ESSAYS

ADMINISTRATIVE JUSTICE IN ITALY: ORIGINS AND EVOLUTION

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Abstract

The aim of the following pages is that of recounting the principal phases in the evolution of the system of administrative justice, from its origins to the present day, an era which is distinguished by a significant process of codification of the administrative trial that will thus find itself, for the first time, a unitary discipline with an organic code, on a par with the civil and penal codes.

The first part will analyse the theoretical foundations that led to the creation of a system of administrative justice, following the movements of the processes of reform that sprung up in the middle of the nineteenth century and that pointed initially to the affirmation of the single jurisdiction of the ordinary court (1865) and later to the institution of the IV section of the Council of State, which then became an administrative court. The so-called "binary system" had been created, as in France and Germany .

In the second part the analysis will be centred more on the jurisdictional system (of the administrative trial) and the most significant passages of its long evolution will be revisited, those that led to the creation of a system of protection for citizens in dealing with public power that for its structural process and the effectiveness can be compared to (and, in some aspects, betters) the civil trial.

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THE ORIGINS OF THE ADMINISTRATIVE JUSTICE

Section One: The choice for the judicial protection

The key pillars of the system of judicial protection against the public administration were erected in the second half of the nineteenth century, during the first forty years of Italian unity, with the laws of 1865 and 1889. The former affirmed the jurisdiction of ordinary judges (the only kind there was at the time) in the resolution of disputes involving the government; so the choice was made for judicial protection, abandoning the previous system of administrative supervision. The latter was set up as collegiate system, the Fourth Chamber of the State Council,

whose judicial nature would later be recognised so an administrative judge was placed alongside an ordinary judge, resulting in a dual-track system. The system of administrative justice still rests on these pillars. However, the requirements of substantive law, the structure and function of the trial and the remedies have profoundly changed over time.

1. *The abolition of the Ordinary Courts of Administrative Law*

After the abolition of the Ordinary Courts of Administrative Law following the Unification of Italy in 1861, Parliament immediately turned to the unification of administrative legislation; and, from this point of view, the solution of the problem, which was then politically significant, the protection of citizens against the administration.

Past experience in most of the pre-unification states and, after 1861, in the Kingdom of Italy, did not allow, due to a strict interpretation of the principle of the separation of powers, that the administration would be "dragged" before the courts. The issue of protection of citizens was therefore resolved by using the system called "Administrative Litigation", which was introduced in Italy at the time of the Napoleonic conquest, modelled on the French system.

Disputes with the administration were devolved to the ordinary courts of administrative law, collegial bodies of an administrative nature and inserted, albeit with some guarantee of independence, within the organisation of the executive power. In the Kingdom of Sardinia, after the reform of 1859, due to the work of Rattazzi, such courts were, in the first degree, the Governing Council, sitting in each Governorate (Prefecture), and, on the second degree, the Council of State or, in matters of public accounting, the Court of Auditors.

After Unification, achieved through the expansion of the Kingdom of Sardinia, the system of the pre-unification states remained temporarily in place.

Parliamentary debate post-unification therefore focuses on maintaining or abolishing the system of administrative litigation; or, rather, on the preservation or alteration of the model of French origin, adopted by many of the pre-Unification states after the

Restoration (1815). In continental Europe meanwhile an alternative model took root: with the Belgian Constitution of 1831, disputes with the administration were entrusted to the ordinary judge, like any other dispute. This model would inspire those who adhered to the often intransigent thesis of so-called liberal constitutionalism, which had among its main goals the elimination of administrative litigation and affirmation of the "ordinary and universal jurisdiction".

As is known, the parliamentary debate could not be concluded because of the approaching war against the Austro-Hungarian Empire (the Third War of Independence). The executive was granted full powers; it approved the Law of 20 March 1865, No. 2248, on administrative unification, faithfully using, however, the texts under discussion in Parliament. Together with local administration, public security, and health and public works, this law regulated the in Attachment D, the Council of State, and, in Attachment E, the administrative litigation.

The first article provided for the abolition of the ordinary courts of administrative litigation; art. 2 states that "all cases involving misdemeanours and all cases dealing with civil and political rights" should be referred to the ordinary judges.

2. The essential features of the reform of 1865

The literal meaning of Article 2 mentioned above was quite clear: any subjective right acquired legal protection, and was no longer restricted to obtaining only the protection of administrative law. The phrase "civil and political," according to unambiguous interpretation, included all individual rights, claimed by citizens against the administration. Nor could any obstacle to justice be contained in the fact of the administration's being involved in the dispute, or in the presence of "measures of executive or administrative authority". The judges' jurisdiction was therefore extended to any dispute over individual rights.

The principle of the separation of powers, having been overcome in the field of jurisdiction, rose to the surface again in the regulation of possible action and the judge' power of decision. For art. 4 of the Act, the court could not cancel, revoke or amend the rules and administrative measures if it considered these not to

comply with the law, it did not apply them: in other words it did not bear them in mind in reaching a decision.

The same article, in its second paragraph, established the duty of the administration to comply with the court decision. This obligation, whose content opened a long-running dispute among scholars, was, however, not enforced by any sanction. The vacuum would then filled by the law of 1889.

The reform, referring to individual rights, also left numerous and substantial disputes with the administration (the "Issues not included" in art. 2) out of the jurisdiction; and the ordinary courts of administrative disputes (in which it was irrelevant whether the dispute was on rights or other interests) having been abolished, these disputes could only be resolved through administrative remedies (generally determined by the next level of administrative hierarchy to the one who had made the contested decision). Attachment D to the same law also maintained the possibility bringing in the administrative remedy the "extraordinary" action to the King, which was decided on the advice of the State Council.

Ultimately, the law of 1865 had ensured the legal protection of individual rights and left for other administrative "issues" that degree of administrative protection that could be handled by the administration itself actively by means of ordinary and extraordinary administrative remedy.

3. The implementation of the reform

Among the lawyers of the time there was the distinct feeling, at least among the majority, that the issue of judicial protection against the Administration had been resolved completely and definitively. It was a widely held belief that judicial protection could be the only guarantee of individual rights: in the absence of individual rights no intervention by the court could be conceived of.

As we will see this vision reeked of schematicism, and even then this was clear to some scholars. But the partial nature of the reform (with the incomplete legal protection it entailed) appeared obvious to everyone because of how timidly and restrictively it was implemented.

On the one hand, the ordinary judge, burdened with a task

to which he was not accustomed, did nothing to guarantee to his action that breadth and effectiveness that the law would have allowed.

On the other hand, the State Council, which was then the judge of conflicts of competence between administrative bodies and courts, contributed heavily to reduce the field of jurisdiction: from July 1865 to April 1877 500 conflicts of attribution were launched, "in only 111 was jurisdiction recognised"[1]. The State Council then began to develop the argument that when the dispute relates to administrative measures, particularly measures that are discretionary, it can not be related to individual right, and therefore does not fall within the jurisdiction, as outlined by the law of 1865.

It is absolutely true that this interpretation was in marked contrast to the letter of the law, which explicitly considered the possibility of disputes concerning rights and at the same time involving administrative actions, but it must have expressed strong and extensive convictions if we consider that once the power to resolve conflicts of attribution was transferred, in 1877 to the Court of Cassation in Rome (with the Law of 31 March 1877, n. 3761), the orientation hardly changed. Essentially the ordinary judge was granted jurisdiction (acts *jure gestionis*) in those case in which the administration would act as a private body.

In its capacity as a Court for resolving conflict, the Court of Rome (which decided in United Sections) might well have taken a different attitude, asserting jurisdiction in all cases where the dispute related to individual rights, and not denying it when the controversy involved administrative measures. If it did not do so this is because it too had core beliefs that were not different from those of the State Council.

Such a reductive implementation of the reform made it clear that not only interests not recognized as individual rights, but also these, when they are influenced by an administrative measure, were deprived of legal protection.

4. The theoretical framework

While the political reform of 1865 can only be regarded as

[1] G. Mantellini, *I conflitti di attribuzione in Italia,* (1878) 33.

bold and radical, we only think of the final break with the system of administrative litigation and of the different and more limited value given to the principle of the separation of powers, in theory it collides with the prevailing view of the relationship between the current administration and the citizen.

The contracting authority was intended as an expression of sovereignty: their organs were able to pursue the public interest and without any obstacles whatsoever. In the sphere within which it wielded power there was no room for the rights of citizens: two separate and overlapping spheres existed more in the theoretical belief in positive law (such as the implementation of the reform shows), one reserved for the power of the administration, the other reserved for citizens' rights[2]. The two spheres were bound by laws, which could result in a strictly alternating way, in either "administrative power" or the individual right of the citizen. In the first case it was excluded that from law ("administrative law")[3] could derive "rights in the strict legal sense of the word" nor simple "interests".

From this perspective, civil and political rights, based on "civil and political laws", could not collide with administrative power, based in turn on (other) "administrative laws" so that the protection of rights could only be limited to cases where the administrative authority acted in violation of civil and political laws, without being able to extend to the violation of administrative laws.

The theoretical framework is presented in an extremely simple way: the administrative laws attributed powers to the administration, and this necessarily precluded the simultaneous attribution of rights to citizens. The absence of individual rights led to again, necessarily, a lack of judicial protection. It seemed therefore not only justified but necessary that disputes relating to this sphere, characterized by the existence (and operation) of administrative powers, were left to the Administration, which would decide through the examination and conclusion of the administrative remedies.

On the other hand, the civil and political laws attributed individual rights to citizens, and therefore did not attribute

[2] G. Azzariti, *Dalla discrezionalità al potere* (1989).

[3] A. Salandra, *La giustizia amministrativa nei Governi liberi* (1904) 325.

powers to the administration. In this case judicial protection was ensured.

The huge number of conflicts of authority demonstrates that the theoretical framework was deeply flawed, yet it endured beyond the law of 1877 and the law of 1889, although not for long.

Evaluating the reform of 1865 years later we can agree with Salandra, who believed with this, the first unified response to the problem of protection from the administration, that civil, personal and property rights were given greater weight: according to this scholar, who was also a leading politician, the reformers of 1865, wished to affirm "the legal guarantees of civil liberty", as in the period after the French Revolution when "the political guarantees of popular sovereignty" were sought.

5. The movement for "administrative justice"

In the generally shared, but objectively inadequate theoretical framework that supports it lies the limit of the 1865 reform. But awareness of its inadequacy, or rather incompleteness, or rather, derived from practical reasons: the political world, both the historical Right and Left, soon realized that it had not paid sufficient attention to the protection of "minor rights", or "less perfect rights", or "rights that are subordinate to considerations of public interest", that is, "rights arising from administrative law", that had been widely discussed in the parliamentary debate.

Over the years these "minor rights" grew in number and economic importance, along with the enlargement of the administrative functions and the sphere of discretionary powers.

The reductive way in which the law of 1865 has been carried out increased the problem: even the rights "ensured by a law" remain largely devoid of legal protection.

The need for a new reform became clear almost immediately after 1865, and grew quickly in time. The acceleration was due to a political event, which in itself was extraneous to the problem of administrative justice. As we know, the Government of the Right, that had been in power since the Unification, fell in 1876.

Their removal from government, however, led to a renewed attention to the problem of protection in the administration, to the

extent that the men of the Right placed it at the top of their political agenda, albeit from a particular point of view, that is as a need to react against the interference of political parties in the administration. A movement for "justice in the administration" was established, led by Marco Minghetti[4] and Silvio Spaventa.

It was believed to curb favouritism and partiality by broadening the possibility of acting against acts of the administration: there was a request to "complete the work of 1865", with which the legislature, "radically abolishing the administrative jurisdiction, deprived many interests of any guaranty of justice, and left many more rights without a judge at the mercy of the administration"[5].

To complete the reform of 1865, not undermine it: despite the timid attempt of the ordinary judge, nobody thought it would be possible to return with regard to the solution affirmed by that law, which, having achieved administrative unification started to be considered "as foundation" and raised "to the level of myth"[6].

Section Two: Administrative justice

1. The Crispi Laws of 1889

The question of the extent of legal protection, however, entrusted to organs of independent and impartial decision makers, strongly felt by the Right, was given a solution through the work of a government at least formally referable to the Left, and chaired by Francesco Crispi.

The Law of 31 March 1889, No. 5992 (then coordinated with Attachment D to the Law of 1865 in the single text approved by RD 2 June 1889, No. 6166). In effect, it would change the internal organization of the State Council, an administrative authority, with the establishment, next to the first three (dating back to 1831), of the Fourth Chamber, named "for administrative justice".

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[4] M. Minghetti, *I partiti politici e la ingerenza loro nella giustizia e nell'amministrazione* (1881).

[5] S. Spaventa, *Giustizia nell'amministrazione*, Speech made to the Bergamo constitutional Association, 7 May 1880, in S. Spaventa, *La giustizia amministrativa* (1993) 54-55.

[6] F. Benvenuti, *Mito e realtà nell'ordinamento amministrativo italiano,* in F. Benvenuti e G. Miglio (eds.), *L'unificazione amministrativa e i suoi protagonisti*, (1969) 75.

The Fourth Section was called upon to "decide to on complaints of incompetence, excess of power or violating the law against acts and measures of an administrative authority or a deliberating administrative body, that have as their object an interest of individuals or moral judicial bodies, when such actions are not the responsibility of the judicial authority, nor are they materials that should be referred to jurisdiction and remit of special bodies or colleges" (Article 3).

The scope of the new judicial body was, as stated explicitly, described negatively in relation to the to the "competence" of the judge. This provides proof of the design aimed at completing the reform of 1865, without wishing though to reduce or modify it in any way.

In Art. 3 mentioned above the pillars of what was to become administrative trial were stated: recourse to the impugnation of acts or measures; to enforce their errors of law (incompetence, excess of power and violation of the law); to protect individual "interests", which are different from individual rights.

The choice of protection (only) following administrative action in the form of impugning "acts and measures", seemed adequate to ensure administrative justice, and avoid favouritism and partiality, with no disruption to the normal performance of administrative tasks. Consistent with this formulation, "acts or measures of the Government in the exercise of political power" were withdrawn from the new form of care.

In contrast with the technique followed at the time by the legislature of 1865, the new law specified the range of grounds of appeal, setting the causa petendi of the judgment, while placing the base (the only one left until the Law of 11 February 2005, No. 15) for the preparation of the discipline of the invalidity of administrative actions, resulting in the annulment for errors of law.

What was not gone into in any more detail was the concept of "interest"; and this is easily explained on the basis of a twofold consideration: first, no one really knew in what it consisted from a legal standpoint; and second it was sufficient to identify it concretely simply as not being an individual right.

To the syndicate of legitimacy was added, in certain limited circumstances, the syndicate of merit: one of the cases involved

the obligation of the administration to comply with the "judgement" of the ordinary courts. Thus was finally ratified the widespread non-fulfilment of this obligation, established by Law of 1865, on the part of the unsuccessful administration.

With a subsequent law (1 May 1890, No. 6837) functions relating to deciding disputes concerning acts of local administrations were attributed to another administrative body sitting in the Prefecture, the provincial administrative council: an organ which, following the Constitution of 1948, will be declared constitutionally illegitimate because of its composition, which doid not ensure its independence and impartiality.

There was a passage, though without awareness of it (on the contrary the principle of single jurisdiction will continue to be considered in force and defended), from the monistic system in 1865, with full legal protection in the hands of a single judge, to the dualistic system, for which protection against the administration is divided between two different legal orders, the ordinary judge and (what was to become) the administrative judge. But this different systematic solution was not consciously pursued: it was the result of two episodes of reform inspired by different ideologies and needs.

2. The cognizance and powers of the Fourth Chamber

Not only the field of cognizance of the newly established body was designed in negative relation to the field of jurisdiction of the judge (ordinary), regarding all and only the disputes that were not "expertise" of the latter; the powers of decision too appear commensurate with powers not attributed to the judge (ordinary). While the law of 1865 had denied that the court could annul acts of the administration, even if they felt them to be illegitimate, the law of 1889 gave the Fourth Section only and exclusively the power of annulment.

The administrative "judgment" therefore manifested itself as the reciprocal and opposite of ordinary judgment. One can certainly think it was the kind of "judgement" that best suited the need to limit the interference of political parties in the administration; and we may add that the attribution to a body, that was in a position to decide impartially, the power to annul acts of the administration must have seemed like a dramatic

improvement (and, from the other side, a source of concern), if we only think that the old courts of administrative disputes, despite their obvious nature as administrative bodies, were not endowed with that power.

One can also agree with those who held that the law of 1865 had foreshadowed "in the negative the type of trial which will created by the law of 1889"[7]. This observation may justify the impression that the first commentators had of the law of 1889: with it, simply for the fact that they were filling in the "gaps" in the law of 1865, both from the point of view of cognizance (having added the care for interests to that of rights), both in terms of decision-making powers (having added the power annulment the powers of non-application and imposition of a fine), it was believed that the reform had been completed and had received a complete set of safeguards against the administration. For the second time, one had the illusion that the problem of administrative justice had finally been solved.

Sufficient attention was not paid to the gaps in protection that remained; and that, unfortunately, in large part, have been handed down to our day, and remain unfilled. The result was the generality of protection, apart from the free zone of political acts (at the time fully responding to "civic consciousness"); protection was provided for any dispute that the citizen had against any administration. But the protection provided was never full and complete because the means of protection (available before the courts and before the Fourth Chamber) were not cumulative: if the dispute relates to individual rights, it could lead to actions of investigation and the sentencing to payment of sums of money; if the dispute relates to interest, all that could be proposed was the constitutive action for annulment.

The objective of full protection, if indeed that had been the intention of the reformers (as can be inferred from the vain attempt, shortly after, to introduce the so-called dual protection), was not achieved.

3. The problem of the legal nature. The attempt at dual

[7] M. Nigro, *Problemi veri e falsi della giustizia amministrativa dopo la legge sui Tribunali regionali*, in R. T. D. Pubbl. 1832 (1972).

protection

The law of 1889 never uses the words "jurisdiction" and "sentence": it uses the words "competence" and "decision"; in the declared intentions of the legislators, in line with the theoretical concepts of the time, the "control" over administrative activity (particularly if discretionary) and the annulment of administrative acts could not be decided if not by an organ belonging to the administration. In the report of the Central Office of the Senate it was emphasized that "the new institution is not a special or exceptional court of law, but remains in the sphere of executive power (...). It is the same executive power arranged to better protect the interests of citizens". Furthermore, according to general opinion[8], "it was lucky the thing was viewed in that way, because, if not, the reform that is crucial for our legal system would most likely have been hopelessly condemned (...): a general syndicate of character court, with the power first to suspend and then revoke and annul acts of the administration, would have seemed too inconsistent with the concepts still prevailing on the division and independence of powers, as intolerable judicial interference in the public administration, capable of paralysing it".

To reconcile the administrative character of the fourth section with the very substantial nature of its judicial function, there was talk of "judicial control within the administration itself against the abuse of its organs, with sufficient guarantees of justice", thus accepting a broad (and non-technical) notion of jurisdiction. The best doctrine of the time, from Orlando to Santi Romani to Codacci Pisanelli, sided on similar positions.

The recognition of a judicial nature (in the strict sense) of the Fourth Section, and thus "decisions" taken by it, was the work of the United Sections of the Supreme Court of Rome, on the basis of the law on conflicts of 1877 and the law of 1889. This allowed the United Sections to set the policy of allotment (including the jurisdiction of ordinary courts and "competence" of the Fourth Chamber) on the *causa petendi*[9], but also allowed them to transform the Fourth Chamber of administrative body into a court.

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[8] See V. Scialoja, *Come il Consiglio di Stato divenne organo giurisdizionale*, in 1 R. T. D. Pubbl. (1931) 410.

[9] Cass., United Sections, 24 June 1891, *Laurens* Judgment; Cass., United Sections, 24 June 1897, *Trezza* Judgment.

Bear in mind that the United Sections, according to the law of 1877, was in charge of both "regulating jurisdiction between the judicial authority and administrative authority where one or other is declared incompetent" (Article 3, paragraph 2), i.e. to decide on negative conflicts of attribution; as well as "judging positive or negative conflicts of jurisdiction between the ordinary courts and other special courts, and the invalidity of the judgments of these courts on grounds of lack or excess of power" (Article 3 no. 3), i.e. to decide conflicts of jurisdiction, positive and negative.

Faced with decisions affirming the Fourth Chamber (explicitly or implicitly) the "jurisdiction" of that section, the United Sections, "to prevent any usurpation of the powers" entrusted to the court, had no other means (since it is positive conflict) except the cancellation for lack of jurisdiction or excess of power of those decisions under Article 3 no 3 of the Law on conflict, on the necessary assumption that these decisions were judgments and that the Fourth Section was a special jurisdiction.

The jurisdictional nature of the Fourth Section was later enshrined in the Law of 7 March 1907, no. 62.

The position taken by the United Sections on the criterion of apportionment based on the *causa petendi* was the occasion of a legal debate on the possibility of ensuring to individual rights, other than the protection for actions carried beyond the ordinary courts, the protection of annulment entrusted to the administrative. This generous effort, which called for dual protection, and is based on the idea that the individual right could be invoked (even) as a (simple) interest, saw the doctrine deeply divided (for, among others Scialoja V. and O. Ranelletti; contrary, among others, V.E. Orlando, at least until the mid-'90s), and was sunk by the United Sections with the Judgments Laurens and Trezza. With that ended the practice followed by the Fourth Section to the contrary[10].

4. The Law and Regulation of 1907

The administrative nature of the new institution served to defuse the problem of legal protection afforded in the absence of

[10] To which bears testimony of L. Meucci, *Il principio organico del contenzioso amministrativo in ordine alle leggi recenti*, in IV Giust. Amm. (1891) 29.

individual rights, namely the legal protection given to interests that had, by definition, legal recognition. Of extreme importance is the attitude of Silvio Spaventa, given his capacity as President of the Fourth Section: he spoke of jurisdiction, but as a function attributable to the administration, exercised by the administration as a "new form" of "the supreme right of inspection" of the government on acts of the administration; a new form, since the exercise of that power was conditioned by the demand of private persons "who have been directly involved, but proceeds with such forms of procedure and with such effectiveness of command over any arbitrary administrative, which can be derived from the King, in whose name, as the supreme head of the administration, the new judiciary does justice"[11].

The "jurisdiction" should necessarily be an objective one: there was no need to "determine disputes arising from the collision of individual and homogeneous rights", but was directed to" know only if the right target was observed (...). The offended individual interest is only taken as a reason or occasion for the administration itself for the review of its acts"[12].

The objective character of the jurisdiction, if it were considered in the proper sense or in a broad sense (according to a non-formal criterion of content), was affirmed by many scholars (e.g. by Vittorio Emanuele Orlando and Alfredo Codacci Pisanelli), because it helped to overcome the binomial indivual right/judicial protection, avoiding the mutual relationship of necessary implication, that was believed to exist between them: the process of objective law is independent of the consideration (and protection) of independent legal situations.

Starting from a more rigorous notion of jurisdiction, and recognizing the (authentically) jurisdictional nature of the Fourth Chamber, the recognized possibility of judicial care in the absence of individual rights was an issue[13], since, in consequence of its being protected in court, "The idea of pure interest fades and turns into legal entity"; "affirming interest as a matter of law of contentious administrative proceedings, is an affirmation contrary to the principles of reason, the concept of justice, that of

[11] S. Spaventa, *Discorso per l'inaugurazione*, cit. at 96.

[12] See A. Romano, *I caratteri originari della giurisdizione amministrativa e la loro evoluzione*, in D. A. (1994) 635.

[13] L. Meucci, *Il principio organico,* cit. at 14.

jurisdiction, and even the law of liberty".

Thus arose the need to find a form of interest, which was not merely a simple interest (or in fact), entirely devoid of legal relevance, but it was not even an individual right; and envisioning began of a "legitimate interest, i.e. corresponding to an individual right", with which it has an occasional relationship".

Thus, the jurisdiction of the Fourth Chamber might not be understood any longer as a jurisdiction of individual right, since "the legal justification of the contentious-administrative competence" could be identified "in a moderate popular action." It thereby built a "real action even it was before administrative magistrates."

The orientation of the fourth section gradually shifted, especially after all the recognition by the Rome Supreme Court of its jurisdictional nature, towards a process model of individual right, that is designed to protect individual situations; and simultaneously, in close logical connection, the doctrine began to deepen the concept of legitimate interest.

The Act of 1907 (coordinated in the consolidated act of 17 August 1907, No 638), and the Rules of Procedure, approved by RD 17 August, 1907, no. 642, did nothing but sanction definitively, not only the actual legal nature of the Fourth Chamber, but also the individual nature of the process that takes place before it.

5. The introduction of exclusive jurisdiction and other reforms before the Constitution

The legislation of 1907 did not prove exhaustive. There remained many unresolved problems: the one on the criterion of apportionment of jurisdiction, conflict of case law in both the Council of State (especially between the Fourth and Fifth Chambers) and the guidelines of the Court of Cassation; up to the problem of the extreme difficulty of obtaining protection against the inertia of the administration.

Very soon (in 1910) the government (Pres. Luzzatti) felt the need to establish a Commission at the highest level to propose reforms. The proposals were developed: the concerned protection against silence, the promiscuous power of the two sections of the State Council, the identification of matters to be reserved only to the jurisdiction of a single court order, without the need to

distinguish between individual rights and legitimate interests.

Not immediately, but in 1923, during a period of vast reforms, the last two proposals were accepted, while the first was not. With the Law of 30 December 1923, no. 2840, the Fourth and Fifth Chamber both became competent; the State Council, which had been prevented by the Supreme Court, was allowed to decide incidentally issues concerning personal rights as well, except those relating to status and capacity; leaving the ordinary courts, however, the cognizance of the so-called consequential property rights; above all it created the exclusive jurisdiction of the administrative courts.

Thus some subjects were identified in which it was considered more difficult than others to distinguish between individual rights and legitimate interests; and disputes relating to these matters were referred "to the exclusive jurisdiction of the State Council in court". Among those matters particularly important was the relationship of public service. Similar reforms related to the administration of provincial government.

With the law of 1923 (which was later coordinated with the legislation of 1907 in the consolidated act of June, 1924, No. 1054, partially still in force), a second criterion of apportionment of jurisdiction was created, a special criterion, based on materials, compared to the general criterion, based on individual legal situations. This criterion abandoned the principle established in 1865, for which the protection of (all) individual rights was provided by the ordinary judges.

Unfortunately, the law of 1923 merely created the exclusive jurisdiction but did not dictate its own discipline for the related trial; so that the protection of the rights of self-report was included (and largely remains so) in the narrow context of the administrative trial.

The jurisprudence of the State Council removed some serious bottlenecks: it allowed actions to be brought within the statute of limitations, rather than outside the limitation, where the dispute relates to individual rights, but has never embarked on the construction of a suitable process for the protection of the situations of joint legal and legitimate interest, i.e. a process of exclusive jurisdiction. Indeed, the differentiation of the deadline for bringing an action depending on whether the contested acts Committee (damaging rights) or authoritative acts (damaging

legitimate interests) shows that, even within the exclusive jurisdiction, jurisprudence had not managed overcome the distinction between (protection of) the two subjective situations.

It should be remembered that with the R.D. of December 11, 1933, No. 1775 the case of public waters, entrusted to the regional courts and the High Court of Water, was reformed. Furthermore, with the consolidated act municipal and provincial law, approved by RD March 3, 1934, No. 383, incorporated the rules on administrative appeals.

THE EVOLUTION OF THE SYSTEM

Seeking ways to protect citizens against the administration was a political issue of central importance from the Unification of Italy up to the Crispi laws of 1889. From then on the problem has become largely technical and legal: the successive reforms, among which stands out the introduction of exclusive jurisdiction, were dictated by the need to deal with a certain sluggishness and flaws in the system resulting from the two fundamental laws of 1865 and 1889.

The evolution of the system is due almost exclusively, at least throughout the twentieth century, to the work of jurisprudence, flanked by doctrine.

Interest in administrative justice rose at a political level during the drafting of the constitutional text, even if the Constituent Assembly did not spend a great deal of time on the topic and felt it unnecessary to introduce profound innovations in the system.

In the decades following the Constitution, the legislature acted to institute Regional Administrative Courts, and, recently (in 2000), to dictate certain appropriate provisions for the administrative process. In addition, in 2009 the Government was delegated to proceed with the reorganization of the administrative process.

Section One: The constitutional impact

1. The "constitutionalisation" of the system

The Constitutional Charter, which came into force on 1 January 1948, contains a number of provisions for dealing with

administrative justice and other more general provisions that establish general principles for the magistrature and judicial protection.

During the work of the Constituent Assembly the reaffirming of the unity of jurisdiction was pursed as authoritatively as it was pointlessly[14], entrusting all disputes with the administration to the ordinary courts. The constituents preferred to leave unchanged the basic outlines of the system, such as they were at the time, thanks in part to the prestige of the State Council, because of its attitude of independence during the dictatorial rule of the Fascist period.

The dualistic system was therefore sanctioned by a constitutional norm, dividing disputes with the administration between ordinary courts and administrative courts, according to the criterion of individual situations, while retaining exclusive jurisdiction "in particular matters laid out by law" (Art. 103, paragraph 1).

While the establishment of specialised courts was forbidden (Article 102, paragraph 2) and "revision" within five years is prescribed, for existing "judicial bodies", both the Council of State and the Court of Auditors were saved (VI transitory disposition).

Both these institutions are dealt with in Title IV on the Judiciary, as well as in the preceding Title III, in the section on auxiliary organs of the Government. In this way the dual functional vocation of both is ratified: the Council of State remains therefore, by constitutional provision, "the legal-administrative consultative body that offers protection to justice in the administration" (Article 100, paragraph 1); the Court of Auditors is both a supervisory body (Article 100, Section 2) and organ of jurisdiction "in matters of public accounts and others specified by law" (Article 103, paragraph 2).

The judges of both institutions are considered "judges of special courts" (Article 108, paragraph 2), since they lie outside ordinary justice. And this is so even if, as regards the Council of State (and Regional Administrative Courts), they are recognized as having general jurisdiction in terms of legitimate interests: they are therefore special courts operating a general jurisdiction.

With regard to the administrative courts, the Constitution,

[14] By Piero Calamandrei.

albeit in the wrong place (Rule 125 Title V), requires the establishment of "organs of administrative justice of the first instance". This requirement will be implemented only in the '70s, with the establishment of the Regional Administrative Courts[15].

On the establishment of the Statute of the Region of Sicily, the Council of Administrative Justice of the Sicilian Region was set up, an institution that corresponded, in its functions, to the Council of State[16].

Except for these final provisions, the constitutional design of the system of administrative justice, with regard to the judges and the allocation of jurisdiction, reflects exactly the system that had grown up over time. It even reproduced the rule that limits the appeal in cassation against the decisions of the State Council and the Court of Auditors to "only reasons relating to jurisdiction" (Art. 111, last paragraph), thus preventing the Cassation (or any other judicial body of a different composition) from performing the necessary general "nomophilatic" action, which, by its nature, can only be unitary and universal. In this respect, commentators have criticized the constitutional text, stating that it had given a higher legal value, resulting in greater difficulty for major reforms, to a system which even then was not widely regarded as satisfactory.

2. *The constitutional "openings"*

A different assessment should be made relating to other constitutional provisions, especially those relating to the exercise of judicial functions. These rules affect any jurisdiction, and therefore apply also to the administrative courts.

Already in the First Part, among the rights of citizens, it is solemnly recognized that "everyone" can "take legal action to protect individual rights and legitimate interests" (Article 24, paragraph 1); as well as the "inviolable right" to defence at every stage and level of the proceedings (Article 24, paragraph 2).

It is reiterated that "against the acts of the public administration the judicial protection of legitimate rights and interests are always admitted" (Article 113, paragraph 1).

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[15] Law 6 December 1971, No 1034.

[16] Leg. Decree, 6 May 1948, No 654, modified with the D.P.R. 5 April 1978, No 204 and, recently, with the Leg. Decree 24 December 2003, No 373.

It seems appropriate to point out first that legitimate interests are matched to individual rights: a circumstance that is all the more significant if one considers that the phrase used (but in a non-technical way) in the parliamentary work of preparing the laws of 1865 and 1889 had never entered the legislative language. This is the constitutional text that uses it for the first time.

Both the use of the phrase and especially the juxtaposition of the figure to that of individual right made a decisive contribution to that doctrinal movement, which had already begun, aimed at demonstrating the substantive character (not just at trial) of the individual judicial situation known as legitimate interest.

The recognition of legitimate interest as a subjective situation which protected in (and was not born with) the trial has a considerable impact both at the theoretical and practical level: it definitively establishes the character of the subjective process of law and the process of parts that the administrative process had long since acquired. In addition to this it reopens the debate on the object of the administrative trial, which had been (almost) peacefully identified earlier in the contested administrative act. Finally the way opens to the affirmation, which occurred several decades later (in 1999), of the compensation for the injury inflicted by the administration on legitimate interest.

It seems useful, secondly, to note that the constitutional text reaffirms the generality of protection against the administration: both the limitations inherent in the non-impugnability of certain categories of acts (political acts are the most relevant example) and those arising from the exclusion of the verifiability of the acts in some respects (usually in terms of excess power) fail.

Judicial protection "cannot be excluded or limited to particular kinds of appeal or for certain categories of acts" (Article 113, paragraph 2). This, which in the opinion of this writer, is the most important provision concerning protection against the administration, cannot be considered fully implemented yet: beyond the significance of the expression "special means of impugnation", one cannot but recognise that the Constitution also wanted to ensure, in addition to general questions, the fullness of judicial protection. Which means that, in disputes with the administration, the actions that, in general, are attemptable in

litigation between private parties must be attempted; thereby overcoming the strange situation before (still partly present), in which the ordinary courts can neither annul administrative acts nor order the administration to a specific doing or giving, and the administrative judge could not then (and generally cannot even today) issue different (or independent) sentences from the annulment of the contested measures.

It is therefore undeniable that the Constitution of 1948 contains everything that might be required to ensure the system of administrative justice can reach a satisfactory degree of effectiveness.

3. The work of the Constitutional Court

Since the early '60s, the work of the Constitutional Court has been intense and successful both with respect to special administrative courts and, later, with regard to the discipline of the administrative process.

It should be remembered that, because of legal requirements or on instruction from the Supreme Court, the range of special judges had been enriched by numerous figures in the decades before the new Constitution. The inadequate composition of these judicial bodies and the roughness of the discipline of the process that took place before them led to the displeasure of the constituents with regard to special judges. However, the legislature has not responded to the need for implementing the review within the period specified by the VI transitory disposition.

The inertia of the legislature prompted the Constitutional Court to eliminate many of these specialised courts, relying on Article 108, paragraph 2, and on the principle of independence enshrined therein. Thus the following were eliminated: the Councils of Prefecture[17], the Provincial Administration[18], the Captains of the Port[19].

Indicative is the story of the electoral administrative dispute: by ancient tradition election petitions were decided respectively by the municipal and provincial councils. The

[17] Const. Court, 3 June 1966, No 55.
[18] Const. Court, 29 March 1967, No 30.
[19] Const. Court 9 July 1970, No 121.

Constitutional Court, which had previously considered that the judicial nature of that activity was decisive, declared unconstitutional the rules governing the electoral administrative disputes unless the independence and impartiality[20] of the body hearing the case could be guaranteed. The legislature believed it could resolve the problem by creating Sections for Electoral Disputes, such as special sections of the establishment of regional administrative courts, made up of two state officials and three elected members from the regional or provincial councils. The Court held that a college thus formed violates the principle of the independence of the judge. The problem was later solved by giving jurisdiction in terms of the administrative electoral operations to the regional administrative courts.

It should be pointed out that the Court has helped to create (or did not prevent the creation of) parliamentary courts, in clear contrast to its constant guidance.

The Constitutional Court has also dealt with the government appointment of some judges of the State Council, holding it to be constitutionally legitimate. On the other hand, it declared illegitimate the designation by the Regional Council of some members of the Council for Administrative Justice of the Sicilian Region, insofar as these held office for four years and could be reappointed.

The question of constitutionality was also raised for those advisers to the Regional Court of Administrative Justice of Trentino-Alto Adige, who are appointed for the Sections of Trent and Bolzano by their respective provincial councils. The matter was dismissed as manifestly unfounded by the administrative court.

At a second point, the Court has dealt with the discipline of the administrative process: it has repeatedly intervened on judicial protection; it has granted constitutional value to the rule of two levels of jurisdiction; it has condemned the probatory system, but only with reference to the process of public employment; it has introduced the opposition of the third ordinary; it has stressed the importance and implications of compliance with the adversarial principle; it has identified strict limits to expansion, that were highlighted in the last fifteen years, of exclusive jurisdiction.

[20] Const. Court, 27 December 1965, No 93.

4. The establishment of the Regional Administrative Courts

In a late implementation of Art. 125 of the Constitution, the Law of 6 December 1971, no. 1034, established the Regional Administrative Courts "as administrative bodies of Justice of First Instance" with regional constituencies. The seats of the courts are in the regional capitals; in some regions outlying branches have been set up.

The establishment of bodies of first instance became urgent following the declaration of unconstitutionality of the provincial government administrative bodies that served as Administrative tribunals of first instance, but with limited jurisdiction.

The new courts have jurisdiction that instead corresponds to that of the State Council; as a result, the latter, which was sometimes the first court of appeal (against the councils) and often the judge of first instance, became an appeal court. Only one case of jurisdiction of first instance of the State Council remains, and it relates to the application for compliance with the decision by the State Council itself (Article 37, paragraph 3) and the judgments of ordinary courts, when the administrative authority called upon to comply is an institution whose activity is not restricted "solely within the constituency of the Regional Administrative Court (Article 37, paragraphs 1 and 2).

Initially, with the law of 1971, the presidency of the tribunals was reserved to state councillors, and the role of regional administrative judges was created, separate from the role of the State Council (Article 12). Later, with the Law of 27 April 1982, no. 186, the presidency of the Courts was extended to regional administrative magistrates and the judges of the State Council and those of the Regional Administrative Court were given a single role.

However, the separation was maintained between qualifications: councillors to administrative tribunals can only rise to the qualification of state councillor for half of the places available and where they are in possession of at least four years of actual service in the role. The other half of the state councillors is reserved for a quarter to public competition, and for the other quarter, to government appointment (Article 19).

The 1982 Act also established the Council of Administrative

Justice, whose composition has been changed recently. It has essentially the same functions as the Supreme Council of the Judiciary has for ordinary judges. Moreover, the President of the State Council is appointed by decree of the President of the Republic, on the proposal of the Prime Minister; the Council of Administrative Justice can only provide a non-binding opinion (Article 22).

The 1971 law has, as far as possible, repeated literally the formulae of the single text of the Council of State; it has, for example, attributed "to the jurisdiction of the regional administrative tribunals complaints of incompetence, excess of power or violation of law against acts and measures" of administrative authorities, using the same words of Article. 26 consolidated act 1924.

The aim is clear: the newly established courts were not to follow different judicial paths from those indicated by the State Council; the presidency being reserved for state councillors has the same aim.

Nevertheless, the courts, which started operating in 1974, have provided a significant contribution to innovation with regard to the traditional orientations of the administrative courts.

5. The novelty of the 1971 law and the reform of administrative appeals

If the essential thrust of the administrative process was not changed by in the slightest by the law setting up the administrative courts, some innovations were carried across to the discipline relating to trials.

Sometimes the novelties of the law are merely taking note of guidelines for case law that go back some time: for example, the extension of the so-called assessment of compliance with the decisions of administrative judges is none other than the legislative sanction of the statement of case law dating back to the late '30s, the attemptability of remedies against the failure to implement the decisions of the State Council.

The 1971 law also attempted to dictate a discipline for lawsuits that, while elementary and incomplete, might provide a guide for new judicial entities, sometimes reproducing, sometimes clarifying, sometimes changing the elaborated discipline, beyond

the previous rules of law and regulations, from the case law of the State Council.

Real innovations concern jurisdiction: the attribution to administrative courts of disputes concerning electoral operations relating to administrative elections (Article 6); extending the exclusive jurisdiction to complaints relating to disputes relating to the concession of assets and public services (Article 5).

Within the exclusive jurisdiction "in matters relating to rights," the administrative judge was given the power to "order the administration to pay sums which are owed" (Article 26, paragraph 3). This is a first enlargement of the powers of decision, no longer limited to the annulment of the contested measures. For further enlargements it was necessary to wait till the end of the century.

The most important innovation obviously concerns the appeal: consistent with the principle of two levels of jurisdiction, the appeal was designed according to the outline of the burden and not by those of the impugnation in the strict sense; even if a referral to the court of first instance is foreseen in the case where the appellate court finds a procedural defect or a defect of form of the decision (Article 35, paragraph 1). The court of appeal has the same *cognitio causae* as the first judge, the burden is in fact "unlimited impugnation, and with devolutive effect".

A major change compared to the prior regulations concerning the impugnability of measures that are not yet definitive: in this way it permitted the exercise of jurisdiction, irrespective of the prior impugnation of such measures with an administrative (ordinary) appeal and the conclusion of the proceedings (Article 20).

It should be borne in mind that with the Presidential Decree of 24 November 1971, no. 1199, an organic framework of administrative appeals was laid down, including the extraordinary appeal to the President of the Republic.

Despite the undoubted significant impact on the system of administrative justice, the law of 1971 has not resulted in a comprehensive and systematic reconsideration of the means of defence against the administration, nor has it introduced a comprehensive discipline for lawsuits.

Section Two: Towards the present system

1. The work of jurisprudence

The Council of State, in the long period where it was essentially the only judge (the guidelines of the Administrative Provincial Governments never having been relevant), namely from 1890 to 1974, exercised its praetorian jurisprudence to clarify, and more often integrate the gaps in the discipline governing lawsuits; sometimes forcing the literal meaning of written norms, with the aim of increasing the effectiveness of protection.

The entry onto the scene of the Regional Administrative Courts brought new calls for a return in great style of praetorian jurisprudence. It should be noted that the Council of State, being the only appellate court (together with the Council of Administrative Justice for Sicily) and there being no other court with a "nomophilac" function, had the opportunity to collect the sometimes contradictory and sometimes fortuitous results, from the courts of first instance.

There was, therefore, a strengthening of the praetorian jurisprudence of the Council of State, with an expansion of its legitimacy to act and the recognition of the impugnability of certain acts, at first deemed to not be subject to appeal. It was considered that the administrative judge could waive the regulations.

The major evolution has also referred to the supervision process: the decisional character of the orders of suspension was confirmed and it consequently allowed the appeal; and a method was identified to ensure that such orders were actually performed by the administration; judicial protection was extended against the negative decisions and it was recognized that "the effectiveness of temporary protection may also be implemented by other means widely exceeding the pure and simple paralysis of the formal effects of the impugned act". Finally, it was stated that "individual rights, although relative and of a patrimonial nature, can achieve full and effective judicial protection, as a matter of urgency as well," on the part of the administrative courts.

The rules of the process of compliance were also rewritten, in which were emphasised: the judicial nature, the structure of litigation, the cognitive nature, the not merely executive function. It was first denied and then reaffirmed the requirement that the sentence of compliance become final; the orientation matured that

allows compliance even when faced by elusive acts of the judged; after an initial negative opinion, appealability of the judgments of compliance was later recognised; finally, the necessity to notify the application for compliance was confirmed, previously and for a long time refused as a result of an unshared interpretation of Article no. 91, R.D. 17 August, 1907, No. 642.

In terms of silence, on the other hand, jurisprudence has continued to oscillate between an orientation which defines it as the object of the proceedings and an orientation that considers it a simple premise of the case; with quite different consequences in the context of the cognition and of the court and the breadth of its decision-making powers. The highest point of evolution and convincing jurisprudence was reached in 1978, but was not subsequently consolidated. The legislature then addressed the problem in 2000 and 2005.

On the subject of claims, introduced with the ruling of the United Sections of the Court of Cassation of 22 July 1999 no. 500, and then expressly incorporated by law, it was considered that the action for damages could be brought in court where the (illegitimate and) damaging act is impugned quickly.

It was also clarified that it is possible to integrate the cross-examination during the appeal but only in relation to the necessary parties in the lawsuit, and that it is possible to apply Art. 345 of the civil procedure code regarding the admission of new evidence; and that voluntary discontinuance abates the action only after acknowledgment by the court, and that the exception of prescription of debts with respect to the administration may be raised only in the first instance.

Some procedural aspects of the action for the definition of the jurisdiction have been clarified.

The new principles expressed by the Court of Cassation concerning the definitive internal decision and the implicit definitive decision have been accepted.

It must be said, without getting lost in further indications, that jurisprudence has increasingly specified the regulation of the lawsuit, focusing (but not always) on the goal of effective judicial protection.

2. New turmoil in the area of jurisdiction and trial

At the legislative level, in nearly three decades running from the 1971 law to the reforms of the late '90s, there have been only episodic interventions, although scholars have increasingly demanded a global reform and there have also been governmental and parliamentary initiatives aiming in that direction, but without achieving a definitive result.

Legislative action focused, on the one hand, on the sphere of jurisdiction, with the increase of matters devolved to the exclusive jurisdiction of the administrative court and, on the other, on the trial, seeking, in disputes considered particularly delicate, simplified forms or accelerated trials, in order to reduce the time for the conclusion of the trial itself.

The widening of exclusive jurisdiction, which began (as mentioned above) with the law of 1971, continued constantly; in construction matters, administrative arrangements, competition, decisions issued by the Authority for the regulation of utilities and the guarantor Authority for communications; and public procurement.

The criterion for the distribution of jurisdiction between the ordinary and administrative judge is based therefore on the materials rather than individual judicial situations.

Such a different criterion has been considered far better than the one established by Article 103 of the Constitution; to the extent that the parliamentary commission for constitutional reform (commonly known as the Bicameral Committee), established by the constitutional law of 24 January, 1997, no. 1, proposed it as a general rule, in lieu of a criterion based on subjective legal situations. This attempt at constitutional reform was not followed up, and this cannot be considered a negative event; the trend in favour of exclusive jurisdiction has not however stopped, but the Constitutional Court has shown the limits that cannot be exceeded.

With the Law of 31 March, 1998, no. 80 a double change was made: disputes relating to employment (now privatised) with government agencies have been assigned to ordinary courts, with no distinction between disputes over rights and legitimate interests in litigation; on the contrary, disputes in public services, housing and town planning have been assigned to the exclusive jurisdiction of the administrative courts.

Finally, with the Law of 21 July 2000, no. 205 litigation

relating to public works, services or supplies exercised by any person required to apply EU law or the procedures for public evidence provided at state or regional level were devolved to the exclusive jurisdiction.

Even after the decision of the Constitutional Court no. 204/2004, the trend in favour of the enlargement of exclusive jurisdiction has not ceased. This is proven by the devolution to the exclusive jurisdiction of the administrative judge of disputes on nullity of administrative decisions taken in violation or elusion of a final judgment and those concerning the declaration of commencement of activity.

In the same period, the legislator was concerned with tightening the time the lawsuits took for the resolution of certain disputes. The field of election for so-called accelerated lawsuits was initially identified in disputes relating to public works: different legislative interventions followed one another over time, all aimed at reducing the precautionary measures and shortening the time for the decision on merit.

Special forms of lawsuit or shorter terms are also in force for electoral disputes, disputes concerning strikes in essential public services, proceedings for expulsion of foreigners, the right of access to administrative measures, the guarantee of equal access to media during election campaigns, against the "silence" of the administration, and so on.

The wide range of sector-specific interventions reached its high point with Law 205/2000, already mentioned above, which deserves to be briefly illustrated.

An important and proper clarification came from the Constitutional Court in relation to constitutional rights: repudiating (in its substance but formally saving) an opposite opinion given by the Supreme Court (regarding so-called resistant rights): the Court underlined that there is "no principle or rule in our law in our system which reserves exclusively to the ordinary courts - excluding the administrative courts - the protection of constitutional rights".

3. Law no. 205/2000

The most recent legislative intervention is also the most important. Even if it is far from having achieved an organic reform

of the administrative process, however it introduced some innovations useful to guarantee greater effectiveness in administrative judicial protection. The Law of 21 July 2000, no. 205 is the result of an incomplete parliamentary elaboration, given the rush due to the decision of the Constitutional Court 17 July 2000, no. 292, which declared illegal, for excessive delegation, Art. 33, Legislative Decree. No 80/1998.

The hasty drafting of the text becomes apparent from the disorder in the positioning of the provisions, some pointless duplication, and from a frequent lack of coordination. The issues on which the legislator intervened, leaving out the reorganisation of jurisdictions (already examined), deals with the process with particular attention to the precautionary phase of the lawsuit, and the special and accelerated proceedings.

The content of the law will be examined in its own time. Here it has to be underlined that, referring to the trial, some rules in order to guarantee its rationalisation have been provided: the most important seems to be that prescribes the gathering together, through the technical means of additional grounds for appeal, disputes between the same parties, relating to all decisions connected with the one contested in the earlier appeal with which the lawsuit started. This becomes a container where administrative measures (but from different authorities) are mixed together, concerning the same complex administrative transaction, and that allows the knowledge of the whole relationship between public and private parties.

As for the special proceedings, what has to be underlined is the introduction of a special lawsuit "against the silence" of the administration (non-action): the first jurisprudence based on it has not emphasised its strong ability to provide efficient protection against a common and serious maladministration, the unjustified inertia, which, in addition to private interests, primarily negatively affects the public interest.

Once again the legislator intervened regulating what could be expressly and clearly gathered from the Law 205/2000, and that jurisprudence had not pointed out.

Different special regulations for special lawsuits have been introduced, whose common feature is the reduction of the duration of the lawsuit. What is striking is that all the proceedings with shorter duration are closely related to the request for a

precautionary judicial protection: it is not enough that the lawsuit concerns certain matters that are particularly sensitive (connected to fundamental rights), but it is necessary that a precautionary request be made. This is a connection that has no rational justification.

In relation to exclusive jurisdiction, some rules have been provided which, on the one hand, have expanded judges' pre-trial and decisional powers and, on the other, have adjusted the lawsuit model that previously had many variations.

Finally, a major innovation (heralded by legislative decree. No 80/1998 with regard to certain matters included in the exclusive jurisdiction) relates to the powers of the administrative judge or, if you prefer, to actions to be proposed: either in the legitimacy or in the exclusive jurisdiction a claim for compensation can be proposed before the administrative judge.

There can be no doubt that, with Law 205/2000, the administrative process has gained greater flexibility and incisiveness.

4. Achievements and missed targets

Evaluating the overall trend that has taken place in the regulation of administrative justice, the first observation that we are inclined to make is the persistence over time of the flaws that the system presented at its origins: the two fundamental laws of 1865 and 1889 reflect different logics and, despite the views of their authors, they do not make up a harmonious picture and they do not even tend to offer complete protection against the administration.

Despite some attempts, later the legislator refused to intervene on the original regulations in an organic and systematic way: the various episodes of reform consistently had a limited scope and sometimes marginal effects. The numerous and serious shortcomings, especially in lawsuit regulation, were rather filled by case law, despite some inconsistency and some contrast, particularly among the opinions of different courts.

The doctrine has always hoped for the adoption of a complete and exhaustive regulation, in line with constitutional provisions and principles, that has still not been fully implemented. On the contrary most of lawsuit regulation is still

contained in one text, not only dating back to 1907, and even then very backward, but also with a regulatory and non-legislative nature, and therefore in evident conflict with the Articles 101 and 108 of the Constitution.

There were attempts to remedy this situation: at the request of the Government, the General Assembly of the State Council approved, on 23 November 1978, an outline of the bill, which was used by the Government to prepare a draft of a bill for a delegated legislation, presented to the Senate on 13 December 1979 (Act no. 583 - VIII legislature). The legislature, however, ended without the bill being approved. In the following legislature the Government again put forward the bill on 29 February 1984, this time in the Chamber (Acts number 1353 - IX legislature). Simultaneously, 7 June 1984, a bill containing a complete regulation was presented (Acts number 1803 - IX parliament). The two texts have been examined jointly by the Commission on Constitutional Affairs, which prepared a consolidated text of the delegated legislation.

This time too the parliamentary process was not successfully completed, and it is a shame, because it was a deeply satisfying text that also expressed shared principles, for example, on the completeness and effectiveness of protection against inertia, equality between the parties and cross-examination, the effectiveness of the evidentiary system, on the enforcement of judicial decisions and so on.

There have also been other attempts at legislative reform, but none has been successful.

The regulation of jurisdiction and the trial remained incoherent and not entirely satisfactory.

The regulation on the procedure, announced by Art. 19 of the Act of 1971, after more than three decades has not been either approved or prepared.

There is no doubt that administrative justice has been laid, at least geographically, within reach of users, with the result, in itself positive, of a large increase in complaints, due exactly, for the most part, to the institution of administrative tribunals, but this has led to a further problem, still unresolved, except for some palliatives: the insufficient number of administrative judges, which is the main cause of the abnormal duration of trials.

With a recent law, which is discussed later in a subsequent paragraph, the government has been delegated with the

reorganization of the framework of the administrative process.

5. The current debate

Recently, following the work of the Bicameral Committee, the debate on the principle of unity of jurisdiction restarted and, in relation to this, the architecture of the judiciary itself and the bodies which it is composed of; an unclear and unsatisfactory architecture.

According to the most common interpretation of Title IV of Part II of the Constitution, the entire judiciary is divided into courts and other bodies also performing a judicial role.

The first gathers the ordinary judges; the others are the special judges, special because placed outside the judiciary.

However, specialised courts may have general jurisdiction, where the field of their jurisdiction is determined on the basis of general criteria (individual legal situations, nature of the rules invoked, the nature of the parties or one of these) and not a criterion for matters under jurisdiction. From this perspective, administrative courts may be considered a body of specialised judges, having general jurisdiction; while the judges of the Court of Accounts as specialised judges having a special jurisdiction.

Different reconstructions are possible: for example, it was held that the system designed by the Constitution provides "four separate bodies (...) and precisely the ordinary courts, the administrative judge, the judge of the Court of Accounts and the military judge". Each of these "judicial systems, (...) in its field and in relation to others, may be called 'ordinary': this is because all have general competence in their fields, and because it is provided and established by the Constitution". The judiciary then is "divided into four distinct orders (all on an equal basis 'ordinary' in the abovementioned meanings) (...). The unity of jurisdiction, in fact, takes place not on the structural (ie, creating a single judicial order), but on the functional level, through the incorporation into the Constitution of a series of rules and principles for all magistrates. "

The distance between the possible “readings” of constitutional provisions, makes evident the lack of clarity.

In doctrine periodically the hope of a reunification of the organisational judicial system returns, which, in the Constituent

Assembly, was strongly supported by Piero Calamandrei.

Recently, in more articulated way, the principle of jurisdictional unity, or, rather, the "dichotomy" of functional unity-organisational plurality, was read in the sense that "the Constitution recognises and provides a number of jurisdictions separated because of their structure, powers and competence, but admits only one type of independent judge". The author believes that some provisions relating the judges of the State Council (governmental appointment of a quarter of them, combination of judicial and consultative functions, extrajudicial assignments) may compromise their independence.

It should be recalled that the governmental appointment was deemed to be constitutionally legitimate, while in relation to the other aspects there are neither unanimous beliefs nor a position taken the Constitutional Court.

It should be added that, however interpreted, the system is faulty in at least two aspects: control over the jurisdiction of single bodies or "orders" of judges is assigned to one of them, even if it is at the highest level (the United Sections of the Court of Cassation), and this has caused and continues to cause jurisprudential conflicts that cannot easily be resolved; what is lacking is a judicial body with a general function of “nomophiliachy”, so that on the same topics (and these are not theoretical assumptions) different directions can be determined among the various judicial bodies, in contrast with the principle, in its functional perspective, of the unity of judiciary, and with that of the unity of the legal system.

The faulty design of the whole system has emerged again recently, with the declaration of unconstitutionality of the composition of the regional water courts that led almost to their suppression and to the suppression of the superior water court as well.

Recently, however, the principle of functional unity (even if not organisational) of judiciary was reaffirmed by both the Court of Cassation and the constitutional Court, which courts have affirmed the need for the *traslatio judicii* from the judge without jurisdiction to the judge with the jurisdiction.

Another burning issue of current debate is that concerning the division of jurisdiction between the ordinary courts and administrative courts. The original criterion, based on individual situations, has been overtaken by other criteria, for example, in

electoral disputes, financial sanctions and in all cases of exclusive jurisdiction. Since such cases have multiplied, a confused situation has arisen, and probably not one that is respectful of the Constitution.

The fashionable opinion, at least until the Court ruling cost. No 204/2004, was that the division on the basis of single matters was better than the one based on individual situations. My opinion is that we can not do without a general criterion of division: if it is considered inappropriate to refer to subjective situations, another one (the nature of rules, or case, or of one of the parties involved) can be used, and leave matters to the role of exceptional criteria. Moreover, the experience of the systems closer to ours tends in this direction.

On a procedural level, the focus is on the concrete functioning of recent reforms, particularly with regard to the position that the administrative judge gradually adopts in relation to claims for damages connected to the breach of legitimate interests. Up to now, the behaviour does not suggest a great deal of open-mindedness.

Another currently very important theme, especially after the independent authorities entered into action, concerns the power of the judge to evaluate those choices of the administration involving technical administrative discretion. The doctrine is not unanimous: some authors argue in the sense that any technical decision of the public administration can be fully evaluated by the judge, so that full protection is guaranteed whenever the choice is not truly discretionary; other authors tends to admit a more limited review, fearing that the administrative judge can become an administrator.

The basic problem remains, however, linked to the lack of regulation of the lawsuit against the administration, which fills the existing gap and makes more efficient the system of safeguards. See also the discussion in the next section.

6. Recent legislative initiatives.

The legislature seems to have caught its breath in the reform of protection in relation to the public administration, with two delegated legislations, both enacted in 2009.

With the first it has been delegated to the government the

specification of remedies available to any interested parties to react against the public administration and concessionaires of public services that differ from the predetermined qualitative and economic standards, or that violate the rules provided for their actions. This is an appeal for the efficiency of public agencies.

The right of action must be extended to associations and committees, in which the parties are grouped together; the judgment will be devolved to the "exclusive and merit jurisdiction" (an ambiguous or at least unusual formula) of the administrative judge; courts can (and perhaps should) direct the losing administration or concessionaires of public services to adopt the appropriate measures to remedy the violations, omissions or failure in the performance of their duties; with the authority to also appoint a commissioner for the execution of orders; it does not seem that compensation for damage is allowed, but the legislative provision might be in contrast with the constitutional principle of full protection and European principles.

To value the significance of the new institute it is necessary to wait for the delegated regulation, which has already been prepared and on which the State Council gave a positive, even enthusiastic opinion: the legislature "should be congratulated".

The opinion states that the action provided in it would have a collective nature and would be "the corollary of a reforming project that, on the level of general theory, is based on the idea of the administration of results, dominated by the principle of good performance". The suit is seen not only "as a means of protection in a specific form for the citizen", but also, and above all, "as an instrument of pressure on public agencies in order to ensure efficiency in the production of the service" of general interest.

The second law of delegation is much more important, as it involves the reorganisation of the framework of the administrative process.

The guiding principles for the exercise of delegated powers by the Government are very interesting and it is better to quote them entirely:

a) ensure the efficiency, strength and effectiveness of protection, also in order to ensure a reasonable length of trial, also through the use of data processing and data transmission systems, and the simplification of procedural deadlines, the extension of the preliminary functions carried out by a single judge and the

identification of provisional measures meant to eliminate backlogs;

b) to regulate the actions and functions of the judge:

1) reorganizing the existing rules on jurisdiction of the administrative court, even compared to other jurisdictions;

2) reorganising the cases of jurisdiction extended to merit, also through the abolition of those cases that are no longer consistent with the system;

3) regulating, and eventually reducing, the terms for foreclosure and prescription of judicial remedies and the type of judicial measures;

4) providing declaratory judgments, constitutive judgments and convictions in order to meet the demands of the winning party;

c) to review and rationalise special proceedings, and the subject to which they apply, except those provided by the regulation implementing the special charter of Trentino-Alto Adige;

d) rationalise and unify the rules of the administrative process on electoral disputes, providing for a reduction by half, compared with the ordinary lawsuit, of all the procedural time, the precautionary deposit of the complaint and its subsequent notification in both degrees and introducing the exclusive jurisdiction of the administrative judge in the disputes concerning acts of the electoral process preparatory to the elections for the renewal of the Chamber of Deputies and the Senate, by provision of a shortened proceeding in chambers which allows the resolution of disputes in due times compatible with the organisational compliance of the electoral process and the date of elections;

e) streamline and unify the rules of engagement of the trial and its terms, partly as a result of rulings in other Courts, as well as the decisions of regional administrative courts or the Council of State declaring functional incompetence;

f) re-order the precautionary protection, even generalising the *ante causam*, as well as the pre-trial proceedings before the administrative judge in the case of Appeal in Cassation against the decisions of the State Council, providing that:

1) the application for interim protection cannot be processed until the applicant has filed for setting the hearing for

discussion of the merits;

2) For instance of interim *ante causam*, the application instituting the proceedings shall be served and filed, together with the relevant application for setting the hearing for discussion of the merits, within the limitation provided by law or, failing that, in sixty days of the application pending lawsuit, losing any effect otherwise granted temporary protection;

3) If the application is accepted pending lawsuit, the panel setting of the hearing can not be revoked and the merit hearing is celebrated within the time limit of one year;

g) reorganising the system of appeals, identifying the provisions applicable by reference to those in the process of first degree, and by regulating the concentration of the appeals, the devolutive effect of the appeal, the bringing of new applications, tests and exceptions.

The Government, wisely, for the implementation of the delegation wished to make use of the Council of State, in which was established a Commission, to which were invited to participate, as well as state councillors, TAR magistrates, outside experts, representatives of the forum and the general legal council.

The delegated discipline must be made within one year of the entry into force of the delegated legislation, i.e. within the first days of July 2010.

This is a historic opportunity to finally get an organic discipline for the administrative process, extended to solve the problems of jurisdiction and to implement as fully as possible as the constitutional principles of due process. What has not been possible in the past now seems within reach.

7. The code.

In putting into effect the delegacy, a special mixed Commission (administrative judges, university professors and lawyers), chaired by the President of the Council of State, has prepared a draft code that will go on to constitute one of the appendices[21] to the legislative decree containing the norms to be approved of the code, currently being studied by the Government.

[21] Appendix 1, Code; Appendix 2, norms of actuation; Appendix 3, transitory norms; Appendix 4, norms of coordination and abrogation.

The text produced by the Commission, which saw a comprehensive systemising of the material, is articulated in 5 Books, subdivided in turn into Titles and Heads.

The first Book containing the general dispositions, is subdivided into five Titles which lay down the disciplines for the general profiles of the trial. More specifically, on the basis of the provisions of the Constitution (Art. 24 and Art. 111), it expressly recalls the principles developed by the European Union and the ECHR (indicated as "European law") and the principle of the effectiveness and fullness of the protection whose fallout is evident within the whole discipline of the code.

While confirming the structural articulation (Head II) and the distinction between legitimate jurisdiction, exclusive jurisdiction and jurisdiction extended on merit (Head III), in Head II of Title III the class of the actions that could be brought before the administrative court was expanded, guaranteeing in any case, faced by its acknowledged wide powers, the respect for the principle of the separation of powers, thus avoiding the possibility that the administrative court might take the place of the public administration in its discretional choices.

Alongside the traditional action of annulling the administrative provision that presents one of the three defects of legitimacy (incompetence, excess of power and violation of the law) are further contemplated action of verification, action against non-compliance, action of condemnation which is to be added to the compensatory action carried out for damages caused by the illegitimate exercise of administrative power; action of execution that allows the court to condemn the administration and pronounce on the legitimacy of the claim put forward by the private individual against the administration that, consequently, is condemned to emanate the provision that was refused or omitted: executive action and precautionary action. These are the most innovative and relevant aspects of the regulation under approval.

Still from the perspective of providing a structural trial aimed at guaranteeing effective protection, Title III of Book II, which contains the discipline of the first stage of the proceedings, includes a reformulation of the discipline of the preliminary investigation, normally conducted by the judicial college and that, different to the discipline currently in force, can also be carried out before the first hearing by the President of the Section of the Court

where the proceedings are taking place or by a magistrate delegated by him, in such a way as to guarantee that the case might arrive ready for the hearing. Equally relevant, from the perspective of offering to the court cognizance that is not limited only to the formal aspects of the contested action, is the extending of the means of proof through the provision of the possibility, for the court, of making use of all the means of proof foreseen by code of civil procedure, but maintaining the exclusion of the formal interrogation and swearing. The witness proof which, according to the express provision of the norm, is only admitted in written form.

The same Title, Head II, then fully established the discipline for the court's technical consultation and verification, a traditional means of proof, the latter, quick and inexpensive.

The successive Book III contains a complete discipline regarding impugnation, also including the instrument of third-party opposition, first introduced into the administrative trial only thanks to an intervention by the Constitutional Court. Partly in line with what is now provided for in the civil trial the terms for impugnation have been reduced. Their proposing, in fact, has to take place within 60 days of the notification of the sentence or, in the case in which this is not notified, in the longer term of six months starting from the date of its publication.

Book IV contains the discipline regarding the judgment of compliance (Title I). A particular judgment aimed at guaranteeing the carrying out, but also the integration, of the sentences handed down, of the executive sentences in the first degree and of the other executive provisions of the administrative judge.

The following Titles deal with the disciplines regarding the so-called special rites: dealing with access to administrative documents (Title II), inertia of the public administration (Title III); to injunctions (Title IV). To these can be added the abbreviated rites relating to particularly important controversies (Title V), such as that foreseen relating to procedures of tendering for public works, services and supplies (Head III) for which is expressly mentioned turning to the norms that will be emanated following the receiving of the 2007/66/EC directive re petitions; that bound by collective action for the efficiency of the public administration and the concessionaires of public services; that relating to electoral operations for elections in regions, provinces and towns and for

the election of the Italian members of the European Parliament, as well as the rites relating to the preparatory electoral proceedings for the elections to the Lower House and Senate of the Republic.

The final Book, dedicated to the "final norms" contains the list of the materials of exclusive jurisdiction and merit jurisdiction and the hypotheses regarding the mandatory competence of the Lazio–Rome TAR (Regional Administrative Court).

The overall judgment on the new normative text can be declared positive, considering its completeness and innovative character. The protection of citizens faced by the illegitimate use of public power emerges as strengthened.

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