MODELS OF PUBLIC ADMINISTRATION:
COMPARATIVE ANALYSIS OF ADMINISTRATIVE ORGANISATION

Lorenzo Casini
The views expressed do not imply the expression of any opinion whatsoever on the part of the Italian Department for Public Administration, and Formez.
Introduction

The growth of administrative functions throughout the course of the twentieth century has resulted in a steady increase in human and instrumental resources in the public administrations. In the 1980s public sector spending in the EC countries exceeded 40% of GDP and civil servants made up between a quarter and a third of the total work force.

Administrative organisation has also been affected: the emergence of new public interests and new arenas of intervention have caused important changes in the state machinery of all systems. Remedies for increased administrative duties have been quantitative, such as the creation of more offices and bodies, and also qualitative, in the form of differentiation of organisational models. The administrative organisation of various states has been gradually improved with the involvement of new bodies.

The evolution of the administrative organisation of contemporary states can be broadly divided into two phases. The first, stretching from the origins of administrative law in the nineteenth century until the 1960s-80s, saw the affirmation of the social state and new collective needs (education, health, culture, environment). Administrative organisation grew disproportionately during this long temporal arc: government structures swelled, public bodies multiplied, complex regional and local administrations developed. In the second phase, beginning in some states in the 1960s, the quantitative growth of administrative organisation was halted and a new course was taken, intended to reduce the bureaucratic apparatus and to encourage the involvement of private bodies. The age of administrative reform, the era of privatisations and the emergence of global and supranational regulatory systems are thus reflected in the organisation of the public administrations: the reinvention of government and ‘agencification’ began, substantial proposals for the rationalisation and streamlining of administrative structures were formulated, significant outsourcing processes were initiated, and networks of composite administrations were established.

A range of factors were responsible for triggering or accelerating these changes: the need to cap public spending, economic globalisation and market liberalisation, the formation of supranational administrative systems, the desire for progress in the public administration, and the greater flexibility of privatistic instruments.

---

This study considers all these factors, examining administrative organisation from a comparative perspective, with reference to the main countries of Europe and the United States\(^2\).

The analysis is divided into four parts. Part one considers the notion of public administration and highlights the variability of the boundaries of the public sphere in various administrative systems. The second part centres on the relation between centre and periphery, and more specifically, on modalities for distributing legislative and administrative competences between the state, the regions and the local authorities. The third part focuses on the central state administration – government organisation, public bodies and the independent authorities. The fourth part considers the private forms of administrative organisation and the use of privatistic instruments.

The aim of the investigation is to gather, through comparative methodology, experiences and instruments that can illuminate problem areas in Italian administrative organisation and to outline possible proposals for reform.

1. The boundaries of the public administration

The development of the organisational apparatus found immediate correspondence in the evolution of the notion of public administration. Originally conceived as a compact entity enclosed within the state as an ancillary apparatus of the government, the administration mushroomed to the point where we now define it by using the plural: the “public administrations”. Attempts to unify the diversified organisational elements, have always failed. These efforts, starting from a subjective concept, are thus based on the formally public nature of the subjects. An example is the French service public idea: initially meant as a concept capable of unequivocally identifying the public sphere, it then became ineffective when the organisation began to fragment.

1.1. Notions of public administration: from unity to differentiation

The study of administrative functions has placed the accent on the public scope of administrative activity: this, identified and regulated by law, leads to the application of publicistic rules to the administrations that pursue it. This resulted in the recognition of the administration’s instrumentality with regard to the public interest, in which the former adapts itself to the character of the latter. In this way it becomes possible to identify the administration in theoretical terms (and in this respect German legal studies

focus on *Begriff der Verwaltung*), but it remains difficult and probably not very useful to attempt a unitary definition in practical terms.

Making the administration functionally able for the achievement of a public objective prompts variability in the boundaries of the public sphere, and they adapt in accordance with the normative framework in question. It is no great surprise that general studies of administrative law now give little space to the analysis of the notion of the public administration from the “static” point of view. The theme is very nearly absent in Anglo Saxon literature, is quickly dealt with in the French ones, and where it is considered more fully – in Italy, Germany and Spain - the conclusion is that there is not a single definition, but a range of notions of the public administration, the which can be interpreted as an institute of “variable geometry”.

The existence of different notions of the public administration is verified in all systems. The most significant cases are those that refer to the regulation of access to administrative documentation (see also the chapter on procedure). In order to identify the subjects that should have right of access, norms must in fact provide a definition of public administration. So for example, in France, law No. 78-753 of 17 July 1978 considers as administrative all documents elaborated or held by «l’Etat, les collectivités territoriales ainsi que par les autres personnes de droit public ou les personnes de droit privé chargées de la gestion d’un service public, dans le cadre de leur mission de service public» (art. 1, c. 2). Similarly, law No. 2000-321 of 12 April 2000 on the rights of citizens and their relations with the administrations defines as «autorités administratives» the state administrations and the territorial communities, as well as «les collectivités territoriales, les établissements publics à caractère administratif, les organismes de sécurité sociale et les autres organismes chargés de la gestion d’un service public administratif» (article. 1). In these cases, an extended notion of public administration is adopted, which embraces those private bodies that perform functions of public interest. Furthermore a mixed criterion is used, based partly on a list of bodies, partly on substantial criteria. Similar solutions are found elsewhere: in Italy, in articles 22 and 23, law No. 241/1990; the UK, in the Freedom of Information Act of 2000, sections 4-6; in Spain, in the administrative procedure law No. 30/1992, article. 2; in Germany, where, alongside the concept of administration (*Verwaltung*), emerges the idea of institutions tasked with administration (*Verwaltungsträger*).

Essentially, whenever the norm to be applied is designed to offer guarantees and safeguards to users, a broad definition is adopted, encompassing subjects normally regulated by private law but which perform public functions. In this perspective the formula used in the UK Human Rights Act of 1998 is emblematic, insofar as it indicated the public authorities, i.e. “a court or tribunal, and any person certain of whose

---

functions are functions of a public nature” (section 6, subsection 3)\(^4\); Moreover, the House of Lords provided a broad and functional interpretation of the definition, independently of the formally public or private nature of the subjects considered (see the cases Aston, Cantlow and Marcis, both from 2003). This interpretation was confirmed in 2004 by the Report of Joint Committee on Human Rights, a body created by the UK parliament.

However there is no lack of all-inclusive hypotheses of definition, generally used to indicate the public powers. In the United States the Administrative Procedure Act uses the term agency to make reference to «each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include - (A) Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia» (U.S.C., title 5, pt. I, ch. 5, subch. 2, sec. 551 Definitions, n. 1)\(^5\). In this circumstance the expression finds its basis in the structure of the US administrative system, in which the bureaucratic apparatus (agent) is at the service of the political part (principal) and where the attention of juridical science is centred on the constitutional position of the administration rather than on the definition problems of the latter.

1.2. Supranational influence: notions arising from Community law

The use of functional notions of public administration, designed to guarantee the application of a specific norm, is also widespread in the supranational arena. The interesting hypotheses in this respect occur in the European Community\(^6\). Consider, for example, the public contracts sector and free circulation of workers.

In the latter case, the founding Treaty of 1957 established that public administration employees would not be covered by the provisions that guaranteed freedom of circulation for government workers within Community territory (article. 39, paragraph. 4, EC treaty). From here there is a need to give a definition of public administration, in order to uniformly apply the dispensation determined by the Treaty. This need was fulfilled by the Court of Justice which repeatedly ruled that the dispensation regarded «jobs that imply direct or indirect participation in the exercise of public powers and duties directed the safeguard of general interests state or other public bodies, and therefore presuppose on the part of those that hold them, the existence of a relationship of solidarity with the state, as well as reciprocity of the rights and duties that form the ties of citizenship»\(^7\). A restrictive notion of public administration thus emerges, one


\(^6\) S. Cassese, Le basi costituzionali, in Trattato di diritto amministrativo, cit., p. 173 and following, especially 196 and following, and for a wider perspective, M.P. Chiti, Diritto amministrativo europeo, II pub. Milano, Giuffrè, 2004.

that almost wholly excludes sectors like health, education, research and public services; this with the aim of limiting the range of the dispensation cited in article 39, para. 4, EC Treaty, and to allow the maximum circulation of workers within Community territory.

Quite a different matter is the definition of the body of public law contained in directives for contracts. Here the object is to extend the range of the provisions safeguarding the free market, so an adjudicatory notion of administration is adopted, in order to encompass not only administrations in the traditional sense (state, regions, local authorities), but also those private bodies subject to public influence (funding, appointment of administrators, control). Community norms therefore specify a public law body as being: a) an institute for specifically satisfying general needs of non-industrial or commercial nature; b) endowed with juridical personality, and c) funded mainly by the state, territorial public bodies or other organs of public law, or whose management is controlled by the latter entities, or whose organ of administration, direction or vigilance is constituted by members at least 50% of which have been designated by the state, by the public territorial bodies or by other public law entities (see article 1, section 9, paragraph 2, dir. 2004/18/EC).

This is a substantial definition, mitigated by formal elements (such as juridical personality) and supplemented by indicative elements (see Enclosure III of directive 2004/18/EC). But there is no lack of interpretative problems, particularly the first requisite: at first, Community case law held that only the first part of the formula was important, and concentrated on the general interest of the activity; later, in order to eliminate the risk of an overextended application of the notion, the Court of Justice conferred equal attention on the clause «non-industrial or commercial character».

It can be observed, however, that this expression has been altered by the French system, where it has been used since after the Second World War to refer to the public administration (e.g. see the first Statute of the fonction publique, approved with law No. 46-2294 of 19 October 1946, which states, in article 1, that it must not be applied to personnel of the établissements publics de l’Etat qui présentent un caractère industriel ou commercial).

The cases considered show that the definition of public administration is a function of the application of a given norm and the fulfilment of a specific public interest (other examples can be taken from the political economy sector: see article 103, EC Treaty). The supranational origin of the notions then produces other consequences, since the formulae conceived in the Community arena penetrate the national systems, and sometime expand their range of action (think of the case of the public law body, often referenced by Italian case law not only in connection with public contracts, but also other contexts, such as access to administrative documents: see Council of State, VI, No. 4711/2002).

It is important to note, however, that many of these notions do not have properly organisational valency, but are formulated to delimit the boundaries between the public sphere in order to apply a specific normative regime.

---

10 (See rulings by the Court of Justice, 10 May 2001, combined cases C-223/99 and C-260-99, relating to the well known case Ente Autonomo Fiera Internazionale di Milano).
2. Relations between centre, periphery and local administration

Towards the end of the twentieth century, four of the seven most industrialised countries (France, United Kingdom, Canada and Italy\(^\text{11}\)) launched reform campaigns with a view to increasing decentralisation and devolution in their government systems. Stronger local and regional entities and the decongestion of state structures were consequences in almost all the countries, for a range of cultural, economic, political and geographic reasons.

There are of course different forms and solutions for regulating relations between centre and periphery and to effect the transfer of duties from the state of the regions and local authorities. A distinction should be made between devolution (political decentralisation from the centre to local elected bodies possessing a high degree of autonomy and their own financial resources) and deconcentration/decentralisation (the transfer of administrative duties from central to local offices); deconcentration is the decongestion of the central apparatus by shifting functions to peripheral state structures. However these processes do in reality overlap, creating tension between the territorial levels and imposing forms of organisational and procedural cooperation. It is also wise to point out that political decentralisation is not always accompanied by full administrative decentralisation.

Relations between centre and periphery can traditionally be narrowed down to two opposing ideas: on the one hand, unity and administrative uniformity, typified by the French state; and the other, a widespread autonomy (so-called self government) granted to local authorities, typical of the United Kingdom\(^\text{12}\). This distinction stems from the origins of the administrative systems of the two countries – strong centralisation in France since the Napoleonic age\(^\text{13}\), and the marked identity of local communities in Great Britain since the time of the medieval boroughs. It has long been an influence on the jurisprudence in the matter of local government\(^\text{14}\). The distinction has now lost


\(^{12}\) An in-depth examination of the French and British administrative systems is found in S. Cassese, La costruzione del diritto amministrativo in Francia e nel Regno Unito, in Trattato di diritto amministrativo, edited by S. Cassese, II ed., Diritto amministrativo generale, cit., I, 1 and following, where the distances and divergences between the two systems are reassessed.

\(^{13}\) Still the 1980s, M. Hauriou wrote that centralism constituted «une manière d’être de l’état» (Id., Précis élémentaire de droit administratif, V ed., Paris, Surley, 1943, p. 43); fora n investigation of the studies conducted by Hauriou on decentralisation, see F. Fournié, Recherches sur la décentralisation dans l’oeuvre de Maurice Hauriou, Paris, L.g.d.j., 2005.

\(^{14}\) For a general overview, refer to the institutional treatments and for France in particular, G. Braibant and B. Stirn, Le droit administratif français, VII ed., cit., p. 88 and following., and for the UK, P.P. Craig, Administrative Law, V ed., cit., p. 167 and following.
much of its significance, following the decentralisation operations carried out in France in the past twenty years, and the gradual strengthening of the UK central administration after the Local Government Act of 1972. And moreover, other important experiences have been formed or consolidated during the post-war period, as much in Europe (German, Spanish and Italian systems) as in the rest of the world, in countries such as the USA and India.

Generally speaking there is an observable increase in strongly decentralised administrative systems, linked partly to the crisis in state organisation and to the need to bring offices and bodies as close as possible to the citizen: this is just what has happened in most EU countries, thanks to the principle of subsidiarity. Also, the integration of the states in supranational or international contexts has led to the need to create intermediate territorial levels between centre and periphery (i.e. the gradual strengthening of the regions in France or the new decentralised system in Poland or the committee of regions in the EC administration). Historical, political, economic and geographic factors have been behind the extraordinary growth of regional and local administrations all over the world in the last thirty years. Sometimes the international institutions have contributed towards this tendency: the World Bank has made decentralisation one of its criteria for good governance in the sphere of investment projects in depressed areas, thus pointing many Asian and African countries towards the strengthening of local and regional government.

But the relation between centre and periphery is also influenced by the form of state and related constitutional principles. Thus, a federal system (such as exists in the United States, India, Australia, Germany or Austria) leads to solutions that differ from those found in regional (Italy and Spain) or unitary states (like France). Nevertheless, contrary to widespread opinion, a federal structure does not necessarily provide greater autonomy for local administration, as exemplified by the cases of Germany and the United States. In the former, the charter guarantees ample powers to the local...

15 For a comparison of experiences in France and the United Kingdom, A. Zorzi Giustiniani, Le metamorfosi dello Stato unitario: «décentralisation» francese e «devolution» britannica a confronto, in le Regioni, 2006, p. 269 and following.
authorities: article 28 sanctions the right to self administration (Selbsverwaltung) for municipalities (Gemeinden) and provinces (Landkreise)\(^{21}\). In the USA however, local authorities are subordinate to the states of the federation, so that the dominant vision of the relations between national and local government has been on the lines of that deriving from the so-called Dillon’s rule (named for its late nineteenth century author Judge J. Dillon), which declares that local authorities are «creatures of the state », and subordinate to it\(^{22}\).

The forms of decentralisation in the various systems are many and varied. It is therefore difficult to pinpoint common traits, while the identification of certain trends is easier.

In matters of legislative competence, it can be seen how the decision to divide powers among more bodies is closely linked to the form of state. It is in federal or regional states that competition between producing centres of laws is admitted (between union or federation and states, or between state and regions)\(^{23}\). In such cases the constitution of the countries sanctions and recognises state and regional legislative power. In the United Kingdom the absence of a written constitution has allowed recourse to more flexible mechanisms for the implementation of the devolution process in Scotland, Wales and Northern Ireland.

Unlike the distribution of legislative competences, administrative decentralisation is not directly linked to the form of state. In all systems, whether federal, regional or unitary, there has been a progressive increase in functions assigned to local administrations, as to the creation of provincial or regional bodies (a representative case is the regions in France). However, the transfer of more competences does not necessarily mean greater autonomy, as the state administration often retains important powers of control and remains the main provisioning channel for local financing. Also, the existence of more than one level of government has triggered the development of cooperation and coordination mechanisms and instruments among the various parts.

Finally, the formation of an ultrastate juridical space and the emergence of global administrative law does not represent an obstacle to the transfer of legislative and administrative competences from the centre to the periphery. Rather, the shifting of decisional processes to the international sphere or the obstacles encountered by national governments in dealings with ever more powerful global organisations are among the factors that have increased political and administrative decentralisation in contemporary states\(^{24}\).

### 2.1. Scale of territorial levels


\(^{24}\) On this theme see N. Devas and S. Delay, *Local Democracy and the Challenges of Decentralising the State: An International Perspective*, cit., p. 677 and following.
Two elements can be considered when sketching out the basic traits of the various systems: the scale of territorial levels and the distribution of competences.

The body found in all countries is the municipality. Though a constant presence, it exists in many different modes depending on the context.

Great Britain has districts, which, contrary to what one might expect, are strongly influenced by central government; in 1997 a Council of Europe Congress resolution on regional and local authorities concluded that the greater limitations for local authorities appeared in only six states: the UK appeared among them, alongside some states from the former Soviet Union. For this reason local government reform was introduced in 2000, giving more powers to local authorities, even if they remained financially dependent on the centre.

There are over 36,000 municipalities in France but most of them have a population of less than 1000. This has helped advance forms of intermunicipal cooperation on procedural and organisational levels, with the creation of ad hoc bodies.

However the juridical arrangement of the body is not always uniform among the diverse municipalities of a country. For example, the 2000 reform was prompted by the principle of diversity and the local authorities themselves can choose which hierarchical structure to adopt, with three options at their disposal. In Spain a ley of each Comunidad autónoma provides important indications on the organisation of provinces (diputaciones) and municipalities (municipios).

Bodies and institutions at provincial level are widespread. For example, provinces or counties exist in most of the EU countries, and can be classified as federal type (the Landkreise in Germany, while Austria does not have provinces); regional type (provinces exist in Italy and Spain, though in Spain they are not so much bodies of autonomous democratic investiture as second level organs, representing the municipalities), and unitary type (the French départements, though they are essentially administrative districts of the central state, headed by a prefect). A double level of local government is also found in the Anglo-Saxon countries, consisting of the abovementioned districts (or cities) and counties. (The United States has a veritable galaxy of local bodies, consisting of around 3000 counties, 19,000 municipalities and 16,000 town or town-ship governments). Significant exceptions to this rule include Australia, where municipalities are only level apart from the federal states, and supramunicipal levels exist only for cadastral purposes; or China, where there are four levels of local administration – province (sheng); county (xian); city (shi); village (lî) – apart from the regions (zizhiqu) and the big municipalities (zhixiashi).25

The distinctions owe to multiple reasons: geographical, historic, economic and political26. But it can be noted that in almost all the countries the main urban centres or


26 As emerges in the case of the Scandinavian countries, in which geographic elements like the strong dispersion of population and culture have influenced the development of a local administration, see A. Pitino, Tecniche di cooperazione tra enti locali e governo centrale negli Stati scandinavi, in Amministrare; 2005, p. 121 and following, and T. Kleven, T.S. Floris, M. Granberg, S. Montin, O. Rieper and S.I. Vabo, Renewal of Local Government in Scandinavia: Effects for Local Politicians, in Local Government Studies, 2000, p. 94 and following.
capital cities enjoy a special administrative regimen (as is the case in Germany, the United Kingdom and also in Russia and China). In this respect the Italian system would appear to be “out of alignment”, given that the metropolitan areas have difficulty in being instituted and indeed there is yet no provision for the recognition of a differentiated status for the city of Rome.

The starkest divergences however emerge from analysis of the third territorial level: the regions.

The existence or otherwise of regions depends significantly on the form of state. In regional and federal systems, it is the constitutional charter that makes reference to the Länder, (in Germany or Austria), to the regions in Italy or to the Comunidades autónomas (in Spain). The latter country has experienced the creation of an “asymmetrical” system, in which the competences of the autonomous communities are defined in the instance of their institution. And in the United States, the federation is made up of actual states that have many competences and a high degree of autonomy, even in judicial matters.\(^{27}\)

Most of the unitary states in the EU (such as Greece, Portugal, Netherlands and Finland) do not have a regional level; where present it is usually represented by state i.e. the peripheries in Greece and the regional authorities in Ireland, which are under ministerial control.\(^{28}\)

There are however some important instances of regionalisation in states characterised by administrative uniformity – France being the main example.\(^{29}\) The regions are not contemplated by the constitution and were instituted by ordinary law in 1982; they gradually acquired greater competences, and following a constitutional amendment (constitutional law 2003-276), they were included among the territorial structures of the republic (article 72): They are now defined as décentralisée organisations (according to the amended text of article 1 of the constitution).

The United Kingdom is a particular case; the system is centralised but the territory is made up of areas of distinct national identity: apart from England itself there is Scotland, Wales, and Northern Ireland. For a long time these three areas had little autonomy from central government. Then a process of devolution began in the mid 1990s, leading to the constitution of legislative assemblies in all three areas and the transfer of a significant number of competences, including education, prisons and taxation.\(^{30}\) The interesting aspect is that the phenomenon of devolution has taken


\(^{28}\) On this theme, A. Delcamp et J. Loughlin, Introduction: La décentralisation dans les États de l’Union européenne, in La Décentralisation dans les Pays de l’Union Européenne, cit., p. 11 and following.


\(^{30}\) On devolution in the British system, R. Hazell, The English Question, Manchester, Manchester University Press, 2006, Devolution, Law Making and the Constitution, ed. by R. Hazell and R. Rawlings,
different forms in each case. It has been very sweeping in Scotland (Scotland Act 1998), where there is an elected parliament, a first minister and a cabinet. The Regional Development Agencies Act 1998 set off a process, now underway, of regionalisation of the British administrative system. The act has divided England into eight regions plus London and creates central government-funded regional agencies whose tasks include the coordination and promotion of economic development. The process has not however enjoyed popular support: a 2004 referendum blocked the creation of a regional Chamber for the north east.

2.2. Distribution of competences, the principles and forms of cooperation

A consideration of distribution of competences must first make a distinction between the legislative and administrative plane.

In the regional or federal systems competition exists between legislators, with varying degrees of power at stake: the most extreme case is the United States, where the states can legislate on criminal law. Germany is a more balanced situation, Britain and its devolution is differentiated and Spain is asymmetrical; legislative competences change depending on the type of autonomous community (in accordance with the operating principle in article 147, para. 2, Spanish constitution)\(^{31}\).

In the hypotheses of a reallocation of legislative competences between state and regions, it is the constitutions play the determining role. In most cases the attributions of central or federal power are expressly indicated, while the national or regional bodies are charged with all the others: this is what happens in the United States, Germany and Switzerland, whereas in Canada and India, it is the task of the federation and the union respectively to issue laws in matters that the constitution does not attribute to the states. There are also often concurrent spheres of legislative power, in which the state dictates the essential principles and the regions legislate in detail: examples are Switzerland, Italy, Spain and India; a more complex situation exists in Germany, where concurrent legislative attributions exist between the Bund and Länder. A federal framework legislation was also planned but faces repeal by a constitutional draft law approved in 2006.

Even more complex scenarios can be found, such as the division of competences between federal union, member states and federal district, called for in the Brazilian constitution of 1988. Sometimes, though, the arrangements defined in the constitutional charters are not genuinely put into action: for example the Indian Union has rarely exercised the sweeping powers attributed by the constitution with regard to the laws of the single states. One case in point is devolution in Britain, distinguished by its non-written constitution and by the differentiation of competences transferred in accordance with the approved Devolution Act\(^{32}\).


\(^{32}\) Given the absence of a written constitution in the United Kingdom, the Devolution Acts contains the statutes of the new arrangement of competences, together with appropriate accords between central
With regard to administrative functions, the decentralised levels generally have organisational autonomy. Federal systems (like the United States) in systems allow a wide range of powers to the single states: the tenth amendment of the constitution holds that «the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people». In other cases, though, the state can also confer ample powers on the federal bodies (think of the close ties between Bund and Länder in Austria, a highly centralised federal state).

Local autonomy thus represents the right of local administrations to intervene in those sectors of public life linked to their sphere of interests: the point is made clear in a decision note of the Spanish Tribunal constitucional of 1981 (No. 32 of 28 July) and occurs again in the French constitution after the 2003 changes, where it is stated that «des collectivités territoriales ont vocation à prendre les décisions pour l’ensemble des compétences qui peuvent le mieux être mise en œuvre à leur échelon» (article 72, para. 2). The example of highest local autonomy probably comes from Germany, where the principle of self administration (Selbsverwaltung) finds solid application.

On a global level, an element common to local government is the close tie between decentralisation and democratisation. In almost all countries, local authorities are governed by elective organs, on the basis of one of two principal models: the monocratic system (elected directly by the people – the predominant system in Latin America) or the collegial system (with possible variations in relations between head of the executive and the council or committee, as in the traditional British model). The municipal level of government always presents forms of direct democracy and popular participation (referendums, inclusive consultation procedures public enquiries): one of the more interesting experiences occurs in Brazil, where the mechanism of participatory budgeting has been adopted in the big cities. It involves communities elected in poor quarters, with the mandate to decide how to use the municipal funds allocated to them.

It should be pointed out, however, that the existence of regional, provincial or local administrations does not guarantee in itself distance from the centre. Indeed, compared with frequent general provisions in which the principles of decentralisation or subsidiarity are affirmed, the national governments’ powers of control and influence on policy are often very pervasive.

The United States presents some interesting cases of centre-periphery relations, in that of national and local government. In fact the constitutions of the states do not provide for the conferment of powers and duties to the local authorities (eg. the paradigmatic case of the constitution of Georgia). At other times they assign wide-ranging rights to counties and cities, but without giving real autonomy: in the case of the state of New York, the constitution contains a bill of rights for local governments.  

---

33 For a deeper examination, N. Devas and S. Delay, Local Democracy and the Challenges of Decentralising the State: An International Perspective, cit., p. 682 s.

34 The experience is recalled by P. Ginsborg, La democrazia che non c’è, Torino, Einaudi, 2006, p. 76 and following.

and sanctions the principle of effective local self government; but this principle is given substance essentially in the possibility for local authorities to have an organ of elective government.

Very often, however, the insufficient financial autonomy of the local authorities allows the central administration to exercise considerable influence over them (as happens certainly in Italy or India, and also in the United Kingdom and the United States). China has provided some interesting solutions in this regard, through a division of the tax system and purpose-created banks to guarantee greater autonomy in the management of resources.

On the other hand the observable existence of numerous territorial levels has resulted in the provision of instruments of coordination and cooperation. This translates into both vertical and horizontal solutions, manifested as much in procedural mechanisms as in the creation of dedicated mixed bodies (interesting cooperative mechanisms are planned for France and Spain, on the lines of the system of state-local authorities conferences in Germany and Italy). The central level often has a competent office for regional or local affairs (as in the Department for Transport, Local Government and the Regions in the UK). Furthermore, the cooperation exists between the various territorial levels, and between these and the state administration (in some cases, such as Germany, there are also instances of “obligatory” administrative cooperation between Bund and Länder: see article 91 of the German constitutional charter).

3. Composition of the state administration

Strong ties with the executive can be identified as one of the original features of administrative law. In the nineteenth century, when the public administration began to acquire its own juridical arrangement, it appeared to be a servant of the government. Echoes of this idea still exist today in the French constitution, which establishes that the government «dispose de l’administration» (article 20, para. 2), and in the Italian constitution, in which the section on public administration is inserted in the title on government. The Napoleonic period saw the development of a hierarchic and pyramidal structure in the state administration, with a political senior management - a member of the national executive body: this is the ministerial model. This model of central was then reprised and imitated by the majority of modern nations.

A more flexible model developed in the Anglo Saxon countries: it was initially based on purpose-designed bodies (boards or commissions), then on permanent offices (departments), not dissimilar to ministries (even though there may be big differences between the British and the American system, partly due to historical reasons, partly due to the diverse constitutional engagement of the administration).

The central organisations of all the states, whatever their structure, have in the late twentieth century undergone important reforms. The changes and modifications have

---

36 The matter is examined in Z. Suli, ‘Federalism’ in Contemporary China – A reflection on the Allocation of Power between Central and Local Government, cit., p. 1 and following.

37 On forms of cooperation between centre and periphery, with regard to the Italian experience but also with a comparative outlook, see R. Bifulco, Il modello italiano delle conferenze Stato-autonomie territoriali (anche) alla luce delle esperienze federali, in le Regioni, 2006, p. 233 and following.

38 For the structure of the central administration, refer to the institutional treatment cited in the previous notes. A combined vision is in E. Gualmini, L’amministrazione nelle democrazie
aimed to streamline the bureaucratic machine, reduce the number of offices and ensure
greater efficiency. Among the factors that have led to a need to reinvent government
systems are: administrative decentralisation, which is increasingly widespread and
requires the shrinking of the central structures; the liberalisation of markets and the
privatisation of public enterprises (forcing a change in the state’s role from
entrepreneur to regulator, and leading also to the creation of independent authorities and
the slimming down of ministerial departments); the emergence of supranational and
international administrations, which have connected the national administrations to real
networks of global public powers, beyond the control even of the constituent states.

3.1. The organisation of government: ministries, departments and government agencies

The models of central administration in modern states can be traced back to two
archetypes: the French originating ministerial model, closely anchored to the executive;
and the Anglo Saxon departmental model, more flexible and based on a clear separation
of political and administrative duties (and within this case there are important
differences between the British and US systems). So it would be useful to examine both
these models, acknowledging of course that significant variations are found through the
various countries (e.g. since the nineteenth century in Sweden, the executive has been
organised around agencies – the so called ämbetswerk – which are then teamed up with
the ministries; or, in Italy there is the objective of the post 1999-reform scenario of a
mixed system with ministries divided into departments and agencies). The reforms
launched in the last quarter of the twentieth century brought the various systems closer
together; they now exhibit many features in common. Lastly, the organisation of
government depends also on the form of state, as verified through the relations between
centre and periphery, but is especially influenced by the form of government: a
presidential system such as in the US, establishes a streamlined structure, linked to the
president (the ministries are in fact called secretaries and exercise their duties through
delegation of presidential power).

The ministerial model has French origins, so an examination of the central
organisation of the country should allow us to identify some of the characteristic
elements of this system. First off, the number of ministries is variable and is decreed by
the head of state: the number has increased over the years but is now fixed at around
fifteen (more or less similar to other countries with the ministerial model, such as Italy
and Spain). Ministries in France are headed by members of the council of ministers –
and therefore the national government. The minister is personally responsible for the
work of the ministry (the principle of ministerial responsibility). Ministers are supported
by a cabinet, consisting of members chosen by the minister, and under secretaries. They
appoint the heads of the most important offices. Ministries therefore have political and
administrative duties. Lacking juridical personalities, ministries are organs of the state.
They have a pyramidal and divisional structure: offices increase in number and decrease
in size further down the organisational hierarchy, from the directions générales to the
sous-directions and the services down to the simple bureaux. The ministries also have
peripheral branches (service extérieurs or services déconcentrés).

contemporane, cit., and previously, La riforma amministrativa in Europa, ed. by Y. Meny and V.
Wright, cit.
The system thus described has been adopted in many countries, although with differences concerning the arrangement of the Presidency of the Council (in Spain or example, it is structured like a ministry) or the cabinet of ministers (it doesn’t exist at all in Germany). The ministerial model has undergone important reforms in recent years, motivated by the twofold need of reorganisation of the centre in the wake of decentralisation operations, and the improved efficiency of ministerial structures through the creation of new bodies. This has led to the spread of so-called agencification – the creation of agencies or other offices connected to the executive but possessing more autonomy than the respective reference ministry. The result is a slimmed down ministerial apparatus and a greater distinction between political and administrative duties. The phenomenon has been witnessed in Spain (the first autonomy agency for taxation was created in 1991), in Italy (legislative decree no. 300/1999 called for the establishment of 12 agencies) and also to some extent in France (a 1992 law made it possible for ministries to create organisationally and managerially independent centres of responsibility). All these measures are pretty clearly based on the 1988 UK reforms of the Next Steps Programme, so that what has taken place is a rapprochement between the ministerial model and the more flexible model for departments and agencies associated with the Anglo Saxon countries.

In these systems in fact, the central organisation has been differently structured since its origins; and there are in any case big differences between the British and US systems. In the case of the US, the federal government is sectioned into the executive (or Cabinet) departments, the executive offices linked to the president, headed by a secretary. The departments do not diverge from the ministries in terms of numbers (there are 15 of them), but rather in their closer political dependence on the executive hierarchy and in their appointed duties. They do not generally have the tasks of rulemaking or adjudication, which are typical of the administrative agencies; the departments administer financial resources, oversee big infrastructure projects, and perform high administration functions. The departments’ internal structures consist of numerous complex offices with special autonomy, termed Administrations or Bureaus (the most important of them include the Food and Drug Administration, within the Department for Health and Human Services, or the Federal Bureau of Investigation, linked to the Department of Justice). These structures are usually departmental offshoots, but often only formally, and indeed it is not rare that they are immune to political influence; a fundamental difference when compared to the British arrangement, where the executive agencies are subject to ministerial monitoring. Outside the Executive Departments, the federal administration counts over sixty Independent Agencies and Government Corporations – they can be divided into Executive Agencies (like the Environmental Protection Agency) and the Independent Commissions (like the Federal Trade Commission) – and over seventy Boards and Commissions.

The US central organisation is evidently more flexible and inhomogeneous in comparison with the ministerial model. Each cabinet department has a different internal organisation and most of the administrative functions are carried out by dedicated structures. The existence of executive agencies and a fragmented centre are also identifying traits of United Kingdom governmental organisation. Here, government is formed by a prime minister, twenty cabinet ministers and over fifty junior ministers.

---

There are twenty four ministerial departments titled in various modes (most of them are known as Departments, headed by a minister or Secretary of State; but there is also the Cabinet Office, Her Majesty’s Treasury and the Ministry of Defence) and twenty non-ministerial departments (such as the Food Standards Agency or the Office of Water Services). An idiosyncratic feature of the British administration is the hundred Next Steps Agencies (named for the government programme that brought them into being). The UK reform programme was already underway in the 1960s, moving from a rigid concept of ministerial responsibility towards a more flexible and efficient model with new organisational modules. The report from the Fulton Commission (1966-1968) recommended that a better allocation of administrative functions would be achieved by “hiving off” a certain number of activities from the centre and delegating them to bodies outside the ministerial structure, but having them remain under ministerial direction. So, 1971 saw the constitution of the Department of Trade and Industry, the Civil Aviation Authority, and in 1974, the Department of Employment created the Manpower Service Commission, the Advisory and Conciliation Arbitration Service (ACAS) and the Health and Safety Commission.

In 1979 the government created a new study commission: the Reyner Unit (thenceforth better known as the Efficiency Unit). Its work culminated in the “Next Steps” Report (1988), drawn up with the intention of indicating the next steps in the path to administrative reform: the separation of service delivery and policy making, transferring powers and functions from ministries to executive agencies, with the objective of the latter performing 95% of PA activity and ending the fiction that the minister is responsible for all that is carried out in his or her name.

The recommendations of the report were implemented: by the end of the 1990s there were over 100 agencies with a total of nearly 380,000 employees (over two thirds of the civil service workforce). Regulated by a framework agreement between ministry and agency, the UK Next Steps agencies exhibit interesting aspects regarding personnel, controls and accountability, so much so that the organisational model designated by the Next Steps programme has become the reference experience for many European countries (like Spain and Italy, although the agencies have not proliferated to the extent they have in the United Kingdom).

3.2. The fragmentation of the centre: public bodies and agencies

State administrations have become increasingly complex and multifaceted throughout the course of the twentieth century. As already argued, government apparatuses first expanded in terms of size and then duties (exemplified by the gradual increase in the number of ministries), to be then redesigned with the aim of streamlining the offices. The consequence of government organisation reform has in many cases been the creation of multiple agencies or mission administrations, with much more autonomy compared with the ministerial structure.

Nevertheless the spread of the agencies is not the first case of proliferation of public subjects in the sphere of the state apparatus. Moreover, the term agency does not necessarily indicate a precise category of government office. It has been seen that in the USA, the expression agency is used to refer generally to public powers. In the UK system there are not only the agencies resulting from the Next Steps programme, but also many other organs that are considered agencies: advisory agencies, tribunals, commissions and boards. The term agency is therefore used also a catch-all label to
describe the plethora of institutions that perform government functions but which are also positioned outside the departments. A case in point is the Italian system, where the term agency is a polysemous *nomen*, indiscriminately indicating public bodies (e.g. the Italian Space Agency or the public administration agency for contractual representation), as well as government offices possessing a specified autonomy, with or without juridical personality (such as the agencies called for by legislative decree No.300/1999).

The phenomenon of the institution of public bodies is common to all systems with overseas origins. The oldest examples are the creation of Boards by the British parliament during the 1800s (these were central government units under joint direction, which did not report directly to the legislative assembly) and the provisions of the French *Code civil* relative to the *établissement public*. During the 1920s many public bodies were created in a number of country systems. Since then the number of bodies has consistently increased, especially in France, Italy and Germany, leading to great diversification and a crisis of the notion. Case law has thus had to adopt particular techniques in order to recognise and identify the public character of a body. The most well known one is that of revelatory indices (*faisceau d’indices*), which includes for example, the formal criterion of the institution of the body through a law: this principle is found in the French constitution, which states that «la loi fixe également les règles concernant […] la création de catégories d’établissements publics» (article. 34, para. 3) and in the German constitution, which establishes that in matters falling within the exclusive competence of the Bund, federal laws can be used to institute autonomous federal authorities (*Bundesoberbehörden*) and new public law bodies (*Körperschaften und Anstalten des öffentlichen Rechtes*) directly dependent on the federal level (article. 87, para. 3); this system does not apply to the United kingdom, however, where the creation of public bodies follows more formal paths (such as a simple ministerial act).

In the 1980s the great wave of privatisations and the current inclination for contracting out and outsourcing have resulted in a reversal of trend in the evolution of public bodies. Many of them are turned into private bodies and the company form becomes the vehicle privileged by the administrations for more efficient running of public functions.

### 3.3. Independence from government: independent commissions and autorités administratives indépendantes

The beginning of the 1990s saw in Europe the mushrooming of a particular kind of body, known for some time in the United States, and characterised by its freedom from government influence: the independent authorities. This organisational model was introduced in order to guarantee an impartial and efficient execution of public functions in sensitive or highly technical sectors, such as the regulation of economic activity or the exercise of basic rights and freedoms.

---

The origins of the Independent Commissions in the United States go back a long way: the Interstate Commerce Commission, for example, was founded in 1887 (and abolished in 1995, its activities being transferred to the Surface Transportation Board, linked to the Department of Transport), and the Federal Trade Commission was instituted in 1914. The independent authorities are constituted by Congress, operating at a distance from the president. Their neutrality and freedom from political interference have gained them a reputation as a sort of «headless fourth branch of government». Several other bodies exist in this category, most of them dating back to the New Deal era (such as the Security and Exchange Commission). These structures’ independence from the executive is guaranteed in various ways: the members (usually five to seven) are appointed by the president with the consensus of the Senate (as happens with the directors of the executive agencies), but they are selected according to bipartisan criteria, remain in office for a period longer than the presidential mandate and are not revocable for political motives (they are not subject to the rules of the spoils system). The principle of independence has been recognised by the Supreme Court since in the decision note Humphrey’s Executor v. U.S., regarding the Federal Trade Commission, the latter is defined as «a body of experts» which in the view of Congress, was supposed to be «independent of executive authority, except in its selection, and free to exercise its judgement without the leave or hindrance of any official or any department of government» (the Federal Trade Commission Act, in fact, stipulates that the commissioners of this authority must be removed by the president only «for inefficiency, neglect of duty or malfeasance in office»). The independence of these agencies cannot therefore stressed too much, since both president and Congress can exercise an influence over them.

The Independent Commissions perform functions both of adjudication and rulemaking. For example, the Security and Exchange Commission possesses normative powers, applies the rules its creates, and rules on whether these norms have been violated. The growth of regulatory activity by the independent authorities evidenced the greater problems of legitimation of these bodies and their compatibility with the principle of the separation of powers. The need to rein in regulation by independent commissions was one of the contributing factors in the approval of the 1946 Administrative Procedure Act, whose provisions apply also to the independent authorities (including those on the judicial review).

The problem surrounding the constitutional position of the authorities derives from the fact that the US constitution attributes power to the president through the so-called vesting clause, which states that «the Executive power shall be vested in a president», and the “take care clause” i.e. that the president must «take care that the laws be faithfully executed». But the channel for Congress to be able to institute bodies free from executive influence is guaranteed by ‘necessary and proper clause’. It says that Congress has the power «to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all powers vested by […] Constitution in the government of United States». Further ambiguities stem from significant regulatory powers at the disposal of the authorities, since only Congress ought to have legislative power, without delegation to other subjects or bodies (the so called non-delegation doctrine). The doubts have however been resolved by a Supreme Court

ruling; in a decision in Mistretta v. U.S. 1989, recognition was given to the possibility of Congress delegating rulemaking powers to independent authorities, provided it was indicated in a legislative act «an ‘intelligible principle’ to which the person or body authorized to act is directed to conform». The institution of independent commissions, thus takes place within the sphere of checks and balances between Congress, the president and the Supreme Court; their legitimation resides in the need for expertness and advanced technical competence for the performance of the their assigned functions (the so called « the need for expertness», according to the theory propounded by James Landis in the 1930s).

In Europe the first independent authorities appeared at the end of the 1970s. This delay behind the US was due mainly to the different political and economic context. The existence of state monopolies in important sectors (such as public services) long impeded the formation of regulatory authorities, which were consistently created only with the advent of liberalisation from the late 1980s onwards. It is not surprising, then, that the first authorities in Europe were created to guarantee basic rights and freedoms rather than regulate economic activities. In France, for example, the first authority, created in 1978 was the Commission nationale de l’informatique et des libertés, defined expressly by law 1978-17 as an «autorité administrative indépendante» (article 11, para. 1).

Since then more and more authorities have appeared. There are more than thirty in France. Some are indicated as such by legislative texts (e.g. l’Autorité des marchés financiers, created in 2003, or l’Autorité de sûreté nucléaire, formed in 2006), while others are defined by the decision of the Conseil constitutionnel (e.g. l’Autorité de régulation des communications électroniques et des postes) or by studies conducted by the Conseil d’État (such as the Autorité de régulation des communications électroniques et des postes). Organisationally, these structures are considered state administrations, devoid of juridical personality. Their independence from government is guaranteed by organisational autonomy and by measures similar to those used in the United States (joint bodies appointed by different administrations, serving five or six years).

In European countries it is sometimes difficult to distinguish the independent authorities because various bodies are found to be largely independent of the government (in Germany and Italy there are also semi–independent authorities). The influence of the US and France has been very strong in some countries, such as Spain and Italy. The role of the European Community, through the liberalisation of the markets, has been a decisive factor in spreading these bodies. Following the liberalisation of public services and the subsequent privatisation of the big public enterprises, even the UK has set up regulatory bodies, like the Office of Communications-Ofcom, the Office of Gas and Electricity Markets-Ofgem and the Office of Water Services-Ofwat. These are known as non-departmental public bodies, classified as regulatory agencies: they do however refer to a department and their activity falls within the political responsibility of a ministry; but the degree of political influence is severely attenuated (appointees are subject to control by a special parliamentary body, the Commissioner for Public Appointments, and there are forms of internal control and accounts rendering). In sectors other than public utilities, the British system has bodies that operate «to a greater extent at arm’s length from Ministers», such as the Competition Commission.

The spread of independent authorities has raised issues not only in the US but also
in Europe, of their legitimacy and their positioning in the question of separation of powers. The absence of democratic legitimacy of these bodies has provoked a search for other forms of legitimacy, both technical and procedural. In France, for example, the constitution frames the public administration within the government (article 20), meaning that structures without ties to the executive appear unconstitutional; a solution was to link the authorities directly to the law. Doubts also arose in Germany regarding the compatibility of authorities of high technical competence, not inserted into the people-parliament-government-administration circuit. The problem was caused by the fact that article 20 para. 2 of the constitution states that all power belongs to the people («Alle Staatsgewalt geht vom Volke aus»). The issue was resolved by granting recognition to the law to be able to institute these bodies, (which contributes the German legislator’s hesitancy in creating non-ministerial offices).

The spread of independent authorities in most contemporary administrative systems, together with economic globalisation, has led also to the signing of international accords and the formation of global administrative networks, created directly by these bodies without the mediation of national governments. The safeguard of competition is a case in point: the International Competition Network, made up of the antitrust authorities of around one hundred countries, formulates proposals and recommendations.

4. Administrative organisation and privatistic instruments

As evidenced, the fragmentation and differentiation of administrative organisation stem from multiple factors: the evolution of relations between centre and periphery and the growing importance assumed by regional and local authorities; the reorganisation of government structures; the creation of public bodies and independent authorities; the formation of composite administration and global regulatory systems. But there is a further factor that must be considered: the extraordinary development of public administration in private form.

The theme of administrative organisation with privatistic instrument is connected to the problems regarding public administration activities governed by private law, and more generally, the relationship between public law and private law. This paper shall deal with the sphere where the execution of activities is organised in privatistic forms and on adopted organisational models43.

Instruments of private law have been used in national administrative systems for a long time now: in the United States contracting out was consistently practised as far back as 1920s44; in France the expression «organisme chargé de l’exécution d’un service public» appeared in the 1930s, in the decision of the Conseil d’État on 13 May 1938, Caisse primaire «Aide de protection».

However privatistic instruments have long been used mainly in entrepreneurial activity. Think, for example, of the French of the public enterprise (enterprises publiques) structures. These take the form of établissement public industriel et

---

43 On this theme see G. Napolitano, Le regole dell’esternalizzazione, in Dir. econ., 2006. A comparative study, though centred more on activity, is in I contratti della pubblica amministrazione in Europa, edited by E. Ferrari, Torino, Giappichelli, 2003.

commercial (like the Société nationale des chemins de fer français) or the société anonyme (like the Société nationale des poudres et explosifs) and they are defined as public, not because they have public law personalities but because the state (or another public body) exercises control over them (in the case of companies, the control consists of retaining a majority share of the company capital).

But now privatistic forms in administrative organisation occur in a wide range of spheres of public activity, including military administration: in France the loi de programmation militaire 2003-2008 (law No. 2003-73) states that «la politique engagée par le ministère en matière d’externalisation depuis plusieurs années sera poursuivie et accentuée» (point 2.5.2 of the programme). Also the outsourcing of public functions to private groups is widespread not only in all countries in the world, (the process has taken place on a large scale in Australia), but also in the global and international administrative context: examples are the Internet Corporation For Assigned Names and Numbers (ICANN), a not-for-profit organisation under United States law but charged with the global regulation of the Internet.

The concept and practice of contracting out has become increasingly widespread, whereby a public body appoints an organisation outside the public administration with the execution of an activity or the delivery of a service.

The different spheres of activity can be distinguished: functions carried out in the general or collective interest; services delivered to individual users; services that are instrumental to the public administration. Each of these instances implies a different regime. In each case, in all systems, one of the main problems to have emerged is identifying how much administrative activity can be assigned to private bodies and how to arrange non-outsourceable activity. Prison services are an interesting example. In France all functions in the prison system «autres que celles de direction, de greffe et de surveillance» (article 2.1. No. 87-432) can be entrusted to «personnes de droit public ou de droit privé habilitées». Also in the American prison service a distinction is made between inherently governmental functions, which are reserved for the public powers, and commercial activities, carried out by public or private bodies on the basis of a simple evaluation of opportunity and cost; but this distinction also entails complications, as there are those who believe it is acceptable that private bodies should be able to manage activities connected to functions of prevention, repression and rehabilitation of prisoners, provided the overall responsibility remains with the administration.

So there are a number of duties that are considered beyond the sphere of those that can be delegated to private bodies; the system in fact holds that functions of high authoritativeness or which involve the public interest at an important level can be performed only by public administrations.

The point is expressed very clearly in the United Kingdom, where recourse to privatistic solution have been increasingly frequent since the 1980s. The system has produced important norms to help regulate the modalities and limits of outsourcing. For example the Deregulation and Contracting Out Act of 1994 expressly excludes the

---

transfer of certain tasks to private bodies. These include «the exercise of jurisdiction of any court or of any tribunal which exercises the judicial power of the State» or activities that may concern «the liberty of any individual» or consist of the «a power or right of entry, search or seizure into or of any property» or that may constitute a «power or duty to make subordinate legislation» (section 71).

At other times privatisation is curbed directly by the constitutional charter. In France for example, the privatisation law No. 86-912 of 6 August 1986, does not include within the sphere of its application «entreprises dont l’exploitation présente le caractère d’un service public national ou d’un monopole de fait» (art. 20), thus repring subsection 9 of the Preamble of the Constitution of 1946: «Tout bien, toute entreprise, dont l’exploitation a ou acquiert les caractères d’un service public national ou d’un monopole de fait, doit devenir la propriété de la collectivité» (on this point, the decision is found in the Conseil d’État 30 June 1995, Union des syndicats CGT de la Caisse des dépôts et consignations)46.

With regard to organisational models, a variety of solution are possible. The blending of publicistic and privatistic elements offers a vast range of possibilities (associations, foundations, companies). This complexity is illustrated clearly in German, where on the one hand, public functions are executed by a series of coexisting pluralist and specialist administrations, and of «fast-, halb- und nicht-staatlichen Organisationen». On the other side forms of kooperative Verwaltung or Verwaltungshilfe are emerging between the public and private sectors47.

At any rate, the big privatisations launched in the 1980s have brought strong growth to the company model, especially at local level. The UK has its regulated companies, which are companies in which «Local Authorities have interests». They are divided into two categories: controlled companies and influenced companies; however these companies are subject to the same financial controls as the local administrations, to avoid them being set up just to avoid the controls.

The use of companies of local public participation differs from one country to another: in Spain, the sociedad de economia mixta is one of the many options for public-private partnership, such as the gestión interesada, the concierto, the arrendamiento, contemplated by the ley de Contratos de las Administraciones Públicas (decree No. 2/2000). In Italy, article 113 of legislative decree No. 267/2000, a single text on the local authorities, indicates various management modalities for local public services.

It emerges that the administrations maintain controls on these companies (the principle is expressed clearly in the German system, where the Einwirkungsplicht states an obligation of influence on the part of the public bodies over the private subjects). However, the European Court of Justice has alluded to statutory rules saying that public authorities cannot reckon on a position of enterprise shareholder with exorbitant

---


privileges not based on a normal application of company law. The European Community has therefore performed an important role in ensuring that member states’ increasing recourse to privatistic modules does not represent a way of avoiding the rules earmarked for public administration, especially in connection with norms for public contracts and the problems posed by in-house tasking.

In the United States the privatisation wave has had a lesser impact, partly because the big enterprises were already private and because the practice of contracting out was already long established. Also, United States legal science has focused more closely on the problems linked to accountability of private bodies tasked with public functions and their autonomy (e.g. the question of whether the Freedom of Information Act applies to private bodies carrying performing public services). It is vitally important that in matters of outsourcing, final responsibility for the activities remains with the public powers, guaranteed through the use of suitable regulatory and control mechanisms.

---
