THE ORIGINS OF LAW NO 241/1990 AND FOREIGN MODELS

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Abstract

This article argues, first, that law No 241/1990 has its source in a shift of perspective occurring in Italy with regard to the regulation of administrative activities, and, second, that the strengthened protection of procedural rights is not only coherent with the interpretation of Article 97 of the Constitution, but also with European Union law. From the first point of view, although the Italian Constitution laid down in 1947 the principles of impartiality and sound administration, it was not until the 1980s that our legal culture accepted the idea of a general legislation on administrative activities. In the last twenty years, however, the protection of procedural rights has been gradually strengthened and such rights are now included within the standards that are established by State laws. From the second point of view, procedural safeguards are coherent with the principles laid down by the European Union as well as with those of the ECHR, although national standards of protection are more restrictive and must, therefore, be adjusted.

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I. The traditional concept of administration and administrative procedure.

My task in this short essay is essentially historical and comparative, to the extent that I will consider the origins of the Italian law on administrative procedure, law No 241 of 1990, the influence of foreign legal *models* and, finally, the impact of the new framework governing administrative procedure.

It ought to be stated since the outset that the law No 241/1990 has its source in a shift of perspective occurring in Italy in the regulation of administrative activities, and it reflects such shift in its layout, although its provisions appear to need completion and improvement. The dynamic of change becomes more evident when considering the starting point. In accordance with the common view of the rule of law (or, more precisely, *Rechtsstaat*) of 19th century continental Europe, Italian administrative law was traditionally based on the concept of administration as a manifestation of the power of government over society. Such power was to be regulated and limited by law. However, governmental power kept a position of superiority, and a sort of separation from individual and associated citizens.

From this viewpoint, there was no room for regulation of the exercise of administrative powers that could ensure the participation of affected interests in the process of administrative *decisions*. In the context of the administrative unification laws of the Kingdom of Italy, issued as far back as 1865, only *for* some of the most economically and socially significant *administrative decisions were provided* some specific procedural guarantees in the sense meant above. Nor was a general law on administrative activities, regulating procedures in accordance to specific principles and guarantees for interested parties, adopted subsequently. There was only a variety of rules governing an individual procedure or a set of procedures, without such regulation being connected with common principles or models.

It is in this legal context that, from the thirties onwards, a notion of administrative procedure took form in *la doctrine*. Such notion aimed at including all the kinds of administrative procedures known in that epoch, but from a merely formal point of view. That is to say, the procedures were simply seen as a sequence of preparatory acts in view of the adoption of the final *decision*, the only one which produced effects on the recipients of administrative action.

Only some years later did a substantive concept of administrative procedure take shape. *Administrative procedure was regarded above all in its nature of decision-making process that had to be regulated in the way to ensure the best elaboration of administrative decisions, specially of discretionary decisions, giving in particular the affected interests the opportunity to be represented and participate.*

Control over the non-arbitrary and unbiased exercise of discretionary powers was essentially assigned *ex post* to the administrative judge, after 1890. It ought to be observed that the administrative judge did not limit itself to ensuring compliance with the formal lawfulness of administrative activities, but also progressively identified – through censure over the faults connected with excess of power – principles and rules both of a substantive nature and of a procedural nature, beyond what was set out by the laws. All this ensured a more penetrating and rooted impartiality in the discretionary decision-making process.

II. Different attitudes on the regulation of administrative procedure after the Constitution (1948)

The *entry into force* of the new Republican Constitution since 1948 did not change radically these initial features of administrative procedures, despite what is provided therein.

In particular Article 97 of the Constitution specifically considers the administration as a separate activity from government, to be organised and regulated in accordance with the basic principles of good management and impartiality. However, when considering administrative action, unlike jurisdiction, the Constitution does not lay down principles or rules of a procedural nature concerning the performance of such activities.

It is interesting to mention that, during the preparatory works for the new Constitution, the problem truly arose in light of

the democratic order that was being laid out. Foreign legislations on the matter were considered, such as the Austrian laws of 1925, and the US Administrative Procedure Act of 1946. However, a different opinion prevailed. According to this opinion, it would be a task for the future parliamentary legislation to set general principles aiming at protecting citizens, such as the rights of information and participation, and the duty to give reasons, which are today summarised in the principle of *a* fair procedure (*or due process of law)*, or in accordance to European rules, fair administration.

This task, however, has not been fulfilled by Parliament for many years after the entry into force of the Constitution. During the first two decades (1948-1968), several draft bills aiming at introducing a general regulation of administrative activities were elaborated and debated. However, not only such draft bills have never been approved by Parliament, but they were still based on the traditional idea according to which administrative procedures were a only formal sequences of the preparatory acts for a final *decision*.

Nor has the Italian legal culture soon detached itself from its early emphasis on "acts", by establishing a fully distinct concept of administrative procedure. More broadly, administrative action was still conceived as a unilateral manifestation of authority, operating in accordance with different procedures or means in the various areas of public policy. In this context, even the principles of good management and impartiality established by Article 97 of the Constitution were initially considered merely as a confirmation of the conceptual framework that had already existed since many years. Indeed, the decisions of both the constitutional and administrative courts may be seen as fulfilling a culturally conservative role, to the extent that no serious attempt was made to interpret Article 97 as a potential basis for affirming the principle of *a* fair procedure. Nor was such principle derived from other rules of the Constitution, such as Article 24, which lays down principles concerning *jurisdiction.*

On the other hand, until the 1980s those academic circles that were trying to revise public law doctrines in order to make them more coherent with the Constitution could not reach a widely shared opinion concerning the opportunity of a general legislation on administrative activities.

On the one side, some scholars strongly advocated the need to launch a new legislative framework ensuring that the affected interests could have a reasonable opportunity to be heard during the formulation of administrative provisions, as well as access to the documentation held by the administration and an adequate knowledge of the grounds of the decision taken. All this aimed at bringing the respective positions of citizens and the administration closer, and thus ensuring transparency and democracy in the decision-making process of the administration.

On the other, the more traditional strains of *la doctrine* were sceptical about the adoption of an administrative procedure act, if not openly against it. Even some of the most distinguished scholars feared that the introduction of the principle of participation may lead to a further worsening of the Italian administration, which was already severely slow and inefficient. To this we must add the hostility of politicians and civil servants towards a legislative framework based on the principle of fair procedure that would at any rate contribute towards limiting the arbitrary exercise of *discretionary* powers.

Other strains of *la doctrine*, more advanced, were favourable to regulating administrative activities in general in accordance to models such as the Austrian or American one, or at any rate in accordance to a participation-based model. However, they argued that there was first of all a need to reform the structures and the organisation of the administration, so as to set up an administration apparatus that would have been able to deal with the increased amount of workload that may derive from legislative regulation of procedures. This explains why, still in 1979, in the well-known report on the main problems of the administration of the state, presented by the then-Minister of Public Administration Giannini, the main focus was on the organisation and streamlining ("deforestation") of procedures.

III. The elaboration of law No 241/1990: driving forces and political guidelines

If not only the political environment was hostile to a profound legislative innovation, but also the legal culture was at least sceptical, we may wonder why and how things changed during the 1980s. The question thus arises, in other words, of

which were the driving forces leading to the adoption of law No 241.

A first explanation focuses on the increasingly serious and self-evident estrangement between citizens and the institutions, not compensated even by the effective creation of regional institutions after 1970. Indeed, the decentralisation of administrative functions to Regions and local authorities was not accompanied by a different method of carrying out administrative activities towards citizens and society. Another possible explanation, that does not necessarily exclude the other one, focuses on the experience of other European countries. As a matter of fact, during the course of the 70's, neighbouring France saw the approval of regulations aiming at promoting transparency, and in 1976 Germany adopted a federal law on administrative procedures.

All of this re-focussed Parliament and the Government on the need to issue new regulations that aimed in general to the "improvement of relations between citizens and the administration". The Agenda approved by the Senate on the 10th of July 1980 focussed specifically on this topic. The new government (led by Bettino Craxi) that took place after the general elections of 1983 implemented more than one initiative in terms of the reformation of the administration. In particular, a *Government Commission* was appointed to make propositions for new laws, so as to remove or contribute towards the removal of three great reasons for the lack of citizen satisfaction towards the administration: inscrutability, unjustified slowness, and the surpassed authoritarianism of the administration itself. The appointment of the Commission thus provided that with this in mind, there should be an identification of the "well-defined rights" of citizens in terms of the public administration. This in particular aimed at the democratisation and concurrent simplification of *procedures*.

The task was therefore complex: not only there was a need to implement principles of impartiality (transparency and participation), but also those of good management (simplicity, immediacy, fair cost) as considered by the foreign laws mentioned above.

It is also important to recall the essential features of the appointment of the *Commission*, because it helps in understanding

more clearly what the layout was for the proposal brought forward in mid-1984, and of the law that derived there from in 1990. Right from the terms of the appointment, we may as a matter of fact understand how the viewpoint according to which the Task Force should operate was completely new with respect to the dominating Italian tradition, and at the same time was also removed from foreign law models on administrative procedure.

Provisions were made in general for the improvement of relations between the administration and the public, recognizing to the latter several rights that enabled the democratisation and at the same time the simplification of procedures. The law was not therefore conceived as a regulation of procedure (in accordance to one or more procedural models as in the other applicable foreign laws), but, rather, as a law that in the first place would reshape the relationship between citizens and the administration. Not only it would lay down new principles, distinct from the ones deriving from the traditional theories of public administration, but it would also strengthen citizens' rights in terms of the performance of administration activities. This meant that the focus (as opposed to the prevailing one in the past) should be on the citizen or on the interested parties, and that there was an acceptance of the idea of *procedure* of a substantial nature as being an instrument and place of representation and protection of the substantial interests and rights that were involved or affected by the final decision.

As a consequence of all this, the legislative framework that the *Commission* was expected to elaborate went clearly beyond the regulation of procedure. It impinged, more broadly, on the relationship between citizens and public administration. Accordingly, the *Commission* should not limit itself to consider the regulation of guarantees within administrative procedure, but should have also provided measures aiming at ensuring the expected outcomes for affected interests, in terms of the final *decision*.

IV. The Law No 241/1990 as a general law of principles and rights in terms of administrative activities

The proposals elaborated by the *Commission* have followed scrupulously the political guidelines and thus have lead to the new law, finally approved by Parliament on August 7, 1990, albeit

with non-negligible limitations. The title of law No 241 still refers to "new *provisions* on administrative *procedure*" (even after several amendments occurring in the past twenty years), but in truth it is a law that, as we already saw, does not regulate one or more procedural models (like the Austrian, the North American, the German or more recently the 1992 Spanish one).

It is a law introducing a series of general principles and *procedural devices*, whilst at the same time affecting administrative activities well beyond the scope of procedures. As a matter of fact, law No 241/1990 contains several provisions regulating, among other things, agreements between public administrations and access to files.

According to the law No 241/1990 were such principles of administrative procedures regarded as rights granted to citizens *vis à vis* public authorities. In this respect, the rights recognized by the law are coherent with the rights stemming from European treaties and the case-law of European courts. The law, therefore, is a catalogue of the (new) rights of citizens or a statute of citizens in terms of public administrations.

There are several provisions or guarantees, connected with the right to a fair procedure or, more broadly, with the right to good administration, albeit only with regard to the issue of provisions of an individual and concrete nature and not of a general nature[1]. Such *provisions* include the right to communication or preventive information, the right to participation (albeit only exercisable in a written form), the giving reasons' requirement, and possibility that agreements between the administration and the interested parties either integrate or substitute unilateral *decisions* of a discretionary nature.

Many other provisions aim at ensuring sound management *and* transparency. Among the former, mention must be made of the right to obtain the closing of procedures within a set time limit (i.e. the right to an administrative *decision*), the right to the unitary conduction of each procedure through the institution of the "person responsible for the procedure" for proper compliance

[1] For further analysis of the distinction between regulation and adjudication and their partly different legal frameworks, see B. Mattarella, *Participation in Rulemaking in Italy*, infra.

with time limits, the right to concentration of the procedures relating to the same activity or the same result through the institution of a "services conference". Another fundamental *device* is the substitution of authorisations or licenses with a statement made by the interested party, affirming that the activities that he/she intends to pursue are in compliance with existing legal requirements (statement on the beginning of activities). The so-called tacit approval (*silenzio-assenso*) is still another legal instrument. When authorisation by a public authority is still required, its silence after the time limit previously established "is tantamount to acceptance of the application". Other measures imply the simplification and acceleration of procedures.

Last but not least, chapter V of the law is fully dedicated to transparency, to the right of accessing administrative documents though, differently from what proposed by the *Commission*, it provides such right as a right of the interested parties and not as a right of the citizen as such, of the *quisque de populo*.

V. The innovative elements for the whole administrative system

Even a quick look at the law No 241/1990, thus, shows that, first, it has been a turning point and, second, that its constitutional relevance is undeniable.

From the first point of view, the law has overturned the traditional viewpoint that *regarded citizens as subjects* with respect to the administration, to the extent that it equipped the former only with the possibility of reacting against the unlawful acts of the latter, by asking the administrative judge to annul such acts.

Nevertheless it should undoubtedly be noted that individual procedural rights were recognized, but often in restrictive way. We should also avoid hiding the difficulties affecting the implementation of the law. However, twenty years after its entry into force, the meaning and scope of law No 241 have become increasingly relevant for the development of Italian administrative law.

Firstly, it must be observed that subsequent parliamentary legislation refers to law No 241 as a basis for the rules governing administrative activities and procedures in a variety of policy fields. To the extent that law No 241 lays down complementary

and subsidiary rules (e.g. with regard to the time-limit for concluding a procedure), this law integrates the rules concerning specific administrative procedures, which often refer to it.

Secondly, it must be pointed out that the law, or better the law's general approach, has also provided the grounds for subsequent reforms in terms of administrative organisation. The new pattern of the relationship between citizens and the administration has inevitably affected subsequent primary and secondary legislation. On the one hand, its choices aimed at improving such relationship, by considering each citizen an end itself, not only a beneficiary of collective action. On the other hand, the law No 241 has introduced several instruments aiming at granting increased autonomy and responsibility to technical/ professional administrative structures with respect to political ones. That said, it must be noted that in both legal culture and administrative practice there is still a strong influence of the traditional bureaucratic/authoritarian-model of administration that is not consistent with the spirit and the letter of law No 241.

Thirdly, the new legislative framework governing administrative procedures has gradually determined an improvement of judicial protection. Once each citizen as well as other parties have been entitled to veritable rights with regard to public administration's activities, the demand for new forms of judicial protection has grown. Not only has the traditional action for the annulment of unlawful administrative *decisions* been strengthened, but new judicial remedies for ensuring compliance and compensation in case of non-compliance have also been introduced. At least two examples of the first type of new remedies may be indicated. One is the action aiming at obtaining a *decision* against the silence kept by the administration. Another is the action aiming at obtaining the display of documents in case of unjustified denial by the administration. In this case, the administrative judge may order the administration to provide access. With regard to compensation, the recent law n. 69/2009 has amended law No 241/1990, introducing a new kind of liability (from delay). According to the new provision, if the administration does now comply with the terms previously set out for concluding a procedure, it has the duty to compensate the damages suffered by the interested parties.

VI. The constitutional relevance of law No 241

The legal importance of law No 241/1990 emerges clearly also at constitutional level, and from different angles. On the one hand, the Constitutional Court in its most recent judgments changed its opinion concerning the *principle of a fair procedure* (or due process of law). While in earlier judgments the Court had affirmed that "due process of law" was not a constitutional principle, but a general principle of the legal system applicable only to regional statute law but not national one, this no longer the case. Indeed, the Court has sought to find a constitutional foundation and has found it in Article 97 of the Constitution, laying down the principles of impartiality and sound administration. In addition to admitting that "due process of law" is constitutionally relevant, the new trend of constitutional *case-law* provides a constitutional coverage to the law's provisions. On the other hand, and consequently, the Court has used the law No 241 as frame of reference when evaluating the constitutionality of individual pieces of legislation. If specific rules diverge from the general provisions of law No 241/1990, the Court says, their reasonableness must be ascertained.

The constitutional relevance of the law No 241/1990 has been addressed also with regard to the rules applicable to both Regions and local authorities. What was at issue, after to the constitutional reform of 2001, which extended the lawmaking and regulatory powers of Regions and local authorities, respectively, was whether law No 241, being an "ordinary" (as opposed to constitutional) law of the State, could produce binding effects with regard to Regions and local authorities. Although the Constitution does not mention administrative procedures, it was possible to affirm that these fall within the "minimum level of services connected with civil and social rights that must be guaranteed across the nation", for which any determination is reserved to the exclusive legal competence of the State (Article 117, paragraph 2, letter *m)*, of the Constitution) and therefore removed from regional and local determination [2]. This interpretation has been recently confirmed by law 69/2009, already mentioned earlier, which has

[2] For further analysis of these issues, see R. Bifulco, *Legislative regulation of administrative procedures: the role of the State and regions in Italy*, infra.

amended law No 241. Following the new constitutional interpretation, it can be thus argued that the provisions of law 241 that apply also to Regions and local authorities are binding, except for higher levels of protection of the citizens that Regions and local authorities may choose to offer. This is the interpretation more coherent with the legislative intent of strengthening the rights of citizens and interested parties. Presumably, therefore, the Constitutional Court, will confirm such interpretation, should it be requested to *pronounce on the matter*.

VII. Prospects for the enrichment of law No 241/1990

The legislative intent of strengthening citizens' individual and collective *rights* is not only coherent with the interpretation of Article 97 of the Constitution, but also with European Union law. After the amendment introduced in 2005, Article 1 of the law No 241/1990 refers, more precisely, to the principles of the legal order of the EC. As a consequence, national administrative activities shall be subject not only to the principles set out by law No 241 itself, but also to the principles of the legal order of the EC. The constitutional reform of 2001, too, introduced an explicit mention of EC law. Article 117, paragraph 1, now affirms that state laws and regional ones are required to comply both with the legal order of the EC and international obligations. In other words, EC provisions *and international obligations* have been included within the parameters for judging the constitutionality of the laws themselves.

This change is particularly important in view of the application of the Treaty of Lisbon, which includes the Charter of Fundamental Rights of the EU, adopted at Nice, and of the European Convention of Human Rights. As a consequence of this, any interpretation of procedural rights must pay due attention to the rights enshrined into the Charter and the Convention, as well as to the case-law of the two Courts, of Luxembourg and Strasbourg, respectively. More precisely, both the rights recognized by law No 241 and the standards in accordance to which these were defined must now be integrated with the provisions of European law. In many respects, the standards of protection by law No 241 are more restrictive and should therefore be integrated and completed. Consider, for example, the right to

be heard in administrative procedures. Although the intervention of interested parties within such procedures is formally provided by law No 241, it only takes place in written form. Consider also the legislative regulation of transparency and the right of access to documents, which has far more extended scope in the EU than in Italy (legislative decree No 150/2009). Last but not least, consider that the principles of law No 241 are not applicable to rule-making and planning activities, which the legal systems of different countries and the European ones already provide specific participatory instruments.

The framework of law No 241/1990 as a law of principles and of rights eases this task of comparison and integration. However, there is no doubt that such law must now be completed and enriched with the provision of types of differentiated participatory tools, in accordance to the different substantial environment of the different types of procedures, so as to achieve the social demand of an administration more coherent with the ideals of democracy.

There is a good chance to do so, since a new revision of No 241/1990 has recently been announced by Government. A draft law has been elaborated and is now under parliamentary examination. If approved, it may lead to adoption of a Charter of Duties of the public administration, and to the implementation of a unified wording including general rules on administration activities, which would also include law 241. It remains to be seen, of course, whether this occasion is fully exploited. Where law No 241 should formally disappear, it is to be hoped that new legislative framework draws inspiration from its spirit and complete and enrich its provisions. In this respect, the indications and suggestions that may be produced by comparative legal analysis, like the one that was provided by this conference, would be invaluable.

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