When the Economy is affected with a Public Interest

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I. Structural and functional developments in common law countries and in continental Europe.

1. De-regulation and re-regulation of public utilities and, more generally, of economic activities affected by public interests are having a highly disputed impact on the respective provinces of administrative law and of its neighbours, private law on the one side and constitutional law on the other.
According to some scholars de-regulation is paradoxically extending administrative law. De-regulation gives economic activities back to private hands (and consequently to private law),but attached to such activities, principles and obligations remain that previously applied to State actions only. Upon this premise the boldest ones argue that administrative law principles are now common to the discipline both of public and of private power.
According to others it is re-regulation that is modifying, and in this case eroding, the boundaries of administrative law. For re-regulation substitutes the technical supervision of independent agencies for the discretionary control of administrative departments under the political direction of the Executive, therefore reducing the realm of administrative law. The new agencies -it is argued- fall outside its boundaries and open a new era in which 'non majoritarian institutions' embody a totally renewed separation of powers. Therefore, many of the traditional principles of administrative law, first of all the principles that find their origin in the dependence of the Executive of administrative institutions, are doomed to lose part of their hold.

2. Much of the dispute is biased, and even distorted, by the resilient cultural paradigms that history built decades (if not centuries) ago around the notions of administrative law and of administrative discretion, both in continental Europe and in common law countries. Administrative law has been profoundly

changed by the legislative and judicial developments that have intervened throughout the years and further changes are occurring within the new legal frame that de-regulation and re-regulation themselves are presently shaping. Despite this uninterrupted process of innovation, the original paradigms that grew around the initial administrative law survive in the culture of scholars, of courts and of those very regulatory institutions that are mostly responsible for such process nowadays.

The assumption that the bodies of law that continental Europe and common law countries call "administrative" are still as different from each other as they initially were is, in fact, losing ground (even though more than one continental scholar keep stubbornly arguing that continental administrative law remains administrative as long as it retains its traditional features). However, despite the increasing acknowledgement of the converging trends that have taken place, some of the crucial factors that have changed both systems throughout the decades are frequently ignored. Attention has certainly been given to the enlarged boundaries and scope of judicial scrutiny both in the Continent and in common law countries. Much less attention has gone to the gradual process that in the Continent has 'unbundled' the public interests initially incorporated in the inscrutable *raison d'Etat* and later on in the police power of national States and has consequently led to tying each measure to a single and identifiable public interest, therefore paving the way to the single mission authorities of our time. Under the light of this development such authorities and the rules they apply are much more than a mere transplant from common law countries exclusively due to the privatisation of economic activities. They seem to be the last (and not necessarily the final) stage of an 'indigenous' process of transformation of continental administrative law the previous stages of which deserve to be reconstructed. Such a retrospective view may lead toward a fresh and unbiased assessment of the rules and institutions that are prevailing in the current decades.

3. The historical process by which administrative law took root and shape in the post medieval legal systems of Europe is a well-known one. It is closely linked to the efforts (and to their respective outcomes) that were common to several kingdoms, aimed at centralising the fragmented institutional architecture inherited from the Middle Ages.

In the countries where these efforts were successful a national army and a national bureaucracy were built up and became the backbone of the newly formed national States. The protection of any new public interest was in itself a good reason to strengthen such a backbone and to bestow new functions and tasks upon it. The concept of police power came out as the main cultural as well as legal product of this structural process. The State has the power to protect the 'polis' and any measure aimed at this protection falls within the jurisdiction of its bureaucratic machinery, that in principle no court is entitled to review.

In the countries, namely the UK, where medieval institutions succeeded in remaining the frame within the boundaries of which the process of centralisation was forced to stay, nothing similar came out. The bureaucratic arms of the King remained crippled for centuries and it was the Judiciary that extended and strengthened itself as the backbone of the nation. The difference was sharp. Judges were appointed by the Crown and were formally its agents. And yet they were under the legal obligation to apply the same rules to everybody, with the consequence that public interests themselves could be protected only as long as their protection did not violate individual rights and liberties recognised by the common law of the country.

4. It is a matter for dispute whether administrative law was already born in the continental 'anciens regimes' just referred to (we will see later on that the prevailing opinion dates its birth in the years following the French Revolution). Certainly there was no administrative law where the common law was the paramount law of the land and the differences between such a model and the continental one already implied different answers to similar demands.

The 'reasonableness' and 'affordability' of prices of first necessities and of duties to be paid for licensed and/or monopolistic services was a common concern in both systems. These were indeed the cases in which economic activities were 'affected with a public interest'. Who was empowered to take care of such interest? In continental Europe this was an area progressively absorbed into the police power of the State, with two main consequences: firstly that public services could be directly run by public bodies; secondly that setting reasonable and affordable prices for prime necessities such as bread became a primary task of officials belonging to the bureaucratic machinery of the State. In the UK (and in the American colonies) this was and remained an area of judicial decision up to the 18th/19th century. The 'Assisa Panis et Cervisiae', an English code establishing special rules for the sale of bread, trusted the enforcement of such rules to the justices of peace. The code had been issued in 1266 and remained in force in the London area until 1815. As to public services, they were most frequently run by private 'common carriers' subject to common law plus special rules equally enforced by the courts.

5. Thus, in relation to the stage we have just described, it is fair to say that administrative law was no more than an embryo in continental Europe, while it was part of the unknown future in common law countries. Yet some of the reasons both for the common and for the diverse features it would have taken in the two legal systems, could already be detected.

In common there was the derogatory aim of the rules protecting public interests in relation to private activities. In both systems that protection was the source of special rules imposing special responsibilities

and obligations upon private operators. Above this common threshold diversity prevailed. In common law countries no special responsibility or obligation was allowed to restrain property rights and freedom of contract to such an extent that a court might find 'unreasonable', according to its ordinary standards. In continental countries derogation was not supposed to meet such a limit, it was indeed among its usual goals to trespass upon it. Do not forget that public law was aimed at the establishment of uniform, central rules replacing the fragmented rules and jurisdictions that the building up of national States was facing.

A second and no less important difference should be noticed. In common law countries each one of the public interests that were to be protected was assessed by the courts in its individual specificity and consequently balanced against the individual and contractual rights touched upon by it. There was an unavoidable degree of discretion both in the assessment and in the balance, but far less than the much wider discretion allowed to State officials on the continent. Not just because continental officials were not legally bound to respect individual and contractual rights whenever a 'superior' public interest might require their sacrifice, but also for a structural reason. These officials were all entangled in the bureaucratic machinery of the State and therefore part of a net by which not one but several public interests were to be protected. Therefore any decision was expected to be mindful of all of these interests, to the effect that the protection of one would not impair the others. Such a structural contiguity of public interests, that required (and allowed) public decisions to adjust to a variety of impulses, first of all to the guidelines coming from political authorities, brought about far reaching consequences. Although justified as rational instruments to free the legal systems of the continent from the pre-existing mess of legal sources and jurisdictions, public law and its measures also appeared as flexible instruments in the hands of the rulers, whose arbitrary will could be easily channelled through them. In the long run the way was paved to the notion of administrative discretion not as a balance of public interests vis-à-vis individual rights, but as a balance of public interests vis-à-vis other public interests, sometimes equally important, sometimes 'secondary'; with a lasting taste of arbitrariness in it.

6. The 19th century is crucial for the development of administrative law. As already mentioned, the prevailing opinion dates its very birth in continental Europe in the immediate aftermath of the French Revolution, when the separation of powers was firmly established and the Conseil d'Etat was set up. It is a fact that it was after these two events that administrative law was baptised as such. It is, however, disputed whether separation of powers and Conseil d'Etat were the foundation or a turning point in the life of a special branch of law traces of which, despite the name, could be detected even before.

We have already seen that what is usually pointed out as the main feature of administrative law -namely its derogatory nature with regard to the rules otherwise applicable to the relevant case- was inherent to the acts adopted under the kingly prerogatives of the *ancien regimes*. The real innovation that the separation of power and the judicial review bestowed upon the Conseil d'Etat brought about was the double leash that they attached to the neck of such a derogatory power. Derogation was going to be regulated by law and therefore limited to those areas deemed it necessary by the newly elected Parliaments. In those very areas, which remained outside the range of ordinary courts, a specialised court, the Conseil d'Etat, was empowered to void those administrative measures that overstepped their legislative boundaries and goals. One might be tempted to argue at this point that to date the tiger's birth from the moment of her taming is ideological, to say the least. However, it is not essential for us to go deeper into the dispute. From our viewpoint it is the new course that has to be noticed, as well as the parallel and no less significant change that occurs in the same years. Public law's derogation had repeatedly and pervasively entered into the sphere of economic activities during the *ancien regime*. Now economic activities find their uniform rules in the Civil Code upon the free market's principles that leave such activities to the contractual arrangements of private parties. The change is profound in more than one sense. Firstly, derogatory rules and measures had been used by the King and his bureaucracies to the effect of centralising and making more uniform the fragmented legal systems they were fighting against. Now the uniform rule is on the other side, on the side of the Civil Code, and derogatory administrative rules become 'special' law. Secondly, after the Civil Code and according to its principles, the sphere of economic activities will remain for decades largely (even if never entirely) outside the range of administrative derogation, that will be restricted within the protection of public order. As has been rightly noticed the police power of the State, so broadly defined in the 18th century as to include economic regulations, became the power to protect public order, public safety and the like. However, when the need arose in the last decades of the 19th century and the gates were opened again, administrative law was ready to restore its hold on a significant part of economic activities.

Which sort of administrative law was it at this stage of its own evolution? It had both common features with the derogatory prerogatives of the *ancien regime* and significantly new ones. New were the interests it was called to serve. Mostly the interests of low income classes whose demand for protection against the main risks of life and of essential services at an affordable price could not be satisfied within the framework of the inter-private relations of the Civil Code. But also the interests of the emerging industry that were frequently in conflict with those of landowners and prevailed upon them by virtue of the public interest inherent to industrial activities. New also was the compliance with the rule of law and with the principles that administrative courts had been expounding. In France the principle 'The king can do no

wrong' was a fading one and the scrutiny on the excess of power continuously eroded the traditional discretion of administrative authorities. In Germany and in Italy the protection of the so-called legitimate interests (into which individual rights were transformed and consequently downgraded when touched upon by public interests) steadily reduced its own distance from the actual protection of legal rights by ordinary courts.

Inherited from the past were two other features that the erosion of the pre-existing discretionary powers had not discarded. The first one was the wide range of intrusive powers that were ready to be activated as soon as an economic activity happened to be affected by a paramount public interest: not just special responsibilities upon private operators still under the jurisdiction of ordinary courts as in common law countries, but intensely conditioning licenses under review by administrative courts and private rules remaining as an ancillary source of regulation; furthermore, reserve to the State (or to the municipality) of the relevant economic activity that could be either directly exercised by public entities or given back to private exercise by discretionary grants only. The second one was the enduring structure of continental administrative machineries as bureaucratic nets in which public interests interacted with each other. Therefore, the contiguity of public interests to be considered in any administrative decision remained as a natural consequence of their being tied to the same net.

However, a limited but significant break-through was achieved during the late 19th century, when separate institutions were set up to administer pensions, workers' insurance and safety regulations in the places of work. Furthermore the scrutiny of administrative courts was producing a restrictive and corrosive effect even upon the traditional machinery that was of the highest importance for the future. Administrative courts increasingly requested each administrative measure to reflect a transparent and motivated order as to the respective roles of the relevant public interests. There had to be a 'primary' public interest, facing which the others were 'secondary' and were to be treated as such. Certainly administrative discretion remained remarkably high. And quite understandably the most authoritative scholarly opinions would have identified the core of it in the balance between 'primary' and 'secondary' public interests; with the consequence that all of them, even if so graded, concurred with each other in defining and consequently restricting the boundaries within which conflicting private interests had room for protection. It is however a fact that this new set was already remarkably different from the initial police power. The walls of the traditionally compact administrative machinery were not as stable as they had been. The unbundling of public interests was on its way.

7. We have seen already that in the UK (and in the American colonies) the structural pillar of continental administrative law, a wide and hierarchically organised body of bureaucratic offices

under the direct control of the Crown, was missing. New functions that naturally accrued to the 'police power' exercised by that bureaucratic structure on the continent necessarily had a different allocation here. Furthermore, according to the common law principles, the protection of public interests affecting economic activities did not require the transfer of such activities into public hands and was generally satisfied by charging private undertakings with special responsibilities, that were subject to jurisdiction by ordinary courts.

On these premises, the same social demands that in the continent were answered to by widening bureaucratic administrative powers, for a long time received judicial answers in common law countries. It was only when this solution proved to be either unfeasible or counterproductive that new *ad hoc* institutions were set up, each of them with a limited and clearly defined jurisdiction, which was not incorporated into a general administrative realm (as on the continent). When and how this happened it is part of a well-known history, that shares some of its developments with the continental one. Basically, throughout the 19th century it emerged that the lower classes' demands on the one hand could not be satisfactorily answered to against the background of property and contractual rights, and, on the other were conflicting with the rigid protection that the courts were giving to property and the contractual rights of others. Therefore the traditional 'special responsibilities' were not a suitable answer. It became necessary to bestow derogatory powers upon new authorities that were naturally modelled more on the familiar patterns of the Judiciary than on the bureaucratic ones of continental machineries (which was not without precedents if one goes back to the origins of the Star Chamber).

Infants protection, housing, public health, public education and other fields of public interests increasingly fell under the jurisdiction of Inspectors and Administrative Tribunals (the name 'Tribunals' has to be noticed), empowered to take measures that were both derogatory of common law substantive rules and immediately effective, independently of (otherwise necessary) judicial writs. It is also well known that the tide went far beyond these new authorities (which are generally considered to be the original fruit of common law tradition in the institutional design for the protection of public interests). Besides these and after them the UK also experienced the construction of a central administrative machinery whose discretionary powers were initially exempted from judicial scrutiny by the enabling statutes.

Substantially similar were the birth and the early developments of administrative law in the US, with one significant exception, namely this wide judicial immunity. We can therefore leave it aside momentarily.

Was this new statutory evolution 'administrative law'? Even Albert V. Dicey had to admit it in his late years. Yet it was quite a different brand from the continental one. The two brands shared some essential features. Both of them were derogatory in substantive as well as in procedural terms. In both brands the

derogation was to be motivated by the protection of identifiable public interests. In both brands such a motivation was (or became) subject to judicial scrutiny but ordinary courts in the one case and administrative courts in the other met inexorable limits in the impenetrable core of administrative discretion (*ultra vires*, error of law, proportionality in common law countries, excess of power and its symptoms in continental countries were the tools that in the course of time the courts would have used to reach and to narrow the bounds of that core).

However, two substantial differences remained. In common law countries administrative law generally established itself as an added, though special segment of regulation of economic activities still subject for the rest to common law rules. The extensive incorporation of such activities in public law was much more exceptional than in continental Europe (excluding the case of local public services). Administrative control and almost entirely public regulation of activities such as banking, insurance or (later on) oil distribution remained as a typically continental experience. The second difference relates to the sphere of administrative discretion in the two cases. In both there was something that was to remain beyond judicial scrutiny. Yet both the new institutions and the central administrative machineries set up in common law countries had a more limited sphere for the very simple reason that each unit was expected to care of the only interests entrusted to it by the enabling statute. None of them had the DNA of the continental police power. On the contrary, they were authorised to give their attention to 'secondary' public interests only when explicitly requested by law. Therefore the balance they were supposed to strike had specific public interests on the one side and the conflicting private ones on the other, which made the balance itself much less uneven and much more open to objections from the viewpoint of the latter than it still was in continental Europe.

8. Let us see how the process of convergence has proceeded throughout the 20th Century.

In common law countries the *ad hoc* institutions and the ministerial offices of the early stages are initially empowered to act under procedural rules rarely consistent with the requirements of natural justice and eventually to adopt highly discretionary measures, over which (particularly in the UK) -as already observed- judicial scrutiny is either excluded or severely limited. It is a mounting trend that satisfies the new protected interests but which also raises sharp reactions. 'Lawless discretion' is an expression frequently used on both sides of the Atlantic. British and sometimes American scholars express their admiration for France, where the Conseil d'Etat seems to them a desirable and effective leash. One might argue that the administrative tide appears 'tyrannical' to those who stand for the conservative and rigid defence of property and contractual freedom previously provided for by traditional case law. The argument would not be an unsound one. However the initial restraint of the courts vis-à-vis the new

administrative acts (and procedures) was contributing to a dangerous unbalance that required and received corrections, gradually brought about both by statutory reforms and by the courts themselves.

In the UK administrative Tribunals were more and more identified as a part of the judicial machinery. Due to their quasi-judicial nature, the Tribunals and Inquiries Act of 1958 provided both for better procedural rules before them and for wider right of appeal to the High Court against their decisions. Moreover a new *ad hoc* procedure (the application for judicial review, AJR) as a remedy exclusive to public law disputes was established (initially by revision of an Order of the Rules of the Supreme Court, more recently by statute, the 1981 Supreme Court Act) to impose fast judicial scrutiny on administrative decisions. The new procedure extends its reach to the new 'policy oriented' Tribunals that have arrived before and after its enactment (initially the Monopoly and Mergers Commission, the Commission on Industrial Relations, the Civil Aviation Authority, the Independent Broadcasting Authority, the regulatory agencies in the privatised public utilities sector in the 80's).

In the meantime the Courts had widened the boundaries and the scope of such scrutiny by judicial interpretation of general principles and, where existing, of statutory law. Already at the beginning of the century the principles of natural justice (to which the essential procedural rights of the parties were connected) were considered inescapably applicable to 'quasi-judicial' bodies, whatever the language of their respective statutes. 'Administrative' bodies only (therefore departmental offices) could be statutorily exempted from such principles. Later on this very distinction faded away, judicial scrutiny was generalised and reasonableness plus proportionality were added to natural justice, thereby giving the Courts adequate weapons to challenge not just the procedure, but also the substance of administrative measures.

The evolution in the US was quite similar. It was the Administrative Procedure Act of 1946 that fuelled the principles of natural justice into administrative procedures and also set the distinction (necessary in that institutional context) between the right to be heard in the case of adjudication and the right to be heard in the case of rule making. While it was judicial 'creative' action that made the scrutiny of the Courts more and more penetrating, by assuming that it was a mandatory task for the Courts themselves to safeguard the purpose of statutes that: a) intended to protect the new properties (entitlements) of low incomes, b) were not meant to be enforced by agencies captured by the regulated industries, and c) required adequate consideration of all the relevant interests.

In both countries the outcome has been a deep change in the notion itself of administrative law. It is still derogatory, which seems to be its identifying nature, but the quality of its derogation is partially reversed. The standards of transparency and due process are even higher than in procedures falling under common (private) principles. The necessary discretion in pursuing the assigned statutory mission is restricted

within limits that do not allow other public or private interests to prevail in the decisions. The insurgence of a wide range of policy oriented agencies, each of them covering its own well defined area, has underlined not just such a distinctive relevance of the protected interests, but also their nature: sometimes collective interests, more and more frequently individual rights to be safeguarded against the abuses of public or private powers.

Let us now turn to continental Europe. At the beginning of the century in the continent, and first of all in France, public service meant by itself 'regime administratif' and therefore priority, if not exclusivity, of public entities as providers of services, in any event services extensively regulated by administrative law and jurisdiction bestowed upon administrative Courts. Quite significantly (and *mutatis mutandis*) the patterns of the changes that have intervened since that first stage are somehow parallel to those of common law countries.

On the one side the derogatory realm of administrative law was reduced by assigning the disputes on public services of 'industrial or commercial' nature to ordinary courts under the rules of private law. On the other side statutory principles and judicial scrutiny converged in requiring, and obtaining, the tying of each administrative measure to a single and transparent public interest; which in turn brought about further steps in the process of unbundling of those public interests originally confused and incorporated in the police power of the State.

The principle of legality played a powerful role in outlawing administrative measures not authorised by statute; and statutory authorisations (obviously before and after the reverse tide of the totalitarian regimes) standardised the request of measures distinctively aimed at the protection of specified public interests. For its part judicial scrutiny, though in different ways in France, Germany and Italy, constantly reduced the area of administrative discretion beyond its range. It did so by reviewing the administrative assessment both of the relevant facts and of the measures that could and should be adopted to face them. Among the consequences of the more severe standards of such scrutiny (proportionality, costs and benefits, reasonable connection...) was the increasing difficulty for administrative authorities to finalise their measures for the protection of public interests different from the ones referred to by the authorising statutes.

Furthermore, under the pressure of new demands (mostly related to the more active role in the economy that the State played in the first decades of the century), new and separate public entities were set up by statute, each of them with its specific mission: regional development, promotion of small and medium companies, protection of agricultural products, urban development, financial services to municipalities for their public works (apart from public utilities). These new entities, usually entrusted both with public powers and with entrepreneurial capacity, remained under the responsibility of the Executive and

therefore subject to its policies. However, the interests bestowed upon them were legally and structurally not connected with the others still tied to the traditional administrative machinery. The initial break-through that had been opened in the compact walls of such machinery by the end of the 19th Century for the protection of workers' rights widened more and more.

It is against this background that the birth of the first independent authorities (typically single mission authorities) in continental Europe has to be seen and understood not as a sudden transplant, but as the outcome of a long historical process. Quite significantly the first examples were those of authorities whose mission it was to protect individual liberties threatened by public and/or private powers ('*les secteurs sensibles*', as the French doctrine calls them). At this point the relevant public interest was impressively distant from those of the traditional police power. At the time of that power over such interests the interest of the State (and/or of the rulers) could always play its paramount role. Now the protection of individual rights was paramount. Furthermore, these peculiar public interests were committed to authorities totally disentangled from the administrative machinery as well as independent of the policies of the Executive. And not unexpectedly the 'sensitive sectors' opened the gate to a new organisational model that (with various degrees of independence) has gradually extended its reach to other areas as well, from public utilities to privatised economic activities generally.

A long historical cycle is reaching its conclusion. Eventually the bureaucratic architecture of the 16th century's national State is becoming obsolete and equally obsolete become the notions of administrative institution (as a necessary part of that architecture) and of administrative discretion (as simultaneous attention to both declared and undeclared public interests) to which that architecture gave its own DNA.

9. To summarise the conclusions of this historical review. There seems to be more than one piece of evidence supporting the hypothesis according to which the continental model of administrative law, throughout the process of 'unbundling', has taken longer steps than the common law one towards common patterns. And yet also the overall features of the evolution of the latter are remarkable, not just for what has changed, but even more for what has apparently remained. On the one hand, it is undoubtedly true that a refined judicial scrutiny has reduced the discretion initially trusted to the newly created administrative offices and institutions of the late 19th Century, making administrative law much more transparent and procedurally fair than conceived at that time (and the influence of continental judicial scrutiny is undeniable, despite the use of standards typically belonging to the common law tradition). On the other hand, the tardy creation of administrative machineries (which seem similar to the continental ones) has not cancelled the long-standing principle (opposite to the ones that continental

machineries had nurtured) according to which each authority entrusted with the protection of public interests is expected to care of the only interests committed to it by statute.

As to the continental model, the process of transformation has heavily affected its initial pillars and led to the gradual unbundling of the several public interests that bureaucratic machineries had structurally interconnected with each other. As we have seen, the process has been a long one, largely due to the increasingly severe standards of the courts. And yet it has been its last step, namely the creation of independent authorities, that has dealt the deadly blow to the traditional notion of administrative discretion as a balance between 'primary' and 'secondary' public interests. Only a few years ago the Italian 'Consiglio di Stato' rejected complaints against inter-ministerial decisions that had established prices in view not just of the costs of the service, but also of the anti-inflationary policy of the Cabinet, on the ground that the latter was the typical 'secondary' interest to be taken into account, whatever the statutory language. The newly created independent authorities for electricity, gas and telecommunications have the power to set prices and tariffs but are expected to concentrate on those interests (technological improvement, opening of the market, consumers welfare) specifically indicated by their respective statutes, therefore ignoring the policies of the Cabinet (while in the US micro-economic fine tuning has sometimes appeared among the 'relevant' interests to US agencies, but every time it was so required by statute).

One final qualification of the conclusion we have reached is, however, necessary. Despite all of these developments, despite the fact that the traditional administrative machinery is now surrounded by several separate institutions that separately take care of their respective public interests, inside the machinery the traditional notion of administrative discretion is still enforced. An Italian Administrative Tribunal stated the following principle in a decision of 1995: "the Public Administration shall assume that not just one single public interest exists, but a plurality of them, sometimes conflicting with each other. It shall therefore ascertain which of them are involved in the scrutinised facts, compare their respective relevance and identify the one that has to be considered primary". This is not a principle that we could apply to the new agencies of our time. The unbundling of public interests has occurred. But part of the past is still with us.

10. Upon these premises, whether the current trends of regulation of economic activities are eroding or extending administrative law is an issue that cannot be solved by simplistic answers. For sure such trends have brought about an erosion of administrative law, whenever decisions that were taken by public authorities have been transferred to private hands, therefore falling into the realm of private law. Even though -as some authors argue- private operators have frequently to comply with principles either of

fairness or of restraint from abuses that, to say the least, represent the enduring legacy of the previous administrative frame.

What is more disputed is the typically continental evolution, by which economic sectors that were almost entirely subject to administrative regulations, are now subject to private law plus special regulations enforced (and sometimes issued) by independent agencies. This too appears as an erosion of administrative law and certainly it is such for the part that has moved under private law. But some authors suggest a further step and ask if the structural features and the narrow discretion of the new agencies that cover the remaining part may be such as to place them too out of the territory of administrative law.

Common law scholars would be inclined to answer 'no', for these features are part of their own image of administrative law (that had its birth when similar special regulations were added to the common law rules). Continental scholars are inclined to answer 'yes', but their positive answer mirrors the outdated cultural paradigms we were initially referring to, that do not take the profound evolution of administrative law into due account. A public authority does not lose its administrative nature because the interests it protects are not to be influenced by governmental policies. And a public measure does not lose its administrative nature because the discretion it requires does not call different (and not explicitly indicated) public interests into play.

Of course, in these redefined terms, the administrative nature of the measure does not imply the application of all the pre-existing principles of continental administrative law. If the power of the Executive to declare any administrative act void for reasons of public interest is the expression of one of those principles, it is quite unlikely that it has survived the redefinition of administrative law (at least it should be restricted to a more limited area that does not include the agencies statutorily independent of governmental policies).

Can the same conclusion be reached as to the political responsibility that the Executive traditionally holds in relation to any act of any administrative authority? If the Executive is deprived both of the power to void the acts of an agency and to address previous political guidelines to the agency itself (which is not always the case, because there are 'authorities' that, under some respects, are subject by statute to the guidelines of the Executive), no reason remains for it to be politically responsible. But is such a conclusion consistent with the (enduring) administrative nature of the authority and of its measures? The question is not a new one: already in the 30s it had been raised in the US and the Supreme Court answered that independent authorities have 'special functions' that justify their special regime. More recently it has been argued that independent authorities, as 'non majoritarian institutions', find their own legitimacy not through the channels of political responsibility, but because of their accountability by

different means: the transparency of their procedures, the compliance with the due process principles, the consequent rights of the parties and the judicial scrutiny their acts are subject to.

If one accepts these premises a further conclusion can be reached. Dependence or independence of the Executive is not in itself a feature in relation to which the administrative nature of an authority can be assessed. The nature of authorities that are by statute empowered to pursue their specific missions and by consequence have a discretionary sphere limited to such missions (which usually implies that they are legally obliged not to take 'secondary' public interests into account) can be defined administrative in relation to other factors. Which ones? Basically, the quality of the functions entrusted to them and the resulting quality of their powers. Therefore rulemaking remains administrative and administrative remains the consequent choice of the technical rules appropriate to the pursuit of the legal mission. Also adjudication of single cases aimed at deciding not who is right and who is wrong, but rather what the most appropriate balance of the interests embodied in the mission itself is, remains administrative.

Within this revised frame, the special rules and the authorities that more and more frequently remain attached to sectors that are for the rest transferred under private rules should be considered administrative much more often than the traditional continental paradigms are ready to explain (were these authorities either totally or even partially independent of the Executive). However, some cases remain in which the administrative label raises legitimate doubts even under the redefined criteria suggested above. There are authorities with no regulatory powers, that adjudicate single cases and to this end make use of quasi-judicial standards: no discretionary balance of interests, decisions on who is right and who is wrong by assessing the facts under the light of the applicable statutory rules. In these cases there is no substantial difference from the courts and the only reason for such authorities not to be absorbed by the Judiciary seems to be the special training they require: few cases indeed, perhaps no more than some of the national antitrust authorities of continental Europe. Whatever the figures, these authorities raise an intriguing issue: if they are not administrative, what else are they? Is it conceivable that they may stand on their own, as an independent power of the State? Were there not supposed to be three powers?

The most reliable solution is suggested by the already mentioned doctrine of 'non majoritarian institutions' that envisages the constitutional legitimacy of such authorities in their accountability by procedural rules and principles. Of course, vis-à-vis the established frame of our constitutional systems, one of the essential features of which is the separation of (three) powers, any solution of this kind may sound too bold and too difficult to accommodate. Yet the doctrine of non-majoritarian institutions is strongly motivated and should be considered at least as a promise of a fruitful systematisation. After all, what is really essential to our constitutional systems is the principle that wants the powers to be

separated. Their being three, and no more than three, reflects the political context and the consequent institutional balance of the late 18th Century. We have inherited this balance and accepted it by tradition, but why should we exclude - as part of the French doctrine has underlined precisely in connection with independent authorities - further evolutions?

The process of innovation that is profoundly changing the legal frame of economic activities is therefore calling for a redefinition both of administrative and of constitutional law. But the former is enough for the scope of this research.

II. Towards Economic Soundness as a Main Goal of Regulations.

1. The evolution under examination demonstrates, firstly that throughout recent centuries economic activities have undergone public regulations under the pressure of a variety of goals and interests; secondly that in continental Europe's national States all of these goals and interests were entangled with each other (and incorporated in the police power) and were later on 'unbundled' by judicial and statutory action. Does this evolution have any relevance vis-à-vis the conclusions unanimously reached by economists (and not only by them) as to the impact of State interventions in the economy?

Different economists adopt different criteria for their respective analyses. Yet all of them share the basic principle according to which State intervention is useful when and if it promotes nothing else but growth and efficiency, by eliminating costs of transaction and/or asymmetries that economic operators cannot cope with under their own arrangements. Upon this principle economists have constructed highly explanatory analyses both of the actual effects of public regulations and of the not uncommon discrepancies between such effects and the goals originally pursued (or declared) by the regulators.

Douglas North has rightly written that in real life there is a frequent gap between the motivations of public regulators and the theoretical models of the economists. And the question is whether the gap is irredeemable. Some of the economists are very sceptical and see no remedy to it, mainly because of the selfish interests of the political actors that affect the decision-making process. Others have more positive expectations, at least under appropriate conditions. It is a fact that centuries ago public regulation played a remarkable role in making the UK and Holland the front runners of modern capitalism. It is also a fact that the 'unbundling' of the public interests previously incorporated in the police power of the State has gradually brought regulation of economic activities closer and closer to the pre-conditions at least of the ideal models of the economists (which therefore are much less unreal in to day's Europe than they were in the past). Such evolution has in fact deeply changed the range of public interests affecting economic activities and has consequently created the necessary institutional frame in which the promotion of

economic growth in the context of market economy could emerge, and actually has emerged, as a distinct and more and more frequently paramount goal of public regulation of economic activities. This does not necessarily imply that economic growth is actually promoted by the regulations that explicitly and distinctively aim at it. It rather implies that within that new framework the search for regulatory solutions consistent with economic analysis (and mindful of it) can be more and more fruitful and also supported by appropriate institutional safeguards.
Let us briefly reconsider the main passages of this historical evolution, focusing on aims and means of public regulations.

2. In their early stages feudal relations (in which both the common law legal systems and the continental ones had their initial roots) embodied a clear-cut and transparent transaction. In a time when agricultural production, and consequently food, was limited under the continuous threat of robbery and therefore either not marketed or locally marketed only, economic operators (more peasants than farmers) needed to be protected, while their feudal lords and their soldiers needed to be fed. Upon this background the first feudal contracts, which had both public and private nature, traded security against natural products and 'corvées' on the land of the lord. In theoretical terms, it was the paradise of contemporary economists. Both aims and means of that kind of regulation were consistent with the requirements of economic analysis. The aim certainly was to protect economic production, the means had the unambiguous effect of neutralising costs that the producers could have never coped with themselves.

3. In time things changed. The story is a well-known one. The lord became more demanding. He needed more and more soldiers to satisfy the demands of the upper lord, who, in turn, needed more and more powerful armies not just to defend his territory, but also to expand it. In the UK this further development remained within the contractual frame of feudal relations, which was so successfully flexible as to adapt to it and to prevent at the same time a disruptive concentration of power at the top. In continental Europe the evolution was quite different. It was the king who succeeded in not depending on others for his supply of soldiers. Little by little a national bureaucracy was set up to raise the necessary funds for the army and, unavoidably, to concentrate into its machinery most of the public functions previously exercised by feudal and municipal authorities. This had a profound impact on the aims and means of public regulations of economic activities. The financial burden on the producers went far beyond what was needed to make their activities more secure. Furthermore, public order and the security of the Crown became paramount goals in themselves, frequently overstretched and frequently

accompanied by other goals, such as the protection of health and morality, that more than once were covertly ancillary to them.
Regulations of economic activities aimed at these goals and, moreover, aimed at all of them at the same time (as we have seen, all of them were issued by the same structurally compact bureaucratic machinery to which all of the goals were equally entrusted). Quite predictably they were heavily intrusive and also quite unsatisfactory from the angle of economic analysis.

4. It has honestly to be added that the incumbency on economic activities of interests such as public order or public health was also due to other reasons, totally independent of the centralising process of continental national States. Let us take the case of bread. When Louis XIV said that 'the need for bread is the first thing a prince should care about', he stated a universal truth, at his time equally compelling in the UK and in continental Europe, in small municipalities and in the newly formed national States.
The distribution of flour and bread had been regulated since the late Middle Ages (when trade exchanges had been restored and towns and villages had again their own market places), aiming at the promotion of direct sale to the final consumer at an affordable price. Therefore, intermediate distribution was either severely limited or totally prohibited, while bakers themselves were supplied after the final consumer and were not even allowed to store flour and bread beyond the expected daily production. Why these regulations? When they had been initially adopted and for centuries afterwards popular revolts over sudden shortages of bread were a matter of frequent and dreadful concern to kings, lords and local officials. Public order was disrupted and the economy itself was heavily affected: outlets both robbed and destroyed, prices subsequently reduced by decree independently of costs. Prophylactic measures therefore appeared preferable (even if not always effective, as the repeated revolts eloquently demonstrate). It was the need to supply national armies and increasingly populated urban agglomerates that made such measures so economically unsound as to transform distributors, initially perceived as speculators, into an essential ring of trade. However, it was a lengthy and politically costly process, also because by tradition the list of entitlements had grown longer and longer: not just final consumers, but also local lords, parish priests, tax collectors and others. Eventually the reasons of (our contemporary) economists prevailed almost everywhere.
In other areas the compound of diverse public interests, that was typical of continental States, was much more persistent. Economic activities remained subject to regulations that were highly discretionary as well as distorting. The power to grant licenses for industrial and commercial activities was one of the main instruments by which the entire set of the (at the time) relevant interests could be simultaneously protected: certainly good faith of consumers and public health, but also morality (by frequently requiring

a certificate of the parish priest…) and, last but not least, public order and security of the Crown (both by keeping an eye on any outlet and by using the licensee as a source of information). It should not be found surprising that in Italy such power was transferred to local authorities not earlier than in the late 1970's. Up to that time (even in relation to any shop, or bar, or movie theatre in any small village of the country) it had remained within the exclusive and firm jurisdiction of the national police, under the legislative heading 'public security'.

This brand of public regulation was by far the most dominant in continental Europe until the early 19th century (and it survived much longer, as we have just seen). However the European continent, and more precisely France, had also experienced public regulations more unilaterally oriented towards the promotion of economic growth at the time of Cardinal Richelieu and even more during the reign of Louis XIV, when Jean Baptiste Colbert was his Secretary of State. Both Richelieu and Colbert had clearly realised that the priority itself of military strength required a flourishing economy and a positive trade balance, which was necessary to increase the monetary reserves of the country. This was the underpinning of their action on behalf of new manufacturing activities in France, that were promoted by granting monopolies, by supplying the producers with new capital, by giving fiscal incentives to the importers of qualified manpower, and by training the poor. Furthermore guilds were given the power to inspect plants and to issue special and detailed regulations with the aim of enhancing the quality and competitiveness of French production in foreign markets.

By all of these 'colbertist' measures no other interest but the promotion of growth was pursued according to patterns that the 19th century would have extensively adopted. Our contemporary economists would object that the soundness of the aim was more than outweighed by the intrusiveness of the means, which in the long run would have crippled innovation and therefore competitiveness. And this is precisely what happened after the initial spur, mostly where monopolies had been granted and where guilds had exercised their regulatory and consequently suffocating role. However France was and stayed much better off than other continental countries, which had remained loyal to the dominant brand of public regulation and thereafter fell into a deep and structural stagnation. The case of Spain is an unrivalled example.

5. The picture is obviously different in the 19th century. The all-embracing police power has gone, even though its legacy to the 'administrative' States of Europe will survive for many decades and will slowly retreat before the new restrictive principles that both administrative courts and statutes will gradually introduce. Despite the fact that 'police' now has a narrower meaning, which includes the preventive protection of public order and public security only, the activities within its potential range are not

necessarily those in which crimes may find their origins. Still in the early 20th century a prestigious Italian scholar, Aldo Zanobini, refers to it as the public function by which any individual freedom may be limited for the sake of such public interests. Therefore, even ordinary economic activities may be reached by the 'police' rules and institutions; and so they are, as it is testified by the public security laws which will regulate licenses to any commercial outlet for many decades to come.

The continuous pressure of judicial scrutiny, which strictly expects from any measure a clear and demonstrated link to public order and public security, reduces the initially inscrutable discretion of these police measures and brings them towards the border of acceptability according to economic standards. As long as they take into account the reliability of the potential licensee and therefore protect the good faith of consumers, they comply with such standards. But they frequently go beyond the border. Suffice it to say that the license may be withdrawn when 'dangerous' customers attend the shop.

One might argue that these are visible inconsistencies, but it is at the same time undeniable that they also prove that the process of 'unbundling' is developing and already requires public measures to demonstrate the actual interests they are instrumental to. Something that paves the way to the future adoption of economic analysis.

Similar issues are raised by the new developments of the late 19th century. Firstly the wave of nationalisations and municipalizations of services of general interest aimed at their universality and affordability; secondly the new public interests by which economic activities and rights could be affected, such as the health of industrial workers and their protection against the main risks of life, the orderly and healthy growth of urban agglomerates, the needs of industrial growth (frequently conflicting with the existing rights on the land).

All of these aims are much more familiar to us than the ones that had previously affected economic activities. Indeed they are the undisputed aims of many contemporary regulations and what is disputed about them is whether the rules that protect them are either sensible or more appropriate than others. Quite significantly these are the arguments to which one of the two main chapters of contemporary economic analysis of public regulations is usually devoted, while the other deals with regulations directly aimed at the promotion of economic growth and efficiency.

However, when this new era begins in the late 19th century, the pre-existing principles and institutions unavoidably affect it. Public services are municipalized upon the argument that the needs of consumers, mostly in case of natural monopolies, are not satisfied by undertakings whose main goal is the pursuit of profit. The expectation, therefore, is that publicly owned companies will devote their revenues both to long term investments and to efficiently provide the marginal consumer with their services despite the higher cost (which a private monopolist would not do). But municipalizations restore the old discretion

of political and administrative institutions, which fact in itself opens the gates to interests totally inconsistent with consumers' welfare, first of all the political interests of locally elected officials and also the pressure of the employees for high salaries and privileged status. This does not prevent public services from being universally provided at an affordable price. However, it also leads to overstaffing, rates frozen independently of costs, inefficiency and consequent shift of the increased burden onto the taxpayer (who still is the consumer in a different capacity). After some decades of this kind of experience, economists will have an easy job arguing that even when competition is not available other solutions should be devised. And some of them will indicate privatisation plus independent regulatory authorities as the most reliable (or least unreliable) of these solutions.

As to the new interests that emerge vis a vis economic activities (or property rights), they themselves are initially doomed to fall between the new and the old. In common law countries they promote the setting up of ad hoc authorities, specifically devoted to them (which opens the now longstanding debate among the economists as to the reliability and actual independence of such authorities). In continental countries their initial protection is most frequently bestowed upon the pre-existing bureaucratic machineries, which by their own nature tend to infiltrate them with other interests. And yet in the course of time here too a similar setting is slowly approached. Not just for the judicial scrutiny that obliges administrative institutions not to merge public interests unless provided by law, but also for the first breach in the compact walls of bureaucratic machineries. The fact has already been mentioned that also in continental countries public but separate institutions were set up to administer pensions, workers' insurance and compliance with safety regulations in the places of work- a first structural change leading towards the institutional framework that may be considered as the necessary pre-condition for economic analysis to be fruitfully applied.

6. Next come our times. Public interests and aims that by their very nature were inconsistent with economic growth have gone. Whatever public interest is now protected, the corresponding public measure survives judicial scrutiny only if it is demonstrated that all of the relevant interests, but nothing more than the relevant interests, have been taken into account by the competent authority, even when such authority is part of a wider machinery. Furthermore, for the many instances in which not even the indirect influence of political and other public interests is deemed to be appropriate, ad hoc independent authorities are more and more frequently set up.

I define this institutional framework as a necessary pre-condition for economically sound regulations for the very simple reason that within it unsound regulations are in principle due to regrettable discrepancies, not to deliberate and lawful policies. Which by no means implies that the soundness of the adopted

regulations can be taken for granted. However, the performance of the regulators in relation to their own declared goals may be assessed and the discrepancies that frequently remain may be reduced. In some instances it may also be argued that not even the essential and preliminary pre-conditions are actually met.

Obviously mostly economists have produced this kind of analysis, but also legal experts in competition. And the movement for 'regulatory reform', which is presently taking root throughout a significant number of countries under the auspices of the OECD, is largely based on the same analysis. Furthermore, in legal contexts such as the European one, many economic regulations, when issued by member States, fall under the jurisdiction of the Community, which may prohibit any State measure that curbs the free movement of goods and services or hampers competition or aids economic activities beyond the restricted limits provided for by the Treaty. And yet, despite all of these new informal and formal constraints, the amount of inappropriate or manifestly disproportionate economic regulations that nevertheless remain unobserved is surprisingly high. This is certainly due to several reasons and a role is undoubtedly played by political and social demands as well as by the culture and the electoral interests of political groups and leaders. But a role is also played by the limits of judicial review of legislation in national countries (for economic unsoundness may not always be challenged as a violation of the Constitution) as well as (in Europe) by the limited scope of the powers that the Community has upon member States' measures. It is a fact that the wide immunity that anti-competitive public regulations enjoy, gives rise to a striking inconsistency.

No private conduct liable to reduce the competitiveness of our economies is free of investigation. Private companies are continuously under the risk of being challenged for this reason. And public institutions have developed a formidable know how in the analysis of markets and conducts, in the collection of appropriate evidence, in adopting decisions supported by sound economic and legal reasoning. This is why it is striking that public regulations, to which this very know how could be usefully and extensively applied, may remain largely untouched. The consequence, and not a lesser one, is that the competitiveness of our economies, so carefully protected against private restrictions, is heavily hampered by those very institutions that have formally adopted competition as a paramount principle. They adopt or keep in force structural regulations where supply and demand should be free to find the appropriate balance, tariff regulations where information would be more than enough to tackle existing asymmetries, prescriptive rules where incentives would do a better job and exclusives to professions where there is room for an open market.

What can be done to remove this inconsistency? Can we expect in the long run a more penetrating scrutiny by existing reviewers of public measures? Or should we only pursue a better quality of rule

making along the patterns of the 'regulatory reform'(which in some countries, as we will see, is producing remarkable effects)? Whatever the final outcome, history tells us that a long process might be necessary, passing through more than one stage. Therefore, as far as Europe is concerned, the setting up of an observatory on Member States' regulations aimed at the assessment of their economic soundness (that could be publicised on the newly established scoreboard) might be usefully considered as an initial stage. It would not require any formal addition of powers. It could avail itself of the existing know how of DG IV and other Directories. It would supply Member States and the Community itself with models and standards for an improved legislation.

This research, in its following part, can do no more than offer a pattern and suggest the guidelines for this future desirable task.

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