

[7] See Directive 97/67/EC of the European Parliament and of the Council of December 15th, 1997, on Common Rules for the Development of the Internal Market of Community Postal Services and the Improvement of Quality of Service, art. 22, 1998 O.J. (L 15) 14; Directive 2001/14/EC of the European Parliament and of the Council of February 26th, 2001, on the Allocation of Railway Infrastructure Capacity and the Levying of Charges for the Use of Railway Infrastructure and Safety Certification, art. 30, 2001 O.J. (L 75) 29; Directive 2002/21/EC of the European Parliament and of the Council of March 7th, 2002, on a Common Regulatory Framework for Electronic Communications Networks and Services, art. 3, 2002 O.J. (L 108) 33; Directive 2003/54/EC of the European Parliament and of the Council of June 26th, 2003, Concerning Common Rules for the Internal Market in Electricity, art. 23, 2003 O.J. (L 176) 37; Directive 2003/55/EC of the European Parliament and of the Council of June 26th, 2003, Concerning Common Rules for the Internal Market in Natural Gas, art. 25, 2003 O.J. (L 176) 57.
Not every independent agency created by transposition measures issuing from these Directives is independent from government departments: the independence presupposed by EU Law involves primarily separation from economic operators (and not – or, at least, not always –independence from government).

[8] See, e.g., Shapiro (2011a, at 113, 116-125). The European supervision can integrate also national structures (such as the European System of Central Banks, constituted by the European Central Bank, together with the national central banks.

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tendency of economic regulation points toward a "*homogenized* system effect" and toward organizing the market under one single vision (the one of the regulator), which is the "fatal weakness" of economic regulation (Friedman, 2009, 152-157) . Other Authors blame the crisis of regulatory inaction, on the grounds that agencies either did not have the necessary powers to face the crisis, or when they did they did not use them and so they failed to conduct their own risk assessments and instead they trusted credit-rating agencies' evaluations,[9] which encouraged excessive risks to be taken (Napolitano, 2010, 571) , and irresponsible behavior on the part of certain economic operators (Stiglitz, 2009, 331-333).

As far as the rulemaking power is concerned, the question concerns both the agencies' gradual expansion (even concentration) of powers (legislative, but also judiciary) and the legitimacy of administrative bodies to produce rules substantially analogous to statutes issued by parliaments. If "behind every theory of administrative law lies a theory of state" (Harlow and Rawlings, 2009, 1), one question merits serious debate: is the Rule of Law, Democracy and the Constitutional State compromised in some important respect when regulatory agencies are committed an extensive power to make rules? Considering that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny,"[10] one wonders whether the face of the State has so dramatically changed to the point of having allowed the intrusion of new tyrants into democratic constitutions.[11]

Regulation and rulemaking power: Regulatory Discretion

Regulation and regulation law turned out to become key concepts (Baer, 2004) in contemporary administrative law, insofar as they permit to conceptualize and systematize the answers and the legal constructs that try to handle the consequences of privatization and liberalization (Wahl, 2006, 84). The scope and (above all) the high-profile tasks required from regulation entail that administrative bodies be provided with wide-raging powers whose exercise cannot be confined to the traditional instrumentarium of the forms of administrative action.

Rulemaking: regulations as regulatory tools

The emergence of the regulatory state demanded regulators to have modes of action that permit regulatory policies to be implemented. Traditionally, those modes of action are adjudication (in continental Europe it might be termed "administrative act") and regulations.

Far from being easy to define, the concept of regulation covers a wide range of meanings which, as Professor Susan Rose-Ackerman stresses, result from the "interdisciplinary nature of regulatory reform." (Rose-Ackerman, 1994, 1207). As a matter of fact, in English, the word *regulation* conveys both the meaning of task and form of action.[12] On the one hand, it clearly suggests a specific new public mission in which very different activities are involved, all of them aiming at market supervision, at the promotion of free and fair competition, and at ensuring the essential goods and services (see Danwitz, 2004, 977; Badura, 2005, 106; Säcker, 2005, 180; Blersch, 2007, at 11; Gonçalves, 2010, 97; Machado, 2011, 203) , all this within the framework of the separation of responsibilities between the State, the economic operators and the society (Schuppert, 2011, 479). On the other hand, a regulation constitutes a source of law issued by an administrative body to which a statute (commonly its organic statute) has committed a rulemaking power in order to implement statutory law. According to the second meaning, a regulation is the product of the exercise of rulemaking power.

Owing to their character as rule of conduct and decision parameter (Larenz, 1995, 71),[13] regulations are instruments of regulatory policy (Magill, 2004, 1386-1390). Furthermore, owing to regulations' general and abstract character, rulemaking does not simply encompass a regulatory policy but really builds and shapes it.

[9] Evaluations which are not entirely trustworthy since, in the early 1970s, the business model of the rating agencies changed from the "investor pays" model to the "issuer pays" model – a fact that brought with it the nefarious consequence of turning the agencies into hostages of the bond issuers: "the effect of the bond issuer's power to choose among them [rating agencies] mimics the effect of bribing an agency to grant an optimistic rating" (White, 2009, at 389, 393).

[10] The Federalist No. 47 (James Madison), at 239 (Lawrence Goldman ed., 2008).

[11] Recent developments in U.S. administrative law led Chief Justice John Roberts to raise the same question: "[i]t would be a bit much to describe the result as 'the very definition of tyranny', but the danger posed by the growing power of the administrative state cannot be dismissed." *See* City of Arlington, Texas, et al. v. Federal Communications Commission et al., 133 S. Ct., 1863, 1879 (2013) (Roberts, C.J., dissenting).

[12] The text implicitly suggests that this is a singularity of English language. In other languages, the terms which express those two realities are not identical: e.g., and respectively, *regulation/règlement* (French), *Regulierung/Verordnung* (German), *regolazione/regolamento* (Italian), *regulação/regulamento* (Portuguese), *regulación/reglamento* (Spanish).

[13] making the case that underlying those two characters is the validity claim of a legal rule and its purported application to analogous cases within the spatial and temporal scope of a legal rule (see Larenz.1995, 71).

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The fact that regulations are a source of law and, therefore, a general command instrument (Schmidt-Assmann, 2006, 52), implies that they also bind the agencies that issue them, in accordance with the maxim of Pittacus of Mytilene *legem patere quam ipse fecisti*. This characteristic, which underlies the so-called self-binding force of regulations, increases compliance of relevant public values such as uniformity, reliance, predictability, rationality, and coherence of administrative actions. However, regulations have a double face: besides being a source of law, they also constitute a form of administrative action, a facet that places them between statutes (with which they must comply) and decisions (which must obey to regulations).

Despite statements to the contrary by many scholars, the choice between rulemaking and adjudication actually depends on several factors (Shapiro, 1965, 921). In addition to the procedural requirements (rather important in the U.S. legal system),[14] the decisive answer lies in factors such as the intended approach to regulatory policymaking (focusing on structural measures, or highlighting the specificities of single cases),[15] limited arbitrariness and capriciousness of agencies' future decisions (West, 2005a, 655), or the scope of judicial review.

The advantages of rulemaking are vividly epitomized in National Petroleum Refiners Association v. FTC, "[T]here is little question that the availability of substantive rule-making gives any agency an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate. More than merely expediting the agency's job, use of substantive rule-making is increasingly felt to yield significant benefits to those the agency regulates. Increasingly, courts are recognizing that use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication."[16]

Despite the various reasons why regulators prefer rulemaking over adjudication, the truth is that the administrative rulemaking power raises delicate constitutional and administrative questions, since regulations correspond to so-called delegated legislation. By virtue of the typically extensive regulatory discretion of agencies' actions in the regulatory state, administrative rulemaking sometimes dangerously borders on the exercise of substantive legislative powers. Thus, we must discuss whether regulations issued under such a wide discretion violate the material foundations of the constitutional state.

Regulatory discretion

While very widespread in the United States, in Europe the concept of "regulatory discretion" appears for the first time in German case law (*Regulierungsermessen*). In a 2007 decision concerning the Federal Network Agency (*Bundesnetzagentur*), the Federal Administrative Court (*Bundesverwaltungsgericht*) stated that, where a complex discussion between public and private interests is taking place, the legislature grants the agency with broad scope for choice and conformation.[17] That is to say, regulatory discretion expresses the powers of agencies as they exercise evaluation prerogatives in a risk context. It postulates technical assessment and forecast toward strategic decision-making (*hoc sensu*, decisions that denote a regulation strategy); consequently, judicial review over actions carried out in the exercise of rulemaking activity must be deferential (Schmidt-Assmann, 2006, 141; Attendom, 2009).

Regulatory discretion discloses itself both in adjudication and in rulemaking procedures. The relation between regulatory discretion and adjudication is reflected in the way the legislature ascribes decision-making power to agencies and, simultaneously, in the kind of judgment required from regulatory administrative decisions.

The first problem is related to the "atypicalness" of administrative decisions in continental Europe. One of the main features of administrative law in continental Europe is the "principle of typicalness" of administrative decisions, according to which determination of their effects is a legislative competence (Sandulli, 1989, 616; Giannini, 1996, 319). At present, their scope is restricted to the delimitation of the interests to be pursued (or the results to be accomplished), while granting administrative bodies the power to shape the effects of their decisions.

The specific reasoning of regulatory decisions must also be pointed out, which leads to the second question. This kind of decisions entails interpretation of largely indefinite concepts and economic and strategic assessments, projections

[14] See, e.g., Magill (2004, 1390-1393). *Cf.* also West (2005a, 659-664), reflecting on the reforms of rulemaking procedures.

[15] See Rachlinski (2005, 529), arguing that regulation by adjudication and regulation by rulemaking creates different cognitive contexts; therefore, the choice will depend on whether the regulatory issue demands a general and abstract rule or whether it requires only a concrete decision.

[16] National Petroleum Refiners Association v. FCT, 482 F.2d 672, 681 (D.C. Cir. 1973).

[17] See Bundesverwaltungsgericht [BVwG] [Federal Administrative Court] Nov. 28, 2008, Neue Zeitschrift für Verwaltungsrecht 575, 2008 (Ger.).

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as well as prognoses.

Similar questions appear in the rulemaking arena. That is why Professor Aldo Sandulli stressed as early as in 1970 that governmental regulations were just a limited field of the regulations universe, thereby suggesting, in a rather premonitory way as far as the European context is concerned, that the rulemaking power of regulatory commissions would play a major role in the change of scope of administrative regulations (Sandulli,1970, 51) . In this domain, statutes only act as a formal source of law, whereas the definition of the substantial or material discipline is incumbent on the regulation (Foà, 2002, 106). Delegation of rulemaking power to agencies is connected, above all, with the highly technical nature of their tasks, which can not easily be carried out by the legislature. In this sense, the broad rulemaking power of the agencies is tantamount to exercising a normative function, and it expresses fulfillment of the (juridical) obligation to regulate (also by means of rules) the market (Politi, 2001, 4) . The point is whether such an extensive rulemaking power is compatible with the standards set out by modern constitutionalism – a question that I will try to answer in the following pages.

Regulatory Discretion and Delegalization

The full scope of the rulemaking power of agencies stands out as one of the most striking questions. Assuming that the delimitation of the boundaries of regulatory powers is a legislative competence, it is not surprising that the relations between statutes and regulations depend on the diachronic and synchronic relations between legislative and executive branches.

The principle of legality: in the beginning was (only) the statute…

The birth of administrative law is strongly linked with the formation of the principle of legality. Initially, it was understood as intimately intertwined with the concept of law (statute law) included in the article VI of the 1789 *Déclaration des Droits de l'Homme et du Citoyen*, according to which the law is the "expression of general will" (*expression de la volonté générale*). Statutes were, therefore, the perfect instrument to protect citizens from abusive behavior on the part of the Public Administration. Three consequences stemmed from the sacred character of statutes presupposed in this understanding: i) the statute was viewed as the result of the sum of individual wills; ii) it was designed to meet general purposes rather than to satisfy individual demands; iii) law came to be seen as coinciding with statutes enacted by the parliament (see Brunet, 2005, 6; cf. Cimellaro, 2006, 110-111). The absolutization of Montesquieu's and Locke's theory of separation of powers laid the foundations to the idea that the other public powers – including the Executive – were founded in statute law, regarded as the legal framework that limited their acts and as the criterion for the legitimacy of their actions (see Bronze, 2006, 360).

Within this context, the role played by the principle of legality is understandably a corollary of the idea that statutes enacted by parliaments are at the basis of the whole political construction. Subordination of the remaining branches to the legislature is the birthmark of European (continental) administrative law. The centrality of statutory law was the result of being considered as "expression of the general will" and as protection of the individual rights of citizens.

This liberal understanding of the principle of legality includes three dimensions (Soares, 1981, 171-175) .

First, the subordination of Public Administration to statute law took on a negative sense, according to which administrative bodies could not act against statutes; otherwise, their actions would be illegal and, therefore, void. This negative sense conveyed the principle of primacy of law, and it was grounded on the concept of law as an ethical instrument for protection of fundamental rights.

Second, according to the positivist approach law only consisted of statutory law, and its object was uniquely the legal discipline of liberty and property. The path to the construction of a material/substantive concept of statute (Jellinek, 1919, 231-242; Mayer, 1903, 92) and of statutory reservation was then open. Rather than abandoning the political views of the *Ancien Régime* and the *Polizeistaat*, the dogmatic evolution of the statutory reserve shows that the center of divine attributes was only transferred from the King to the Nation and to its expression: the statute (Soares, 1955, 63-65).

Third, the creation of a material/substantive concept of statute and the identification of parliamentary legislation with law entailed an important consequence to administrative action that neither affected liberty nor property: the liberty of administrative action *præter legem* (beyond statute law). This liberty involved three main areas: administrative organization (which included juridical relations within administrative bodies), positive obligations toward citizens (very limited, at first, but incremented from the Industrial Revolution onwards) and administrative discretion (acknowledged to the Administration in every matter toward which no particular content had been determined by the legislature). In those spaces free-from-law (*hoc sensu*, free-from-statute), administrative bodies possessed an originary power, a scope of action that nearly equaled the unlimited discretion of the

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Polizeistaat.

Crisis of Legality

This view was soon overtaken by reality. The idea that the "state is only a special dimension of society" (Soares, 1986, 69, 71) replaced the typically positivistic separation between the State and Society which characterized the birth of administrative law. After the First World War, new tasks were assigned to Public Administration, thereby giving rise to the "administrative State" (Peters, 1952 and 1965). Far from only enforcing statute law enacted by parliaments, Public Administration had a significant role in shaping the social order. As the Welfare State was consolidating itself, novel missions were allocated to administrative bodies and as a consequence of that they took on new responsibilities with regard to social security, health care, culture and education.

Owing to a "gigantic need for norms",[18] the new conjuncture triggered an exponential growth of the legislative (the "legislative motorization") (Soares, 2008, 153-154). Such "overlegisla-tion" (Ruffert, 2012, 1166) entailed parliamentary intervention in all fields of social life. So much so that modern democracies are presently in the middle of a process of legislative inflation, frequently associated with the degradation and disappearance of the traditional timelessness that characterized statutes, now transformed into instruments for a (certain) majority to satisfy its ends.[19] Insofar as it affects not only the quantity of statutes but also their extension (see Bronze, 2006, 547-548, n. 280, with references to Portugal and Hisparis, 2005, with references to France, Germany, Belgium, United Kingdom, Russia and the Czech Republic) this phenomenon could be termed "administrativization" of law, the sole objective of which is to address even more specific and technical problems in the most efficient way.

The de-sacralization of statutes generated a major consequence: no longer would the Administration be strictly subject to parliamentary statute law.

The sidelining of legality is one of the main features of administrative law of regulation. In fact, traditional subordination of administrative action to law (*hoc sensu*, statutes enacted by national parliaments), which marked the birth of administrative law in the 19th century, has been overtaken by the booming of international and administrative sources (some of them lacking binding force). Accordingly, the role of statutes is devalued and they tend to gradually be replaced by regulations which now rule most of the social-economically relevant matters. In other terms, the crisis of legality has triggered delegalization.

Delegalization: meanings and forms

"Delegalization" is a very polysemic word. The etymology points toward the antonym of "legalize": delegalization is, in that sense, the action of making something illegal (Temperley, 2000). Viewed from another angle, delegalization means the increasing citation of nonlegal sources in judicial decisions. Among legal scholarship, the word is connected with interdisciplinarity and the ease of access to nonlegal information, and so it suggests a "breakdown in the line between the legal and the nonlegal with respect to law itself." (Schauer and Wise, 2000, 510-515). Delegalization also refers the tendency toward reducing the number of laws and regulations (and, consequently, toward lessening authority impositions on citizens), translating an answer to the excessive and the complexity of laws and regulations that undermine the Rule of Law itself (Breger, 1996-1997; Kennedy, 1978-1979 and 1979-1980).

However, by delegalization I mean something different, namely, the trend toward providing administrative bodies (namely regulatory agencies) with powers "to operate outside the reach of law." (Werhan, 1996, 466). One of those powers is precisely the power to make regulations which, according to a particular evolution of the "dynamics of the normative system," (Sandulli, 1970, 14) are trying to progressively substitute statute law enacted by parliaments.[20]

[18] The Author alludes to a crescendo toward a massive legislation. See Ossenbühl (2007a) 159; cf. Eichenberger (1982) 21-25.

[19] The Author remarks that law is no longer the expression of the general will, for it became the "expression of a legislator's will", often influenced by lobbies; in one word, law is the "expression of a policy", cf. Terre, 1980.

[20] Although the exercise of *legislative* powers by *Governments* (and not only by Parliaments) is also distinctive of this particular context, I will not include it in the concept of delegalization. As a matter of fact, there are Constitutions that allow the Government to issue legislative acts: in such cases, the acts enacted by the Government are not regulations, though they have legislative value – the very same value of Parliament acts. That is to say, although these norms have a governmental source, still they remain rules enacted by the legislative branch, because either the Constitution allocates normal legislative powers to the Government (and to the Parliament), or permits the transfer of legislative powers from the Parliament to Government, or, under exceptional circumstances, allows the provisional exercise of legislative powers by the Government, while requiring later ratification of the Parliament. See Pizzorusso (1997, 678).
Among European countries, the Portuguese Constitution, for instance, is unique in granting the Government the normal legislative powers. In Portugal, legislative power is shared by the Parliament (Assembleia da República) and the Government: except for matters within the scope of the statutory reserve, the Government may legislate about everything, by using the "Decree-Law" (Decreto-Lei) form; in that case, Government measures have legislative value. Unlike other European legal systems, this governmental legislative power is not the result of parliamentary delegation; on the contrary, it constitutes an originary constitutional competence. See Constituição da República Portuguesa [C.R.P.] [Constitution], Apr. 2, 1976, Diário da República n. 155, Aug. 12, 2005, art. 198 (Port.). See Canotilho (2004, 95).
In Spain, some of the situations labeled as "legislative delegation" clearly determine the cases when the Cortes Generales grant the Government the power to

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If it should be considered that regulations play a new and significant role as sources of law, as I will argue later, this should not jeopardize the material foundations of the Rule of Law and democracy (Schmidt-Aßmann, 1993). At any rate, the legal circumstances that determine contemporary exercise of rulemaking powers by administrative agencies are entirely different from those when the legislative and executive fields were clearly separated from each other. This situation is paving the way to "delegalization", a word that broadly conveys the progressive sidelining of parliamentary statutes in favor of other normative (but infra legem) sources of law.[21] Considering the mutability of the social basis of statutory law, unable as it is to address the flow of events, statutory law is being substituted by administrative instruments of regulation.

Delegalization is linked with the increasing importance and specificity of the public rulemaking powers assigned to non-governmental bodies and, naturally, to regulatory agencies. Nowadays, regulations are instrumental to decongesting parliamentary activity[22] as they meet the needs for technicality, flexibility and procedural acceleration (Bradley and Ewing, 2010, 623-624). Several are the situations in which wide discretionary rulemaking power is granted to the Public Administration (especially to the agencies): where the Parliament lacks expertise to enact rules on certain matters; where the issue at stake is extremely likely to change and the Parliament does not want to offer too rigid a solution; or where the measure has political costs that the Parliament does not intend to afford. This whole idea is progressively introducing mutations in the relations between the legislature and the Public Administration. In the same vein, the doctrine states that if "[t]here is no more characteristic administrative activity than legislation", the fact remains that "[a]dministrative legislation is traditionally looked upon as a necessary evil, an unfortunate but inevitable infringement of the separation of powers" (Wade and Forsyth, 2004, 857) .

Formal mechanisms of delegalization

As we have just seen, delegalization involves the sidelining of the statute and the corresponding strengthening of regulations, a phenomenon that can be expressed by two[23] formal mechanisms: "normative reference" and delegation. The main difference between these two models lies in that while the latter implies transfer of a normative task from the legislature to the Public Administration, normative reference concerns the broader scope of a normative power that is

enact norms with the force of law ("Legislative Decrees", Decretos Legislativos) for the purpose of drawing up texts comprising various articles (too complex to be debated in the Parliament) or to consolidate different legal texts into one. See Constitución Española [C.E.] [Constitution], B.O.E. n. 311, Dec. 29, 1978, art. 82, 85 (Spain). This possibility – known as "material legislative delegation" – aims at expanding the normative powers of the Administration and it modifies the normal arrangement of competences, where legislative acts are enacted by the Parliament (alone). See Garrido Falla *et al.* (2010, 731), Diez-Picazo, (1997, 731). Moreover, the Spanish Constitution states that, in the case of extraordinary and urgent need, the Government may issue temporary legislative provisions that shall take the form of Decree-Laws (Decretos-Leyes) and that may not affect the legal system of the State's basic institutions, the rights, duties and freedoms of the citizens, the system of Self-governing Communities, nor the general electoral law; those Decree-Laws must be immediately submitted to debate and voting by the entire Congress. See C.E. art. 86. See Gómez-Acebo Santos (1951) .

In France, the "Ordinances" (*Ordonnances*) enacted by the Government qualify as delegated legislation. According to the French Constitution, the Government, in order to implement its programme, may ask the Parliament for authorization, for a limited period of time, to take by Ordinance measures that are normally part of the statutory reserve. Those measures are issued by the Council of Ministers, upon consultation with the *Conseil d'État*, and they require further ratification by the Parliament. See 1958 La Constitution [Const.] art. 38. "Ordinances" are treated as regulations until they are ratified; after that, they retroactively take on legislative nature and value. The use of "Ordinances" points toward the constitutional delimitation between the scope of the statute ("domaine de la loi") and the scope of the regulation ("domaine du règlement"), because it allows for governmental interference in matters under the scope of the statute. See Chapus (2001, 665); *cf.* Delvolvé, (2005) on the abuse of the Ordinances.

On certain matters, the Italian Constitution consents, for a limited period of time and for specific purposes, a legislative delegation which authorizes the Government to issue "legislative decrees"; in that case, the Parliament must have established principles and criteria in a previous statute. See art. 76 Costituzione [Cost.]. However, article 77 states that, in extraordinary cases of need and urgency, the Government adopts provisional measures having force of statute law (provisional "decree-laws"), without a previous enabling statute. In those situations, the Government exercises its own legislative competence, rather than a delegated legislative power; on the other hand, the exceptional nature of the circumstances permits to overstep the border of statutory reserve. See Pegoraro *et al*. (2005); Baudrez (1997); Paladin (1997).

In Germany, the enactment of regulations with force of statute law is justified under exceptional circumstances. See, e.g., Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I, art. 119 (Ger.), in matters relating to refugees and expellees, pending settlement of the matter by a federal law. See Wolff *et al*. 1999, 354). Besides, German law comprises also another figure: the "assenting regulations" (*Zustimmungsverordnungen*), which consist of regulations relating to matters whose essentiality status (*wesentlich*) would demand an act of Parliament; however, the celerity and flexibility of regulatory procedures seem more appropriate to the specific situation and, therefore, the Government issues a regulation subjected to a mere parliamentary authorization. See Ossenbühl (2007a) at 261, 289.

[21] A broader meaning of this concept might also encompass one of the recent tendencies in European law: the replacement of national statutes by European sources of law. This phenomenon directly impacts on the exercise of rulemaking power by regulatory agencies: because the creation of national agencies is mainly an European law requirement, and since many of the tasks of the regulators consist of implementing European policies, their normative powers are not granted by national Parliaments, but instead by European sources of law that substitute national statutes. See Merusi and Passaro (2003) at 99.

[22] Stating that decongesting the legislature is the primary function of regulations. See Saurer, 2005, 205-206.

[23] A third mechanism may be identified: the one established by the 1958 French Constitution, which created a dichotomy between the "statute's domain" (*domaine de la loi*) and the "regulation's domain" (*domaine du réglement*). Based on constitutional provisions, this material separation between statute and regulation marked the decline of statutory law and its ensuing loss of influence to regulations.

The "regulation's domain" is enshrined in Article 37 and comprises matters such as civil procedure, energy policy or public utilities. It is limited by a residual clause; i.e., included in the "regulation's domain" are all subject matters that are not contained in the "statute's domain." As a relevant consequence of that, the Government may contest the admissibility (*opposer l'irrecevabilité*) of bills that fall outside the "statute's domain" and therefore undermine the "regulation's domain". Regulations enacted under Article 37 are called "autonomous regulations" (*règlements autonomes*), in opposition to the "implementation regula

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part of the executive function, but whose exercise depends on a legislative authorization that, in this particular case, is broader than it used to be.

As a mechanism of delegalization, normative reference may appear under several forms. It may include (a) situations where the statute establishes a substantive legal framework on certain subject matters while also stating the general principles that must be respected and assigning normative development to regulations; and (b) the cases where the statute allocates to regulations the task of defining the normative framework of a specific subject matter, without stating any material principles. This model is current in European Latin countries.

Different from normative reference is the delegation model, whereby a parliament transfers the rulemaking power to administrative bodies. This is what happens in German Law and in US Law.

In Germany, under Article 80 of the Basic Law, the Parliament can delegate its legislative competence to the Public Administration, in order to meet what the doctrine calls "deconcentration of legislative power." (see Ossenbühl, 2007a, 262; Ossenbühl, 2002). According to that norm, "The Federal Government, a Federal Minister or the Land governments may be authorized by a statute law to issue regulations. The content, purpose and scope of the authorization conferred shall be specified in the statute. Each regulation shall contain a statement of its legal basis. If the statutes provide that such authorization may be further delegated, such redelegation shall be effected by regulation."[24]

This clause stipulates that the *Verordnungen* (regulations enacted by the Executive under Article 80 GG) should not to be confused with the other forms of regulation under German Law (the *Vorschriften*, as an expression of self-organization, and the *Satzungen*, issued under Article 28, No. 2 GG, as an expression of self-government typical of certain administrative bodies) (Axer, 2000, 229-237; Wiegand, 2008, 140). The quoted Article 80 permits the Parliament (*Bundestag*) to delegate by statute its normative competence to the Executive, as a consequence of the refusal to attribute ordinary legislative power to the Government, owing to the fact that under the Basic Law the normative power is concentrated in the Parliament.[25] This legislative authorization must observe the conditions established by Article 80 of the Basic Law; that is to say, the authorization is constitutional only if it specifies the content, purpose and scope of the authority or, at least according to the Federal Constitutional Court (*Bundesverfassungsgericht*), if these elements can possibly emerge from the interpretation of the statute (see Ossenbühl, 2002, at 149, with indications of the decisions on this matter) . This kind of legislative delegation raises sensitive issues as to the meaning and scope of the rulemaking power of the Executive: actually, the regulations enacted under the legislative authorization are considered norms issued in the exercise of a delegated legislative power (and not in the exercise of the executive function). The *crux* of this constitutional problem is that of achieving the subtle balance between the practical need for regulations and the imperative of setting limits to legislative authorization (Axer, 2000, 16-175, 362-365).

This type of delegation is analogous (though not equal) to the delegation of quasi-legislative power accorded by the US Congress to agencies. However, the constitutional frame of reference here is quite different from that of the German Basic Law. In fact, Article I, § 1 of the US Constitution states that "all legislative powers herein granted shall be vested in a Congress of the United States," which could be understood (and it actually has been) in the sense that, since the Constitution has delegated legislative power to Congress, the latter could not redelegate it to administrative bodies. Although this theory is no longer held today, the possibility and the limits of rulemaking power delegated to agencies were the result of a jurisprudential construction (the non-delegation doctrine) and they do not appear explicitly in the

tions" (*règlements d'éxecution des lois*), which require a previous statute to found their emanation. The cited dispositions have also the meaning of creating a substantial concept of statute whose scope is mainly (although not exclusively) defined by Article 34.
At first sight, the constitutional text might induce the interpreter to conclude that the "statute's domain" is narrower than the "regulation's domain". Nonetheless, practical objections, politics and difficulties associated to a clear distinction, *in concreto*, between subject matters in the "statute's domain" and those in the "regulation's domain" lead to preclusion of a rigid application of the underlying logic of Articles 34 and 37. Besides, the decisions enacted by the *Conseil Constitutionnel* prevent the regulation from overstepping the subject matters in the "statute's domain", and vice-versa. In spite of this safeguard, the *Conseil Constitutionnel* admitted that a statute containing norms which by their nature correspond to the "regulation's domain" is not necessarily unconstitutional; being subject to a *déclassement* those statutes are modifiable by regulation. See Conseil Constitutionnel [CC] [Constitutional Court] decision No. 82-143DC, July 30th, 1982, 114 Journal Officiel de la République Française [J.O.] 2470 (July 31st, 1982) (Fr.).
See generally, Chapus, 2001, at 67-73.

[24] A Translation of art. 80, No. 1, of the Basic Law: "Durch Gesetz können die Bundesregierung, ein Bundesminister oder die Landesregierungen ermächtigt werden, Rechtsverordnungen zu erlassen. Dabei müssen Inhalt, Zweck und Ausmaß der erteilten Ermächtigung im Gesetze bestimmt werden. Die Rechtsgrundlage ist in der Verordnung anzugeben. Ist durch Gesetz vorgesehen, daß eine Ermächtigung weiter übertragen werden kann, so bedarf es zur Übertragung der Ermächtigung einer Rechtsverordnung."

[25] During the Third Reich, the *Reichsgesetz zur Behebung der Not von Volk und Reich*, enacted on March 24th, 1933, authorized the Government to issue statutes with the same value as the acts of Parliament. Under this document were approved some of the most terrible measures of the National-Socialist period. Never more would German law allow the Government to issue statutes with the same value as the acts of Parliament.

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constitutional text. The main concern is now how to define those limits lest so broad a discretionary rulemaking power, lacking legislative power, be delegated by Congress.

Substantial forms of delegalization

Considering the kind and, most of all, the full scope of the interference of regulations in each subject matter, delegalization is not a homogeneous phenomenon, but instead has several facets to it. The crucial matter is checking whether the primary normative framework established by a regulation entails that a previous statute be altered.

There is first level delegalization when, under a new statute, a regulation is assigned primary elements of a subject matter not previously fixed by any statute, or when the statute, without setting the framework of a certain subject matter until then established by another statute, (explicitly or implicitly) revokes the latter and allows the regulation lay down the new legal regime (García de Enterría and Tomás-Ramón Fernández, 2008, 280).[26] Both forms of delegalization raise the problem of delegated legislation, which involves evaluation of the conditions under which a statute may commit the definition of a normative framework to a regulation; that would mean approximating to (or even confusing with) the legislative power of Parliaments the exercise of the rulemaking power of administrative bodies.[27] The problem exists because those forms of delegalization somehow imply that a "blank check" be issued to the Executive. Obviously, this kind of delegalization solves the quantitative problem of the crisis of legality, as it contributes toward reducing statutes (replaced by regulations) and in some way toward restoring the "dignity of the legislature." (Demuro, 1995, 36).[28]

Nonetheless, it is understandable that there must be also limits to delegalization. As I will show next, indiscriminate delegation of normative powers to the Executive (especially, to agencies) infringes the constitutional principle of exclusivity (shared alike by the European and the U.S. constitutional systems), according to which the powers of the branches are defined by the Constitution, and, therefore, delegation of such powers is only admissible if and when the Constitution authorizes it and under the terms of the Constitution, which is tantamout to a particular application of the classical *ius commune* principle "*delegatus delegare non potest*." (Zanobini, 1955, 436).

A second, more profound level of delegalization is when a statute allows for future modification by regulation, thereby entailing the introduction in the statute of a clause that allows for some change or substitution of the legal framework by regulation; in the English law this is called the "Henry VIII clause".[29] French Constitutional Law expressly admits that, when the Parliament enacts a statute on subject matters included in the regulation realm, the Government has the power to modify it through a decree (*décret*) in case the Constitutional Council has found that those are matters for regulation (See 1958 Const. 37, 2).[30] In Germany, it is acceptable that the statute contains a clause under which its

[26] This type of delegalization includes the situations of "autodelegalization" (or "selfdelegalization") and "heterodelegalization": the former happens when statute A revokes statute B and, at the same time, determines that the subject matter regulated by statute A is thereafter regulated by a regulation; the latter happens when statute B removes the binding legal force from the norms of statute A and, therefore, admits their modification by regulation. (See Miranda, 2004, at 231-232 and Otero, 2003, 902).

[27] According to both the traditional view of the legal system (partly influenced by Hans Kelsen) and the meaning of the principle of legality, statutes and regulations have different hierarchic levels. On the basis of the internal sources of law alone, the legal systems can be pictured as a pyramid: at the top lies the Constitution, below it is the statute and the regulations at the bottom; all three layers are separate and should remain separate. When statute A revokes statute B in order to commit to a regulation the definition of the legal regime originally established by statute B, statute A brings about a degradation of the hierarchic level of the subject matter in question – which runs counter to the so-called "principle of the prohibition of degradation of the hierarchic level" or "depetrification clause".

[28] The Author goes further and argues that delegalization offers a significant contribution to the qualitative dimension of the crisis of legality by reducing the superabundance of statutes and thereby allowing for an evolution towards rationalization.

[29] The "Henry VIII clause", which enabled the statutes passed by the Parliament to be amended by subordinate legislation, is due to the the Donoughmore Committee's report (1932) and hearkens back to the image of executive autocracy associated with that English monarch. See Bradley and Ewing (2010), at 649, 653; Vagt (2006, 105); Wade and Forsyth (2004) at 861. One of the most remarkable examples of delegalization is the 1539 Statute of Proclamations: under unexpected circumstances that could not wait for the parliamentary procedure, the king acquired the power to legislate by means of proclamations which had the very same force of Parliament Acts. After all, that meant that the king had the power to issue all measures that were considered necessary to the public good and political order. See Adair (1917), Bush (1983) and Elton (1974).
French law also admits exceptional and urgent circumstances under which the enactment of a regulation that would suspend a statute is justified. In a decision on the legality of a regulation (a *décret*) issued by the President that suspended a statute establishing rights of information in disciplinary procedures (the famous *Arrêt Heyriès*), the *Conseil d'État* admitted that possibility, on the grounds that the President has the duty to look after the good functioning of public services, and, especially during war times, to avoid their paralyzation –a special circumstance that justified the extension of the President's powers. See CE June 28, 1918, Rec. Lebon 651. See also Steck (2007, 330-338).

[30] Given this context, it is remarkable that the French constitutional reality shows a certain evolution opposite to delegalization, by favoring the possibility of the Parliament (whose majority supports the Government) issuing (substantive) regulations through statutes, a tendency which is congruent with the movement toward "de-sacralization" of parliamentary statutes. However, this option has a specific purpose: since regulations (but not the statutes) are controlled by the *Conseil d'État*, the enactment of substantive regulations by the Parliament conceals a subterfuge to avoid such control of legality. This is especially the case with the so-called *lois de validation* ("validation statutes") that validate a posteriori the issuance of regulations. On the admissibility of these "validation statutes", see Conseil Constitutionnel [CC] [Constitutional Court] decision No. 80-119DC, July 22, 1980, Journal Officiel de la République Française [J.O.] [Official Gazette of France] July

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change or elimination by regulation is allowed (*gesetzesändernde Verordnung*: literally, "regulation that changes statutes"); this situation brings about a more nuanced understanding of both the principle of separation of powers and the relation between statutes and regulations (Lepa, 1980, 352; Seiler, 2001).[31] In addition, German Law also provides for statutes that allow regulations (Vorschriften) to change them or, more frequently, to complete them; herein lies the source of the "law of administrative completion" (*administrative Ergänzungsrecht*) and of the phenomenon of "statute completion" (*Gesetzesergänzung*) (Rogmann, 1998; Ossenbühl, 2002, 155, 162-163; Scheuing, 1982, 158).

Italian law[32] gives a step further as it recognizes the power of independent agencies to issue regulations that modify statutes. As a consequence of ascribing an exclusive competence to agencies, the legislature attributes to it the power to change the statutes on the subject matter comprised in such exclusive competence. Far from being an exceptional measure, this situation reflects a very common tendency in the Italian legal system (Merusi and Passaro, 2003, 98-99).

Our survey shows that this kind of delegalization is highly problematic from the point of view of the respect owed to the principle of legality. In fact, the possibility of a statute being changed or eliminated by a regulation undermines the meaning of the subordination of the Executive to the legislature – which was the keystone of the traditional principle of legality. On the other hand, whenever independent agencies are provided with this kind of power questions arise as to the compatibility of that with democratic principles. At stake here is the legislative task as well as the ascription of normative competences to independent agencies on the grounds that such competences are necessary to meet their public interests, without thereby undermining the cornerstones of the Constitutional State: the rule of Rule of Law and democracy.

Rule of Law and the Rulemaking Power of Administrative Agencies

The characterization of regulations as sources of law and forms of administrative action requires an approach to the rulemaking power from the Rule of Law perspective. Once the progressive replacement of legislative rules by regulations is under way and a wide regulatory discretion is admitted, two main questions arise: how to understand the subordination of Public Administration to law? How to conciliate the rulemaking power of administrative agencies with the traditional arrangement of the legislative, judicial and executive branches?

Rule of Law, juridicity and legality

One of the key dimensions of the Rule of Law is the subordination of administrative action to law. In spite of the apparent tautology, this idea is a fairly recent achievement of administrative law in European civil law jurisdictions. Actually, by establishing the parliamentary statutes as the only limits to administrative action, the traditional understanding of the principle of legality (as shown above) undermined the importance of other sources of law, like the principles, the Constitution or the court cases.

In continental European countries, the earliest manifestation of this concept took place in German and French Law during the last few years of the 19th century.

In Germany, the concept of Rechtsstaat, first advanced by Professors Stahl, Gneist and Mohl was only theorized by Professors Stein, Laband and Georg Jellinek (Schmidt-Assmann, 2006, 47-86; Gozzi, 2007). It is remarkable in this regard the doctrinal transition in France from the *État légal* to the *État de droit*. The concept of *État de droit* was introduced by Professor Carré de Malberg. Over against the view of Public Administration as the mere executor of the Parliament's will, and claiming that administrative action too should be performed under constitutional rules, the Author states that such legal state (*État légal*) must give rise to a framework in which the rights of citizens are safeguarded by judicial review and by the constitutional self-limitation of State actions (Carré de Malberg, 1920, 488-494).[33] Also, the debate over the juridical nature of the 1789 *Déclaration des Droits de l'Homme et du Citoyen*[34] contributed to a deeper

24, 1980, p. 1868; Conseil Constitutionnel [CC] [Constitutional Court] decision No. 97-390DC, Nov. 19, 1990, Journal Officiel de la République Française [J.O.] [Official Gazette of France] Nov. 25, 1990, p. 17020.

[31] Both Authors reflect on the so-called "depetrification clause" (*Entsteinerungsklausel*), and they argue that it is rarely used by Public Administration since the statutes are already subject to a great amount of changes by the Parliament itself, which makes unnecessary their modification by regulations. Besides raising obvious difficulties related to interpretation, this possibility involves serious problems from the point of view of the constitutional framework of statutes and regulations.

[32] There are other forms of delegalization in Italian Law. For instance, the Government has the competence to enact regulations on subject matters that are not included in the statutory reservation, and those regulations have the power to eliminate the incompatible statutes – see Art. 17, 2, Legge 23 agosto 1988, n. 400, in G.U. September 12, 1988, n. 214. On this norm, see Demuro (1995), at 68-84; cf. also Zanobini (1955), at 367, 378-379 (the Author reflects on the antecedents of L. 400/1988).

[33] In spite of the progressive aspects described in the text, this Author is after all a son of legal positivism. Thus, it is not surprising that the Author continued to stress the importance of the subordination of Administration to statute law, albeit he added new dimensions to the principle of legality and introduced the relevance of judicial review of administrative actions.

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understanding of the subordination of public powers (including the legislative and the executive) to principles and individual rights (Laquièze, 2007, 261).

Throughout the 20th century and especially during the last sixty years, juridicity gained increased relevance vis-à-vis legality. The principle of juridicity expresses the subordination of administrative action to law – not only to statutes enacted by parliaments, but also to all layers of the legal system, principles included. For that reason, juridicity constitutes one of the corollaries of the Rule of Law and expresses a stand provided with a particular rationality that, in the context of separation of powers, emphasizes the protection of fundamental rights by statute law and the existence of juridical constraints even when the legislature accords wide discretion to administrative bodies (Schmidt-Assmann, 2006, 47-80). This understanding is particularly relevant in the context of agencies' regulatory discretion and its limits.

The principle of juridicity introduces also the autonomy of the executive branch vis-à-vis the legislative branch (and, naturally, vis-à-vis the judiciary). The construction of this principle, besides insisting that the Administration is subordinated to the legal system as a whole, underpins also the specific framework of the relations between the legislature and administrative bodies. Indeed, this principle demonstrates how outdated is Liberalism's view of Public Administration as a mere execution of parliamentary statutes (Schmidt-Assmann, 2012).[35] Always pursuing public interest, the executive constitutes an autonomous branch that cannot be totally pre-determined by the legislature nor entirely controlled by the courts. This position reveals a singular conception of administrative discretion: on the one hand, it provides for the existence of a space for autonomous administrative evaluation and decision, immune to the interference of the other two branches; on the other hand, it compels Administration to respect all requirements imposed by the legal system (especially by principles) even when it exercises a discretionary power.

The overcoming of the notion that Administration acts are nothing more than the strict implementation of statutes entailed also the end of a parliamentary and jurisdictional "domestication" of the Administration. Current administrative action should be defined by the juridicity/legitimacy binomium. The core idea is the affirmation of the responsibility of Public Administration: besides grounding the autonomy of the executive branch, the use of the concept of responsibility involves close attention to the highly demanding missions and tasks assigned to administrative bodies. Responsibility, a concept deeply related to the Welfare State (Schuppert, 1998, 419-420), is not restricted to responsibility for the execution, in that it also points to tasks that involve self-planning mechanisms and development of normative programs barely drafted by the legislature as well as their implementation through specific measures (Schmidt-Assmann, 1976, 231-233, the Author develops a typology of Public Administration responsibilities).

The relevance of the principle of juridicity must not overshadow the fundamental role of statutory law as the foundation of administrative action. In this way, juridicity shall be understood as a *plus* towards legality, and this is why the principle of legality of administrative action remains a material foundation of the Rule of Law (Canotilho, 2004, 256).

Two dimensions are especially stressed in the modern understanding of legality.

On the one hand, the fact that the functions of the executive branch can be described as satisfaction of public interests defined by the legislature points toward a principle of statutory law precedence.[36] In line with this *positive* meaning of statutory prevalence, the administrative action always requires a previous parliamentary statute whereby at least the competence and the public interest to be pursued are laid down. As will be demonstrated below, the scope of this principle is one of the most difficult issues concerning the rulemaking power of agencies.

On the other hand, statutes prevail over administrative action. Therefore, administrative action that contravenes statutory law is void. From this *negative* sense of statutory prevalence two consequences follow: Public Administration is compelled to enforce or apply statutes ("obligation to ap-

[34] This debate engaged the most important constitutionalists at the time. On the one hand, Professor Adhémar Esmein (profoundly influenced by legal positivism) argued that the 1789 Declaration had no legal binding force, and that it was a mere declaration of principles, a dogmatic text inspired by philosophical beliefs – see Esmein (1921, 553-563) (distinguishing between "declarations of rights" and "protection of rights"). On the other hand, Professors Duguit and Hauriou claimed that the 1789 Declaration had a constitutional status. Duguit stated that a statute incompatible with the 1789 Declaration should be considered unconstitutional and void. Moreover, since the Declaration expresses and proclaims pre-existing rights, the Author recognized its supremacy over the Constitution itself. See Duguit (1923a, 159-150); Duguit(1923b, 562-564). Hauriou, too, recognized the juridical character and the constitutional nature of the 1789 Declaration, but he added that the enshrinement of those principles required parliamentary legislation. See Hauriou (1930, 242-243).

[35] On the fascination with the simplicity of the liberal triad: Administration unity, formality of administrative action and enforcement of law as mere execution.

[36] In Europe, this statutory law precedency can be replaced by an EU source of law, such as an European Treaty, an European regulation or, more generally, a source which is directly applicable in Member States.

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ply"), thereby underscoring the *executive* dimension of the executive branch; Public Administration is prohibited from violating (deviating from) statutes ("forbiddance from deviation"), thereby underscoring the concept of statutory law as a *limit to administrative action* (Ossenbühl, 2002, 133-198; 2007b, 185-187).[37]

Rule of Law and separation of powers

Judicial oversight and legislative power are the two constitutional checks on executive branch authority: should one of them be in danger, the balance granted by separation of powers would disappear. The problems arise from the relations between the agencies, the legislature and the courts. The question of administrative discretion (and, naturally, the regulatory discretion as well) is tackled from two perspectives: the one of *administrative action*, which underscores the relation between the legislature and the Public Administration; and the *judicial review* perspective, which highlights the relation between the Executive and the Judiciary (Voßkuhle, 2008).[38]

"Good-bye Montesquieu"? [39]

It is all too well-known that the historical understanding of the principle of separation of powers is the combined result of Locke's and Montesquieu's doctrinal efforts.

In his *Second Treatise of Civil Government* (Locke, 1690), Locke adverts that "[I]t may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government[.] " (Locke, 1690, §143).

Locke's understanding of the legislative power as the supreme Power is rooted in democratic concerns (Locke, 1690, §§134-142). His reasoning hinges on two premises: first, since the legislative consists in the "joint Power of every Member of the Society given up to that person, or assembly, which is Legislator", therefore it cannot possibly be arbitrary; second, legislative power is limited by the Law of the Nature (which is the expression, at the same time, of the reason and the Will of God) and by the "public Good of the Society." (Locke, 1690, §135). As far as relations between the legislative and the other powers are concerned, Locke adds a specific limit, as he states that "the Legislative cannot transfer the Power of making Laws to any other Hands"; in other words, since the legislative is derived from the people, the legislature has *only* the power to make laws and not also the power to transfer authority (Locke, 1690, §141).

Montesquieu's construction of the principle of separation of powers is exposed in Chapter VI, Book XI of his masterwork – *De l'Esprit des Lois* –, within the context of a reflection on the British Constitution of the early 18th century (Montesquieu, 1973). While breaking down the *Polizeistaat's* absolute power (unable to ensure individual liberties), Montesquieu divided it into three powers: legislative, executive and judiciary. The relation between the legislative and the executive expresses the relation between the general will and the execution of that general will (Montesquieu, 1973, at 144), with both powers limiting each other (Montesquieu, 1973, at 148). In such context, the (superior) role played by the legislative follows from the understanding of statutory law as a manifestation of reason: law is a product of the human reason that governs all the peoples on earth; political and civil laws of each nation are only a particular case to which reason applies (Montesquieu, 1973, at 8). Nevertheless, it must be remarked that Montesquieu's original construction has not an absolute character; on the contrary, the Author admits a dynamics or interdependency between the three powers: according to Montesquieu, because of the necessary movement of things, those powers are compelled or obliged to act concertedly ("*aller de concert*") (Montesquieu, 1973, at 150).

The principle of separation of powers has changed greatly owing to the evolution of constitutional and administrative law. It does not mean that the role of this principle could be ignored – after all, it is a core feature of the constitutional State. The doctrine of the separation of powers is one of the

[37] Substantive Rule of Law requirements impose certain limits on this negative sense of statutory prevalence. This perspective offers the answer to two main questions: can (must?) administrative bodies (administrative agencies, in particular) decline enforcement of statutory law whenever it is unconstitutional?; can (must?) administrative bodies decline enforcement of unjust statutory law (*leges corruptæ*)?
Different from these two questions (which reflect a non-positivist idea of law and the clear distinction between statutes and law) is the so-called problem of "useful illegality". It refers to the perception that, in contemporary complex societies, the efficiency and the agility of administrative action are not terribly affected by scant leeway for disregard of statutes (administrative action *contra legem*). Even if one finds unacceptable the view that administrative efficiency is incompatible with legality, one cannot ignore that certain illegalities actually do not affect the juridical consistency of administrative action, owing to their irregular (rather than invalid) quality. See Wolff, Bachof and Stober, (1999) at 428-429.

[38] On the distinction between the "perspective of action" – *Handlungsperspektive* – and the "perspective of control" – *Kontrollperspektive*).

[39] Ackerman, 2010.

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most valuable conquests of the Revolutions:[40] "[t]he purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy".[41]

The emergence of independent agencies and chiefly the significant powers attributed to them have caused some imbalance in the legislative, executive and judicial triad (Barkow, 2008) - some speak of a "new separation of powers" (Ackerman, 2000).[42] The apogee of regulators has undermined the importance of Government and central Administration, which are transformed into a kind of "Cheshire Cat",[43] appearing and disappearing at the same time. Besides showing the difficulty of distinguishing the three branches and their functions, this phenomenon has elicited positions in favor of replacing checks and balances with the idea of trust and fiduciary law (Criddle, 2006). Proliferation of administrative bodies employing normative and quasi-judicial powers, exponential growth of the Administration's tasks and the articulation of agencies (within the European Union, between European and national agencies) are among the factors that contribute to the confusion, the instability and even the irrationality in the executive branch. Particularly sharp and ironic is Merusi's remark that, concerning the separation of powers issue, the leading figure is no longer Montesquieu but rather the Baron of Münchausen (Merusi, 2012, 9).

Notwithstanding the importance of the foundations of the principle of separation of powers, I must conclude that its future lies in a multidimensional approach.

The separation of powers, understood as division of powers and functions, only emphasizes its *negative* component: anchored in the primary sense (the one linked with the reaction to the absolutist *Ancien Régime*) of separation of powers, the division of powers stresses the idea of *control* and *limitation* of power in order to prevent the concentration of powers and to ensure the protection of the citizens from abuses of the public powers. Thus, the principle of separation of powers allows the individualization of three branches: legislative, executive, and judiciary.

The doctrine of the separation of powers points to an organization of the branches, each one having the *responsibility* to carry out a specific task (Canotilho, 2003, 250). The connection between separation of powers and rationalization of their exercise allows for the absence of a rigid organic separation. It is according to this *positive* meaning of the principle that the extensive powers of administrative agencies shall be understood; in fact they exercise not only traditional administrative competences, but also "quasi-legislative" and "quasi-judicial" powers, originating a real "fourth branch".

This understanding of the separation of powers opens the path to developing the nucleus of each power. According to this theory, any deviation from the correspondence between (constitutional) authorities and branches is allowed provided that it does not compromise the nucleus of each branch. Although the doctrine of separation of powers allows the individualization of three branches, their characterization is not definitory, but obeys instead a *typological* criterion. Accordingly, in order for an activity to correspond to a certain branch, not all the features of such branch are required to be present; only those that are core to it (Melo, 1988, 20-36). Furthermore, contemporary legal systems show that the relations between public activities and the bodies that exercise them are not isomorphic (Melo, 1988, 4). – a situation that is clearly illustrated by the quasi-legislative and quasi-judicial powers acknowledged to independent agencies, despite their administrative character. Again, no real threat to the separation of powers principle is involved here, in that the nucleus of each branch is left untouched.

So, an identification of the *core activities* of each branch is now the main problem to tackle. Because I am considering the rulemaking power of administrative bodies, the question that most immediately comes up is how to know when agencies are invading the legislative branch and, therefore, what defines the nucleus of the legislative branch that could not be tampered with by the regulations of administrative agencies.

The nucleus of the legislative branch

From the perspective of the articulation of the normative powers in the executive and those in the legislative branches, some interpenetration between statutes and regulations may be healthy. The ultimate goal is to address the prob-

[40] The American and the French Revolution. The principle of separation of powers is established by the 1787 US Constitution and by the 1789 Declaration of the Rights of Man and of the Citizen (article XVI).

[41] Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

[42] The Author proposes a new functional theory of separation of powers, identifying an "Integrity Branch" and a "Regulatory Branch".

[43] The metaphor is proposed by Stewart (2003) 451.

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lems that affect the legislative branch (length of the legislative procedure, technical content of the rules and complexity of the issues) and compel parliaments to resume their original function: the elaboration of norms concerning the most significant matters and principles (Ossenbühl, 2002, 147). This conception of regulation is not innocuous, since it brings about consequences such as a shift in the balance between statutes and regulations, allowing the latter to assume the function of primary normative instrument. Naturally, when regulations act like statutes pathologic situations emerge as true "degenerative phenomena" (Cosimo, 2005, 3, 21).

In this way, the compatibility of the rulemaking powers of agencies with the principle of separation of powers (in a positive sense) depends on one condition: the rulemaking powers accorded to agencies must not impinge on the *nucleus* of the legislative branch. The difficulties arise from the very meaning of "*nucleus* of legislative branch". Two kinds of answers stand out in this regard: the American nondelegation doctrine, and the German "essentiality theory" (*Wesentlichkeitstheorie*). Although the theoretical premises of these two theories are identical (both of them assume that the rulemaking power of the executive is delegated from the legislature), current jurisprudential orientations take different paths, since the *Bundesverfassungsgericht* (German Constitutional Court) is more severe than the US Supreme Court, which rarely invokes nondelegation doctrine to consider a Congress delegation as unconstitutional. In any case, as I will argue, as long as the Constitution allows (directly, as in Germany, or indirectly, as in the United States) the exercise of a rulemaking power by administrative bodies – which is fundamental to the fulfillment of their tasks – the crucial problem is to identify its scope and extension.

The ultimate goal of the American nondelegation doctrine is that of limiting the rulemaking power of agencies by restricting the delegation by Congress of normative competences. One of the axioms of American Constitutional Law is the affirmation that Congress alone has legislative power – a statement that does not hinder the agencies from exercising a quasi-legislative power. The crucial point here is to determine how Congress may delegate normative powers to agencies without offending Article 1 of the US Constitution. Or, as I would prefer, how can Congress assign normative powers to agencies (and therefore pursue a healthy cooperation between the legislative and the executive branches) *without violating the nucleus of the legislative branch?* As *Hampton* clearly shows, the idea of a coordination among the branches was not lacking in the early 20th century jurisprudence of the Supreme Court: in spite of (or perhaps precisely on account of) signaling the birth of the "intelligible principle",[44] whose function was that of confining administrative discretion, the Supreme Court emphasizes that the three branches are coordinate parts of one government, and hence each one may invoke, in the field of its duties, the action of the two other branches "insofar as the action invoked shall not be an assumption of the constitutional field of action of another branch."[45]

According to the early Supreme Court's jurisprudence on this matter, a delegation (understood as an expression of that coordination between branches) is compatible with the Constitution whenever it does not imply an abdication or a transfer to other branches of "the essential legislative functions with which [Congress] is vested;" however, this prohibition must be balanced with "the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly"[46]-which, obviously, will depend on context and particular circumstances (Lawson, 1994, 1239). So, delegation is unconstitutional if the legislature has not declared any policy or set up any standard to guide the Executive's action, although Congress – after laying down its policies and establishing its standards, and by reason of flexibility and practicability – may "[leave] to selected instrumentalities the making of subordinate rules, within prescribed limits and the determination of facts to which the policy, as declared by the Legislature, is to apply."[47]

American Trucking gave rise to contemporary discussion on this topic. From a comparative law perspective, this case presents two important issues.

The first of them draws our attention to the refusal of the argumentation developed by the D.C. Circuit's decision: "Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own. Doing so serves

[44] See J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

[45] See J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 406 (1928).

[46] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-530 (1935).

[47] Panama Refining Co. v. Ryan, 293 U.S. 388, 414-415, 421 (1935).

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at least two of three basic rationales for the nondelegation doctrine. If the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily. (...). And such standards enhance the likelihood that meaningful judicial review will prove feasible. (...) A remand of this sort of course does not serve the third key function of non-delegation doctrine (...). The agency will make the fundamental policy choices. But the remand does ensure that the courts not hold unconstitutional a statute that an agency, with the application of its special expertise, could salvage."[48]

Although this judgment was reversed by the Supreme Court – on the grounds that the thesis according to which "an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power" is "internally contradictory",[49] the inter-related topic of the interpretation in conformity with the Constitution requires some discussion. In fact, one of the most debated issues in European Administrative and Constitutional Law is that of determining whether Public Administration (and, therefore, also the agencies) may invoke that interpretive canon in order to safeguard the constitutionality of an act of the legislature.[50] As far as the relations between the Executive and the Legislative are concerned, *American Trucking* is a precious tool in outlining the limits of an interpretation consistent with the Constitution. This case shows that when the question of constitutionality touches the core of the separation of powers (and especially the scope of delegable powers) all doubts shall be clearly (intelligibly) resolved by Congress (Sunstein, 2006, 2607-2609),[51] and agencies have no competence to develop an intelligible principle.[52]

The second matter that is relevant here touches upon the heart of nondelegation doctrine. By stressing that even in "sweeping regulatory schemes" it is not demanded that the statute provides a "determinate criterion" or a precise measure to concretize a general clause or, as the D.C. Circuit has termed it, "to state (...) how much is too much" (American Trucking, 175 F.3d at 1034), the Supreme Court expanded the content of the lines that *delimit* the nucleus of the legislative power (American Trucking, 531 U.S. at 475).[53] More recently, those boundaries were further expanded in *Arlington v. FCC*: on the grounds that "there is *no difference*, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its "jurisdiction") and its exceeding authorized application of authority that it unquestionably has," it is now admitted that the agency has discretion in interpreting the statutes that define its scope of jurisdiction.[54] Apparently, *Arlington v. FCC*

[48] American Trucking Ass'ns v. U.S. EPA, 175 F.3d 1027, 1039 (1999).

[49] Whitman v. American Trucking Ass'ns, 531 U.S. 457, 473 (2001).

[50] Clearly, this problem represents just one side of a wider question: the autonomy of the Executive to interpret statute law.
Even when performed by an administrative body, interpretation is a moment of the more complex task of deciding which law applies to an individual case – in methodological terms, this is expressed by the purpose of "law-finding" (*Rechtsfindung*) or "law-creating" (*Rechtsschöpfung*) as an answer to a conflict of interests (Wolff, Bachof and Stober, 1999 at 287). The grounds for the autonomy of the executive interpretation are both methodological and democratic.
On the one hand, only theoretically can the interpretive moment be separated from the application of norms: as expressively stated by Professor Norberto Bobbio, to interpret means "to know a spiritual act through its expression in order to accomplish it" (see Bobbio, 1938, 136) (my translation)); rather than a cognitive disquisition, a practical intentionality is involved in that process. According to Professor António Castanheira Neves (who draws upon Professors Karl Engish, Wolfgang Fikentscher, Konrad Hesse, Arthur Kauffmann, Karl Larenz, Martin Kriele or Friedrich Müller, mong others), interpretation may be characterized by the "methodological circle" image (analogous to the "hermeneutical circle"), which stresses that the norm is discovered only interpretatively, whenever it is deployed as a criterion of decision for the individual cases, all of which enrich and reconstitute it; the law in action appears thus as a *continuum*, a complex act in which interpretation is but one of the moments (Neves, 2002, 11-14; Neves, 1995, 128-134).
On the other hand, the fact that the Executive (as the Judiciary) has sovereign powers proves that the competence to interpret law is as much an attribute of the judge as (to some extent) of the executive authority. The need to implement a general policy designed by the Parliament presupposes that the Executive will be able to find out the meaning of statutes and act accordingly (Seiler, 2000, 53). Or, as the US Supreme Court has stated, "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation" and, therefore, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" (Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., et al., 467 U.S. 837, 843-4 (1984)).
Naturally, what is being suggested here is not the obliteration of the differences between the executive interpretation and the judicial interpretation. Those differences arise from the tasks developed by executive bodies, since the application of law to individual cases aims in this case at the satisfaction of the public interest. Consequently, the impartiality to which Public Administration is also obliged is quite different from the impartiality and especially the independence of the Judiciary. The recognition of the importance of executive interpretation is compatible with the fact that the judge is the interpreter par excellence to whom is granted the power to review (even if only deferentially) the interpretation of Public Administration. I believe that this is the reason why *Chevron* also implies that, when the court determines that Congress has not directly addressed the precise question at stake, that obviously does not mean that the judge will not review; it means instead that he shall appreciate "whether the agency's answer is based on a permissible construction of the statute" (Id. at 843).

[51] By reflecting on the limits of *Chevron* doctrine related to nondelegation canons, the Author concludes that they prevent the Executive from adopting constitutionally sensitive decisions, since those decisions are reserved for Congress.

[52] Cf. Oren (2006), 31, stating that the D.C. Circuit's decision, instead of declaring the statute unconstitutional, suggested that it fell to EPA to develop an intelligible principle.

[53] See also Mistretta v. United States, 488 U.S. 361, 372 (1989): "[a]pplying this "intelligible principle" test to congressional delegations, our jurisprudence has been driven by a practical understanding that, in our increasingly complex society, replete with ever-changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives".

[54] City of Arlington, Texas, et al. v. Federal Communications Commission et al., 133 S. Ct. 1863 (2013).

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committed the definition of an agency's scope of authority (and, consequently, the delimitation of the legislative branch's nucleus) to the discretion of the agency itself…

Another perspective is offered by the German "essentiality theory". As already indicated above, Article 80 of the Basic Law states that the enactment of regulations (*Verordnungen*) by the Government presupposes a preliminary parliamentary authorization in which their content, purpose and scope are defined. Building upon this rule and the necessity of delimiting the subject matters included in the statutory reservation (which ultimately is related to parliamentary reservation), German constitutional jurisprudence laid down a number of exigencies relating to the content of the authorization statute: at first, it was demanded that the content of the regulation should be predictable on the basis of the content of the statute; later on, although more open positions have been advanced, the fact is that they get more demanding every time the rights of citizens and Tax or Criminal Law are involved. It was the interpretation given to the interaction between these three criteria (content, purpose and scope of the authorization statute) that gave rise to the essentiality theory, according to which the chief aspects of a given legal framework is defined by a parliamentary statute, because the Parliament alone relies on a direct democratic legitimacy (bearing in mind, though, that the exigencies demanded from the content of the statute shall not undermine the character of source of law that regulations also have). The difficulty is how to define the *core aspects of a legal framework*. The answers have been found in a case-by-case basis, which should not be regarded as necessarily negative. As a matter of fact, there are guidelines – like e.g. the "relevance of fundamental rights" (*Grundrechtsrelevanz*) – for the interpreter not to get trapped into a legal deadlock. When applied to new areas of law, the theory of essentiality has been criticized for softening the exigencies. As a result, an "inverted theory of essentiality" (*umgekehrte Wesentlichkeitstheorie*) has been formulated. This theory comes from the Environmental Law field, and in that regard it claims that statutes should only contain vague, abstract expressions concerning environmental protection, in order to delegate the decisive content of the legal framework to regulations.[55]

Taken together, these two doctrines indicate that the nucleus of the legislative branch provides for the definition (or, at least, the typological definition) of the relations between the legislative and the executive branches. As to the limits of delegating quasi-legislative powers to administrative bodies, the solution lies in determining which decisions are to remain within the legislative branch insofar as they functionally belong to parliaments, requiring therefore a more consistent democratic legitimacy: those are the decisions which form the nucleus of the legislative branch. It must be remarked that the demarcation of this nucleus is not an abstract task that is meant to underpin a general and rigid enunciation of those decisions; on the contrary, the interpreter should take into account both the nature of the subject matter (e.g., individual rights will require a much stricter definition concerning the scope of the agencies' rulemaking power) and the points of the subject matter committed to regulatory discretion (e.g., regulatory discretion shall be avoided whenever individual rights are restricted, but it might be allowed when statutes commit to regulations only the concretization of those rights).

This thesis permits statute law to resume its primary function of laying down society's fundamental political decisions while allowing also for an expansive discretion of the agencies, so that such discretion does not impinge upon those decisions and remains within the framework designed by them. In addition, a correct definition of regulatory discretion by the legislature along with the consequent balance between discretion and rules would have also the advantage of clearly stating the powers entrusted to regulators, lest they fall under suspicion from economic operators, and in order to facilitate the acceptance of the exercise of those powers when regulators try to impose unpopular measures (Brunnermeier *et al*., 2009, 36, 57).

Judicial review over regulatory discretion

The subordination of administrative action to law implies that it must be subjected to judicial oversight, as a way of assessing whether the agency has complied with the juridical principles and rules and has pursued the public interest, in keeping with the purpose of the agency (Pietzcker, 1982, 108). In order for a regulatory system to work properly, and despite the concerns over the use of soft law instruments hardly subjected to ordinary review mechanisms, the fact remains that agencies' actions do need judicial review. Notwithstanding the administrative turn implied by the recognition of a regulatory discretion, judicial review has a value of its own required by the Rule of Law and by the separation of powers. In many situations, what is at stake is deciding whether the legislative "porosity" means that such porosity should be filled by agencies' actions (especially by regula-

[55] On the "theory of essentiality" (see Axer, 2000, 312-327; Sauerland, 2005, 293-305; Vagt, 2006, 88-94; Lepa, 1980; Ossenbühl, 2007a, 208-214; On the "inverted theory of essentiality" (see Ossenbühl, 1999, 3-4).

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tions) or if instead it grants a coordination or interaction between the Executive and the Judiciary in the accomplishment of their *mutual* task of applying rules to individual cases (Gärditz, 2009, 1009).

This is the proper arena to invoke the British principle of judicial deference to administrative experience and technical competence. This principle is considered to be a limit on the scope of judicial review over discretionary powers, as a means of ensuring that Public Administration is provided with its own space to decide on politically sensitive matters, such as immigration, foreign affairs, deportation and prison administration (Wade and Forsyth, 2004, 369-371). In the very same sense, U.S. administrative law distinguishes between non-deferential review and deferential review. Considering precisely the agencies' rulemaking power, the *Chevron* canon allows the agencies to interpret legislative ambiguities in a sense that is still reasonable (permissible construction of the statute); that is to say, in such cases, "the court does not simply impose its own construction on the statute". Conversely, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[56] In *City of Arlington v. FCC*,[57] the Supreme Court went further and admitted that deference under Chevron shall be granted to the agency's interpretation even where the statutory ambiguity concerns the scope of its jurisdiction (i.e. statutory authority)...

Therefore, when the court oversees a non-discretionary action, it should evaluate whether that action corresponds to the one established and prescribed by the legislature (positive control); on the contrary, if the agency enjoys a discretionary power, the Judiciary should estimate whether the administrative action does *not* offend the law (negative control). The rationale for this distinction is precisely the doctrine of separation of powers, which prevents courts from interfering with the nucleus of the executive power, i.e., with the discretionary dimensions of administrative actions (adjudication and rulemaking) – without prejudice, naturally, to their juridicity (compatibility with law).

One must be aware, though, that regulatory discretion and judicial deference unfortunately tend to be vulnerable to corruption (Johnson *et al.*, 1998, 389-391). In this connection, a new model of judicial review should be developed, namely, the *institutional model*, in that it assigns to courts an active role in overseeing administrative action. The origins of this model can be traced back to the 1997 Neill lecture delivered by Lord Woolf at the University of Oxford. Concerning the relations between the Executive and the Judiciary, Lord Woolf argues that the role of the latter is more significant whenever checks and balances do not work properly: this happens, for instance, in cases when there is not a strong and effective opposition to the Government which has *de facto* control over the Parliament. The answer to these situations consists not in an "executive-friendly judicial review", but rather in the enlargement of scope and an increased judicial oversight of administrative action, in order to reestablish the separation of powers, even if it creates a tension between the Executive and the Judiciary: "[t]he tension is no more than that created by unseen chains which (...) hold the three spheres of government position. If one chain slackens, then another needs to take the strain." (Woolf, 1998, 580).

Despite the fact that Lord Woolf's theory was meant for the British parliamentary system, it can be applied to all legal systems based on the separation of powers. As far as administrative action is concerned, the purpose of judicial review consists in ensuring that the Executive keeps itself within the limits of its sphere of action or, in other words, in controlling whether administrative bodies overstep the limits of their powers (Zwart, 2010, 148; 2011, 195-196). The relevance of this objective is increased whenever the agencies enjoy a particularly wide competence owing to the fact that their statutory limits are restricted to the (constitutionally admissible) minimum level.

Thus, along with an *objective model*, a *subjective model* has emerged. The latter is focused on protecting individual rights while the former has evolved to ensure the legality (rectius, the juridicity) of agencies' actions, which naturally includes the normative actions.[58] Therefore, Courts are expected to oversee and review unlawful acts of the Executive, even when the rights of the citizens are not trampled upon.

Over against this viewpoint, one might ask why should Court

[56] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., et al., 467 U.S. 837, 843 (1984).

[57] City of Arlington, Texas, et al. v. Federal Communications Commission et al., 133 S. Ct. 1863 (2013).

[58] The distinction between *subjective* and *objective* models of judicial review over administrative action is common in Europe and it relates to different juridical traditions. Underlying this division is the function assigned to Courts: whereas the objective model (whose roots are French) assumes that Courts must primarily control the legality and the legitimacy of administrative action, the subjective model (more connected to Germany, but having an incontestable Anglo-Saxon background) intends judges to defend citizens' rights or legally protected interests against Public Administration. At present, the European systems of judicial review try to reconcile the subjective and the objective model.

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assessments be considered as superior to those issued by the Administration? The magic word here is *balance*[59]. As already stressed, the active role required from the Courts is not meant to substitute administrative judgments; there will always be non-justiciable issues. However, the point is not about non-justiciable matters but rather about certain dimensions of those matters which involve judgments that, owing to the doctrine of separations of powers, cannot be repeated by the court, as they represent the nucleus of the executive branch.[60] This means that, apart from those dimensions (the only ones that actually relate to the exercise of discretion), there always remain facets of the administrative action which are subjected to judicial review (partially reviewable matters); in other words, the institutional model proposes the reduction of the non-justiciable areas by stressing the existence of juridical limits to agencies' actions.[61]

Regulatory review

As it is already known, the extension and the intensity of agencies' powers have combined to the point of being considered as a "fourth branch". Those factors are also accompanied by an increasing independence of those agencies, and they are absorbing the legislative (through the exercise of the rulemaking power) and the judiciary (owing to the creation of "quasi-judicial authorities") powers, while also freeing themselves from the executive branch.

Regulatory review appears[62] as a form of ensuring that the President, as head of the Executive, oversees and controls the exercise of power by agencies, thereby making regulatory rulemakers accountable to the White House (DeMuth and Ginsburg, 1986, 1081). Although regulatory review is related

The background of the objective model is deeply linked with the birth of Administrative Law in France and, consequently, in the other continental European countries. Usually, the event that signals the origin of the *Droit Administratif* is the so-called "Blanco Affair". See Tribunal des Conflits [TC] [it settles disputes between the Conseil d'État and the Cour de Cassation] February 8, 1873, S. Jur. 1873, III, 153 (Fr.). It relates to a decision of the Tribunal des Conflits on the civil liability of the damages suffered by a 5 year old girl (Agnès Blanco), who had been severely injured by a *wagonnet* driven by four workers of a tobacco company owned and explored by the French State. Her father prosecuted the workers and the State in the judicial courts, and so the question of their competence arose. The Tribunal des Conflits decided that the State's civil liability for actions perpetrated by public workers was not ruled by the same principles or norms of the civil liability of the citizens (the latter was ruled by the Civil Code); on the contrary, that liability, which was neither general nor absolute, was subjected to special rules, which depended on the needs of public service and on the necessity to conciliate State's rights and citizens' rights. Therefore, the Tribunal concluded, judicial courts had no competence to judge this matter, which lied on the competence of the administrative authorities. That is to say – in modern words –, European (continental) Administrative Law was born not to ensure citizens' rights, but rather to protect the prerogatives of Public Administration. Accordingly, the priority of the review over administrative action consisted in guaranteeing that the administrative bodies met the public interest established by law.

[59] A balance not always understood throughout History. A combination of an absolutist understanding of the doctrine of the separation of powers and positivist thought led the 18th century French legislature to prohibit any interference of the Judiciary in the Executive (and vice-versa) and, consequently, to interdict the judicial review over administrative action. As stated in the Décret du 16 fructidor an 3, the courts were forbidden to review any administrative action and the violation of this prohibition was criminally prosecuted. See «Décret du 16 fructidor an 3 qui défend aux tribunaux de connaître des actes d'administration, et annulle toutes procédures et jugements intervenus à cet égard» [Decree of Fructidor 16, year 3, *alias* September 2, 1795, which interdicts the courts from reviewing Administration acts and annuls every procedure and judgment issued on those matters], Collection Complète, Décrets, Ordonnances, Règlements et Avis du Conseil d'Etat (Duvergier & Bocquet) [Duv. & Boc] VIII, 1825, 315 (Fr.).

[60] This stand is not very different from two of the principles used by UK courts to review administrative actions under the 1998 Human Rights Act. In International Transport Roth GmbH & Ors v. Secretary of State for the Home Department [2002] EWCA Civ 158 [81]-[87] (appeal taken from Engl.), Lord Justice Laws systemized four principles "for the ascertainment of the degree of deference which the judges will pay, or the scope of the discretionary area of judgment which they will cede to the democratic powers of government": first, more deference must be paid to an Act of Parliament than to a decision of the Executive, because the latter is just a Parliament's delegate (and, under the English system, the Parliament is sovereign and not under any constitutional text); second, there is more scope to deference when the European Convention on Human Rights requires a balance to be struck than when the rights it guarantees are unqualified; third, greater deference is due when the subject matter falls under the constitutional responsibility of the democratic powers than under the constitutional responsibility of the courts; fourth, greater deference is due when the subject matter falls under the actual or potential expertise of the democratic powers (for instance, in the area of macro-economic policy) than when it falls under the actual or potential expertise of the courts.
That is to say, by linking my perspective to Lord Justice Laws' principles (especially, to the third and fourth principle), the degree of deference depends on the specific nature of the subject matter: the point is one of determining whether the question *sub iudice* falls under the scope of the constitutional responsibility and the actual or potential expertise of the Administration (*in casu*); if the answer is affirmative, the review is deferential, because administrative authorities enjoy a discretionary power.

[61] The defense of the institutional model involves other problems. As Tom Zwart explains, the shift from private rights to the institutional model brings with it the danger of transforming courts into strategic operators (Zwart, 2011, at 199-200). This is strongly connected with the social consequences of court decisions.
From a methodological point of view, any doctrinal proposal that upholds a "social sterilization" of law (according to the maxima fiat *iustitia, pereat mundus*) is no longer acceptable nowadays, and therefore the practical consonance between the fundaments, the norms, and the results of the decision cannot be ruled out. However, consideration of those results should not jeopardize the judges' independence from pressures of public or private interests groups; thus, it is also not tolerable that social consequences of judicial decisions should be deemed *the* (sole) criterion for deciding, whenever it is incompatible with the juridical criteria.
Rather than endorsing a utilitarian view of the application of law, what this thesis stresses is that the result of the decision only carries some weight as long as it is consented by the normativity of the norm. That is to say, when the norm contains certain objectives, it must be interpreted in that purposive way, so that the consequences of the decision will be consistent with the purposes of the norm given by the underlying juridical principles (MacCormick, 1994, 129-151) (on the consequentialist arguments). This position also evokes the "synepeical analysis", the "consequential thinking/reasoning" or the "reasoning from effects", designed by Professor Wolfgang Fikentscher. As the Author states, the Greek word "synépeia" means consequence, and, hence, synepeical analysis, as a metatheory of social sciences, studies the causes and the consequences of a specific theory within the context of a culture-related mode of thought. Synepeical analysis can help to provide a (but not the) definition of Law: according to a synepeical definition, Law is a consequential *Sollen* (should) and, within this vision, synepeics assesses whether (the foundations of) a specifically juridical "mode of thought" (or, summing up the Author's position a specific legal system) is consistent with the results or consequences which flow from the application of that juridical "mode of thought" (See, among others Fikentscher, 1980, 94-118; Fikentscher, 2004, 130-149).

[62] On the origins, evolution and consolidation of regulatory review. See, e.g., Friedman, 1995; DeMuth and Ginsburg, 1986, 1076-180; Tozzi, 2011.

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to all regulatory activities, its birthmark looks strongly connected with rulemaking power.

The very existence of presidential documents ruling the exercise of regulatory powers by agencies proves a power of the Executive over regulatory activity, one whose constitutional foundations may be found in the so-called "completion power." (Goldsmith and Manning, 2006, 2295-2297).[63] Besides establishing mechanisms for centralized review of agency rulemaking, and besides reporting obligations to the Office of Information and Regulatory Affairs (OIRA)[64] and resolution of conflicts between or among agency heads or between the Office of Management and Budget (OMB) and an agency, those Executive Orders already determine a package of principles and guidelines to orient and coordinate the rulemaking. That means that the Executive has a say as to the exercise of power by agencies, even when they are independent agencies.[65]

The situation is quite different in Europe, since independence is considered a main feature of (almost all) regulatory agencies, owing to the need of breaking away from political circles (*lato sensu*) and from cyclical majorities.[66] The goal of such independence is the separation between the establishment of market rules and State activity as an economic operator, in order to guarantee a free and competitive market. In this way, not only the powers granted to agencies are exercised in a way that ensures independence from economic operators, but the system is more able to prevent any interference from governments, thereby allowing for regulatory agencies' actions to be exclusively under the control of the Judiciary.[67] In this way, not only the powers granted to agencies are exercised in a way that ensures independence from economic operators, but the system is more able to prevent any interference from governments, thereby allowing for regulatory agencies' actions to be *exclusively* under the control of the *Judiciary*.[68] This is why regulatory review triggers an interesting reflection on the role of regulation in the framework of the relations in the triangle formed by the government, economic operators and the agencies. The fact that regulatory review is envisioned as an established means for promoting presidential policies through the coordination and the oversight of agencies' regulatory activities (West, 2005b, 78) reveals an entirely different perspective on this topic. Experience shows that the introduction of regulatory review is being used not only to control rulemaking but also to induce the enactment of regulations and, for instance, pursue the White House agenda – that is the case of the "prompt letters" or the "hit lists," both of which illustrate OIRA's proactive approach concerning the rulemaking inaction of regulatory agencies (Bagley and Revesz, 2006, 1277-1280; Graham, 2008, 460-463; Livermore and Revesz, 2013, 1381; Miller, 2011, 98).[69]

Despite the political permeability that appears to be inherent to this system and that generates controversy even in the United States (Sunstein, 2013b, 1871-1874), the advantages of the system should not be forgotten. As a matter of fact, notwithstanding the different philosophies underpinning the European and U.S. Regulatory Law as far as agencies' independence is concerned, it is undeniable that, from a comparative law perspective, regulatory review

[63] According to these Authors, "[t]he completion power is the President's authority to prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of any congressional authorization to complete that scheme." (Goldsmith and Manning, 2006, at 2280. Despite the criticism that may be levelled against this position, the fact is that, originally, the Presidential supervision of rulemaking was justified by the Take Care lause, as it was understood by Chief Justice Vinson's dissent in *Youngstown* (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 701-704 (1952) (Vinson, C.J., dissenting).

[64] On the role of OIRA, see the synthesis at Sunstein (2013) 29-32.

[65] The primary addressees of Executive Orders 12,291, 12,866 and 13,563 are the executive agencies, and not the independent agencies. See Sec. 1(d) Exec. Order No. 12,291, 3 C.F.R. 127 (1991); Sec. 3(b) Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 86 (2006 & Supp. V 2011); Sec. 7(a) Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted as amended in* 5 U.S.C. § 601 app. at 101 (2006 & Supp. V 2011). However, there are provisions that apply to executive and independent agencies alike – this happens, for instance, with the regulatory planning mechanism. See Sec. 4 Exec. Order No. 12,866. In addition, Executive Order 13,579 of July 11, 2011, prescribes that independent agencies should promote the regulatory goals; they are requested to comply, "to the extent permitted by law," with the provisions about the requirements concerning public participation, integration and innovation, flexible approaches, and science, established by Executive Order 13,563. As for a retrospective analysis of the existing rules, Executive Order 13,579 grants independent agencies the competence to lay down the best instruments to carry out such analysis, though it does not exempt them from doing it. See Sec. 1(b)(c), Sec. 2, Exec. Order No. 13,579, 3 C.F.R. 256 (2012), *reprinted in* 5 U.S.C. § 601 app. at 102.
De *iure condendo*, there are proposals that advocate the general regulatory review of independent agencies' regulations (Miller III, 2011, 100; Tozzi, 2011, 68).

[66] See, e.g., the definition proposed by Professor Mark Thatcher: "a body with its own powers and responsibilities given under public law, which is organizationally separated from ministries and is neither directly elected nor managed by elected officials." (Thatcher, 2002, 956). The Author also identifies a set of indicators in order to measure the degree of independence of agencies: appointment, dismissal and resignation of members of agencies, tenure of members of agencies, agencies' financial and staffing resources, and the existence of powers to overturn agencies' decisions (See Thatcher, 2002, 959; Shapiro, 2011a, 114 (stating that one of the reasons to create agencies in Europe was precisely the need to create an administrative sector "beyond the reach of the political parties.")

[67] This affirmation concerns national regulatory agencies. On the independence of EU agencies (Shapiro, 2011a, 111, 114).

[68] Occasionally, statutes establish the governmental control of certain agencies' decisions, but in practice it rarely occurs (Thatcher, 2002, 961-962).

[69] Along with these instruments, the White House policy office takes the initiative to promote rulemaking procedures whenever they are related to presidential priorities (Sunstein, 2013b, 1871-1874).

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brings significant contributes with it. First of all, it permits to coordinate the regulatory action and to concentrate contributions from innumerous (public and private, juridical and technical) sources, and thus allows the rationalization of rulemaking, which in turn stimulates interadministrative and interagency cooperation (Sunstein, 2013b, 1840-1841).[70] But regulatory review – especially after Executive Order 13,563[71] – also imposes important mechanisms designed for ensuring public participation and transparency in rulemaking procedures. Among the several instruments established by Executive Orders on regulatory review, I emphasize both the judgment on the necessity of enacting regulations and the institution of the cost-benefit analysis, especially on economic and financial matters (see Shapiro, 2011b, at 385, giving a comprehensive perspective on the theme and discussing several doctrinal positions; Sunstein, 2014, addressing the problem from the single perspective of a former OIRA Administrator).

Obviously, cost-benefit analysis does not intend to rule out the evaluation of non-monetized or non-quantifiable benefits (such as human dignity or safety), which actually are also balanced in regulatory rulemaking procedures (Sunstein, 2013b, at 1866-1867). In those cases, cost-benefit analysis shall be replaced or complemented by "cost-effectiveness analysis," a method required, after all, by Executive Order No. 12,866.[72] Cost-effectiveness analysis implies the comparison of several alternative measures for pursuing a fixed goal and, according to Posner's accurate definition, it consists in "a procedure for comparing the different means for achieving a given regulatory end; it identifies the least costly means as the most cost-effective" (Posner, 2003, 1069) – a procedure of capital importance whenever the purpose of the regulation is not (or not only) to correct market failures but instead (or but also) to distribute wealth (Posner, 2003, 1074).[73]

Another relevant aspect is the retrospective analysis of existing rules and their role in the rationality of the regulatory system. Retrospective review received an important stimulus since Executive Order 13,610 of May 10, 2012,[74] which stresses public participation and highlights the main purposes of regulation in a particularly difficult economic context, by giving priority to initiatives "that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens" and simultaneously protect traditional public interests like public health, welfare, safety and environment.

In a word, regulatory review as a mechanism (a supplementary layer) (Livermore and Revesz, 2013, 1339) of oversight to regulatory activity (especially rulemaking) according to principles such as cost-benefit analysis (Posner, 2001, 1140),[75] public participation and protection of public values helps to improve the harmonization as well as the accountability and the controllability of regulation without seriously compromising the agencies' autonomy – which favors the protection of the system of constitutional checks and balances. Since regulatory review (partially) contradicts the present European regulatory system, consideration should be given as to whether its advantages should point to the introduction of similar mechanisms in European countries as well.

Democracy and the Rulemaking Power of Administrative Agencies

From the standpoint of democracy, the crisis of legality raises delicate questions relating to participation and legitimacy. To be sure, the inherently wide regulatory discretion undermines the normative standards of democratic legitimacy. The discretion enjoyed by agencies – especially when they are considered to be independent from Government and Parliament – entails some problems in connection with the principle of popular sovereignty, and it damages the "transmission belt" that links the Administration with the legislature (Stewart, 1975, 1675).[76] Besides, against the claim that regulatory discretion is grounded in the fact that agen-

[70] The Author describes OIRA as "an information aggregator".

[71] On the impact of Executive Order 13,563 (Sunstein, 2011, 9, 11-12). Significantly enough, the Author qualifies this document as the "mini-constitution for the regulatory state." (Sunstein, 2013b, 1846).

[72] See Sec. 1(b)(5) Exec. Order No. 12,866.

[73] Distinguishing between the two abstract categories of – prescriptive or transfer – regulations, according to their purpose.

[74] Exec. Order 13,610, 3 C.F.R. 258 (2013).

[75] Considering "cost-benefit analysis as a method by which the President, Congress, or the judiciary controls agency behavior".

[76] According to Professor A.A. Berle, "Administrative law is the law applicable to the transmission of the will of the state, from its source to the point of its application", since "[t]he administrative machinery – the whole government – is not unlike the machinery which is used in mechanics to transmit power, from its motor source, to the point where it is brought into contact with the raw material requiring its application" (Berle, Jr., 1917, 431,434). The reference to this metaphor does not imply the integral acceptance of the Author's position; it is used only by virtue of its illustrative potential.

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cies provide technical specialization and evaluations, one could argue that agencies themselves are granted powers to make non-expert judgments about social and political choices and about the public interest (Mashaw, 1985, 22); on the other hand, as Norberto Bobbio argues, democracy and technocracy are antithetic concepts (Bobbio, 1995, 23).

In this kind of scenario, the safeguard of democracy requires from agencies that their actions fulfill the purposes and interests cherished by the polity. This is only possible if, despite the "fuzzy legality," (Cohn, 2001)[77] the normative premises of those actions continue to be defined by a legislature[78] that establishes their goals, and as long as there are mechanisms of plural participation totally committed to strengthen dialogue and public interaction (Sen, 2009, 326), two features which characterize democracy as "the public government of public power" (Bobbio, 1995, 17-19, 85). This idea is tied to the concept of "democratic procedure", understood as a mechanism that ensures the necessary communicative means to the formation of public will (Habermas, 1998, 180),[79] and permits to strengthen the sense of visibility, publicity and transparency so as to get rid of "invisible" or "occult" powers (elusive to citizens' scrutiny) (Bobbio, 2011) as well as any sort of "administrative despotism." (Brachet, 2010, 147). Within this context, Kant's "transcendental formula" requires particular attention: "[a]ll actions that affect the rights of other human beings, the maxims of which are incompatible with publicity, are unjust." (Kant, 2006).

Negotiated and contracted procedures

Concerns with public participation in rulemaking procedures are present both in European and US law.

In the United States (Coglianese *et al.*, 2008, 36-43),[80] the procedural requirements of the APA include, in the formal and the informal rulemaking alike, moments that promote participation: notice-and-comment rulemaking imposes the agency to give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation;[81] on-the-record rulemaking involves a hearing, an adversary trial-type procedure.[82] Similar worries with transparency and openness are also found in the several Executive Orders on regulatory review.[83] Public participation received a new boost from President Obama's Memorandum on Transparency and Open Government, issued on January 18th, 2009:[84] considering that transparency, participation, and collaboration constitute decisive tools to achieve efficiency and effectiveness in Government, this document promotes active citizenship and accountability in that it increases opportunities for participation in administrative activity.

In Europe, too, owing to a perceived democratic deficit in the administrative agencies born from the liberalization and privatization tendencies induced by Europeanization of national administrative law (Majone, 1998, 15) participation and transparency in rulemaking procedures play the role of a sort of "reestablishers of democracy." European law includes openness and transparency among the principles that shape European Administrative Space, while also highlighting their functionally orientated character, designed to promote the scrutiny of administrative actions (regulations included) by citizens (OECD, 1999, 11-12) – fully in keeping with the idea that participation encompasses a double function, that of collaboration and that of defense (Mendes, 2011, 32-36, 43-61).[85]

Accordingly, contemporary administrative procedure acts of European legal systems institute different kinds of participation, depending on both the procedural moment when that occurs and on the citizens allowed to participate. So it is

[77] The Author identifies six types of "unfaithfulness to strict legality".

[78] In Europe, the difficulties in finding a democratic radical are increased by the fact that the legislature may be an institution of the European Union. On the democratic deficiencies of European Union (see generally, Beck, 2012, 64-68). In his turn, Professor Paul Kirchhof argues for the "return to responsibility structures" (*Rückkehr zu Verantwortlichkeitsstrukturen*) precisely to legitimate the EU modes of action, especially when at stake are budgetary decisions with relevant impact in the member-States' finances (Kirchhof, 2012, 83-84).

[79] Discussing the formation of a rational political will.

[80] To understand the roots of public participation and transparency in the United States (considered as "hallmarks of American administrative law"). See generally, Funk (2009).

[81] See 5 U.S.C. § 553 (2012).

[82] See 5 U.S.C. §§ 556-557 (2012).

[83] See Sec. 6(a)(1) Exec. Order No. 12,866 (granting meaningful public participation in the regulatory process); Sec. 2 Exec. Order No. 13,563 (determining public participation in rulemaking procedures); Sec. 2 Exec. Order No. 13,610 (on public participation in retrospective review).

[84] Fed. Reg. 4685 (2009).

[85] Discussing the double role played by participation and its relevance in rulemaking procedures.

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possible to distinguish between preventive participation and successive participation (when citizens are expected to make comments before or after the elaboration of a regulation project, respectively) on the one hand, and on the other hand between individual participation and collective participation (when the procedure is open to all citizens, or restricted to the participation of interest groups, respectively) (Mendes, 2011, 46-58; Correia, 2011, 313, 327-329, 351-352).

Alongside those types of participation – which, according to their intensity, may be qualified as forms of "participation-collaboration" that also help to reduce the democratic deficit that characterizes agencies' rulemaking –, new models of coordinated, consensual and concerted administrative action arise (Manganaro, 2004, 233).[86] A significant step toward participation is the result of the introduction of *regulatory negotiation* (*lato sensu*) (Coglianese, 1997, 1256, n. 6), which has yielded advantages, such as flexibility, efficiency, and reduction of conflicts (Freeman and Langbein, 2000). Within this framework new forms of participation are included, and the will of citizens plays a truly constitutive role. One such case is the procedure instituted by the Negotiated Rulemaking Act: the negotiated rulemaking procedure. The new procedural rules added to the US Code[87] aimed at encouraging a qualified public participation – which intensifies the exchange of information, knowledge, and expertise – and at contributing towards conflict reduction.[88]

Some European countries go further and start envisioning within rulemaking procedures the possibility of celebrating contracts with the interested parties, originating the so-called "normative contracts" or "contracts concerning norms." (Axer, 2000, 56-95; Becker, 2005, 651-723; Fahlbusch, 2004; Gösswein, 2001; Moniz, 2012, 512-535; but see Llora, 1998, 354). These are administrative endoprocedural contracts (i.e., administrative contracts signed before or during an administrative procedure) concluded between administrative bodies and citizens in order to achieve concerted positions on the enactment and/or the contents of a regulation. Normative contracts are, therefore, self-binding administrative instruments for the exercise of regulatory discretion, in that they condition future administrative rulemaking (Arnauld, 2006, 434; Maunz, 1981, 502-503; Raschauer, 1982, 245). Furthermore, those contracts are means to promote more active participation in rulemaking procedures and to make citizens real co-authors of regulations. In this scenario, participation reaches a new level, that of public-private cooperation, as it provides the opportunities for a better balance between public and private interest or, in other terms, for a less burdensome regulation and more advantageous to private interest, while also satisfying public interest (Franco, 2007, 186).

Public participation: towards democratic legitimacy and capture avoidance

From the perspective of the scope of rulemaking procedures, participation – understood as an expression of the acknowledgment of several social autonomies and as an indispensable element to fight against citizenship deficit (Nabatchi, 2010) – strengthens the democratic legitimacy of regulations and improves their quality and effectiveness.[89] Insofar as it guarantees Society's involvement in the enactment of norms, participation arises as a juridical value in *se* (*Rechtswert an sich*) (Ossenbühl, 1982, 466).

It is not surprising, therefore, that one of the axes of modern democracies is public and civic participation. Some of the most recent German scholars claim that one of the consequences of the new conception of the State as a cooperative State is precisely increased citizen participation in normative procedures (Becker, 2005). As pointed out in the Report on Transparency and Public Participation in the Rulemaking Process, "Transparency" and "public participation" represent two features of the rulemaking process that can enhance rulemaking quality and legitimacy. Transparency refers to public access to information held by government rule makers as well as information about their decision making. Public participation encompasses varied opportunities for citizens, nongovernmental organizations, businesses, and others outside the federal government to contribute to and comment on proposed rules. Both transparency and

[86] Arguing that citizens' participation in administrative actions through coordination acts or consensual acts demands a new branch of administrative law: special administrative law of concerted Administration.

[87] See 5 U.S.C. §§ 561-570a (2012).

[88] There is no consensus about negotiated rulemaking procedure. Compare Cary Coglianese, Assessing Consensus: The Promise and Performance of Negotiated Rulemaking, 46 Duke L.J. 1255 (1997); Cary Coglianese, Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter, 9 N.Y.U. Envtl. L.J. 386 (2001); Philip J. Harter, Assessing the Assessors: The Actual Performance of Negotiated Rulemaking, 9 N.Y.U. Envtl. L.J. 32 (2000).

[89] See Alonso (2005) 375 (on the functions of public participation in rulemaking procedures); Rossen-Stadtfeld (2012) 663, 699-702 (pointing out that if the rationale of traditional participation mechanisms was to provide information and knowledge that permitted Administration to decide, the purpose of modern exigencies of participation is to allow a qualified intervention of private actors, in order to satisfy their desires of democratic optimization). Of course, those observations do not imply that rulemaking procedures demand in every circumstance the participation of all citizens (Gösswein, 2001, 121-122).

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public participation can promote democratic legitimacy by strengthening the connections between government agencies and the public they serve. Both can also help improve the quality of agency rulemaking. Transparency helps ensure meaningful and informed public participation, and meaningful and informed public participation informs agency rule makers (Coglianese *et al.*, 2008).

Besides, one must also bear in mind that the promotion of dialogue and cooperation inherent to negotiated and contracted rulemaking procedures – which is benefic when envisaged from the vantage point of the articulation of public and private interest – may lead to pernicious consequences such as agency capture and eventually corruption (Ayres and Braithwaite, 1992, 54-100).[90] This will happen whenever the exercise of regulatory powers (namely through rulemaking), instead of being guided by public interest, is under the influence of interest groups in order to favor them (Carpenter and Moss, 2013; Livermore and Revesz, 2013, 1343). In fact, one of the dangers of regulatory negotiation is precisely its susceptibility to favor capture. Moreover, under this kind of solutions public interest might degenerate into something to be bargained away, and the agencies would shirk their own responsibility for the contents of the rules (allegedly because those rules are the result of consensus) (Funk, 1997, 1366-1369, 1374-1379). However, openness and publicity of rulemaking procedures appear as tools apt to fight against this tendency. This is why, for example, the agencies must publish their decision of establishing a negotiated rulemaking committee and provide a period for the submission of comments and applications for membership of the committee;[91] by working towards the same goal we also find out the impartiality guarantees established by the norms which prevent conflicts of interest.[92]

So, it can be said that the mechanisms of public participation have "capture-reducing properties." (Livermore and Revesz, 2013, 1341).[93] Transparency is recognized as an instrument to prevent capture (Livermore and Revesz, 2013; Dorf, 1998, 58-59),[94] and, hence, mechanisms of public participation within a "regulatory due process" (Sunstein, 2013b, 1843) are considered as factors of procedural legitimacy of agencies' actions (Majone, 1998, 20). As Professor Mark Thatcher notes, "'[p]rocedural legitimacy' offers a source of 'input legitimacy'" to regulatory agencies, stimulating what the Author calls the "answerability" of those bodies (Thatcher, 2002, 958 (quotation) and 968 (reflecting on answerability)), and therefore promoting their credibility and accountability.

Nevertheless, participation shall not be overestimated nor regarded as *the* criterion of rulemaking. On the one hand, these procedural requirements shall not erase substantial concerns on the material legality (or, as I would prefer, juridicity) of administrative actions in general and of regulations in particular (Mashaw, 1985, 26-27). On the other hand, administrative openness facilitates what Professor Cass Sunstein (although in another context) refers as the risk of "epistemic capture" (Sunstein, 2013b, 1860-1863). As long as the participants in rulemaking procedures (regulated entities and interest groups mainly) purport to defend their points of view, they will bring up only the elements and the information that underpin their claims (Mashaw, 1994, 188);[95] even if agencies officials are subjectively impartial, it is natural that their opinions somehow reflect the participants' perspectives and that the final result – regulation – eventually mirrors their interests.

Conclusion

A comparative study of the rulemaking power of U.S. and European agencies leads to the general conclusion that it should aim at carrying out the hard task of achieving market balance, while maintaining the axiological and core requirements of the Rule of Law, democracy and good governance.

In particular, the fashioning of an efficient, juridically adequate regulatory system requires that the exercise of rulemaking power is oriented by a number of guidelines:

a) Rule of Law and flexibility: the issuance of regulations as a means towards an effective regulatory policy presupposes that the material requirements of the Rule of Law are respected. However, compliance with these require-

[90] Facing the problem of agency capture, the Authors discuss how tripartism, or the participation of relevant public interest groups, might be a solution to capture and corruption.

[91] See 5 U.S.C. § 564 (2012).

[92] See 5 U.S.C. §§ 568(a)(2), 569(b) (2012).

[93] The Authors discuss the benefits of regulatory review.

[94] Arguing that "[i]n the new regulatory model, citizens and other constituencies participate directly in the formulation of policy, regulators participate in the activities they regulate, and transparency serves to limit the opportunities for agency capture and self-dealing".

[95] Pointing out that "all participants in regulatory or rulemaking process are boundedly rational and limitedly altruistic".

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ments does not intend to obliterate the transformations that administrative subordination to law has undergone over the last twenty years. Nowadays, regulatory discretion is regarded as an exigency of flexibility for the good functioning of the regulatory state. Accordingly, regulations issued by agencies shall be responsive to changes (Baldwin and Black, 2008, 73-76, 89-91).[96] As the advent of cyclical crises clearly demonstrates, flexibility and dynamism are required in regulatory actions; in view of that agencies shall be aware of the changes in the regulated sectors and act accordingly – which might entail the alteration of regulatory goals and regulatory instruments (and, among them, regulations themselves). Besides, the preference for soft law instruments stands out as one of the most important topics in this matter. Although it may raise a number of delicate problems from the Rule of Law standpoint, there is no question that in several areas flexibility and informality are key to guarantee effective regulation.

b) Checks and balances: If regulatory discretion (in rulemaking power, too) is an inevitable and important moment of the regulatory State, it must nevertheless be balanced with the objective scope of the other government branches – which demands an accurate perception of both the nucleus of the legislative branch (and, consequently, of the matters to be ruled out from regulatory discretion) and the scope of judicial review (since too much deference will, sooner or later, kill the system).

c) Reinforcement of the democratic foundations: By walking the "path back to the citizens" (Kirchhof, 2012),[97] rulemaking procedures shall defeat citizens' passivity. The development of active citizenship is strongly connected with the sustainability of the legal and political system: through it, citizens will be set free from the "moral servitude" of contemporary democratic societies (Cortina, 1999, 23-28;[98] Schmidt, 2006, 132; Sen, 2009, 351, 354).[99] The openness of rulemaking procedures to public participation, the institutionalization of a "regulatory due process" (Sunstein, 2013b, at 216) and the admissibility of citizen prompt letters (Graham, 2008; Hsu, 2008, 497-499) could be important instruments to achieve that goal.

d) Improvement of interadministrative and interagency coordination: In order to overcome the "tunnel vision" (Breyer, 1993, 11)[100] that characterizes some of the regulations issued by sectorial agencies, it is imperative to promote the harmonization of the agencies' rulemaking power whenever cross-cutting matters are stake.

e) Consolidation of regulatory ethics: On the one hand, regulatory ethics impacts on the relations between agencies and regulated entities, inducing regulators to adopt a fair, cooperative behavior and to act in accordance with "procedural justice." (Tyler, 2006, 6-7, 115-124).[101] In fact, regulatory ethics pursues public interest and observes juridical rules, while also striving to address the economic operators' concerns. In so doing, it succeeds not only in gaining the regulated entities' acceptance, but also in favoring compliance with agencies' regulations. On the other hand, the aim of turning to regulatory ethics is that of instituting or strengthening instruments against regulatory capture, such as the establishment of regulators who are independent vis-à-vis economic operators, or the punishment of regulatory actions issued under the influence of corruption.

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[96] Describing the meaning of the concept "responsiveness to change" and stressing the importance of modifying and adjusting strategies and tools.

[97] On the central role of citizens to overcome the economic crisis, the subtitle of the Author's work is telling: "the path from the debtor back to the citizen": "[d]er Weg vom Bürgen zurück zum Bürger".

[98] The Author refers to a "moral of responsibility", in the sense that citizens should take seriously the social structure of reality.

[99] After all, this proposal intends to be only a piece of a major task toward incrementing public participation in the *polis*, for, as Ronald Dworkin argues, "[t]he vicious circle goes down and down. If the political consultants tell the politicians to treat us as ignorant, we will remain ignorant, and so long we are ignorant, the consultants will tell the politicians to treat us that way". See Dworkin (2006) 128. On this matter (which transcends the purpose of my text), cf. also the innovative proposals presented by Ackerman and Fishing (2004); Ackerman (2013) 309.

[100] Stating that "[t]unnel vision, a classic administrative disease, arises when an agency organizes or subdivides its tasks that each employee's individual conscientious performance effectively carries single-minded pursuit of a single goal too far, to the point it brings about more harm than good".

[101] On procedural justice and the reasons why it encourages voluntary compliance with the law.

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