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# Discretionary Power of Public Administration and Control of Public Debt: The Citizen and the Judge between the Law and the Precedent

## *Dyskrecjonalna władza administracji publicznej i kontrola długu publicznego: obywatel i sędzia między prawem a precedensem*

SUMMARY

Discretionary power, a central feature of administrative power, comes into play when administration is called to select an option between two or more solution and a way of balancing between public and private interests. After the 20th century, devastated by wars, public deficit and debt, most State models circumscribed their markets to the detriment of the global one, turning the old economic models into new ones after the 1958 Treaty of Rome and, after the phase following the Maastricht Treaty of 1992, and the crisis of 2008, the final concept is that the EU Members States should restructure the public finances, facing the increase of the public goods and services demand and with the rested rights. The purpose of this article was to enquire whether the European and national rules may limit the discretionary power while expanding the administrative one.

**Keywords:** public debt; citizen; public administration; discretionary power; judicial control

## INTRODUCTION

Discretionary power is a central feature of administrative power, recognized since ancient times as a convenient tool of legal reasoning and defined by Aristotle as means of "correction of the law" (Eth. Nic., 1137, b).

Discretionary is the power of choice: it is a way of balancing between different interests (public and private) involved; it is a means to achieve the purpose intended by the law; it is a selection of an option between two or more solutions suggested by a preliminary activity.

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The object of the choice can be *an* (whether or not to take measures), *quando* (when), *quomodo* (with such terms, conditions and loan covenants or ancillary provisions) and *quid* (with what content).

Filling the gaps of law is an inevitable task. The legislator, however, sets up some constraints, such a reasonableness and proportionality test, coherence between choices, protection of legitimate expectations of the citizen, and punctuates the phases. Decisions have to be planned and to follow a due process of law. The authority is not entirely free: it exercises its power within the law and the public interest.

The purpose of the article is to enquire whether the European and national rules, on the government spending power, while at a first glance limiting discretionary power, may on the contrary result in an expansion of the administrative power.

Rules concerning the national public debt control affect administrative law, including discretionary powers as traditionally understood. "Sustainability" must be "secured" in the exercise of power of the public administration, and therefore not only at a legislative level, but also on a day to day implementation of national, regional and local policies. Obviously, also individual rights are affected: rights of first, second and third generation.

The liberal State, based on theoretical premises entirely acceptable, had to deal with a very different reality and with market failures. The State, in part because of the 20th century industrial revolution and the wars that ensued, has abandoned the role of neutrality and indeed has significantly intervened in large sectors of the economy, often becoming a business enterprise. This phase, which started in the aftermath of World War II lasted until the end of the 20th century and in some ways it is still present. First, it has given rise to the entrepreneurial State and, later, to the Welfare State.

The issue has become more complex with the advent of the constitutions. Political communities which were born or resurrected after World War II have enacted constitutions which have created new rights and expanded existing ones.At the same time, the tasks of public administration have increased. The State started to manage a greater share of public resources to support the growing demand for public goods and services, financed mostly through taxation. Since taxation was not sufficient (which was common to all modern democracies), the State has resorted public deficit and public debt. The result was a system that has grown inside a public organization whose social weight, politically and economically has become immense over the years. The accession of several countries to the European "project" has complicated the already known scenarios.

Most State models, whether liberal or socialist carried out economic systems not open to global markets. Such a vision was in contrast with EU rules which, since the entry into force of the Treaty of Rome in 1958, have gradually replaced old economic models with new ones whose content was not clear at that time. Such

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a situation has gradually led to the short circuit which we have today in many areas of Europe, including Italy.

While the weight of the government was increasing under the pressure of implementing constitutional provisions, Italy has willingly decided to join the single currency, which requires – today with urgency – reduction (now claim with urgency) of that public organization and that same government which we have known for years.

New and more stringent rules (such as single currency, common rules on financial matters, parameters written for debt and the budget deficit) shall be added to the traditional rules of the Treaty of Rome (free competition, free movement of the goods and capital, prohibition of state aids).

The Maastricht Treaty of 1992, now incorporated in the Lisbon Treaty has signed a new phase: a phase which concerns our present and our immediate future.

The fundamental mission of the State, that wants to be tied to the project of a single Europe, is to restructure public finances, which in turn implies a decrease of public spending, due to the high level of public debt and the interest burden on the debt itself.

The State, become unavoidably a State-finance, has committed itself to maintain a public deficit not more than 3% of GDP and a public debt below 60% of GDP. Although the convergence criteria are mainly political, their legal nature shall not be underestimated.

The Maastricht Treaty has provided for a complex process managed by the European authorities in order to monitor and sanction any negative deviations. In this latter context, due to the serious economic crisis of 2008 and under the new international Treaty on the Fiscal Compact of 2012, Member States have introduced in their legal systems the principle that all public administration must keep the public debt within "sustainable levels" accepted by the financial markets.

The State should comply with the EU commitments and manage the reduction of public spending through financial operations and extraordinary administrative measures. Then, it becomes crucial to understand which sectors will be mainly affected by what appears to be a titanic task of the government. The State, in fact, would reduce the benefits (in part stemming from the constitutionally guaranteed rights) until now mainly secured by an extensive spending power which has lasted more than a century. In some respects, this is a new situation and it raises several issues.

The EU Member States should, at the same time, restructure the public finances, maintain a balanced budget, reduce the debt up to acceptable levels, while securing acceptable levels the production of public goods and services, and dealing with vested rights resulting from already signed agreements.

Rights are concerned because the decision on how to use the resources, especially if they are scarce, depends not solely on government discretionary power but

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also on the interpretation of constitutional rights[1]. It follows that the debate on the sustainability of the government debt cannot be independent of the issue concerning the effects on the rights arising from the reduction of the debt.

The assertion of rights implies the need to examine the costs. From this point of view, there is no difference between the first and second generation rights[2]. All rights, including the future (third generation: Clean environment) must compete with the costs. The costs are the burden for the public budget. The rights are the important interests of individuals or groups, that can only be protected by government intervention. The assertion of fundamental rights requires a very strong administration[3]: economic difficulties restrict their practical realization. Extraordinary measure, taken by UE for example to fight the COVID-19 corona virus, are only the tip of the iceberg: the insufficient level of public debt generate enormous fear in an extraordinary moment.

## ROLE OF ADMINISTRATIVE LAW IN THE NEW COURSE OF THE DEBT REDUCTION

The existence of the public administration is grounded of its ability to meet the needs of the community. The administrative law was created to regulate this phenomenon and to protect citizens from the abuse of authority or the failure to comply with the duties imposed by the constitution for public policy.

There is, therefore, a close link between the organization of public administration and the use of public resources and between the government and economic model chosen by politics. There is also an immediate relationship between the expansion of debt and the affirmation of administrative law.

The continental European constitutions had drawn an administrative law model largely inherited from the past which put emphasis on ministries, local territorial authorities and public agencies. With the entry into force of European law, the system underwent a profound evolution that gradually led to a crisis of governmental entities and the advent of more complex administrative models aimed at pursuing the public interest in the functioning of market and free competition[4].

Here a discussion on the systems which resulted and on whether the legislature has created the bases for an effective reduction of the public sphere will be omitted. In this context, we would like to highlight that lawyers have drawn administrative action models and suggested legislative reforms, on the assumption of the existence

[1] L. Ferrajoli, *Diritti fondamentali. Un dibattito teorico*, Roma–Bari 2001.
[2] S. Holmes, C.R. Sunstein, *The Cost of Rights*, New York 1999.
[3] E.W. Bockenforde, *State, Society, and Liberty*, New York 1991.
[4] G. Corso, *Manuale di diritto amministrativo*, Torino 2010, p. 180 ff.

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of a public power provided with discretionary spending power, which is a central element of administrative discretionary *tout court*. It has been assumed that public power had resources because spending power was reputed inherent to the essence of sovereignty.

The opportunity to rethink such models arises not solely from the desirable trend towards reduction of the public sector in social and economic relations, but also from the necessity of new analyses on the reduction of public power.

The watchword, today, is not an administrative reform, but the exercise of administrative powers that are compatible with the public debt. In this light shall be read the provision introduced in 2012 in the Italian Constitution (Article 97), according to which public authorities have to ensure balanced budgets and public debt sustainability.

The intergenerational equity and the protection of creditors of the State have to find a reasonable compromise.

## LOOKING BACKWARDS AND LOOKING FORWARD

It is possible to examine two scenarios: the future and the past of public debt. The future is entrusted to the automatic reduction of public debt to the level required by the EU Treaty and, most recently, by the Fiscal Compact[5]. While the Treaty limits itself to setting the rules known to admit the deficit up to 3% and the debt up to 60% of GDP, the Fiscal Compact establishes in Article 6 that a numerical and control constraints should ensure a more orderly recourse to debt.

The various principles introduced in EU countries will always look to the future, especially the balance of the budget. They fix the rule for which the recourse to debt is allowed only in order to consider the effects of "economic cycle"[6]. In addition, these principles introduce some institutional controls to cover any overruns of spending targets set by the EU.

Within a framework even further away, the Stability Bonds will also enter into force. They are intended to replace national issuance with joint sovereign bonds among Member States of the euro area: this remedy would be effective, but it requires a shift to a common European fiscal policy[7].

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[5] Treaty on Stability, Coordination and Economic and Monetary Union governance, establishes for the Contracting Parties with a debt to GDP ratio over 60% laid down for the Maastricht Treaty, the obligation to reduce by at least one twentieth per year.

[6] The balance "over the cycle".

[7] See Green Paper on the feasibility of stability bond European Commission Green Paper "Feasibility of introducing Stability Bonds", COM(2011) 818, final.

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For the future, the age-old question of the conditions and the limits for debt seems to be properly addressed, in a context of greater responsibility the European institutions which are called to set the spending limit and to monitor the developments in government debt of the Member States. Therefore, the recourse to the financial market must be considered appropriate and necessary, just in case of emergency or to correct a negative economic cycle.

Conversely, the use of public debt cannot be justified to cover current expenses or to cover higher costs that could undermine the balanced budget, to avoid a serious anomaly in the financial management as well as the violation of the Treaties and the constitutional rules.

The past, however, looks very different. There is a mountain of public debt which has been accumulated for half a century and over in a large part EU countries, thanks to which many States have mortgaged Nations and with them – this generation and the next[8].

To ensure the sustainability of public debt, it also means striving to look retrospectively and therefore using all the tools to reduce the burden of debt and the interests accumulated deriving from the past. These instruments may result even by administrative law. In fact, the attempt to reduce the public debt with the proceeds of privatization of state assets can be considered ineffective. These are operations that, particular as regards beneficial effects on free competition, recall the parable of the spoon which empties the sea.

It is useless the old ploy of recourse to inflation, which is now under the direct control of the European Central Bank. Finally, it is also difficult to achieve the goal of reducing the debt burden through tax increases or other extraordinary tax systems.

The road is to honor the debt, upon different conditions. This road could become mandatory in the near future. Its aim is to renegotiate the debt in accordance with the European law, so the public administration could reduce the mass of securities in circulation, the duration of them and especially the measurement of the interest rate.

Contrary to this view there is the thesis of intangibility of the agreements signed by the State, that is, the inviolability of public debt. Such a thesis, whose value shall not be underestimated, could, however, now be balanced with other interests and especially considering that a fair balance must be found between the rights of creditors and the rights of present and future generations. So basically, the public administration must ensure the sustainability of public debt and, at the same time, the rights of creditors.

The European law is, therefore, intended in the coming years to affect the administrative law for profiles related to the reduction of public debt and so on

[8] According to data from Eurostat the average debt of EU countries is 87% of GDP. Bearing in mind the situation, it is clearly evident that all the countries finally aggregates to European project lower the average level. For example, the level of Italy is more than 133%.

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a different side from the one known so far and with the related effects on the notion of administrative discretionary known until now.

While the law founded on free market, as the European law, had reduced the areas of administrative law, the law that must deal with the public debt sustainability and intergenerational equity requires a strong public administration and the use of the tools of administrative law.

In this sense, we could predict a future where the administrative law will be again in charge of the regulation of public authorities, society and economy; as well as we can imagine that public officials will perform such tasks with greater competence, foresight and knowledge of the responses to the requests of citizens.

## THE FUTURE OF THE PUBLIC DEBT

Today, "the current generation" wears the uncomfortable clothes of the "future generation" at the time those decisions were made, that have brought the level of debt to unsustainable levels. In other words, the discussion about the sustainability of the public debt concerns those who are suffering the consequences of any facts dated over time, hoping to give an answer that can solve the problems of the present and the future. To quote H. Jonas, the future is not represented by any collegiate body nor it is a force that can throw their weight on the scale: a thing that does not exist, it can have no lobby[9]. We need a solution "for the past and the future" which, however, follows the economic theory, it is to try to understand the meaning, rather than to formulate their theories that can influence public spending powers.

This solution certainly is not made easier by the vast and arcane rules governing public finance, dotted with various level sources (EU Treaties, the Constitution, international Treaties, laws, regulations and directives, decisions of the ECB and the IMF, ministerial decrees, circulars, banking instructions, as well as decisions of the internal and European Courts).

The reality has shown that any cure or theory has not produced, at the time, the desired results: not only the level of debt is not decreased but it also increased, despite high taxation and policies aimed at automatic reduction of public levels. Moreover, even the tightening of balanced budget principle in itself is capable of resolving the issue, resulting in more rules to prevent excessive budget deficits and to apply for the future, as a remedy for the burden accumulated in the past.

[9] H. Jonas, *Das Prinzip Verantwortung*, Frankfurt 1979, p. 30.

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## THE PRIMACY OF THE TREATIES ON PUBLIC DEBT AND FAILURE OF EUROPEAN LAW

With the full opening of markets and the introduction of the single currency, the European Union has significantly affected the administrative power[10]. National public interest has lost the relevance it had in the past.

The phase which started with the Maastricht Treaty and culminated in the single currency has resulted in a relative legal and financial impossibility for the EU Member States to achieve the goals concerning the debt set forth in the Maastricht Treaty. On the other hand, precisely because of community constraints, the State has been deprived of any significant room of maneuver and debt management according to the previous rules: in this way, it has been impossible to maintain the debt to sustainable levels and to reduce the weight of administrative organization and the related management of goods and services of constitutional significance.

However, the action of European law has not proven fully effective for this purpose either. The supervisory and control proceedings of the European institutions set forth in the Treaty, have not been translated into concrete actions.

Yet, the European Union is intended to be a guidance for the policies concerning the public finances of individual States. The concept of healthy public finances is a fundamental pillar to the survival of the single currency and the European Union. The relevance of such a pillar is testified by the fact that Treaties have included provisions concerning the levels of deficits and debt considered "sustainable" for the presence of the State in Monetary EU[11]; while proceedings for monitoring compliance with the financial provisions and, in severe cases, to impose a sanction of State in breach (Article 126, formerly Article 104, TFEU) has been set forth. Although the infringement proceedings are intended to be brought against the Member States for failure to comply with the excessive deficit prohibition, the citizens are the immediate beneficiaries. The infringement proceedings may constitute an opportunity given to the citizens of the State in breach to hold politicians accountable and to pressure for a political turnover.

Beyond its political importance, Article 126 TFEU is the legal basis for EU actions towards Member States' public debt, while, at the same time, limiting the powers of the EU institutions and the governments of Member States[12].

Unlike what happened in the past, when the Member States maintained monetary discretionary, the single currency management is, indeed, within the European Union's exclusive administrative jurisdiction (Article 3 TFEU).

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[10] S. Cassese, *Lo spazio giuridico globale*, Bari–Laterza 2003.

[11] Protocol No. 12 on the excessive deficit procedure annexed to the Treaty on European Union (Official Journal 115, 9.05.2008, p. 0279–0280).

[12] J. Ziller, G. Della Cananea, *Il nuovo diritto pubblico europeo*, Torino 2019.

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The EU monetary policy may not be independent of or even in contrast with other European law provisions, such as those that require the Union to promote the welfare of EU citizens (Article 3, formerly Article 2, of the EU Treaty), full employment and social progress.

In other words, the monetary union shall be interpreted as instrumental to the main goals set forth in the Treaty. Arguing otherwise would mean interpreting each provision of the Treaty as totally unrelated with other provisions and with the main and whole European project.

On these premises, we may argue that the EU itself could be held accountable for the negative results of Member States with a deficit in excess. It follows that the Contracting States with excessive deficit are not the only parties to blame. Excessive deficit implies that the European Union coordinating role has not properly functioned[13].

## SELF-SUFFICIENCY OR FAILURE OF THE PUBLIC LAW?

If, as D. Hume argued, we should really consider the possibility of a "violent death" of public debt[14], we shall conclude for a voluntary bankruptcy of the State, whose effects would be as disastrous as useless for the citizens. Is it really necessary to go so far? Certainly not.

While waiting for positive results produced by the complex mechanism of the Treaties, some answers could come from the public law and the correct use of discretionary power.

Public law currently offers stronger legal protections to public debt holders compared to common law or private law. While in case of bankruptcy of private companies, creditors may be compelled to renounce to a portion of debt and debt restructuring is a common remedy, public debt holders are immune from such events. Yet, the administrative law and the administrative judge are considered a significant safeguard of private citizens in their relationship with the government. For more than a century Italian administrative justice has given the opportunity to private citizens to bring claims against the government and to question the validity of administrative acts. Administrative law is intended as a barrier to administrative power.

When public debt is involved, we have a three party relationship: 1) the creditors, i.e. the debt holders; 2) the government (the debtor); and 3) the citizens. While citizens are formally the debtor, they do not have any contracting power. It results that it is the government which has to act as an agent in the interest of its principal.

[13] ECJ, 13 July 2004, case C-27/04.

[14] D. Hume, *Essay VIII: Of Public Credit*, [in:] R. Fleming, *Political Discourses*, Edinburgh 1752.

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While public law usually provides for flexibility of government action especially when public interest is involved, in the case of public debt, a different solution seems to prevail. In the relations between citizens of that State and creditors, creditors are stronger than the citizens and the State. The inequality is clear in this matter.

However, public law may suggest a different conclusion. It is possible to argue that the power of the government to renegotiate the debt does not contrast with EU provisions and fulfills the aim of the Treaty. It is even further possible to argue that both European law and the Italian Constitution do not allow for an absolute and preferential treatment of creditors.

## NEW ROLE OF ADMINISTRATIVE LAW IN THE REDUCTION OF PUBLIC DEBT

Now that the principle that requires debt sustainability has been constitutionalized in order to protect present and future generations, the main issue is how to balance between the different interests at stake. It is not enough to provide for a decrease of the public debt in times of crisis, only through containment maneuvers in government spending without affecting the interest on the debt and the time of enforcement of the past debt capital[15].

The decline of the level of public debt must, therefore, be reflected in the adoption of administrative measures aimed at the renegotiation of already issued bonds, even when they are derived from signed contracts. In any case, if there is a contract there is also the administrative act that starts "upstream" the entire administrative procedure, for which the public administration retains all powers of review by all standards dictated by law and jurisprudence. Renegotiation may involve both interests and the length of the debt, extending the deadline.

The State shall not only ensure the vested rights of property of the credit holders, but shall meet the commitments made to citizens and the EU. According to this perspective, market confidence, based on the consistency of State behavior, shall be balanced with other principles, among which firstly the suitability of solutions in line with the canons of administrative action. Indeed, because of the recipes to contain the debt have proved ineffective until now, the same markets may take a positive view of measures that, in the medium to long term, are resolved in the stabilization of the debt and the country's system. In other words, sacrifices must apply to everyone. It may be argued, in other words, that public interest shall be realized through renegotiation. It follows that the public administration has not only the power but also the duty to ensure the sustainability of public debt.

[15] F. Merusi, *Il sogno di Diocleziano. Ruolo del diritto pubblico nelle crisi economiche*, "Rivista trimestrale di diritto penale dell'economia" 2013, No. 1, p. 2.

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If we go back to the question of the relationship between the government/citizens on the one hand and the creditors on the other and ask: Why the latter must prevail?, the most common answer is: The latter prevails because they are stronger. But we know that law is essentially meant to balance among different power situations and resolve conflicts. The most appropriate solution is to balance with reasonableness among the vested rights of creditors and the legitimate expectations of the majority.

In general terms, the administration has the power and the duty to remove the instrument adopted previously, each time it is in conflict with the interest to debt reduction and to intergenerational equity. And of course, the measure would be in compliance with the public interest.

## THE RENEGOTIATION OF THE PUBLIC DEBT WITHIN THE FRAMEWORK OF THE TREATIES

There are other arguments, arising from European law, in favor of the duty to renegotiate the public debt. One of the EU's founding principles, indeed the central, is the single market, which is an economic instrument in order to achieve a political project[16]. To ensure the unity of the market it is necessary to create competition between States[17]. The latter is a pre-condition required to apply the competition between EU businesses by the rules laid down by the Treaty[18]. Both monetary policy and the definition of competition rules are exclusive competence of the EU and the States cannot adopt rules in contrast with such provisions (Article 2 TFEU). The conditions, through which the action of the public authorities performs within the single European area, must be as uniform as possible.

If one of the States is weak because of the debt, the companies of that State will be in worse position than companies from other countries with sustainable debt, because on them it will be reversed the burden (higher taxes, lower incentives, infrastructure investments insufficient). If a Member is heavily in debt, the issue is outside the narrow political sphere of relations between individual State and citizens of it. Therefore, one of the fundamental objectives set out in Article 3 TFEU (formerly Article 2 TCE) is threatened. It provides that, in order to establish an internal market, the EU "shall work for the sustainable development of Europe,

[16] M. Cartabia, J.H.H. Weiler, *L'Italia in Europa*, Bologna 2000, p. 18, 243.

[17] Among many, see Court of First Instance, 28 February 2002 (N-86/95-General Shipping companies).

[18] Refer to the Treaty on the Functioning of the European Union (consolidated version Official Journal C 326, 26.10.2012, p. 0001–0390) Title VII Chapter I (Section I "Rules on competition"; Section II "Aids granted by states"), Chapter II ("Tax provisions"), and Chapter III ("Approximation of laws, Regulations and administrative provisions of the Member States").

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based on economic growth balanced and with stable price", on a social market economy that is highly competitive, aiming at full employment and social progress, and based on a high level of protection and improvement of environment quality. It shall promote scientific and technological progress.

There is a close parallel between this programmatic provision and the other one much more concrete, that regulates the parameter of debt and public finances of the Member States (Article 119 TFEU), which lays down the principle of coordination of Member States' economic policies. Once the single currency is introduced, this action should include the definition and conduct of a monetary policy and a unique exchange rate policy, with the primary objective of maintaining price stability and to support the general economic policies of EU in accordance with the principle of an open market economy with free competition. These actions of the Member States and the EU shall involve also the respect of the principle of "sound public finances and monetary conditions". The declination of these principles is entrusted in particular to the provisions of the TFEU concerning the Union's economic and monetary policy[19], including specific provisions relating to the parameters of public debt and deficit[20].

How can the individual State achieve all the objectives laid down of Article 3 of the Treaty, if it devotes huge resources to repay the past debt? The ECJ stated that the purposes enunciated in this provision are linked to the existence and functioning of the Community and that their achievement must be the result of the establishment of the common market[21]. Therefore, the link between the existence of sound finances and the basic objectives of the EU is confirmed.

The State has to eliminate any internal factor that could limit the equality in the European legal space and undermine the implementation of economic freedoms and fundamental rights under European law.

The result is to strengthen the idea that the reduction of domestic debt may be obtained by resorting to extraordinary administrative instruments and not only by focusing on the containment of public spending. The limitation of property rights of the creditors of the State could be justified by the general interest to comply with the Community provisions. According to the Community system, the exercise of property rights may be restricted, if the Member States believe it "necessary" that it is in the general interest[22]. However, as the ECJ underlined in the *Hauer* case (C-44/79, § 23), "it is still necessary to examine whether the restrictions introduced by the provisions in dispute in fact correspond to objectives of general interest pursued by the Community or whether with regard to the aim pursued, they con-

[19] Title VIII Chapters I–IV.
[20] Article 126 (formerly Article 104 TCE).
[21] ECJ, 13 December 1979, case C- 44/79, *Hauer*.
[22] *Ibidem*.

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stitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property".

To argue otherwise would lead to an unreasonable asymmetry. The European States have been constrained recently with more and more radical provisions for the control of public finances and the level of debt, to the point where the budget law must receive every year the prior authorization of the Commission. These requirements are intended to protect the sovereign debt and to reassure creditors.

It would be impossible, taking into account this vast program, to deny citizens, which have to bear the burden of austerity policies, the benefits arising from being EU citizens and namely the existence of a legitimate expectation of compliance with rules that expand their legal rights implicit in the fundamental objectives of the Treaty, among which the "promotion of a high level of employment, the guarantee of adequate social protection" (Article 9 TFEU).

## DEBT SUSTAINABILITY IN A THEORETICAL PERSPECTIVE

Constitutions and laws contain a new provision: the sustainability of public debt to meet future generations. It is the solidarity ethics applied to public accounts. It is important to ask yourself what it means in theory "sustainability", of which up to now we have heard in other areas and particularly with respect to environmental policies[23].

The two major moral theories to the political phenomenon, namely utilitarianism of J. Bentham and J.S. Mill, and "the contract" of Kantian ancestry, were inadequate to respond to the ethical problem that sustainability aims to address: the duties towards future generations. This also is to be referred to the financial sustainability in the economic field and, therefore, for debt sustainability. The idea of holding the debt can disagree with the utilitarian precept to pursue wellness[24]. First of all, there are different opinions in the literature on the relationship between the debt level and the sound economy of a country.

Second, even if the reduction of public debt in the long term may prove to be a winning strategy from an economic point of view, for utilitarian could still face the problem of justifying the strong suffering of populations waiting for future benefits. The case of Greece could be exemplary.

Even contract theory does not offer a good crutch to the principle of sustainability. The original contract, assumed by many political theories (such as J. Rawls[25]), would hardly be possible as a pact between the generations present and future.

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[23] C. Pugh, *Sustainability, the Environment and Urbanization*, New York 1996.

[24] R. Hare, *Moral Thinking: Its Levels, Method, and Point*, Oxford 1981.

[25] J. Rawls, *A Theory of Justice*, Cambridge, Massachusetts 1971.

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In order to understand the principle of sustainability is, rather, useful the thesis of H. Jonas[26] about the imperative of responsibility. Jonas moves from the inadequacy of utilitarianism and contract theory to answer moral questions raised by this scientific technique and internationalization of ethics and law, and in particular: a) the attitude against those who are far from us (not part of Rawls' contract); b) the requirements of future generations.

The principle of responsibility, applied to public ethics, implies the possibility of an authentic and free life. Freedom, however, generates responsibilities. Only those who are truly free can predict and calculate the future consequences of their actions, and only those who are free can alter them. The principle of responsibility, therefore, requires caution. This attitude is reflected in the legal political precautionary principle.

This thesis can justify better, in terms of the general theory, the legal and political debate on the sustainability of public debt. In fact, the principle of sustainability cannot be understood with the traditional criteria taken from the utilitarian and contract theories. On the one side, globalization and the full opening of the markets are not able to ascribe liabilities, e.g., for speculative maneuvers that may cause difficulties for the economy of a country. On the other side, the same financing of the economy creates a situation where actions are disconnected from consequences. Instead, the sustainability associated with the principle of responsibility is a concept that is based on the exhaustion of resources. It allows to establish a connection between the consequences of actions – in this case, level of debt – and the future political dimension.

## DO WE NEED A BINDING PRECEDENT TO BETTER CONTROL THE ADMINISTRATIVE POWER?

The way to intend the role of a judge is not secondary in the perspective of the present article. The argument typically mentioned in favour of the binding precedent is legal certainty[27], a fundamental value that underpins any orderly community. In particular, the precedent is a tool to protect the expectations of citizens and as such a guarantee of greater liberty. The *stare decisis*, in fact, allows to predict in advance the behaviours sanctioned by law and plan your life choices accordingly. The European Court of Human Rights has stressed the relevance of predictabili-

[26] H. Jonas, *op. cit*.

[27] G. Lamond, G., *Precedent and analogy in legal reasoning*, 2006, http://plato.stanford.edu/archives/sum2006/entries/legal-reas-prec [access: 5.01.2020].

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ty[28]. Within the purposes of the European Convention on human rights, the notion of "law" is not linked to formal or procedural criteria. The ECHR has developed, *vis-à-vis* all States, an "autonomous notion" of law, compatible with all European constitutional systems. Pursuant to the ECHR, the univocity, consistency, intelligibility and predictability of law are evidence of the effectiveness of the rule of law at a national level[29]. Therefore, in the eyes of the EHCR, the "law" is not knowable or predictable if the law is often challenged and contradictory[30].

Furthermore, predictability guarantees the liberty of citizens also in another way. The *stare decisis* sets forth stronger and more precise limits of the discretionary power of public officials, so that they may be held accountable where they have issued enactments in violations of the rules laid down in the precedents.

The *stare decisis* can be as well supported for reasons of efficiency. If courts are altogether consistent, rules are clearer and reasons for conflict decrease. The result is deflation of litigation and processes.

The argument of predictability is intertwined with that of legal certainty. Therefore, if on the one hand the precedent seems to hinder the principle of the rule of law as it implies the recognition of creative power of the judge, on the other hand, it serves to one of the functions that the principle of the rule of law aims at promoting, i.e. protecting citizens from arbitrary and unpredictable behaviour of the public authorities. Legal scholars have already stated that the rule of *stare decisis* is not contrary to the principle of "rule of law", but it is actually its own corollary[31].

The administrative case law has been mainly carried out through creative activity of the judiciary. Statutory law followed judicial decisions[32]. The techniques by which the administrative judge analyzes the "excess of power" are by definition independent of any specific statutory rule and refer to general standards or principles (such as reasonableness, etc.), the application of which implies a broad discretionary

[28] Decision of 29 April 1979, *Sunday Times v. Regno Unito*, §§ 48–49. As a consequence, the Court claims that the "law" is not knowable, and predictable, if the case law is contradictory and questioned (please note that the reasoning is the same for both common law systems and those of civil law).

[29] See J. Raitio, *The Principle of Legal Certainty in EC Law*, Dordrecht 2011 (especially "The Principle of Legal Certainty Based on the Case Law of the European Court of Justice and the Court of First Instance", pp. 187–263).

[30] Explicit in this respect are the judgements that have defined the actions: *Kruslin v. Francia*, 24 April 1990, §§ 27–36; *Kopp v. Svizzera*, 25 March 1998, § 73; *Valenzuela Contreras v. Sapin*, 30 July 1999, §§ 52 ff.; about Article 7 Conv., *Kokkinakis v. Grecia*, 25 May 1993, § 40; *Cantoni v. Francia*, 15 November 1996, §§ 28 ff.; *Achour v. Francia*, 29 March 2006, §§ 49 ff.; *Pessino v. Francia*, 10 October 2006, § 28.

[31] J. Waldron, *Judges as moral reasoners*, "International Journal of Constitutional Law" 2009, Vol. 7(1), DOI: https://doi.org/10.1093/icon/mon035.

[32] In Italy, see S. Cassese, *Problemi delle ideologie dei giudici*, [in:] *Studi in memoria di Carlo Esposito*, Padova 1972, pp. 1392 ff.; M. Nigro, *Giustizia amministrativa*, Bologna 1983, p. 326 ff.

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power by the court[33]. By a clear rule of law, the administrative court shall ensure "full and effective protection" according to "the principles of European law" (see, e.g., Article 1 of the Italian Code of Administrative Process)[34]. Despite any arguments related to the sources of Law, as facts have proved over time, no ideology has been able to prevent that judges consciously created new law[35].

In the light of the above, while a good amount of normative confusion is unavoidable when dealing with the public debt, the administrative judge could be acknowledged as a powerful and effective tool not solely to make order among the varieties of normative antinomies but also to provide more effective protection of citizens' fundamental rights. The common argument of the costs of rights which is usually carried out by the legislator and the government to delay or even prevent state intervention may be overcome by a more effective judicial intervention[36].

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The administrative law was created to protect citizens from excessive authority. As a consequence of the entry into force of the European law, the system gradually led to a crisis of government entities. Today, the watchword is the exercise of administrate powers that are compatible with public debt. The intergenerational equity and the protection of the creditors of the State have to find a reasonable compromise. Consequently, examining the past and the future of the public debt, it is clear that there is a mountain of public debt accumulated for half a century and over in a large part of EU countries, thanks to which many States have mortgaged Nations. Looking retrospectively, there should be a use of all the tools required to reduce the burden of debt and the interest accumulated from the past and the public administration must ensure the sustainability of public debt and the rights of creditors.

For the future, we can predict that the administrative law will be again in charge of the regulation of public authorities, society and economy, as well as competent and foresighted public officials. A solution for the past and the future could be to

[33] See F. Patroni Griffi, *La sentenza amministrativa*, [in:] *Trattato di diritto amministrativo*, a cura di S. Cassese, tomo V, Milano 2003, p. 4468.

[34] See Italian legislative decree n. 104/2010. See also ECJ, 6 October 1982, case C-283/81, *Cilfit srl e Lanificio di Gavardo spa v. Ministero della Sanità*, in Racc., 1982, 3415; ECJ, 15 September 2005, case C-495/03, *Intermodal Transports BV v. Staatssecretaris van Financiën*, Racc., 2005, I-8151

[35] G. Tarello, *Storia della cultura giuridica moderna*, Bologna 1976.

[36] As for Italy, see Article 99 of the Code of Administrative Process approved by the d. lgs. 104/2010, that assigns a new role to the Plenary Session of the State Council. In particular, the third paragraph of Article 99 prescribes that if the section of the Council of State, which is assigned the appeal, believes that it does not share a "rule" laid down by the Plenary Session, transfer to the latter, by reasoned order, the decision of the appeal. The rule laid down by the Plenary Session resembles the rule of precedent typical of common law systems.

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try to understand the meaning of the economic theories that can influence public spending powers. In fact, any theory has produced a decrease of the level of debt, so the necessary way forward for the consolidation it is to create primary budget surpluses, and to practice this measure without creating recessionary effects. In the meanwhile, the role of the precedent in administrative Courts could be more important in this matter.

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STRESZCZENIE

Władza dyskrecjonalna jako główna cecha władzy administracyjnej ma miejsce wówczas, gdy administracja jest upoważniona do przypisania konkretnego znaczenia, dokonując wyboru spośród kilku możliwości, który jest sposobem zrównoważenia interesów publicznych i prywatnych. Po XX stuleciu, zdewastowanym wojnami, deficytem publicznym i długiem, większość modeli państwowych ograniczyła swoje rynki ze szkodą dla rynku globalnego, zmieniając stare modele ekonomiczne w nowe po traktacie rzymskim z 1958 r., traktacie z Maastricht z 1992 r. i kryzysie, jaki nastąpił w 2008 r. Ostateczną propozycją jest to, że państwa członkowskie UE powinny zrestrukturyzować finanse publiczne w obliczu wzrostu popytu na dobra publiczne i usługi. Celem artykułu było zbadanie, czy regulacje europejskie i krajowe mogą ograniczać uprawnienia dyskrecjonalne przy rozszerzaniu zakresu przepisów administracyjnych.

**Słowa kluczowe:** dług publiczny; obywatel; administracja publiczna; uprawnienia dyskrecjonalne; kontrola sądowa