BOOK REVIEWS

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A REQUIEM FOR THE CONSTITUTIVE JUDGMENT?

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1.

Having been entrusted[1] with the examination of the opening contribution in the series "*Il diritto amministrativo: variazioni*" (directed by Giacinto della Cananea, Daria de Pretis, Marco Dugato, Aristide Police and Mauro Renna) a grim reflection immediately comes to the mind of the procedural law scholar, namely: if it is now possible that "administrative acts may constitute contractual relations", "as it is not necessary for the parties to manifest their common desire to enter into a contract" (p. 225); and it is also possible that "they may bring contractual relationships to an end" (pp. 226 f.), all this remaining firmly outside any "regulation conferring the *specific* power exercised", what is now the purpose of the constitutive judgment? What purpose is served by the fact that (alone) above the judge – the power of the State, better armed than any other with the guaranty provided by the Constitution – continues to encumber the law in order to use, case by case, its power to "create, modify or extinguish legal relationships with effect between parties" (art. 2908 Italian civil code)?

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[1]As on 20th June, 2016 on occasion of the presentation of the volume at the Department of Social Sciences at the Federico II University of Naples, where I was sent to speak alongside my colleagues Stefano D'Alfonso, Giacinto della Cananea, Lucilla Gatt, Renata Spagnuolo Vigorita and Aldo Sandulli.

In fact, if it were true that "administrative acts can produce the establishment of a contractual relationship between private bodies, but they can also [...] determine their early termination" (p. 4), then the system would be seriously exposed to allegations of (in)consistency because, after eliminating the judge subject to the law (*praevia*, *stricta*) of the case, the administration itself would then be the arbiter of the "exercise of discretionary administrative power" so that the constitutive or extinguishing effect "would come directly and immediately from the law" (p. 11). In brief, it would be both an atypical and menacingly authoritarian and illiberal power: indeed, "if the requirement of typicality is respected by constitutive power as a whole, the content of the acts adopted is not equally typical [...]. Therefore, private bodies suffer a limitation to their contractual freedom [...] what is more, with obligations established by the authority at its discretion even in terms of the *quid*" (p. 106).

Moreover, if examined together with the constitutive judgment, more startling (and worrying) aspects emerge: on the one hand, while administrative acts with constitutive effects (and therefore) performed by a judge (this is the topic of voluntary jurisdiction, declaredly alien to the volume: cfr. p. 24, nt. 49) are designed to respond to the strict principle of typicality; and, on the other hand, the minimum legal standards required in administrative actions of the kind considered here (at best being a matter for primary legislation: pp. 204 ff.) would not remain within its confines, as there would also be consequences in the judicial process, where the degree of reserve in terms of the law is rather different (arts. 108, 111, 117 Italian Constitution).

Let us consider, taking an example from the book, a case where the administration establishes a form of contract, "with an obligatory formal requirement *ad substantiam* or *ad probationem*" (p. 108). Such a discretionary choice would, in all evidence, also damage the parties involved (as "the evidence of witnesses is permitted only [...] when the contracting party has, through no fault of his own, lost the document that provided evidence"), which depends for its form on art. 2725 I. c.c. And then, it would no longer be true, as it says *there*, that only "the law or the will of the parties" can require that "a contract must be evidenced in writing." *Here* – in fact – there would be neither one nor the other.

2.

The scholar of procedural law feels a sense of relief, when addressing the (hypothetical) production of specific constitutive effects of contractual relations through the administration: the author – it should be pointed out – states, with regard to the so-called constitutive administrative acts, raised to the status of *self-standing*, that "unlike potestative rights, the holder of power is always outside the legal relationship which said power will affect. In fact, the 'conforming' regards the contractual autonomy of individuals (in the abstract) and is manifest (in practice) in contractual relations to which the authority is not a party. It is expressed through unilateral acts and is performed by the holder for an interest that is not shared" (p. 258).

Thus, the thought arises that with regard to the constitutive action at issue and the constitutive-extinguishing effect that (perhaps) depends on it, what needs to be taken as the point of reference rather than the "relationship", or even the contract (regarding which it appears safe to argue that it is an entity destined to precede and follow - in any case - the exercise of administrative power being investigated and thus remain indifferent to it in terms of the *substance*), is the subjective legal situation of each Contracting Party or both (but individually), and not so much the relationship that exists between them in any case.

This would seem to be the conclusion we get from reading § 2.5 of Chapter VI (*Structural and functional aspects of conformative administrative acts*), where no mention is made of the actual effects of the creation or extinguishing of real legal relationships, speaking only of "automatic constitution of the contract" or "the obligation to make exist" (p. 260), which implies the Administration's inability to give or take away existence (as a whole) in relation to the contractual autonomy of others, indeed presupposing its existence; and even more so from reading what, despite the affirmation that it is "always" a question of effects of a constitutive nature (p. 239), the author means when she says that there "are always two private legal spheres affected by the exercise of (constitutive) power"(p. 259).

In this case then, is it the individual subjective legal situation of the recipients that comes to the fore or the postulated constitutive (or extinguishing) effectiveness of their relationship or contract? For the author, it makes no difference, so much so that

"constitutive effectiveness – identified as a characteristic feature of the category – can taken on many forms to establish, modify or extinguish a subjective legal situation *which, in terms of constitutive acts, always imply a contractual relationship*" (p. 239).

Except that, while not "changing the proceduralist's mourning into dancing", the examples given in the study continue to paint a picture of a system in which the only truly constitutive power is judicial.

In the sole case (see. pp. 98 f., 225 f.) of the so-called "imposed contract" (as the case of the "obligation to contract" would only be a matter for judicial ruling in terms of its actual coming into existence), there are, in my view, a range of arguments for an alternative understanding, where the source of the obligations of each of the parties to the outcome of the exercise of administrative power does not become a *new* "contract", but perhaps an [administrative] act that can produce one in accordance with the legal order (art. 1173 cc), thus being one of *variae causarum figurae*.

On the question of the *imposed contract*, the author writes that: "the authority has therefore established the extended validity of the contract beyond the scope of the agreement between the parties" (p. 102), as one of the parties had already invoked the power to apply the termination clause within the contract. But this is not enough, in my opinion, to lead us to believe that it is thanks to an administrative act that a contractual relationship has been established *ex autorictate* whose content is also established by the administrative authority (p. 103).

Despite its different origin and the fact that it is destined to continue, the relationship does not appear new, nor does the administrative measure have any (other) power to affect the efficiency of the power of a private individual, whose effect it precariously neutralises. Whether this efficiency remains or is lost, the relationship is still the same, intangible in its identity, and there is no alternation between an original and genuinely private one and another that is imposed *jure imperii*, as may happen more generally with regard to non-enforceability arising *per factum principis* of a private power within the context of a framework contract (the case of arbitration awards under art. 1, c. 25, of the Severino Law and the Constitutional Court's judgment n. 108/2015 might serve as a paradigm of the conventional

permanence constraint *i.e., the same contract until (and beyond)* of the contract until (and beyond) the possible removal of the cause of ineffectiveness imposed upon the unilateral power of access to arbitrators).

The case of the administrative act allegedly able to end the effectiveness of the relationship or the contract of others is no different: but there is no real example even of this, in fact here the very words used by the author suggests – regarding the one example provided – that it is not a matter, in terms of the public power to affect, of a sufficient cause of effective extinction. In fact, she says that the act "imposes the termination", and not that it *actually* terminates the relationship (see p. 227).

The expert in procedural law, then, can still hope that the only power to "create, modify or extinguish legal relationships, with effect between the parties" remains, in its own way, the judicial authority.

3.

The different conceptual treatment that emerges also has other consequences, of course more noticeable in the field of legal protection than elsewhere (a field with other avenues of interest for scholars of procedural law, such as, for instance, means of exercising control over technical discretion, see pp. 308 s.).

The author declares, "a characteristic of constitutive acts is that they have an impact on contractual relationships. Administrative acts normally affect the legal position of a person or body, but the acts at issue are so specific and distinctive that they produce their effects on a contractual relationship and not on a legal position in itself. This characteristic causes numerous further consequences which are then examined, and what immediately stands out is that the act always has at least two subjects (the direct subject of the constraints, and an indirect one, i.e the contractual counterpart, who may assume various positions with respect to the act, increasing or restricting his/her powers)" (p. 107).

Now, beyond the fact that the true constitution or extinction of contractual relationships ought to be able to follow/proceed from the access of protected situations to forms of direct judicial protection (through the possible non-application of the administrative act and, in the abstract, the enforceability of a

regulation *pursuant* to art. 41, paragraph 2, of the Code of Civil Procedure by the Administration), no asymmetry in the power to act, and still less in the regulation of the duties (and preclusions) of the parties, appears consubstantial with the phenomenon. In short: the parties to a legally constituted or extinguished relationship cannot then be divided into direct or indirect subjects without the risk of confirming that the administrative structure has in fact affected (in a different way) the individual subjective situations and not (in the same way) the contract itself (which, in my opinion, is precisely the preferable opposite view).

Conversely, the question of the power constituting or extinguishing the contractual relationship of others, if and when it emerges, is naturally able to explain the presence of the "requirement to make immediate and timely appeal" (p. 337) or the effectiveness of *res judicata* "for all the contracting parties whose relationship had been brought into being by the contested measure" (p. 333); and yet this may not be logically compatible with the identification of a distinction between the categories of "indirect subjects – contractual counterparties alongside those of the direct subjects" (p. 296). The parties to a contract created from nothing or reduced to nothing are, isonomically, both direct and necessary subjects: each one is obliged to appeal, each is a necessary party to the judgment and, of course, the immediate recipient of the judgment. So, if we really wish to imagine an incidental extension of the authority towards the so-called indirect subjects, it may perhaps be necessary to think of the subjects as being in a position of giving or receiving cause to or from one of the parties and in respect of which a differentiated position, marked by interest concerning the nature of the contractual relationship may seem remarkable.

4.

Ultimately, "constituting, modifying or extinguishing legal relationships with effect between the parties" seems still to be the task of the judiciary, and the liberal guarantee of the "cases provided by law" a further valid protection, since, as I have learned, a "court hearing is required for the same reason that one may not take the law into one's own hands" and "explains why

the legislator has wished to reserve to its prior assessment of eligibility the use of a such an incisive form of protection"[2].

[2] G. Verde, *Diritto processuale civile*, I, (2015) 138.