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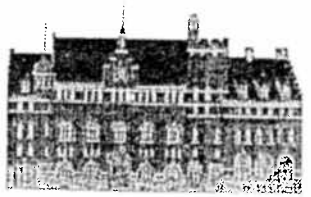

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Legal Reasoning and Democratic Legitimation in the Administration of Welfare State

One of the main characteristic of the Welfare State is the extension of public Administration[1]. As FRIEDMAN says, the Public Administration is "ubiquitous"[2]. An American jurist expresses this idea in this terms: "Administrators make decisions that affect us before the cradle to beyond the grave"[3]. The big size of bureaucracy depends upon the need to implement the social programs issued by the legislature[4].

The Welfare State[5] can be defined as a "form of State", in opposition to "form of government". The expression "form of State" underlines the relationship between the State and the citizenry with respect to the particular goals of that specific State. On the contrary the expression "form of government" refers to the distribution of Functions (legislative, executive, judiciary) among the various Powers in a State. Examples of "form of State" are: Patrimonial State, Police State, Liberal State, Socialist State, Welfare State, etc. Examples of "form of government" are: Oligarchy, Monarchy, Democracy, Presidentialism, Parliamentarism, etc.[6].

The specific goal of the Welfare State is, as the name says, the "Welfare", i.e. the economic well-being of all the citizens in the country". So the State interferes in the economic system to reach a distribution of goods different from that that we would have because of a free economy.

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[1] M. FRIEDMAN *Legal Culture and the Welfare State* in G. TEUBNER (ed.) *Dilemmas of Law in the Welfare State* Berlin - De Gruyter, 1985, p. 13, 18

[2] *Ibid.*, p. 13

[3] MASHAW J.L. *Due Process in the Administrative State* Yale University Press, 1985, p. 12. The author adds that "The Secretary of Health and Human Services, in developing the regulations governing public financing of abortions, may influence or even determine whether we are born. The decision of a county Welfare official concerning our mothers' access to prenatal medical care or to income support or to food stamps, and the decisions of a State health planning agency concerning the location of special postnatal care facilities, may critically affect the physical and mental resources with which we begin our lives" (p. 12), and also that: "To observe, administration beyond the grave, we might merely note that how, where, and at what price we are finally laid to rest will be influenced by the decisions of several administrative agencies. And whether our physical remains 'rest in peace' may depend on the decisions of highway, water project, or other public works administrators concerning the use of our final resting place for some public purpose" (p. 14).

[4] FRIEDMAN *Legal Culture and the Welfare State* cit., p. 13 and 18

[5] MORTATI *Le forme di governo* Padova, Cedam, 1973, pp. 61-65; FRIEDMAN *Legal Culture and the Welfare State* cit., p. 13

[6] MORTATI *Le forme di governo* cit., pp. 3-8, 73-81

On the contrary, the goal of the Liberal Democratic State is the protection of individuals' rights and liberties

This is the main difference between the Welfare and the Socialist State. In fact both of these forms of State are based on the same premise: the production cycle in a system of private property produces an enrichment of the means' of production owners and an impoverishment of the non-property owners. But the Socialist State wants to modify this situation by removing his premise (private property), whereas the Welfare State tries to change only the effects of this situation[8]. To realise this main goal, the Welfare State uses the fiscal system to collect money and the social programs to redistribute it. In this context the Public Administration plays an essential role because it collects money and carries the social programs into effect.

Thus Parliaments of the countries that follow the Welfare idea, have created new agencies, have assigned new jurisdiction and new discretionary powers[9] to Administrative Bodies.

Now we have a very extended Public Administration, that 1) holds a great deal of autonomy from the Executive Power (the political heads of departments, i.e. ministers) and 2) holds wide competence and discretionary powers.

Also Italy, which is an example of a Welfare State[10], presents this kind of problems (autonomy of bureaucracy and wide discretion). Especially we can notice that:

1) about the first point (autonomy of bureaucracy), various elements contribute to make the Administration independent from the Executive Power: a) the bureaucracy on one hand and Chiefs Executive from the other carry out different functions[11]. Single minister and collectively ministers in the Council of Ministers are usually non-professional men. They deal with the determination of goals of the government of the day and the means to achieve them. On the other way the bureaucracy is formed by professional men . It

[8] MORTATI *Le forme di governo* cit., pp. 63-64.
[9] For this concept in general see ENGISCH K. *Einführung in das juristische Denken*. Stuttgart, Kohlhammer, 1983, pp. 100-137.
[10] MORTATI *Le forme di governo* cit., pp. 61-63.
[11] LESSONA S. *La posizione costituzionale della Pubblica Amministrazione* in LESSONA S. *Problemi amministrativi della società moderna (1955-1967)*, Firenze, Noccioli, 1967, pp. 93-103. The author affirms that the principal functions of the contemporary State are not three (legislative, judiciary, executive), but four (legislative, judiciary, political, administrative)

takes decisions and performs material actions needed to carry into effect the goals by the means that single minister and Council of Ministers have determined[12]. b) A textual element in our Constitution (*Parte 2 titolo III sezioni I and II*) has been used by some authors to affirm the autonomy of the Public Administration from the Government[13]. In fact in the Third Title of the Second Part of Italian Constitution, we can find two distinct sections. The first deals with the composition, structure and functioning of single ministers and Council of Ministers, the second section deals with the organisation and the functions of Public Administration (this second section is entitled "*La Pubblica Amministrazione*"). c) The fact that a civil servant can not be fired without reasons contributes to show that the bureaucracy is independent from the Government . Indeed in Italy the civil servants are said to hold a right of their job stability. But if they hold a legal position of stability, they will be also less responsive to their political chiefs executive and so more independent. d) Moreover in recent years in Italy we can notice the very growth of Independent Authorities[14] that for express provision of law are autonomous from the Government.

2) The second point is about the wide discretionary powers that Public Administration holds. They are, in almost every cases, not checked either by ministers (how could a minister control every acts issued by all the offices inside his department ?)[15] or by judges[16]. Furthermore the conformity to the law of this wide discretionary powers depends only on the observance of

[12] LESSONA *La posizione della Pubblica Amministrazione* cit. D'ALBERTI M. *Autonomia dell'Amministrazione pubblica e servizi resi alla comunità* in MARONGIU G., DE MARTIN G.C. (a cura di) *Democrazia e Amministrazione: in ricordo di Vittorio Bachelet*, Milano, Giuffrè, 1992. D'ALBERTI emphasises the expertise of civil servants, that notably distinguishes them from ministers.
[13] CRISAFULLI V. e PALADIN L. (a cura di) *Commentario breve alla Costituzione*, Padova, Cedam, 1990, pp. 609-610 (art. 97 Cost.)
[14] Examples of these boards are : Commission on Pubblic Access to Administrative Documents (*legge* n. 241/90), Commission on Strikes in Essential Pubblic Services (*legge* n. 146/90), Authority for Broadcasting and Publishing (*legge* n. 223/90), Authority Guarantor of Market and Competition (*legge* n. 287/90), etc.
[15] This is another element that let us thinking to Public Administration as independent from Government.
[16] In fact in Italy the administrative decisions are subject to the control of administrative tribunals only about their conformity to the law (violation of law, incompetence, excess of power), and not about their merits. G. PARODI *Tecnica, ragione e logica nella giurisprudenza amministrativa* Torino, Giappichelli, 1990, pp. 29-35.

limits posed by statutes. Inside these boundaries the Administration is substantially free. This is , of course, a rough description of the 'discretionary power' concept. In fact one of its main characteristic is the difference between discretion and liberties of private individuals. Indeed if the private subjects holds autonomy, i.e. freedom inside the boundaries of the law, public bodies hold only discretion in conformity of the law. Thus only negative prescriptions exist for private individuals, instead also positive ones exist for public bodies (rule of law). But this idea is not completely correct. On one hand in Welfare State private individuals have many positive obligations towards not only other individuals but also the State (for examples art. 42[2] Italian Constitution). On the other hand the Administration, in a lots of cases, holds unfettered discretion to realise the goals of this form of State. In this sense we can say that Administration in exercising wide discretionary powers, makes 'political'[17] choices.

At this point a problem of responsiveness and responsibility (democratic legitimation)[18] of administrators arises ; in fact unlike legislators and ministers , the administrators are not elected by the citizenry and not held accountable to the electorate through the ministerial responsibility. Indeed we have seen that they hold a great deal of independence from the Chiefs Executive. Furthermore we must also notice that the independence of bureaucracy from Ministers makes simpler for economic lobbies to influence in their favour the exercise of powers by administrators.

Thus in Welfare State, in relation to administrative actions, it is necessary not only to protect individuals from the exercise of powers , but also to check the exercise itself by the citizenry or his representative[19].

[17] PARODI *Tecnica, ragione e logica nella giurisprudenza amministrativa* cit. , pp. 19-25
[18] BOBBIO N. *La democrazia e il potere invisibile* in *Rivista italiana di scienza politica* 1980, pp. 181 e sgg. ; ARENA G. *Una nuova legittimazione per la Pubblica Amministrazione* in AA.VV. *Valori costituzionali e Pubblica Amministrazione* (Atti del convegno, Firenze 19-20 /2/1993) Firenze, Edizioni Regione Toscana, 1994, pp. 29-32; ALLEGRETTI U. *Pubblica amministrazione e ordinamento democratico* in *Foro italiano* 1984, V, p. 211
[19] FRIEDMAN *Legal Culture and the Welfare State* cit. , p. 19

The possible answer to this need could not be the traditional conception of Public Administration[20], that is a 'Transmission Belt Model': citizen→Parliament→statutes→Public Administration. This concept is based on the rule of law and the representative democracy: citizenry elects Parliament, Parliament enacts statutes, statutes are carried into effect by Administration, that is a mere instrument of accomplishment of the will of the representative body, and it is controlled by Parliament through ministerial responsibility. This concept derives from what in Great Britain in the last century A.V. DICEY, in his *The Law of the Constitution* , called 'Unitary Democracy'[21]. All public powers , in particular administrative ones, had their democratic legitimation in the fact that they were all channelled throughout a Parliament freely elected by the citizenry. In fact Acts of Parliament conferred public powers and determined the way to exercise them. Independent judges controlled that public powers were exercised in conformity with the law and ministers were politically accountable to Parliament for every act performed in their department.

But as we have seen, the Welfare State Administration is not a mere instrument to carry into effect statutes, it has wide powers, i.e. 'political' powers. Furthermore the bureaucracy, on which the most part of the implementation of social programs depends , holds a lot of independence (*de facto* and sometimes *de iure*) from the heads of departments, who are accountable to Parliament and so to the electorate[22].

Structural solutions, as administrators election, could produce more disadvantages than advantages[23]. So especially procedural devices could be an answer to legitimate the wide powers held by an autonomous Administration. They refer to the administrative procedure[24] and the way of reasoning of administrators.

[20] KELSEN H. *Il primato del Parlamento* Milano, Giuffre, 1982, pp. 62-75
[21] CRAIG P.P. *Administrative Law*, London, Sweet & Maxwell, 1989, pp. 4-6; HARLAW and RAWLINGS *Law and Administration*, London, Weidenfeld and Nicolson, 1984, pp. 13-20##.
[22] Do you think it probable that Parliament hold accountable a minister or the Council of ministers for a single action performed by an administrator ?
[23] KELSEN H. *Il primato del Parlamento* cit.
[24] For example *legge* n. 241/90.

Solutions of this kind are present in various State that are inspired to the Welfare idea[25], but I will analyse only the particular Italian situation.

- A first approach is that to model administrative procedure on judicial process (trial-type hearing) and so to make administrators reason like judges. In this model legitimation of administrative powers depends on rationality and fairness. In exercising discretionary powers administrators have to apply to a syllogism[26] and to assure a fair hearing[27] to the directly affected parties. First of all, in this hypothesis, administrators must assure a fair inquiry. This means that: a) they have not to be biased and b) before deciding they must give to the affected parties an opportunity to be heard for sustaining their position in relation to all the elements in possession of Administration. Afterwards, administrators must decide on the records collected during the inquiry. The decisional process must be structured on that followed by a judge. It is necessary to determine which statutes must be applied to that specific situation. By interpreting those statutes administrator has to determine the norm that identify the major premise of the syllogism. The relevant facts must be ascertained and the administrator must subsume them in the major premise by a juridical qualification of them (minor premise). This operation can also be seen from the point of view of the major premise. In fact the juridical qualification of facts (subsumption) to determine the minor premise and the interpretation of statutes to determine the major premise are substantially the same operation seen from different viewpoints[28]. In practice the administrator must progressively brings the proposition that describes the relevant facts, as

[25] See for USA STEWART *The Reformation of American administrative law* sta in 88 *Harvard Law Review* 1975, pp. 1667 e ssg.; for Italy see AA.VV. *Valori costituzionali e Pubblica* Amministrazione; ALLEGRETTI U. *Pubblica amministrazione e ordinamento democratico* sta in *Foro italiano* 1984, V, pp 205 e ssg.; BENVENUTI F. *L'amministrazione oggettivata: un nuovo modello* sta in *Rivista trimestrale di scienza dell'amministrazione* 1978, pp. o e ssg., for United Kindom see CRAIG *Administrative Law* cit., pp. 15-33.

[26] For example art. 3 *legge* n. 241/90.

[27] For example artt. 7-10 *legge* n. 241/90.

[28] See in general ENGISCH *Einführung in das juristische Denken* cit., pp 43-81.

they have been ascertained by him, closer and closer to the proposition that constitutes the major premise of a norm. A typical example of this kind of approach is the *legge n. 241/90*, that is about the administrative procedure and the right of access to government-held information. This Act of Parliament structures the administrative procedure on a trial-type model. In particular it provides that administrators in the decisional process must follow the way of reasoning of judges. In fact article 3 of this statute provides that for every act issued by the Administration, except specific exemptions, it must be furnished the reason on which the act is based. Art. 3 provides that in the statement of reasons the responsible official must identify the relevant facts, as they have been ascertained during the inquiry, and the juridical premise. Furthermore he has to describe the legal reasoning (syllogism) that has been used to reach that decision from those premises (factual and juridical)[29]. We can notice that this article imposes to the Administration a way of reasoning very similar to the judge one (syllogism)###.

- A different solution is that to appeal to argument of expertise[30]. Administrators are professional men that in the exercise of discretion apply the non-legal rules of administrative science[31]. They have to act and reason as a doctor or an engineer. In this hypothesis legitimation depends upon the fact that exercise of discretionary powers has objective basis, it is fettered by the non-legal rules of administrative science. The implication of this approach is that the affected or merely interested private parties must not be heard. In fact if Administration has objective basis as medicine, why must we assure to the affected parties an opportunity to be heard ? There may be an error in the decisional process to determine the goals to realise and the means to achieve them, but parties

[29] Art. 3, first comma: "Statement of reasons must determine the factual premise and the legal reasons that have determined administrative decision taking into account the inquiry's results"

[30] KELSEN H. *Il primato del Parlamento* cit., pp. 67-68.

[31] See PARODI *Tecnica, ragione e logica nella giurisprudenza amministrativa* cit., pp 19-20 note 12.

subject to an administrative power are no more prone to this power then are patients remitted to the care of a skilful doctor. An example of this kind of approach can be seen in the determinative process of drugs' prices: *legge n. 1034/70 and 395/77*. These statutes provide that an administrative body , the Interministerial Committee for Prices (CIP), must makes an inquire about the relationship between costs of production and prices of drugs every three year. CIP must communicate this analysis to another administrative body, i.e. the Interministerial Committee for Economic Programming (CIPE). CIPE will determine criteria to bring prices of drugs up to date. CIP will make this revision unilaterally, i.e. without hearing before pharmaceutical industries or drug's consumers. The Legislator confers this power to the CIP because of the expertise of CIP's members. In fact he assumes that this (the expertise) is the best guarantee for consumers and industries, especially because the discretion of CIP is more apparent than real. Indeed in exercising that power CIP is fettered by the non-legal rules of administrative and economic science.

• The last solution, especially suitable for rule-making functions, is to model administrative procedure on legislative process and so administrative reasoning on legislative one. The individuation of the interest to pursue in specific cases by the Administration results from a compromise between various interests (public, private, collective, etc.)[32] as in the legislative process. Indeed there is no ascertainable , transcendent 'public interest', but only distinct interests of various individuals and groups in society. Administration must act like in a 'theatre'[33] open to all the interested parties and subject to their control. In this model legitimation of discretionary powers derives from the direct participation and control of citizens. This goal is achieved by structuring administrative procedure as

[32] GHEZZI G. e ROMAGNOLI U. *Il diritto sindacale* Bologna , Zanichelli, 1992, pp. 260-263.
[33] This metaphor belongs to BOBBIO N. *La democrazia e il potere invisibile* cit., pp. 182-183 and ALLEGRETTI U. *Valori costituzionali e Pubblica Amministrazione. un nuovo inizio ?* in AA.VV. *Valori costituzionali e Pubblica Amministrazione* cit., pp. 15-22.

a surrogate of political process to ensure the fair representation of a wide range of affected interests in the administrative decisional process and by making administrators reason as Members of Parliament. An example of this approach can be seen in the *legge n. 146/90* on strikes in essential public services (train, bus, national health service, school, street cleaning and refuse collection service, etc.). This statute provides only minimal safeguards in favour of the public services users (for example: 10 clear days strike's announcement by Trade Unions, communication of strike's duration, etc.). It remits to the Public Bodies that furnishes these services, to regulate strikes in order to provide the public with the bare necessities of these services. But these regulations must follow the agreements signed between civil servants and representatives of public bodies. Thus the administrative power to issue these rules is the product of a compromise between conflicting interests: public interest to furnish essential services, collective interest of Trade Unions; the interests of users are represented by an Independent Authority (Commission on Strikes in Essential Public Services) that must approve the content of the agreements. In this particular case the administrative power has a democratic legitimation to regulate and so to limit (freedom of) strike in essential public services. This legitimation derives on one hand from the participation in administrative procedure of a large number of interests affected by administrative action and on the other from the interests balancing exercise performed inside the Public Administration as in a Parliament[34]. Another example of the legislative model can be find in the *legge n. 349/86 art. 6* about the valuation on environmental impact (VIA). This article provides: 1) the communication to the public of new (industrial, housing, street, etc.) development projects with the studies on environmental impact; 2) the possibility for every citizen to comment these projects; 3) the duty of the

[34] GHEZZI G. e ROMAGNOLI U. *Il diritto sindacale* cit., pp. 260-264.

Minister for Environment to take into account these comments before exercising his administrative power to approve the projects[35].

These three models can cohabit in the same legal system, in fact each one is suitable for different type of administrative powers[36]. The 'contentious model' particularly suits authoritative Administration, that is the Administration that acts with authoritative powers (Inland Revenue, Police, Army, etc.). The 'expertise model' is particularly suitable for regulatory Administration, that is the Administration that intends to control and regulate the economic system (Independent Authorities). The 'legislative model' especially fits in the Administration that furnishes services to citizens (Health, Education, Social security, etc.). Furthermore I think that these three models not only can cohabit in the same legal system, but that they must be present and they must cohabit in a State inspired to the Welfare idea. In this form of State, as we have already seen, the Public Administration holds a great deal of autonomy from the (indirect) control of citizens and it holds very extended powers over citizens. Thus P.A. in Welfare State need to have its powers legitimated from the citizenry. But these powers differ substantially, and so the ways of legitimating them must differ, too. They must adapt to the particular power exercised. For this reason I think that it is not sufficient one only model to legitimate the administrative powers in the Welfare State, as it happens with the 'Unitary Democracy' of the last century. We need a plurality of these models, that must cohabit in the same legal system.

BORGONOVO RE D. *Il diritto di informazione in materia ambientale in Francia, negli Stati Uniti e in Italia* in ARENA G. (a cura di) *L'accesso ai documenti amministrativi* Il Mulino, Bologna, 1991, pp. 265-310.

ALLEGRETTI U. *Valori costituzionali e Pubblica Amministrazione: un nuovo inizio?* cit.; ARENA G. *Una nuova legittimazione per la Pubblica Amministrazione* cit.

PART III:

EUROPEAN COMMUNITY LAW