

FORWARD

ADMINISTRATIVE PROCEDURES AND RIGHTS IN ITALY: A COMPARATIVE APPROACH

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I. Legal limits to despotism: from Constitutions to administrative procedures acts

In his classic essay on constitutionalism, Charles McIlwain argued that we should “Admit the truth of Paine's dictum that ‘a constitution is not the act of a government but of a people constituting a government’”¹. And, if this be true, this ‘constitution’ must be “Superior in character to the acts of any ‘government’ it creates”. As a result, the ‘constitution’ must be also unalterable by ordinary legal process. This is not only a logical consequence, but at the same time a necessary one. The reason is, McIlwain continued, that “Constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law”.

This is the reason why the first Western constitutions sought to protect the fundamental principles of human liberty. Consistently with *ratio*, more recent constitutions, such as those approved by Spain and Portugal in the 1970's after authoritarian governments were overthrown, added new rights to traditional civil and political rights. Such rights concern the relationship between citizens or individuals and the government. They include the right to be heard in individual procedures and the right to have access to files. As a result, the legal protection of such rights must be ensured not only against the government of the day, but also against the will of the majority of people's representatives.

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¹ C. McIlwain, *Constitutionalism. Ancient and Modern* (1947, 2nd).

In Italy there is no such constitutional basis for this new kind of right against the government. The Constitution of 1947 lays down only broad principles of good governance. However, in 1990, an Act of Parliament set out principles on administrative procedure. It codified judge-made law, in particular with regard to the duty to state reasons with regard to all administrative decisions, with the exception of those that lay down rules. It also recognized new rights, including the right to take part in administrative procedures. Last but not least, it provided any person with the right to access public authority records and information².

In the Italian political and administrative landscape, the importance of this Act may not be neglected. It was one of the most important innovations ever introduced by national legislation in the field of public law. It is, beyond any shadow of doubt, the Act most frequently invoked by lawyers and judges in this field (the pervasiveness of administrative due process litigation after 1990 is not necessarily a problem, but an element which deserves specific analysis). It raised, more than any other piece of legislation, questions for jurists and other social scientists. Whether it contributed to imposing real changes on central and local administrators, it remains however to be seen. Evidence of its success may be seen in the opposition that administrators have constantly displayed against it. Twenty years ago, according to the then-President of the Council of Ministers, the Act was approved during summer precisely as a way to avoid the opposition of the bureaucracy. Fifteen years later, when the Act was amended by Parliament, the bureaucracy succeeded in limiting some of the most significant changes introduced by the Act. For example, the default term (which must be complied with, in other words, if no specific term is set either by law or by a regulation) for concluding a procedure was extended from thirty to ninety days (Article 2, 3rd paragraph).

² For an overview, see M. Cappelletti, J.H. Merryman & J.M. Perillo, *The Italian Legal System. An introduction* (1967) and, with regard to administrative law, D. Sorace, *Administrative Law*, in U. Mattei & J. Lena (eds.), *Introduction to Italian Law* (2002). See also S. Cassese, *The Italian Legal System 1945-1999*, in L.M. Friedman & R. Pérez-Perdomo (eds.), *Legal culture in the age of globalization – Latin America and Latin Europe* (2003), 220.

Whether this confirms McIlwain's thesis that the only way to secure fundamental rights is to enshrine them in a constitution is, however, debatable. An equally debatable issue is whether the Act was adopted with the idea of legitimising administrative power through controlling administrative process or, more simply, to demonstrate that politicians were not insensitive to the growing demand for better administration, which took other paths during the last decade of the twentieth century.

II. Evaluating an Administrative Procedure Act through the comparative legal analysis

When considering, in its twentieth anniversary, whether the Act of 1990 provides forms of decision-making, participation and access for the modern administrative state, a question of standards arises. Too often, the Act is regarded exclusively from a national perspective, as if administrative law were only a province of the State, of each State. The idea that the performance of public institutions should be measured only against national benchmarks, however, is not only in contrast with, say, Maastricht fiscal criteria (often criticized by economic literature for its lack of theoretical foundations, but constantly used by technical and political institutions). It is in contrast also with the most recent achievements in the field of administrative procedures in the European legal field.

Such achievements derive, first of all, from a simple fact. As observed by a precursor, Giorgio Pastori, almost fifty years ago several European countries adopted a legal framework for their own administrative procedures³. Austria took the first step in this direction as far back as 1925, with a set of statutes. Other central European countries followed suit shortly afterwards: Czechoslovakia and Poland in 1928 and Yugoslavia in 1930. After the Second World War, other European countries adopted their own legislation to deal with administrative procedures. The fact that such countries included Spain and Hungary, at that time certainly not democratic polities, confirms Carol Harlow's remark that general principles of law must be distinguished from

³ G. Pastori, *La procedura amministrativa* (1964).

underlying values, which are different and vary to some degree⁴. However, those principles existed and were shared, which is not irrelevant. Nor was it fortuitous that, after a second wave of statutes during the 1970's, with the Swedish Act of 1971 (later amended in 1986) and the German one of 1976, several European countries laid down principles of administrative procedure. Italy was one of such countries. Even France and the United Kingdom, whose legal and political culture long opposed the idea of a codification of administrative procedures, introduced specific statutes aiming at ensuring freedom of information. Once again, this does not demonstrate that national values coincide. Indeed, while in Scandinavian countries freedom of information is regarded as a basic right of citizenship, in the UK secrecy, instead of openness, has for a long time been the general rule. However, the similarities between national rules and principles should not be neglected. We may wonder whether, as Rudolf Schlesinger argued more than fifty years ago, the most important task for comparative lawyers is the study of the general principles of law common to the Member States, also with a view to the increasing globalization of law⁵.

Secondly, some broad principles of due process and transparency were established by European organizations. In 1977 the Council of Europe passed a resolution on the "*Protection of the individual in relation to the acts of administrative authorities*", establishing several rights and duties. These are the right to be heard and to have access to both essential facts and legal advice, and the duties to provide reasons and provide a system of judicial review. Three years later, the Committee of Ministers adopted another recommendation, establishing, *inter alia*, that reasonable time-limits must be defined and complied with. The ECHR exerts a stronger influence on national procedural laws. It strengthens the standard of legality and ensures the protection of procedural rights within the scope of Article 6. The impact of the EU is even stronger. The Court of Justice has used general principles of law, like the duty to provide reasons and that of ensuring judicial protection against administrative acts, as instruments to reduce

⁴ See C. Harlow, *Global Administrative Law: the Quest for Principles and Values*, 17 *Eur. J. Int'l L.* 187 (2006).

⁵ R. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 61 *Am. J. of Int'l L.* 734 (1957).

the procedural autonomy of member States. EU directives produce similar effects in specific fields. The same happens when international treaties, such as the Convention of Aarhus, are issued by the EU.

We must be aware, of course, that, although EU law is a powerful instrument to de-nationalize public law, it is re-nationalized when it is implemented within the Member States. As a matter of fact, implementation is affected by national institutions, processes, and legal cultures. This, however, does not soften the need for comparative analysis. Quite the contrary, this need is reinforced.

III. Strength and weaknesses of the Italian Administrative Procedure Act

As it becomes evident that the use of comparative analysis of law in the study of administrative procedures is useful or even necessary, a first question arises on why the Italian Parliament legislated only in 1990, so many years after other countries. The opposition of bureaucrats is not the only relevant factor, probably not even the most relevant. Legal culture, particularly the opinion of influential scholars against this kind of legislation, ought to be adequately considered.

Another problem is that since 1990 the Act was amended several times, more than ten in the first fifteen years, and twice in the last fifteen months. We may ask why such amendments were regarded as necessary, since the Austrian Act, for example, was modified very rarely. We may ask, moreover, whether such modifications altered the essential contents of the Act, unlike in the Austrian, German and U.S. contexts. We may ask, finally, why the Act was not amended in order to strengthen the right of access to documents, after the application of international treaties, such as the Convention of Aarhus, and the evolution of case-law in European courts.

The scope of application of the Act is still another problem, from the point of view of the division of competences between national and regional legislators. This Italian situation is by no means unique, in this respect. In the U.S., for example, the Freedom of Information Act, which was implemented in 1966 to provide any person with access to Federal Agency records, does

not apply to state agencies. Indeed, each state has its own public access laws that should be consulted for access. The German codification of 1976, too, recognizes the autonomy of each Land with regard to its own procedures. It is in light of these experiences, and others, that we may better understand whether the rules adopted in Italy, especially after the constitutional reform of 2001, strike an adequate balance between regional autonomy and procedural rights.

IV. A closer look to procedural safeguards against government

If we now turn to the contents of the Act of 1990, two complex issues emerge. Firstly, although other commentators have criticized the absence of legislative provisions concerning for example the right to petition, comparative analysis shows that this is not a common element to all other national legislations. It shows, more generally, that while some Acts codify procedural administrative law, for example the German federal *Verwaltungsverfahrensgesetz*, others only lay down some general principles and rules, such as the Italian Act of 1990. The question is, rather, whether those principles and rules provide only a loose frame of reference for due process of law, particularly in two respects. First, unlike in other jurisdictions, what the Act ensures is the right to present evidence and documents and that to have access to files, but not the right to be 'heard'. Second, the rules of the Act, as distinct from its broad principles, are binding only for adjudication, not for rule-making. To make a brief comparison with the U.S. APA, there is no such thing as formal on-the-record rule-making. There is not even an informal notice and comment. In sum, although rule-making involves the exercise of discretion concerning not only the technical means of implementing a policy, but also the priorities to be accorded to relevant and competing interests, nothing is specified by the law, except the fact that everything is left to specific statutes (Article 13). The question thus arises whether the widespread opinion according to which the Act of 1990 creates at least the preconditions for administrative or deliberative democracy – that which in other countries is used in order to enrich political democracy or to overcome some of its limits – is simply wishful thinking.

The other issue is the balance between social values. Some of the first commentators held that the Act ought not to be regarded only from the point of view of the protection of human liberty, but also from that of administrative efficiency. That was, I believe, a correct and helpful remark. It introduced a useful degree of utilitarianism in a debate that would otherwise have been dominated only by lawyers (many years ago Massimo Severo Giannini warned public lawyers with regard to *'Il Diritto Degli Avvocati'*). The appropriate enforcement of certain rights is important, but it does not exhaust our demand for a good life. When considering such demand, other aspects must be considered, for example the impact of those legislative provisions that oblige higher civil servants to identify who is responsible for carrying out each administrative procedure.

However, that kind of utilitarianism produced very different outcomes in the last years. Consider the duty to provide reasons. Whether or not it is the mildest of all constraints, as argued by Martin Shapiro, it is undoubtedly a constraint on governments⁶. It does not prevent governments from following a certain course of action, but it obliges decision-makers to state the reasons underlying their choices. In this respect, it achieves procedural fairness and transparency, a prerequisite of democracy. Of course, such procedural values are not the only ones that increase social welfare. It is not surprising, therefore, that administrative courts talk about balancing the interest of the party claiming a procedural due process right, for an accurate determination of the reasons upon which a certain decision is based. The problem is, rather, that not only the Act of 1990 does not require any kind of reasons for rule-making, but the amendment introduced by Parliament in 2005 clearly aims at preventing the annulment of administrative acts for the infringement of 'formal' requirements (Article 21-*octies*). This amendment, and the interpretation according to which such formal requirements include the reasons the authority omitted to specify, may reflect a cultural shift, the idea that procedural constraints are only laces, or obstacles to a well-intentioned decision-maker. Or, it may reflect another idea, notably that the

⁶ M. Shapiro, *The Giving Reasons Requirement*, *University of Chicago Legal Forum* 179 (1992).

individual interest of that party claiming a procedural due process right may not be weighed against the collective interest that the administrative decision maximizes. However, the public also has an interest in knowing if public agencies duly and accurately implement political decisions, and assigns a social value to it. The question of how much society is prepared to assign importance to procedural constraints is not, therefore, purely a formal one. Nor is the question likely to be solved by the rhetoric of 'bound administration'. One can easily imagine situations in which the administration does not exercise discretionary powers with regard to substantive choices. However, as Maurice Hauriou once observed, that does not eliminate another kind of discretion, as far as the choice of time is concerned. Nor should issues of impartiality be easily neglected, when several decisions are taken by the same authority in a variety of situations.

A proper consideration of all these issues may greatly benefit from comparative analysis. We may wonder whether the consideration of the social costs and benefits that flow from granting or denying the use of some procedural tools varies remarkably from one legal order to another and, if so, why. We may try to understand, moreover, whether the tests applied by the courts are radically different or whether there is at least some element of convergence.

V. Improving the Act

All of the above shows that the Act of 1990 is quite an important one. To the extent to which it introduces, or codifies, procedural constraints on the government, it strengthens the 'limitation of government by law' which is still, as McIlwain argued, if not the most most important part of Western constitutionalism, beyond doubt the most ancient. However, when evaluating the Act, both its strengths and weaknesses ought to be considered, especially when the latter prevent the exercise of rights. In other words, the Act must not be idealized, but, rather, studied critically and, if possible, improved ⁷. Comparative analysis may be very helpful also in this respect.

⁷ S. Cassese, *Per una nuova disciplina dei diritti dei privati nei confronti delle pubbliche amministrazioni*, in 5 G.D.A. (2007).