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COMPLEXITY, DISCRETION, PUBLIC INTEREST

ABSTRACT

The paper draws on the questions posed by the call-for-paper, reorganized around essential thematic cores.

These are three essential cores, i.e., (i) the complex nature of the legal system and the reasons for it; (ii) the complexity of the decision in relation to the formation process; and (iii) the complexity of the decision in relation to what is to be decided.

Once the essential thematic cores have been identified, the paper addresses the problem of the relationship between them and, thus, (i) complexity as a function of the evolution of society (to which the discipline of the legal system is addressed); (ii) the role of the decision maker and its legal and institutional legitimacy (a central theme of the decision-making process); and (c) to the evolution of the very concept of the power to decide with the authority of a public law measure.

Thus identified the issues and their relationships, the analysis concerns the complexity of (i) the decision, (ii) the decision-making process, and (iii) the identification of what is complex and what is not.

First, with respect to the concept of decision, in addition to the characteristics peculiar to the decisions of the legislature, the courts, and the executive branch, we discuss the various theories of decision prevalent in the legal literature. In this perspective and in relation to the problem of complexity, the problem of the legitimacy of the decision-maker, i.e., the one whose decision eliminates complexity, arises. With respect to the legitimacy of the decision maker, theories that are based on mythical explanations are criticized, as are those that are based on theories of the legal system (which, ultimately, base the decision on

itself). Overcoming inadequate explanations means highlighting the problems that generate the complexity of the decision and, with respect to measures exercising public power, relate to the emergence of the complexity of interests, the complexity of facts or their scientific explanations, the complexity of the interpretations of positive law given the presence in the law of vague or polyenes utterances.

With reference to the procedure of decision making, once--again--the various theories of procedure, process and decision making have been pointed out, the problem arises that procedures in general have the function of learning the factors of complexity (interests, facts, norms) and reducing complexity through procedural operations. Which means that these operations (i) are either also neutral, (ii) or they are decisions.

The construction of a theoretical scheme for solving complexity, then, is proposed through a solution to the problems of (i) the complexity of legal rules in relation to what is to be regulated (facts and interests), (ii) in relation to decision-making, and (iii) in relation to the decision itself.

The solution to the problems posed, then, with respect to the three problem cores and the three corresponding paths of analysis, is proposed through a theory- respectively to each of (i) discretion, (ii) public power, and (iii) public interest.

KEYWORDS: discretion – public interest – fundamentals rights – decision – procedures

SECTION I

1. Issues raised by the call-for-papers

My intention is to start the discourse from the questions posed by the call-for-papers.

1.1. The issues that I assume to be relevant in this work are those posed with regard to the relationship between complexity and (*i*) vagueness of the law; (*ii*) plurality of regulated interests; (*iii*) articulation of complexity between decision and decision-making process; (*iv*) notion of "public interest"; (*v*) relationship between legality and efficiency (or simplification) as a complex relationship; (*vi*) legal system and (complex) relationships between rules of different legal value and different authors; and, finally, (*vii*) complexity of the relationship between legal command and reality (which includes the complexity of the relationship between legal knowledge and other non-legal sciences).

1.2. In this perspective, I assume that it is appropriate to concentrate the issues into three thematic blocks, namely:

(*A*) complexity of the legal system and its reasons [comprising issues (*i*), (*vi*) and (*vi*)].

(*B*) complexity of the decision – which is an exercise of public power – in relation to decision-making [which includes issues (*iii*) and (*v*)].

(*C*) complexity of the decision - which is an exercise of public power - in relation to what is to be decided [which includes the remaining issues].

1.3. These thematic blocks are profoundly interconnected; so that (*a*) the questions posed become even more complex and (*b*) the concepts that can be expressed are necessarily imprecise, as they can only inevitably be placed in one of the three above areas at the cost of some simplification.

To prevent these simplifications from altering the precision of the discourse, it is necessary to indicate three major systems of linkage between the issues; with respect to the questions posed, their linkage expresses greater complexity because it highlights the evolution:

(*A*) of society (to which the commands of authority are addressed), of the perception of the role of the fundamental rights of the individual within the institutional framework of power, of non-legal thinking, of technology and the market;

(*B*) of the forms of legitimization (political and legal) of authority (of executive, legislative, judicial power) over time;

(*C*) of the concept of decision and (public) power to decide.

In other words, about public power, the question of complexity (*i*) does not only apply to the problem of the legal system as such, but also (*ii*) as an instrument of regulation of society – thus posing the problem of the evolution of society, its perception of power and the legitimization of the latter.

Of course, the questions posed by the Guest Editorial Board are many more and even more complex. Precisely for this reason, it seemed necessary to set the perimeter of the issues addressed in this paper.

1.4. To address the questions posed hereinabove, it seems therefore useful to indicate the order of the discussion that will follow.

In particular, it is necessary to

(*A*) specify the content of the idea of complex public decision (in the abstract and according to the main proposals in legal literature).

(*B*) equally, specify the concept and function of the decision-making process leading to a complex public decision.

(*C*) finally, address the problem of the complexity of decisions and the decision-making process, leading to a complex public decision and propose a possible solution to the complexity problem. That is, theorizing what is the criterion in the light of which complexity can be simplified.

SECTION II

2. On Decisions

The root of the term [the Latin *decidĕre*, from (*de-*) and (*caedĕre*), properly "to cut away"] clarifies the concept of decision. It means the prevalence of a solution over a problem. It is *Εκλέγειν*.

2.1. Judgment, choice, power

In relation to the use of public power to decide (resulting in the issuance of a law, a judgement, an administrative measure), a question immediately arises as to whether the solution is the result of (**i**) a judgement or (**ii**) a choice.

Judgement ([1]), in fact, is the rational assessment with respect to certain parameters (legal, in our case); as such, therefore, it does not depend on pure will, but on the consideration of all relevant elements, all factual circumstances, all available knowledge, to achieve the best possible judgment with respect to the assigned (in this case, legal) parameters.

The choice, on the other hand, is dominated by the will. One may choose one solution or another in relation to mere personal propensities, or for purposes that are not necessarily rational - or in-susceptible of adequate rational explanation.

In one case, all alternatives are "cut off" because they are judged worse; in the other, only because they are not liked.

It would seem reasonable to expect that in the case of the decision of the public authority (of the legislative, judicial, or administrative power) the decision can only and exclusively be conceived in the sense of judgement.

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1 See, L.H. HART, *Discretion*, in (127) *Harvard Law Review*, 2013, 652; on this posthumous paper, N. LACEY, *The path not taken: H. L. A. Hart"s Harvard essay on Discretion*, in (127) *Harvard Law Review*, 2013, 636 e G. C. SHAW, *H. L. A. Hart"s Lost Essay: Discretion and the Legal Process School*, *ivi*, 666; nonetheless, see, previously, R. DWORKIN, *No Right Answer?*, in P. M. S.HACKER e J. RAZ (eds.), *Law, Morality and Society: Essays in honour of H. L. A. Hart*, Oxford, Clarendon Press., I977, 54, and, R. DWORKIN, *The Model of Rules*, 35 U. CHI. L. Rev. 14, 32-34 (1967), on concept of adjudicative discretion has several different meanings.

2.1.1. This is certainly true as to the decision of the judge; however, even in this case it could not be reasonably argued for a long time - and even at the present time the development is incomplete - that it was a judgement in the sense just indicated, since in the judgement of acts of State or other public authorities, it suffered from limitations both as to the cognition of the fact and the power to review the discretionary assessments contained in the decision ([2]).

2.1.2. For a long time, however, it was almost unanimously assumed that the decision on the adoption and content of the law was entirely free, devoid of any element of judgement and entirely entrusted to the political will of the legislature; although such a way of reasoning is not admissable in a constitutional State, with a rigid Constitution ranking higher than the law of Parliament ([3]), the constraints on the legislature are still considered to be rather limited ([4]).

It would not, in essence, be a matter of declining the Constitution in a judgement that in any case encounters insurmountable limits and is, internally, directed by the implementation of constitutional rules; rather, the problem is not to conflict with express constitutional rules. Thus, except for "external" limits (the conflicting constitutional rules), the legislator is thought to remain essentially free.

The decision about the law, therefore, closely resembles a choice and not a judgement.

The issue does not change if one looks at it in relation to the rules dictated by the European Union. The fact that EU law prevails over national law

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2 Recently, G. Tropea, *La specailità del giudice amministrativo tra antiche criticità e persistenti insidie,* in *Diritto Processuale Amministrativo* 2018, 889. On Court discretion, F. Saitta, *Interprete senza spartito? Saggio critico sulla discrezionalità del giudice amministrativo*, Naples, Editoriale scientifica, 2023.

3 Recently, F. Modugno, *L"interpretazione degli atti normativi*, in *Giurisprudenza Costituzionale* 2022, 1093.

4 For a traditional authoritative approach, C. Esposito, *La validità delle leggi. Studio sui limiti della potestà legislativa, i vizi degli atti legislativi e il controllo giurisdizionale* (1934), reprint Padova, Cedam, 1964; lately, A. Pizzorusso, *Il controllo della Corte costituzionale sull"uso della discrezionalità legislativa*, in *Rivista trimestrale diritto e procedura civile*, 1986, 797; recently, Q. Camerlengo, *La causa della legge*, in *Giurisprudenza Costituzionale*, 2014, 3647.

merely shifts to the level of the European authority what previously belonged to the national Parliament (or public administration, or judge).

It does not, however, change the idea that the decision about rules is a (political, in this case) choice.

2.1.3. As for the executive power, the scope of the discretionary assessment characterizing its decisions has been explained - essentially - in two ways([5]).

According to a tradition, more typically Anglo-Saxon, it is a political decision - or one derived from political guide-lines; which explains the deference of judges towards those decisions - and also the North American hard look doctrine does not exclude that the debatable portion of the decision is not conditioned by legal rules.

The European tradition, essentially of German derivation, differs in a non-decisive way: where the law is indeterminate, it is up to hermeneutics to resolve the issue and, if the result of this work proposes several legitimate solutions, the decision of the (non-elective) official among them will be free of legal conditioning – the executive power will have to interpret the spirit of the people, but this portion of the decision can hardly be qualified as a judgement; it is a choice.

Although derived from the German tradition, the Latin solution brings out the interplay of interests - public and private - in relation to the case; the decision must provide a reasonable balancing of the interests at stake. However, the administration "wants" a certain balance of interests, so we are faced with a choice and not a judgement.

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5 On all the issues and discussion mentioned in paragraph, please refer to L. R. PERFETTI, *Discrezionalità amministrativa, clausole generali e ordine giuridico della società*, in *Diritto amministrativo*, 2013, 299; ID., *Discrezionalità amministrativa e sovranità popolare*, in *Al di là del nesso autorità/libertà: tra legge e amministrazione*, Turin, Giapicchelli, 2017, 119; ID., *Discrecionalidad administrativa y soberanía popular*, in *Revista Española de Derecho Administrativo*, 117 (2016), 195; ID., *Il governo dell"arbitrio*, Soveria Mannelli, Rubettino, 2022.

2.1.4. Contrary to what would be reasonable to expect, power absorbs the decision (and not the other way around); hence the decision exercised by public power is - in most cases - a choice and not a judgement.

2.1.5. On the decision side, therefore, the result is that the public authority exercises the po-er of choice; power is the substance of the decision. Power is not only the effectiveness of the decision, which is imposed on others even without their consent. Rather, power is the power itself to make the decision, to make a choice. Since public authority chooses as an exercise of power, the margins for rational criticism will be very limited: the decision may be annulled because it is patently illogical, wrong, based on non-existent facts, or similar hypotheses. To substitute the evaluation - of a judge - for the choice of authority would mean shifting the choice into the hands of the judge. But the substance would remain the same.

This is a way of reasoning that does not convince me, but it remains that it is the one widely spread throughout Western culture.

Complexity, therefore, is solved through the exercise of power, through a choice that is expressed in terms of power. What overcomes the complex problem is the decision, it is the will, the choice of power that "cuts off" other possibilities.

2.2. On legitimacy of the decision-maker and foundation of power

The problem, therefore, resolves itself into that of the legitimation to exercise public power. If the complexity is resolved by an act of will, by the decision taken by the public official (legislator, judge, or civil servant) ([6]), there must be a rational explanation for the attribution of such a power.

Public decisions are always structurally complex. They have to deal with a conflict over the application and interpretation of rules (in the case of the judge); they refer to the creation of rules that must govern complex facts and

6 See, M. Monteduro, *Il funzionario persona e l"organo: nodi di un problema*, in this *Journal*, VIII (2021), 49.

interests (in the case of the legislator-king); they have the task of applying rules (often complex and uncertain) to com-plex facts and interests (in the case of the official of a public body). Since they are complex decisions and, nevertheless, must result in a decision (de-caedĕre), the reduction of the various options to a single one must be carried out by a decision-maker. If the criterion for choosing the solution from the various possible options is public power, then the latter must have been assigned legitimately. Since someone must have the power to decide, the question shifts to why he or she has this power and the rules of its exercise.

2.2.1. In Western legal culture there are several explanations for this problem, all of which refer to the "myth" ([7]).

In other words, none of them are truly rational, but are simply argued as such. Whether one hypothesis a social contract ([8]), a free original determination of an ideal community (*Genossenschaft*) ([9]), a mythical Leviathan ([10]), an organic construction that moves from society to institutions ([11]), the foundation in the objective rationality of the law ([12]), in any case, a non-existent and mythical abstraction is placed at the foundation of this power.

Once we have stopped believing in purely mythical explanations or purely theoretical constructions, what becomes clear is that the foundation of the legal order - and, therefore, of the legitimization of public officials in the exercise of power - has profoundly to do with the exercise of force at the constituent moment of the political order to which that foundation historically re-

7 E. CASSIRER, *The Myth of the State*, Yale, Yale University Press, 1946, particularly for the chapters XVII and XVIII about Hegel and the role of myth, the evocation of destiny, the hero and the use of technology in the emergence of modern dictatorships.

8 E. CASSIRER, R. DARNTON, J. STAROBINSKI, *Drei Vorschläge, Rousseau zu lesen*, Fischer, Frankfurt am Main, 1989; J. RAWLS, *A Theory of Justice*, Revised Edition, Harvard University Press, Belknap Press, 1999.

9 J. K. BLUNTSCHLI, *Lehre von modern Staat. Allgemeines Staatsrecht*, v. I e II, 1885/1886, Stuttgart, J. G. Cotta, now Aalen, 1965.

10 T HOBBES, *Leviathan*, N. Malcolm (ed.) critical edition in three volumes, Clarendon Oxford University Press, Oxford, 2012. On Hobs shall be considered the Schmitt"s book, C. SCHMITT, *Der Leviathan*, Cotta, Stuttgart, 1965.

11 S. ROMANO, *Studi sul concetto, le fonti e i caratteri del diritto*, Firenze, Sansoni, 1946.

12 F. HEGEL, *Grundlinien der Philosophie des Rechts*, Gans, Eduard, 1797-1839.

fers. Force, moreover, is a permanent datum of the foundation of authority that reveals itself in particular at the moment of the crisis of institutions and thus of the questioning of the commands given by them to society. With the consecration by the constituted order, force ceases to appear arbitrary and rather becomes legitimized by law. Consequently, although violence remains immanent in the command, the exercise of power is recognized as legitimate. Thus, the true legitimization of the power exercised by the public body with the decision (be it legislative, jurisdictional, or executive) resides in a justifying event of law and its force that cannot be hidden under the mask of myth: it is, rather, the exercise of force that lies at the origin of the foundation of the established order.

What is originally «*Gewalt*» becomes «*Gesetz*» and thus «*Gesetzgebende Gewalt*».

At the foundation, then, if one does not want to resort to mythical beliefs, lies the violence that takes possession of the State institution. Thus, it is the exercise of sovereignty ([13]).

2.2.2. Each "mythical" explanation, as a matter of fact, is indeed just a possible justification to the attribution of sovereignty ([14]) to public power, to the State.

Sovereignty has simply been, for centuries, the public law juridical status of the king, of the monarch in force[15]. The legitimacy of the authority derived from its sovereignty[16]. Once the idea of sovereignty as a power to be attributed to the State as a whole, as an entity – rather to the person of the governing monarch – the topic concerning the legitimacy of power upon the different State bodies started to emerge, in a perspective dominated by the separation of

13 Please see, L. R. PERFETTI, *L"ordinaria violenza della decisione amministrativa nello Stato di diritto*, in this *Journal*, I (2017), 3.

14 J. DERRIDA, *Force de Loi. Le «Fondement mystique de l"autorité»*, Galilée, Paris, 1994.

15 E.H. KANTOROWICZ, *The King's two bodies: a study in mediaeval political theology*, Princeton University Press, Princeton, 1957.

16 M. FOCAULT, *Il faut défendre la société*, Paris, Gallimard, 1997, conference of 11th, 18th, and 25th, February 1976; M. FOCAULT, *Naissance de la Biopolitique*, Paris, Gallimard, 2004.

powers. The progressive limitation of the monarchs" power has strongly affirmed the State sovereignty. As a consequence, it has entailed the problem of the legitimacy of the State bodies.

The easiest and most rational answer lies in that the legitimacy of decision-makers (be it a legislative, jurisdictional, or executive decision) derives from the distribution of competences within the State, with the latter remaining the only true sovereign. In such a perspective, the legitimacy of the public body taking a decision with a voluntary act, a choice, and thus "resolving the complexity" only lies in the distribution of competences within the State organization. If a certain State body has a legislatively funded competence to assume a certain decision its legitimacy to do so directly derives from the sovereignty of the State as "divided" within the public organization ([17]).

However, this explanation suffers some criticalities.

First of all, either the legitimation of the public servant is based directly on the original violence that determines the division of power over the State - but, then, it loses its characteristic of legitimacy, because it is based only on the pure fact of the availability of power, of violence; or, if its legitimation derives from the attribution of State sovereignty, the legitimation collapses in on itself. Indeed, such an explanation is tantamount to saying that power is legitimized by itself. All mythical explanations of the legitimation of public power seek its foundation in something non-existent and, indeed, mythical. The purely institutional one, which is based on the distribution of State sovereignty among its organs, finds no explanation of legitimation. Its foundation is a norm of superior rank: the Constitution for the law; the law for the judgement or administrative decision. But the legitimation of the power that is thus distributed is always founded on sovereignty, that is, power is founded on itself.

17 On the problem of legality and legitimacy, C. SCHMITT, *Legalität und Legitimität*, Duncker und Humblot, Munich and Leipzig, 1932.

Secondly, this explanation does not seem adequate for contemporary Constitutions, which with various formulations assign sovereignty to the people and not to the State.

2.2.3. From this perspective, it should be noted that most scholars have understood popular sovereignty as the power to appoint elective assemblies. In essence, popular sovereignty is expressed in representation. Through representation, consequently, the organs of the State and public bodies establish the political direction of the taxpayers" constituency.

This theory is unconvincing for many reasons ([18]).

First of all, the Constitution does not allow for this reduction of sovereignty to representation - for reasons that will be discussed below.

Secondly, not only are judges and civil servants non-elective, but even more so their independence is guaranteed by the Constitution and the law - so that it is difficult to argue that the direction of Parliament alone through the law and of the government (for executive officials) can guarantee this consistency.

In any case, MPs are elected without a mandate, so that the political direction of the people is not guaranteed.

Above all, the Constitution proposes an image of judicial and administrative power as a function of popular sovereignty unmediated by political power.

Certainly, representation is one of the forms in which popular sovereignty is expressed. But it is neither the only one nor the main one. Consequently, a theory of the legitimacy of the power to decide cannot be built on this basis.

2.2.4. To find a solution to the problem of the substance of power - and therefore of decision-making - and that of discretionary power in particular, it is - therefore - necessary to move on from the question of sovereignty.

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18 See, B. Giliberti, *Il merito amministrativo,* Padua, Cedam, 2013.

There is a profound and often overlooked reason for this: sovereignty is the (inexhaustible) source of public power, the foundation of the legal capacity of the entity; if one does not address the issue from the side of sovereignty, one may place limits on power (as Rule-of-Law typically does) but its substance, its source, its inexhaustible content will remain intact. The attempt to curb power through law, if it does not address the issue of sovereignty, resolves itself in creating limits to its expansive force; but no more. In fact, most scholars think that legality constitutes an external limit to power, but the evaluations on which the decision is based remain within the perimeter of "merit" ([19]), not susceptible to judicial review.

It is, therefore, necessary to propose a theory of sovereignty. There is no need here to go over the various doctrines on the subject ([20]).

Public powers derive their legitimacy from sovereignty. This is the fundamental point of all theoretical constructions of public law in Europe. As long as sovereignty is thought to belong to the State, it is obvious that jurisdiction and administration will be organizations functional to the satisfaction of the aims of the sovereign, of the State ([21]).

For some time, I have been trying to point out the legal reasons why, on the other hand, sovereignty belongs to the people and its consequences for the dynamics of powers ([22]). This affirmation entails various consequences, which

19 See,, more broadly, to L.R. Perfetti, *Organizzazione amministrativa e sovranità popolare. L'organizzazione pubblica come problema teorico, dogmatico e politico*, in This *Journal*, IV (1/2019), 7.

20 See, as well as for literature references, to L. R. Perfetti, *Discrezionalità amministrativa, clausole generali e ordine giuridico della società*, *cit.*; Id., *Discrezionalità amministrativa e sovranità popolare*, in *Al di là del nesso autorità/libertà: tra legge e amministrazione*, *cit.*; Id., *Discrecionalidad administrativa y soberanía popular*, *cit.*; Id., *Il governo dell'arbitrio*, *cit.*; Id., *I diritti sociali. Sui diritti fondamentali come esercizio della sovranità popolare nel rapporto con l'autorità*, in *Diritto pubblico*, 2013, 61; Id., *Sull'ordine giuridico della società e la sovranità*, in *Scritti per Luigi Lombardi Vallauri,* Padua, Cedam, 2016, 1153.

21 L. R. Perfetti, *L'organizzazione amministrativa come funzione di sovranità popolare*, in *Il Diritto dell'Economia*, LXV (2019), 43.

22 This is not the place for a thorough argumentation of these theses. For the sake of brevity, let us refer to L. R. Perfetti, *Per una sistematica dell"equità in diritto amministrativo. Principi istituzionali e regole della relazione tra società ed autorità*, in *Studi in onore di Alberto Romano*, vol. I, Napoli, ESI, 2011, 653; Id., *Pretese procedimentali come diritti fondamentali. Oltre la contrapposizione tra diritto soggettivo e interesse legittimo*, in *Diritto procedurale amministrativo,* 2012, 850 - 875; Id., *La dimensione pubblica dei diritti individuali. The coordination of administrative and judicial* enforcement *in the European Union and the emergence of common European law*, in *AIDA. Annali italiani del diritto d'autore*

do not need to be discussed here, first and foremost that for which public powers are functional to the satisfaction of the interest of the popular sovereign; and since many Constitutions - and above all the Italian one - recognize fundamental rights and do not affirm or constitute them, it must necessarily be assumed that fundamental rights are in the same constituent power.

In other words: if the Constitution, the exercise of constituent power and therefore, clearly, of sovereignty, recognizes the existence of rights as fundamental rights, it means that these exist in sovereignty; and in sovereignty they remain permanently.

If, therefore, fundamental rights remain in sovereignty, then public powers can only be functional to the full enjoyment of fundamental rights. Therefore, the notion of public interest is clear: the aim to be pursued by legislative, judicial, and executive bodies is to maximize the enjoyment of fundamental rights.

Consequently, all their decisions are not the result of a choice through the exercise of power, but of a rational and controllable judgement precisely in the light of maximizing the fundamental rights of the individual. This does not mean that decisions are not discretionary. In fact, fundamental rights may conflict with each other and balancing them will be necessary.

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della cultura e dello spettacolo, XXI, Milano, Giuffré, 2012, 338; ID., *I diritti sociali. Sui diritti fondamentali come esercizio della sovranità popolare nel rapporto con l'autorità*, *cit.*; ID., *Discrezionalità amministrativa, clausole generali e ordine giuridico della società*, *cit.*; ID., *Funzione e còmpito nella teoria delle procedure amministrative. Meta-teoria su procedimento e processo*, *cit.*; ID., *Sistematica legale e controllo razionale del potere. Osservazioni sul problema del metodo nel pensiero di Antonio Romano Tasso e considerazioni sulla base dell'ordine legale della società*, in *Diritto e processo amministrativo*, 2015, 803; ID., *Sull'ordine giuridico della società e la sovranità, cit.*; ID., *La legalità del migrante.* Status *della persona e compiti della pubblica amministrazione nella paradigmatica relazione tra migranti respinti, migranti irregolari, minori detenuti e pubblico potere*, in *Diritto e processo amministrativo*, 2016 (X), 393; ID., *Discrecionalidad administrativa y soberanía popular*, *cit.*; ID., *L'azione amministrativa tra libertà e funzione*, in *Rivista trimestrale di diritto pubblico*, 2017 (LXVII), 99; ID, *Discrezionalità amministrativa e sovranità popolare*, *cit.*; ID., *L'ordinaria violenza …., cit. ;* ID., *Persona, Società e pubblica amministrazione*, in *Amministrare*, 2019, 199 ; ID., *Organizzazione amministrativa come funzione della sovranità popolare*, in *Il diritto dell'economia*, LXV (2019), no. 98 (1/2019), 43; ID., *L'attitudine della giraffa. Per una teoria dei diritti sociali come esercizio della sovranità Nella stagione della crisi del welfare pubblico*, in M. FRANCESCA AND C. MIGNONE (eds.) *Finanza di impatto sociale,* Naples, Edizioni Scientifiche Italiane, 2020, 6.

However, two decisive elements follow from this: (*i*) firstly, since it is a rational judgement, it will be repeatable and open to criticism; (*ii*) secondly, a fundamental theoretical point has been reached: power does not derive from the inexhaustible source of sovereignty without any knowledge other than its external limits; its inner essence, its purpose, its nature are clear, and consist in the maximization of the fundamental rights of the individual.

If this theory is true, complexity is not resolved by a choice legitimized by the ownership of power, but by a judgement whose purpose is clear and is to maximize the rights of the individual.

2.3. Why is decision complex whenever it concerns exercise of power?

With reference to the decision involving the exercise of public power, therefore, the problems immediately emerge as to (*a*) the content of the assessment that is made by deciding (whether choice or judgement and how the power stands in relation to the decision) and (*b*) the fundaments of the power to decide.

These issues are central to the problem of complexity. Indeed, the decision is the act by which complexity is resolved through the adoption of one of the possible solutions.

It remains to be said for what factors the decision involving the exercise of a public power is always related to a complex problem.

First of all, this type of decision always concerns the solution to a complex problem because with respect to the exercise of public power, a multiplicity of interests (both public and private) emerges in relation to each other; the selection, consideration, evaluation and balancing of these different interests always involves complex assessments. Moreover, these interests very frequently arise as the rights of those affected by the effects of the decision; it must also be taken into account that these rights are guaranteed by law in different ways (e.g., the legal system protects inviolable rights, fundamental rights, simple rights with economic content and legitimate interests differently). The variety

of interests and the relationships between them, and the different ways in which the legal system guarantees the different rights involved in the decision, always results in a complex situation.

Secondly, the decision involving the exercise of a public power is almost always confronted with facts that are themselves complex. Not only are the interests that are impacted by the decision manifold and in an articulated relationship with each other, but also the material, concrete facts that the law envisages only in the abstract as the subject of the decision. The knowledge, evaluation and qualification of these facts is itself complex. This complexity directly involves another: specifically, the evaluation that the law incorporates into the norms of knowledge and concepts that belong to sciences other than law. When public authorities find themselves having to decide on a given situation, they will have to assume technical knowledge that fits into knowledge systems other than the legal one; however, the qualification of that knowledge will have to be made in the light of legal parameters; this poses the problem of technical evaluations, i.e. all those hypotheses in which various equally reasonable opportunities derive from non-legal knowledge; the decision involving the exercise of public power will therefore have to choose, *inter alia*, between several technical solutions that are all rational within the specific sphere of knowledge of that technique.

Thirdly, the decision involving the exercise of a public power is very frequently confronted with uncertain norms. Indeed, legal norms are often vague; within the set of norms applicable to a specific situation, there are always some that express general principles, as such susceptible to diversified interpretations; there are different criteria for interpreting the provisions of the law that can be correctly applied, leading to different solutions. Not only, therefore, are the interests diverse, the rights impacted by public decisions are not all guaranteed in the same way, the facts and technical knowledge are often complex, but

also the legal system itself generates complexities and uncertainties that it is up to the decision-maker to resolve.

2.4. Complexity and Decision. On discretion

In essence, therefore, the problem of complexity from the perspective of the decision involving the exercise of a public power coincides with the question of discretion (whether of the legislator, the judge or the administrative official). It is therefore necessary to refer to what will be discussed below with respect to discretionary power.

3. On the decision-making

In the exercise of public power, one cannot limit oneself to considering the complexity of the decision. The profile of the procedure (legislative and, above all, administrative) and of the process is no less relevant. The decision resolves complexity by preferring one of the possible solutions, but in the case of a decision that is an exercise of public power, it must always be preceded by a procedure or trial. Whereas in the realm of individual choice a procedure can be dispensed with, public power can only be exercised through a procedure or process regulated by law.

This is relevant for complexity analysis.

On the one hand, in fact, the procedure is a tool for reducing complexity, since the decision-maker - acting through proceedings or processes - takes the decision progressively, eliminating facts and interests assessed as irrelevant and evaluating others, progressively identifying the factual assumptions and legal reasons for the decision. On the other hand, however, since proceedings are the ideal place for facts, interests, oppositions or support from the interested parties to emerge, it is evident how it is the natural forum in which complexity arises. On another, then, the procedure is governed by rules that may be vague or contain principles, the application of which in the concrete case may present significant levels of complexity.

3.1. Are procedures neutral?

The first issue to be raised is that of the neutrality or otherwise of the procedures with respect to the decision.

It is clear, in fact, that if procedures are legal instruments in which decisions are made, certain features that belong to them will also be proper to the procedure. It is difficult to deny that (procedural) decisions are taken in procedures; whoever conducts the procedure, for example, will have to assess whether the participating stakeholders or the parties in the process have the legitimacy to take part in it, whether the acts produced by the parties (private or public) are relevant, timely, and proposed in the manner prescribed by the rules applicable to the procedure. Thus, decisions are made. These are procedural decisions, which relate precisely to the procedure.

Substantive decisions are also made, however. In fact, in the course of the procedure (or trial), interests, facts, specialised and technical knowledge are selected; the person conducting the procedure, therefore, may emphasise some circumstances and leave others in irrelevance; he may acquire specialised or technical opinions or verifications, or exclude the need for them; and so on.

Procedures, therefore (i) are functional to the decision, but in the course of the procedures (ii) procedural decisions are made, concerning the proceeding, and (ii) substantive decisions are made, e.g. capable of predetermining or guiding the decision.

Procedures, therefore, are abstract legal techniques that, however, directly affect the decision; they serve to decide, but they also contain preliminary decisions that can condition the decision. They are not, therefore, neutral.

3.2. On procedural decisions

On the side of procedural decisions, more or less all legal systems of Western democracies are familiar with rules of impartiality, fairness, due

process ([23]). These are rules whose function is to ensure that the procedure is conducted in a complete, impartial manner, adequate to acquire facts, interests, positions of the parties, etc. The fairness of the proceedings is thus functional to achieving a "just" solution to the complex problem.

3.3. On substantive decisions. The public interest

More difficult, however, is the issue of substantive decisions. Their assessment is only possible in the light of the function of the procedure. If the procedure is functional to the expression of a judgement - as is my opinion ([24]) -, then the differences between procedure and process are limited. If, on the other hand, one is convinced that administrative and legislative procedure are functional to a choice, the differences increase.

This issue has been explored in greater depth with regard to administrative procedure. Traditional theory constructs the administrative procedure as a sequence of tasks and operations; in these terms it appears to be a pure technique; the prominence of the actions carried out previously condition the subsequent ones, on the model of the protracted process. This explanation does not help to resolve the complexity and is unable to clarify the functionality of procedural decisions to the final one: it is a purely mechanical construction consistent only with the idea that procedural decisions and the final one are exercises of power that express the will of the public official.

3.4. Administrative procedure and performance of the function (in a legal sense)

A different explanation of administrative procedure has become widely established - at least in Italy. This is the theory of administrative procedure as a function in the legal sense. It is derived from Kelsenian structuralism and de-

23 See, T. SEARCHINGER, *The Procedural Due Process Approach to Administrative Discretion: The Courts" Inverted Analysis,* 95 *Yale Law Journal* 1017 (1986); R. M. LEVIN, *Administrative procedure and Judicial restraint*, *Harvard Law Review Forum*, 129 *Harv. L. Rev.* 1890 (2016).

24 See, for a wider discussion, L. R. PERFETTI, *Funzione e còmpito nella teoria delle procedure amministrative. Meta-teoria su procedimento e processo*, in *Diritto proceduale amministrativo*, 2014, 53.

veloped, therefore, in opposition to functionalism. This theory ([25]) is connected with the idea that sovereignty belongs to the system and not to the State or the people; consequently, just as the *Grundnorm* confers validity on rules (in a structural, not functional way), in the same way, the procedure confers validity on the transformation of power into a decision. In my view ([26]) this explanation utilises the theories of the transformation of the concept of substance into that of function ([27]) and that of overcoming causality through function as a correlation of phenomena ([28]). Consequently, it theorizes the administrative procedure as the performance of a function in relation to an objective.

In this scheme, therefore, the administrative procedure is a legal mechanism characterized by the participation of all interested parties and all are on an equal footing, with no primacy of the deciding authority until the conclusion of the procedure; respect for the adversarial process and all the rules of the procedure are conditions for the validity of the final decision. What is most relevant to the problem of complexity is the subjective point of view. From the subjective point of view, the function is primarily aimed at satisfying the interest of the subject exercising it, i.e. the authority ([29]). Administrative procedure, therefore, is not the place where a concatenated series of events is accompanied by (procedural) power decisions with a view to the final (power) decision; rather, it is a function in the legal sense, with full cross-examination and participation, a duty to provide information and justification, materially no different from the process, and compliance with the applicable principles and rules are a condition for the validity of the final decision; however, in subjective terms, the function is directed to satisfying primarily the public interest. Thus, all interests involved in the administrative procedure are ordered on the

25 F. Benvenuti, *Funzione amministrativa procedimento e processo*, in *Rivista trimestrale diritto pubblico*, 1952, 118; Id., *Funzione. Teoria generale,* in *Enciclopedia giuridica,* 1989, *ad vocem*.

26 L. R. Perfetti, *L'azione amministrativa tra libertà e funzione, cit*.

27 E. Cassirer, *Substanzbegriff und Funktionsbegriff. Untersuchungen über die Grundfragen der Erkenntniskritik*, Berlin, Cassirer Verlag, 1910.

28 E. Mach, *Erkenntnis und Irrtum. Skizzen zur Psychologie der Forschung*, Liepzig, Bart, 1905

29 See, F. Benvenuti, *Funzione amministrativa, procedimento, ..., cit*., 127

basis of this priority. The assessment of complex facts, the complexity of conflicting or not easily coordinated interests, complex procedural decisions and the orientation of substantive decisions are primarily directed to the public interest.

3.5. Administrative procedure and public interest

The administrative procedure understood as a function in the legal sense (but the theory of function also explains the process and legislative procedure) constitutes enormous progress. The result achieved by this theory is to make the entire decision-making process legally relevant; therefore, interested parties will be able to claim rights with regard to compliance with procedural rules, represent interests and claims, and assert liability for wrongs suffered. These are elements that increase complexity - because all the relevant facts and interests can represent themselves adequately and in dialectic with each other - and, nevertheless, make the final decision more transparent, democratic, accurate and thus stable. From the perspective of the function in the legal sense, procedural decisions and the final decision are not pure choice, merely an expression of will.

But the problem remains that of not explaining what the public interest is; if the main interest to be satisfied is that of the proceeding authority but this remains not precisely identified, the result is that complexity will be ordered in the light of an unclear, opaque criterion, destined to be clarified *ex post*, in a case-by-case logic. Even the idea that the public interest is defined by the rule of law that assigns the power ([30]), does not solve the problem: the law that assigns a power to the public administration - normally - does not define the interest to be pursued at all; in the very rare cases in which this happens, the identification takes place with vague or generic terms, which retain a great

30 See, F. BENVENUTI, *Funzione amministrativa, procedimento, ..., cit.*, 127

deal of uncertainty. It is no coincidence that the courts use the public interest clause, assigning it meanings that vary case-by-case ([31]).

In order to give content to the term "public interest", a parameter external to public power and discretion must be identified. In the interpretation proposed here, it is the maximization of the rights of the individual ([32]): if sovereignty is retained in fundamental rights; if the portion of sovereignty that is delegated to the State is a function of the rights of the individual; if public administration is a function of the sovereign, and therefore of the people, e.g. it is a function of the people for the maximization of individual rights; then the public interest is the interest in the maximization of individual rights. Once we have clarified what the public interest is, we will have found the criterion for resolving complexity in procedures. And this interest coincides in legislative and administrative processes and procedures because it is always the interest of the recipients of the decision by which public power is exercised. Since the subjective interest is not that of the one who acts but coincides with the balancing of that of the addressees, the interest becomes objective ([33]).

The solution to complexity, therefore, lies in the most accurate possible assumption of facts, knowledge, interests, and rights and in the ordering of all this in the interests of the recipients, balancing the fundamental rights involved in a rational manner.

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31 See, L.R. Perfetti, *Cerbero e la focaccia al miele. Ovvero dei pericoli del processo amministrativo e delle sue mancate evoluzioni*, in *Il Processo*, 2020, 429.

32 See, P. Forte, *Enzimi personalistici nel diritto amministrativo*, in this *Journal*, I (2017), 163.

33 In this perspective, the issue of the relationship between administrative procedure and the objectivization of power arises. The problem can be observed both from its original Weberian inspiration (see, M. Weber, *Die "Objektivität" sozialwissenschaftlicher und sozialpolitischer Erkenntnis*, in Archiv für Sozialwissenschaft und Sozialpolitik, XIX (1904), 22. and ID, *Der Sinn der "Wertfreiheit" der soziologischen und ökonomischen Wissenschaften* (1917), in *Gesammelte Aufsätze zur Wissenschaftslehre*, Tübingen, Mohr, 1922 ; Id, *Wirtschaft und Gesellschaft*, Tübingen Mhor, 1921/22), than in the contemporary debate on objectivism (see, R. Nozick, *Invariances: The Structure of the Objective World*, Cambridge, Harvard University Press, 2001); for an Italian view in administrative procedure perspective, see M. Bellavista, *Oggettività giuridica dell'agire pubblico*, Padova, Cedam, 2001.

SECTION THREE

4. How to deal with complexity in context characterized by the exercise of public powers

As clarified in the opening, the issues raised by the call-for-papers can be centered around the complexity of decisions in relation to (i) rules, (ii) decision-making (procedures), (iii) the decision itself.

(A) The issue that seems central is that in legal thought, for the vast majority, the uncertainty of rules, the complexity of procedures and decisions is resolved through public power, the choice of the official who has that power. As such, the solution given to complexity is only partially rational and controllable.

The assumption of this way of reasoning is that the authority, the State, is the holder of sovereignty, e.g., of an inexhaustible capacity to command in the face of public needs and interests. The legal theories of the last two centuries (first and foremost Rule-of-Law) have set limits, procedures, rules, counterweights, to State sovereignty; but they have never denied it. The essence is that the solution to the complexity of rules, interests, facts, and rights affecting the decision comes about through the exercise of power.

B) The argument in this paper is the opposite. Contemporary constitutions assign sovereignty to the people. The State, the public authority has only that portion of sovereignty that the people transfer through representation. But in transferring it, it retains the decisive portion of sovereignty itself, which permanently resides in fundamental rights. Indeed, the constitution does not create these fundamental rights, but "recognizes" them; as such, they exist even without the legal order. Consequently, the powers transferred to the State by the people are only in the service of the sovereign (the people). Since the people retain fundamental rights in the permanent exercise of sovereignty, public power is legitimate only in function of those rights. The task (or duty ([34])) of

34 See M. MONTEDURO, *Doveri inderogabili dell'amministrazione e diritti inviolabili della persona: una prospettiva ricostruttiva*, in this *Journal*, VII (2020), 543; P. FORTE, *I doveri del cittadino-sovrano: un*

public power is the maximization of rights. The resolution of the complexity of rules, interests, facts, rights that affect the decision takes place by means of a judgement that, by balancing possible conflicts with a view to maximizing individual rights, achieves the public interest purpose - which is precisely to ensure the full enjoyment of individual rights.

These are two radically different perspectives, which can therefore be declined with respect to the three thematic cores of the call-for-papers.

4.1. Dealing with rule's complexity

The difference between the two approaches appears very clearly when the decision is complex due to the legal system (vague rules, conflicting principles, antitheses, etc.).

In both theories, it will be necessary - making the best use of hermeneutics - to resolve complexity without supplementing the rules with discretionary assessments, in order to arrive at a single acceptable solution.

If, however, even after hermeneutic activity, more than one legitimate solution presents itself, then the two theories diverge.

In common opinion, the discretion that remains triggers power; faced with complexity that has no certain solution, the holder of power chooses; this choice is very much open to criticism. It is the will with which power is exercised that reduces the various possibilities to one.

In what (not only) I argue in this paper, discretion, on the other hand, triggers the official's duty to direct the decision to the maximization of individual rights, with a rational, reasoned, controllable judgement, in which the public interest is not the authority's, but society's objective interest in the enjoyment of rights.

The complexity of the legal system, therefore, is resolved through *(i) a* choice exercise of power, or *(ii)* rational and controllable judgement, the pur-

presupposto per i diritti e le libertà, in *Rivista di studi politici*, 2010, 37; L. R. Perfetti, *La pubblica amministrazione come dovere*, in *Scritti per Franco Gaetano Scoca*, Naples, Editoriale scientifica, 2020, 3965.

pose of which is to maximize the enjoyment of individual rights, e.g., through the best choice over the parameter.

The theory of sovereignty that I am again proposing has radically different effects from the traditional theory of public power.

4.2. Dealing with decision-making complexity

In the procedures governed by law that the authority must necessarily follow in order to make a decision (legislative, administrative, judicial), complexity arises, essentially, from (*i) the* rules, (*ii) the* facts, (*iii)* the interests protected by law (and, therefore, rights).

(**I**) As to the complexity that arises in the application of the rules (procedural and substantive) of the procedures, the issues are the same as those already addressed in section 4.1. above, so it is not worth repeating.

(**II**) As for the complexity arising from the facts, however, it is useful to clarify the assumptions.

Several hypotheses may arise:

a) the legal rule is certain, and the reconstruction of the fact is uncertain (the law provides "if fact "x" is true, then consequence "y", where "x" is the subject of the investigation in the proceedings but cannot be determined with certainty).

b) the legal rule is uncertain, and the reconstruction of the fact is certain (the law provides "if fact "x" is true, then consequence "y", where "y" cannot be determined with certainty).

c) both the legal rule and the reconstruction of the fact are uncertain (the law provides "if fact "x" is true, then consequence "y", where both "x" and "y" cannot be determined with certainty) and the law intends precisely to regulate situations that are difficult to foresee (such as emergencies) in an open or imprecise manner.

d) both the legal rule and the reconstruction of the fact are uncertain, e.g., at least one of them is uncertain (the law provides "if fact "x" is

true, then consequence "y", where either "x" or "y" or both cannot be determined with certainty) and the law does not intend to derogate from the principle of legality, so that uncertainty is not desired.

e) both the legal rule and the reconstruction of the fact are certain (the law provides "if fact "x" is true, then consequence "y" is true", where both "x" and "y" are determinable with certainty).

For the purposes of this paper, I cannot devote myself to demonstrating the non-existence of hypothesis ***(e)*** ([35]).

Hypothesis ***(b)*** is irrelevant here because it coincides with the problem addressed in section 4.1.

The only relevant hypotheses, therefore, are (*a)*, (*c)* and (*d)*.

Hypothesis ***(a)*** is the one in which the fact is objectively uncertain and yet (*i*) it is deliberately not described by the legal rule in an uncertain manner - because otherwise one would be in hypothesis (*c)* - and (*ii*) it is not described by the rule in such a way as to be debatable - because otherwise one would be in hypothesis (*d)*.

Hypothesis (*a)* is the one for which uncertainty arises from knowledge of the fact: these are circumstances that are not adequately knowable or in respect of which technical or specialized knowledge cannot adequately define it. As in the case of uncertainty arising from legal rules, all available cognitive resources must be engaged in order to reach an acceptable solution.

If, despite these insights, the fact remains equivocal, then again there is a divide. In fact, (*i)* according to established theories of discretion, the holder of public power, faced with uncertainty about the fact, will decide by exercising power in the public interest; this thesis, almost unanimously shared, exposes itself to the radical criticism that we would be faced with the creation of truth using the power of authority.

35 Therefore, I completely agree with F. Follieri, *Administrative decision and binding act*, in *Federalismi*, 7/2017, 1.

As I see it, however, *(ii)* in the face of inadequate knowability of fact, there is no public power. In fact, the power is necessarily assigned by a rule (principle of legality), which describes a case; if the fact cannot be adequately traced to the case described by the legal rule, the power provided by that rule cannot be exercised.

So: either there is no uncertainty (because better specialist knowledge makes it possible to overcome it), or there is no public power.

By hypothesis ***(c)***, I mean to refer to those hypotheses in which the law describes the fact (and possibly the power device) in a deliberately uncertain manner. The typical case is that of emergency powers. But that is not all: there are also hypotheses, albeit very objectionable from the Rule-of-Law point of view, in which the rulemakers introduce rules that do not adequately identify the factual prerequisites for the purpose of introducing atypical or in any case largely discretionary powers (this is frequent in economic policy - such as the case of golden powers - or in the regulation of certain sectors - such as the banking sector).

The characteristic feature of this hypothesis is that the facts are complex as in the others, but the legal rules - instead of simplifying them by specifying them - take them into the text of the law precisely as complex and undefined. Just think of the "dangerous" fact that is followed by emergency measures. These public powers (even very invasive ones) are triggered by completely undefined facts, of which we only know that they can bring about an effect (the danger), described generically.

The experience of the pandemic has provided much food for thought on this subject ([36]).

Here, too, there is a clear alternative. According to the widely accepted orientation, the emergency is functional to *salus rei publicae*, to the preservation

36 See, for discussion and references L.R. PERFETTI, *Massnahmevorschriften and Emergency powers in contemporary Public Law*, in *The Lawyer Quarterly*, X (no. 1/2020), 23; ID., *Sullo statuto costituzionale dell'emergenza. Ancora sul diritto pubblico come violenza o come funzione dei diritti della persona*, in this *Journal*, VII (2020), 51.

of the State and the political and legal order; in my view ([37]), on the other hand, the function of emergency powers is only to protect the fundamental rights of the individual when they are put at irreparable risk by unforeseen circumstances.

Hypothesis ***(d)*** is the most common and discussed hypothesis. It is the hypothesis for which the legal rule and/or the reconstruction of the fact are uncertain without this depending on a choice by the legislature.

Simply, both the determination of the fact and the definition of the legal rule are debatable.

In this case, according to the traditional approach, dubitability is resolved by a choice of the authority, a very limited discretionary assessment.

From my point of view, on the other hand, it is a rational and repeatable judgement in court, through which uncertainty must be resolved in the light of an external parameter with respect to the uncertainty that characterizes the factual situation or the legal rule; it is, in the constitutional perspective of the sovereignty of the people, the maximization of individual rights, in the balancing of them.

(**III**) As to the complexity arising from the consideration of interests.

It has already been said that the interests of the parties (public or private) to the proceedings emerge in the context of the procedure; the measure, then, affects a variety of interests. The dynamics of the interests involved in the procedure and the measure is certainly complex.

Normally, a simplification is used, which in my view leads to an error. It is commonly Stated that interests are ordered by legal rule. The problem is that both the procedure and the measure are governed by a set of legal rules, both certain and uncertain, and general principles. Rules and principles protect various interests, with the consequence that the set of general rules and princi-

37 My opinion is broadly exposed in L.R. Perfetti, *Sullo statuto costituzionale dell'emergenza. Ancora sul diritto pubblico come violenza o come funzione dei diritti della persona*, cit.

ples that apply in the specific case do not order interests but propose a multiplicity of orders.

In other words, the system is not [*rule*] =ordering=> [*plurality of interests*].

Rather, the normal situation is [(plurality of *rules*) and (plurality of *principles*)] <=> [*plurality of interests*].

Very rarely does it happen that the law expressly States a hierarchy of principles, the rule of relationship between them and, therefore, orders interests. A recent example, in Italian law, is legislative decree no. 36 of 31 March 2023 - the Public Contracts Code - which enshrines a system of principles, their hierarchical order and the rules of coordination; the result is an ordering of interests.

Normally, however, this does not happen. A specific legal case will be regulated by various laws and regulations, dictated for different purposes, with different systematic order, with different general principles.

This gives rise to a hermeneutic problem on a strictly legal level.

Regardless of the hermeneutic question, however, the various rules and principles bring out the most diverse interests and ensure their legal protection. Let us take, for example, the location of a large public work: to this decision and in the course of the administrative procedure that precedes it, various regulatory systems will be applied (environmental, health, landscape protection, technical rules on geological matters, engineering design, budget for its financing, etc.), falling within the competence of different bodies (Superintendencies, Municipalities, Provinces, Regions, State, various agencies and public bodies in different specialized fields), designed to protect rights and claims in different areas.

The complexity of interests is not ordered by the legal rules; rather, the protection that the legal system ensures to these different interests and rights, in different spheres, converges on the relevant case, without connecting or hierarchical criteria.

The result, according to the ordinary approach, is that the public authority proceeding and deciding orders the interests - in the light of the rules - through its choice.

The typical characteristic of discretion is precisely that of balancing interests, ordering them through a decision of power; this decision of power is not repeatable or open to criticism in court, unless it is manifestly illogical or factually incorrect.

My view is quite different. Rights and interests emerge in relation to the public interest to be pursued by those who proceed and decide; but the public interest is none other than the interest in obtaining in practice the maximization of individual rights in balancing them out. It is not an interest of the authority that proceeds and decides. On the contrary, the authority is only functional in maximizing the rights of the interest-bearing citizens.

Thus, the public interest is not an opaque concept, which is only clarified by the will, a will that is expressed in the exercise of power (to choose the preferred solution). The public interest can be known by anyone, in the course of the proceedings - where interests emerge - and at the time of the decision; this is because the content of the public interest (which is the maximization of individual rights in balance with each other) is external to the authority, it is up to individuals and their rights, so that it is verifiable, reproducible and contestable in court.

4.3. Dealing with complexity of decision itself

The decision that it is the result of the exercise of public power is necessarily complex (mentioned above for what reasons).

The problem is in the light of which criterion and with which instrument one "cuts off" all other possible decisions, in order to actually take one of them. As already mentioned, the most widespread idea is that the authority makes a choice, exercising public power. In other words, the public official exerci-

ses an (almost unquestionable) power to choose the content of the decision, which is imposed on everyone else.

My idea, on the other hand, is that the public interest - i.e. the criterion by which the official decides - is that of maximizing individual rights, a criterion extraneous to authority, which the official must follow by applying it to the interests at stake in order to evaluate them and balance the inviolable rights so as to reach the best possible decision in the light of this criterion; it is a judgement, not a choice, so it is rationally knowable and, therefore, contestable.