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AXIOLOGICAL *VICINITAS*: TRYING TO INCREASE THE ACCESS TO JUDICIAL PROTECTION AGAINST THE ILLEGITIMATE ADMINISTRATIVE POWER[1]

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1. THE JUDICIAL CONTROL OF MERIT FROM THE BLACK TWELVE YEARS TO HIS OVERTHROW *IN BONAM PARTEM*

If a primary task can and must be set on the *scientia iuris*, and with it on the judge, it is that of supervising the method: recognizing its constitutional significance[3] and therefore the imperative need never to use it in such a way as to then allow illiberal systems to abuse it. The supervision of method is the key of keeping our system as liberal and democratic.

The principle of legality is more central than ever here: inevitably exposed to the terrible risk of being used to conceal the "legality of evil"[4], however, it remains, despite all its insidious fragility, the first bulwark to protect a democratic and – in a strong sense – constitutional order and *ordo productionis*. Enervating its stability by denouncing its fall in traction and centrality in favor of regulatory substances with a reticular structure, the outcomes of uncertain and uncontrollable interpretative processes to which self-referential forces would imprint from the outside the chrism – albeit self-legitimizing – of legality, means preparing the best conditions for the creation of a *locus minoris resistae* available to the aggression of powers unwilling to respect the founding bases of that order. A point of attack, that is, to infiltrate the vital centers of an institutional system without having to even

[3] See B. RÜTHERS' approach, *Die heimliche Revolution vom Rechtsstaat zum Richterstaat. Verfassung und Methoden. Ein Essay*, Mohr Siebeck, Tübingen, 2016, trad. it. *La rivoluzione clandestina dallo Stato di diritto allo Stato dei giudici. Costituzione e metodi. Un saggio*, Mucchi, Modena, 2018

[4] S. GENTILE, *La legalità del male. L'offensiva mussoliniana contro gli ebrei nella prospettiva storico-giuridica (1938- 1945)*, Torino, Giappichelli, 2013.

previously demolish the primary and supporting frame: the rule of law, whose sad *Dämmerung*[5] is thus celebrated.

The result is an increase in the discretionary power of the judge: who becomes an entry valve or a barrier filter for the acquisition of the process of higher and primary needs perceived in the community, and to which only – more than positive law – must he draw inspiration the pronunciation.

Can we consider – today as well as in the tragic totalitarianisms of the 20th century – the model of the *Weltanschauungsstaat* as prevailing, for which no written rule can prevail over the vision of the world and over the table of values professed by the decision-maker (or prophesied by him)? [6]

The axiological construction of the legal system entails a necessary consequence, which derails even more from the legislative law system: the struggle to affirm the values – whatever they may be – which constitute its backbone. This risks giving an unnatural twist to jurisprudential law, which in turn becomes a right to struggle fought with the weapons of

[5] I am referring to J. GOLDSCHMIDT, *Gesetzesdämmerung*, in *Juristische Wochenschrift*, 1924, p. 245 ff.

[6] G. PINO, *La certezza del diritto e lo Stato costituzionale*, in *Dir. pubbl.*, 2018, p. 517 ff., esp. p. 542 f.: «[…] la diffusa "giurisprudenzializzazione" del diritto contemporaneo porta con sé alcuni problemi», e cioè «[…] il rischio che il diritto dello Stato costituzionale diventi non solo sempre più giurisprudenziale, ma anche sempre più sapienziale (nel senso di "tecnico", esoterico, iniziatico) […] con evidenti ripercussioni sul valore della certezza del diritto, tanto più quando la pratica dell'interpretazione conforme si spinge fino alla disapplicazione della legge da parte dei giudici comuni». See also M. LUCIANI, *L'eclissi della certezza del diritto*, in *Libero osservatorio del diritto*, 2015, p. 4: «La tecnica di normazione per princìpi implica un tasso maggiore di incertezza nel riferimento alla Costituzione e suggerisce la distinzione tra attuazione e applicazione della Costituzione. In teoria, la prima dovrebbe essere riservata al legislatore, mentre la seconda dovrebbe spettare all'amministrazione e alla giurisdizione, ma in pratica i confini si sono offuscati, per la sempre più frequente pretesa della giurisdizione (costituzionale e non) di attuare i princìpi costituzionali prescindendo dalla previa mediazione legislativa. La giurisdizione, così facendo, si impossessa di spazi che dovrebbero essere riservati alla legislazione, pretendendo di identificare direttamente i tempi e i modi dell'attuazione costituzionale».

interpreted norms: «hermeneutic struggle against phenomena that are not considered adequately protected by the law»[7], turned on to the point of being able to lead to the illicit jurisprudential interpretation.

Nothing new, I'd say. As in the Nazi Reich, the figure of the judge finds himself, *mutatis mutandis*, a militant terminal of many expectations. In the twelve years he had abandoned the role of the peaceful man of letters far from reality (*ein weltabgewandter Buchstabenmensch*), to become a warrior of the people well planted in the middle of life (*ein mitten im Leben Kämpfer des Volkes*) who fights for the affirmation of his creed ideological, invariably deemed beneficial to society.

The dispute (the battle over the method) then becomes decisive. Up to becoming more important than the same table of constitutionalized values to which it must apply: the question of interpretation, in short, has super-constitutional rank.

The judicial transcription of this model is immediate. It means entrusting the judge with the task of governing the process by using wavering and evanescent decision-making criteria: he uses methods and outcomes characterized by important areas of discretion, therefore unpredictable.

Not only the merits of the dispute, but also – and even before – the configurability of a right to protection undergoes from time to time a subjective examination of compatibility with that table of values. Access to judicial protection itself, in other words, becomes subject to a filter whose criteria the judge-gatekeeper draws from «a superior source of legitimacy»[8]

[7] Effectively said in a criminal law key: M. DONINI, *Il diritto giurisprudenziale penale. Collisioni vere e apparenti con la legalità e sanzioni dell'illecito interpretativo in Diritto penale contemporaneo, 2016, no. 3, p. 13 ff., https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/donini_3_16.pdf)*, p. 23.

[8] Thus, in critical terms, R. VILLATA, *Ancora in tema di inammissibilità dell'appello al Consiglio di Stato sulla giurisdizione promosso dal ricorrente soccombente in primo grado*, in *Riv. dir. proc.*, 2017 p. 1110, nt. 93, with reference to the current regulatory situation of the relationship between legislative and jurisprudential law.

in turn genetic legitimacy of the subject to the establishment of the dispute. A model that can easily be exploited to govern the ways of procedural protection even (or above all) restrictively: either by *denying* the right to judgment already in advance; or considering the meritless groundlessness of the question every time the action collides with «values emerging from below, which end up constituting the ordering rules "invented" by the interpretative community»[9]. Which would be «by now devoid of its traditional categories and projected to the government of the concrete case».[10]

In short, the admissibility of the question is left to the judge's prudent perception of its worthiness when ideally brought before the eyes of society, of popular sentiment: if – in this imaginary theater – it was lacking, the door to the trial would remain closed.

But this too is a theoretical model that is unfortunately already known and already tested. Which is due, as known, above all to Adolf Schönke[11], which bases on the existence of the so-called need for judicial protection (*Rechtsschutzbedürfnis*), «the general prerequisite for the provision of the same protection»[12] starting with the scrutiny of the admissibility of the application (and then of all the individuals, other acts of the parties).

In short, by examining the existence or otherwise of the *Rechtsschutzbedürfnis*, the process – no longer an overly reductive instrument («*zu eng*») of mere implementation of the law, but teleological, publicistic and moralised – can easily filter and select all the "claims"

[9] R. VILLATA, *Ancora in tema di inammissibilità*, cit., p. 1115; A. GENTILI, *Senso e consenso. Storia teoria e tecnica dell'interpretazione dei contratti*, Torino, Giappichelli, 2015, p. 75: «The community of interpretation is nothing but the collective name of jurists who stand out for their constant diatribes».

[10] Thus, between criticism and irony, R. PARDOLESI-G. PINO, *Post-diritto e giudice legislatore. Sulla creatività della giurisprudenza*, in *Foro it.*, 2017, V, c. 113 ff., esp. c. 115.

[11] A. SCHÖNKE, *Das Rechtsschutzbedürfnis. Ein zivilprozessualer Grundbegriff*, in *Archiv für die civilistische Praxis*, 1949, p. 216 ff.

[12] A. SCHÖNKE, *Das Rechtsschutzbedürfnis*, cit., p. 219.

activated, allowing the *litis ingressum* only to those that do not dissonant with the nebulous axiological system of the regime as perceived by the judge on a case-by-case basis: in other and more authentic words, to questions that do not adversely affect interests (more or less disguised as public) of economic and political power, mediated and subsidized by the extremely broad discretion of Richter, creator of law and enacting the rule of the concrete case.

However, one aspect is central here and should be underlined: the model of the *Rechtsschutzbedürfnis* must not be read in a neutral way, as a sort of blank page that is given to the judge so that he can write his decision on *Klage*'s admissibility; but as a theoretical construct that proves functional to operate above all, if not exclusively, *in malam partem*: that is – here is the point – to deny the right to trial to anyone who may be the holder of a substantive right. Through the negative check of merit, and the consequent denial of the judge, the regime can ensure full economic and political control of the civil process, at the most by twisting it to also make it a «place» of social engineering.

Model not new, I said. And of undoubted adaptability: which is easily explained by analyzing its macrostructure, which is quite linear. Ultimately, it is a simple «receptor» of imprecise legal concepts that the judge – without any *gesetzliche Grundlage* – uses for the purpose of *Verhinderung*, i.e. to paralyze the action of the holder of substantial subjective situations, denying their admissibility. Which is the *unbestimmte Rechtsbegriff* evoked from time to time is irrelevant aspect in the functioning mechanism. What counts is that it is precisely indeterminate, as well as multiform, imprecise and not very transparent; and that the Judge – by disregarding or even opposing a provision of positive law, where it exists – gives itself the power to "perceive" by milky ways its content in its allegedly effective and living scope[13], applying it to the concrete case according to a very personal axiological-causal syndicate.

[13] *Figurae* reappear here as the carnality of law, factuality, concreteness, profound currents of society, *unmittelbare Lebens- und Rechtsanschauung*, etc. The list can go on and on. I add in full, given the very close connection of the

Today – let it be clear – the scheme records an important, but not structural variation as regards the general functioning system.

If in the twelve black years the judicial function was subservient to the regime, now the relationship tends to change, if not actually reverse itself. As mentioned, the liberation from representative law is instrumental in the self-legitimized claim of spaces of sovereignty, often in open conflict with political power and its exponents.

And yet it seems to me that there may be spaces and ways of using the model I am recalling *in bonam partem*.

Let me explain.

To base the major premise of an orderly reasoning *in malam partem* on an indeterminate concept evidently means not to conclude, but rather to expand without limits (at least basically) the perimeter, the extension of the area (or of the casuistry) which will remain devoid of protection: it will in fact be different according to the concrete, variable and

material with the topics covered here (in fact we will soon return to the Author's thought, which can be shared at least in part), a passage from M.F. GHIRGA, *Principi processuali e meritevolezza della tutela richiesta*, in *Riv. dir. proc.*, 2020, p. 13 ff., esp. p. 20: «la stessa attività della Corte Costituzionale, chiamata costantemente al bilanciamento tra principi spesso non riconducibili ad una puntuale enunciazione, in funzione della specificità di casi sempre mutevoli, più che rafforzare la gerarchia delle fonti, *obbliga a calarsi nella realtà sociale e identitaria della comunità, per individuare, partendo dalla base, il senso del diritto posto*. *Ma si tratta della stessa attività compiuta dal giudice ordinario* chiamato ad offrire della norma da applicare una interpretazione conforme e adeguata ai principi costituzionali. È evidente allora che *in questa rivisitazione del sistema, che mette in dubbio lo stesso criterio della gerarchia delle fonti*, anche *principi apparentemente fondativi come quello di legalità perdono il loro tradizionale significato, e si afferma la necessità di impostare in termini nuovi il tema della legalità*». See again M.F. GHIRGA, *Principi processuali e meritevolezza della tutela richiesta*, cit., p. 21: «se è vero che i giudici nel rendere giustizia vanno alla ricerca di "un diritto che si coglie anche nella vita quotidiana delle persone, nel terreno solido di un popolo che vive la sua storia quale comunità fondata su valori diffusi e condivisi", la legalità come principio viene dopo e non prima di questo procedimento applicativo». The passage here-reported is taken from N. LIPARI, *A partire da "*L'invenzione del diritto" *di Paolo Grossi*, in *Riv. dir. civ.*, 2018, p. 349, esp. p. 358.

unquestionable perceptive outcomes of the values to which it will[14] reach our judge, free inventor creator perceiver. And twice interpreter: first of all, of his new role in the system; then, of the relationship with the procedural norm, which he did not apply, but governed.[15]

However, we could first of all overturn Schönke's construct, using it for objectives opposite to those for which it was theorized by him: not for a *Verhinderung*, a restriction of the area to which the procedural law ensures protection; but for an *Ermöglichung*, that is, an amplifying assent of the entrance gates to the guardianship itself.

It is true. Put only in these terms, however, my proposal would continue to discount the limits of the original Schönkian model: it would always be our judge-recipient who decides at the discretion of the submerged and the saved. But here the *Rechtsschutzbedürfnis* – or, if one prefers, the check on the merits of the application – would be used only in an amplifying sense of the ways of law (jurisprudential) received up to that moment and therefore stabilized. It is in these terms, symmetrically opposed to those theorized by Maria Francesca Ghirga, that one can agree with the reconstruction «of the rule on the interest in acting, as a matrix also of a control, in the concrete case, on the merits of the requested protection».[16]

[14] In such a context, the volitional and non-cognitive nature of the judicial decision is evident. More generally, if it were transmodified (as it has been more than transmodified in the past), we could say of «a violently voluntaristic conception of law» (M. LA TORRE, *La «lotta contro il diritto soggettivo». Karl Larenz e la dottrina giuridica nazionalsocialista*, Giuffrè, Milano, 1988, p. 22).

[15] See G. VERDE, *L'abuso del diritto e l'abuso del processo (dopo la lettura del recente libro di Tropea)*, in *Riv. dir. proc.*, 2015, p. 1088, which continues: «se questa è un'evoluzione inevitabile, non possiamo che prenderne atto. Dobbiamo, però, denunciare l'obsolescenza delle norme costituzionali che avevano assegnato al giudice ben diverso ruolo e che su tale presupposto avevano designato una nomina e una carriera di tipo burocratico, quale male si adatta all'attuale loro funzione».

[16] M.F. GHIRGA, *Principi processuali e meritevolezza della tutela richiesta*, cit., p. 14.

Indeed, this reconstruction is based on a super-positive basis of values and principles – friable and therefore not trusting – the consequences of which are (or in any case may be) functional to the *Verhinderung*, to the denial of protection: central to Ghirga's discourse is the equation whereby «the control over worthiness is to the shop what the interest in acting is to the action»[17]. Both of the legal transaction, therefore, and of the action, it is necessary to evaluate the merits from the point of view of the concrete cause. And the parameter of that causal investigation, *ça va sans dire*, are obviously the principles of the order and the values expressed in it: more precisely, «the voices emerging from society – or rather [...] the options of someone, convinced of be the authentic interpreter of those voices».[18]

I have to make a clarification. The critical point is not so much the attribution (or self-attribution) of a discretionary and creative power, also because it is impossible to arrive at a stringent positive regulation of the interest in acting. The pitfall lies, however, in the vector orientation *in malam partem* of the theory: the control of deservingness is in thesis a third condition of the action, i.e. a further filter (compared to legitimacy and interest) and indeterminate that the question must pass in order to be deemed admissible by the judge.

But we can go in the opposite direction, valuing – in the face of «all these spaces open to interpretative discretion and argumentation» – not those «of an extra-legal nature and of a regressive nature», but the spaces «perfectly legitimate and of a progressive nature because to guarantee the rights».[19]

[17] All the passages cited in the period of the text are in M.F. GHIRGA, *La meritevolezza della tutela richiesta*, cit., p. 139.

[18] R. VILLATA, *La giurisdizione amministrativa e il suo processo sopravviveranno ai «cavalieri dell'apocalisse»?*, in *Riv. dir. proc.*, 2017, p. 106 ff., esp. p. 111.

[19] See for example E. ALLORIO, *Bisogno di tutela giuridica*, in *Jus*, 1954, p. 547 ss., esp. p. 548: «Ora a me pare che i processualisti tedeschi abbiano qui sciupato la fortuna, che essi avevano tra le mani, d'un codice vergine del concetto equivoco che stiamo vagliando».

The check of worthiness that I propose therefore becomes functional to the opening, to the expansion of such progressive spaces, for which the involutionary (and, *in deterius*, authoritarian) «risks» deriving from the use of imprecise criteria in order to deny the action they would reverse into their opposite. In other words, they would become progressive factors, all available to increase the guarantee tools of the individual or of the community that requests protection. A control, therefore, which ceases to be *Verhinderung*, but acts as a «friendly» tool devoted solely to the *Ermöglichung von Rechtsschutz*.

Reoriented, this time, *in partem bonam*, the axiological system operates in harmony, indeed in alliance with the community, developing a virtuous circularity: first criticized for its insidious absence of directionality (being a pure subjective capture of super-positive values which possibly also regressive), that model can now be channeled towards purposes that merely amplify the right to judge.

On the more concrete level of the control of worthiness, by now freed both from the nefarious gloom of the black twelve-year period and from its unreliable modern use *ad impediendum litis ingressum*, it becomes a suitable tool for faithfully transcribing the emergence of new and more advanced social values in terms acquisitions of positions directly legitimizing (at least) the demand.

2. PROGRESSIVE EXPANSION OF THE TRIAL LEGITIMACY AND NOMOPHYLACTIC DEFENSE OF THE MOBILE FRONTIER

But how to identify the *vallo di limes* (always "relocatable", but only in a more advanced position than the previous one) which protects the conquests now acquired to the axiological heritage received in the juridical-regulatory dimension, so that they can (better) resist any hermeneutical impulses placed at the basis of traditionalist jurisprudential attempts, if not exactly openly reactionary?

It is here, in my opinion, that the defensive role of the so-called stabilized jurisprudence can find proper emphasis: considered by the Constitutional Court to be subject

to a constitutional review, as well as intangible from interventions of legislative law in an interpretative function. In other words, capable of articulating that – progressive and therefore amplifying – control of worthiness regarding interests that claim protection because they are inspired by an axiological framework in which the community feels – in the given time – to be able to recognize itself with a spirit of cohesion and sharing.

I limit my observations to the role of the Council of State, the Italian Supreme Administrative Judge, whose task of nomophilachy can well fulfill that assignment of consolidating the mobile frontier I mentioned.

Of course, the possibilities of a blockage and crystallization of the jurisprudential administrative law are objective: but this shows itself as an irrepressible profile where one wishes to pursue policies of stabilization of the law that does not come from the sovereign and of fortification of the essential levels of protection conquered in the history of a country and its order.

The risk, however, is mitigated for two reasons.

One, more general, derives from the structure of our legal system: as far as civil law is concerned, the judge tends not to scrutinize the past heuristically, as in the common law, but to look to the future, that is siding – at least as a tendency – «on the side of modernization and social change, and not from that of tradition».[20]

[20] In this sense, E. SCODITTI, *Dire il diritto che non viene dal sovrano*, in *Questione giustizia*, 2016, p. 129 ff., spec p. 130.

The other is specific and concerns the Council of State[21]: it seems to me difficult to deny (even during our black twenty years) a "well-tempered" presence due to its ability to mediate between tradition and experimentation.

These dynamics are well understood precisely in the specific context of the right (or power) of appeal, where methods and criteria of connection with the existence and ownership of a substantial subjective situation legitimizing the trial – considered not always necessary[22] – cannot be typified by legislative law (except when it is the law that directly attributes access to the judge).

But even the use of other formants – doctrinal and jurisprudential law – suffers from a methodological bias which in turn calls, above all in the first field, to a choice imbued with value or, if one prefers, to a metatheory.

I clarify. The approach to the subject of access to the judge immediately presents a methodological alternative. The first is to elaborate this or that "pure" general theory of law, trying to root the dogmatic presuppositions in it in order to logically deduce, that is by "clades", an intrinsically coherent system which perimeters and schematises the extension and casuistry of the *ingressum litis*. But the *Reinheit* of this choice is only apparent. In reality, it accepts – or must accept – any concrete outcome, before which it remains – or must remain

[21] The Council of State is the Italian administrative appeal judge: it represents the highest administrative judging authority, and it has a strong function of nomophilachy, capable to address the rulings that follows its decision, especially when it decides in Plenary Assembly.

[22] The need for the appellant to have a subjective situation of a substantial nature has long been questioned, as known, by A. ROMANO, *Giurisdizione amministrativa e limiti della giurisdizione ordinaria*, Milano, Giuffrè, 1975, p. 310, in the sense that all interests worthy of protection «nel processo amministrativo possono trovarla, pur se sostanzialmente protetti come situazione soggettiva non possano dirsi, perché sindacati e annullati possano venire gli atti che comunque li ledano, se violano norme oggettive, per quanto deboli o addirittura inesistenti siano i collegamenti tra queste norme e quegli interessi».

– indifferent. Which is already a side, albeit disguised. Again with Schmitt's categories: the impolitical attitude is in itself political, and in any case implies a decision.[23]

The second alternative is the one I prefer. Remaining firm within a modern and evolved positivist choice, one can express a favor for the maximum possible extension of the legitimizing positions. In other words, considering their progressive enlargement and, at the same time, the nomophilactic defense of the progressively mobile frontier conquered as a value.

Metatheoretical (or meta-axiological) is the same choice between the two paths, neither of the two carrying in itself a criterion of preference over the other if not the outcome, in fact, of a logic of "line up": again, of value.

The first of the two alternatives starts from an explicit premise – I would say hyper-positivistic – according to which the right of appeal can only derive from a rule which, concerning a good of life, intentionally identifies the recipient of the protection it ensures in the fruition of the good same.

The application effects are imaginable. All subjects who cannot be included within an administrative relationship, even if multipolar, would be excluded from access to the judge, and in particular those who are not direct recipients of the measure or intended beneficiaries of the invoked rule: they are the extended ones categories of "third parties" instead legitimized by jurisprudential law, which recognizes them as such even in the absence

[23] The "agnostic", but no less "political" attitude is well described – in terms of general theory – by R. PARDOLESI-G. PINO, *Post-diritto e giudice legislatore*, cit., c. 117: «questo margine di creatività è presente, paradossalmente, anche quando l'interpretazione sembri attestarsi sul significato più ovvio, letterale, del testo normativo da interpretare: se non altro perché anche in questi casi si sarà operata una scelta, "negativa", di escludere altri possibili significati, meno ovvi ma pur sempre giuridicamente accettabili e argomentabili».

– evident or doubtful – of a rule that explicitly takes them into consideration in relation to the good of life subject to regulation.[24]

Paradigmatic is the case of *vicinitas* as a genetic factor of the right to trial: a physical-factual data – therefore meta-normative – today considered by the judge as sufficient (if accompanied by proof of a concrete prejudice deriving from the burdened act) to make the appeal admissible.

In the view that I prefer, legitimacy is (also) an instrument of counterpower available to the private sector, which in this way stands up to face – equally, if you like – the (subjectively) public antagonist.

I say it better. Legitimation presupposes, *in apicibus*, the normative nature of the third party's interest: understood, however, not so much with reference to a single physical property, but as an "organic interest", resulting from a plurality of factors ordered to a final arrangement deemed worthy of protection by a corpus of protective legislation.

I am thinking, for example, of the maintenance of the quality of life in the urban fabric where that third party lives, obtained by virtue of a particularly successful standard framework and which he intends to continue to enjoy. To this end, he can request the annulment of subsequent planning or location choices that have envisaged a detrimental infrastructure therein in violation of rules bearing protection of that organic interest.

If we agree with the choice for the normative nature of the substantial interest that allows access to the judge, the role of the jurisprudential formant can peacefully develop embedded in the legislative *ductus*, finding within them the ambits for an elaboration which – as mentioned above – can and knows how to structure, even by cultivating the "forbidden

[24] The point is highlighted by Guido Corso in the review to G. MANNUCCI, *La tutela dei terzi*, cit., in *Riv. trim. dir. pubbl.*, 2017, p. 517 ff., esp. p. 520: «il Consiglio di Stato e poi i tribunali amministrativi regionali hanno allargato la protezione del cittadino proprio perché non hanno preteso di subordinarla all'accertamento di una situazione soggettiva preesistente all'esercizio del potere».

ground" of values, mobile frontiers. In other words, that they are always available to advance: knowing that they have in any case their backs protected – thanks to a shrewd stabilizing nomophilachy – from the pitfalls of regressive yielding.

3. COUNCIL OF STATE, PLENARY ASSEMBLY NO. 6/2020: THE THEME OF AXIOLOGICAL VICINITAS IN THE WORDS OF A JUDGE

This is the case of the Plenary Assembly of 20 February 2020, no. 6. In my opinion, a paradigmatic sentence regarding the role played by the Council of State in defending the jurisprudential progress achieved; on the contrary, the regret is only for not having pushed further forward a system of protection adequate to the growing complexity of social relations.

The Plenary starts from a general methodological-exegetical assumption that seems to me difficult to criticize: «the evolution of the positive normative *datum* certainly cannot be read in a key that results in the decrease of protection»[25] indeed it must be held that «the path taken by the legislator was rather marked by the awareness of the existence of a living right [developed: *author's note*] according to a line of progressive raising of the protection».

Hence the theoretically subsequent step, which clearly distinguishes the diversity of positions between the public administration and social formations in the relationship with the public interest: «the situations are in fact different and heterogeneous: the administration has the duty to take care of the public interest and therefore enjoys a juridical situation capable of affecting communities and categories (power); the associations representing communities or categories, on the other hand, embody the substantial interest, they are its users», says the Plenary exactly.

[25] Like the one in the text, the following passages too – unless otherwise indicated – are taken from Plenary Assemby no. 6/'20, cit.

The legitimate interest[26] clearly reveals its nature of *Gegenrecht*[27], by counterlaw: a contrast agent[28] which operates as a "right" of opposition-resistance deriving from a divergent vision with respect to the concrete institutional management of the public interest.

In short, the second track of legitimation of the protection of the widespread interest finds its sedimentary foundation once the latter, on the one hand, is understood in its "incarnation" of material and by no means private interest: therefore distinct from that interest which we call "public" only because it is subjectively regulated by the entity (public, in fact) to which the law entrusts its management; and is, on the other hand, referable to subjective figures who do not recognize themselves at all in that specific regulation, but rather intend precisely to oppose it procedurally, considering it prejudicial.

In fact, it is necessary to see that (private) material good in its overall and organic meaning, the outcome and resultant of a complex multiplicity of causal factors interacting towards that final arrangement, as worthy of protection: to remain with an example that I have already given more above, the quality of life in a given urban context, achieved thanks to a particularly rich set of standards.[29] In these terms, the well-known conceptual syntagma

[26] That is our "interesse legittimo": in Italy, the relationship between private individuals and the public administration is constructed through the theoretical opposition between "power" and "legitimate interest", since a position of pure "right" is not recognised in relation to public power. In other words, since the administration looks after the public interest, and to do so it is endowed with powers to be dutifully exercised, the private individual is typically subject to their exercise, not claiming "rights". However, since the private individual remains deserving of protection in the legal system even with respect to power, he is not deprived of any legal situation, but is the holder of a "legitimate interest", protected by the Administrative Judge. This subjective legal situation is also protected by our Constitution – articles 24 and 113 of the Constitution – and has equal dignity with "rights".

[27] The reference is to the theory of counter-rights by C. MENKE, *Kritik der Rechte*, Berlin, Suhrkamp, 2015.

[28] P. FEMIA, *Il civile senso dell'autonomia*, in *The Cardozo Electronic Law Bulletin*, 2019, Issue 1, p. 1 ff., esp. p. 9.

[29] See F. TRIMARCHI BANFI, *L'interesse legittimo attraverso il filtro dell'interesse a ricorrere: il caso della* vicinitas, in *Dir. proc. amm.*, 2017, p. 771 ff., esp. p. 799: «il bene cui l'ordinamento conferisce tutela è proprio l'insediamento

of Cassese finds confirmation, according to which this typology of goods escapes the «bipolar paradigm» as it is a mixture of profiles on the one hand traditionally privatistic-dominical; on the other hand, innovatively publicistic-value-based.

This seems to me to be the shareable meaning – proper to Scoca's well-known theory and now taken up by the Plenary – of the correlation between (private) interest and (public) power. The latter would otherwise become an empty expression, devoid of legal relevance: what does "correlating" mean in concrete terms, if not allowing the control of power?

This is why I consider the thesis of the Plenary more linear, which does not use the scheme of extraordinary legitimacy *ex lege* (this yes, an indication of an undeniable objectification of the process), but commendably derives the right of appeal from articles 2[30] and 118 of the Constitution[31]: therefore the passage in which the Nomophylachy states that the right of appeal can «regardless of explicit regulatory recognitions» does not seem wrong to me[32], thus underlining the non-exclusivity of the first track, *i.e. ope legis* access.

abitativo nel suo insieme, e la scomposizione dell'insieme in singoli beni, che viene compiuta ai fini della personalizzazione del danno che il suo deterioramento produce, ha l'effetto di rendere irrilevanti alcuni profili della qualità dell'insediamento abitativo, o di ammetterne eventualmente la rilevanza come fattori di deprezzamento della proprietà immobiliare, anziché come elementi dell'interesse materiale protetto».

[30] Art. 2 Constitution: «La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale». The Article provides the so-called "principle of solidarity".

[31] Art. 118 Constitution, in particular its paragraph 4, conceiving the so-called principle of horizontal subsidiarity, that is the cooperation between public bodies and citizens in order to take care of the general interest: «Stato, Regioni, Città metropolitane, Province e Comuni favoriscono l'autonoma iniziativa dei cittadini, singoli e associati, per lo svolgimento di attività di interesse generale, sulla base del principio di sussidiarietà». See the references in Plenary Assembly no. 6/'20, cited above, point 5.2.2.

[32] Plenary Assembly, no. 6/'20, cit., point 7.3.

The central concept, in fact, is expressed in the same point, where – repeated twice – we read the role of the judge before the *Rechtsschutzbedürfnis*, i.e. in relation to the claims that ask for protection: the Plenary speaks to us of «substantial interests (so-called "life goods") deserving of protection according to the appreciation that the administrative judge makes of them on the basis of the positive order»[33], following «a line of progressive increase in protection».[34]

The reference to the two articles of the Constitution (arts. 2 and 118), and its "tone", seem to me to be of considerable importance. Above all, the explicit reference to horizontal subsidiarity referred to in paragraph 4 of art. 118 of Constitution cit., is however a valid reason not to ignore the meaning and scope of that paragraph, thus confining it to the traditionally unfrequented island of more or less utopian optativeness.

I place the accent here on the "qualified private individual", i.e. on the "citizen" in the strong and full sense. The *civis* – also associated – presents itself as the holder of its own mission: the subsidiarity performance of activities of general interest on the basis of a power of initiative which is not heteronormated, but which finds its own rules, as autonomous. As has also been noted, paragraph 4 looks at the citizen – single or associated – as a constitutional subject.[35]

The modernity of the Plenary, its being on the frontier, seems to me to reside in this: in having finally overcome certain hesitations that the previous jurisprudence denoted

[33] Plenary Assembly, no. 6/'20, cit., point 7.3.

[34] Plenary Assembly, no. 6/'20, cit., point 5.2.

[35] G. ARENA, *Il principio di sussidiarietà nell'art. 118, u.c. della Costituzione*, in *Studi in onore di Giorgio Berti*, Jovene, Napoli, 2005, I, 179 ff.

regarding the value of art. 118, para. 4, as a source of access to the judgment, not deriving the right to appeal from the constitutional emergence of horizontal subsidiarity.

In short, the Plenary defended the line of approval, and did so in the way we have just seen: basing it directly on horizontal subsidiarity to reject the regressive attack.

No "leap forward" or "return to the past", therefore; nor displays of inopportune muscularity by a "herculean" judge[36], but a simple "fight not to retreat".[37]

If a criticism can actually be made at the Plenary no. 6/'20, it consists in my opinion for the exact opposite reason: for the timidity with which it limited itself to a (albeit meritorious in itself) role – as mentioned – merely defensive, i.e. without making progress on the evolutionary arrow regarding the right to judge.

Indeed, once the current protection front has been consolidated with the decision in question, as is well known, at least two gates still remain difficult to penetrate today, both of great importance: access to the judgment by the *ad hoc* spontaneous committees and of the civil *uti* subject.

As for the former, a more advanced[38] jurisprudential orientation – not only territorial – recognized their right of appeal, appropriately distinguishing itself from conservative positions that still qualify them as suspected associations of convenience.[39] In reality, the profile that the jurisprudential law in force considers preclusive of access to the judge, *i.e.*

[36] So instead G. MANNUCCI, *La legittimazione a ricorrere delle associazioni: fuga in avanti o ritorno al passato?*, in *Giorn. dir. amm.*, 2020, p. 529 ff., esp. p. 535.

[37] A. SCHIAVONE, *Progresso*, Bologna, il Mulino, 2020, p. 33.

[38] See for example TAR Umbria, 2 September 2016, no. 581, preceded by Cons. State no. 4502/'11, no. 4532/'12 and no. 36/'14, cit. and by Cons. Giust. Amm., 27 September 2012, no. 811.

[39] Cons. State, IV, 9 February 2022, no. 937; Tar Salerno, III, 21 April 2022, no. 1050.

the formation of spontaneous committees only on the occasion of the "triggering event", is precisely the one that generates the objective need for them to form themselves in order to act in judgment. In short, the *crux* lies in overcoming an unreasonable requirement: temporal stability.

There seemed to be some hope. For example, Council of State, V, 27 July 2011, no. 4502, despite being too "occupied" in claiming "exclusively" to jurisprudential law the identification of extra-positive criteria for access to the judge (even if "on the basis of normative data and juridical arguments"), openly recognizes the existence of «situations which manifest a particular axiological significance» precisely with reference to the protection of super-individual interests; and for this purpose it values the guidelines, recently emerging, which welcome «a new criterion for recognizing the legitimacy to act, identifying it in the principle of horizontal subsidiarity, by now constitutionalized in art. 118, paragraph 4, of the Constitution».

The conclusions are very open, almost futuristic: «the full valorisation of this principle, i.e. the direct contribution of individuals and their social formations in the direct management of administrative activities (so that public intervention takes on a subsidiary nature with respect to their initiative), imposes that it must find immediate application also in the trial in order to guarantee, to those same subjects who are entrusted with the initiative on the substantive level, the widest possibility of reviewing the administrative function in the courts, for obtain widespread social control even after it has been exercised by the public authorities: in this way the legitimacy to take legal action to spontaneous committees of citizens is recognized, although lacking in significant levels of representation and organization»[40], in the wake of «an irrepressible tendency to widen the legitimizing situations to protect the citizen for the purposes of an ever more correct and better exercise of the administrative function». Consider the hendiadys: as has been noted, subjective and objective

[40] My translation.

profiles of the administrative process come together. Hence the «need to rethink the distinction between the recurring "*uti singulus*" and "*uti civis*", overcoming this sort of schizophrenia which appears to be the precipitate at the individual level of the traditional public/private antithesis, shaken to its foundations by the emergence of the subsidiary principle».[41]

But this more advanced protection front, although it took shape for about a decade, was unfortunately not recognized and strengthened in the Plenary no. 6/'20, which instead reaffirmed the traditional layout. The pernicious requirement of temporal stability therefore continues to operate, without taking into account the dissonant consequences with respect to art. 118, paragraph 4, of the Constitution.

The second passage – the right to appeal of the *uti civis* subject – encounters in the *vicinitas* a barrier still operating in restricting that way of access to the judge. Therefore, all that remains are the usual access paths, with their uncertain ridges: qualification and differentiation, which however can, must at least be re-read in the prism of subsidiarity. To "go beyond". In other words, in order not to limit oneself to considering – as a legitimizing factor – only the pre-trial activity and "commitment" carried out by a subject active in that particular socio-territorial context in which the "triggering event" occurs which brings out the need for protection[42] according to a frontier model which can be shared, but which still

[41] P. DURET, Taking "commons" seriously: *spigolature su ambiente come bene comune e* legitimatio ad causam, in *Riv. quadr. dir. amb.*, 2013, p. 3 ff., esp. p. 44. My translation as well.

[42] This is the thesis, which persuades me, of F. GIGLIONI, *La legittimazione processuale attiva per la tutela dell'ambiente alla luce del principio di sussidiarietà orizzontale*, in *Dir. proc. amm.*, 2015, p. 413 ff., esp. p. 452 ff., which reduces the legitimizing qualification to the «*demonstration of a commitment carried out prior to the moment of recourse to the trial as a condition of protection of general interests*», i.e. to «*a proven commitment for the pursuit of general interests which takes place at the outside the process and in real social dynamics*» (my italics).

remains confined to the conceptual context of the applicant's physical proximity to the place affected by the contested decision.

It is therefore necessary, in my opinion, to "liberate" the *vicinitas*, to expand its meaning and juridical effect as much as possible, to the point of considering it to exist even when the proximity relationship is not physical, but only axiological[43]. In other words, it is a question of recognizing the right of appeal also to subjective figures without a material connection with the place of impact of the decision to be enforced. It seems to me a necessary step to allow for the protection of interests that are not always referable only to the strictly geo-territorial area of impact of a given measure. However, it is difficult to specify the selection parameters: an operation that always leaves areas left to jurisdictional assessment, i.e. to the assessment of the worthiness of the interest brought on a case-by-case basis. In short, the underlying political *lato sensu* is difficult to eliminate, as access to the judge constitutes the gray area, the moment of connection between tables of insidious values because they are inevitably subjective and therefore difficult to legalize.

However, a compensatory factor could be identified – as I have tried to argue above – in the joint action of two mechanisms: on the one hand, the activation of that merit filter only for the purpose of *Ermöglichung* (and never of *Verhinderung*) of the protection; on the other, the nomophylactic function, which stabilizes the line of progress gradually "conquered"[44], counteracting regressive initiatives and – with this – discretionary, therefore pernicious praetorian oscillations.

[43] Very well says C. CUDIA, *Legittimazione a ricorrere, concezione soggettivistica della tutela e principio di atipicità delle azioni nel processo amministrativo*, in *P.A. - Pers. amm.*, 2019, p. 99 ff., esp. p. 103: «se il cammello (l'interesse legittimo) non passa dalla cruna (legittimazione a ricorrere) e non possiamo (*ex* art. 24 Cost.) rinunciare al cammello, può rivelarsi necessario trasformare la forma della cruna».

[44] Which – as we have seen with regard to the conservative position of Plenary no. 6/'20 on the subject of spontaneous committees – does not necessarily coincide with the most advanced line ever.

If this model is accepted, subjective figures would find entry into the judgment from time to time legitimized by a plurality of typological neighborhoods. To that now received, which looks at the physical-territorial datum, would in fact be added proximity of various content: from a catalog still in the process of being written I draw the hypotheses of cultural vicinity or that (of an economic nature) of the productive sector.

Some examples.

According to this assumption, an association set up to conserve the physical vestiges – the house of residence, for example – of an illustrious character of the past could rise up against a building permit that would allow modifications deemed harmful to the historical memory referable to him.

Just as, coming to the second closeness, an association – for example – for the protection of oenology would have the right to challenge a provision for the location of a landfill near an area with vineyards with a very high production and quality vocation: in fact, it would be acting in defense of a specific interest other than that expressed by the community based on the spot and made out to the relative exponential territorial body, but still worthy of protection.

But there are glimmers that bode well.

The recent decision of the Plenary Assembly of 9 December 2021, no. 22, in fact, punctually felt the beneficial pressure underlying instances of justice formulated for the protection of individual interests, but suitable for reflecting in a positive sense – with a mutual mirror game – on the protection of the needs of the community.

The Plenary reviewed – with unusual and appreciable authenticity of tones – some remote jurisprudential viscosity (including those attributable to the same nomophilia of Palazzo Spada), to then register the "modernist" theses that legal thought has recently elaborated in the sense of favoring access to the judge using the proximity tool.

Among these, the Plenary would seem to have also incorporated my proposals and views: «[…] always within the framework of the protection of meta-individual interests, a sort of "liberation" of the *vicinitas* from its original perimeter is invoked, to the point of deeming it existing even when the relationship of proximity between the subject and the protected asset is not physical but axiological».

Hence, then, one of the principles of law set out therein, which must be fully adhered to: «In cases in which the illegitimacy of the building authorization title is complained of due to contrast with the rules on distances between buildings imposed by laws, regulations or urban planning instruments, not only the violation of the legal distance with the property bordering that of the appellant, but also that between said property and a third building may be relevant for the purposes of ascertaining the interest in the appeal, whenever this violation could lead to a concretely useful restoration effect, for the appellant, and not merely emulative, with the cancellation of the building permit».

Notice. The Plenary, albeit with a hint of doubt, based its reasoning precisely on the relationship that binds the *civis* to the quality of the surrounding environment, fulcrum the conditions of the action without further mediation: «The reasoning around the interest in the appeal, understood as a state of affairs, it is therefore necessarily linked to the utility that can be obtained from the cancellation protection and the restorative effect; utility which in turn is functional and mirrors the injury suffered. This prejudice [...] in the face of a building intervention *contra legem* is found in jurisprudence, not without a series of variations, in the possible depreciation of the property, neighboring or in any case contiguous, or in the compromise of health and environmental assets to damage of those who are in lasting relationship with the affected area. It can be debated whether these assets are the result of the breakdown of a single, so-to-speak summary interest, that of the quality of the housing settlement (expression already present in the aforementioned sentence 523/1970), or whether they must necessarily be considered atomistically, on the assumed that no inherent interest would be given to the housing development as such. The reference to the enjoyment of the property together with the reference to health and the environment is, moreover, an investigation plan that is already sufficiently broad and it is on this that the jurisprudence has relied to recognize the prejudice suffered by the third party not only, for example, in the

decrease of air, light, sight or landscape, but also in the impairment of urban values and in the degradation of the environment as a result of the increased urban load in terms of reduced public services, overcrowding, increased traffic (see, again most recently, Council of State, IV, no. 6130/2021)».

4. SOME STEPS FURTHER

Perhaps further progress can be made. For some time now we can come across some jurisprudential outposts that have legitimized the direct access of the individual – albeit always qualified and differentiated – to the procedural protection of the supra-personal interest, whose particularly intense axiological connotation impresses – as observed by Council of State, IV, 9 January 2014, no. 36 – a new curvature to the classical conception of the conditions of action. The regulatory attributions of special legitimacy have their ratio in the primacy of the respective sectors to which they pertain, in implementation of art. 118 of the Constitution: which – continues that decision – generates and roots, even before that, a general legitimation that is no longer connected «to the "narrow" ownership of a subjective position, but to a matter and to a constitutionally guaranteed value». In the same way – it goes on – such a greater breadth of active legitimation inevitably determines also a different consideration of the interest in taking action, which must be regarded not already with reference to the single subjective juridical position for which protection is postulated in judgement, but to the "common good or value", to the protection of which the "utility" of the judge's ruling must be parameterized. To this kind of relationship, considered by jurisprudence as differentiating and qualifying, between the user of a public service and the provisions concerning the relative organizational-performance structure, one could perhaps add that which connects particularly representative personalities in certain "environments" of relationship life with decisions made in that same context and considered as harmful.

These are the hypotheses, mentioned above, of the cultural vicinity and of the productive sector, here however declined "in the singular". An *ampliatio* that seems important to me also from a strictly legal-political point of view, since it takes away from

associationism, which is not always irreproachable in its strategic choices, the monopoly of jurisdictional initiative to protect the super-personal.[45]

What if we finally tried to break the barrier of the subject, that is, of the necessary subjectivation of a claim?

I wonder, that is, whether it is possible to overcome the requirement of the above all subjective determination of the substantial interest and of the relative question as an insurmountable border of access to the judge. That is, the need for the holder of the "right", therefore the plaintiff, to be well defined in his individuality (like his opponent: here it does not matter whether or not the parties are divided into one or more distinct subjects).

Thus we return to the subject of subjective law, that is – speaking of a dual system such as the Italian one – to the need for the *Anspruch* (has the nature of a subjective right or legitimate interest) to coalesce around a subjectifying figuration. Which is – or becomes today – a limitation. Singular trajectory. Tools – subjective situations – with which to face (as well as control, if this interpretation is accepted) power; through which it was once «fought against the late absolutist denials of rights, especially in the European continental constitutionalism of the nineteenth century, in which rights represented guarantees»[46]; and

[45] Interesting, due to its declared radicalism, is the basis from which B. Giliberti moves, (B. GILIBERTI, *Contributo alla riflessione sulla legittimazione ad agire nel processo amministrativo*, Milano, Wolters Kluwer CEDAM, 2020) according to which the general center of attribution of administrative functions is also the person (individual or associated), so as to open up «ampi spazi giuridici alla rivisitazione della struttura del processo amministrativo, che da un'impostazione essenzialmente soggettivistica può aprirsi a ponderate e circoscritte rivisitazioni oggettivistiche, le quali, attraverso l'istituto della sussidiarietà orizzontale, nelle forme della legittimazione civica, favoriscano la saldatura tra dimensione strettamente individualistica e partecipativa delle persone» (p. 179 According to Giliberti, this results in a notable expansion of the right to appeal, since legitimised will be «any subject who can be said to have been affected by an event of power, that is to say, who has suffered the effects of an administrative decision, because the power - in its concrete form (that is to say, in its administrative form) - has intersected his life, constituting, modifying or extinguishing the conditions of his existence (or denying that a requested modification is produced), as they have been determinated prior to the exercise of the power itself» (p. 182).

[46] A. FISCHER-LESCANO, *Subjektlose Rechte*, in *Kritische Justiz*, 2017, p. 475 ff., esp. p. 475.

which for this reason have in turn been fought by the totalitarian declinations of the imperium, today instead «usually restrict access to jurisdictional processes».[47] As Andreas Fischer-Lescano always reminds us, «even today, the subjective claim is the fixed star of the legal universe».[48] But with its dark side: «subjective rights privatize the public sphere. They impose ownership of rights, bind the guardians of the law to a specific (and not generic) subject and subjects to take individual private paths in the world of law. [...] Individual rights, therefore, not only open the doors of the institutions of justice, but also limit access to them. Those who, according to the theory of the protective rule, cannot prove any subjective right, but can only invoke an alleged "objective right", cannot, as a rule, resort to administrative law (§ 42.2 *VwGO*)».[49]

A general theory of private origin[50] critically defines – with a synthesis formula – binarism[51] this approach, which reduces political dynamics to (a web of) predetermined legal models[52] in which the subject can enter and act only on condition that it is clearly identifiable

[47] A. FISCHER-LESCANO, *Subjektlose Rechte*, cit., p. 475.

[48] A. FISCHER-LESCANO, *Subjektlose Rechte*, cit., p. 476.

[49] A. FISCHER-LESCANO, *Subjektlose Rechte*, cit., p. 475.

[50] P. FEMIA, *Il civile senso dell'autonomia*, cit.

[51] In fact, it assumes the mandatory creditor-debtor relationship as hypostasis of the model under examination, or in any case its corresponding procedural impact in terms of the typifying relationship between plaintiff and defendant. This duality is therefore not descriptive (that is, in numerical *sensu stricto* terms), but theorizing of a general system in which the legal phenomenon is conceivable and can be expressed only on condition of a rigid and prior identification of the subjects – two or more, provided they are well identified – that "enter" the pre-established scheme.

[52] In our field, the crisis of the classic concept of subjective law is highlighted by da G. ROSSI, *Guida alla lettura: linee di un nuovo diritto amministrativo*, in F. GRASSI, O. H. KASSIM (a cura di), *Vecchie e nuove certezze nel diritto*

through the possession of precise substantive and then procedural requirements: «the complexity of the social problem is reduced to the formula: which action in court and against whom?».[53] An old story, since its roots – it is observed – lead back to Jhering and the insistent need for every claim (and above all its owner) to be determinable.[54]

In short, is still there legality «when the limits of the faculty of desire are no longer inspired by the lexicon of binary conflict»?[55] Without even wanting to touch them here, we are faced with the procedural implications of the theory of the common good. The legal system does not yet connect executable questions to it, the admissibility of which would lead to the breaking of the binary network of current juridical categories and would require far more complex points of view than those that come to the fore in a binary dispute: that is – always in the sense just clarified – between "plaintiff" and "defendant".

The answer is one of great openness, a lofty and noble parenthesis. The time has now come – argues Pasquale Femia – to imagine a transitive juridical nature (transitive

amministrativo. Elementi essenziali e metodo gradualista. Dibattito sugli scritti di Giampaolo Rossi, Roma, Roma Tre-Press, 2021. Rossi underlines «the relational nature of all subjective situations» (p. 34), so that each of them is governed by legal positions of various types, of which other owners. In other words, «every subjective juridical situation has a prismatic character» (p. 36), such as for example the right to property, which «is not a relationship between a subject and a good, but a relationship between a subject and other subjects in relation to a good» (p. 68).

[53] P. FEMIA, *Il civile senso dell'autonomia*, cit., p. 7.

[54] R. VON JHERING, *Geist des römischen Rechts*, 1. Aufl., III, 1, Leipzig, Breitkopf und Härtel, 1865, p. 329: «Il giudice civile può proteggere solo gli interessi di co- loro i quali mostrano l'immagine di un corpo stabile; quando abbandona questa forma e si trasforma nello stato di aria, si perde completamente nell'indeterminato, la sua forza finisce – non si possono catturare le nuvole in un sacco o in una capsula (*man kann Wolken nicht in einen Sack oder eine Kapsel fangen*) –; il giudice deve, invece, poter cogliere ed afferrare le cose per giudicare con sicurezza».

[55] P. FEMIA, *Transsubjektive (Gegen)Rechte, oder die Notwendigkeit die Wolken in einen Sack zu fangen*, in A. FISCHER-LESCANO, H. FRANZKI, J. HORST, (per cura di), *Gegenrechte. Rechte jenseits des Subjekts*, Tübingen, Mohr Siebeck, 2018, p. 343 ff., esp. p. 344.

Rechtlichkeit) in which the action of the right holder is neither to his advantage, nor to the benefit of third parties, nor of the community, if the latter continues to be reductively understood as an entity with defined boundaries, i.e. as a simple legal space: therefore a place where everything is, in an artificial way, divided into subjects and objects, into assets and liabilities.[56]

In other words, the arrow of progress would go in the direction of an order no longer obsessed with the positivist myth of determinacy and of the "given"; a *Rechtsordnung* that overcomes rejection, "the curse of indeterminacy" (*der Fluch der Unbestimmtheit*) and instead finally accepts the idea of being able to trap the "clouds of transcendence". However, new "sacks" are needed, very different from the now worn-out subjective right.[57]

According to this fascinating theoretical formulation, multipolar political conflicts cannot be resolved in their juridical "binarization", due to which everything that remains outside this constrictive scheme is in itself indeterminate and consequently extrajuridical: it is, essentially, to go beyond the traditional construction of traditional subjective law, «to change our thinking: from thinking by statutes of juridical subjectivity to thinking procedurally without subjects».[58] Therefore, without the subjective right, which must finally give way to a model no longer attributable to subjectivity (whether individual or associative), but open to a new distinctly transitional situation. These are trans-subjective rights: which «neither end in an object, nor are they exhausted in a subject, rather they cross them to spread elsewhere, without ever dwelling on a holder. They are rights without a master».[59] And again: «neither new rights nor new subjects, nor even the abolition of subjectivity through meta-

[56] P. FEMIA, *Transsubjektive (Gegen)Rechte*, cit., p. 344.

[57] Both passages are from P. FEMIA, *Transsubjektive (Gegen)Rechte*, cit., risp. p. 345 e p. 346.

[58] A. FISCHER-LESCANO, *Subjektlose Rechte*, cit., p. 488.

[59] «Rechte ohne Herrscher»: P. FEMIA, *Transsubjektive (Gegen)Rechte*, cit., p. 351.

subjective rights, to overcome subjectivity: it would only be a question of a misleading formula. The annihilation of multiple subjectivities in the name of an all-inclusive objectivity (e.g. Mother Nature), would be nothing but a veiled formula for the creation of a new subjectivity. Sentinels of the boundaries of these new supersubjects shaped in the courts would immediately come to light. New, terrible, fundamentalist subjectivities».[60]

A new and more fascinating way to evoke the *actio popularis*? Let us hear from Schmidt-Aßmann: «one can rightly ask oneself whether the "private" interest whose protection should constitute the subjective-juridical substance of a judicial action, has not so far been interpreted too erratically, and whether the connections and the reciprocal overlapping of public and private interests have been correctly grasped. Aren't there also constellations – in certain areas of law, for example environmental or regulatory law – in which individual interests include the pursuit of public interests and do not lose their "private" character just because they present themselves as aggregate interests?».[61] Hence, in turn, Schmidt-Aßmann's exhortation to a reading of the order in terms of attorneys, all leaning in favor of the *Mobilisierung des Bürgers*: hence «the awareness that the executive in a democracy does not have the monopoly of defining the common good».[62]

Obviously unpredictable in their developments, the paths of the right to judge and the trajectories of the theory of interpretation (with which the former intertwine an unsolvable tangle) will continue to preserve profiles of indeterminacy, whose internal compensation will still be left to the appreciation of the individual judicial decision maker.

This seems like a fact to me. But how insidious? In my opinion, the question needs to be reformulated, indeed moved around its object. Thus: where that discretionary power

[60] P. FEMIA, *Transsubjektive (Gegen)Rechte*, cit., p. 351.

[61] Thus E. SCHMIDT-AßMANN, *Verwaltungsrechtliche Dogmatik. Eine Zwischenbilanz zu Entwicklung, Reform und künftigen Aufgaben*, Tübingen, Mohr Siebeck, 2013, p. 113. My translation.

[62] E. SCHMIDT-AßMANN, *Verwaltungsrechtliche Dogmatik*, cit., p. 114. My translation as well.

can – perhaps, must; perhaps, it can only be – left free to pour itself out? I answer: only in rite, in regulating access to judgment; only *ad augendum* et *in bonam partem*.

So I don't think I'm contradictory, arguing, on the one hand, the need to escape decision-making models that are based on axiological-hermeneutic techniques of interpretation. To use the words of Luigi Mengoni, who very well represent the method opposed here: «the interpreter cannot access the meaning of the law if he does not elaborate his hermeneutical horizon by assuming the value-adding viewpoints that the positivistic model of subsumption would like to exclude since relevant to the exclusive competence of the legislator and not susceptible to scientific analysis. If he does not include the extra-systematic points of view among the referents of his reflection on him, he is not able to understand the problem according to which the text must be addressed and to which they must be measured, in order to ensure the objectivity of the interpretative result, the anticipations of meaning and the solution projects formed in its pre-understanding».[63]

The point then becomes that of contrasting, from the outside, the arbitrary regressive power, that is, of withdrawing the threshold of access to the judge. However slow, the regulatory transition from a nomophilachy of persuasion to a nomophilachy of constraint allows the line of protection to be stabilized, leaving the indispensable role of experimenting yes, but only to progress, to the territorial and sectional administrative judges; and stimulated, as well as controlled[64], from a *scientia iuris* that is never complacent, but free and severe.

I am aware of the dangers inherent in a model that accentuates too much the binding value of the previous one: a corresponding marginalization of the doctrinal formant (assuming that, in the decline of effectiveness that characterizes it, it can still be defined as

[63] L. MENGONI, *Teoria generale dell'ermeneutica ed ermeneutica giuridica*, cit., p. 18. My translation as well.

[64] As Rüthers admonishes (in F. PEDRINI, *Colloquio su Metodo, Interpretazione e* Richterstaat. *Intervista al Prof. Bernd Rüthers (Konstanz, 14 novembre 2015)*, in *Lo Stato*, p. 189 ff., esp. p. 212. cit.), «theirs, in my opinion, is never the last word» («Aber das ist, aus meiner Sicht, nicht das letzte Wort»).

such), to the advantage of an indolent conformism jurisprudential. But, on the other hand, we know all too well the consequences of an opposite model: the proliferation of multiple positive jurisprudential rights. Let us listen again to Palazzo's reflection: «The individualism and rebelliousness of magistrates would thus risk fueling a phenomenon that can be defined as jurisprudential pulverization [...]: typological distinctions and subdistinctions would be the necessary tool to circumvent a constraint that may be felt to be excessive. The bias for certainty would be lurking»[65], thereby also expiring the very concept of law, as Bobbio reminded us.[66]

Nor is it worth evoking conceptual *nebulae* – the age of complexity, for example – to deduce the ineluctability of a vague and elusive law. I take from Vito Velluzzi: «the age of uncertainty must seek the certainty of the law; the latter and the justification of judicial decisions are linked, in fact, precisely in avoiding the bad rhetoric of fundamental rights and the constitutional state, a bad rhetoric that greatly raises the risk of emphasizing the right solution according to the wishes of the interpreter on duty hidden by the label of rights and constitutional principles».[67]

Yet I realize that these words can remain a wish among the many similar ones, therefore empty and ineffective. And that juridical science risks «losing its identity, [...] all

[65] F. PALAZZO, *Legalità fra* law in the books *e* law in action, cit., p. 11.

[66] N. BOBBIO, *La certezza del diritto è un mito?*, in *Riv. int. fil. dir.*, 1951, p. 146 ff., esp. p. 147. And even so, L. GIANFORMAGGIO, *Certezza del diritto*, in E. DICIOTTI, V. VELLUZZI (eds.), *Filosofia del diritto e ragionamento giuridico*, rist. riv. edited by S. Zorzetto, Torino, Giappichelli, 2018, p. 81 ff., esp. p. 84: «[…] il diritto per questo c'è: per esser certo; cosa che evidentemente non potrà mai compiutamente essere, ma a cui altrettanto evidentemente ogni operatore giuridico non potrà non tendere (così come ogni scienziato non potrà non tendere alla – inattingibile – compiuta conoscenza della realtà che è oggetto del suo studio)».

[67] V. VELLUZZI, *Metodo giuridico, legge e Stato costituzionale: note (convergenti) sulle riflessioni di Fabio Ciaramelli*, in *Etica & Politica*, 2022, p. 373 ff., esp. p. 377.

the more so in view of the inclination of jurisprudence to become doctrine. More than an alliance, then, an absorption. Or worse». There is little or no point in arguing, as hermeneutics do, that «when the primacy of legislation is lost, it is necessary for the role of doctrine to regain strength if one wants to avoid the absolute government of jurisdiction»[68]: where the problem lies in the resigned, if not even desired, acceptance of the premise.

In reality, a «hendiadys in the odor of *reductio ad unum*» emerges, such as to lead one to believe that «the exaltation of the judge's creativity aims [...] to further compress the patrol of the lords of the law. Or, in any case, to impose and make explicit a new hierarchy, indifferent to the lack of democratic legitimacy (to create law) of the new absolute protagonist».[69] I would add: a legitimacy that *Richtertum* now believes exists, because it derives «formally, from the fact that the judge is delegated, according to the laws of the Republic, to decide "in the name of the people", as directly foreseen by art. 101, first paragraph, of the Constitution»; indeed, with the mischievous observation «that an analogous provision for the Constitutional Court [is] contained in a law of lower rank: law no. 87 of 1953, art. 18, third paragraph».[70]

This is why Guastini's position seems optimistic to me, if not outright surpassed by the current overwhelming preponderance of jurisprudential law: for him, «much of what we consider current law is *Juristenrecht*, a law created precisely by jurists, [...] because it is precisely the doctrine that provides judges with both conceptual and "methodological" tools (I am referring to the so-called methods of interpretation) necessary for their arguments: after

[68] F. VIOLA, *La legalità del caso*, cit., p. 327.

[69] All the passages are by R. PARDOLESI-G. PINO, *Post-diritto e giudice legislatore*, cit., c. 117.

[70] As underlined by an exponent of the "rogued doctrine": A. LAMORGESE, *L'interpretazione creativa del giudice non è un ossimoro*, in *Questione giustizia*, 4, 2016.

all, judges are trained in the Faculty of Law, and doctrine determines their very forma mentis».[71]

But I'd be delighted to be wrong.

Abstract. *The contribution examines the Italian theoretical construction of the relation-ship between a private individual and the public administration, when it lands in court.Access to the protection of the administrative judge, in Italy, is in fact linked to the existence of two conditions: the so-called 'legitimacy' and the 'interest in acting'. "Legitimacy" implies that the private individual must assert and demonstrate that he is the holder of a "legitimate interest" in the substantive profile of the matter for which he applies to the Judge. However, 'legitimate interest' is typically personal: this makes access to protection difficult for those who are not directly affected by ad-ministrative power, and yet want to defend an interest that does not (only) belong to themselves, but to entire communities, a 'diffuse interest'. Decisive to this end is the jurisprudence of the Council of State, which some-times interprets the normative datum - in deference to the principle of legality - ex-tending the possibility of access to the Judge, requiring that the plaintiff be the holder of a "vicinitas" to the defended interest that is even only "axiological", i.e. linked to a table of values rather than to a minimum physical distance.*

[71] R. GUASTINI, *Teorie dell'interpretazione. Lo stato dell'arte*, in *Lavoro e diritto*, 2014, p. 235 f.