

Recent Trends in Italian Public Administration

Giorgio Pastori

Abstract: Although the reality of an administration continues to provoke the public's harsh criticism and widespread discontent, at least from the beginning of the 1990s, a considerable quantity of reforming legislation and organisational measures has sought to create a new and better relationship between the public administration, society and citizens. The article argues that, although the Constitution of 1948 was left unchanged in these respects, these reforms, considered as a whole, introduce the new vision of administration. The first of such reforms was the introduction of a law laying down general principles of administrative action (Law no. 241 of 1990). Together with other legislative measures, this deeply affected the relationships between citizens and public administrations. Second, both the constitutional framework and administrative organization have been modified, the latter throughout the 1990's and the former in 2001. More recently, as a third step, several measures were introduced in order to improve judicial protection of individual and collective interests. After considering all these trends, the article observes, however, that, while a transformation occurred, it still has not influenced the spirit and behaviour of the people working in administration. A change in the ethic of the administration is thus needed.

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I. *In Search of an Administration that serves Society*

If one examines current trends in Italian public administration and its related law, it is fairly evident that Parliament and the Government have been trying for some time to create a public administration capable of better meeting the general public's needs and expectations.

On the one hand, there is the reality of an administration that continues to provoke the public's harsh criticism and widespread discontent. On the other, at least from the beginning of the 1990s, a considerable quantity of reforming legislation and organisational measures (some very recent) has had the aim (despite manifest inconsistencies and second thoughts) of creating a new and better relationship between the public administration, society and citizens.

Although the reforms have had an impact on all the main areas of administration (the organisation of administrative structures, the procedural rules governing administrative activities and the forms of judicial protection available *vis à vis* the administration), they have a common source of inspiration and are interdependent.

It would be correct to say that underlying all the main reforms is the intention to implement a vision of public administration differing from the one that continued to dominate, even after the new Republican Constitution came into force in 1948. This new vision is, in fact, linked both to what the Constitution had itself prefigured and to requirements subsequently resulting from the national legal order's ever increasing integration with that of the European Community.

Briefly revisiting the main features of this vision, it should first be remembered that, within the new framework of political and social democracy it established, the 1948 Constitution identified novel objectives of personal and

* English Translation by Catharine Rose de Rienzo (née Everett-Heath).

** Professor of Administrative law and Dean, Law School, Università Cattolica del Sacro Cuore di Milano.

collective promotion and development and placed them at the heart of the relationship between public institutions and citizens. At the same time, it defined such objectives both as tasks to be shared by all public institutions and as the object of as many individual rights. For example, health protection is defined both as a collective interest and a right of the individual (article 32 of the Constitution).

At the same time and for the first time in Italy's constitutional history, the Constitution expressly considered public administration as a separate function (although it did so in the context of the rules dedicated to the Republic's Government). Article 97(1) provides that "public offices shall be organised according to the provisions of law in such a way as to ensure the good functioning and impartiality of administration".

In this way, the Constitution brought administration into relief as an activity to be organised and carried out separately, according to basic principles that in themselves govern and must govern every administrative activity, whether public or private (i.e. good functioning - a condensation of the requirements of effectiveness, efficiency and economy of action - and impartiality). This so that the objectives of general interest and the rights contemplated by the Constitution might be achieved.

The 1948 Constitution therefore sets public administration in a context of relationships between government institutions and society that differs radically from the one existing under the previous constitutional framework. Formerly, administration had been conceived as the manifestation of executive power and state authority. It was held to operate according to the legality principle but for the purposes of providing for public interests that were the preserve of government institutions and in a relationship that saw such interests as distinct from and contrasting with citizens' freedoms.

Under the 1948 Constitution, however, the public administration fits into a context of relationships that fosters the integration and convergence of public institutions, citizens and society. The meeting point may be found in the objectives of personal and social promotion and development established by the Constitution. Administration is conceived, in particular, as the instrument guaranteeing effective enjoyment by everyone of the civil, social and economic freedoms recognised by the Constitution and by the legislation enacted under it.

Thus administration is no longer pre-eminently conceived as the manifestation of authority, even if it involves the exercise of authoritative

powers. Indeed, many of the Constitution's rules take care to reassert and reinforce the principle of legality, not only as the basis for administrative powers but also as the means of circumscribing them. Even when the administration avails itself of authoritative powers, however, it is conceived by the constitutional framework first and foremost as an activity that has the function of achieving specific goals. In such sense, it is significant that the above-cited article 97 refers to good functioning or the achievement of goals even before it refers to impartiality.

Likewise, the first of the general reform laws to introduce the new vision of administration (Law no. 241 of 1990), states at the beginning of section 1 that "administrative activity shall pursue the objectives established by law". It then immediately takes care to list economy of action and effectiveness amongst the criteria governing such activity, followed by impartiality, publicity and transparency. The Constitutional Court has, in its turn, described such aims as "goals that are objectified in legislation". Precisely for this reason, they cannot be considered the preserve of government institutions but are, rather, attributable both to the general public as a whole and to individual citizens (see the Constitutional Court's judgement no. 453 of 1990).

Such fact means also that administration is public not so much because it originates from or depends on government institutions as because it is aimed or directed at tasks and goals that are public insofar as they concern society or the general public. Public administration is defined as such not because of its provenance from one or other government institution but because of the objectives of general interest it is structured to achieve, although there are clearly various ways in which it may do so. Administration may take the form of regulation (whether or not authoritative) or of providing services, for example. It cannot be equated with government but has, rather, the function of serving society or (if one may summarize it so) of social organization.

Thus the first distinctive and determining feature of this new vision may be identified as the consideration of administration as a separate function (i.e. a function that is autonomous and distinct from the political function of government). Such function is mainly connoted with the duty to pursue pre-established goals and is governed, in the first place, by certain principles that it shares with every other administration and that may be summarised as good functioning and impartiality.

Administration therefore comes to be characterised as an activity directed at pursuing given goals rather than an activity distinguished by its

provenance from government institutions and operative in its exercise of specific powers of command. Such a characterisation corresponds not only with an emphasis on administration's finalistic profile but also with a consideration of the goals as objective aims no longer ascribed to government institutions but to the legal order and social organisation. In short, it is what is meant nowadays when people are wont to say that a "goal-oriented administration" needs to be achieved. Such expression conveys the sense of the abovementioned change in perspective only too clearly.

This is, on closer inspection, the same vision of administration as the one drawn from the Community's legal order. By virtue of the reference provided for by the same Law no. 241 (as amended in 2005), the principles governing that legal order now apply integrally to Italy's national administrative activities. The Community's legal order sees administration as an activity essentially characterised by the tasks and objectives it is structured to pursue. It is said that the European Community is a "community founded on the rule of law". Whilst encompassing a plurality of States or government institutions, it can be identified (as the Founding Treaty and other subsequent Community rules show) by common tasks and objectives corresponding not only to new social and economic structures but also to rights enjoyed by individuals and groups of persons that must be recognised and effectively exercised throughout the Community space.

Naturally enough, at a Community level, this has resulted in administration being considered primarily in terms of the goals and tasks to be performed rather than the persons in charge of it. Thus the Community's administration is no longer the expression of a State or one government institution rather than another. It is defined as "Community administration" by virtue of the tasks that the Community's legal order gradually identifies and its actions are subject to common rules that the said legal order identifies independently of the institutions provided for by the various national legal orders.

In the light of such a conception of administration, provenance from public institutions or the lack of it loses its preliminary and characterising significance. Similarly, the type of instrument employed loses its decisive importance, whether such instruments be authoritative powers or not. What comes into prominence, instead, is the administration's functioning in accordance with the common principles and rules that govern it according to its

distinctive binding goal and the fact that it has social organisation as its purpose.

Now, if this is so, then administrative law is also changing. It can no longer be defined as the law governing “administration-as-authority”. The focal point becomes administrative action as a function that matches every organised social reality at a private or public level and at a local, national, Community, international or transnational level. Administrative law is freed from the particularism of national legal orders and tends to identify with a unitary body of principles and rules that administrations have in common and apply beyond national confines.

On the other hand, it is often said nowadays that we are moving in the direction of a global administrative law or “natural administrative law”. This means that a convergence is occurring beyond national boundaries in relation to rules that regard the administrative function as cooperative action towards a given goal and that are applicable whether or not they have been provided for by any particular rule of positive law.

II. *The Main Reform Trends at an Institutional and Organisational Level*

The main implications of this vision of an administration at the service of society had already been outlined by the Constitution of 1948. They are now being confirmed and sometimes developed further by the most recent reform trends.

If one considers the institutional and organizational profiles, it must firstly be recalled how the Constitution opposed the centralised nature of the previous politico-administrative framework. Its original text had already provided for the creation of a pluralistic framework for government institutions: no longer just the State but also Regions, Provinces and Municipalities alongside it. In this respect, the Constitutional draftsmen then provided for a wide-ranging devolution of administrative functions from the State to the newly founded Regions and Local Authorities (articles 5, 114 and 128).

More recently, the constitutional reform of 2001 (anticipated by reforms enacted by Parliament during the period 1997-98) has further reinforced the system’s autonomistic structure. It has established that the division of administrative functions between local, regional and central institutions must

be provided for by national and regional legislation (each on the basis of its own areas of competence regarding subject-matters) according to the principle of “vertical” or “federal” subsidiarity and the related principles of appropriateness and differentiation. In other words, it provided that the distribution of administrative functions must start from the basic institutions (i.e. the Municipalities) and work upwards (i.e. “bottom-up”), according to the nature and scale of the functions themselves, whilst attributing different functions to institutions of the same kind, where appropriate (article 118 of the Constitution).

In its affirmation of such principles, the Constitution’s new article 118 requires administrative activity, insofar as it is a function serving social organisation, to be primarily attributed to the institutions closest to citizens (or, at least, the relevant social and economic realities), where this is compatible with the requirement that the individual functions be performed effectively and efficiently.

Furthermore, article 118 adopts the requirement that administrative functions be attributed to the institutions best suited to the goal. Thus it overturns the traditional perspective: no longer from the public institution to the function but, rather, from the nature and scale of the function to the institution.

The requirement that administrative functions be distributed according to their nature and scale has been confirmed quite specifically by constitutional case law, from the well-known Judgement no. 303 of 2003 onwards. The Constitutional Court has highlighted how administrative functions can be divided between the State and the Regions according to the principle of subsidiarity and the other principles referred to above, without having regard to the division of legislative functions. Indeed, administrative functions draw the corresponding legislative functions to themselves (by way of the so-called “pull toward subsidiarity” [*chiamata in sussidiarietà*]). In this way, the Court has added an element of flexibility and mobility to the originally rigid division of legislative competences between the State and the Regions decreed by article 117. It has transformed the subsidiarity principle into a principle that allows the whole legislative and administrative system to be adapted to the administration’s concrete requirements regarding the objectives and results to be achieved at the social and economic level.

A division of functions that is calibrated to concrete social and economic requirements implies, lastly, that each institution or administrative centre must

be allocated a combination of functions capable of guaranteeing it a unitary responsibility for regulating the relevant activity, providing the service or achieving the result provided for (see section 4 of Law no. 59/1997, in this sense). In other words, there must be no molecular or subdivided distribution of competences but, rather, an administrative system that, from the bottom to the top, corresponds to a network of centres that are directly responsible towards their respective communities.

It should nevertheless be remembered that Italy is still waiting for Parliament and the Government fully to implement the scheme reordering the administrative system contemplated by article 118. The parent Act providing for so-called “fiscal federalism” (Law no. 42/2009) has recently been approved, however. This dictates that the criteria governing the distribution of resources must be established before those governing the division of functions. It should nevertheless be emphasised that, at the financial level, the legislation establishes the basic principle that each institution must be autonomously responsible for managing its own functions and resources in relation to pre-established objectives and benchmarks.

Secondly, the reform of article 118(4) effected in 2001 expressly stated the principle of “horizontal” or “social” subsidiarity, as well. According to this principle, the conduct of activities of general interest by citizens (as individuals and as members of associations) must be promoted when citizens can themselves conduct such activities in an appropriate manner.

Article 118 of the Constitution adopts the idea (already present in article 2 of the Constitution’s original text) that it is not just public institutions that can pursue goals significantly defined (as in the Community’s legal order) as “of general interest”. Citizens themselves, both as individuals and as members of associations, also (and primarily) have the right to do so, in the exercise of those freedoms that the Constitutional Court calls “social freedoms” (see Judgement no. 300 of 2003). That is to say, whilst exercising their right to act through various, free and autonomous initiatives that have solidarity or social usefulness as their purpose.

Thus, under article 118(4) of the Constitution, public administration (in its objective connotation as an activity carried out for purposes of general interest) may also be carried out by private parties nowadays. From the Constitution’s point of view, administration must not only be close to the people and the social realities it is providing for, but it must also be carried out by society’s own structures when possible. Under article 118(4), citizens must

be encouraged to play their part in the conduct of administrative activities i.e. the pursuit of objectives of general interest. The provision opens up the perspective of an administration spread through society. The rules commonly governing administrative activity nevertheless apply, even though the party in charge of it is a private party, as today generally provided for by the above-cited Law no. 241 of 1990.

Ordinary legislation now offers many examples of such a way of understanding and making the most of the contribution that private parties, especially “non-profit” ones, can make to the pursuit of objectives of general interest. In the past, the government and society were traditionally seen as opposed. The private sphere was considered eminently bent on protecting individual interests and personal economic advantages. It is well known that there are, however, other civil and cultural traditions inspired by the idea of social freedom and, therefore, of freedom-as-responsibility in the exercise of which private parties shoulder the burden of goals of general interest.

Thirdly and as is evident from the already-cited article 97(1), in giving priority to the principles of good functioning and impartiality, the Constitution was establishing the main lines along which to govern the organisation of administrative structures and the conduct of administrative activity, no matter which government institution was entrusted with it.

As far as the public structures in charge of administration are concerned, the Constitution accepts the basic need for them to be regulated according to the administrative function’s intrinsic requirements. In particular, article 97(2) provides that “the regulations of the offices shall lay down the areas of competence, the duties and the responsibilities of the officials”.

In contrast to the traditional ministerial model (according to which administrative units were directly subordinate to ministers or the corresponding organs in regional and local government), the Constitution required the administration to be organised in units enjoying their own competences and autonomously responsible for exercising them, albeit in observance of the policy-setting and monitoring prerogatives enjoyed by the political organs of government.

Whereas the political function is an expression of the majority and involves making free and innovative choices regarding the objectives and interests to be pursued within the Constitution’s framework, administration has the task of executing the political choices by organising or seeing to the realisation of the goals such choices have identified. By virtue of its intrinsic

connotation as an activity geared to pre-established goals or identified by its binding goal, administration is governed by principles differing from those governing the political function. As already stated, good functioning means the capacity to achieve the given goals in the simplest, fastest and most economic manner, whilst impartiality means the duty not to pursue goals other than those defined by law or by other policy-setting instruments.

Although such an organisational distinction between administration and government was introduced by the 1948 Constitution, it remained for decades merely a statement of principle, despite efforts to implement it (in a very reductive manner) during the early 1970s. Only with the advent of Law no. 142 of 1990 (regarding Local Government) and, then more generally, with that of Legislative Decree no. 29 of 1993, were the roles and competences enjoyed by the political structures of government (vested with the tasks of politico-administrative policy-setting and monitoring) distinguished from those enjoyed by the technical/professional structures (entrusted with the tasks of management).

The distinction between the roles and areas of competence attributed to organs of government and those attributed to managerial organs is now regulated by Consolidation Act no. 165/2001. This contains rules applying to all levels of public administration. Such distinction has now also been hallowed by the Constitutional Court as a constitutional principle deriving from the already-cited article 97 (see Judgement nos. 103 and 104 of 2007).

By virtue of such fact, at all levels of administration, the offices run by officials belonging to the special "manager" category must be identified. The managers in charge of such offices not only enjoy decision-making powers affecting the public but also the internal organisational competences needed to achieve the objectives and results established by government organs, the achievement of which they are responsible for.

Even after its general enunciation in the ordinary legislation, the organisational distinction between roles and competences pertaining to the political moment of government and those pertaining to the technical/managerial moment has often been contradicted by both national and regional legislation aspiring to restore the old organisational model and remove such a distinction. The Constitutional Court's pronouncements mentioned above and the very recent Law no. 15 of 2009 nevertheless appear to be helping to consolidate the distinction-drawing organizational model today.

In particular, the new enabling Act no. 15 of 2009 provides for the re-organisation of state administrative structures. It has also specified the ways in which the overall planning/realisation/monitoring cycle for objectives and results is to be realised (this for the purposes of governing both how the administration functions and the relationship between political organs and managers). It should also be noted that the new law is intended not only to guarantee greater managerial autonomy and responsibility but also to foster transparency outside the administration with regard to the results achieved. In particular, section 4(g) of the Act provides that “full disclosure [both] of the data regarding the services provided by the public administration” and of the related assessments must be guaranteed. In this respect, Law no. 15 seems to confirm that transformations in the administration’s organisation and transformations in the position of citizens *vis-à-vis* the same are interdependent.

Nevertheless, the need to guarantee managerial autonomy and responsibility for matters concerning personnel management (the ways in which managerial appointments are conferred, the length of appointments and performance evaluations, in particular) has not yet been fully met. Today, despite some guarantees directed at ensuring its impartiality, the management of such personnel remains to a great extent under the control of the political leadership or is, in any event, heavily conditioned by it.

Of itself, the political choice of “fiduciary managers” can only be justified for a limited number of people working directly with government leaders. Should the desire be, on the other hand, to achieve full autonomy both for the managers and for their management as personnel, then bodies and mechanisms similar to those envisaged for the judiciary will also be necessary.

That does not mean, however, that administration must be independent of the political institutions. It means, rather, that there is call for a management of the managers that is directed as far as possible at making the most of professional skills and commitment. This without prejudice to the policy-setting and monitoring competences enjoyed by government bodies, however, since it is they who are ultimately responsible for administration *vis-à-vis* the general public or electorate, by virtue of the democracy principle.

It should also be remembered that, on the basis of the same principles inferable from article 97, it has been possible to establish independent regulatory authorities in various socio-economic fields during the last two decades. By virtue of the functions they perform, these enjoy special forms of independence from the Government and political power in general. There is

nevertheless a need for linkage and co-ordination with the representative institutions capable of bringing even the independent branches of administration back into the overall system that implements the democracy principle.

III. *Reform Trends affecting Administrative Activity and Relations with Citizens*

It is the change of perspective both in the law governing administrative activity and in relations with citizens and affected parties that constitutes the core trend in the reforms currently in progress, however.

The institutional and organisational transformations achieved or under way are, in a certain sense, instrumental. Of themselves and with the exception of the social subsidiarity principle, they are not enough to implement the new perspective of an administration structured to serve society as it had been envisaged by the Constitution.

Indeed, it may be noted that decentralisation of both governmental and administrative functions (achieved very belatedly, in itself) has had only a minimal impact on the relations between the administration, citizens and society. This despite all the good intentions enunciated during the 1970s, in the newly established Regions' Charters, in particular. That certainly contributed to bringing the institutions of government significantly closer to the general public and to changing "who" ran the administration, but not "how" it was run.

The need to lay down new general rules governing the administration's decision-making and provision of services in such a way as to guarantee citizens the expected result (i.e. the administrative act or the service) rapidly, simply and economically, whilst better ensuring the impartiality of such decisions and services, has long remained essentially unmet.

Yet the Constitution had not limited itself to reasserting and reinforcing the legality principle by entrusting the task of establishing the precise boundaries between authority and freedom to legislation. On the contrary, it had laid down principles binding the legislator and thus setting the parameters for the constitutional legitimacy of legislation governing not only the administration's organisation but also, and above all, its activities.

As far as the activities are concerned, by referring both to good functioning and impartiality, the Constitution required administration to be governed by a general principle of functional responsibility when pursuing legally established goals of general interest and meeting citizens' corresponding expectations.

This meant, in particular, that the administration's traditionally privileged position of superiority over citizens was no longer acceptable. What was needed was a regime governing decision-making activities that contemplated precise administrative duties and corresponding rights for citizens and affected parties, in implementation of that functional responsibility principle.

Prior to the 1990s, the principles of good functioning and impartiality (which, under the Constitution, should have been pervading administrative activity) did not catch on in legislation, save in isolated instances of sectoral reform. Implementation of such principles was almost entirely entrusted to constitutional and administrative case law. The former was nevertheless extremely slow to make the most of the innovative and binding effect of article 97's provisions on the legislator. The latter, acting as a substitute for the legislator, certainly contributed to enriching and refining the substantive rules that should have guaranteed the impartial exercise of administrative discretionary power. It was, however, unable to help implement the good functioning requirements or, more generally, alter the basic connotations of the citizen/administration relationship.

The turning point came during the mid-1980s when the government began studying new rules primarily intended to improve relations between citizens and the administration. This was to remedy the evils that were being denounced, at that time, as "the inscrutability, groundless delays and outdated authoritarianism of administrative behaviour". To such end, "precise rights for citizens *vis-à-vis* the administration" were to be identified. The reform initiative then made particular reference to the need to simplify and democratise administrative procedures.

As may be noted, the listing of the evils to be tackled (evils typical of an administration that persisted in its confrontational dissociation from its citizens) was already accompanied by an initial, precise recommendation as to how to go about it. Jointly implementing the principles of good functioning and impartiality by laying down new general rules for administration was not enough to make the latter an effective instrument for serving individuals and

society, however. Such a transformation had to be effected through the identification of citizens' rights *vis-à-vis* the administration and, therefore, of the latter's corresponding duties to them.

The initiative was to find its opening in Law no. 241 of 1990. Formally intended to lay down new rules on administrative procedure, it actually contained a catalogue of new citizens' rights, some of which regarded relations with the administration more generally.

In order to remedy the "inscrutability" complained of, the Act introduced the brand new right of access to administrative documents (albeit limited to affected parties and not extending to citizens as such). This right applied to every form of administrative activity, whether decision-making or service-providing, and could be exercised against any public or private party in charge of such activity.

In order to remedy the "groundless delays", it introduced measures simplifying, concentrating and accelerating procedures. Of these, the creation of the duty to conclude every procedure within a fixed timeframe and the extended application of the "*silenzio-assenso*" institution (a mechanism by which the administration's silence is, after a certain period, to be equated with the grant of an application) enjoy a central importance. Of equally central importance was the introduction of the "procedure manager" (*responsabile del procedimento*) as the unitary guide to the expedited conduct of a procedure itself and the institution of the "*conferenza di servizi*", a meeting that co-ordinates the decision-making of several administrative bodies, thereby concentrating procedures. In addition to its procedure-simplifying measures, the Act also provided for the substitution of administrative authorisations with "self-certification" by interested parties.

In order to remedy the "outdated authoritarianism", the Act then introduced (at least, in relation to administrative acts affecting individuals) the fundamental rights of access to information, of anticipatory participation and to the statement of reasons that are normally associated with the principle of fair administrative procedure or due process. It further provided that discretionary acts could be substituted by agreements between the administration and private parties, in conformity with models existing in other countries.

The change in perspective that the Act sought to interpret was well received by the Council of State. When advising on the bill, it stated that the latter expressed "the search for a procedural (and organisational) framework capable of meeting the needs of a new Society that conceives the relations

between the general public and public power in terms that differ from those of the past”.

It may easily be observed that the new rules introduced in 1990 sought to implement the Constitution’s two requirements of good functioning and impartiality. On the one hand, they simplified procedures and imposed duties permitting interested parties to obtain the awaited result quickly and, on the other, they introduced the instrumental guarantees necessitated by the requirement that administrative powers be exercised impartially. In themselves, these two constitutional requirements are conflicting and hard to reconcile. The law has broadly favoured the requirements of good functioning, simplification and the acceleration of administrative activity over those relating to procedural “democratisation”. Proof of this lies in the fact that the Act’s final draft restricted the anticipatory participation of interested parties to the presentation of documents and written arguments and that the procedures relating to instruments of a general content are not covered. The Act’s subsequent amendments and integrating additions have generally followed the same line.

The result is a legislative framework in which result-oriented rules and guarantee-oriented rules have perhaps remained more juxtaposed than integrated. This may be the result of the Act’s extremely general nature and its failure to provide for different kinds of procedure allowing the “good functioning” and “impartiality” dosages to be varied.

What should nevertheless be emphasised is that what may be defined as a “Charter of Citizens’ Rights” has, for the first time, been ratified in relation to the administration when exercising its authoritative powers. Furthermore, the right of access to the documents relating to any administrative activity whatsoever has been introduced. In other words, the attitude necessitating a reform of the law governing relations between citizens and the administration has been overturned. Such fact is confirmed by subsequent legislation. Law no. 212 of 2000 provides that rules similar to those in Law no. 241 are to be applied in the field of fiscal administration (to which the general law was not applicable). Significantly, it contains the wording “Charter of taxpayers’ rights”.

Law no. 241 has been followed by other measures. In the field of public services or services of general interest managed either by public structures or by private parties, legislation has ratified the right of customers to require observance of the governing criteria, modes and standards of service

established in special Service Charters, in accordance with the principles of universality and equal access that govern the provision and quality of the services themselves.

Thus the Act has had a paradigmatic, policy-setting or trend-setting value for subsequent legislation, for which it has remained a point of reference (see, most recently, the so-called “Code on Public Contracts” contained in Legislative Decree no. 163 of 2006). Even the repeated adjustments and amendments the Act has undergone during the relatively few years since it came into force have not altered its basic structure but have, rather, developed it further. In this sense, the rule added by section 1- *bis* of Law no. 15 of 2005 is significant. Under this rule, save in the case of acts of an intrinsically authoritative nature and where the law does not provide otherwise, administrative activity is to be deemed governed by private law (although the principles normally governing every administrative activity must always be held to apply, in any event).

Attempts to limit or reduce the force of the Act’s provisions have not been lacking even recently, nonetheless. For example, on the occasion of the constitutional reform in 2001 (which granted greater legislative autonomy to the Regions and Local Authorities), an attempt was made to argue that the scope of its application was limited to the national administration and that it could not be applied directly to regional or local administration.

Despite such attempts, first Law no. 15 of 2005 (reforming Law no. 241) and then the more organic and very recent reform provided for by section 10 of Law no. 69 this year have specifically stated that the public administration’s main duties as established by Law no. 241 pertain to “the essential levels of service corresponding to the civil and social rights that must be guaranteed throughout the national territory” (the determination of which is reserved to the State, pursuant to article 117(2)(m) of the Constitution, and the mandatory nature of which therefore extends to administration in general). The Regions and Local Authorities are therefore bound to respect the rights and duties established by the Act, without prejudice to their entitlement to provide for higher levels of protection for citizens and affected parties. Curiously, in its list of duties, the above-cited section 10 does not mention the duty to state reasons (which must nevertheless be deemed implicitly included) whereas the “self-certification” and the “*silenzio-assenso*” (“silence equals grant”) institutions are expressly included.

On the other hand, it should not be forgotten that the body of rights ratified by Law no. 241 is linked to the right to good administration and the right of access to documents established at a Community level as two of the rights pertaining to European citizenship. In the version reformed by the above-cited Law no. 15 of 2005, Law no. 241 itself provides that “the principles governing the Community legal order” shall apply to all national administrative activity. It should further be remembered that in recent judgements such as those referred to (judgement nos. 103 and 104 of 2007), the Constitutional Court itself has come to recognise that the principle of procedural fairness must be deemed a constitutional principle under article 97 of the Constitution.

All in all, it must therefore be considered that the rules contained in Law no. 241 comprise the mandatory, constitutionally protected, common core of what are recognised as genuine rights for citizens and affected parties *vis-à-vis* the administration. Possible new judgements from the Court ought to confirm their description as such, as contained in the very recent Law no. 69 of 2009.

Such fact does not mean that there is no need nowadays to continue the journey that Law no. 241 began. In terms of good functioning, efforts to improve the relations between citizens and the administration still further have not been lacking. Several variform legislative and organisational measures directed at liberalising the conduct of activities previously governed by administrative law, at reducing administrative duties for natural persons and enterprises, at concentrating decisions relating to the same activity or result, at reducing decision-making timeframes and at computerising the administration’s operations increasingly extensively both internally and in its relations with citizens have been adopted and are continuing to be adopted.

A provision added to the Act in 2005 and modelled on the corresponding rule in the German law governing administrative procedure moves in the same direction. Under the German provision, administrative acts with a content pre-established by law cannot be quashed on grounds of formal or procedural defects in cases where it is ascertained that their prescriptive content could not have been other than that actually adopted. Nor can discretionary acts be quashed when adopted without prior communication, if the administration can prove at trial that the content of the act could not have been other than that actually adopted (section 21-*octies*).

The rule has been the object of particular criticism. In this respect, it may be remembered however that the Community law on the right to good

administration also structures such right first and foremost as the right to a fair and reasonable administrative act. It is in relation to the fairness and reasonableness of the act that the Community provision then incorporates the right to the procedural guarantees regarding information, anticipatory participation and the statement of reasons. The rule's primary function is therefore to guarantee a substantive result and the procedural guarantees are seen as instrumental to that primary objective. Similarly, under the rule contained in section 21-*octies*, the fact that an act's content has already been pre-defined by law means that formal or procedural defects no longer have the power to vitiate lawfulness.

Parliament has paid less attention to the need to complete and integrate Law no. 241's rules regarding impartiality and implementation of the procedural fairness principle. As far as the procedures relating to acts affecting individuals are concerned, the modes of anticipatory participation have recently been reinforced with regard to applications by interested parties, thereby allowing the latter to make themselves heard before an application is rejected (section 10-*bis*, added by Law no. 15 of 2005).

The need to introduce adequate modes of participation into the procedures relating to instruments of a general nature or, in any event, having a particular social impact still remains unmet, on the other hand. These were excluded from the general Act's provisions, being left to possible special sectoral legislation in the future. The need to fill the existing lacuna and introduce forms of "participatory democracy" like the ones that have long been present in other countries has rightly been highlighted in relation to such procedures ever since the Act came into force. The particular nature and complexity of the individual and collective interests affected by such instruments require it.

It should nevertheless be remembered that, in certain areas, the legislator has already intervened to regulate procedures involving widespread participation that could appropriately be generalised. For example, action has been taken with regard to the regulatory activities of independent authorities (including, in particular, the authorities working to protect credit and savings – Law no. 262 of 2005) and in implementation of Community provisions governing environmental protection (Legislative Decree no. 152 of 2006).

IV. *Reform Trends affecting Judicial Protection*

If one now considers the new conception of the citizen/administration relationship in terms of its implications for judicial protection, it is not difficult to perceive the vistas it has opened. At the same time, the difficulties deriving from Italy's unusual jurisdictional approach to the public administration should be emphasised.

The formulation adopted by Law no. 241 (and taken up by subsequent legislation) shows that genuine rights for interested parties or customers and corresponding duties for the administration are being created in every sphere of administrative activity. Legal relationships based on rights and duties creating equality between the administration and affected parties have now been defined even in the area of decision-making activities.

A relationship of rights and duties creating equality between the administration and affected parties is now also emerging in relation to observance of the fundamental principles governing such decision-making activities and deriving jointly from the national legal order and the Community one (i.e. reasonableness, proportionality, legitimate expectation, non-discrimination, equal treatment and the duty of care).

Such fact has thrown what was a traditional postulate of Italian administrative law into crisis. According to this postulate, in every case where an administrative power exists and is exercised, nothing more than a "legitimate interest" will arise: a "subjective right" can only arise in cases where no administrative power exists. When compared with the postulates of this previous conception of the administration, the profound novelty of the constitutional position adopted under Law no. 241 becomes clear. According to the previous conception (inspired by the authority/freedom conflict), it was only when the administration acted without any authoritative power that affected parties enjoyed genuine rights (defendable in the ordinary courts) against it. When, on the other hand, an authoritative power existed, the only right of action was to have the administrative act quashed for breach of the law determining how that power was to be exercised. Such "right" was the "legitimate interest", defendable before special administrative judges. In other words, relations between the administration and citizens were in the past built on the postulate that administrative power and the rights of citizens and affected parties were mutually exclusive. Such postulate has now been confuted by the way in which the legal order has evolved.

It should nevertheless be borne in mind that in its rules concerning judicial protection of citizens against the public administration, the Constitution itself transposed the dual system of subjective rights and legitimate interests and their related jurisdictions. It did provide, however, that in certain areas the administrative judge might also try issues involving the infringement of subjective rights (under what is known as the “exclusive jurisdiction”). In this respect, the provisions clearly reflect the previous vision of the citizen/administration relationship. And yet precisely the Constitution, in its basic conception, had intended that even when exercising its authoritative powers, the administration was to be directed both at achieving constitutionally identified goals of general interest and at honouring the corresponding individual rights, whilst respecting the canons of good functioning and impartiality.

As a result and as may be observed, citizens and affected parties have been recognised as enjoying genuine subjective rights against the administration for the purposes of ensuring its good functioning and impartiality, even when authoritative powers are being exercised.

It can be seen that there is a need, nowadays, to distinguish between two broad categories of rules creating “right/duty” relationships. On the one hand, there are the rules of a finalistic or substantive nature. These are result-oriented in that they are intended to guarantee an affected party’s right to obtain a final result i.e. an administrative act, the provision of a service or the direct honouring of a substantive interest in accordance with the law (here one may think of the general application of the “*silenzio - assenso*” [“silence equals grant”] rule relating to measures issued further to individual applications). On the other hand and in addition to the substantive rules and principles mentioned, there are the classical procedural rules or “instrumental guarantees”. These pertain to the execution of administrative action. They are intended to ensure its impartiality (especially when discretionary powers are being exercised) and the achievement of a lawful (i.e. fair and reasonable) result through the participation of affected parties.

Both categories of rules and relationships are the expression of a single responsibility principle, however. Nowadays, the administration finds itself in a relationship that creates a general responsibility towards third parties both when it is bound to ensure results and when it must ensure the above-mentioned instrumental guarantees.

Traditionally, administrative responsibility was perceived primarily in a vertical sense. It was in relation to the top political echelons in government institutions that the responsibility of a manager or official mattered. This is still the case today. The role of politico-administrative policy-setting and monitoring enjoyed by government organs is flanked by so-called “managerial accountability”, particularly with regard to the achievement of results that have been pre-established in programmes, directives and other instruments of policy-setting.

Nowadays, however, a relationship creating responsibility in the horizontal sense is coming to the fore. This in the sense of rights and duties regarding both achievement of a result (i.e. an administrative act or service) and observance of the procedural guarantees when performing administrative duties. Such fact is quite consistent with the administration’s function of social integration i.e. the integration of individual and collective living conditions.

It may therefore be observed that the very status of “legitimate interest” is being transformed into a collection of rights of a substantive or procedural nature. This is partly in accordance with article 117(2)(m) of the Constitution, which refers to “services corresponding to the civil and social rights that must be guaranteed throughout the national territory”.

Logically, transformation of the status of legitimate interest into a collection of rights of a substantive or procedural nature should have resulted in a transformation of the related forms of judicial protection. The peculiar dualistic jurisdictional framework has made the transformation highly problematic, however. There would have been no particular problems with a single jurisdiction but adaptation of the remedies has been complicated by the presence both of an *ordinary* jurisdiction over rights relating to administrative activity carried out in the absence of authoritative powers and of an *administrative* jurisdiction ordinarily enjoying competence over legitimate interests that have been transformed into subjective rights.

Initially, an attempt was made to get round the need for new forms of protection through repeated recourse to the administrative judge’s exclusive jurisdiction. The latter could not be extended indefinitely, however, owing to constitutional restrictions imposed by the Constitutional Court in its judgement no. 204 of 2004. It was therefore subsequently considered preferable to extend the administrative judge’s jurisdiction beyond the traditional power to quash administrative acts, although such extension did not go as far as restructuring the forms of protection in an organic manner.

In particular, the legislator has accorded the administrative judge adjudicatory powers capable of guaranteeing that the new, result-oriented rights and duties be positively honoured. As already mentioned, administrative judicial protection was traditionally a protection operating through instrumental guarantees. It essentially ended in the nullifying moment when the administrative act was quashed, without the interested party achieving the result sought. This approach generally proved increasingly unsatisfactory as the administration became more involved in regulating economic and social life and as a vision of the administration as the means of properly honouring individual and collective rights (or, in the case of independent administrations, of regulating relations between private parties) became established.

It had already been necessary in Law no. 241 itself (and its subsequent amendments) to provide for new forms of protection capable of ensuring that both the right of access to documents and the right to obtain an act (in cases of silence) were duly honoured. Nowadays, the law provides that, in the first case, the administrative judge can order the production of the document and, in the second, that the judge can not only verify the duty to issue the act but also “try the substantive claim” i.e. establish the very contents of such act, when the circumstances so allow.

As regards the provision of public services, on the other hand, the fact that parent Act no. 15 of 2009 provides for the possibility of customers and consumers proceeding against service providers before the administrative judge in a sort of class action is particularly interesting. Such action is to be permitted for the purposes of obtaining provision of the service in accordance with the duties and standards established by the regulatory authorities or Service Charters.

The areas in which the administration may be sued for damages have also grown. The administrative judge has become a judge determining liability in the cases falling under the exclusive jurisdiction and, more generally, in the context of his usual jurisdiction for determining lawfulness. A century's worth of case law had denied compensation for loss or damage caused by unlawful acts committed during the exercise of administrative powers. The basis for this was the assumption that affected parties had a legitimate interest rather than a subjective right. The Court of Cassation's fundamental judgement no. 500/99 nevertheless confirmed the compensable nature of legitimate interests, effectively according them the same status as subjective rights for this purpose.

Subsequently, Law no. 2005 of 2000 accorded the administrative judge competence also to try disputes regarding liability following the quashing of administrative acts. In its later judgement no. 204 of 2004, the Constitutional Court stated that compensation is an “additional form of protection of a legitimate interest” and ruled that administrative judges have jurisdiction to make compensation orders.

In any case, there is now the possibility of compensating the damage deriving from breach of both result-oriented duties and guarantee-related ones, even when authoritative powers are exercised. In particular, by adding section 2-*bis* to Law no. 241, the very recent Law no. 69 of 2009 has ratified the compensable nature of damage caused by the administration’s procedural delays, confirming that affected parties have a genuine right that the procedural time limits be respected.

Where administration serves society and individuals and may be carried out both by public structures and by private parties, availing itself of authoritative powers and private-law powers alike according to common principles and rules governing conduct of the activity, then judicial protection must always be capable of ensuring that both the guarantee-related and the result-related duties are discharged and that damage caused by their breach is compensated according to the rules generally applicable to inter-party relations.

Such fact of itself presupposes that the distinction between subjective rights and legitimate interests be abandoned and the jurisdictional dualism still existing and enshrined by the Constitution be left behind.

Whoever the administrating party may be and whatever instruments may be employed, administration is an activity that, all in all, is defined by the public goals it has to achieve. Such goals have corresponding subjective legal positions that can no longer be divided into rights or legitimate interests but are to be seen solely as substantive or procedural expectations constituting as many rights. If the courts are to protect subjective legal positions within a relationship creating equality with the administrating party, the only feasible goal is that of realising a unitary jurisdiction as regards the administration.

Pending an improbable constitutional reform, jurisdiction remains divided between the ordinary judges and the administrative ones. Administrative judges’ adjudicatory powers are nevertheless increasing and diversifying. The above-mentioned parent Act no. 69 of 2009 heralds a reform of administrative trial procedure. Amongst the guiding principles the enabling statute contains is the provision that judges are to be given the possibility of

making various kinds of “rulings that are appropriate for honouring the victorious party’s claim”, including declaratory judgements, liability rulings, injunctions and orders quashing, suspending or modifying administrative acts.

In this respect, the parent Act’s implementation may provide the opportunity to give a more organic structure to the forms of protection resulting from the new substantive reality of relations between citizens and the administration, at least as regards the administrative jurisdiction.

V. *The Administration’s Transformation and the Service Ethic*

If the conception of administration is being transformed in the manner briefly described above, it should be noted in ending that such transformation needs to influence the spirit and behaviour of the people working in administration. As stated in the OECD reports, there is a need for the three “Es” in today’s administration (effectiveness, efficiency and economy of action) to be accompanied by a fourth, namely the “E” for ethics, and a service ethic, in particular.

An administration conceived as the manifestation of government and authoritative power has often generated a bureaucratic and authoritarian ethos in the people who have worked in it and continue to work in it. Instead, the rule-oriented ethos of administrative employees needs to become a goal-oriented one directed at results, thereby creating an egalitarian democratic ethos or service ethic.

Combined with the new technology of the computer era, the most recent administrative reforms have contributed to making the administration autonomous of the political moment. They have also contributed both to the introduction of management rules geared to a transparent and efficient functioning and to the development of a relationship creating responsibility towards the public. All this must now become concrete in a service ethic that can allow the administration to be lived as what a French author has happily defined as “everyday democracy”.

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