

Sarajevo, 22 July 2019

CONTRACTUAL AUTONOMY OF PUBLIC ADMINISTRATION

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WHAT DO WE MEAN BY CONTRACUTAL «AUTONOMY»?

- **Traditionally:** autonomy is the expression of moral and social freedom to act according to individual needs---
presupposition of juridical phenomenon =
clear separation between role of law/individual needs
- **Currently:** overcoming rigid legal positivism, based on the central role of state law
- **Crisis of sovereignty = crisis of law:** the regulation of relations between private individuals is no longer carried out by law but is identified in rules that are given by the operators themselves (from codes of ethics to Authorities)

SELF-REGULATION

- Tools are needed to regulate the most ductile relationships, promoting a gradual **enlargement of the spaces of selfregulation** in areas previously removed from private autonomy
- Our age is characterized by «an unstoppable transition from a law produced in hierarchical form to a law that is written (...) by different subjects, legislator, judge, independent authorizations, doctrine, individuals»

Division of competences between public authorities and private individuals

- **Traditionally:** regulatory power up to public authorities and enacting power up to private individuals;
- **Currently: P. OF SUBSIDIARITY**
 - **Italian Constitutional Court** (sent. n. 300/2003): for the regulation of private interests, even if of general importance, the original and primary competence lies with the private subjects; public authorities intervene when the regulation of private individuals proves in practice unsuitable for achieving a balanced protection of the interests, in compliance with the principles of reasonableness and proportionality.
 - **Article 5(3) of the Treaty on European Union (TEU)** and Protocol (No 2) three preconditions for intervention by Union institutions in accordance with the principle of subsidiarity: (a) the area concerned does not fall within the Union's exclusive competence (i.e. non-exclusive competence); (b) the objectives of the proposed action cannot be sufficiently achieved by the Member States (i.e. necessity); (c) the action can therefore, by reason of its scale or effects, be implemented more successfully by the Union (i.e. added value).
- **P. OF PROPORTIONALITY:** Article 5, : 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'.

Division of competences between legislator and jurisdiction

- The **legislator** has the task of identifying the interest worthy of protection
- The **judge** has the task of concretely graduating the protection of the interest, in comparison with other potentially worthy interests

ENFORCEMENT VS PRIVATE INDIVIDUALS (ORDINARY JUDGE)

- In a legal relationship, **all the rules are combined**: private and public law are not detached territories
- the **SUBJECTIVE RIGHT**: the subject has the power to realize its own interest. Subjective right is a synthesis of a position of strength and a position of freedom;

SUBJECTIVE RIGHT

- Taking the example of property rights, the set of rules provides a mechanism which, through the connection between:

1. The rules that define the **CONTENT** of the protected situation (Art. 832 c.c.: content and limits of protected interest);

2. The rules that identify the **ACTIONS** that can be exercised in the event of damage to the interest violated by the law (Article 948 c.c.: action to protect the interest);

3. The rules governing the **PROCEDURES** for implementing the judge's provision that provides concrete protection under the law (art. 2930: implementation of the judge's decision).

allows the DIRECT AND IMMEDIATE realization of the interest protected by law

ABUSE OF THE LAW

- The protection limit is represented by the institution of abuse of the law. The assessment of the abuse must be concrete and take into account the circumstances.
- The abuse occurs when the owner exercises the right according to modalities that give rise to a not inevitable **DISPROPORTION** between the own benefit and the sacrifice of others.

ENFORCEMENT VS PA (ADMINISTRATIVE JUDGE)

- **LEGITIMATE INTEREST** entails the power of the individual to request a judicial control regarding PA behaviour.
- The legitimate interest indicates a technique of protection of individual positions valued as worthy of protection only **undirectly and mediated** with respect to the primary protection of public interests.
- For example: The candidate who takes part in a public competition, for example, can act for the judicial protection of his interest in the event that he has been injured by an illegitimate provision of the public administration that banned the competition.

ENFORCEMENT VS PA

- The owner of the protected interest may challenge the illegitimate administrative act that damages his interest; but the eventual sentence of acceptance of the competent regional administrative court will not declare him winner of the competition; It will simply cancel the unlawful act, with the result that the administrative authority that had issued that act will have to issue a new act without the defect established by the T.A.R.
- The protection granted to the protected interest is:
 - **indirect**, because what is protected is not the final interest of the subject but the instrumental interest to procedure's regularity;
 - **mediated**, because protection is granted on so far as the individual interest coincides with a proper interest of the public administration.

ENFORCEMENT VS PA

- In these cases in point, the private individual has the specific power to **control the regularity** of the public action's action as well as a power to challenge any defective acts.
- For a long time the jurisprudence has excluded the **indemnifiability** of the damage from injury of the legitimate interest: the expectation to the correct explanation of the public powers could receive protection only through the removal of the illegitimate deeds, but not also through the instrument of compensation of the damage.

OVERCOMING TRADITIONAL DICHOTOMY SUBJECTIVE RIGHT/LEGITIMATE INTEREST

- The **Court of Cassation** (n. 500/1999) by virtue of the general rule of the art. 2043 of the Italian Civil Code, stated that - in the presence of an unlawful act of the public administration committed with intent or fault that caused an undue damage as a direct consequence of the provision - its addressee is entitled to **compensation for damages**, even if he is not the **owner of a subjective right but a legally relevant interest**. This would have important consequences on liability's classification.

WHEN P.A. CAN ACT *iure privatorum*?

- P.A., in the adoption of non-authoritative acts, deeds, **acts according to the rules of private law**(L. 241/1990; L. 15/2005),
- Nevertheless, in using private tools, PA remains subject to the obligations of **impartiality and good performance** of the administrative action set by art. 97 Cost.

WHEN P.A. CAN ACT *iure privatorum*?

- P.A. can act through private law rules:
 1. **Own activity:** supplies, transport, purchases, disposals, rentals or works concerning the various administrations and the various services of the State;
 2. **Subjective rights:** acceptance of a donation or a testamentary succession, stipulation of contracts to procure goods or services, alienation of assets, rental of available assets.

WHAT CAN P.A. DO *iure privatorum*?

- The power of private autonomy of the Public Administration must be carried out compliance with the constitutional principles of **legality, impartiality and protection of the third party**, as well as the regulatory principles that govern administrative action;
- Peculiarity: Negotiating autonomy is **limited and functional** since purposes of acting *iure privatorum* are always **fixed by law**
- The activity of private law of the P.A. is not an expression of a right to freedom, as for private individuals, but is always bound to respect **public goals** and, therefore, functional to the pursuit of **PUBLIC INTEREST.**
- **A REASON OF PUBLIC INTEREST IS ALWAYS REQUIRED TO RESORT TO PRIVATE LAW**

P.A. contractual capacity

- The set of rules recognises to public authorities a **legal general capacity** of private law;
- Legal limitations are due to **the peculiarity** of the administrative activity, in the pursuit of its **institutional purposes**

HOW DOES P.A. NEGOTIATE?

- a) the contract resolution with which the competent body of the administration decides to implement the contract;
- b) the contract conclusion between P.A. and the chosen party;
- c) the approval of the contract
- d) execution of the contract

TYPOLOGIES OF CONTRACTUAL ACTIVITIES PERFORMED BY P.A.

- 1. **public law contract**, whose object is the exercise of public function;
- 2. contract of **public evidence**, characterized by the mixing of the rules of public law with those of private law: there is a general interest that the choice of the contracting party shall take place according to public enforcement process to ensure transparency and legality of administrative action (eg the tender and the consequent contract for the construction of a school)
- 3. the actual **private law contracts** of the public administration (eg a lease).

DEROGATIONS FROM GENERAL PRINCIPLES OF CONTRACTUAL LAW

1. FORM

- The general principle of freedom of form is not applicable (in writing form under penalty of nullity)
- The conclusion of the contract must be carried out by the body with external representation of the stipulating body.
- Requirement of certainty of law;
- Controls due on the formation of the public will.

DEROGATIONS FROM GENERAL PRINCIPLES OF CONTRACTUAL LAW

2. TIPICITY

- P.A. can accomplish, in its own contractual activity, only what is **expressly permitted by law**.
- Art. 1322, 2., c.c. does not operate.

WHAT IF PA DOES NOT FULFILL ITS COMMITMENTS?

- For example: damages caused in the course of its research activity of the contractor in the context of a public procedure, even in the presence of a legitimate administrative provision; or a private company sued the Public Administration to request the compensation for the rejection of the previously stipulated contract.
- P.A. it is not immune to **liability**. The harmful conduct of the private's position is protected in compliance with the constitutional principles of equality and reasonableness. The use of private tools by the PA inevitably renders applicable to it the negotiating rules of common law, in the same way as any other party of the contract.

WHAT IS THE SUBJECT OF P.A. CIVIL LIABILITY?

- Here liability does not concern the judgment of validity of the act (violation of rules of public law) but the violation of common rules, which pertain to **behavior** and impose on the administration duties of **fairness and good faith** likewise to those that burden a common subject (principle of good faith in an objective sense of the art. 1337 c.c.)

WHAT KIND OF LIABILITY?

- **Traditionally: non contractual liability (law of torts).** The obligation of good faith, to which the negotiating relationship must be based, arises from a generic duty in external relations, which is materialised in behaviors of loyalty and fairness before third parties.

TRADITIONAL ISSUES

- **THE PRE-CONTRACTUAL LIABILITY “ENIGMA”**
 - PAR. 348 BGB: CONTRACTUAL NATURE;
 - artt. 1112-1112 code civil Fra: NON CONTRACTUAL NATURE;
 - DIVERSIFIED ITALIAN DEBATE

RECENT THEORIES

- A different and recent approach has developed the “**social contact**” theory: **non compliance without provision** arising from the connection between PA and individuals following the awarding of the contract stipulation in a public tender procedure.
- The consequence is the **contractual qualification** of the responsibility:
 1. prescription;
 2. burden of proof;
 3. foreseeable damages;

STATE – LEGISLATOR LIABILITY

- State liability to individuals for breach of EU law in case of damage resulting from failure to **implement European regulations**:
 - Qualification of State responsibility towards the European Union;
 - Definition of the relationship between a Member State in breach of EU obligations and its citizens

THE ECJ AND TREATY CONTRIBUTION

- Principle of **effectiveness**: the citizen must be able to assert his right;
- Principle of **equivalence**: the right must be enforced under the same conditions in which a similar situation of domestic law could be asserted.

FRANCOVICH CASE (C 6/90 e C 9/90 - 1991)

- Right to compensation:
 - the result prescribed by the directive should imply the attribution of rights in favor of individuals;
 - the content of these rights had to be clearly identifiable on the basis of the provisions of the directive;
 - there had to be a causal link between the violation of the State and the damage suffered by the injured party

EUROPEAN ENFORCEMENT

- The European citizen can invoke before the national court a right deriving from European source
- The national court must not apply the internal rule conflicting to a European standard

STATE-JUDGE LIABILITY

- Liability of the Member State for the damage caused to individuals as a result of a breach of EU law for the violation following an **interpretation of the rules** or an evaluation of the evidence made by this court.
- L. 18/2015

“NEW” ADMINISTRATION

- END OF UNACCOUNTABILITY DOGMA
- PA as a service provided to citizens, assessable due to the ability to reach the set goals;
- Citizens as customers – officers as managers
- Check – transparency - accountability

Thank you for your attention

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