# EDITORIAL

## THE ITALIAN ADMINISTRATIVE PROCEDURE ACT: BACK TO THE FUTURE*

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1. Were one to ask any Italian academic which piece of Italian legislation is currently the most important for administrative law, the reply would invariably be the law on administrative procedure (Law no. 241 of 1990).

From its very beginnings, Law no. 241 of 1990 has occupied a special place in the Italian legislative terrain. Indeed, it is the fruit of the work carried out by a commission of academics appointed in 1979 by the then Minister for the Civil Service, Massimo Severo Giannini, and presided over by Mario Nigro (two of the greatest professors of administrative law active during the second half of the twentieth century). Thus Law no. 241 was the product of the intellectual ambition of a narrow circle of academics. Basing their work not only on the consolidated line of administrative case-law but also on comparative legal research, they introduced the principles of participation, simplification and transparency: consider, for example the rules on timeframes and the officer responsible for procedures, as well as those governing agreements, the conference of services (a meeting of the representatives of the various public bodies involved in a procedure, who discuss possible solutions and take a decision by way of a majority of those present), communication of the commencement of a procedure and access to administrative documents.

Law 241/1990 was not, therefore, the product of a political season of administrative reforms. The political class hardly ever intervened during the law's gestation phase. On the contrary, the

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length of time passing between the bill's drafting (1982) and its enactment (1990) was due precisely to the indifference and suspicion with which Parliament, the government and the bureaucracy viewed the text.

The original text of Law no. 241/1990 was streamlined and basic and it looked at administrative action from a citizen's perspective. Indeed, it would be fair to say today that the main contents of this piece of legislation have deeply penetrated the fabric of society and have radically changed the relationship between the administration and those "administrated".

This original text regulating administrative procedure identified the principles common to all procedures and then constructed the essential rules governing action on the foundations of a common model of adjudicatory administrative procedure. If one takes the text of the original Law no. 241 as a whole, one can see how the legislator constructed the principles around just two broad procedural models: the adjudicatory procedure (which produces measures affecting individuals or categories of addressees that have been identified or are identifiable) and the general one (which results in the adoption of general regulatory or administrative measures having a certain degree of abstractness and generalness about them). The latter type was (and still is) outside the scope of Law no. 241 (a choice that was heavily criticised by some legal academics). So much so that the procedure law had the exclusive task of declining the principles common to all administrative procedures affecting individuals.

Furthermore, the original text of Law no. 241/1990 struck a perfect balance between the rules on simplification and those providing guarantees, seeking as it did to reduce procedural timeframes without affecting citizens' rights both to participate and to protection.

Lastly, it introduced rules on transparency (or, more precisely, on access to administrative documents) that were avant-garde at a world level at the time.

2. This original plan has subsequently been modified on various occasions by the legislator, often without regard for the unitary design but simply modifying individual provisions or parts of the statute.

In some cases, genuinely significant improvements have been made. For example, the rules governing failure to respect the timeframe for concluding a procedure have been made more effective, the decision-making mechanism for the conferences of services has been improved and the possibility of adopting agreements in substitution of authoritative measures has been generalised.

In the majority of cases, however, the changes have also had a distorting effect.

Administrative action has been viewed more from the perspective of the administration than from that of citizens.

The barycentre of procedures has been shifted to simplification and acceleration of action, diminishing the profiles concerned with guarantees. Thus the economic logic of results and competitiveness has been followed, marginalising that of the democratisation of administrative action.

Amendments have been introduced thinking more of the benefits of reducing administrative litigation than of the advantages to be gained during the procedural stage.

The law has been seen merely as the vehicle for transposing the most recent trends in case-law, thus altering the meaning of a statute containing principles common to all adjudicatory procedures.

The procedural models have fragmented into a thousand rivulets, creating a considerable divarication between procedures requested by individual parties and those commenced *ex officio.*

Attention has focussed anew on the legal regime governing a procedure's final act, instead of on a procedure's preliminary fact-finding activities.

A growing depreciation of the organizational dimension (as opposed to the procedural activities proper) has become evident.

The law governing access to administrative documents (which, in other European countries, has taken giant strides forward) has, for the most part, been left unaltered but has been modified for the worse in some respects.

In comparison with the wide-ranging manner in which European law guarantees the application of certain principles of administrative action, the Italian law has been left behind.

Lastly, there has been a steady reduction of the scope of Law no. 241's application, following exempting legislation that

has led to a flight from the general rules governing administrative procedure (see, for example, the emergency procedures and those relating to grand-scale infrastructures, which are not subject to the rules established by the procedure Act).

Ultimately, these endless amendments have produced a patchwork effect, in the sense that both the consistency and the original spirit of the law have been lost.

3. These critical comments certainly do not diminish the importance of Law no. 241/1990. The latter remains a fundamental legislative text and a benchmark that, in only a few years, allowed the Italian administration to make up a huge leeway as regards the principles of impartiality and good administration.

There is, however, a need to reason programmatically and *de jure condendo*. This for the purposes of initiating a new phase of jurisprudential building that may lead to the formulation of a new administrative procedure Act.

In the first place and on the basis of all that has been said so far, it seems desirable that the legislator should take a long break and abstain from making makeshift amendments to Law no. 241/1990 that simply follow the Council of State's latest judgement.

In the second place, legal science needs to return to investing significant sums in research dedicated to the study of administrative procedures. Such research should have the objectives of monitoring the procedures currently being followed by the Italian administration (in order to change, one must first be informed) and carrying out serious comparative legal studies. That would allow a complete mapping of the Italian situation which could then be compared with the experiences of the most highly developed legal orders.

In the third place, should the results of the second step merit it, a group of legal and administrative experts could be entrusted with a task similar to the one assigned to the Nigro Commission at the beginning of the 1980s. That is to say, the task of reflecting on a new administrative procedure Act capable of giving the country once again a coherent and innovative structure for administrative action and one capable of re-striking the balance between efficiency and guarantees.

4. In such a context, it is clear that the purpose of this edition of the IJPL is not exclusively commemorative. Nor does it intend merely to constitute a means of disseminating the contents of the administrative procedure law beyond national confines.

On the contrary, it has the programmatic aim of building a bridge between different legal systems, in order to exchange knowledge and experiences and create a network of academic contacts. Not to commemorate, therefore, but to build for the future.

This explains the motive for inviting illustrious European jurists to discuss both the positive elements and the most critical aspects of Law no. 241 of 1990 on the occasion of its twentieth anniversary.

For a return to the future of the Italian law governing administrative action.