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I "CONCETTI GIURIDICI INDETERMINATI"

COMPARAZIONE TRA SISTEMI GIURIDICI
E ANALISI ECONOMICA DEL DIRITTO

Abstract in lingua inglese

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Undefined statutory terms

Comparative analysis of legal systems and economic analysis of law

The objective of the study is investigating the issue of undefined statutory terms and of the scope of judicial review in connection with their application by public agencies in two different legal systems (the German and the U.S. ones) against the background of the Italian system, then exploring possible paths of analysis in a law and economics perspective.

The starting point is the German system, which is traditionally associated with the idea of a full judicial control over *unbestimmte Rechtsbegriffe*. The first chapter describes the evolution of the German debate, with a view to highlighting the most important steps in its development.

Particular attention is devoted to the German caselaw that recognised a *Beurteilungsspielraum* in specific groups of instances, in whose connection the *Bundesverwaltungsgericht* admitted that the application of the undefined statutory terms made by the administration could only be narrowly reviewed by courts.

A number of cases is discussed, also in order to consider how the Italian courts would have behaved when facing the same circumstances. It emerges that, as a general tendency, the attitude of the Italian judges in the specific instances considered would not have differed so much from the approach of the German judges. The conclusion is drawn that we can assist to a factual convergence between systems even where considering "models" in the abstract may in principle lead to exclude any tendency towards an intersection point.

A final set of considerations concerns the introduction of the *Verpflichtungsklage* in the Italian system of judicial review over administrative action, which casts new light on the debate concerning undefined statutory terms, especially in relation with those requiring evaluations from the administration that are currently characterised as falling in the scope of the so-called "*discrezionalità tecnica*".

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In the second chapter the issue of undefined statutory terms is looked at from an U.S. perspective. After giving an overview of the available standards of judicial review, the focus is placed on *Chevron* and the famous "two-step test" is investigated, moving then to explore the debate broken out over the so-called *Chevron* "step zero", which represents the initial inquiry into whether *Chevron* comes at all into play.

It appears that the *Chevron* framework is not so crystal-clear as it would seem at a first glance and, mostly, that when reasoning of filling out the meaning of undefined statutory terms through case-by-case determinations on particular facts, *Chevron* might not be the correct reference. What matters in these instances is not, in fact, a question of pure interpretation of law, rather one of application of law to the facts and the reach of *Chevon* could be limited to the first set of questions.

In connection with law-application questions (also qualified as "*mixed question of law and fact*"), it is necessary to examine the standards of judicial review over the *factual findings* of the administration, which are applied to determine whether the agency decision is "arbitrary or capricious" or unsupported by substantial evidence.

The pre-*Chevron* framework in connection with "mixed questions of law and fact" is inquired, through the examination of a number of interesting cases.

It is concluded that the depth of the judicial review over the application of undefined statutory terms by an agency in the U.S is dependent upon various factors and is mostly fact-driven, this making it impossible to speak of a single model of judicial review.

It also remarked that the boundaries between *agency policymaking* e *agency law-finding* are not clear-cut and that a question of application of an undefined statutory terms to the facts may result in an exercise of administrative discretion. A recent thesis according to which many similarities exist between the Chevron doctrine and the German model of review over *unbestimmte Rechtsbegriffe* that would lead to a functional equivalence between the two models is reviewed and criticised.

In the third chapter the issue of undefined statutory terms is investigated under a L&E approach. This approach, whose application to the administrative law is still in an early stage of development, offers different possible interpretation keys.

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Four paths of analysis are elected: the first one deals with the problem of the legislative allocation of delegated power between agencies and courts (*policy and delegation lotteries*); the second one concerns the debate on the optimal precision of rules (*rules vs. standards*); the third path explores the costs and benefits connected with the unpredictability of deference standards (*deference lotteries*); the fourth is devoted to the problem of optimal "aggressive" judicial review, dealt through a cost-benefits analysis.

The research, overall considered, shows that the attempt to identify a convergence among legal models is vane, not only because any system is deeply rooted in its originating legal tradition, but also in light of the fact that the complexity inherent to each system allows an identification of symmetries and asymmetries only in connection with single specific instances where the review of agency action comes *concretely* into play. The adoption of a factual approach is therefore indispensible.

The analysis shows an additional interesting result: the different systems considered, regardless of their specific features, their different legal tradition and administrative structure, seem to converge on the acknowledgement that the judicial review over undefined statutory terms cannot *always* amount to a full judicial review; when the control is not full, a standard of reasonableness applies.

It is argued that this result may be compelled by the very structure of the exercise which the judge is asked to carry out, at least when the application of the undefined statutory term at stake requires knowledge outside of the scope of the judge's expertise.

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