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Rule of law and Public Administration
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1. *Rule of Law* concept and the values of which is carrier as fundamental principles of contemporary legal systems

The *Rule of Law* is a controversial issue¹ that, even it has been accepted as a characterising element in the majority of the modern legal systems, offers no standardized definition². Maybe, it is possible to identify it on the basis of an inductive analysis that, starting from its main indicatives prerequisites, try to understand the essence of it. For this reason, verifying some of the specific

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¹ M. ROSENFELD, *Lo Stato di diritto e la legittimità della democrazia costituzionale*, in *Dir. & Quest. Pubbl.*, 4/2004, 118; R. BIN, *Rule of law e ideologie*, in G. Pino (ed. by), *Scienza giuridica e "Rule of law"*, Bologna, 2015; R. BIN, *Rapporti tra poteri nello Stato di diritto del secolo XXI*, in M.A. Presno Linera (ed. by), *La metamorfosis del Estado y del derecho*, in *Fundamentos*, 8/2014, 127.

² R. FALLON, *"The Rule of Law" as a concept in constitutional discourse*, in *Columbia Law Review*, 97/1997, 1 ff.



features that make reference to the *Rule of Law*, it is possible to define its contours and to outline accordingly its ability to influence the functioning legal systems' dynamics it inspired.

In general, it seems possible to start from some elements that represent both the fundamental reasons and the objectives related to the *Rule of Law* concept. First of all, it is necessary to avoid the Hobbesian war of everybody against everybody³. Second of all, it is needed to allow the partners to direct their legal actions in order to anticipate the legal consequences related to them. Finally, it is necessary to establish the right safeguards against the arbitrariness of public officials⁴. The above-mentioned needs come from a common demand: the need for legal rules⁵. This can be further defined specifying that this must concern fair, stable and impartial rules.

As an initial approach, it is possible to affirm that the *Rule of Law* implies that the government of men have to be exercised within the limits of laws, which have to be able to conduct the human nature⁶. The basic content of this concept, thus, requires that the government will be implemented by means of general application rules, the appropriate legal certainty is provided and the principle that nobody is above the law have to be effective⁷.

So told, the *Rule of Law* runs counter the bad politics represented by the arbitrariness, paying attention both the political authority exercised in the form of the law and the law itself able to guide the human actions. In this sense, as Aristotle said, it is fundamental to do everything possible to entrust the mind on the man domination on man in order to take him apart from the whim of passions⁸.

It is evident, therefore, that the *Rule of Law* and the principle of legality are inseparably related. The legality idea, intended as government of law over the government of men, starts from considering the law as the more adequate instrument to contain the personal and arbitrary human passions.

In the light of the preceding remarks, some scholars have stated that the *Rule of Law* represents a virtue of the legal system that allows only the judgement of its proper functioning⁹. Actually, it would be a “political ideal” related to the ought to be of a legal system but, having a mere formal

³ R. BIN, *Rapporti tra poteri nello Stato di diritto del secolo XXI*, op. cit., 124.

⁴ Related to the above, please make reference to S. CIVITARESE MATTEUCCI, *Il significato formale dell'ideale del «governo delle leggi» (Rule of law)*, in *Dir. Amm.*, 1/2011, 32.

⁵ P. COSTA, *Lo Stato di diritto: un'introduzione storica*, in P. Costa-D. Zolo (ed. by), *Lo Stato di diritto*, Milano 2002, 94.

⁶ F. VIOLA, *Il “Rule of Law” e il concetto di diritto*, in *Ragion pratica*, 2008, 152.

⁷ M. ROSENFELD, *Lo Stato di diritto e la legittimità della democrazia costituzionale*, op. cit., 122.

⁸ F. VIOLA, *Il “Rule of Law” e il concetto di diritto*, op. cit., 152.

⁹ J. RAZ, *The Rule of Law and Its Virtue*, in Id., *The Authority of Law*, Oxford, Clarendon, 1979, 211.



nature, it have to be separated from a justice theory. Paradoxically, a legal system consistent with the *Rule of Law* should be compatible even to the greatest injustice¹⁰. That is why, while it is considered for its merely formal meaning, the *Rule of Law* will be not paying attention to the State's actions purposes but rather the methods in pursuing them¹¹.

The above-mentioned reconstruction, however, does not appear convincing because it is focused on an analysis extremely anchored to the historical genesis of the *Rule of Law*. It is possible to trace back the historical roots of the *Rule of Law*, within the 19th-century liberal State. At that time, the law offered wide guaranties regards its purposes due to the fact that the intended social base, (at that time really restricted), for the legal precept was perfectly represented in the law making system. At the most, the need to order and maintain compliance with the law itself is deduced¹². This concept, therefore, is no longer applicable nowadays. The continuous enlargement of the social fabric as a pillar of the contemporary legal systems and the consequent affirmation of the democratic principle, have inevitably dictated to orientate the legal system to offer answers to wide and heterogeneous demands. From that it is impossible to coincide a priori the legal idea whit the law¹³.

As a consequence of that, the principle of legality can be considered as a precondition for the *Rule of Law*, as the first cannot represent the essence of the latter. This is why the principle of legality does not offer wider fully-fledged responses than those of the *Rule of Law*. Indeed, the principle of legality states how a legal system operates (namely, in compliance with the law). It does not mention the law contents or the purposes concerning the public powers actions¹⁴.

The problem in question appears in all the legal forms related to the *Rule of Law*, starting from the German *Rechtsstaat* and ending with the Italian *Stato di diritto*. The establishing of the Constitutionalism theory and its consequent execution maybe are considered the final turning point. The Constitution, indeed, appears as an overall limit to the legislation, related to which introduces some regulations that represent both a formal limit and a substantial content for its legal purposes.

¹⁰ F. VIOLA, *Il "Rule of Law" e il concetto di diritto*, op. cit., 151.

¹¹ R. BIN, *Stato di diritto*, in *Enciclopedia del diritto*, Annali IV, Milano, 2011, 1151 ff.; J.F. STAHL, *Staatslehre und die Principien des Staatsrechts*, Heidelberg, 1856, 138.

¹² R. BIN, *Rapporti tra poteri nello Stato di diritto del secolo XXI*, op. cit., 125-126.

¹³ Related to the above, it is shareable some reflections by M. RUOTOLO, *Crisi della legalità e forma di governo*, in *Riv. Dir. Cost.*, 2003, 146. He said: «da legalità formale non sembra più essere strumento sufficiente di garanzia nel momento in cui all'amministrazione spetti anche decidere in modo relativamente autonomo i conflitti e i contrasti fra interessi diversi».

¹⁴ A. PINTORE, *Stato di diritto*, in *Dir. & Quest. Pubbl.*, 11/2011, 875.



In those terms, therefore, the most complete expression of a legal system anchored to the law compliance and, in the meantime, intended to maintain its value-based choices is perhaps the *Rule of Constitutional Law*¹⁵. This model combines the legality and the democratic principles. It is also able to offers substantial foundations to the *Rule Of Law* in order to hold civil rights and liberal negative liberties together with social rights and the demand for a material justice underlying to them¹⁶.

2. Rule of Law and Italian legal system: the importance of impartiality principle of the Public Administration

Thus, if it is crucial the impact of the constitutional Charters in building the *Rule of Law* model, it is useful to know which is the consideration paid by the constitutional Text to this concept, paying attention to the Italian matter. Furthermore, it is extremely useful to determine, starting from the constitutional Text itself, its peculiar and distinctive remarks within the legal system.

On a first analysis, it is possible to notice that the Italian Constitution does not quote directly this concept. Likewise, the expression “*Stato di diritto*” (the nearest to the Italian legal system’ semantic formula) has been sporadically used in the Constituent Assembly. Given that, its essence is not alien to our legal system. Actually, it is possible that it would have been preferable to substantiate this model in translating the legal content of the *Stato di diritto* into institutions, principles and autonomous rules. In so doing, the content has been included in the constitutional Text without mentioning the container¹⁷.

So, even not clearly mentioned by the Italian Constitution, - and probably even not determinable by clear and unambiguous terms¹⁸ -, the *Rule of Law* has its roots in our constitutional Charter. Respect to this, actually, this concept can be identified as an ideal, related to the Text, that precede the constitutional ask and model the subsequent regulatory bid¹⁹.

As concerns our legal system, the *Rule of Law* will result a concept that impose to its substantial contents together with its formal nature some considerations to be taken into. For this reason, as the Italian legal system presents an inseparable relation between law and rights, it follows that the

¹⁵ Related to the above, please make reference to G. ZAGREBELSKY, *Il diritto mite*, Torino, 1992, 39.

¹⁶ A. PINTORE, *Stato di diritto*, op. cit., 881-882; R. BIN, *Rapporti tra poteri nello Stato di diritto del secolo XXI*, op. cit., 128.

¹⁷ R. BIN, *Stato di diritto*, cit., 1157.

¹⁸ Related to the above, please make reference to M. PARODI, *L’Unione europea nel ruolo di garante dello Stato di diritto. Prime riflessioni sul nuovo quadro giuridico introdotto dalla Commissione europea*, in *Federalismi.it*, 19/2014, 29, in particular, the note n. 75.

¹⁹ G. PALOMBELLA, *Il Rule of law oltre lo Stato*, in *Riv. trim. dir. pubbl.*, 2/2009, 328.



Rule of Law can not be intended to be apart from the recognition and the protection of those fundamental rights that the legal system itself recognizes and guarantees within their multi-faceted nature.

Within the axiological coordinates of the *Rule of Law*, the principle of impartiality of the Public Administration it is particularly significant. This principle is the main element of the modern constitutionalism and a fundamental coordinate for our constitutional Text. In fact, on this topic, The Italian constitutional Charter gives a very clear path to follow especially according to art. 97 and 98 whereas, presuming the necessary impartiality of the public officials, they offers a reply to the egalitarian demand concerning the public apparatus.

So told, the principle of equality under the art. 3 Const. highlights an inextricable link to the impartiality of the Public Administration²⁰ for which this impartiality becomes both the logical premise and the objectives and aims of the action.

The right to have an impartial Public Administration, as an element that executes the fundamental principles of the constitutional Text, is above the law. It imposes to the latter to recognize it on a prescriptive basis and, in the meantime, to force every legal individual to offer interpretative solutions in accordance with this legal system's undeniable choice.

The P.A. impartiality is intended to the care of the administration structure and in the meanwhile, if not primarily, to the neutral pursuit of collective interests, intended as public interests, that the legal system have to protect²¹. The Public Administration impartiality, both organizational and functional²², is linked to the mere care of public interest. In this way, it also represents a necessary content of legislative provision that is applicable to those in charge of taking care of the government functions²³. This is confirmed by the art. 54 Const., whereby the public officials are imposed to fulfil with honour and discipline the public functions they are entrusted to and operate in accordance with specific legal obligations and fundamental ethic values. So told, the

²⁰ R. CARANTA, *Art. 97*, in R. Bifulco-A. Celotto-M. Olivetti (ed. by), *Commentario alla Costituzione*, II, Torino, 2006, 1892.

²¹ R. CAVALLO PERIN, *L'etica pubblica come contenuto di un diritto degli amministrati alla correttezza dei funzionari*, in F. Merloni-R. Cavallo Perin (ed. by), *Al servizio della Nazione. Etica e statuto dei funzionari pubblici*, Milano, 2009, 159.

²² C. ESPOSITO, *Riforma dell'amministrazione e diritti costituzionali dei cittadini*, in Id., *La Costituzione italiana. Saggi*, Padova, 1954, 257; U. ALLEGRETTI, *L'imparzialità amministrativa*, Padova, 1965, 181 ff.; G. CORSO, *Manuale di diritto amministrativo*, Torino, 2008, 360 ff.

²³ E. CARLONI, *Il nuovo Codice di comportamento ed il rafforzamento dell'imparzialità dei pubblici funzionari*, in *Ist. fed.*, 2/2013, 385.



constitutional Text imposes ethical behaviour to P.A. bodies in order to guarantee the impartiality and the good performance that govern the administrative action²⁴.

The national data is ultimately corroborated by the fact that the Public Administration impartiality is an essential part of that *Rule of Law* mentioned in the art. 2 of the Treaty on the European Union, since the entry into force of the Lisbon Treaty. The observance of the *Rule of Law* is essential for integration able to create, within the European Union legal system, a real “area of freedom, security and justice” (art. 3, par. 2, TUE). The freedom of movement and establishment of the citizens within the Union territory will be effectively granted only if Member States are committed to verify and to constantly observe the values underlying the *Rule of Law*. Therefore, each individual, located in any country of the European Union but above all not in his own, will have the certainty to count on commonly accepted and observed system of principles and rules²⁵. In this scenario, even the European legal system gives a specific role to the impartiality of the Public Administration. In the art. 41 of the Charter of Fundamental Rights of the European Union, it is recognized as a fundamental element in “the right to a good administration”²⁶ and it is identified as a guideline for the European functionaries’ actions as required by the European Code of Good Administration Behaviour²⁷.

Moreover, the impartiality of the Public Administration is intended as an essential element of the *Rule of Law* within the EU legal system. So told, it is an indispensable pillar in the construction of the Italian legal order.

3. Impartiality of the Public Administration and the prevention of conflict of interests

The impartiality of the Public Administration, intended as both organizational formula and action model, is strictly linked to the rules governing the presumption of conflict of interests and incompatibilities for public officials.

Paying a particular attention to the rules governing the Public Administration power, it is to be noted that the more the administration activity is bound by the law, the lesser the personal interest of the functionary will be significant. Vice versa, when the law entrusts the Public

²⁴ Related to the above, please make reference to R. CAVALLO PERIN, *L’etica pubblica come contenuto di un diritto degli amministrati alla correttezza dei funzionari*, op. cit., 147 ff.; M.C. D’ARIEZZO, *Obblighi di astensione e di segnalazione nel procedimento amministrativo e pienezza della tutela*, in *Federalismi.it*, 1/2015, 9.

²⁵ M. PARODI, *L’Unione europea nel ruolo di garante dello Stato di diritto. Prime riflessioni sul nuovo quadro giuridico introdotto dalla Commissione europea*, op. cit., 6 ff.

²⁶ M. TRIMARCHI, *The impact of article 41 of the EU Charter of fundamental rights on Italian administrative law: some observations*, in *www.ius-publicum.com*.

²⁷ R. CARIDÀ, *Principi costituzionali e pubblica amministrazione*, in *Consultaonline.org*, 23.



Administration with a discretionary power activity, the necessity to guarantee the absence of any interest of the functionary, even if potential, is inevitable²⁸.

As above-mentioned, in the presence of a bound activity, the rules on the public officer abstain can also be based on peremptory assumptions, and thereby, restricted. On the contrary, where the Public administration is called to realize a discretionary activity, the evaluation of the possible causes of the agent incompatibility should include those profiles of interest of conflicts that, even if merely potential and therefore not yet concrete nor ultimately expected, may be fundamental. This is to avoid that the functionary makes his own interest instead of the public ones.

In order to guarantee the fundamental principles of the Public Administration impartiality, therefore, it is important to notice that the variable prescriptive intensity of the rules for the functionary incompatibility is a necessary condition to avoid the *Rule of Law* becomes the *Rule by Law*²⁹. This is a situation where the functionaries could improperly use the administration power and accordingly there is no public interest granted.

Ultimately, as regards the *Rule of Law*, the rules for the incompatibility causes want to avoid the possibility that the personal interests of a public officer, that as such they have to remain alien to the decision making process, can contaminate a discretionary administration. Definitively, everything mentioned before aims to avoid the *Rule by Law* wayward in which perspective the abuse of the rules of the administrative actions could transform the technical discretion in an arbitrary use of the decisional power³⁰. In this way, the administration decision, left to the functionary technical discretionary, cannot be reduced to a mere instrument for his personal arbitrary preferences.

So, offering its foundation to the Public Administration impartiality, the *Rule of Law* guarantees the legal freedom for the people. This freedom, therefore, let the citizens to be subjected just to the juridical norms and not to the arbitrariness of the public officers³¹.

The *Rule of Law* offers a model for channelling the decisional power of the P.A., conveyed by means of those individuals inside them within positive rules schemes. The latter are organized in order to avoid that the public officers' personal interests could contaminate the final decisions.

²⁸ Related to the above, it is shareable some reflections by P. BARILE, *Il dovere di imparzialità della pubblica amministrazione*, in *Scritti di diritto costituzionale*, Padova, 1967, 201. He said that the impartiality represent «un modo essenziale di esercizio del potere discrezionale».

²⁹ G. PALOMBELLA, *Il Rule of law. Argomenti di una teoria (giuridica) istituzionale*, in *Soc. dir.*, 1/2009, 31 ff.

³⁰ Related to the above, please make reference to L. FULLER, *Positivism and fidelity to law – A reply to Professor Hart*, in *Harvard Law Review*, 71, 1958, 660. The Scholar argued that the supreme principle of the *Rule of Law* is that the law exists to prevent arbitrariness.

³¹ F. VIOLA, *Il "Rule of Law" e il concetto di diritto*, op. cit., 160.



Referring to the Public Administration actions, the *Rule of Law* wants to avoid the *Rule of men*, which tends to transform decisional power in arbitrary domain³². In those terms, thus, it supports that legal theory that states the *Rule of Law* is useful: “to preserve the law from the threats and demands of the villain”. By definition, these are arbitrary whilst the law tends to fight against the power arbitrariness. So, an arbitrary law is a contradiction in terms³³.

Therefore, if the legislation wants to guide the actions of whom subjected to the public authority, it will be able to be, above all, a mentor to the public authority itself. According to the *Rule of Law*, therefore, the legislation shall offer the individuals the instruments able to guide their actions to avoid those strictly personal reasons that may interfere with their proper behaviour³⁴.

4. News related to the *Anticorruption law 2012* and *Code of Conduct of Public Officers 2013*

The above-discussed legislative framework received a relevant contribution after the approval of the *Anticorruption Law* (law n. 190 of 2012) followed by the adoption of a new *Code of conduct of Public Officers* (decree of the President of Republic n. 62 of 2013). The legal measures in questions give a renewed and an ampler importance to the P.A. impartiality.

In particular, the law n. 190 of 2012 amended the Italian administrative procedure act (law n. 241 of 1990), adding the new art. 6-bis under which the public officers “*must refrain from in case of conflicts of interest, by reporting any instances of conflict of interest, even if potential*”.

In order to give a specific implementation of the aforementioned law, the *Code of conduct of Public Officers* has ultimately ruled in relation to the obligation to abstain for the public officers. The art. 6, paragraph 2, states: “*the employee refrains from taking decisions or carries out the tasks related to his duties in any instances of conflict of interest, even if potential*”. It adds a further clarification: “*the conflict would include any kind of interests*”.

In line with the prevision re-evoked, the art. 7 introduced a specific description of the circumstances among which the obligations to abstain are included. Respect to this regulation, the expressive form adopted has a particular interest. This is more than ever effective as its scope is to include, in the legal perspective, numbers of specific cases. Indeed, after enumerating some of tangible hypothesis that give rise to such conflict of interest, it states: “*the public officer is abstain from any possible case among which serious grounds of expediency exist*”.

³² G. PALOMBELLA, *Il Rule of law. Argomenti di una teoria (giuridica) istituzionale*, op. cit., 35; M. ROSENFELD, *Lo Stato di diritto e la legittimità della democrazia costituzionale*, op. cit., 122.

³³ This is the quotation of F. VIOLA, *Il “Rule of Law” e il concetto di diritto*, op. cit., 155-156.

³⁴ F. VIOLA, *Il “Rule of Law” e il concetto di diritto*, op. cit., 155.



Therefore, these dispositions regulate the conflict of interest (and the consequent obligation to abstain from) in broader terms, including its potential aspects. Nowadays, these rules, indeed, dictate to all the public officers to abstain from in presence of a conflict of interests, even if potential. Moreover, this conflict could be referable to any kind of interests.

The recent decisions of the Administrative Courts have taken into account these regulatory provisions. In fact, it underlines that, together with the abstention duties (provided by the art. 6-bis, law n. 241 of 1990 introduced by the anticorruption law), the legislator “*creates a clause of general application. This requires inescapable impartiality, transparency and equal treatment. The origin of this principle traces back its applicability to the discretionary purposes that imply subjective claims that can be influenced by the personal interests of whom is involved*”³⁵.

As far as concerns the law of 2012, the relevant choice of the *sedes materiae*, which has been introduced in the Italian Administrative Procedure Act, is worth to mention. Confirming that the administrative procedures are the natural seat for regulating the power practice³⁶, the legislation at issue is addressed to any public administration action. In this way, it tries to limit the crisis of the Italian legal system caused by the more frequent mismanagement of the public power³⁷.

So, taking into account the new art. 6-bis of law n. 241 of 1990, it is clear that this rule, regulating the incompatibility causes and the consequent obligations to abstain of the functionary, claims to be a general rule respect to the overall actions of the P.A. This regulation not only states how the public authority directs the actions of those who pursue its will, but it indicates how those individuals have to behave. In this sense, the thought of those who state: «*il diritto tutela la possibilità dell'agire morale nella vita sociale. Senza questo presupposto il diritto stesso perde la sua specificità rispetto agli altri metodi di controllo sociale*» (“the legislation preserves the moral behaviour in the social life. Without this presumption, the right itself loses its identity in reference to other means of social control”) is shareable³⁸.

The norm in question, as it is formulating hypothesis to avoid the substantial anti-judicial behaviours of public officers, introduces also a specific attention to the so-called “appearance”, intended as a feature of public ethic that gives a specific value to both potential harm of the

³⁵ Regional Administrative Court of Abruzzo - Pescara, Dep. I, judgment n. 316, 19.02.2015. Similarly, please make reference to Regional Administrative Court of Campania – Salerno, Dep. II, judgment n. 580, 17.03.2014.

³⁶ F. BENVENUTI, *Funzione amministrativa, procedimento, processo*, in *Riv. trim. dir. pubb.*, 1952, 134 ff.

³⁷ M.C. D'ARIEZZO, *Obblighi di astensione e di segnalazione nel procedimento amministrativo e pienezza della tutela*, op. cit., 6.

³⁸ This is the quotation of F. VIOLA, *Il “Rule of Law” e il concetto di diritto*, op. cit., 153.



behaviours and public evaluation linked to a specific conduct³⁹. This is based on the premises that the functionary who has a conflict of interest harms the credibility of the institutions and the overall democratic system⁴⁰, which roots are in the governed' trusts over the governors⁴¹.

Considering all the above, the actual meaning of the legislation, from the point of view of the democratic principle, shall take account of consideration the public opinion that contributed to determine its approval⁴². For this reason, if the idea that the law accepted also the public opinion solicitations, the lexical wording of the regulations - purposely with large mesh – shall be evaluate according to this the widest preceptive scope. If the disvalue of the conflict of interest is reported, even in its potential dimension, the vagueness used by the legislator shall not be misperceived as a wrong use of the expression form. This shall be caused by the opacity of the legislative precept that does not allow to correctly outlining the regulation field. So told, this expression form represents a conscious choice adopted by the legislator who on purpose has specified not the law in order to reduce not its effects.

5. The Public Administration impartiality and its development from principle to regulation

The importance of the new legislation taken into exam can be evaluated also on the basis of a comparison with the existing situation before its recent introduction. Indeed, before the above mentioned reform, the provisions in matters of conflict of interest and obligation to abstain of the public officer are mainly borrowed from the Civil Procedure Rules with respect to the sole judges (art. 51 and 52, C.P.R.). According to this, a fundamental role has been played by the Courts that have rebuilt – and perhaps in a discretionary manner – the regulation field of the law. This one – formally absent in the positive law – has become an actual “praetoric law”.

According to this, it is fundamental the contribution paid by the law n.190 of 2012 and then by the decree of the President of Republic n. 62 of 2013 in order to fully delineate both the concept and the extent of the conflict of interest of public officers as well as the consequent obligation to abstain related to them.

³⁹ E. CARLONI, *Il nuovo codice di comportamento ed il rafforzamento dell'imparzialità dei funzionari pubblici*, op. cit., 397.

⁴⁰ A. PETERS, *Conflict of interest as a cross-cutting problem governance*, in A. Peters-L. Handshin (ed. by), *Conflict of interest in global, public and corporate governance*, Cambridge, 2012, 3.

⁴¹ S.A. FREGO LUPPI, *L'obbligo di astensione nella disciplina del procedimento dopo la legge n. 190 del 2012*, in *Dir. Amm.*, 4/2013, 672.

⁴² R. BIN, *Stato di diritto*, cit., 1153.



As is well known, the constitutional Charter states that the principles of impartiality and sound management of the Public administration are the foundations of the organization and proper functioning of it. The adoption of a specific provision, referred to the art. 6-bis of law n. 241 of 1990 introduced by the new law of 2012 in order to counter the undue influence, clearly intends to consolidate and broaden the offered protection⁴³. In so doing, this regulation entitles by law the right of abstention of the officers in presence of conflict of interest, even if potential⁴⁴.

Following the new law introduced in the Italian Administrative Procedure Act, therefore, the impartiality of the Public Administration develops from principle to rule⁴⁵. In fact, originally, the impartiality of the Public Administration has represented a policy principle that, recognized by the Constitution and directed to the legislator, aimed to be addressed to the State apparatus. At the present, indeed, being a positive legal rule, the impartiality of the Public Administration attributes to all the citizens specific rights whose flipside is the specific obligations of the Public Administration.

The presence of a specific legislative hypothesis, in accordance with the provision, requires at the same time to respect the *ratio legis*, that is the intentions attributed to it. The above-mentioned legislation, effectively, underlines the inescapable objective to both prevent and restrain the conflict of interest of the Public Administration, in the widest sense that this concept will assume.

In those terms, the legislator has clearly expressed the certainty that the sole act of violating the rules regarding the proper handling of the Public Administration power, even sanctioned by the competent bodies, does not guarantee the concrete realization and the effective protection of the *Rule of Law*. The latter and the idea of legality represent all together the reason and the aim of the Public Administration organisation and principles.

In order to restrain the distorting phenomena of the correct enforcement of the public authority, therefore, the Italian legal system seeks to involve the classic “further protection”, assigned to the repressive and enforcement system of the Judiciary, and the “preventive control tools”, able to

⁴³ G. FONDERICO, *Le modifiche alla legge sul procedimento amministrativo (art. 1, commi 37-38, 41 e 47)*, in B.G. Mattarella-M. Pelissero (ed. by), *La legge anticorruzione. Prevenzione e repressione della corruzione*, Torino, 2013, 162.

⁴⁴ M.C. D'ARIEZZO, *Obblighi di astensione e di segnalazione nel procedimento amministrativo e pienezza della tutela*, op. cit., 9.

⁴⁵ Related to the above, it is shareable some reflections by R. BIFULCO, *Il rilievo costituzionale della legge n. 241 del 1990*, in *Nuove Autonomie*, 2/2010, 293 ff. The Scholar highlighted the "close link relationship" between the constitutional Text and the Italian Administrative Procedure Act. It was seen as a "measure of direct implementation of the Constitution".



avoid any possible misconduct⁴⁶. According to this, a new *Anti-Corruption Authority* has been established. This Authority is an independent body that highlights and reports to the Public Administrations all the eventual disruptive elements related to their activities. In this way, the Public administration can correct and review its behaviour and the Authority can prevent the misconduct of administrative activity.

Furthermore, with the same aim, the actual legislation foresaw the need to adopt a *three-year plan in order to prevent the corruption for any Public Administration*. This plan represents a prior analysis instrument that focuses on the major fields where the degenerations are possible to occur the most. Moreover, its aim is to prevent all possible occurrences of future illegal acts.

Accordingly, within each Public Administration, the designation of a *supervisor for the corruption prevention* has been foreseen. This functionary's task is to detect the presence of possible risks factors, and in case, he will take all the necessary action in order to solve and remove all the eventual misuses of the Public Administration power. In order to guarantee its impartiality, the legal system has introduced some prevention instruments that can be associated to the usual repressive prevention entrusted to the Judiciary. In this regards, it is really important to notice that with this new model of protection, the prevention precedes the penalty.

So doing, it is trying to fill the typical legislative helplessness, as the repressive legal system is just able to punish and avoid not the system decline. It is also fundamental the Judiciary role that, within a civil law system such the Italian one, will offers the interpretative recommendations useful to establish the regulatory terms of the recent legislation⁴⁷. In by making the laws, the competent judicial organs need to take into account that the impartiality of the P.A. and its functionaries is governed by a new and specific legislation. The autonomy of the relevant legislation comes from the fact that the Civil Procedure Rules stated specific laws in order to guarantee the impartiality of the sole judges and these laws were also extended to the public officers.

As mentioned before, it seems desirable to start a renewed and autonomous case law, able to take into account the specific needs of the impartiality of the public officers.

The legislator stated the possibility to configure the hypothesis of conflict of interest and the consequent obligation to abstain from of the judges in those cases quoted by the law. Consequently, the courts have preferred to interpret rigorously the relevant disposition. This is in

⁴⁶ E. CARLONI, *Il nuovo codice di comportamento ed il rafforzamento dell'imparzialità dei funzionari pubblici*, op. cit., 381.

⁴⁷ Related to the above, please make reference to the critical reflections by G. COGLIANDRO, *Rule of law. La possibilità del contenuto morale del diritto*, Milano, 2012, 403.



order to prevent that a wider case law that legitimize the disqualification of judges can affect the constitutional principle of natural justice (art. 25 It. Const.). The above-mentioned interpretative recommendations, even if they are substantiate whereby referred to the judge role, have been always confirmed also in different cases of disputes whose content was referable to the impartiality of the public officers⁴⁸. Sometimes, though, the objectives are inadequate to intervene fully on the Public administration conflict of interest.

The guarantees to be recognised to the impartiality of the P.A., however, need nowadays to find specific and different solutions. In order to confirm all this, in effect, the impartiality of the P.A. is based on the specific regulatory references, both on constitutional principles and positive laws. The constitutional reference framework, as stated before, highlights the urge to guarantee, in wider terms, the impartiality of public officers. The same can be told about the recent regulation. The National Anti-Corruption Authority confirms all the above when it states: *“if there is even a potential conflict of interest, the obligation to abstain of the public officers, according to the art. 6-bis of law n. 241 of 1990, is a general rule that does not allow any exception and derogation”*⁴⁹.

In conclusion, since today on, the Judiciary will ensure the protection of the Public Administration impartiality. To this purpose, the descriptive nature, with which the legislator has intentionally formulated the relevant provisions, will be enhanced. Thus, in the properly application of the regulation, an interpretation able to seize all the potentialities will be assured.

⁴⁸ Related to the above, the Council of State said: *«In general terms, the reasons for incompatibility under the art. 51 C.P.R.»* are *«extended to all fields of administrative action as an application of the constitutional obligation of impartiality (...); they however possess an exhaustive nature and they escape the application by analogy in order to protect the need for certainty of administrative action and, in particular, the regularity of the selection boards composition»* (judgment n. 3956/2014). The highest degree Administrative Court, therefore, with reference to the Public Administration has confirmed the parameters of impartiality established by the civil procedure rule.

⁴⁹ In this regard, the National Anti-Corruption Authority expressed itself with the guidance n. 78, 23.09.2014.