Kapitel 2:
Regelbruch und brauchbare Illegalität

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Useful illegality in Italian administrative law

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Abstract

The aim of this article is twofold: first, to examine the concept of useful illegality within the context of Italian administrative law; second, to demonstrate that within this context the concept of useful illegality can be understood more broadly than in sociological literature, since in a number of instances it does not stem from the internal dynamics of public organisations, but rather results from specific legislative choices. To this end, it demonstrates that many cases of useful illegality occur within a grey area, where a potential conflict arises between a legal rationale on the one hand and what could be described as managerial rationale on the other. Based on the results of a limited scope field survey, attention is then turned to useful illegality in the practice of Italian public administration. Subsequently, after having introduced the concept of legislative tolerance for certain breaches of the law, the more specific concept of useful illegality of legislative origin is identified. The latter is illustrated by referring to recent legislative provisions that temporarily limited the liability of civil servants for pecuniary damage to the public administration in order to facilitate the efficient implementation of public policies. At this point, the differences between forms of useful illegality that occur within public organisations and those of legislative origin are outlined and it is argued that, from the point of view of legal scholarship, the similarities between them seem to be such as to justify a unitary and thus broader notion of useful illegality.

1. Introduction

For scholars of public law, the subject of 'useful illegality' ('Brauchbare Illegalität') is both fascinating and complex and could perhaps even be considered rather confusing. From a legal perspective, the notion of illegality indicates, in general terms, an act, behaviour or situation that does not comply with a legal norm and for which there are negative consequences

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(sanctions) provided for in the legal system. In this respect, illegality and the consequences associated with it have the function of guaranteeing the effectiveness of the legal system (e.g. Kelsen 1960; Hart 1961).

The notion of 'useful' illegality, a concept that has intrigued scholars of sociology of law and of organization since the well-known study by Luhmann (Luhmann 1964, pp. 304 ff.), is evidently different. Simplifying it to the utmost, it refers to the situation in which conduct that violates certain legal provisions can at times be beneficial not only to the member of the organisation that commits the infringement, but also to the organisation itself, as it can lead to greater efficiency and stability. It is widely acknowledged that within every organisation there is a formal structure with certain expectations which interacts with an informal structure with just as many expectations, and that the two structures may at times come into conflict: 'This places organization members in a permanent quandary regarding rule compliance and deviance' (Kühl 2022, p. 211). The phenomenon of useful illegality derives essentially from the need to reconcile these contradictory requirements within organisations. Such conduct and practices thus tend to make the formal structure of the organisation more flexible and adaptable. For some authors, this situation could even represent a catalyst for innovation (Kühl 2022, Chap. 8, par. 1, and related doctrinal references). In short, the issue essentially concerns the internal dimension of the organisation itself and the behaviour of those who work there.

The concept of useful illegality is very broad and can refer to many heterogeneous situations: for example, it can be found in both public and private bodies, it can involve either minor or major violations, infringements of internal rules and legal norms, as well as provisions laid down in the public interest or to protect the interests of those outside the organisation (e.g. Kühl 2022, pp. 50 ff.).

In this article, an attempt is made to apply this notion to Italian administrative law (for a similar attempt in German law, but from a different perspective, see Schütz et al. 2018, esp. Chap. 6). The research also aims to highlight that in this specific legal order the concept of useful illegality can be understood in a broader sense than that generally found in sociological literature. In fact, it can also include scenarios of useful illegality that do not arise from the internal dynamics of organisations, but are connected to specific legislative choices.

The extreme complexity of this topic, however, makes it necessary to specify from the outset the scope of reasoning to be presented. In particu-

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lar, it should be pointed out that the research follows a more restrictive approach than that used by Luhmann (Luhmann 1964, p. 306), taking into account only violations of law or regulation committed by civil servants in order to ensure the smooth running of the administration – namely, activities inspired by the principles of efficiency, economy and speed. Thus, forms of illegality for self-serving motives, such as corruption or favouritism, even if beneficial to the organisation in some way, are excluded here. Furthermore, the issue of useful illegality in the context of collegiality is not addressed (Luhmann 1964, pp. 314 ff.), as this aspect would add an excessive level of complexity. Similarly, the research presented here deals exclusively with public administrations rather than private organisations, such as associations, companies, political parties, or trade unions. The reason for this is that public administrations are subject to public law rules of action and organisation that are substantially different from those that apply to private bodies.

The article has the following structure. First of all, the point is made that many instances of useful illegality occur within a grey area where there is a potential conflict between a legal rationale on the one hand and a rationale that, for the sake of brevity, can be called managerial on the other (Section 2). Based on a limited scope field survey, attention is then turned to useful forms of illegality arising from the internal dynamics within public administrations (Section 3). Subsequently, it is highlighted how legislators at times demonstrate a degree of leniency towards certain violations of the law (Section 4). In this respect, two cases are distinguished. The first is more general and takes place when the law reduces the negative consequences of unlawful conduct for the benefit of the public administration; this occurence, which is referred to as 'administrative tolerance', is illustrated by briefly reporting on the legal regulation of the violation of particular provisions on administrative procedure (Section 4.1). The second, and more specific case is that of useful illegality of legislative origin and occurs when the reduction of negative consequences is beneficial to the civil servant who committed the violation, with the aim of encouraging more efficient and productive behaviour: to illustrate this, reference is made to a recent law that provided for the temporary limitation of the liability of civil servants for pecuniary damage to the administration in order to facilitate the implementation of public policies (Section 4.2). At this point, the differences between useful illegality occurring within public organisations and that of legislative origin are highlighted (Section 5), and, in the concluding remarks, some similarities between the two scenarios are outlined that seem to justify, at least

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from the point of view of the legal scholarship, a unitary (and thus broader) notion of useful illegality (Section 6).

It should be noted that, with a few exceptions, the brief considerations that follow are based on an observation point that is predominantly external to the public administration. In other words, the internal social system of individual administrations, its dynamics and the attitude of individual civil servants towards norms and rules are not considered (e.g. Hart 1961; Galligan 2007).

2. Legal and managerial rationale

If useful illegality is understood as the violation of laws and regulations aimed at ensuring the proper functioning of a public administration, in most cases this practice lies at the junction between two requirements that can easily come into conflict: compliance with legal rules and the efficient pursuit of the objectives assigned to the organisation. In short, two rationales can be seen here that evidently underlie all organisations, but which are particularly prominent within public bodies: the legal and the managerial rationale.[1]

This point was made very clearly by Jacques Chevallier and Danièle Loschak (Chevallier and Loschak 1982; Chevallier 2008) with regard to French administrative law.

To use the well-known Weberian category, the legal rationale is a 'value-rationale' ('wertrational') (Weber 1978, pp. 24–25): compliance with legal norms represents the raison d'être of bureaucratic public administration and its source of legitimacy. From this perspective, the public administration essentially speaks the language of law, and is governed by a comprehensive system of rules that determine the predictability and standardisation of its actions. At the same time, the part the law plays in the internal organizational life of the public administrations is comprehensive and hierarchical, ensuring that their work is completely rational and representing the sole horizon for civil servants, with very little being left to individual initiative. In this scenario, judicial control is fundamentally based on ascertaining whether the acts and actions of public authorities comply with legal

1 Actually, prevailing legal doctrine holds that these two rationales can be traced back respectively to the principles of impartiality and efficiency of public administration under Article 97, para 2 of the Italian Constitution (e.g. Trimarchi Banfi 2007; Pinelli, 2011).

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norms, thus implying that public administrations and their agents bear an obligation of means (compliance with the law) and not of result (Chevallier and Loschak 1982, pp. 685–694).

The managerial rationale, on the other hand, is an 'instrumental rationale' ('zweckrational') (Weber 1978, p. 24). It revolves around the smooth functioning of the public administration, the achievement of results and the efficient management of resources. In this case, strategic planning and the associated objectives and sub-objectives tend to replace legal provisions as a guide to decision-making and allows each member of the organisation, who is entrusted with reaching these objectives to make their choices in relation to a coherent whole. It follows that the correctness of any decision made on this basis must be evaluated by referring above all to the goals that have been achieved; similarly, the organisation needs to be characterised by flexibility and adaptability in order to ensure that the various decision-making centres can effectively execute the established strategic plan. The control procedures found in this context are aimed at verifying whether targets are reached and, when necessary, identifying any necessary corrective actions (Chevallier and Loschak 1982, pp. 694–701).

Whilst in the past the focus of Italian legal scholarship, as in many other countries, was essentially on the legality of administrative action (on this, see e.g. Mannori and Sordi 2001, Part IV), over time the issue of the efficiency of public administrations has received growing attention (for Italy, see, e.g. Immordino and Police 2004 regarding the so-called result-oriented administration). Today, it is therefore not possible to postulate that there is a sharp contrast between the two rationales and the efficiency of administrative action is undoubtedly a legal concept that is of the utmost importance to the legal order (e.g. for the German legal system, see e.g. Hoffmann-Riem and Schmidt-Aßmann 1998 and Schmidt-Aßmann 2006; for the Italian legal system, see e.g. Ursi 2016b). In fact, the efficient pursuit of the objectives assigned to them, reflecting action guided by managerial rationale now represents one to which the main obligations of civil servants are bound.[2]

However, the two rationales must be carefully balanced: in fact, an overly legalised public administration runs the risk of being inefficient, just as an

2 See Legislative Decree No 165 of 30 March 2001 (as subsequently amended), General Rules on the Organisation of Employment in Public Administrations, and Legislative Decree No 150 of 27 October 2009 (as subsequently amended), on Optimising Public Work Productivity and the Efficiency and Transparency of Public Administrations (e.g. Ursi 2016a).

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overemphasis on a managerial rationale can easily lead to the legal rationale being undermined.

In the Italian administrative system, in the majority of cases this balancing act takes place through the autonomous choices that individual administrations- political bodies, public managers and, depending on the circumstances, civil servants make within regulatory frameworks, although in some cases it is provided for directly through legal provisions. Over the course of time, legislators have attempted to strengthen the managerial rationale within public administrations in various ways (e.g. Ursi 2016a, Chap. III; Melis 2020, Chapters VI and VII), at times even resorting to forms of regulatory simplification (e.g. Celotto and Meoli 2008; Mattarella 2011).

Nevertheless, it is precisely in the areas of tension between these two different forms of rationale that many examples of useful illegality can be found.

3. Useful illegality in the practice of Italian public administrations

There is obviously no question that, from the legal perspective, law provisions must be observed in full by the public authorities and their civil servants, and that any breaches are generally followed by various forms of sanctions.[3] Also from a broader perspective than that of the purely legal standpoint, however, a sacrifice of legality in the public sector that exceeds certain limits is neither conceivable nor acceptable (e.g. Luhmann, 1964, p. 247); situations of 'unlimited illegality' (e.g. Kühl 2022, Chap. 4; for a general perspective, see, e.g. Ionannidis and von Bogdandy 2014, pp. 59–96) compromise the proper functioning of the public administration and, in the Italian system, could lead to restorative measures of a drastic nature. In essence, in the administrative context, illegality, in order to be useful, must represent an exception and be of minor importance. This, at any rate, is the hypothesis assumed here.

That said, the issue of useful illegality in administrative practice raises the highly complex problem of finding the necessary sources of informa-

3 In this regard, it should be pointed out that, in general, public law provisions (those that are applied by the public administration) are mandatory; consequently, the violation of such provisions gives rise to various types of negative consequences (i.e. sanctions).

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tion. Individual civil servants would be highly reluctant to publicly admit to having violated mandatory rules, despite the fact they may have done so purely in the interests of the administration itself. Additionally, when practices are disclosed through official documents, it is usually because either they are deemed virtuous and therefore lawful or because they have been deemed illegal (e.g. Court of Auditors reports). The same is true for the judgements of the administrative courts, whose specific purpose is to ascertain the legality of the acts and conduct of public authorities; in fact, the following statement recurs in the case law of the Consiglio di Stato: 'administrative practice can never be *contra legem*' (e.g. Council of State, Section VII, Judgement No 4984 of 19 May 2023). On the other hand, with reference to Italian public administrations, it does not appear that any specific empirical research has been carried out on the subject of useful illegality. In short, it is not easy to access the grey area within which episodes of useful illegality take place.[4]

For the purpose of preparing this article, a small number of individuals holding management positions in Italian public administrations were therefore asked whether and what kind of illegalities were at times committed in their organisation in the interest of ensuring efficiency.[5]

This simplified investigation confirmed an intuitive fact – namely that many civil servants will at times violate internal rules and legal provisions. A few examples of when this could happen include: taking certain decisions that are favourable to the recipient and do not involve third parties, without another administration having issued acts within its competence that are mandatory by law but of little importance for the outcome of the decision-making process; providing, in breach of the law on administrative procedure, a very brief statement of reasons, without referring to the results of the investigation, for measures that are favourable to the recipient and do not involve third parties; conducting spot checks instead of exhaustive checks required by the law on certain activities of employees; omitting certain supervisory actions and the related sanctioning powers, for example regarding the smoking ban, which is nevertheless observed in most cases); not fully complying with the provisions on the composition and functioning of certain commissions, such as examination in universities, and on the

4 This conclusion is confirmed, in general terms, by the appendix to the book by Stefan Kühl (Kühl 2022), who dwells specifically on the difficulty of finding data in this field.

5 However, it should be noted that, formulated in these terms, the question assumes that the respondent did not mention illegal conduct not deemed directly related to the smooth functioning of the administration or not deemed useful in any case.

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simultaneous recording of certain activities, without, however, making false statements; interpreting some of the legal provisions on the procedures for the signing of contracts for the purchase of a small quantity of supplies very loosely; adressing certain issues through informal discussions, rather than formal communications prescribed by law.

Although this is a preliminary and exploratory survey, the answers obtained allow for an initial orientation on the subject and above all indicate that, at least in the opinion of the respondents, these violations:

1) are the result of the choice of the individual civil servant;
2) are tolerated and sometimes implicitly encouraged by the organisation;
3) are of minimal importance. It may be inferred from this that for the most significant matters- those that concern parties outside the administration or are subject to control by external bodies- civil servants tend, at least formally, to observe the relevant provisions (in this sense also Luhmann 1964, p. 309);
4) arise from the contradictory nature of input received by members of the organisation. The internal social context consequently tends to rework different types of input, attributing value to certain provisions and devaluing others in relation to various factors such as perceived usefulness and the importance of the required fulfilments, available resources (Kühl 2022, Chap. 1; Galligan 2007, pp. 319–320 speaks in general terms of 'unauthorised discretion'; see also Mashaw 1982, on the 'internal law of administration');
5) have as a rule a compensatory function. That is to say, they are aimed at remedying from time to time the hypertrophy and inconsistency of the regulatory system, the inefficiency of other administrative branches, staff shortages and the need to avoid activities considered to be of no substantial use, in order to simplify and speed up the performance of activities considered to be more important;
6) are more specifically aimed at balancing the legal and managerial rationale: on the one hand such breaches do not impinge on important values or interests protected by the regulatory system and on the other hand they are intended to enable the administration to pursue its key objectives and priorities more efficiently, sometimes resulting in direct benefits also for other parties). From this point of view, the following statement made by a senior manager of a public body is emblematic: 'if all the regulations were to be complied with, the organization would immediately be paralysed'.

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The answers obtained from this survey lead to another, more general conclusion. These breaches of the law seem to rest on informal expectations that exist within the organisation and this influences the balancing act performed by the officials committing the infringement, who take into account the circumstances of the case, the risks for themselves, and the benefits for the administration. In this regard, one fact must be emphasised: when useful illegality occurs in situations where subjects external to the administration are involved, it is highly likely that these will be situations in which none of the parties has a qualified interest in bringing an action against the violation before a court. This means that these infringements can at most lead to disciplinary consequences, although there are clearly just as many informal expectations here too.

In any case, this information seems to confirm the hypotheses formulated in sociological theory that in order to function properly and adapt to the context in which they operate, a certain level of tolerance for regulatory violations carried out by their members is necessary within public administrations. In contrast, this information is not sufficient to prove another assumption advanced by sociological scholarship, namely that useful illegality can have an innovative effect, for instance, by exerting a positive influence on developments in organisational practices (e.g. Kühl 2022, Chap. 8). Certainly, it cannot be excluded that some (possibly widespread) illegal administrative practices may well have led to the amendment of laws or regulations, for instance, in order to simplify certain duties or procedures. This scenario, however, has little to do with the innovative capacity of useful illegality, but rather with the quality and quantity of regulation and thus the need to rationalise the regulatory system to enable the public administration to function more efficiently.

4. Legislative tolerance for legal violations and useful illegality of legislative origin

In the scenario above, the violation of the law is a choice that the civil servants make essentially with the aim of performing their work more effectively and which, for the same reason, is tolerated by the organizations to which they belong. At times, however, tolerance for the breach of certain provisions is expressed by the legislator, resulting in the reduction of a sanction imposed on a public body that has violated a legal provision. This situation, which is quite widespread in Italian law, can be called 'legis-

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lative tolerance'. In this context, a more specific and rarer case can then be identified, which is referred to below as 'useful illegality of legislative origin'. It shares the same characteristics as legislative tolerance, however with one key difference: the tolerance of the law is not beneficial to the public organisation, but to the individual civil servant who breached the law.

Although there may be various reasons behind the benevolence of the legislator, in the following we essentially look at that aimed at ensuring greater efficiency in public administration, i.e. reinforcing the managerial rationale at the expense of the legal rationale. In Subsection 4.1, the main features of legislative tolerance towards violations of the law are illustrated, also via an example, while Subsection 4.2 outlines the main features of useful illegality of legislative origin, examining a recent piece of legislation that has been the subject of heated debate.

4.1. Legislative tolerance

As mentioned above, legislative tolerance is observed when a law reduces the negative consequences that would result from a breach of the law by the administration. This mitigation of sanctions benefits only the infringing public organization and does not affect the officials who are responsible for the illegal action.

However, it should be pointed out that, if the law actually eliminates all possible consequences of such a violation, the administrative conduct can no longer be considered illegal, as it has instead been legalised. For this reason, there can only be legislative tolerance when, in relation to an illegal administrative action or omission, the law excludes some, but not all, of the consequences connected with the violation of a legal rule: the qualification in terms of illegality of the administrative conduct or omission cannot be eliminated completely but must remain present in some respects. From this perspective, what is considered beneficial by the law is not the violation itself, but the reduction in the sanction: the assessment of usefulness translates into greater tolerance of the non-observance of certain legal rules. This is of course obvious, since, were the legislator to deem a certain type of illegality useful, it would have to eliminate all negative consequences connected with it or even make the (once illegal) action or omission mandatory.

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On this point, a further clarification is necessary. The reduction of sanctions related to administrative illegality may take place either *ex post* or *ex ante*. In Italian administrative law, there are numerous cases where the law, considering *ex post* 'useful' illegal administrative activities, has blocked (or remodulated) some of the sanctions provided for in case of a breach of the law, thus allowing the illegal situation to remain in existence. This happened, for example, when certain illegal administrative measures were regularised by law,[6] or some complex situations which could have had a significant impact on public finances, involving the realisation of public works on private land that had not been legally acquired by the competent administration, were subsequently legalized (e.g. Conti 2006). It is not possible to dwell on these cases here, considering that they are both substantially outdated and very specific. On this point, it seems sufficient to observe that these legislative interventions were not intended to ensure the greater efficiency of the administration, but, on the contrary, to remedy cases of maladministration.

Instead, it seems appropriate to analyse in more depth a case of legislative tolerance where the reshaping of sanctions was carried out *ex ante*, in relation to future administrative misconduct, as the result of a balancing act performed by the law between the legal and the managerial rationales.

The example is represented by certain provisions of Italian law on administrative procedures (which are partially inspired by Sections 45 and 46 of the *Verwaltungsverfahrensgesetz*: see e.g. Hufen and Siegel 2021). According to these provisions, infringements of the rules on administrative procedures or the form of administrative acts cannot lead to the annulment of the unlawful measure when the substance of that measure could not have been different[7] (e.g. Giovagnoli 2017, pp. 1142 ff.; and for a general overview Villata and Ramajoli 2017, pp. 581 ff.). This means, for example, that if a public administration omits certain procedural activities required by law,

6 See e.g. Constitutional Court, Judgement No 263 of 24 June 1994 and Judgement No 14 of 5 February 1999 (which, however, declared the regularisation unconstitutional).

7 Article 21-octies(2), Law No 241 of 7 August 1990, New Rules Regarding Administrative Procedure and the Right of Access to Administrative Documents (as subsequently amended and supplemented): 'A measure that is adopted in breach of rules governing procedure or the form of instruments shall not be voidable if, by virtue of the fettered nature of the measure, it is evident that the provisions it contains could not have been other than those actually adopted. In any event, an administrative measure shall not be voidable on the grounds of failure to communicate the commencement of a procedure if the authority shows at trial that the content of the measure could not have been other than that actually adopted' (translated by Catharine de Rienzo).

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such as the hearing of the interested parties, but this omission does not affect the substance of the decision, the administrative court cannot annul that decision. However, according to prevailing scholarship and case law, the administrative measure must nevertheless be considered illegal.

These legislative rules reflect a twofold assessment. On the one hand, these infringements are seen as essentially harmless from the point of view of a legal rationale, as they do not violate values of primary importance in the legal system and indeed are essentially devoid of consequences (e.g. Luciani 2003, Chap. 2). Sanctioning these violations would thus not bring any effective advantage to those negatively affected by the measure, considering that in the event of annulment by the administrative court, the public administration involved would have to issue a new measure with the same substance. On the other hand, the blocking of the sanction is deemed 'useful' as far as the managerial rationale is concerned, since it 'aims at guaranteeing greater efficiency to administrative action' and thus at preventing 'uneconomic and useless duplication of activities' (e.g. Council of State, Section II, Judgement No 1081 of 12 February 2020);[8] this obviously represents an advantage for the community in terms of the greater effectiveness of administrative action.

It should be added that in this case, the decision not to impose the sanction – namely, the annulment of the unlawful act – is entrusted to the administrative courts who obviously have the obligation to assess all the relevant circumstances.[9]

4.2. Useful illegality of legislative origin

Whilst in the example above, legislative tolerance benefits only the public organisation that committed the infringement, in the case of useful illegality of legislative origin on the other hand, there is a limitation of the negative consequences for the civil servant who perpetrated the violation. In this way, the intention of the legislator is to influence, albeit indirectly, the

8 It should be noted, however, that a recent legislative intervention has significantly limited the scope of these provisions, establishing that the breach of certain procedural rules regarding the hearing of the parties concerned must nevertheless lead to the annulment of the act: see Article 12(1)(i) of Decree-Law No 76 of 16 July 2020, Urgent Measures for Simplification and Digital Innovation, converted with amendments by Law No 120 of 11 September 2020.

9 It is interesting to point out that administrative courts have interpreted these provisions rather broadly.

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choices that individual officials make between violation/respect of the rules. In this regard, it can be said that useful illegality of legislative origin is often aimed at making public bureaucracy more efficient and productive, encouraging public employees to strike a different balance between the legal and the managerial rationale behind their actions.

One of the factors affecting the choices of public officials in Italy is the fear of facing prosecution for committing a crime against the public administration. Indeed, the relationship between criminal law and public administration is clearly closely connected to the issue of useful illegality of legislative origin, so much so that it is constantly at the centre of public and parliamentary debate (see, e.g. Ruggiero 2022; Perongini 2020; Constitutional Court 18 January 2022, No 8). Recently, in an attempt to promote greater efficiency in public administration, the criminal offence of misuse of office, which was greatly feared by civil servants, was abolished.[10] However, the observations that follow do not consider the problems of criminal law and more specifically the issue of the reformulation in a reductive sense of criminal sanctions, or the so-called *abolitio criminis*, referring to the illegal actions of public officials. In fact, to also take into account issues related to criminal law would overcomplicate the discussion.

That being said, the legislator has recently enacted some provisions that can be framed within the concept of useful illegality of legislative origin.

In order to understand this issue, it is important to recall that in Italy there is a widespread mistrust in the public administration and its operational capabilities; a mistrust that is expressed not only by social and economic actors, but also by government, parliament and a majority of political parties at national and local level (e.g. De Lucia 2019). Without dwelling on the details, it should be recalled that for decades the legislator has repeatedly intervened in the administration (e.g. Mattarella 2017) in an attempt to reconcile the legal and the managerial rationales. Many of these pieces of legislation have regulated administrative action in a meticulous, but not always orderly, precise and coherent manner, and have provided for sanctions of various kinds against civil servants in the event of non-compliance with their duties.

However, the effect of these policies has been paradoxical. As pointed out by Robert A. Kagan (Kagan 2010, p. 179): 'In an atmosphere of mistrust of

10 This criminal offence was repealed by Law No 114 of 9 August 2024, Amendments to the Criminal Code, the Code of Criminal Procedure, the Judicial Order, and the Code of Military Ordering.

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the agency's professionalism, adopting a legalistic style of rule-application provides bureaucratic officials a somewhat safe haven. A vicious circle ensues. In an atmosphere of mistrust of the agency's professionalism, legislatures are … likely to constrain its decision-making with more detailed rules … All this, of course, increases the likelihood that the agency officials will act legalistically …'.

This explains an issue that is currently at the centre of discussion in Italy: the so-called 'defensive administration' (or 'defensive bureaucracy') (e.g. Cafagno 2018; Bottino 2020), an expression that indicates an attitude widespread among civil servants, inspired by the utmost caution and 'which leads to decisions that, although ... lawful from a legal point of view, are aimed more at reducing the risks for the public decision-maker than at benefiting the administration and the community in which it operates' (Battini and Decarolis, 2020, p. 343) or, in other words, 'the criterion of conduct of the civil servant who among the various possible solutions chooses the more traditional and perhaps the least incisive, as in this way they are certain that they do not assume any responsibility' (Travi 2022, p. 167).

At first glance, it could be assumed that defensive bureaucracy represents the paroxysmal affirmation of legal rationality and is thus the exact opposite of useful illegality: in the first case, the civil servant focuses on scrupulous, and sometimes unreasonable, compliance with the rules to the detriment of the smooth functioning of the organisation; in the second on the other hand, they are willing to infringe certain rules in order to act according to a managerial rationale, thus ensuring the efficiency of the administration and the achievement of the goals set. However, the issue is more complex. In fact, according to the information gathered, in practice useful illegality essentially concerns minor violations that are not likely to adversely affect important public interests or those external to the administration.[11] On the contrary, the idea of defensive bureaucracy as a rule concerns administrative activities of major relevance or at any rate those that have a direct impact on the outside world (e.g. as the subject of external controls). In essence, there is not necessarily a contradiction between useful illegality and defensive administration.

Nonetheless, it is widely believed that the defensive attitude of civil servants derives from the fear of incurring, in addition to criminal liability

11 See Section 3, above.

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(i.e., until recently, the criminal offence of misuse of office), 'administrative liability': the specific liability of a civil servant who, with intention or gross negligence, causes financial damage to the administration. This liability, which is composite in nature,[12] is ascertained through a special trial that takes place before the Court of Auditors and is initiated by the Prosecutor's Office established at the Court; if the Court determines that damage has been done, it is the civil servant responsible for this who is held personally liable to provide compensation.

On this premise, the recent law regulating a form of useful illegality of legislative origin, which has been the subject of controversy, can be introduced (see, e.g. D'Urso 2021; Carapellucci 2023).

During the course of the pandemic in 2020, a Decree-Law changed on a temporary basis the regulation of this special liability: until 31 December 2025 (originally 31 December 2021), civil servants may only be held liable for having caused financial damage to the public administration only if they have acted with intent, meaning when the deliberate nature of the harmful event is proven, and not if they have acted merely with negligence or gross negligence.[13] If, however, the damage results from an omission or inaction on the part of civil servants, under the above rules, the latter may also be held liable for negligence and gross negligence[14] (Pagliarin 2021).

12 This form of liability performs a multitude of functions and in particular preventive, compensatory, and sanctioning functions (see e.g. Constitutional Court, Judgement No 132 of 6 June 2024, para 5.2. with other references to constitutional case law).

13 Article 21(2), Decree-Law No 76 of 2020, converted with amendments by Law No 120 of 2020 and further amended most recently by Decree-Law No 202, of 27 Decembre 2024, Urgent provisions on regulatory deadlines, converted by Law No 15 of 21 February 2025: 'Limited to acts committed from the date of entry into force of this Decree and until 30 April 2025, the liability of those who are subject to the jurisdiction of the Court of Auditors in matters of public accounting for the liability action referred to in Article 1 of Law No 20 of 14 January 1994 shall be confined to cases where the production of the damage resulting from the conduct of the person acting is wilfully intended by him. The limitation of liability provided for in the first sentence shall not apply to damage caused by the omission or inaction of the agent'. For the further extension of this deadline to 31 December 2025, see Decree-Law No 68 of 12 May 2025, Extension of the deadline referred to in Article 21(2), of Decree-Law No 76 of 16 July 2020, converted, with amendments, by Law No 120 of 11 September 2020, concerning liability for financial damage to the public treasury.

14 In this way, the legislator tried to counter the problem of the so-called 'fear of signing', that is the (apparently widespread) situation in which civil servants, in order not to take responsibility, prefer to remain inactive, not taking decisions that need to be taken.

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For the sake of clarity, it must first be stated that this piece of legislation can also cover serious breaches of the law.[15] Second, such violations remain illegal: this law therefore did not legalise conduct previously considered illegal, but merely eliminated a negative consequence of such conduct. This means that the civil servants are still obliged to act diligently and must pay close attention to the way they carry out their office activities, particularly when their actions lie on the borderline of legality; however, if the breach of this obligation results in financial damage to the public administration, the civil servant responsible for it cannot be held accountable before the Court of Auditors, although they can still be held accountable on other grounds, such as disciplinary liability or civil liability.

In addition, regarding the most important public actions aimed at supporting and relaunching the Italian economy, the same Decree-Law provided for a specific form of management control carried out by the Court of Auditors, known as 'concomitant control'.[16] If the Court finds serious management irregularities, they must report them to the competent administration so that it can take the necessary corrective measures and activate the procedures required to determine the responsibility of those managers who have not achieved the objectives assigned to them (e.g. Gioia 2022).[17]

In essence, in an attempt to strike a more satisfactory balance between managerial and legal rationale and to overcome the phenomenon of defensive bureaucracy, this piece of legislation alleviated the 'quandary' of public employees 'regarding rule compliance and deviance'. To this end, one of

15 It may be useful to recall that Article 2(3) of the Code for Public Contracts (Legislative Decree No 36 of 31 March 2023) provides that 'for the purposes of administrative liability, gross negligence constitutes the breach of legal provisions and administrative self-imposed rules, as well as the blatant violation of rules of prudence, expertise and diligence and the omission of the precautions, checks and preventive information normally required in administrative activity, insofar as they are required of the public agent on the basis of specific competences and in relation to the concrete case. A breach or omission determined by reference to prevailing case law or to opinions of the competent authorities does not constitute gross negligence'.

16 Article 22, Decree-Law No 76 of 2020. Concurrent controls (or controls over ongoing management) are regulated by Article 11(2), Law No 15 of 2009 (on concurrent controls, see recently Di Lullo 2024, pp. 297 ff.).

17 Managerial liability is regulated by Article 21, Legislative Decree No 165 of 2001. It arises, *inter alia*, when the public manager does not achieve the objectives assigned to him and does not observe the directives attributable to him; it entails the impossibility of renewing the same managerial appointment and, in the most serious cases, revocation of the managerial appointment (on this issue, see, e.g. Immordino and Celone 2020).

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their great concerns has temporarily been removed: for a limited period of time, the illegal conduct of civil servants – i.e. violations of the law, other mandatory provisions, rules of prudence, etc., that cause financial damage to the administration – are not sanctionable by the Court of Auditors, and are therefore tolerated.

More specifically, through this provision, the legislator wanted to 'to provide, with respect to public administrators and civil servants, a regulatory framework in which the fear of liability does not expose them to the possibility of slowdowns and inertia in the performance of administrative activities'. The purpose of the new law is therefore 'to determine how much of the risk of the activity should be borne by the apparatus and how much by the civil servant, in the search for a balance that, for civil servants and public administrators, makes the prospect of liability a reason for motivation, and not a disincentive' (Constitutional Court, Judgement No 371 of 20 November 1998).[18] To use the classification coined by Norberto Bobbio (Bobbio 2007, p. 27), this example of useful illegality can be considered as a 'facilitation technique', through which the law encourages a desired behaviour. In more explicit terms, the elimination of the administrative liability for negligence and gross negligence should encourage civil servants to follow a managerial rationale, directing their actions towards the pursuit of the results assigned to them.

The ultimate goal of this law is therefore to prompt a change in the way civil servants act (Bobbio 2007, p. 19), triggering innovative, or at least more productive, processes within the public administration.

To complete the picture, three further aspects should be mentioned. First, the fact that one of the instruments for ensuring administrative efficiency – that is, liability for a public manager's failure to achieve their targets – has not been particularly effective to date (e.g. Mainardi 2022, pp. 13 ff.). Second, with regard to the National Recovery and Resilience Plan, the concurrent control of the Court of Auditors has been repealed in April 2023.[19] Although the Court of Auditors can still carry out other types of management control, the elimination of the concurrent control

18 Although these statements of the Constitutional Court refer to Article 1, Law No 20 of 14 January 1994, Provisions on the Jurisdiction and Control of the Court of Auditors (as amended by Decree-Law No 543 of 23 October 1996), they can be adapted to the provisions discussed in the text; in this regard, see also Constitutional Court No 132 of 2024, para 6.5.

19 Decree-Law No 44 of 2023.

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nevertheless signals less focus on the objectives to be pursued and the accountability of managers. Third, the Constitutional Court considered the limitation of administrative liability for willful misconduct to be constitutionally legitimate, to the extent that it is a temporary limitation related to very specific needs such as economic recovery after the Covid-19 pandemic and the implementation of the NRRP; it also called on the legislator to reshape the legal regulation of administrative liability in such a way as to reconcile the tension between the managerial and legal rationale in a manner that is more appropriate to the current situation.[20]

5. Differences between the two forms of useful illegality

The two forms of useful illegality examined above represent a response to the tendentially contradictory needs present in the administrative system, namely, in the hypothesis assumed here, that of a legal and a managerial rationale. However, they have different features that should be briefly illustrated.

Useful illegality within public organisations:

- operates essentially in the disjunction between the formal and informal expectations that civil servants are subject to;
- is rooted in the organisational autonomy of public organisations and is therefore influenced by their internal dynamics, that is, those of individual social systems and their subdivisions;
- is therefore context-dependent, since each organisation or its internal divisions may show greater or lesser tolerance towards violations of legal provisions and rules;
- is somewhat ineradicable, and perhaps even indispensable, considering that, as sociological studies show, it is the spontaneous fruit of the organisation's need to adapt to its environment (e.g. Luhmann 1964;

20 Constitutional Court, Judgement No 132 of 2024. In this regard, it should be noted that on 9 April 2025, the Chamber of Deputies approved the legislative proposal AC 1621, Amendments to Law No 20 of 14 January 1994, to the Code of the Court of Auditors' Jurisdiction, as set out in Annex 1 to Legislative Decree No 174 of 26 August 2016, and other provisions concerning the control and advisory functions of the Court of Auditors and the liability for financial damages to the public treasury. This legislative proposal- which, among other things, introduces a new framework for administrative liability- is now under examination by the Senate of the Republic (AS 1457). On this legislative proposal, see e.g. Polito 2025.

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Kühl 2022, with extensive references to the literature; for a different perspective, see Galligan, 2007, pp. 127 ff.);
- is the subject of different levels of assessment, which are characterised by a certain degree of subjectivity: each civil servant generally carries out a prior balancing of the risks, costs and benefits – for instance for the efficient functioning of the administration – of acting contrary to the law; those responsible for monitoring compliance with the law may, in turn, carry out an assessment, whether prior or subsequent, as the case may be, to decide whether to tolerate or sanction the conduct (see the reflections on this point by Kühl 2022, pp. 149 ff.);
- is subject to direct assessment, which in any case concerns the breach of the law in relation to the possible positive and negative consequences;
- is always potentially sanctionable, since, despite informal expectations to the contrary, there is no guarantee that the infringer will not be charged for their illegal, but useful, conduct.

All this indicates that this form of useful illegality contains a certain inherent degree of uncertainty for the transgressor, not least because, for example, organisational lanscapes can also change rapidly (see, e.g. Luhmann 1964, p. 313). In addition, there are no unambiguous criteria for establishing whether a violation is actually useful and to whom it is useful (see also Kühl 2022, Chap. 3). On the other hand, as the above information shows,[21] this form of illegality generally involves rules of secondary significance and the potential liability, such as disciplinary liability, of the infringer is, nonetheless, a considerable deterrent against the spread of illegality.

The second case of useful illegality, i.e. the new and temporary regulation of administrative liability, is essentially affected by the fact that it is the subject of a legal regulation. This means that, on the basis of overall assessments of the functioning of the public machinery, this legislative intervention:

- acts primarily on formal expectations, having established that certain illegal conduct is, for the time being, not punishable;
- is the result of a political choice that can be reversed, as the legislator could resort to other policies and instruments to make the public administration and its bureaucracy more efficient;[22]

21 See Section 3, above.

22 On this point, the scientific literature is obviously very extensive (see, e.g. Cassese 2023).

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– is independent of the context, since the provision, as it is worded, applies to all public organisations regardless of their internal dynamics to all officials, and binds all other public actors starting with the Court of Auditors;
– is subject to an assessment that is both preventive, because the reduction in sanctions concerns future conduct, and objective, because this reduction is of general application, leaving aside any verification of the benefit obtained by individual public organisations from the breach that has been committed;[23]
– expresses an indirectly positive judgement on the usefulness of illegal behaviour, since, as mentioned, it does not allow for the violation of certain provisions, but has only established the reduction of the sanctions previously provided for these violations;[24] this is based on the assumption that greater tolerance can encourage a change in the way civil servants act in terms of greater efficiency.[25]

6. Similarities between the two forms of useful illegality

Despite the considerable differences mentioned above, there are probably good reasons for extending the concept of useful illegality to include that of legislative origin.

The starting point here is that the differences outlined depend essentially on the level of seriousness of the violations in the two scenarios. However, both typologies of useful illegality refer to the grey area between compliance with the rules and rule violation (Luhmann, 1964, p. 304; Kühl 2022, p. 41) and more specifically to the point of tension between a legal rationale and a managerial rationale; both then highlight the need to devise and implement specific strategies to adequately manage a 'positive deviance' phenomena (Spreitzer and Sonenshein, 2003, pp. 207–224). In the first case, this task is the responsibility of the individual organisation although the legislative system can obviously condition these actions in numerous

23 It should be noted that in the course of the liability proceedings before the Court of Auditors, the Court has to carry out an assessment (obviously subsequent) as to the possible utility to the administration or the community of the unlawful conduct: see Article 1(1-bis), Law No 20 of 1994.
24 See Subsection 4.1, above.
25 See Subsection 4.2, above.

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ways.[26] In this respect, it has been demonstrated that the desire, expressed by some organisations (amongst which also public organisations), to rigidly oppose all forms of illegality – including useful illegality – in addition to being in vain, can often be counterproductive for the organisation itself and the results it achieves; hence the need to find correct ways to deal with useful illegality (Kühl 2022, Chapters 6 and 8). In more serious cases, the competence to adopt a strategy in relation to illegal conduct lies with the legislator. More specifically, the law is required to regulate the administrative liability – and, *a fortiori*, criminal liability in crimes against the public administration – by identifying the right 'balance between the dangers of overdeterrence and underdeterrence'.[27] As pointed out by the Italian Constitutional Court, the legislator must make this choice wisely considering the evolution and growing complexity of society and the legislative system, as well as the increase in tasks carried out by public authorities.[28]

In essence, in both cases the problems that come to the fore and the solutions proposed are not so different. Be it legislative or organisational in nature, tolerance of certain violations of legal provisions is still a problem of social action, since it relates to civil servants who have to decide whether to violate a rule in order to achieve certain results in the general interest. Adopting a different perspective, it can be stated that the organisational and legislative strategies regarding useful illegality concern the same problem (the relationship between legality and efficiency), pursue the same goal (efficiency), and have the same object (public administrations and the conduct of civil servants). They are thus instruments that can be used to steer public administrations towards certain results (see e.g. Schuppert 2023, which addresses the topic in general terms). These functional similarities seem sufficient to justify a unitary and broader notion of useful illegality.

This finding could, of course, be explored from various points of view. For the purposes of this discussion, it seems sufficient to mention that this unitary view of useful illegality could be fruitful from the perspective of administrative law. Without analysing in depth the complex question of the qualification of this concept (whether it can be regarded as a legal concept in the proper sense or should instead be considered in another way: on the discussion of these issues in German administrative law, see e.g.

26 For example, anti-corruption legislation can certainly affect these strategies of public organisations (see, e.g. Carloni, 2023).

27 Constitutional Court No 132 of 2024, para 6.6.

28 Constitutional Court No 132 of 2024, para 6.

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Schmidt-Aßmann 2004, pp. 401–403), when conceived in unitary terms, useful illegality brings to light a number of issues that cannot be overlooked by legal scholars and that, methodologically speaking, are very challenging.

The oxymoronic concept under discussion calls, in fact, for an overall assessment of the sustainability, from the point of view of the Constitution and the legal system, of the legislative and organisational arrangements envisaged from time to time to enable public administrations to find satisfactory balances between a legal and a managerial rationale. However, in order to be truly 'useful', this assessment should take into account not only normative and case-law data, but also the consequences that the choices of the public organisations themselves and those of the legislator, and their interactions, produce in practice (on this topic, see in general terms Hermes 2004, pp. 359–385, which deals with the consideration of effects in administrative practice; Reimer 2023, on the consideration of effects of legislation). This assessment should therefore be based on a sound information basis.

In more explicit terms, as mentioned above,[29] the two forms of useful illegality operate on different levels: the first in the gap between informal and formal expectations, the second at the level of formal expectations. However, since legislative provisions as a rule directly affect the internal dynamics of public organisations and the way their components act (from this point of view, the studies in 'Law in Society' are very interesting: see e.g. Galligan, 2007), it is very likely that there is an overlap or connection between the two levels. The extensive limitation of liability of civil servants for pecuniary damage to the administration, together with the recent repeal of the criminal offence of misuse of office, is bound to exert considerable influence over the practices of public organisations and generate a number of informal expectations. In other words, it is highly plausible that the new piece of legislation, during the period in which it remains in force, will represent a propagator of various types of illegality in administrative practice – illegalities that are, however, not necessarily of minor importance and not necessarily instrumental in the smooth running of the public administration. This is because this piece of legislation directly affects the very structure of public organisations, greatly reducing the role of the legal rationale within them.

These, however, are only common-sense assumptions that should be supported by accurate information. Instead, as mentioned, the topic of

29 See Section 5, above.

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useful illegality represents a *terra incognita* in Italy. The substantial absence of data on this point therefore prevents the formulation of any assessment. This circumstance evidently represents a pressing invitation to also investigate this issue from an empirical perspective.[30] It would be useful, in this respect, not only to analyse in legal terms the strategies adopted by legislators and public organisations on this matter, but also to verify whether, as is also assumed in the literature (Kühl 2022, chap. 8, para 1), and under what conditions, the two forms of useful illegality could actually constitute an improvement in for administrative action.

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30 On the difficulties involved in collecting data in this area, see Section 3 above, and Kühl (2022, appendix).

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