THE RULES OF EVIDENCE IN THE ITALIAN SYSTEM OF ADMINISTRATIVE JUSTICE

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Abstract

The article examines the rules of evidence in the Italian system of administrative justice and shows how the issue of rules of evidence does not seem of a secondary importance in relation to other issues of administrative justice such as jurisdiction, the powers of the judge, preliminary injunctions, compliance, etc., but it is considered "the central moment of the whole administrative trial". The aim is to highlight the *leitmotiv* of Benvenuti's analysis referred to the position of inferiority of the citizen *vis-à-vis* the public administration and his prospective of creating new concept of relationships among Public Administration and Citizens based on the theory of egalitarian administrative law, which would come (and then has come) into an existence through the creation of legal tools within the administrative procedure and the administrative trial and their further improvement.

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1. The safeguard of citizens and the rules of evidence in the system of administrative justice

Administrative justice refers to those mechanisms, which are provided by a State to its citizens as a tool for safeguarding their rights against the public administration[1]. Every State has a system of administrative justice[2]. Such systems differ, though, in the kind of tools provided for the safeguard of citizens' rights and in the way such tools interact with each other[3]. In fact, each State took its own approach due to historical, ideological and political reasons[4].

Feliciano Benvenuti notes that States, historically, adopted different approaches with regard to the following two aspects, which are shared by such States but have had a different influence in the organization of their system of administrative justice.

The first aspect relates to the problem of reconciling, on the one side, citizens' freedom and, on the other side, the authoritative powers of administrative justice.

The second aspect, which is a consequence of the first aspect, relates to the choice of the judge that should be competent for the resolution of disputes between the citizens and the public administration: the judge that decides the disputes among private citizens, *i.e.* the ordinary judge, or a different judge specifically created for deciding these disputes, *i.e.* the administrative judge. In fact, systems of administrative justice can be substantially divided into, or better described through, the following two categories: monistic (or basically monistic) systems and dualistic systems.

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[1] M. Nigro, *Giustizia amministrativa* (1983), 22.

[2] On how legal systems solve disputes can be found in the recent study by G. della Cananea, '*Public Law Disputes' in a Unified Europe*, 7 IJPL 102 (2015); while for a comparative approach in the field of administrative justice see the study of A. Sandulli, *The Importance of Comparative Law in Administrative Justice*, 7 IJPL 6 (2015).

[3] F. Benvenuti, *Gli studi di diritto amministrativo*, Arch. Isap 1239 (1962). See also the same Author, *Contraddittorio (principio del)*, IX Enc. dir. 739 (1961).

[4] F. Benvenuti, *Gli studi di diritto amministrativo*, cit. at 3, 1239.

The aspect that concerns us the most, with the view of analyzing the rules of evidence in the Italian system of administrative justice, is the first aspect. Such aspect relates to the safeguard of the rights of individuals in their role of citizens, not anymore subjected to the governmental powers as mere subordinates.

It is to be noted that the relationship between the public administration and the citizens has been regulated and later on modified substantially in connection with the evolution of the procedural tools for the safeguard of citizens' rights *vis-à-vis* the public administration.

In fact, the theory and practice of administrative justice have always been the ideal setting for the elaboration of the fundamental principles and concepts of substantive administrative law[5].

In particular, the evidentiary stage of the administrative trial has been one of these settings.

Feliciano Benvenuti, in his work "*L'istruzione nel processo amministrativo*" ("*Rules of evidence in the administrative trial*"), published in its final version in 1953, analyzes the topic of citizens' safeguard through the issue of rules of evidence in the system of administrative justice[6].

At first sight, the issue of rules of evidence may seem of a secondary importance in relation to other issues of administrative justice such as jurisdiction, the powers of the judge, preliminary injunctions, compliance, etc.

In reality, in any kind of trial (civil, criminal or administrative) the evidentiary stage is a central stage of the proceeding, where the foundations for the decision of the case, based on the "truthfulness of the facts", are set.

Particularly, also in the administrative trial the evidentiary stage is central[7]. In fact, starting from the Constitutional provisions (artt. 24 and 113) that explicitly prohibit any limitation

[5] F.G. Scoca, *L'evoluzione del sistema*, in Id. (ed.) *Giustizia amministrativa* (2014), 27 and for a complete overview of the administrative process in Italy see the essay of the same Author entitled Id., *Adminstrative Justice in Italy: origins and evolution*, 1 IJPL 118 (2009).

[6] Edited in Padua (1953).

[7] A. Police, *I mezzi di prova e l'attività istruttoria*, in G.P. Cirillo (ed.), *Il nuovo diritto processuale amministrativo* (2014), 434.

to the right to a judicial decision on the merit and to the right to oppose any public administration decision, it is self-evident that there must be a clear reconstruction of the factual elements at the basis of the case before the judge[8].

The rules of evidence are extremely important for their tight connection with several aspects of the trial: the roles of the parties and of the judge, the duty of the parties to indicate and submit the necessary evidence and the power of the judge to integrate such evidence, cross-examination, accessibility to public documents, fair trial.

2. The evidentiary stage as the "central moment of the whole administrative trial"

The work of Benvenuti[9] was published 30 years after the most recent general reform of the system of administrative justice (legislative act called "*Testo Unico*" n. 1054 dated 24 June 1924) and almost half-a-century after the enactment of the regulations on the proceeding before the judiciary sections of the Council of State (R.D. n. 642 dated 17 August 1907).

Benvenuti indicated at the basis of his decision to analyze the issue of evidentiary rules in the system of administrative justice the observation that, after almost 10 years from the enactment of the Italian Constitution, there still had been no complete fulfillment, within the system of law, of those conditions "which would grant the recognition of the full personality of the individual, who (had changed his position from being) subjected to the public power (…) to finally being a citizen".

This negative aspect had an impact on the administrative trial as well. Undoubtedly, it was contrary to the idea of a modern State that would guarantee justice in the public administration.

This observation led Benvenuti to consider the rules of evidence of the administrative trial in force at the time as a set of provisions, which were still "absolutely embryonic". The objective

[8] C.E. Gallo, *L'istruttoria processuale*, in S. Cassese (ed.), *Trattato di diritto amministrativo* (2003), V, 4393 and P. de Lise, *La prova nella procedura delle giurisdizioni amministrative*, II Cons. Stato 954 (1974) and also Id., *L'istruzione nel processo amministrativo*, 2-3 JUS (2008).

[9] It is referred to *L'istruzione nel processo amministrativo* ("Rules of evidence in the administrative trial").

of Benvenuti, thus, was to give to the evidentiary stage of the administrative trial the "independence", which it deserved.

Two reasons justified his decision. The first reason moves from the assumption that the evidentiary stage is a fundamental stage of the proceeding for both the parties and the judge. The second reason relates to the purpose of the evidentiary stage.

According to Benvenuti, with the evidentiary stage "one realizes the full alignment between the trial and the reality". Such stage is the moment when "the party cooperates with the judge in the formation of the final decision".

Based on these assumptions, the evidentiary stage is considered "the central moment of the whole administrative trial". And Benvenuti offers us, in his work, several elements that help us in understanding the legislative and case law developments of the following decades.

Such elements are the acting of public administration, the role of the individual, which had changed from being subjected to the public power to being a citizen, the scarcity of evidentiary tools, the allocation of the activities of evidence collection between the judge and the parties and the independence of the system of administrative justice from other proceedings.

The *leitmotiv* of Benvenuti's analysis is the position of inferiority of the citizen *vis-à-vis* the public administration. This, both outside the administrative trial, *i.e.* before the trial, and within the administrative trial. The prospective of Benvenuti was the creation of a theory of egalitarian administrative law, which would come into an existence through the creation of legal tools within the administrative procedure and the administrative trial[10].

The path for strengthening citizens' rights passed through the creation and consolidation of the rules of administrative procedure, such as: the duty to adopt the administrative decision in a fixed term, the communication of the beginning of the administrative procedure, the duty to provide the reasons for the administrative decision, the duty for the public administration to evaluate any brief and documentation submitted by the individual

[10] F. Benvenuti, *Per un diritto amministrativo paritario*, published for the first time in *Studi in memoria di Enrico Guicciardi* (1975). See also the prologue on egalitarian administrative law by M. Clarich, *Tipicità delle azioni e azione di adempimento nel processo amministrativo*, 3 Dir. proc. amm. 557 (2005).

involved in the procedure, the right of accessibility to administrative documents[11].

This path had as a consequence that, besides the original component of administrative law, which rested on the juxtaposition "authority-freedom", another component was created, which then became predominant. This component was the recognition of citizens' rights *vis-à-vis* the public administration.

The recognition of citizens' rights (including the so-called "third" and "forth generation rights") led to an increase in the mechanisms of safeguard and protection of those rights.

Essentially, the following three factors can be mentioned as the main drivers of the increase in the number of mechanisms of safeguard of citizens' rights *vis-à-vis* the public administration: (i) national case law, (ii) national legislation and (iii) the influence of European legislation. Set aside a detailed analysis of the same, we hereby only wish to stress the fundamental role of case law. Judges, developing norms to be applicable to the case at issue, have also created important rules of general application and have strengthened many mechanisms of safeguard. The national legislator played its role in a secondary phase, most of the time simply formalizing principles, which had already been developed by the case law. Supra-national law, coming from the European Union and the European Convention on Human Rights and Fundamental Freedoms, has instead the role of further reinforcing the whole system, particularly introducing in the national systems principles such as fair trial and the principle of effectiveness in the judicial protection of individual rights[12].

[11] For an overview on this issue consider the essays of G. della Cananea, *Administrative procedures and rights in Italy: a comparative approach*, R. Caranta, *Participation into administrative procedures: achievements and problems*, G. Corso, *Administrative procedures: twenty years on*, B.G. Mattarella, *Participation in rulemaking in Italy*, G. Pastori, *The origins of Law no 241/1990 and foreign models*, J. Ziller, *The convergence of national administrative procedures: comments on the european perspective*, all published in 2 IJPL (2010).

[12] C. Franchini, *Giustizia e pienezza della tutela nei confronti della pubblica amministrazione*, in *Il diritto amministrativo oltre i confini* (2008), 168.

3. The rules of evidence and the substantive equality of the parties

The analysis of the evidentiary stage of the proceeding has been the opportunity for Benvenuti to highlight the disparity between the parties in the administrative trial. Such disparity, however, did not come into existence with the beginning of the trial but was generated in a previous phase, *i.e.* at the initial contact of the individual with the public administration.

The disparity was, in a way, genetic, going from the procedural phase to the trial phase. Only the rules on administrative procedure and administrative trial would mitigate such disparity.

The administrative trial is a proceeding that begins with the so-called "*vocation iudicis*". In the administrative trial, the parties have a non-equal role. Save some limited exceptions, the citizen has to face several obstacles to give evidence of the right the he/she is trying to enforce, as his/her arguments depend on fact or acts that are internal to the public administration. This derives from the substantive, or better institutional, inferiority of the citizen *vis-à-vis* the public administration[13].

The rule on the burden of proof in the administrative trial has been analyzed by several scholars[14] and by the case law.

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[13] As said Benvenuti.

[14] See among many and omitting those already mentioned: G. Chiovenda, *Principi di diritti processuale civile* (1923); A.M. Sandulli, *Il giudizio davanti al Consiglio di Stato e ai giudici sottordinati* (1963); L. Migliorini, *L'istruzione nel processo amministrativo di legittimità* (1977); P. de Lise, *La prova nella procedura delle giurisdizioni amministrative*, II Cons. Stato 954 (1974); A. Palottino, *L'istruttoria nel processo avanti ai giudici amministrativi*, V Foro. it. 162 (1980); P. Stella Richter, *La riforma del sistema delle prove nel processo amministrativo*, II Giust. civ. 416 (1984); G. Abbamonte, *La prova nel processo amministrativo*, in Riv. amm. rep. it. 689 (1985); A. Travi, *Garanzia del diritto di azione e mezzi istruttori nel giudizio amministrativo (nota a sent. Corte cost. 10 aprile 1987 n. 146*), Dir. proc. amm. 558 (1987); G. Virga, *Attività istruttoria primaria e processo amministrativo* (1991); R. Villata, *Considerazioni in tema di istruttoria, processo e procedimento*, Dir. proc. amm. (1995); F. Cintioli, *Giudice amministrativo, tecnica e mercato - poteri tecnici e "giurisdizionalizzazione"* (2005); L. Bertonazzi, *L'istruttoria nel processo amministrativo di legittimità. Norme e principi* (2005); L. Perfetti, *Prova (processo amministrativi)*, II Enc. dir. ann. 917 (2008); E. Picozza, *Il processo amministrativo* (2009), 367; N. Saitta, *Sistema di giustizia amministrativa* (2009), 209; L. Perfetti, *Mezzi di prova e attività istruttoria,* in G. Morbidelli (ed.), F. Cintioli, F. Freni, A. Police (coords.), *Codice della giustizia amministrativa* (2015), 657.

The main issue with reference to the burden of proof relates to evidence collection.

In the Italian system of administrative justice, the burden of proof lies with the parties (so-called "*principio dispositivo*") but the judge has the power to order the submission of additional evidence (so-called "*principio acquisitivo*").

In such a system, the relevance and intensity of the powers of the judge are, or at least were, justified based on the need to re-establish a balance between the public party and the private party. The reason for such an evidentiary system, in fact, is that the private party is generally subjected to the unilateral power of the public administration and is in a particularly weak position[15]. Based on the above-mentioned explanation, it became necessary to re-establish a situation of substantive equality of the parties out of the trial too[16]. In fact, this system is in many ways disharmonic[17] and it elects the judge as the "lord of the proof"[18].

Nowadays, the above-mentioned justification has become less convincing. The administrative procedure, *i.e.* the context were the public administration expresses its power, is currently regulated by the legislation in order to avoid public administration secrecy and privacy. This has granted to the citizens transparency and access to the acts of the administrative procedure. Consequently, the gap of inequality has diminished and the evidentiary tools available to the private parties have been enhanced, even if in many occasions the public administration still holds an advantage position, at the minimum in those situations, where it exercises its power.

The burden of proof has been explicitly regulated, for the first time, by the Italian Code of Administrative Procedure. The former legislation on administrative procedure, *i.e.* RD n. 1054 of 1924, set some rules on evidence at art. 44 but had no provisions at all on the burden of proof.

Today, the rule on the burden of proof is clearly set forth in art. 64, section 1, of the Italian Code of Administrative Procedure,

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[15] F. Benvenuti, *L'istruzione nel processo amministrativo*, cit. at 269.

[16] L. Giani, *La fase istruttoria*, in F.G. Scoca (ed.), *Giustizia amministrativa* (2014), 378.

[17] F.G. Scoca, *Articolo 63 - Mezzi di prova*, in A. Quaranta, V. Lopilato (eds.), *Il processo amministrativo* (2011), 539.

[18] M. Nigro, *Il giudice amministrativo «signore della prova»*, V Foro it. 9 (1967).

despite there are different interpretations of such provision in the scholarly debate.

According to art. 64, section 1, of the Italian Code of Administrative Procedure: "The burden of proof lies with the parties, which must submit to the court all the evidence available to them with regard to the facts at the basis of their judicial request and any objections".

Nevertheless, it is to be added that, pursuant to art. 63, section 1, of the Italian Code of Administrative Procedure "the judge may ask to the parties to submit any additional clarification and documentation".

Furthermore, pursuant to section 2 of the same provision, "the judge may order to third parties to submit documentation or any other evidence which is deemed necessary" and may "order inspections, verifications and expert opinions".

Therefore, the judge may require to the parties, based on its own decision, to submit any piece of evidence with the only limit of art. 64, section 1, *i.e.* that such evidence relates to those facts that have been indicated by the party as the basis of the judicial request.

In this way, the general rule set forth by art. 2697 of the Italian Civil Code, according to which "the person who wishes to enforce a certain right must give evidence of the facts at the basis of that right", has become applicable to the administrative trial as well.

This means that the party, which fails to provide the related evidence, will not obtain a favorable judgment[19]. However: how can this conclusion be reconciled with art. 63 of the Italian Code of Administrative Procedure, providing that the burden of proof lies with the party but also that the judge has the power to order the submission of additional evidence?

The explanation may be that the judge only interferes with the process of evidence collection upon request of the party and when such party, with no fault, may not provide sufficient evidence for the claim because of objective reasons. In other words, the judge may intervene only when the evidence is not available to the party, who has the burden of proof.

[19] F.G. Scoca, *Articolo 63. Mezzi di prova*, cit. at 17, 543.

There are not many reasons to doubt that art. 2697 of the Italian Civil Code has become (i) the general rule on the burden of proof and (ii) the criteria that the judge must follow in deciding the case. This rule has been recognized by the above-mentioned artt. 63 and 64 of the Italian Code of Administrative Procedure.

The question, of course, revolves around the limits of the power of the judge. There are several factors to take into account, which not only refer to the availability of the evidence to the party and to the kinds of facts in relation to which the party must submit the evidence. Indeed, the rule on the burden of proof must be considered also in connection with the different types of administrative jurisdictions and the different types of legal actions available[20].

Whenever there are situations of inequality, the judge may step in and mitigate the rule of art. 2697 of the Italian Civil Code. This happens in the so-called "jurisdiction of legitimacy". To the contrary, this does not happen in the so-called "exclusive jurisdiction" and in the legal action for damages, where the rule of art. 2697 of the Italian Civil Code should apply with no interferences and the administrative judge should behave as the ordinary judge[21].

4. From the scarcity of evidentiary tools to a unified system of evidence

Benvenuti underlined the scarcity of evidentiary tools available in the administrative trial. The current state of the law has changed. As it has been noted, after 120 years the rules of evidence in the administrative trial have been adjusted to grant the individual an articulated and satisfying system of judicial protection[22].

[20] As it is well know, administrative jurisdiction is divided in the so-called (i) "jurisdiction of legitimacy", (ii) "exclusive jurisdiction" and (iii) "jurisdiction on the merit" (art. 7, par. 3, Italian Code of Administrative Procedure). Moreover, as it is also well-known, there are a plurality of legal actions that may be commenced in the framework of the administrative trial, thus granting a full judicial protection.

[21] A. Police, *I mezzi di prova e l'attività istruttoria*, in Id. (ed.), *Il nuovo diritto processuale amministrativo*, cit. at 7, 439.

[22] Art. 63 of the Italian Code of Administrative Procedure. See also F.G Scoca, *Articolo 63. Mezzi di prova*, cit. at 17, 536.

The Italian Code of Administrative Procedure, at art. 63, makes wide reference to the Italian Code of Civil Procedure, thus putting an end to any limitation to the submission of evidence provided thereof with the only exclusion of oath and formal interrogation.

To the contrary, the previous legislation on the matter was extremely incomplete and was characterized by different rules of evidence for the different types of administrative jurisdiction.

In particular, the rules of evidence have remained substantially the same, at least with regard to the so-called "jurisdiction of legitimacy", as those provided by the statute of 1889 that had created the Forth section of the Council of State, and were later transposed in the so-called "*Testo Unico*" of the Council of State (1924) and then duplicated, with some amendments, in the statute that created the regional administrative tribunals (TAR) in 1971. The set of evidentiary tools has been increased in 2000, with law n. 205, with particular regard to the "exclusive jurisdiction". With regard to the "jurisdiction on the merit", instead, there have been no limitations except for the admissibility of oath and formal interrogation.

The distinction between the rules of evidence for the "jurisdiction of legitimacy" and the "jurisdiction on the merit" was evident, deriving from the differences of these two jurisdictions.

The "jurisdiction of legitimacy" did not involve the direct assessment of the facts by the administrative judge. The administrative judge, in fact, had to consider as certain (and not challengeable) the facts known to the public administration. The judge could challenge the facts as described in the administrative decision only in case they were contradicted by some documents. In that case, the judge could ask to the public administration to have "new clarifications or documentation" or could order "new verifications" (art. 44, par. 1, RD n. 1054 of 1924).

In light of the above, it is evident that the "judgment of legitimacy" was not a decision on the facts. Instead, the "judgment on the merit" was a decision also on the facts.

In the judgment of legitimacy, only the public administration had to assess the facts. Such assessment would usually occur during the formation of the administrative decision. Exceptionally, such assessment could derive from the request

made by the judge[23]. Viceversa, in the judgment on the merit, according to the law (art. 44, par. 2, RD n. 1054 of 1924), the judge may "order the submission of any other evidence".

The limitation to the autonomous access to the facts by the administrative judge derived essentially from the traditional nature of the administrative trial as a proceeding based on the administrative act, not dealing with the underlying relationship between the individual and the public administration. The administrative act traditionally represented the subject matter of the judgment before the administrative judge. Moreover, there was no possibility to challenge any issues of technical discretionality included in the same.

When the purpose of the administrative trial changed from a mere verification of the (formal) legitimacy of the public administration act to a real judicial proceeding, having as subject matter the request of the individual, the administrative judge started to acquire direct knowledge and to make an autonomous assessment of the facts (and not only of the acts and documents) at the basis of such request, despite the assessment of the public administration[24]. Now, not only the administrative act but also the relationship between the public administration and the private citizen has become relevant. In order to ensure full protection, the judge must have direct access to the facts, which cannot be mediated and delimited by the administrative act.

5. The administrative trial as a proceeding between the parties

The increase in the number of evidentiary tools available to the party is in line with the acknowledgement of the administrative trial as a proceeding between the parties, which should be granted equal role (art. 2 of the Italian Code of Administrative Procedure).

The need to increase the evidentiary tools available to the party became greater and greater over the course of the years for several reasons.

[23] F.G. Scoca, *Articolo 63 Mezzi di prova*, cit. at 17, 536.
[24] F.G. Scoca, *Articolo 63 Mezzi di prova*, cit. at 17, 536.

The first reason relates to the introduction in the administrative trial of new kinds of legal actions, in particular the action for damages. Secondly, the way the public administration expresses its power has also changed, not being this limited to the administrative decision anymore. In fact, the disputes started involving the exercise or the lack of exercise of administrative power, dealing not only with formal decisions and acts but also with agreements and behaviors. Thirdly, the way of interpreting the so-called "*interesse legittimo*" (legitimate interest) radically changed. Following the reform of the administrative trial, the concept of legitimate interest became more defined and identifiable, as its counterpart, *i.e.* the public power, is more and more controllable. The legitimate interest, once a mere legitimization to oppose an administrative decision, has now become a legal position that may find protection also through damages request[25]. Fourthly, the action for damages imports in the administrative trial the dualism of the judgment on the administrative decision and the judgment on the behavior. Thus, the following sequences are identifiable and distinguishable: "legal interest - illegitimacy - annulment" and "legal right - wrongfulness - damages"[26]. Obviously, this has several effects on the system of evidence, with the need to provide evidence of the wrongfulness of the behavior and of the illegitimacy of the administrative decision.

In such evolutionary context, the legislator did not act promptly and it was the case law that created those rules, which were later transposed in the legislation.

The evolution of the rules of evidence, before they became unitary for all the three types of administrative jurisdiction (*i.e.* the so-called "jurisdiction of legitimacy", "exclusive jurisdiction" and "jurisdiction on the merit") with a unified system of evidentiary

[25] For an overview see A. Police, *Il ricorso di piena giurisdizione davanti al giudice amministrativo. Profili teorici ed evoluzione storica della giurisdizione esclusiva nel contesto del diritto europeo* (2000), I, but also Id., *Administrative justice in Italy: Myths and Reality*, 7 IJPL (2015). For a centuries-old debate see the reconstruction of F.G. Scoca, *Riflessioni sui criteri di riparto delle giurisdizioni*, Dir. proc. amm. (1989).

[26] E. Guicciardi, *Concetti tradizionali e principi ricostruttivi nella giustizia amministrativa*, Arch. dir. pubbl. 61 (1937) and about this Author see G. Falcon, *Norme di azione e norme di relazione. Tradizione e vicende della giustizia amministrativa nella dottrina di E. Guicciardi*, Dir. soc. 379 (1974).

tools, occurred in different forms and in different times in the three above-mentioned jurisdictions, with obvious disparities.

With regard to the so-called "jurisdiction on the merit", the law granted the possibility to make use of the totality of the evidentiary tools available (pursuant to art. 27, RD n. 642 of 1907 and art. 44, sec. 2, RD n. 1054 of 1924).

With regard to the so-called "exclusive jurisdiction", a decision of the Italian Constitutional Court was necessary. With the decision n. 146 of 1987, the Constitutional Court had declared the partial unconstitutionality of art. 44, sec. 1, of RD n. 1054 of 1924 and art. 7, sec. 1, of the law that had created the administrative Tribunals with regard to public employment disputes[27], because such provisions did not allow the use of those evidentiary tools provided by the Italian Code of Civil Procedure. However, the Constitutional Court, with a further decision (n. 251 of 1989), clarified that this alignment of evidentiary tools did not involve all issues included in the exclusive jurisdiction but only applied to public employment disputes. It was the legislator, that later extended the applicability of all the evidentiary tools provided by the Italian Code of Civil Procedure to all issues included in the exclusive jurisdiction, allowing the use of expert opinion but excluding oath and formal interrogation (legislative decree n. 80 of 1998 and law n. 205 of 2000).

With regard to the so-called "jurisdiction of legitimacy", art. 44 R.D. n. 1054 of 1924, as amended by law n. 205 of 2000, allowed the use of court-ordered expert opinion.

Therefore, notable progresses had been made. The strengthening of the evidentiary tools available had undoubtedly increased the possibility for the administrative judge to fully understand the facts at the basis of the case (so-called direct access to the fact). This allowed the judge to verify, also with the assistance of court-ordered expert opinion, the cogency, adequacy, reasonableness and appropriateness of the administrative decision and its reasoning[28].

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[27] At the time, these disputes were attributed to the competence of the administrative judges in their exclusive jurisdiction, while today such disputes are decided by ordinary judges.

[28] About this issue F. Saitta, *Il regime delle preclusioni nel processo amministrativo tra ricerca della verità materiale e garanzia della ragionevole durata del giudizio*, www.giustizia-amministrativa.it.

6. The most typical piece of evidence (documents) and the piece of evidence that is generally disregarded (statements)

Art. 63 of the Italian Code of Administrative Procedure, at sections 1 and 2, indicates the most important evidentiary tools available (clarifications, documents, order to show documents also against third parties, inspections), at section 3 indicates the possibility to obtain statements from witnesses, at section 4 indicates the procedure of verification and the possibility to obtain expert opinions and at section 5 states that the judge may adopt any other evidentiary tool available in the Italian Code of Civil Procedure, with the exclusion of oath and formal interrogation.

We will hereby focus our attention on documents and statements. This, because we hold that such evidentiary tools have played an important role in the evolution of the system of evidence in the administrative trial, and their evolution has given a special imprinting to the whole administrative trial.

An analysis of the role of documents in light of the historical characteristics of the administrative trial is useful to better understand their role.

Historically, the administrative trial was an inquisitorial proceeding, whose main purpose was to evaluate the legitimacy of the administrative act. Indeed, the administrative trial was created as a proceeding to evaluate the administrative act and it still maintains this role nowadays. In this kind of a trial, the judge would decide on the administrative act and not on the relationship between the private party and the public administration, which was at the basis of the administrative act. The evolution of the trial toward a proceeding between parties having equal role was slow and gradual.

These historical characteristics of the administrative trial have a series of consequences.

The first consequence relates to the participation of the plaintiff and of other individuals different from the public administration to the process of evidence collection. It is to be noted that historically the participation of the plaintiff and other individuals different from the public administration to the process of evidence collection was only eventual and it depended on the discretional choice of the judge. In fact, the judge made its decision based on the administrative act at issue and the documents submitted by the public administration, with the

possibility of requiring the public administration to provide "explanations" or "additional documents" (see in these terms, historically, art. 37 R.D. n. 6166 of 1889).

The second consequence, which is still applicable today, is the absence of a separate stage of the proceeding for evidence collection. A separate stage, handled by a dedicated judge, is missing. The reasons for this absence derive, once again, from the historical model of the administrative trial.

Another consequence relates to the role of documentary evidence. In a context as the one that we just sketched, documents were, and still are, the most typical piece of evidence. They had, and keep having, a crucial role for evidence purposes. Several provision of the Italian Code of Administrative Procedure make reference to this evidentiary tool, which plays a fundamental role in the decision-making process[29]. This fundamental role, as we have seen, derives from the historical model of the administrative trial. In fact, the main acts and documents relevant for the case were those in possession of the public administration, and the private individual did not have access to such acts and documents because of the secrecy principle. There was only a limited right for the individual to access the public administration documents submitted during the trial. This limited access did not allow the citizen that was a party to the proceeding to develop an appropriate strategy regarding the evidence and this had an obvious impact on the outcome of the proceeding, which was only partially counterbalanced by the powers of the judge to integrate the evidence at its sole discretion.

This situation of uncertainty was remedied by the legislation on the administrative proceeding (art. 22, law n. 241 of 1990), which introduced a general right to access public administrative documents. In this way, the so-called "*principio dispositivo*" was strengthened. As a consequence, some case law developed a connection between the burden of proof (art. 63 of the Italian Code of Administrative Procedure) and the right to access public administration documents[30]. As a result of this connection and of the right of accessibility to public administration

[29] L. Giani, *La fase istruttoria*, cit. at 16, 388.

[30] T.A.R. Campania, Napoli, VIII, 1 December 2001, n. 26440. About this issue E. Picozza, *Il processo amministrativo*, cit. at 14, 37; A. Police, *I mezzi di prova e l'attività istruttoria*, cit. at 7, 439 and nt. 24.

documents, it is held that the issue of evidence collection in the administrative trial is nowadays essentially a matter of the parties. Therefore, the judge has no more the duty to actively participate in the process of evidence collection, as there is no need for the judge to integrate the evidence when such evidence is accessible to the party using due care, through its right of accessibility to public administration documents.

Evidence obtained through statements, instead, lies at the very opposite side of the spectrum. Such evidence has always been inadmissible with regard to disputes on the exercise of public administration powers, *i.e.* controversies on legitimate interests. In fact, it used to be held that in such cases the subject matter of the judicial decision should focus only on the extrinsic verification of the legitimacy of the administrative decision. This verification could not be based on facts different from those identified through the trial and resulting from submitted documentation.

The debate that arose on the admissibility of oral statements as evidence in the "jurisdiction of legitimacy" showed some inconsistencies of the Italian administrative trial with the principle of prevalence of communitarian law, with the jurisprudence of the European Court of Justice on effectiveness of judicial protection and with the European system in general[31].

Art. 63, section 3, of the Italian Code of Administrative Procedure has then introduced the admissibility of oral statements as evidence in the "jurisdiction of legitimacy". According to such provision, oral statements are admissible as evidence only as long as such evidence is requested by the party and is included in a written document. Therefore, such evidentiary tool changes its typical nature of oral evidence and becomes documentary evidence, even if the judge has the right, after the review of the written statement, to order the appearance of the witness in person for testifying.

It is worth noting that written statements have been admissible as evidence for many years in other legal systems. One could mention the so-called "*attestations*" of the French legal system (artt. 200-203 of the *Nouveau code de procedure civile*) or the

[31] M. Sica, *Prova testimoniale e processo amministrativo*, Urb. app. (2001). As a general matter this aspect is studied by E. Follieri, *Sulla possibile influenza della giurisprudenza della Corte Europea di Strasburgo sulla giustizia amministrativa*, Dir. proc. amm. 685 (2014).

British affidavit (art. 32 of the Civil Procedure Rules) or the "*Schriftliche Beantwortung*" (written response to the request for evidence called "*Beweisfragen*").

Scholars have raised a major doubt with regard to this kind of evidence. In fact, it has been underlined that "written statements do not guarantee the equal participation of the parties to the process of evidence formation", thus not guaranteeing the right to cross examination. The point is that written statements are not subject to direct and immediate examination from the counterpart, which is not in the position to assess, based on specific and sharp questions, the reliability and credibility of the witness and of its statements.

In the administrative trial, written statements have been introduced as "genetic modifications" of the so called "*dichiarazione sostitutiva dell'atto notorio*" (declaration substituting a public notary act), which was the mean to obtain a statement from a witness and use such statement in the trial as evidence of a fact, which only the witness could confirm.

Indeed, statements from witness may be useful, for example, when trying to give evidence of the date when the construction works were terminated, with the view of assessing if such works were legitimate or abusive; also, they may be useful to give evidence of the public nature and tasks of the work performed by some employees within the framework of the "exclusive jurisdiction"; again, they may be useful to give evidence that the individual's conduct did not justify the adoption by the public administration of a negative decision; finally, they may be useful to give evidence of the effective destination of real estate.

To tell the truth, the issue of admissibility of statements as evidence in the administrative trial may be considered more a theoretical issue than a practical one. Indeed, this evidentiary tool has been used only very rarely, and when it appears to be useful several questions arise[32].

[32] L. Perfetti, *Mezzi di prova e attività istruttoria,* cit. at 14, 661, 692 and 697.

The approach of case law on this matter is that of limiting its use[33]. Undoubtedly, this approach was rather uncontroversial before the enactment of the Italian Code of Administrative Procedure. After such enactment, some limitations were introduced by case law on the use of oral statements as evidence, particularly with regard to the "jurisdiction of legitimacy". Indeed, the main problem concerns the use of oral statements from witnesses as a means to challenge the truthfulness of the statements contained in an administrative decision.

According to case law, oral statements are admissible when such evidence is crucial for the decision. Moreover, such evidence must relate to circumstances that are external and extrinsic to those described in the administrative decision, and thus should not try to challenge the truthfulness of the statements contained in an administrative decision. Furthermore, oral statements must be "essential", as this term is interpreted with regard to the "necessity for the assessment of the facts and for the opinions" in the context of the procedure of verification and of expert opinions. According to case law, in fact, the rule of essentiality set forth by Art. 63, section 4, of the Italian Code of Administrative Procedure should apply to all evidentiary tools and evidence.

Written statements raise a further question. This question relates to the final moment when such evidence may be requested.

The Italian Code of Administrative Procedure states that witness statements, differently from other evidence, may be admissible only upon request of the party (art. 63 par. 3) but sets no rule as to the final moment when such evidence may be requested. This raises several problems.

In the administrative trial, in fact, differently from what happens in the civil trial, there is not a separate procedural phase dedicated to the collection of evidence and specification of the facts that are at the basis of the judicial request. Such activities may take place also at a very late stage of the proceeding, like at the moment before the discussion of the case, as the party may indicate new facts and the related evidence until the submission of

[33] See, for example, A.M. Sandulli, *Il giudizio davanti al Consiglio di Stato e ai giudici sottordinati* (1963); V. Cerulli Irelli, *Note in tema di discrezionalità amministrativa e sindacato di legittimità*, Dir. proc. amm. 527 (1984); C.E. Gallo, *Istruzione nel processo amministrativo*, IX Dig. disc. pubb. (1994).

the final documents and briefs (art. 73 Italian Code of of Administrative Procedure).

In essence, in the administrative trial there is no distinction between the evidentiary stage and the decision-making stage. They both take place during the discussion phase.

This fact would support the admissibility of witness statements also at the hearing scheduled for the oral discussion of the case.

However, according to some case law[34], the request to obtain witness statements may not be sustained if it is made for the first time during the discussion hearing. According to such case law, the structure of the new Code seems to move from the assumption that the parties must exercise their right to obtain evidence before the discussion hearing.

In light of the foregoing, it can be concluded that the administrative trial has a very simple structure, but which is also in some ways incomplete and unclear. The structure is simple because, as we have seen, there is no separate and dedicated evidentiary stage and there is no evidentiary judge, as first institutional contact between the parties. To tell the truth, this structure was not supported by all those who participated to the drafting of the Code, as it emerges from the preparatory works of the Code. Some members of the Committee entrusted with the drafting of the Code by the State Council had expressed the opinion that also in the administrative trial there should be, if not a separate evidentiary stage, at least a separate judge who should decide on the evidence to admit[35]. In fact, it would be useful to have a more complete structure and an initial hearing dedicated to preliminary matters, with the possibility of making further necessary notifications and evidence requests, in order to ensure the correct participation of all the parties to the proceeding and the correct application of the rules of evidence[36].

[34] See, for example, T.A.R. Milano, III, 30 May 2011, n. 1374.

[35] F.G. Scoca, *Ammissione e assunzione di prove. Articolo 65. Istruttoria presidenziale e collegiale. Articolo 68. Termini e modalità dell'istruttoria. Articolo 69. Surrogazione del giudice delegato all'istruttoria*, in A. Quaranta, V. Lopilato (eds.), *Il processo amministrativo*, cit. at 17, 554.

[36] F.G. Scoca, *Il contraddittorio nell'istruzione e nella decisone,* cit. at 17, 162.