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ADMINISTRATIVE LAW SEMINARS AT ROMA TRE LAW SCHOOL (29-30 MARCH, 23-24 MAY, 2022)

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1. The activities of Professors Chevalier and Eliantonio visiting the Department of Law

This Report will focus on the seminars given by Professors Emilie Chevalier and Maiolina Eliantonio for Roma Tre Ph.D. students.

Emilie Chevalier, Professor of Public Law at the University of Limoges, France, visited the Department of Law of Roma Tre University from Monday 21st March to Thursday 31st March 2022. During her visit, Professor Chevalier took part in the activities of the Department of Law contributing to its cultural and scientific development with her deep knowledge of Public, Administrative and Comparative Law.

In particular, Professor Chevalier gave two lectures for the students of the courses on Administrative Justice and on Health Law, taught by Professor M.A. Sandulli and Professor F. Aperio Bella, respectively. The lecture titled «The French administrative judge and the health crisis (focus on interim measures)» focused on the management of the COVID-19 emergency in France and the use of precautionary measures made by French Administrative Courts. This lecture dealt with multiple problems inherent

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to Administrative Justice and Health Law. The students and the scholars who attended the lecture had the opportunity to reflect on the effectiveness of the French Administrative Justice during the pandemic crisis, noticing the similarities and the differences between the French and the Italian systems. The other lecture, titled «The access to administrative Courts in France (focus on legal standing)», dedicated to the the students attending the Administrative Justice class, concerned the most recent developments in the matter of legal standing and interest before French Administrative Courts, and was dedicated to the students of the course of Administrative Justice. Both lectures were given in English, in order to allow a broader participation of the public and to overcome language barriers.

Professor Chevalier also gave two seminars in English for Ph.D. candidates in Legal Disciplines, with the participation and coordination of Professor Sandulli and Professor Aperio Bella. The topics of the seminars were «Transnational Administrative Law» and «Strategic Litigation». In fact, Professor Chevalier is a profound connoisseur of these themes, upon which she has a privileged look as a member of the steering committee of the Transnational Administrative Law Network and as the co-editor of the book «Contentieux Stratégiques: Approches sectorielles», published in 2021.

Mariolina Eliantonio, Professor of Comparative Administrative Law and Procedure at the University of Maastricht visited Roma Tre Law Department from Monday 16th May to Thursday 26th May 2022. Professor Eliantonio, in this visiting period, took part in the Course of Administrative Justice taught by Professor M.A. Sandulli, gave two seminars for Ph.D. students in Legal Disciplines and participated in the activities of the Department of Law.

In particular, Professor Eliantonio on May 17th gave a lesson, in the Course of Administrative Justice, titled «Il rapporto tra Corte di Giustizia e giudici amministrativi». She gave also on May 18th the final lesson of the Course of Administrative Justice with Professor Sandulli and Professor L. De Lucia from the University of Salerno. The lesson titled «L'Europeizzazione della giustizia amministrativa» focused on the European integration process of the administrative justice among Member States. In this lesson Professor Eliantonio analyzed different issues: the role of European jurisprudence on the setting of minimum requirements for integration; the role of national judges in the application of these requirements; the

relationship between national procedural law and the respect of minimum standards; the importance of principles of effectiveness and judicial effectiveness in the uniform application of the European law.

During her visit, Professor Eliantonio also gave two seminars for the Roma Tre Ph.D. School in Legal Disciplines with participation and coordination of Professor Sandulli and Professor Aperio Bella. The topics of the seminars were «Judicial review of administrative action: the case of soft law» and «Comparative approach on judicial review of administrative action: Method». Professor Eliantonio is a great expert of these themes. In fact, she is, inter alia, co-editor of the book «Case, Materials and Text on Judicial Review of Administrative action», published in 2019.

2. *The seminars given by Professor Chevalier: the seminar on «Transnational administrative law»*

The seminar focused on the research carried out by Professor Chevalier on transnational administrative acts and their effects. Professor Chevalier has long studied this topic indeed, with particular regard to the influence of EU law. Moreover, as part of the Transnational Administrative Law Network, she is currently working on a project aimed at the publication of a «Traité de droit administratif international» by the end of 2022.

Professor Sandulli introduced the event, highlighting that the topic of the seminar, even though already known in the past, has taken on new relevance nowadays: transnational effects of administrative acts such green pass or driving licenses are evidently of widespread interest at the present.

The presentation was divided into two parts: the first part concerned the identification of transnational administrative acts, while the second part revolved around the judicial review of this type of acts.

Starting off by the identification of transnational administrative acts, Professor Chevalier stressed the importance of distinguishing them from composite administrative acts. The two categories may overlap, but they do not coincide. Transnational administrative acts imply an horizontal relationship between legal orders, while composite administrative acts are the results of a vertical interaction of a national legal

order with a superordinate legal system (e.g. GMO authorisations issued in the EU as the outcome of a composite procedure with the participation of European and national authorities).

A second preliminary observation was that transnational effects can be produced within the territory of a single State. For instance, in composite States like Germany or the U.S.A., or even in Spain, the administrative acts of a Land, Federated State or Comunidad Autónoma may well produce effects elsewhere in the territories under the State sovereignty.

Finally, transnational administrative acts differ from international administrative acts. The latter are adopted by international organisations or institutions, while the former derive from a State or infrastatal authority.

As for the criteria of identification of transnational administrative acts, Professor Chevalier observed that it would not be possible to refer only to the notions adopted by a national legal order, as they may not be the same in different legal orders. Anyways, Professor Chevalier proposed to utilize the organic criteria, according to which the act in question must be adopted by an administrative authority (or even better, as suggested by Professor Sandulli, by a subject entitled to the use of public powers), together with the formal criteria, according to which regulatory acts, point-like decisions and public contracts can be considered transnational administrative acts. However, it is fundamental to ascertain the transnational dimension of the act. This dimension exists in the presence of a 'foreign' element, depending on the origin of the act, on its effects, or on both. The foreign element may be the reason/ground of the act. It is the case of acts of transnational imputation, whose adoption depends on facts or legal situations existing outside the territory of the authority that enact them. An administrative act may be considered to have transnational effects also if it has consequences in the territory of other States, different from the State of the authority that enacted it. The foreign element is thus the consequence of the enforcement of the act.

According to EU law, the recognition of the efficacy of an administrative act adopted by a Member State's administrative authority is often automatic, on the basis of the mutual recognition principle. On this regard, Professor Chevalier mentioned the famous «Cassis de Dijon» case, whose decision was based on the application of the mutual recognition principle. Other examples of acts automatically recognised in the

EU are diplomas and Erasmus exams. In addition, Professor Chevalier recalled how secondary EU law usually provides for cases of administrative cooperation between authorities of different Member States, obliging the proceeding authority to take into consideration the information produced by the other authorities. Outside the EU, the production of the effects of an act in a legal order different from the one in which the act was adopted depends either on the unilateral will of the State or on the adoption of an international convention. In response to an observation of Professor Aperio Bella, Professor Chevalier clarified that the rest of her speech would not revolve around the so called «authorisations in sequence», that is authorisations subject to an expressed subsequent recognition.

The focus on the the judicial review upon transnational administrative acts was introduced with an emblematic example: the review of the transboundary consultation procedure leading to an environmental impact assessment. In this case, we have an act of transnational imputation (the EIA), adopted in State A, which is grounded on the results of the consultations that took place in State B. What about the judicial review in this case? Can the judge of State A review the process of consultation and its results? According to the sovereignty principle, the answer should be no. In general, the judge of a certain State is never allowed to annul an act adopted in a different State, as a consequence of the aforementioned principle. However, even if the judge could review that process, which law should be applied (national law of State A or B)? Anyways, the judge of State B may well decline its jurisdiction on the consultations process, as it is merely preparatory. A possible solution *de iure condendo*, suggested by Professor Chevalier, would be the provision for a preliminary horizontal ruling, which means that the judge of State B takes part in the process before the judge of State A.

At the EU level, such a gap in the judicial protection is not consistent with the right to an effective judicial protection and with the non-discrimination principle. Therefore, a solution must be found in Professor Chevalier's opinion. On this regard, Professor Chevalier explained that the Court of Justice and, to a certain extent, the French Council of State, opted for the solution that the national judge of the State of adoption of an act can review the transnational part of a transnational administrative act under the EU law.

In particular, the French Council of State, in the Forabosco ruling (9 June 1999,

n. 19034), concerning the functioning of the Schengen information system and the validity of a denial issued by the French authority to non EU-citizens that submitted an application for residence permits, stated that the French administrative judge is competent (has jurisdiction) to evaluate whether the alert sent by another Member State authority is justified or not according to the Schengen information system (SIS) rules. Therefore, French administrative courts have jurisdiction to review the grounds of the decision according to secondary EU law. On the contrary, in the *Catrina* ruling (23 May 2003, n. 237934), the Council of State held that the French administrative courts can not review the lawfulness of the procedure conducted in another Member State which led to the registration of the applicant in the SIS. In this case, in fact, the EU rules are not applicable and the French administrative Judge could not apply the procedural law of a different State.

As for the EU jurisprudence, Professor Chevalier mentioned two cases as well. The first one is the *Berlioz* case (Case C-682/15), in which the ECJ held that art. 47 of the Charter of Fundamental Rights grants the right to challenge the legality of a decision which imposed a pecuniary penalty for failure to comply with an administrative decision to provide information ('information order') in the context of an exchange between national tax administrations pursuant to Directive 2011/16 on Administrative Cooperation in the Field of Taxation. The Court stated that national courts have jurisdiction to review the request of information adopted by the administrative authority of another Member State, thus ensuring the correct enforcement of EU law. More in detail, the Luxembourg court was held empowered to verify the «foreseeable relevance» of the information requested by French authorities, in order to assess whether the request was legitimate under Directive 2011/16.

In the *R.N.N.S. and K.A.* ruling (Case C- 225/19 and C-226/19), the Court of Justice held that the obligation for Member States to guarantee a right to an effective remedy, within the meaning of Article 47 of the Charter of Fundamental Right, against a decision refusing a visa means that the judicial review of that decision must cover the legality of the denial, taking into account all of the elements in the file, both factual and legal, on which the competent national authority based that decision, in accordance with Article 32 of the Visa Code. Nevertheless, the review of the merits of the objection to the issuing of a visa raised by another Member State in the context of the prior

consultation procedure provided for in Article 22 of that code, is reserved to the national courts of that other Member State or Member States. Despite the invocation of art. 47 of the Charter, Professor Chevalier observed that the Court of Justice provided for a solution which is not consistent with the right to an effective judicial protection, because its application would impose migrants to go before at least two different courts in two different States.

In conclusion, Professor Chevalier stressed that even the Court of Justice follows a case-by-case approach, as the mutual recognition principle has different implications according to the subject/matter concerned. It would be useful, concluded Professor Chevalier, to identify some procedural standards, to grant the effectiveness of the judicial protection at least in the EU Member States against transnational administrative acts.

2.1. *The seminar on «The Administrative Judge and Strategic Litigation»*

The second seminar given by Professor Chevalier revolved around the phenomenon of strategic litigation. Professor Sandulli introduced and coordinated the event, Professor Aperio Bella intervened and other participants contributed to the debate.

First of all, Professor Chevalier explained that the French expression «*Contentieux stratégique*» (strategic litigation) refers to the attribution of political relevance to certain cases. In this sense, the appellants may decide to bring their cases before any court, included the administrative courts, in order to give them a wider relevance in the eyes of the public and of the institutions, regardless the chances of victory. By doing so, the process is exploited for the pursuit of different purposes, (e.g. to stimulate a legislative reform).

«*Contentieux stratégique*» means something different from «*stratégie contentieuse*» (strategy of litigation), even though the two expressions may sound alike. The latter, indeed, refers to the reiteration of an action by an individual before a judge, leading to a form of 'justice harassment'.

Professor Chevalier identified in the «judicialisation» of modern societies one of the main factors favouring the expansion of strategic litigation. In particular, the

administrative judge, in France like in Italy (as Professor Aperio Bella confirmed), has strongly contributed to the promotion of fundamental rights and to the development of new remedies, becoming the voice of social changes, and not only of the law.

Professor Chevalier then observed that grey areas exist, in which it is complex to assess whether we are in the presence of strategic litigation. For instance, what is the difference between strategic litigation and judiciary activism? Shall any action brought by a NGO be considered as strategic litigation? In order to answer these questions, and to better circumscribe the studied phenomenon, Professor Chevalier suggested to use three different criteria.

According to the organic criteria, strategic litigation occurs only before a judge. In this sense, strategic litigation implies the authority and legitimacy of a judge. On the contrary, as a rule, no strategic litigation occurs before an arbitrator or in case of alternative dispute settlement mechanisms.

The substantial criteria concerns the content of the action. In most cases, the action aims at finding the failure to act by public authorities, ensuring the effectiveness of the law. Usually the action in question is a transformative action, which is an action whose aim is the transformation of the law, in general by the annulment of a norm. The strategic action may also be a protective action, aimed at the effective application of rights to vulnerable citizens or even a defensive action, ensuring the status quo of the law through the judicial interpretation.

Finally, the subjective criteria gives relevance to the intention of the party/appellant, who brought the action as a result of a conscious process of mobilisation of the judge in order to 'desingularise' the dispute. In other words, the intent of the party is the promotion of an *erga omnes* scope of the action, transforming an individual case in a strategic litigation a posteriori. The Case of Vincent Lambert, decided by the French Council of State on June 24, 2012, on the matter of euthanasia, is emblematic. The association «Union Nationale des Associations de Familles de Traumatisés crâniens et de Cérébro-lésés» decided to intervene in the process concerning the decision of the medical team to stop the treatment, starting a question *prioritaire* de constitutionnalité with the purpose of obtaining a certain interpretation of the law by the judge, which would put patients such as Mr. Lamberti outside the scope of the law invoked before the court.

Migration law is an exemplary field for strategic litigation. As Professor Chevalier explained, the law usually does not take sufficiently into account the vulnerability of migrants, thus failing to grant the access to justice and the effective protection of fundamental right in this sector. In response to such critical issues, there is a relevant recourse to strategic litigation by associations for the protection of migrants. Such associations act as organised or ‘collectivised’ applicants, with a pro-active approach and specific knowledge of the internal functioning and acts of the administration, as they can usually count on an experienced team of lawyers. Professor Chevalier reported some cases concerning the activity carried out by the french association GISTI (*Groupe d’information et de soutien des immigrés*), which testify how sometimes associations intervene in the process to give visibility to an unjust gap of legal protection concerning migrants’ fundamental rights, while in some cases, they are in not even visible, as they only back the action of a natural persons, granting them technical and juridical assistance.

Professor Chevalier clarified that no judge (e.g. administrative, civil, constitutional) is a priori excluded from strategic litigation. In case of more than one judge having jurisdiction for the same case, finding the right judge at the right time is a matter of processual strategy to find the right judge at the right moment.

At this point, Professor Chevalier presented some emblematic cases of strategic litigation in climate law. She mentioned the Urgenda rulings in Netherlands, resulting from the coordinated action of civil society. The Dutch courts have affirmed that the State has failed to comply with its duty of care by not taking all possible measures to combat climate change, therefore ordering the Dutch State to intensify its efforts and to take additional measures. In Germany, strategic litigation led the Constitutional Court, on March 24, 2021, to declare the Federal Climate Change Act incompatible with fundamental rights insofar as they lack provisions on the updating of reduction targets for periods from 2031, ordering the legislator to enact provisions by no later than 31 December 2022 on the updating of reduction targets for periods from 2031 as set forth in the reasons of the decision.

Professor Aperio Bella noted that the Italian Council of State, within the decisions no. 17 and 18/2021 of the Plenary Assembly, denied the intervention in the process of different associations of beach concessionaires, thus impeding the

desingularisation of a dispute which surely had political implications.

Professor Chevalier mentioned some other climate cases resulting from strategic litigation, including the «Notre Affaire à tous» ruling given by the *Tribunal Administratif de Paris* on February 3rd, 2022. Some environmental associations brought different actions before the mentioned Court, holding the French Government responsible for the damage resulting in the modification of the atmosphere and its ecological functions. In particular, the associations claimed the French Government had failed to act in respect to climate change. The administrative court of Paris ascertained the existence of ecological damage linked to climate change, yet stating that the French Government responsibility is limited to the non-compliance with obligations assumed at the international level in terms of greenhouse gas emissions reduction. As for the reparation measures, the Court specified that their content is reserved to the free discretion of the Governemnt. Professor Chevalier highlited that even though the decision did not fully grant the requests of the associations, it had a wide political and social relevance.

In conclusion, Professor Chevalier observed that it is a matter of subjective interpretation to assess whether strategic litigation led to failure of success, considering tha the most relevant cases may well not have ended with a (totally) favourable judicial decision in legal terms.

3. *The seminars given by Professor Eliantonio. The seminar on «Judicial review of administrative action: the case of soft law»*

This seminar took place on May 23rd, 2022, in Roma Tre Law Department and focused on two important issues: EU soft law in the Member States and the judicial review of EU soft law.

Regarding the first topic, Professor Eliantonio analyzed the positive and the negative aspects of the soft law use in the legal system of the Member States. In fact, on the one hand, the advantages of soft law help Member States to implement law and the flexibility on Member States diversity. Soft law also allows to increase information flow both MS-MS and MS-COM and reduce the need to initiate infringement proceedings. Finally soft law plays an important role in the guidance for authorities/judges

(application stage). At the same time, on the other hand, the use of soft law presents several disadvantages like the unclear determination of effects or questionable publicity and accessibility. Soft law also permits the Commission to bypass democratic control and meanwhile the use by EU courts can broaden democratic deficit.

Then Professor Eliantonio showed three different typologies of soft law: a) post-law = interpretative soft law; b) pre-law = prepare legislation; c) para-law = substitute for legislation.

The seminars focused also on the results of the research conducted by Professor Eliantonio in the book «EU Soft Law in the Member States. Theoretical findings and empirical evidence». Professor Eliantonio underlined that, despite the important legal and practical effects, the role of soft law in the MS has not been studied and the lack of attention is problematic as it could create potential dangers for principles of legal certainty, equality and legality and for effective and uniform implementation and enforcement of EU law. At the same time, the potential benefits of soft law to contribute to better implementation of EU law remain underexploited.

The aims fixed in the research were presented by Professor Eliantonio. First, the research shed light on the use of EU soft law at national level by national administrations when implementing EU policies and by national courts when ruling in cases falling within the scope of application of EU law. Secondly, the book aimed at stimulating a debate between academics and practitioners regarding the national role of soft law and with a view to formulating policy guidance intended to support national actors.

What could be the methodology in the opinion of Professor Eliantonio?

Wonder about how (Interviews with national civil servants and national judges, Case law research), what (Policy areas: environment, competition and State aid, financial regulation, social policy) and where (UK, IT, FR, DE, FI, SL, NL + later CY, HU, ES).

Then Professor Eliantonio focused on the second topic of the seminars: the Judicial review of EU soft law.

She analyzed the problems related to the interpretation of Article 263 TFEU and to the role of IBM ruling according to which legal effects are deemed to exist where the measure is «binding on, and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position». Concretely: when soft law is

construed as introducing a new obligation, where soft law determines the way in which an EU institution intends to exercise its discretion, or where soft law has been produced in cooperation with the Member States.

Professor Eliantonio, after these general considerations, examined an emblematic case: C-911/19, *Fédération bancaire française (FBF)*. It is a claim against the act through which the French Prudential Control and Resolution Authority (*Autorité de contrôle prudentiel et de résolution*) declared to comply with the European Banking Authority's guidelines. In light of recent jurisprudential developments, the opinion of the French authority could be subject to judicial review. Professor Eliantonio raised two questions:

Can guidelines issued by the European Banking Authority be subject to an annulment action? Why does the French court care?

The *Textilwerke Deggendorf* ruling said that an act which can 'without any doubt' be challenged directly in a direct action cannot subsequently be challenged indirectly through a preliminary question of validity.

Professor Eliantonio reported the opinion of Advocate General Bobek. According to him, *Textilwerke Deggendorf* should not apply in the case law of soft law because it is impossible to establish whether 'without any doubt' an action for annulment would have been open. Bobek argued that *Foto-Frost* ruling should not apply either: how can something not be challengeable directly but must be indirectly submitted to the Court through a preliminary question of validity? Infact, in the opinion of the Advocate General, the unavailability of action for annulment and the obligation to send a preliminary question of validity are incompatible.

Finally, the ruling of the Court of Justice established that the guidelines at stake have no «binding legal effects», so no action for annulment is available; only the preliminary question of validity is available (without the need to prove individual and direct concern).

Then Professor Eliantonio made a comparison between Italian, English, German and French legal systems in relation to different kind of soft law adopted in each of these States. The comparison also analyzed the admissibility of a judicial review of soft law measures in mentioned States.

The conclusions of the comparison were that all legal systems, to various extents,

admit the judicial review of soft law measures when these measures have relevance outside the administration. At the same time, the CJEU stubbornly sticks to a very restrictive notion of 'legal effects' and relies on preliminary question of validity.

Professor Eliantonio ended the seminar with a question: are the mentioned findings of CJEU in compliance with art. 47 of EU Charter of Fundamental rights?

After the precious explanation of Professor Eliantonio, there was a debate with interesting questions asked by Professor Aperio Bella and Ph.D. students.

3.1. *The seminar on «Comparative approach on judicial review of administrative action: Method»*

The second seminar took place on May 24th, 2022, in the Law Department of Roma Tre University.

Professor Eliantonio spoke about comparative administrative law in action, focusing on the genesis and the production of the mentioned Casebook «Judicial review of Administrative action» published in 2019.

The aims of the Casebook were:

- 1) Examining similarities and differences between administrative justice systems of France, Germany, Netherlands, UK and EU.
- 2) Examining the influence of European Union and ECHR law and jurisprudence on the administrative justice systems.
- 3) Assessing the possibility of a *ius commune* in the administrative justice.

Then Professor Eliantonio explained the features of the Casebook founded first on a case-based and therefore bottom-up approach to the study of the law to uncover common general principles which are already present in the living law, rather than a top-down approach which endeavors to formulate rules and model principles. Another important feature is the functional comparative approach searching for similarities in dealing with comparable situations in the examined legal systems. Professor Eliantonio also underlined the importance of a focus on concepts, principles and the functioning of the law in practice as opposed to mere 'rules' (thus seeing the various national laws and their application in practice as alternative options rather than stand-alone systems).

The last relevant characteristics regard an emphasis on the impact of European law (both EU and ECHR law) and on the question of whether European law is a driving force towards the emergence of a new *ius commune*. At the same time, also a strategic vision of the role of comparative law as a tool to bring forward the common European legal heritage while respecting cultural diversity.

The seminar focused also on the production methodology of the Casebook. Professor Eliantonio showed the most important steps related to cooperation among legal scholars from all over Europe who are each responsible for their 'own' legal system. Moreover, the starting point is extracts from legislation, literature and case law and excerpts from the European level which a) explain the standard or traditional way in which a legal system approaches a certain issue of judicial review; or b) explain patterns of deviations from the standard or traditional approach; or c) explain how the standard or traditional approach has been modified under the influence of the ECHR or the EU legal system. Therefore, different from many 'traditional' comparative works, chapters do not consist of national reports with a comparative analysis by one of the scholars, but on a joint effort. They are mutually discussed and framed.

Professor Eliantonio ended the seminar with the perspective of an 2nd edition of the Casebook «Judicial review of Administrative action» based on updates, addition of other legal system and do's & don'ts (logical terminology, comparative law team, reasonable planning of work).

Throughout the lesson, Professor Sandulli and Professor Aperio Bella intervened with interesting questions and remarks.