ESSAYS

ITALIAN ADMINISTRATIVE LAW UNDER THE INFLUENCE OF EUROPEAN LAW

Daria de Pretis [*]

Abstract.

Administrative law in Italy has changed markedly over the last two decades, a phenomenon which is attributable to various causes, one of which is the impact of European law (this should be taken as referring to both EU and ECHR law). The article offers an overview of the state of the Italian administrative system and its relationship to developments in European law, in order to explain them to a non-Italian reader. The first step was to describe the principal features of administrative organization, activity (which chiefly means administrative procedure) and justice in Italy. The second was to highlight consonances and divergences between Italian and European administrative law and to measure the influence of European regulation on the Italian system. In terms of principles, differences do not appear very profound. If there are divergences, they do not involve compatibility between principles linked to the two systems, but rather the different value or degree of effectiveness given to the same, or basically similar, principles. Nevertheless the influence of European regulation on Italian administrative law would seem to be very important, especially in the fields of the organization and protection of citizens vis-à-vis the public administration. The dismantling of the system of public intervention in the economy was a direct consequence of the new European economic order, as well as the creation of a certain number of independent authorities. Neither the impact on the Italian justice system, nor the fundamental nature of the protection provided have affected its structure, but several

[*] Full Professor of Administrative Law, University of Trento, Italy.

aspects have, concerning the detailed implementation of EU and ECHR principles, such as certain procedural mechanisms and some substantive types of protection offered by the courts.

TABLE OF CONTENTS:

1. Introduction

1.1. Principles

The Italian legal system has a large number of principles concerning the organisation and the action of the public administration and the legal protection of private individuals with whom it interacts.[1] These are special principles that constitute a special branch of the law, different from those governing relationships between private citizens. In this branch of the law, principles play an essential role, so much so that we can say that in Italy, as in other countries, administrative law has evolved more on the basis of principles of case-law and the input of legal scholars, rather than on precise rules set down in formal legal acts. In more recent times many principles have been codified, some at constitutional level, but the fact remains that the founding elements of the subject, which have been developed and improved over two centuries by the major administrative court, the Council of State (*Consiglio di Stato*), and scholars of administrative law, continue to exist as unwritten principles.

These principles deal mainly with the relationship between the law, the public administration and the courts. This relationship and the way it operates define the role of the public administration and the conditioning of its power, as well as the guarantees of individuals' protection. Administrative power pursues the public interest and is separated from legislative and judicial powers; it is the law that determines the powers pertaining to the public administration and defines the objectives that it has to pursue; the exercise of administrative power is subject to control by the courts, which verify its compliance with the law.

This synthesis is obviously simplified. The system is not static and the referents themselves alter so far as their content is concerned. In Italy, too, the relationship linking the three entities is changing considerably: the law is less and less law in the formal sense and tends to take on a more universal sense. The Italian language can express this concept as the change from *legge* to *diritto*. The

[1] S. Cassese, *Il diritto amministrativo e i suoi principi*, in S. Cassese (ed), *Istituzioni di diritto amministrativo*, 3rd ed. (2009).

boundaries of the area of public power tend to shift and become less certain[2], both in the relationship between traditional powers and private powers; in a more fluid general context, even judicial review of administrative decisions tend to change, often becoming broader and more incisive, and occasionally more creative.[3]

When the Republic was founded, the new Constitution formalised more or less explicitly some principles of the system, thus ranking them among the constitutional foundations of the public administration and accompanying them with some – not many - detailed rules for enforcement.[4] It is true, however, that the democratic character of the administrative system and the structural guarantees that were set up to ensure its performance and lawfulness, derive primarily from the broad intention of the Constitution, rather than from the two particular articles (97 and 98) that specifically concern the public administration.[5]

Art. 97, par. 1, lays down that "Public offices are organised according to law, so as to ensure good functioning and impartiality of administration". Attention is focused on the organisation of the public administration, but, as will be seen later when administrative procedure is considered, legal scholars and the courts have enhanced the principles in their substantive dimension as guidelines for the actions taken by the public administration.[6]

The Italian Constitution does not have provisions expressly placing executive power under the law, unlike for instance the German *Grundgesetz* (art. 20). However, the rule of law or, in Italian terms, the principle of legality is likewise the corner-stone of the Italian administrative system.[7] It has always been considered as such by administrative law and the Constitutional Court, since its creation.

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[2] G. Napolitano, *Pubblico e privato nel diritto amministrativo*, (2003).

[3] G. Pastori, *Recent Trends in Italian Public Administrations*, 1 It. J. Publ. L 18 (2009).

[4] S. Cassese, *Le basi costituzionali*, in S. Cassese (ed.), *Trattato di diritto amministrativo* (2003).

[5] C. Esposito, *La Costituzione italiana. Saggi* (1954).

[6] G. Borri, P. Caretti, G. Lony, C. Pinelli, U. Pototschnig, *Commento agli articoli della Costituzione sulla pubblica amministrazione*, in G. Branca, A. Pizzorusso (ed.), Commentario della Costituzione (1994).

[7] N. Bassi, *Principio di legalità e poteri amministrativi impliciti* (2001).

With this as a basis, the special powers of the administration exist because they are provided for by the norms of the legal system, and in particular rules provided in parliamentary acts. Moreover, the law must define the power in outline, establishing the conditions for its exercise, contents and legal effects, and clearly identifying the authority it has.

The constitutional provisions from which the principle is usually taken, other than indirectly art. 97 mentioned above, which enables the law to define (albeit in broad terms) the organisation of public offices and the officials' sphere of competence and responsibility (paragraph 2), are contained in the many reservations of parliamentary law regulating the possibility for public powers to limit citizens' freedom, either as single individuals or associations (art. 21 ff), and, above all, personal freedom (art. 23), and the right to economic initiative and ownership (arts. 41 – 44).

The subordination of the administration to the law is obviously in order to permit judicial review of administrative action and, as such, the justiciability of right and legitimate expectations of private parties affected by it. In this context, the notion of lawfulness of administrative action extends beyond simple compliance with the law, to include conformity of the administrative decisions to the criteria of logic, reasonableness, correspondence with the facts and substantial equity. Giving constitutional status to the principle of justiciability of private favourable positions vis-à-vis the public administration (art. 113) has allowed instances, arising under the pre-constitutional regulations, excluding the courts' review of certain decisions or certain grounds for review, to be superseded.

For the same reason, courts interpret the category of political decisions restrictively, an adjudication which, under the ordinary laws governing administrative judicial review, is considered final [8]. According to Council of State, such an act may only be so defined if it is political in a subjective sense, because it issues from governmental bodies in charge of policy and management at the top level of public activities, and in an objective one, as pertaining to choices of particular constitutional and political importance, relating to the

[8] Art. 31 unified text of the rules regulating the Council of State.

coherent and coordinated functioning of public powers and institutions of the State.[9] On this basis, an application for judicial review against the enlargement of an American military base in the Veneto Region, which had received political assent from the Italian government, was held inadmissible.[10]

The constitutional principles of impartiality and good functioning (*buon andamento*) of the administration have been implemented by the ordinary legislature through the adoption of some important reforms, primarily at the end of the last century. In its procedural significance, impartiality is thought to mean that the decision-maker is necessarily at arm's length vis-à-vis the interests in play. From a more general organisational perspective, it expresses the idea that administrative action which is not strictly political should be removed from political influence. In this sense, the principle precludes provisions allowing a majority of politicians to be included on the selection panel for the recruitment of civil servants, rather than experts.[11] The occasionally problematic distinction, set out in the laws of the 1990s concerning organisation [12], between policy-making, which is the responsibility of the political leadership, and proper administration, which is the responsibility of the bureaucratic management, was aimed at freeing administrative bodies from partisan political interference.

The 1990 legislative reform of administrative procedure[13] and its update in 2005[14], promote *buon andamento* through several rules – about which more will be said later – including, among the most important, participation, economy and efficacy, and transparency of administrative action. In a way, codification has not introduced innovations over and above what had already been developed by courts and legal scholars. For example, the duty to give reasons for

[9] Council of State, IV 1053/2008, according to which these include not only decrees of the President of the Republic dissolving the Chambers and the resolution of the Council of Ministers fixing the date for elections, but also the subsequent acts of electoral procedure. See further Council of State V 209/1997, VI 360/2002, IV 1397/2001.
[10] Council of State IV 3992/2008.
[11] Constitutional Court 453/1990.
[12] Starting with Act 59/1997.
[13] Act 241/1990.
[14] Act 14/2005.

administrative decisions, which became generalised by law as recently as 1990, was already a principle governing administrative action. With regard to other principles, their formal establishment by law and the introduction into the system of instruments for their effectiveness, have had a great impact. This was certainly the case regarding communication of the initiation of the procedure in order to bring about participation in such procedure, and for the regimen governing access for the purposes of so-called transparency.

Principles of autonomy, decentralisation and subsidiarity will be discussed later, when examining the organisation of public administration.

1.2. Consonance and Divergence with European Principles

The principles and the values underpinning Italian administrative law are in line with the founding principles of the European Union (art. 6 TEU). Adherence to obligations deriving from being part of the Community system, primarily loyal cooperation (art. 10 TEC), has not caused conflicts with national principles.[15] The Italian legal system shares the values expressed in the European Convention of Human Rights (ECHR) as well. Bearing in mind the complex circuit of building of the European principles, it is natural [obvious] to mention that Italy has adhered to the common European legal systems since their origin.[16]

Broadly speaking we can say that if there have been problems, they did not involve compatibility between principles linked to the two systems, national and European, but rather the different value or degree of effectiveness given to the same principle or basically similar principles, in the two systems. More specifically, tensions have affected the compatibility of some national rules with European principles which, although they were not questioned in so far as the relationship with the equivalent national principle was concerned,

[15] A. La Pergola, P. Del Duca, *Community Law, International Law and the Italian Constitution*, 1 Am. J. Int. L. 79 (1985).

[16] G. Greco, *I rapporti fra ordinamento comunitario e nazionale*, in M.P. Chiti e G. Greco, *Trattato di diritto comunitario e nazionale* (2007).

have been considered inadequate compared to the European implementation standards of the same principle.

For example, even in the presence of full and effective constitutional guarantees for the legal protection of individuals facing the public administration (arts. 24 and 113 of the Constitution), Community law has acted as the driving force to overcome the rule of non-compensation of infringements of legitimate expectations (*interessi legittimi*). Moreover, some aspects and loopholes in procedures for interim relief pertaining to Italian administrative judicial review have been considered to be in conflict with European standards of legal guarantees for individuals vis-à-vis the public administration. In the first case compliance with European standards was spontaneous, as it followed a ruling by the United Sections (*Sezioni Unite*) of the Italian ordinary Supreme Court (*Corte di Cassazione*)[17]. In the second case, in Italy as in other countries, some adjustments have been made, following interventions by the ECJ, later implemented by national laws for the purposes of realignment to the EU system. [18]

Equally spontaneous, and without notable resistance, was the adjustment of the Italian legal system to the proportionality standard as the most recent interpretation of the reasonableness test in reviewing discretionary power exercised by the public administration.[19] Although it is fair to say that the proportionality standard entered the Italian legal system under the influence of the Community law, it should also be added that the reasonableness principle, in its traditional implementation, already allowed the Council of State to question administrative choices in some sensitive areas, such as the protection of property and the environment, using standards that were not very different from those involved in the proportionality test under Community law.

The European Courts have examined the tension between the Italian and the European law regarding, for example, the Italian regimen for expropriation. The Strasbourg Court has intervened

[17] *Corte di cassazione*, United Sections 500/1999.
[18] Act 205/2000.
[19] A. Sandulli, *La proporzionalità dell'azione amministrativa* (1998).

several times to rule that Italian criteria for calculating expropriation payments, which were well below market value, were incompatible with private property guarantees established by the European Convention.[20] Even in this instance, though, it was not a case of collision of the principles guaranteeing property rights, which in fact are equally solemnly established by the fundamental acts of national and European law, but rather the differing degrees to which they should be taken into account in their practical application.

Problems caused by a potential hiatus between national and European principles may be considered resolved, due to two important reforms dating from the early years of this century.

Following the 2001 constitutional reforms, Community and international law is formally binding upon State and regional legislators in the exercise of their legislative powers (art. 117, par. 1, Constitution). Rulings by the Constitutional Court offer examples of the effects that the reforms had on the Italian legal system. For example, in matters of expropriation, the Constitutional Court considered the amount of compensation fixed by Italian law compatible with the constitutional guarantee of the property right. The Strasbourg Court instead considered those amounts incongruous and in conflict with art. 1, Protocol 1 of the ECHR, as they did not reflect real market values, particularly when the property being expropriated was land with outline planning permission. Since the reform, the Italian Constitutional Court has modified its approach so as to include the Convention rules, as interpreted by the European Court, as "parameters for integrating" the constitutional rules.[21] Another example of the level of integration following the reform is provided by the action undertaken by the Constitutional Court when, for the first time, it made a preliminary reference to the Court of Justice in order to verify the compatibility of a regional law passed by the Region Sardinia – which introduced a new tax levied on all planes

[20] Among many judgments of the Court opposing the systematic and structural infringement of art. 1 of the first Protocol of the ECHR, Scordino 29 July 2004.
[21] Constitutional Court348/2007.

and ships arriving there - with the European principles of free circulation and competition.[22]

The reform of the administrative procedure act (l. 15/2005) includes "the principles of Community law" (art. 1, paragraph 1) among the principles that govern administrative action. Whereas already existing references to Community principles made by the Italian laws in European field have to be considered unnecessary, the new *renvoi* represents a specific choice towards a generalised opening-up of the Italian legal system to the Community law, and has tended to affect administrative law much more comprehensively than it would otherwise have done, in merely conforming to Community obligations. It is no longer necessary to investigate the degree of incidence of Community law on each action carried out by the public administration, but rather to derive the principles influencing the whole action of the national administration from Community law.

2. The Governance Perspective

2.1. Organization und personnel

aa. Bases of the administration's organization

The primary source of the organisational regimen governing the public administration is the law, as laid down by the Constitution (arts. 97 and 98). As the reservation of parliamentary law has a relative character,[23] non-essential aspects of the organisation may be defined by secondary rules, and thus by the public administration's own regulatory powers, where these exist. Some legal scholars maintain that the Constitutional proviso may be the foundation of a symmetrical reservation of the organizational function in favour of the executive.[24] The point is controversial, but of little practical relevance, since the government has been given a general power under the law to regulate the organisation and the functioning of the public administration.[25]

[22] Constitutional Court 103/2008.
[23] Constitutional Court 102/1989.
[24] M. Nigro, *Studi sulla funzione organizzatrice della pubblica amministrazione* (1966).
[25] Art. 17, par 1, (d) Act 400/1988.

A portion of organisational power is given to each public administration, but its amount varies according to the degree of autonomy of the structure involved. Entities with legislative powers enjoy of course the highest level of autonomy, and are thus capable of operating within the reservation of law. This is the case, not only for the State, but also for the regions and the Autonomous Provinces of Trento and Bolzano, which, within the areas of their competences, can define independent organisational models through their own legislative acts.. Public bodies provided with statutory and regulative powers, like municipalities, also have organisational autonomy, within the limits established by the law. The levels of organisational autonomy of other public bodies are set externally, and they are only responsible for the small-scale regulation of their day-to-day work. Wherever its structure comes from, according to the Constitution the definition of the organisational model of the public administration is nonetheless oriented towards the pursuit of objectives in the public interest, as identified by the law, respecting criteria of efficiency, efficacy and cost-effectiveness, impartiality and transparency of administrative action.

In the traditional scenario, public administration coincides with State administration. The local administrations have always formed part of this. The State administration consists in the ministries, hierarchically organised structures under the overall responsibility of a minister. The number of ministries is fixed by law, and they are currently twelve. As the minister is at the same time a member of the Council of the ministers, and as such of the Government, and is also the head of the State department over which s/he presides, the model guarantees the connection between the public administration and Parliament, to which the Government is linked by a fiduciary relationship (Art. 94 Constitution). The ministry has its own more or less complex internal organisation, which also includes peripheral branches that are normally run by the central office.

The Italian system began to move away from this model to a significant extent in the early decades of the 20th century, when administrative functions started to be transferred from ministries to

external legal bodies which had been created *ad hoc* and were linked to the ministries through a less strict connection than the one between the ministries and their offices.

The introduction, by the republican Constitution, of the organisational principles of autonomy and decentralisation (art. 5 and Title V) and their implementation over the course of time, culminating in the overturning of the ordering of levels of government (art. 114) and the constitutionalisation in 2001 of the subsidiarity principle (art. 118),[26] mark the radical shift away from the original design. The levels of government have not only multiplied, but have been reorganised on a bottom-up basis, so that under the new 2001 formulation, «The Republic is composed of the municipalities, the provinces, the metropolitan cities, the regions and the State» (Art 114 (1). Each level is basically guaranteed an organisational connection between the administrative power and the citizens, which can go through either the same fiduciary circuit of the elective assemblies towards the organs of government or through the direct election of those in charge of the various administrative positions, such as town mayors [27]. At the same time, the need became apparent to distinguish the political *corps*, in charge of defining political policies, from the administrative *corps*, in charge of carrying out strictly administrative functions. The multiplication of organisational structures with a certain level of independence from political power in the last decades of the 20th century , the so-called independent authorities, posed new problems of legitimation of the powers that they had been given. To that end, the legislative base of the institution of the each authority, and the procedures to identify the person for the position and his/her specific attributes in terms of prestige and authority have been upgraded.

The Italian administrative system has thus become more and more complex over time.[28] The new territorial autonomous bodies

[26] Constitutional Act 1/2003.

[27] L. Vandelli, *Il sistema delle autonomie locali* (2005).

[28] L. Torchia (ed.), *Il sistema amministrativo italiano*, (2009), offers an up-to-date and well-reasoned representation of the Italian administrative system. On the trends of the national Government, G. della Cananea, *The Growth of the Italian Executive*, in P. Craig and A. Tomkins (eds.), *The Executive and Public Law* (2005).

such as the regions, the provinces, and the metropolitan cities, which join the already existing municipalities (of ancient tradition, but like the provinces reduced to local district status as a result of State decentralisation during the fascist era) create new administrative structures that are largely independent from the State. Their leaders are elected more or less directly by the local communities, which have their own political and administrative powers. They join the State administration in a complex network of organisational structures.

Within this complex system of administrators, administrative functions are distributed according to criteria of subsidiarity (art. 118 Constitution). Administrative functions are attributed to the governmental level that is closest to the citizen, which basically means the municipality, unless such functions have to be given to a superior level (provinces, metropolitan towns, regions or the State [29]) in order to guarantee uniform practice and an adequate and efficient exercise of them . The principle of subsidiarity represents the criteria for the allocation of the functions and the parameter of lawfulness of the organisational choices of the legislators. For this reason, the law currently States, for example, that even in the exercise of substitutive power, when there are regions in default (art. 120 Cost.) that warrant the nomination of an external administrator, the State "must bear in mind" the principle of subsidiarity. [30]

The State administrative structure too has been overhauled in both its central and peripheral aspects. The central organisation has seen the reform of the Government offices (the *Presidenza del Consiglio* and the ministries), with the strengthening of the steering functions of the Prime Minister, the reduction of the number of ministries, often through merging (for example, there is now only one Ministry for Economy and Finance, and only one Ministry for Industry), the creation of "departments" for homogeneous functions, and the adoption of the "agency" model for technical-operational functions (for example Emergency Services, or Tax Revenues).[31] The Ministries of State are complex structures with their own staff and resources,

[29]Constitutional Court 12/2004.
[30] Art. 8 par. 3 Act 31/2003.
[31] A. Pajno, L. Torchia (ed), *La riforma del governo* (2000).

differentiated from one another according to the functions they exercise. In peripheral areas, the old prefectures have been replaced by Government territorial prefecture offices, which have competence over all functions that have not been specifically attributed to specific offices.

Although the Constitution which resulted from the 2001 reform expressly sets out the principle of differentiation (art. 118), in reality the organisation of regional, provincial and municipal administrations tends to follow the organisational model of the central State. This includes an assembly, elected directly by the citizens, equipped with normative powers, a government with executive powers, and a president (a mayor in the municipalities) who is in charge of the administration. Contrary to what happens at State level, though, it is specified that the president (the mayor in the municipalities) is directly elected by the citizens (only regions may have statutes offering different solutions), with the aim of making the executive more stable and government action more efficient.

The political character of public administration, resulting from the fact that its management is elected, is limited by the principle of impartiality, which the Constitution sets out in broad terms as an organisational principle (art. 97), and then further specifies the rules regarding public offices and the status of those who are in charge (art. 98). From an organisational point of view, the principle is expressed in the separation or distinction between political and administrative activities, between political offices and management offices. The principle of the separation between political power and administrative power was strengthened in the last decade of the 20th century and has been applied at all levels, but primarily at the State administrative level. Based on this, political organs have policy functions, while management organs have managerial functions. The former are politically legitimated to establish objectives, the latter are technically and professionally legitimated to implement them through the realisation of the objectives that have been established at political level. Although this may appear obvious, in practical terms,

the border between the two sides is not well defined and this creates uncertainties. [32]

A description of the Italian organisational system cannot overlook referring to the well-known notion of "public body" (*ente pubblico*) that has always been one of its main features. [33] The organisational model of the public body has been particularly successful and has been utilised since the times when the State took on activities, including economic enterprise, and the "nationalisation" of large parts of the society (in particular of the bodies which are representative of professional categories and workers, according to the scheme that is typical of a corporative system) occurred through the creation of new public bodies. This model continued to be adopted for a long time, so much so that at a certain point there were tens of thousands of public bodies (naturally, the territorial bodies are part of this group, of which the municipalities alone number more than 8000). Thus it became necessary to reorganise the system and reduce public expenditure.

The State legislators have intervened regularly since the 1970s to reorganise the system, abolishing public bodies that were considered redundant and limiting the creation of new ones. However, especially over the last few years, the need to comply with Community rules aimed at the reduction of public expenditure and the goal of improving the quality of services has led to drastic measures being taken to abolish public bodies recognised as unnecessary [34], or their transformation into companies or foundations if it was felt that their work would be carried out more effectively that way [35], or the generalised elimination of several categories of public bodies that were singled out because of their small dimensions or the type of functions they carried out. [36]

Broadly speaking, a public body means a legal entity that has public status – either because it has public powers or because it is functionally linked to subjects that have public powers - and is

[32] F. Merloni, *Dirigenza pubblica e amministrazione imparziale*, (2006).
[33] G. Rossi, *Gli enti pubblici*, (1991).
[34] Act 448/2001, so called "*legge finanziaria*" (financial Act) 2002.
[35] Act 137/2002.
[36] Decree 112/2008.

governed by particular rules, different from those regulating private legal entities. This category includes a heterogeneous multiplicity of types. From a systematic point of view, they have the form of the public body, and are defined as public territorial bodies, first and foremost all the representative bodies with a territorial basis, i.e. the State and the other autonomous bodies mentioned earlier (regions, provinces, municipalities). Economic public bodies, created in the first half of the last century to carry out primarily entrepreneurial activities, have become less important, after the privatisation process, which transformed many of them into companies. Some worked as holdings, managing State participation in private companies, such as Iri, Eni, and Efim; others, like Enel (*Ente nazionale per l'energia elettrica*), operated directly as conventional enterprises. A large variety of public bodies continue to collaborate with State administrations and other territorial bodies, exercising instrumental or service functions vis-à-vis the latter's functions. These public bodies are referred to as instrumental, auxiliary or service bodies. Other public bodies exercise functions of general interest not directly linked to a specific level of government (such as INPS, Istituto Nazionale per la Previdenza Sociale), or are remnants of the old phenomenon of nationalisation of private associations (such as Automobile Club d'Italia or professional associations for lawyers, doctors, engineers, etc.).[37]

Since the 1980s, many entities which have followed the organisational pattern of agencies have been created. These agencies carry out technical duties for public administrations, including regional or local ones. The agency represents the same phenomenon of the externalisation of State functions to another public organisational entity which, in the past, was a role assumed by public bodies.[38] Although general rules governing agencies have been issued at the State level with the aim of maintaining a homogeneous

[37] V. Cerulli Irelli, G. Morbidelli (ed.), *Ente pubblico ed enti pubblici* (1994).

[38] *Corte di cassazione* United Sections 11/2001: the agency model is adopted " in those sectors of administrative activity where the creation of bodies which are still public is to be preferred to a reform in the direction of private law, but such as to permit the management of activity public interest to be carried out in a more flexible and effective way, separating the political, decision-making phase from the technical-applicative one".

organisational model, this category is still disciplined in a rather chequered way.[39]

The organisational of the Italian public administration would not be complete if we did not mention the independent administrative authorities, created during the last decades for the exercise of public functions of market regulation and safeguarding of fundamental rights. Their propagation has been facilitated, not only by obligations to implement European law, but also by the weaknesses of Italian political institutions in the last decade of the 20th century.[40] The most important of these authorities are the Competition Commission (*Antitrust*), the Authority for the regulation of energy and telecommunications, the Authority for the guarantee of the right to strike in essential public services, and the data protection Authority. Some older institutions have been included in the category of the independent authorities, and even considered a sort of prototype of them, such as *Banca d'Italia* (founded in 1893), *Commissione nazionale per le società e la borsa Consob* (1974), *Istituto per la vigilanza sulle assicurazioni Isvap*(1982).

In order to protect the interests entrusted to them, considered by the system to be particularly important, or anyhow to be removed from the influence of political, economical and bureaucratic powers, these authorities have been given a great deal of independence. The position of neutrality and independence from external interests is guaranteed by the personal characteristics of those in charge, such as professional competence, technical skills, independence and prestige, and also by a special condition of organisational and managerial autonomy established by law. The authority evaluates the interests entrusted to it by being fully independent and outside any governmental political influence. Because of this, and because of the type of powers that they exercise (regulatory, administrative, punitive and monitoring), it is felt that independent authorities cannot be included within any of the three traditional powers of the

[39] L. Casini, *Le agenzie amministrative*, 1 R. T. D. Pubbl. 393 (2003).
[40] F. Merusi, *Democrazia e autorità indipendenti* (2000); M. Clarich, *Autorità indipendenti. Bilancio e prospettive di un modello* (2006).

State[41]. The regime of judicial review of their acts is that governing ordinary administrative decisions.

Finally, the exercise of public functions by private parties and by the public administration, where it takes the form of private law, should also not be overlooked, has increased considerably over the last few years. The privatisation of many public bodies that continue to exercise public functions, albeit in a private form, creates the phenomenon of the utilisation by the public administration of private companies for the pursuit of public functions.[42] On the other hand, the new art. 118 of the Constitution introduces so-called "horizontal subsidiarity", namely the principle by which the execution of activities in the public interest is not limited to public bodies; in fact public bodies must facilitate citizens' autonomous initiatives, either individually or grouped in associations [43].

bb. Administrative personnel and civil servants

For many years, the working relationship between the public administration and its staff has been the subject of special regulation, different from that governing private parties, and is regulated by a special legislative act called "Statute of State personnel". [44] Moreover, administrative courts have dealt with all disputes in this field since 1923. The idea of the public nature of public jobs is confirmed several times in the already mentioned constitutional provision regarding organisation matters (art. 97) and the reservation of law that it includes, which, according to one interpretation, would be extended to the regimen for jobs with public administrations.

[41]Constitutional Court 226/1995

[42] M, Cammelli, M. Dugato (ed.), *Studi in tema di società a partecipazione pubblica* (2008).

[43] G. Arena, *Il principio di sussidiarietà orizzontale nell'art. 118 u.c. della Costituzione*, in AA. VV. (ed.), *Studi in onore di Giorgio Berti* (2005).

[44] Decree of the President of the Republic 3/1957.

The 1993 reform of public employment [45]has superseded this regulation, which effected an almost complete privatisation of the work relationship for employees in the public sector [46].

Some residual categories of staff that carry out tasks traditionally linked to the essence of sovereignty, i.e. military personnel, diplomats, prefects, magistrates, and police, have not been privatised and are still subject to a public regimen. The same is applicable to university professors. As a result of the reform, notwithstanding the power that each administration has of organising its own offices (which includes determining staff numbers needed for each task), the working relationship is subject to the same rules that govern private work, with respect to the general legislative regulation of the area and of collective work contracts. Collective contracts are stipulated for each public administration sector by the collective representatives, namely the trade unions which represent the workers, and a special agency (*Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni ARAN*), which represents the public administration .[47]

Other aspects that have not been privatised – other than the definition of internal organisational issues and the number of staff required – are the procedures for the selection of personnel, aimed at ensuring equal opportunities of access to work, and also at verifying the professional skills of those who apply for a position. Under the Constitution, in fact, candidates for public employment are normally selected via a public selection procedure (art. 98).

The reform should have profoundly modified public employment, including the abandonment of the criterion of length of service as a determining factor for career progression, in favour of merit, which should also have been linked to salary. The results have not been quite as anticipated. Salaries in the public sector have gone up more than those in the private sector, and executives' salaries have

[45] Legislative decree 29/1993. The reform has been completed over successive phases, in final form as legislative decree 165/2001.

[46] S. Battini, *Il rapporto di lavoro con le pubbliche amministrazioni* (2000).

[47] A. Corpaci, *Agenzia per la rappresentanza negoziale e autonomia delle pubbliche amministrazioni nella regolazione delle condizioni di lavoro*, 3 Le Regioni 1025 (1994).

increased the gap with respect to lower level staff salaries. Promotions based on merit, which have replaced automatic career progression, have become generalised as they are agreed to during collective bargaining[48].

According to official data, the number of people employed on fixed-term and permanent contracts in the Italian public administrative sector exceeds more than three and a half million individuals (equivalent to 16% of people in employment in Italy) at an annual cost of approximately 150 billion euros. Most workers are employed in the education and health sectors (32% and 20% respectively), while 19% are employed in regional and local administration [49]. Furthermore, only a small proportion of this considerable number of professional employees work in what can truly be described as the bureaucracy and in particular in the higher ranks, namely civil servants at the highest level: regarding staff employed in the Ministries, out of approximately 200,000 individuals, about 2% are at managerial level.[50]

The so-called *dirigenza amministrativa* (civil service management) represents, in the Italian system, a distinct professional category as regards other employees, which since the 1970s has enjoyed special status. The reforms of the 90s have also had a marked impact on this sector of public employment, redefining the role and the relationship with political bodies, and bringing about in particular a large-scale transfer of power from the latter to the civil service managers. The political bodies fix objectives and agendas, whereas civil service managers take all the necessary action to implement these objectives and programmes, adopting all measures which involve the administration with outside bodies. In this context,

[48] A. Corpaci, *Pubblico e privato nel lavoro con le amministrazioni pubbliche: reclutamento e progressioni in carriera*, 1 Lav. P. A. 375 (2007).

[49] Data from the "Osservatorio sul cambiamento delle Amministrazioni pubbliche" (OCAP) (RGS, 2004; ISTAT, 2005). More exactly, according to data supplied by the Ragioneria Generale dello Stato (RGS), 3,571,379 individuals as at 31 December 2004. As regards 2005, a certain degree of stability can be observed, attributable to an increase of 0.6% in the aggregate total of public employees (which in 2005 was 3,592,887 individuals), and an increase of 2.7% in the cost of public sector employment (which in 2005 amounted to 148 million euros).

[50] Data from OCAP.

the managers are responsible for the administrative aspects of management and the results which follow. Balancing the politicians' loss of power, more significant power has been granted to management-level civil servants and in particular, the power of assigning and revoking management responsibilities.

The distinction between the management role, which is accessed by a process of public selection, giving rise to a stable employment relationship, and managerial responsibility, which is assigned by the political body on a fiduciary basis, is in fact a function of this organisational arrangement. The special responsibilities assumed last for a fixed period and are renewable at the discretion of the political body concerned. Moreover, it may be brought to an end earlier than anticipated, either as a result of a change of government, so far as the higher managerial responsibilities are concerned, or in general where there are negative results on the part of managers concerning their management or their failure to achieve specified objectives.

Attempts on the part of national and regional law-makers to further increase the fiduciary nature of the relationships between top political and civil service management and to extend the scope of the spoils system have been neutralised by the Constitutional Court, which has been invoked on several occasions to rule on their compatibility with the principle of impartiality and good functioning of the administration. Lately, the Court has established that only so far as the very top managerial roles are concerned, can the principle, introduced in 2002, of automatic cessation of duties within 90 days of the new government taking office apply. Leaving aside these exceptional cases, revocation of managerial responsibilities is only allowed provided there is a reasoned decision following an evaluation of results and on the basis of fair procedure[51]. The Court further specified that where managers of technical structures providing services are concerned, the link with the political body

[51] Constitutional Court 103/2007, which establishes that art.7 (3) of Act 145/2002 is not lawful, which had operated to revoke all State special managerial responsibilities.

does not predicate political allegiances that the spoils system cannot legitimately apply.[52].

cc. The influences of the European law

The changes introduced by European law in national administrative organisation have concerned the system of public intervention in the economy, characteristic of the Italian administrative system throughout the 20th Century, rather than the organisational solutions which function in a restricted way to implement, within the national system, the Community policies in this sector.

The Italian public administration system has never, from the structural point of view, demonstrated particular difficulty or resistance to adapting to the implementation requirements of Community law, even in the absence of direct European provisions regarding organisational aspects, nor of adopting of their own motion if necessary , the structural changes which are convenient to achieve the purpose. Thus, for example, taking into account the plurality of national bodies implementing Community law or policies, possibly even independently, a Department for coordinating Community policies has been established since 1987 under the President's office in the Council of Ministers, charged with the task of coordinating the European Union relationships of all national bodies involved. Of course all the prescribed organisational innovations have been introduced whenever Community law requires specific organisational models to be adopted, as occurred, for example, with the establishment of the various regulatory authorities. In all these cases, national authorities implementing EU law can take action both in relation to matters which strictly concern the Community, as well as in relation to national interests, within a system which is becoming increasingly integrated and complex[53]. The result, common to many

[52] Constitutional Court 104/2007, nullifying the law provision of the Lazio Region, which established that top managerial positions in health authorities fell with the commencement of a new government.

[53] L. Saltari, *Amministrazioni nazionali in funzione comunitaria,* (2007).

other national systems too, is to place emphasis on a network rather than a hierarchy in the organisation of public affairs, which now connotes a high degree of inter-dependence, complementary in nature and complex in the action undertaken[54].

However, the heaviest impact on the Italian administration can be seen in its organisation, namely in approximating the national organisational structure to the fundamental framework underpinning the European institutional and economic system.[55]

The opening up of the market has brought about the dismantling of the powerful system of State participation and more generally the public economic bodies. The gradual liberalisation of public utilities such as transport, postal services, or economic sectors of strategic importance such as energy, has allowed private enterprise to enter the marketplace. The prohibition on State aid has operated to prevent the continuance of State share-holdings which had involved the acquisition and management of the State in formally private companies by the so-called public economic bodies. Such bodies in their turn were under the directional control of the Government, which exercised its power though an appropriate Minister for the State share-holdings. The great public economic bodies managing the State monopolies were transformed into share companies as a result of the substantial privatisation, wholly or in part, of the public capital in their hands. When the Stability Pact was approved (1992), the privatisation of many public bodies and the sale of their assets allowed Italy, saddled with a huge public deficit, to meet the commitments made as a consequence of joining the pact. And even today, the need to respect the Maastricht parameters by reducing public spending continues to require structural intervention which affects the organisational set-up of the Italian public administration.

From another perspective, the concept of a "body governed by public law" developed by the Court of Justice to define the range of application of the Community law of public contracts has imposed, at least so far as safeguarding competition is concerned, the recognition of the public nature of organisational phenomena, which are only

[54] C. Franchini, E. Chiti, L'integrazione amministrativa europea (2003).
[55] M. D'Alberti, *Libera concorrenza e diritto amministrativo*, 1R. T. D. Pubbl. 347 (2004).

formally private. In this way, in accordance with the European orientation, Italian courts have re-classified as coming within the category of a body governed by public law such companies as the Società Autostrade per l'Italia spa[56] (the company running Italian motorways), because of the substantially public nature of the its activity, Rai spa[57], (the Italian public broadcasting company) because of the control and power of appointment of the State and the purposes of public interest for which it was founded. Whereas the courts have not so held a company which manages a gambling casino, because the activity undertaken is not in response to a collective interest and is performed for profit[58].

One area which has undergone far-reaching innovations under the influence of European law is famously the public services sector and, so far as relevant for the present purposes, the organisational models for managing them. Mention has already been made of the radical transformation which the bodies which managed various public services with State involvement and which in many cases brought about their privatisation, such as happened for example to the body which managed electrical energy, public transport and the postal service. The issue is still open so far as local public services are concerned, where there is potential conflict between the forms of organisation used by the local authorities to manage them and Community principles of safeguarding the market and competition. The well-known question of the limits of application of the in house model in the case of State-owned bodies has also captured much attention in the Italian legal system. Many of the leading decisions of the Court of Justice in this field have arisen from Italian cases coming before the Court[59]. The question still open concerning local public services in the Italian system is whether the in house classification

[56] Council of State, IV, 182/2008.
[57] *Corte di cassazione*, United Sections, 10443/2008.
[58] Regional Administrative Court (TAR) Valle d'Aosta, 140/2007; Corte di cassazione, I, 6082/2006.
[59] As representative, see ECJ 18 November 1999, case C-107/98, Teckal; 13 October 2005, case C-458/03, Parking Brixen; 11 May 2006, case C-340/04, Carbotermo e Consorzio Alisei, 8 April 2008, case C-337/05, Commission/Italy; 17 July 2008, case C-371/05, Commission v. Italy.

can be applied in the case of a company with mixed public and private ownership whose private partner is selected, as Italian law provides, by means of public and open tendering procedures, for the period of service conferred.[60]

Finally, so far as administrative organisation is concerned, there are no points of contention with the European Convention. The breadth of the principle of judicial review of administrative acts and the fact that all decisions affecting individual's interests may be reviewed by a court usually excludes the need for enquiry into the independent and impartial nature of the authority making them, since an appeal to an independent and impartial body, namely the court, is in any event guaranteed.

2.2. Administrative action and procedure

aa. Foundations of Administrative Procedure

The need to interpret public administrative action in legal terms developed towards the end of the 19th Century and was centred on the notion of administrative act[61]. In conceptual terms, the construct functions principally to protect the private citizen in the face of public power and is linked in its turn to the emergence of the subjective concept of *interesse legittimo* (legitimate interest or expectation).

The term legitimate interest means the legal position of a private individual in the face of the exercise of public power: it is a central, specific concept in Italian administrative law. It may consist in a beneficiary's expectation that may derive from the exercise of administrative power (under a favourable provision), or in a right which, as a result of the exercise of administrative power (under an unfavourable provision), is 'reduced' to the status of legitimate interest. It is said that legitimate interest can be distinguished from a subjective right (*diritto soggettivo*) (that is, a true right) in that the legal

[60] The compatibility of this solution with Community law was considered by the Council of State V, 5587/2008.

[61] F. G. Scoca, *La teoria del provvedimento amministrativo dalla sua formulazione alla legge sul procedimento*, 1 Dir. Amm. 1 (1995).

system does not provide direct and complete protection of it, but only occasional protection, that is, it is protected to the extent that its infringement relates to an unlawful aspect of the act giving rise to it. Thus, for example, in relationships between private individuals, property rights are fully and directly guaranteed by the legal system, and if infringed, a claim can be set up to an ordinary judge in order to redress the grievance. Conversely, when the right, it could be the same property right, is adversely affected by the exercise of administrative power, it turns into a legitimate interest and only indirect protection is available. The private party entitled to the interest may ask the court to review the legitimacy of the administrative action which has affected him; if the court establishes that the action is unlawful, it will be annulled.

Italian legal scholars, in interpreting the concept of legitimate interest, have drawn attention to the fact that its weak points are linked to the indirect nature of the protection available, and they have criticised this. On the one hand, the fact is emphasised that protection for "goods of life", underpinning the legitimate interest is indirect, but proceeds by way of challenging the offending decision. As a result, it is conditioned by various factors: from the costs to be born by the complainant in challenging the action, the short period of time (60 days) in which the complaint must be lodged, the necessity to stipulate expressly the alleged unlawful aspects of the action, to the prospect that normally the claimant can only seek to have the decision quashed and not a remedy of *certiorari* or, at any event, one that allows the court to order an action. On closer inspection, many of the limiting aspects are no different from those encountered in other legal systems when protection is sought against the exercise of public powers. However, the more marked limitation, and one which used to be a particular feature of the Italian experience, concerns, as noted previously, the absence of any possibility of claiming compensation for loss or damage arising from the infringement of legitimate interests. The road to overcoming what legal scholars have defined as the "dogma" of the impossibility of claiming compensation has been long and hard.

The first step was taken with a ruling that compensation could be claimed for damages arising out of the infringement of a legitimate interest deriving from the reduction of a true right. Still following the principle underlying the theory of the downgrading of the right, the disappearance of the decision would correspondingly remove the downgrading and thus would permit the revival of the right. Hence the ordinary courts – which still had jurisdiction over such matters until 2000 – had reached the point of confirming that the legitimate interest of someone who had been adversely affected by, for instance, a compulsory purchase order expropriating property, which had been nullified as being unlawful, would acquire the full force of the original right again, which would give rise to a claim for compensation. It was only in 1999, as has been noted, that the limitation fell definitively, with the judgment in case no. 500 given by the *Sezioni Unite* (United Sections) of the *Corte di Cassazione*. Once the traditional interpretation of indirect and occasional protection had been overturned, the need for full and direct protection of the goods of life underpinning the legitimate interest is reaffirmed, including through claiming compensation for loss arising from an unlawful decision which has caused damage.[62]

As will be seen more clearly when dealing with the administrative justice system, the protection of interests has always been the province of the administrative courts, which provide it through the exercise of the power of review of the lawfulness of administrative action. The 1889 law which established the 4th Session of the pre-existing Council of State, conferring upon it the functions of an administrative court, gave the newly established court, the power to quash unlawful administrative decisions which damage legitimate interest and identified as grounds for judicial review the three cases of lack of competence, violation of the law and excess of power (*eccesso di potere*). These grounds still remain today as the perspective through which the court reviews the lawfulness of administrative decisions.

Lack of competence arises where the decision is taken by an authority which differs from the one it is empowered by law to take.

[62] A. Zito, *Il danno da illegittimo esercizio della funzione amministrativa* (2003).

Violation of the law occurs when the administrative action is in conflict with a specific legal provision governing its action. The question of *eccesso di potere* is more complex, typically a defect in the exercise of discretion by the administration. This originally happens through a deviation of the power, a direct importation from the *detournement de pouvoir* of French law, which consists in the use of power for a different purpose than that contemplated by the law. Subsequently the Council of State classified other cases of misuse of administrative power within the class of *eccesso di potere*, considered as being 'symptomatic' of misuse. Amongst these, in particular, are the following: breach of the duty to give reasons; conflict with standards of consistency, logic and reasonableness in administrative choices; that facts represented by the administration do not correspond to the actual situation; defects in recognising interests in the procedure and more generally, procedural improprieties which do not amount to a breach of the law, and the evident injustice of a decision. Over the course of time, such instances acquire independent force, in that they assume the character of grounds with *eccesso di potere* consequences, even in the absence of alleged actual or presumed deviation.

Naturally, a definition of the regimen and an analysis of the defective course of the administrative decision also implies an evaluation of the respect paid to the rules regarding the formation of the public will (*volontà pubblica*) under which the decision to act was taken by the administrative authority. Over the years, the importance of these procedural rules has steadily increased, from at least two different perspectives. First of all, various administrative procedures are regulated by law in minute detail, with the consequence that their breach is tantamount to a breach of the law. For example, the procedure of expropriation, or that relating to town planning, has always been governed by a quite detailed regulatory regimen. But also many other procedures relating to various sectors are regulated, to a greater or lesser extent, by the law. The courts extrapolate the relevant principles from these regulatory regimes, which they are beginning to apply even in the absence of specific provisions of law.

From a second point of view, courts tend to place increasing emphasis on the area of *eccesso di potere*, extending the range cases of 'symptomatic' misuse of power. Many of them aim to make metajuridical rules such as rationality or reasonableness, correspondence between facts as postulated by the decision-maker and the actual situation, fairness, protection of legitimate expectations , good administration, parameters for the lawfulness of administrative action. Some chiefly concern the formation of public will and consequently procedural aspects, such as an evaluation of the completeness and correctness of the recognition of interests), the evaluation of private interests and the procedural inquiry in general.

However, having framed the issue in terms of the validity of the act, the focus of attention tends to concentrate on the content of the administrative decision, rather than the *iter* which led to its formation. While the courts strengthen their powers of inquiry into the substance of the decision, which may be revealed through the reasons given, and determined scrutiny of aspects of symptomatic misuse such as unreasonableness, grave and manifest injustice and distortion of the facts, nonetheless the problems concerning procedural protection of the private individual, and his or her participation in the procedure still remain in the background – unless the relevant rules governing each procedure expressly take these factors into account.

Only subsequently, midway through the 20th Century, did attention formally shift from the act itself to the procedure, mainly thanks to the work of legal scholars, who interpreted it by concentrating on its structural aspects. That is to say, they looked at it as a sequence of acts and operations which, by means of a process oriented to attainment of a public goal, leads to the decision eventually adopted [63]. This, therefore, is a procedure taken as meaning a formative process of the administrative will, as a source for the recognition of interests, with the prospect of better care-taking of the interest entrusted to the administration providing it, than as a forum for participation. Nonetheless, it was against this

[63] Reference is made to the work of A. M. Sandulli, *Il procedimento amministrativo* (1940).

background that the question of the so-called "fair procedure" was first posited, namely a process which is just, because intrinsically it guarantees the private individual the opportunity to participate, not only with a view to ensuring that the administration has a clearer perception of the framework of the interests in relation to which it is acting, but also to safeguard his position. Thus the two functions seen as typical of procedural participation finally come together, namely an enrichment of the procedural process through the contribution made by the private individual to the representation of the interests at stake, and the function of preserving the interests of the individual himself.

The concept of fair procedure includes, in its most developed form, the right to be heard (*audi et alteram partem*). While negating its constitutional status[64], the Constitutional Court recognises its validity on the operational level as a guiding criterion for both lawmakers and those who have to interpret the law[65]. Identifying it as a general principle in the legal system has also had the consequence that regional lawmakers have also had to take account of it, in regulating the procedures that fall within their sphere of competence. The administrative courts in their turn adhere to the principle as a substantive canon of fairness of administrative action, to the point of invoking its origins in *natural justice*[66].

General legislation on procedure arrived in Italy only in 1990, with the passing of Act. No. 241 (Administrative Procedure Act). The reform reversed the previous approach. Prior to this, a body of case law identifying the general principles of the system was built up from occasional, fragmentary pieces of legislation enacted to govern particular procedures; now it is Parliamentary regulation itself that lays down general principles underpinning administrative action, setting down what had been developed by administrative courts precedents over the years. This is for instance the case of the duty to give reasons or the protection of legitimate expectations. But the new

[64] Constitutional Court, 23/1978, 103/1993 and 210/1995, 383/1996.

[65] Constitutional Court, 13/1962; it is in any case a guiding criterion for both lawmakers and those who interpret the law, 57/1995, 240/1997, 363/1996.

[66] Council of State, IV, 423/1895 *Chiantera*; 299/1900; Council of State, Plenary Session, 14/1999.

regulation offers strong innovative trends as well, in terms of the values inspiring the change – take, for instance, the principles of giving notice and transparency in administrative action, which has made its first appearance on the stage of public administration – or the concrete mechanisms of the implementation of procedural guarantees such as prior notice of a procedure, the fixing of set time for its conclusion and the creation of a specific role of a person responsible for the procedure.

Furthermore, the most far-reaching of the 2005 amendments to the 1990 Act on the one hand recognise the positions already reached by the administrative courts in implementing procedural guarantees, while on the another they introduce some remarkable novel features, such as, for example, the decision that certain formal defects do not invalidate the final decision. As noted, an important innovation provides that the principles of Community law are generally binding in nature.

We may now pass on to consider the characteristic features of administrative procedure, bearing in mind that, for reasons set out in the description of the historical development, procedural issues from the Italian standpoint tend to become identified with those of administrative action considered from a substantive point of view.

Among the principles which carry greater weight from a procedural point of view, first and foremost the principle of due process should be highlighted. This is linked to the criterion of fair procedure, mentioned above, and the obligation this implies for the administration to offer the chance to be heard to those affected by its action. In this sense, there is express provision for a phase to be dedicated to hearing the interested parties; the possibility of cross-examination is guaranteed under Italian administrative law in procedures which involve measures that are particularly disadvantageous to those affected, such as expropriation or application of penalties, or in especially complex procedures, such as those involving town planning decisions. Furthermore, since 2005, in procedures originating from the request of a private party, the reasons which may prevent the application being accepted must be communicated beforehand to the party making it, so permitting them

to formulate their observations *a priori*, which must then be taken into account at the stage of setting out the reasoning.

In other cases, the principle takes the form of a duty on the part of the administration to apply specific rules contemplated in the Administrative Procedure Act, which ensure the effectiveness of participation[67]. The administration must give notice of the start of the procedure to whoever is affected by the final decision, thus permitting those who have received notice to put forward their own reasoned case. Participation may simply take the form of the right of disclosure, or consist in presenting written representations or documents which the administrative body must take into consideration. However, oral hearings involving the interested parties are not expressly guaranteed, but may be permitted by the administration. Likewise, and saving what will be mentioned later in relation to so called consultation procedures, there is no general provision for public hearings, in the sense of the public inquiries familiar to the common-law tradition.

The factor which legitimises participation is the existence of an interest involved in the administrative decision. The interest could be prejudiced by the decision which is to be reached through the procedure. This implies a specific relationship between the interested party and the decision itself, but actual possession of a legitimate expectation in the form of a specific *interesse legittimo* is not an express requirement, since the potential prejudice is identified in general terms by the law. So far as so-called "widespread interests" (*interessi diffusi*) or group interests are concerned, such as environmental issues, which are indistinctly associated with individuals in a collective sense, only organised bodies (associations, committees, organs etc), whose purpose is to protect such interests, are recognised as legitimate participants in the proceedings.

The duty to give reasons for administrative decisions has always existed in the Italian legal order. Consistently applied in the case law relating to decisions with a disadvantageous effect, this duty is now formally set down in the Administrative Procedure Act which has generalised its application, excluding only normative acts (i.e.

[67] Chapter III of the Act.

governmental rules) and acts of a general nature. This is thought to serve a double function: to allow interested parties to know the reasons underlying the decision which is adversely affecting them and to permit judicial review of it. The duty involves the administration setting out the reasoning, both as regards the facts and the law, which supports its decision.

Extending this duty to "all administrative acts" has reduced the importance, for these purposes, of the distinction between binding and discretionary acts; it was only to the latter that the existence of the duty was ascribed by the courts. The importance of the distinction may re-emerge as a result of the introduction, in the 2005 reform, of the category of so-called "formal" defects[68], where it may be considered that the reasoning concerns the form of the act. In fact it is laid down that an administrative decision cannot be quashed by reason of an infringement of procedural rules or the form of the act, where by its binding nature it is clear that its content could not have been different from that which was in fact adopted. Thus, regarding reasoning as a formal element of the act, a defect in the reasoning of a discretionary act might remain a ground for quashing it, while the same defect in a non-discretionary act would not be relevant, so long as it was demonstrated – at this point through *a posteriori* reasoning – that the content of the decision could not have been different).

The notion of the transparency of public administration first appeared in the Italian legal system in the 1990 act. The criteria of access to information and transparency stood in contrast to the secrecy which had been the hallmark of Italian administrative law in the past. In this way the previous approach, whereby secrecy was the norm and access to information the exception, was reversed. However, beyond the declaration of principle under the law in force, the institutions which express this principle, primarily the right of access to administrative acts, seem more directed towards the goal of protecting private individuals adversely affected by administrative decisions than as an aim of general transparency in the action of the public administration. The right of access to administrative

[68] Art. 21 *octies* Act 241/1990.

documents is conferred upon stakeholders entitled to claim before the courts and only in relation to the claim [69]. The Act sets various limits both in regard to which acts are accessible, excluding for example those covered by official secrecy, and for the purpose of protecting the privacy of third parties.

Impartiality has procedural importance. The principle has already been mentioned, with particular emphasis on its connotation of removing the administration from the partisan conditioning of politics and preventing technical decisions from becoming excessively politicized. In this latter sense, and with a more precise reference to procedure, impartiality is identified with the general principle *nemo iudex in causa sua*, and gives rise to the incompatibility of the position of someone who has a personal interest in the issue which has to be decided by the administration. The conflict of interest concerns not only the actual decision-making moment, but the whole administrative procedure, in which whoever is not strictly a stranger to the issue to be decided, cannot participate in any way. In a more general sense, impartiality in the procedure means that the administration, while called upon to achieve the specific result with which it has been entrusted to deal, must evaluate all the interests at stake, both public and private, and weigh them carefully.

"*Buon andamento*" is often translated using the expression 'efficiency'. The principle is referred to in many provisions of procedural law. It can be summarised as follows: providing for the role of a person responsible for the procedure, namely an individual selected by nomination who takes responsibility, both as regards the internal and external aspects of the conduct of the procedure; the stipulation, provided for all types of procedure, of a date by which the procedure shall terminate, which in any case, in the absence of a specific indication, is normally a period of thirty days; the duty of acting with economy and efficacy, which include a prohibition on lengthening the procedure, for example by calling for a unnecessary advice; the adequacy of the action undertaken to achieve the objective; remedies in the case of the omission to issue advices required by law.

[69] Art. 22 Act 241/1990.

The fundamental principles of reasonableness and legitimate expectation, while less tied to procedure as such, condition administrative activity to an equal extent. Reasonableness, as a natural adjunct to the exercise of power, including administrative power, is an absolute principle of procedure and never takes second place to other principles. Its primary meaning implies a correspondence between the choice made and rules of reason. In procedure, reasonableness is emphasised as a criterion imposing the requirement to weigh all interests, including private ones, characteristic of the exercise of discretion, and preventing the sacrifice of those interests, unless it is strictly necessary to do so. From this perspective, the principle of reasonableness finds advanced expression in the principle of proportionality.

The principle of good faith imposes a duty on the administration to take account of the expectations raised among private individuals[70]. The principle is not expressly set out, but has always been applied by the courts, mainly in the field of so-called "*autotutela*".[71] This expression is used to indicate cases in which the administration has gone back on previous steps taken, annulling or withdrawing its own decisions or in any event modifying its own conduct. Protecting expectations results in a limitation of the power of the administration, which, in exercising its discretionary power, must take account of the expectations raised and set out promptly the reasoning underpinning any sacrifice of such expectations. The 2005 reform of the Administrative Procedure Act regulates the powers of annulment and revocation, establishing limits, for the purpose (amongst others) of protecting legitimate expectations, on the power of quashing *ex officio* the administration's own decisions and the duty to compensate whoever is affected by the revocation of a favourable act for reasons of the public interest[72].

Administrative authorities must conclude procedures started by private individuals by express decision. Furthermore, as

[70] F. Merusi, *L'affidamento del cittadino* (1970); F. Merusi, *Buona fede e affidamento nel diritto pubblico. Dagli anni «Trenta» all'«alternanza»* (2001).
[71] F. Benvenuti, *Autotutela*, 4 Enc. Dir. 538 (1959).
[72] Art. 21 *nonies* and art. 21 *quinquies* Act. 241/1990.

previously mentioned, the procedure must be brought to a conclusion within the time-limit indicated, or, in the absence of an express date, within thirty days. Once the time-limit has expired, the administration is considered non-compliant and its silence may be made the subject of a specific claim, in the appropriate form, before a court, which, should the administrative body continue its non-compliance notwithstanding a court order, may further nominate a commissioner, to be charged with the task of executing the action in place of the administration which has failed to do so[73].

bb. Foundations of the administrative action

According to the classic model of State *a droit administrative*, administrative action, in the Italian legal system too, normally takes the form of the exercise of power. In order to pursue the objectives in the public interest which have been entrusted to its, public administration it finds itself, it is said, in a position of supremacy in relation to private individuals, and have special powers available to them which are not based on a form of contract, but derive from Parliamentary law itself[74].

Administrative powers can be defined and classified in various ways. Administrative power is first and foremost always "typical" in the sense that it is precisely regulated by the law, and is expressed through public acts, administrative decisions, specifically "nominated" by law and characterised by a particular regimen. Its exercise is unilateral and obligatory. The power may be discretionary or bound. [75] From the viewpoint of its effects on the private individual, it may be restrictive or amplifying. However, administrative power may also have a different objective from that of

[73] Art. 21 *bis* Act 1034/1971

[74] From this point of view, therefore, art. 1, par. 1 *bis*, Act 241/1990, as amended in 2005, is not of any significance; under this provision, the administrative body, when taking action that is not authoritative in nature, does so in accordance with the rules of private law, unless the law provides otherwise.

[75] Although, according to a minority of legal scholars, administrative action which is fixed by law is not an expression of power, and therefore does not have the capacity to reduce the individual rights with which it is concerned to the status of legitimate interests.

merely dealing with concrete cases and may be regulatory in nature. Here, reference is made to the regulatory powers of the public administration. Moreover, in the Italian legal system, the administrative action takes the form of power also when leading to the adoption of acts of ordinary law, such as contracts. In this case they are referred to as management powers (*poteri gestionali*)[76].

As noted, the concept of the administrative act is central in Italian administrative law. The characteristic features and limitations on administrative power are reconstructed taking this, and decisions in particular, as the starting point. The regimen governing administrative decisions had been defined by legal scholars and case law, and was only partially codified by the 2005 Administrative Procedure Act. The term "decision" means an administrative act which has external and innovative legal effects. It follows that a building permission, a penalty, or a planning decree constitute "decisions", whereas an advice, or the act of consent that an issuing authority must obtain from another administrative body, are examples of "mere acts".

Stating that an administrative decision is prescriptive highlights the fact that the administration operates as an authority for the care of the public interest. It is also unilateral, since the sole author is the public administration and the will of the private individual is irrelevant. So far as effectiveness is concerned, it is executory in nature, that is, it of direct effect, and remains so, even if invalid until quashed. Regarding decisions with restrictive effect, effectiveness is subordinate to prior notice to the receiver. Executory effect means that public administration is permitted to execute the decision directly and coercively. According to the principle of legality, however, this possibility is reserved to cases where it is expressly provided for by law.

In distinguishing between discretionary and fixed powers, the Italian approach is to reproduce the models which refer to the different binding degrees of the legislative provision to define the power of choice conferred on the administration. Its distinctive feature lies perhaps in an analysis of the structure of discretionary

[76] G. Falcon, *Lezioni di diritto amministrativo, I. L'attività* (2009).

evaluation in itself as an evaluation of interests. The decisive feature of the discretion in this regard is indeed the comparative evaluation of the interests. The administration pursues the primary interest with whose management it is charged, while taking account of the various other public and private interests involved in the process, including those possibly in conflict with the primary interest [77]. This reconstruction has obvious consequences, both for the definition of the scope of the power to be considered as (truly) discretionary, as well as in regard to the possibility of its being taken to appeal before a court. Options which do not involve a comparative evaluation of interests are not considered discretionary but, for example, are only bound to maximise the primary interest, such as in the case of listed buildings, for their historic or architectural interest. The court can review the comprehensiveness of the procedure, both with regard to the interests taken into account and evaluated by the administration, and the congruity of the evaluation process, including its comparative aspects, applying the standards of reasonableness and also proportionality.

However, defining the action which precedes the actual administrative decision, whether it is discretionary or bound by law, remains less clear; in particular, the way in which the facts are evaluated. Italian legal order also perceives the need to take account of this area of activity which is neither truly discretionary in the sense mentioned before, since an evaluation of the relevant interests is lacking, nor completely fettered, since in any case the law leaves the authority applying it a certain margin of evaluation. The ambiguous notion of "technical discretion" has been developed to describe this second phenomenon, which for some time has meant that this type of evaluation has only limited possibilities for judicial review, on the basis that the administration has a reserved power of technical evaluation. Also pertinent to this mode of resolution is the fact that until 2000, administrative courts were not permitted to call for expert technical advices, and were therefore not materially in a position to review the technical basis of the choices made by the administration. Since the end of the 20th century, administrative courts have changed

[77] M. S. Giannini, *Il potere discrezionale della p.a.* (1939).

their stance, exerting a much firmer control over this kind of evaluation.

The Administrative Procedure Act formalised the practice, previously adopted by administrative bodies but whose admissibility has been doubted[78], of the use of power through agreement[79]. In relationships between private individuals and the administration, there is provision for two types: direct agreements in which the discretionary content of a decision is regulated by consent, and agreements which undoubtedly replace decisions. However, a special regulatory regimen governs these agreements, reflecting their public nature: a preliminary, adoptive administrative decision precedes their stipulation, in order to guarantee the impartiality and good functioning (*buon andamento*) of the administrative action; the administration has a power of withdrawal for supervening questions of the public interest and they are under the jurisdiction of administrative courts.

Administrative power may also take the form of regulatory acts, that is, acts which are administrative in form but regulatory in substance. The regime which governs them differs in certain aspects from that applying to proper administrative decisions. For example, the duty to provide reasons does not apply to them, and the normal guarantees of participation are excluded, occasionally replaced by particular provisions under the law governing them, or, more recently, by the practice of consultation. However, the principle of justiciability applies to these acts as well, which permits legal action by anyone claiming to have been adversely affected by them in a direct and specific way, something which is not always easy to prove, since the provisions are general in content. When this is not the case, the regulatory administrative provision can be challenged, together with the act applying it. In addition, unlawful regulations can also be disapplied by the administrative courts, which, however, are normally precluded from disregarding administrative acts even unlawful ones.

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[78] G. Falcon, *Le convenzioni pubblicistiche. Ammissibilità e caratteri* (1984).
[79] Art. 11 Act 241/1990.

As noted, Italian administrative law also includes within the category of public power actions taken by the public administration which do not differ substantially from those which any private individual could set in motion. The authoritative profile of the decision in this case is not so much constituted by the unilateral nature of the exercise of power as by its function in the public interest. Hiring staff to run the public administration, managing public assets, or dispensing economic benefits such as grants or contributions, are all examples of power of this type, exercised by the public administration. The activity undertaken by the administration and the relationships arising from it are no different in substance from the typical kinds of relationships between private entities. Collocating them within the ambit of powers ensures that they are subject to the rules which govern their exercise and, hence, to substantive and procedural guarantees.

The most usual case concerns contractual relations. The contracts, which an administrative body may stipulate in the exercise of its general legal capacity to engage in private law relations, are in general contracts governed by private law, which are no different to those made between private entities or individuals. Nevertheless administrative conduct which is pre-established to undertake such activity is interpreted in terms of the exercise of power. The act through which the administration stipulates a contract is an administrative decision. The reasons underpinning the decision must give an account of the basis upon which it was reached, including the choice of selection procedure used to choose a contractor. The acts leading to the assignment of the contract (therefore, the selection competition itself and the act of adjudication) are administrative decisions in themselves.

The action described gives rise to what is known as the "public evidence procedure". Its purpose is just that, namely to provide public evidence of the course of its conduct in forming the intention to contract, which would be substantially devoid of any legal value under ordinary law. By subjecting such actions to the discipline governing administrative decisions, all the substantive guarantees are extended to them (the duty to give reasons, rationality,

proportionality, freedom from unreasonable conduct, lack of congruity, etc) as well as procedural ones (of access to information, participation, etc) and legal protection (judicial review), which apply to the exercise of power.

The issue of the consequences for contracts of annulment of the administrative decision, the adjudication in particular, is quite controversial. While the two phases were subdivided between the administrative courts, with jurisdiction over the administrative aspects, and the ordinary courts with jurisdiction over the contracts, the reciprocal, substantive autonomy of the two phases was clear beyond dispute. Annulling the adjudication did not make the contract void, which was something only the administration could seek. The administrative courts, once they had become the only courts competent to deal with matters concerning the award of public contracts, opted instead for the solution of cancelling the contract following the annulment of the adjudication procedure. The issue has re-opened recently with the ruling by the United Sessions of the Cassation Court affirming the permanent jurisdiction of ordinary courts over contracts.[80]

cc. Influences of the European law

The system of guarantees offered by Italian administrative law in regard to dealings with administrative bodies does not differ from the protection, under art. 41 of the Nice Charter, of the right of individuals to see issues concerning them dealt with in an impartial and equitable way, within a reasonable time-span. The administration is under a duty to act in an impartial and even-handed way, and the penalty for infringement of this obligation is the consequent annulment of the act. The power must be exercised within a certain period of time which is fixed by law. The expiry of this period with no result opens the way for judicial review. If prejudice arises from the negligent infringement of the obligations indicated, the administration is bound to pay compensation for the resulting loss.

[80] *Corte di cassazione*, United Sections, 27169/2007.

Art. 41 sets out three precise circumstances giving rise to a right to good administration (*buona amministrazione*): the individual's right to be heard prior to measures which are unfavourable to him being adopted; the right of access to decisions which concern him and the duty of administrative authorities to give reasons for their decisions.

The right to be heard in the context of a pre-established procedure preceding the adoption of an unfavourable measure is guaranteed under the participation provisions laid down by the Administrative Procedure Act. To guarantee the participation process there are special provisions placing duties on the administration, from communicating the initiation of administrative procedures that are disadvantageous to them, to announcing in advance the rejection of applications relating to measures in their favour.

Two problem areas can be identified. One concerns the scope of the procedural guarantees, which does not include administrative action aimed at issuing normative acts, general decisions, planning and programming acts[81]. In relation to this type of action, any guarantees depend on the existence of provisions in the law governing such procedures, relating to special cases of participation. Although so far as normative and general acts are concerned, recent practice seems to demonstrate an increase in the use of consultation procedures, a problematic area exists in relation to acts such as planning regulations, which often contain immediately binding provisions, together with a weight of general regulations too. Questions have been raised in the past over some of these, for which the law does not provide a participation phase by interested parties, regarding compatibility with the principle of due process. The Constitutional Court dismissed such claims, on the basis that the principle had no constitutional force[82]. Additionally, the failure to extend the duty to communicate the initiation of administrative procedures that are disadvantageous may raise doubts about the effectiveness of the right to participation, even though it is provided for by the rules governing this sector. Another rule which likewise

[81] Art. 13 Act 241/1990

[82] Constitutional Court 107/1994, 313/1995.

raises problems is that regarding their justiciability within the short period running from the date of publication, rather then the date of effective full awareness of the interested parties, regarding whom specific communication is not laid down in the rules.

A second problematic point concerns the fact that there is no provision for oral hearing. The possibility of the interested party being called to speak, even though it is neither provided for nor guaranteed by law, is not excluded, but it is left to the discretion of the administrative authority conducting the proceedings. However, it is difficult to imagine that an administrative authority would in fact refuse to hear an interested party who had made a request to address it.

The right of access to administrative acts provided under Italian law only partially corresponds to the right under art. 41 (2) ECHR of every individual to have access to their file, which is intended as a general possibility for people to discover what documentation is in the possession of the administrative authority, regarding their particular positions. In fact, although the right of access is exercisable outside the administrative process as well, it is still safeguarded in order to permit judicial protection of rights or interests of those seeking access. Indeed, whoever has a direct, specific and current interest may have access to documents in the administration's possession relating to circumstances which the law protects and pertaining to the document to which access is requested[83] and the right is in any case guaranteed when knowledge of it is necessary to defend an individual's own interests in court[84]. Moreover, the differing scope of protection between the two systems tends to become blurred, if one notes that under Italian law, an indication in the claim that access is instrumental to obtaining legal protection for a right, is sufficient to permit such access, together with the intention on the part of whoever is seeking access to take legal action, but it is not a requirement that an action has actually been started. Thus it is clear that, as a matter of fact, the only legitimation required to obtain access to one's own dossier in the hands of the

[83] Art. 22 Act 241/1990
[84] Art. 24, par. 7, Act 241/1990.

administration is to give reasons for the application, indicating the position to be protected and a declaration of the applicant's intention to go to court. The limitations of privacy and professional confidentiality are the same as those contemplated under Italian law, where privacy and professional confidentiality also include those belonging to the public administration itself.

So far as giving reasons is concerned, it has been noted that this is a generalised requirement. The problems may concern exceptions provided for by the law or applied under case-law. In the first place, normative acts and those of general content should be mentioned, in relation to which providing reasons is expressly excluded by law. However, the question should be raised, so far as this is concerned, as to whether the expression used in the Charter of rights (decisions by public administrative authorities) also refers to these types of acts, which clearly differ from concrete provisions both because of the possible damaging effects in relation to the individual who is subject to the administrative decision, as well as the function of the reasoning in normative and general acts. In the second place, on the other hand, the issue is raised regarding the reasons given of provisions which conclude examinations and public selection procedures. The Council of State held until very recently that a numerical vote is sufficient and adequate, but this position was criticised by those who argue that a vote does not take account of the reasons for a decision, but only reflects its outcome.

An issue concerning the effectiveness of guarantees is linked to the previously-mentioned introduction into the Italian system of the so-called "formal defects", whose presence does not always make the decision subject to being quashed. Many of the mechanisms which are there to ensure the correctness of administrative action vis-à-vis private individuals, result in formal and procedural administrative duties, whose infringement, on the basis of art. 21 *octies* of Act no. 241/1990, may prove insufficient to quash the decision. It is true that the consequence of non-voidability is only provided for where binding decisions are concerned and that it is clear that the administrative decision could not have been substantially any different. This would therefore only concern cases where the

annulment of the decision would presumably precede a new decision taken by the administrative authority regarding the same subject-matter as in the quashed decision , to take effect following the renewed procedure. However, it is clear that the solution opted for by the Italian lawmakers, in the absence of other guarantees as an alternative to quashing the decision, weakens the rights of participation of a formal and procedural nature. For this reason, it is open to doubt as to whether they comply with the standards of good administration set out in the Charter[85].

This problem has in fact been raised at national level, too, in terms of the compatibility of the new rules on formal defects with the constitutional principle of justiciability (art. 113 Cost.) and the rule of law or legality in general[86]. At present, administrative courts are demonstrating caution in finding the bases for applying the provision regarding non voidability, and are tending to recoup some margin of protection for the injured individual through a process of evaluating the procedural rather than the substantial aspects of the decision. The decision, while not voidable, would in any case be unlawful in substance, so that the way would still be open for an action for damages for the infringement, in respect of which the sanction of voidability was unavailable.

3. The Democratic Perspective

The democratic principle is set out in art. 1 of the Italian Constitution, which it refers without distinction to every form of demonstration of "sovereignty" and therefore by implication to the public administration as a public power. The only mention in the Constitution which expresses democratic status as binding in nature occurs with regard to the armed forces (whose organisational system

[85] D. U. Galetta, *L'art. 21 octies della novellata legge sul procedimento amministrativo nelle prime applicazioni giurisprudenziali: un'interpretazione riduttiva delle garanzie procedimentali contraria alla Costituzione e al diritto comunitario,* www.giustamm.it; D. U. Galetta, *L'annullabilità del provvedimento amministrativo per vizi del procedimento* (2003).

[86] D. Sorace, *Il principio di legalità e i vizi formali dell'atto amministrativo*, 1 D. Pubbl. 385 (2007).

must be informed with the democratic spirit of the Republic, art. 52, par. 3), with the evident purpose of emphasising that the application of the principle is not subject to exceptions of any kind. From this specification the idea has developed that democratic status does not end in the legitimation of power to the people, but has a more intense significance, which embraces the adoption of mechanisms involving action shared in by the citizens and which respects the principles and values set down in the Constitution .

Traditionally it is considered that democratic status as applied to the public administration is guaranteed by its connection to Parliament and, through that, to the citizens who elect the MPs. The same circuit of democratic legitimation also works at regional level, in bodies which represent territorial autonomy and is reinforced, so far as municipalities and regions are concerned, by the factors conferring legitimacy directly, through the election of the executive bodies of these entities (the mayors and the regional president as well, where the electoral system, with reference to regional statutes, does not provide otherwise).

The Italian system has come rather late to an awareness of the need for different, and more active, forms of citizen participation in the exercise of administrative power. Only in the 1990s, as we shall see later, did lawmakers put a range of reforms in hand aimed at democratising the public administration, by means of measures such as codifying administrative procedure, making ample space for participation; opening up administrative action to the principle of access to information; involving private citizens in the formative processes behind the major public-sector choices and the promotion of private initiative in carrying out duties of general interest, in competition with public powers. Without doubt, some of these innovations have come about as a result of comparisons made with other countries with more experience in such matters and that supranational influence has played a large part in their adoption.

a. Parliamentary involvement
aa. Parliamentary statute

The relationship between administrative power and Parliament has already been raised, in dealing with the principle of legality, which is a feature of administrative action. So far as the administration is concerned, the law does not merely represent a negative limitation on it, a factor deriving from its obvious state of supremacy, but constitutes the fundamental basis of every instance of administrative power. The term law here means, technically, a primary source, whether Parliament-made laws (or regional legislation), or decrees having the force of law enacted by the Government in situations of necessity and urgency which are subject to ratification by Parliament (*decreto-legge*) or by specific Parliamentary delegation (*decreto legislativo*).

It follows, therefore, that in the Italian system there are no administrative powers which originate in the executive, but only powers which have been conferred and are governed by the law. Parliament guides and influences the public administration, determines its modes of action both generally – take, for instance, the radical amendments of the *modus operandi* of the public administration brought about by the law in 1990, setting up a general regimen for administrative procedure – and in the governing of individual exercise of powers, as well as through laws regarding accounting, finance and expenditure.

Moreover, given the basis upon which the Constitutional Court interprets the principle of legality, the law cannot confine itself to considering power as such (formal legality), but must govern the main features (substantive legality), namely the administrative authority in charge of its exercise, the public interest to whose purposes it is directed, its contents and legal effects. The type of power conferred is identified precisely by law. In this way, reference is made to the typicality of administrative powers[87]. Only on very rare occasions can atypical powers be conferred on administrative authorities, in order to meet extraordinary circumstances, where urgent action is required.

The principle of legality is identifiable, as regards certain aspects, with the notion of reserve of primary legislation, either

[87] Constitutional Court 35/1961.

Parliamentary or regional . In fact in many cases the Constitution expressly confers only on Parliament (or regional law-makers) the power to legislate on public actions limiting personal freedom. Additionally, as we have seen, it reserves, at least to some extent, the organisation of the public administration for primary legislation, either Parliamentary or regional . Where such a reserve operates, the Constitutional Court has stated on several occasions that administrative power which is capable of affecting rights protected by constitutional provisions must be subject to appropriate guiding criteria[88]. Hence, for example, laws conferring power to levy taxes and circumscribe property rights must set out precisely the principle elements of such cases which are governed by the administrative authority: identification of the passive parties, appropriate criteria to define administrative discretion, the objectives of the action, the decision-making bodies and their powers[89].

But going beyond the cases to which the reserve applies, it is thought that the binding element of legality pertains to every possible circumstance of the exercise of power, which can legitimately subsist to the extent that it is contemplated by the law. The Constitutional Court gives weight to the link between legality and protection by the courts, which requires that the legislative regimen should never be confined to simply conferring powers on the executive, but must regulate their content[90], the single exception being the case of emergency powers.

Once the limitations deriving from the principle of substantive legality are adhered to, discretionary powers may be conferred on the

[88] Significantly, this is the content of the first decision (1/1956) issued by the Constitutional Court after its establishment .

[89] Constitutional Court 4/1957, 30/1957, 36/1958. But see also, beyond cases to do with personal liberty, 36/1959 concerning a law which did not indicate criteria or limits for determining the tariffs for putting up advertisements; and 14/1960 and 51/1960. In this sense 70/1960, (especially point 11) according to which "an financial obligation can be considered constitutionally legitimate even in circumstances where the law does not comprehensively lay down limits, but requires the executive power to determine them, provided that, in this case, it indicates appropriate criteria and limits for circumscribing the exercise of such power".

[90] Constitutional Court, 35/1961, 4/1962, 12/1963, 40/1964; more recently, 307/2003, 355/1993, 359/1991.

administration. That is, it may exercise the power entrusted to it, evaluating and adopting whichever is the best solution in the particular set of circumstances. This obviously occurs when the authority making the decision is charged with the task of weighing the interests at stake in relation to a particular event, deciding which should be preferred and to what extent, and conversely, which are the interests to be sacrificed. However, it is thought that a power of evaluation is legitimately attributed to administration, even when the decision to be taken does not concern interests, but facts which do not lend themselves to objective interpretation on the basis of the legal rule or available specific knowledge. This type of case, as we have seen, is referred to as "technical discretion".

For obvious reasons, the monitoring powers of the court over the legitimacy of discretionary activity are limited. First of all, it discounts the fact that, in such cases, the comparison between the decision taken and the legal provision less significant – even though it may retain its importance, for example, for verifying the respect paid to the purposes indicated in the law –and it is expressed in the evaluation of a range of parameters, developed by case-law in the category of *eccesso di potere*, which permits judicial review of the question as to whether or not the discretionary power was exercised correctly. In any case, the court is not permitted to know the merits of the administrative choice to which weighing the interests gave rise.

Administrative action is therefore subject to the law, but it is not exhausted in the mere execution of the law. The administration also enjoys large scope for independent evaluation, in the deployment of which it may decide upon options which are potentially highly innovative. While it is true to say that the lawmakers are free to mould the powers of the administration, it is also true that in many cases there is a need for discretionary powers. The principle of good administrative may require that the administrative authority make decisions, evaluating the circumstances and weighing the interests in the case at hand, and since the lawmaking body is not capable, at the time the general, abstract choice is made, to undertake considerations and evaluations

of this type, allowing a margin for evaluation to the administrative authority may be necessary.

With this consideration, we have progressed to an examination of the other side of the relationship between legislative and executive power, namely the issue of possible limits encountered by the law in regard to the administration. The question which has been posed in Italy is whether the law can replace the administration in making concrete decisions. There is debate as to whether some activity is reserved to the administration, in other words whether an area exists which cannot be reduced. Such an area would be reserved to the administration, and non subject to the power of legislators and the courts. This issue has acquired more practical relevance with regard to the admissibility of the so-called *leggi provvedimento* (law for provision), namely decisions which have the appearance of laws but the concrete and specific content, typical of administrative decision. For example, laws which concede some single benefit to a private individual, or those commonly seen at regional level, approving plans or projects such as town planning or environmental schemes.

The Constitutional Court negates the existence of a reservation in favour of the administration in making concrete decisions. However, it requires that, in the exercise of administrative functions enacting any such provisions, the procedural and jurisdictional guarantees of citizens affected by these powers should not be reduced. Such provisions of law are therefore theoretically possible, on condition that they may be reviewed by the administrative courts on the same basis that those courts review administrative decisions, namely from the perspective of their potential arbitrariness or unreasonableness, to a comprehensive evaluation of all the interests at stake and their consistency with the ultimate objective being pursued[91]. Thus, the Court has held as unreasonable a regional law which introduced a permanent criterion for identifying associations which could be beneficiaries of public grants, without placing importance on the requirement of ascertaining, as a matter of fact, how representative they were. In addition, in order not to exclude participation by interested parties and most importantly legal

[91]Constitutional Court 492/1995, 241/2008 and 271/2008.

protection by the courts, the Court has separated the procedure into an early administrative phase, in which private interests which are affected can be protected, and a second phase, of approval of the law. In a case of regional planning approved by law, the Court held that the requirements of participation and the protection of individual parties directly affected by the provisions were already adequately safeguarded by the administrative procedure (which precedes approval by law) and by the fact that this results in decisions which could be challenged.[92].

So far as concerns the issue of this reserve of administration *vis-à-vis* jurisdictional power, it is thought that there is an ambit of administrative action which is non subject to the scrutiny of both the ordinary and the administrative courts. This consists in the so-called 'administrative merits', that is that part of administrative activity which is not covered by law nor even by the criteria of reasonableness, proportionality and congruence with the facts, which produce *eccesso di potere*[93]. In the context of the various solutions which are compatible with these parameters, it is for the administration to decide the best option. This option is beyond judicial control, as the courts are not permitted to substitute for the administrative function As we shall see, the exceptions to this are the rare cases where the administrative courts are also permitted to review the merits of the administrative choices made.

bb. Governance by budget

Parliamentary control over revenue and expenditure is guaranteed by the relevant reservation of law and by the fact that Parliament has the task of approving the accounts and expenditure presented by the Government (art. 81(1) Cost.). However, since revenue and spending cannot be governed by the budget act (*legge di bilancio* art. 81, co. 3), the budget must be limited to reflecting what has already been decided under the laws which provide for it. The rigidity of this framework, which was set to severely restrict the role

[92]Constitutional Court 225/1999 and 226/1999.
[93]See. supra sub par. bb.

of the government, has been bypassed over the course of time by a range of reforms, taking place at approximately ten-yearly intervals since 1978[94].

The system deriving from these reforms is somewhat complex, it demands a high degree of cooperation between Government and Parliament and may be summarised as follows. Each year, by 30 June, the Government presents a budget to Parliament, containing its economic and financial proposals which, on the basis of four-year economic projections, set out the legislation required to achieve those objectives. In approving it Parliament, in its legislative function, is bound to respect the aims set out in the finance bill.

The legislative acts as such governing public spending consist in the annual accounting budget and the finance bill. These are presented to Parliament by the Government by 30 September each year and are approved by Parliament under special rules which, among other things, exclude legislative procedures which differ from the usual process of parliamentary debate.

So far as the budget is concerned, besides the power of presenting it being reserved to the Government, Parliamentary power is limited to making possible amendments. Owing to binding aspects of a constitutional nature, the Chamber of Deputies can only amend by altering the distribution of funding among the various destinations (for example, they can vote for more funding to one Ministry at the expense of another) but they cannot change the substance of the revenues nor the total expenditure, which remains as proposed by the Government. For these reasons, there has been debate among Italian legal scholars, particularly in the past, as to whether the finance acts are only law in a purely formal sense, and not in a substantive one, given that Parliament does not make any new decisions with regard to such acts, but is confined to taking account of choices already made under other legislative acts.

The finance act introduced under the 1978 reform (which also lays down provisions "linked" to the financial act, setting out the measures necessary for its implementation) is aimed at making decisions about public finance more flexible and, in particular, to

[94] The reference is to Acts 468/1978, 361/1988 and 208/1999.

allow Parliament, when approving the budgetary measures, to table amendments to the current public spending proposals which no longer appear to be consistent with Government guidelines and which would not be possible to amend through the finance act, owing to the constitutional prohibition, referred to above. The draft reform of the accounting system currently before Parliament provides, in the context of a generalised simplification of the instruments comprising the budget procedure, for the replacement of the finance act by a "stability act" (*legge di stabilità*) covering three years, more flexible and restricted in its application in order to improve expenditure planning.[95]

The fact remains that, once the acts approving the budget and financial measures have been passed and the accounting session concluded, there are no further limitations on Parliament's own legislative choices regarding financial policy, theoretically even going beyond the Government's proposals, the only constraint being an indication as to how they would be financed (art. 81(4) of the Constitution: "any other law involving new or increased expenditure must specify the means available to meet it")

This description would not be realistic if no account were taken of the need to respect Community commitments under the Stability and Growth Pact, which considerably reduces the room for manoeuvre in drawing up the budget. Relations with the guardian of the Pact, the Commission, are maintained by the Government, in particular by the Ministry responsible for finance and the economy, a factor which further reduces the margins for intervention by Parliament.

Parliament does not exercise specific control over expenditure, a function which is left to the administration. Provision is made for it by the administrative authorities according to a complex procedure which does not leave space for Parliamentary action. Monitoring the State's budgetary management (and likewise regional and local management) is the responsibility of the Courts of Accounts (*Corte dei conti*), whose competence also includes, besides supervising public spending, various powers of economic/financial control over both

[95] Draft reform bill presented to the Senate on 27 May 2009, *Atti del Senato* 1397-A.

State administration and that of certain public bodies. The Constitution makes provision for a Court of Accounts as an auxiliary organ of Parliament and the Government, and its state of autonomy and independence in relation to both is guaranteed (art.100). The Court reports the results of its findings directly to the Chamber of Deputies.

cc. Further possibilities of parliamentary influence

The principle of legality and the necessary legislative basis for administrative power create a direct and comprehensive link between the power of the legislature and the power of the executive. However, Parliament has other mechanisms at its disposal to bring influence to bear upon the administration.

The first and structurally most important relates to the fiduciary relationship between Parliament and Government, into whose framework the Constitution places the public administration. The main plank of this relationship, which joins Parliament, Government and the public administration, is ministerial responsibility. Each minister (as head of one branch of the public administration and also a member of the government) is collectively responsible for the acts of the Council of Ministers and individually for the acts of his ministry (art. 95 Constitution). However, this in fact operates as a rather weak control mechanism by Parliament over the administration, all the more so since the system of opposing political coalitions started to emerge in Italy in the last decade of the 20th Century, based on an electoral system which tended towards majorities; this has brought about a reversal of roles, such that it seems to be the Government rather than Parliament which leads the way. The vote of no confidence, or parliamentary censure motion against the Government, has a political significance more than anything else, and it is difficult to imagine putting it to use in an administrative context.

In the context of outlining the weaknesses of the system, it is appropriate to mention the so-called "individual censure motion" which came into use in the 1990s, and subsequently adopted as part of the regulations. This mechanism, in one single case, has resulted

in the resignation of one minister, but in fact it appears to suffer the same limitations as the collective no-confidence motions do with regard to the Government, so far as its usefulness as an instrument for parliamentary control over the administration is concerned. In its turn, the role played by ministerial responsibility is of lesser importance in the context of political scrutiny by Parliament. Thus parliamentary questions and points of order are addressed to the relevant Minister, frequently including, in fact, questions raised by the members of Parliament relating to minor administrative issues. To these may be added fact-finding hearings and inquiries which are available to Parliament relating to the functions of the administration.

Parliament further exercises direct control for purposes of information over the administration, on the basis of the duty imposed on the latter by law to provide information. There are a considerable number of laws, around one hundred, which lay down that administrative authorities (ministries, their divisions, public bodies, and so on) periodically give account (on an annual or monthly basis, sometimes more frequently) of the activity carried out by them, or sometimes even of that planned for the future. However, this is a power of small practical importance, given the scant attention generally paid to reports by Parliament.

Two organisational phenomena, features of the evolution of the Italian administration model, have also had a marked effect on the relationship between Parliament and the administration over the last years of the 20th Century, namely the formal division of responsibilities between politics and administrative authority, with the consequent assignment of functions which are within the competence of the civil service, and the spread of independent authorities, that is, administrative bodies which are not subject to the Government interference.

The strengthening of management and the enhancement of their own functions, not subject from political influence and to be exercised independently from government policy clearly alters the traditional Parliament-Government-administration nexus, in which the administration, incorporated within the Government, was the endpoint of the uniform chain of the majority's political policy. The

reformulation of the relationship between executives and ministers (and thus to some extent between the administration and the Government) also inexorably brings about the slackening of the bond between the administration (here to be distinguished from the Government) and Parliament, which is not compensated for by Parliament's normal powers of enquiry and fact-finding, nor by the duty imposed on the Government to communicate the conferral of the most important management responsibilities to Parliament (art. 9, par. 9, legislative decree165/200).

So far as the relationship between Parliament and independent authorities is concerned, there are two distinct aspects to consider, beside the legislative choice opted for when establishing them and their actual make-up, obviously. On the one hand, Parliament often possesses the power of appointment to the authorities, or in any case participates in the nomination process. In some cases, this power belongs to the assembly (this is for instance the case of the Authority responsible for privacy), and in others to the Speakers of the two Chambers; in other cases again, the task of expressing their own advice on the Government's proposal – sometimes by qualified majority - belongs to the relevant Parliamentary Committees, which is then passed on to the President of the Republic for the nomination (this applies in the case of the Authorities for telecommunications, electricity and gas). On the other hand, the rules governing the authorities, although they are not subject to Government control, normally provide that they must report to Parliament on the activities undertaken, or they have power of reference, recommendation or making proposals to the Chambers.

3.2. Other instruments

aa. Transparency and access to information

The notion of access to information, in the sense of a principle which is a natural part of the sphere of action of public power, has had a slow start in Italy in the context of the administration. It was only over the course of the 1980s [96] and later, more extensively in the

[96] Art. 25 Act 816/1985.

1990s[97], that the principle of access to information in administration was laid down, in contradistinction to the previous regimen of secrecy, in laws which had first of all set up specific institutions to implement it and then recognised the existence of citizens' rights of information about the workings of the administration, to be preceded by communication on an institutionalised basis [98]. The Constitutional Court has identified a constitutional basis for the principle of access to information, recognising it as being a principle which is part of the common constitutional heritage of European countries, even though it is not spelt out in the national constitution [99].

Despite all this, general legislation on transparency comparable to the US *Freedom of Information Act* is still lacking in the Italian system, and the set of laws which should implement the general criterion of access to information have to be sought across a range of institutions, whose disciplinary regimes are governed by measures scattered over various pieces of legislation, including for specific sectors, which are more often laid down in order to achieve specific objectives than for the purposes of direct visibility of administrative action.

Some of the institutions have already been mentioned in relation to administrative procedure, such as Act 241 of 1990, in particular. This concerns first and foremost the right of access, but also includes the duty to give reasons, the communication of the initiation of procedures, participation of private parties in public conferences and the nomination of a person responsible for the procedure. While it is true that these aspects contribute to making administrative action more accessible and transparent, their application is confined to the holders of tangible individual rights in the procedure or process and their function is largely to protect these rights effectively, whereas there is no such provision that anyone may discover how the government operates or who can have access to administrative documents without any pretext.

[97] Act142/1990 and later Act 241 del 1990.
[98] Act 150 of 2000.
[99] Constitutional Court 104/2006, which sets the requirement for communication from the initiation of the procedure.

It is only in certain sectors that information in the possession of the public administration is freely available to everyone, and not limited solely to stakeholders with identified, differentiated positions. This concerns environmental matters, in relation to which any individual citizen can make enquiries in public offices, for information they have relating to the state of the environment[100]. Data gathered and analysed in the context of national statistics is likewise available on request for study or research purposes, since the law expressly defines this information as being in the public domain [101].

Laws requiring the publication of certain acts, such as accounts, which the regions, the provinces, the larger municipalities and other public bodies must publish in newspapers in summarised form[102], merely have the aim of making administrative action visible and transparent, and to account to the general public as to how public resources have been spent [103].

A law passed in 2000 provides for the establishment of public relations offices (URP in Italian), in various administrative bodies, together with the setting-up of institutional communications programmes, which may also publicise their activity through advertising and other means of communication, such as meetings, exhibitions and conferences; this is in order to support the principles of transparency and efficiency of administrative action, taken together with the regimen governing informative action and communication by public administrative bodies [104]. The URP are charged with the task not only of rendering the activity of the public administration visible, but also guaranteeing participation and access for citizens, in order to involve them in administrative procedures.

Upgrading of digital technology is aimed at achieving transparency, accessibility and the circulation of information held by the administration. Administrative bodies are therefore under an obligation to adopt information technology so that enterprises and the private parties can communicate with public offices through these

[100] Act 349/1986.
[101] Act 322/1989
[102] Act 67/1987.
[103] Art. 53, par. 14, legislative decree 165/2001; Act. 244/2007, arts. 3, par.18, and 54.
[104] Act. 150/2000.

means, and more generally to facilitate access to data and information held by them, besides organising their own activity more efficiently and communicating more readily with other administrative centres [105].

bb. Participation and self-administration

Until a short time ago, the notion of consultation exercises was unknown to Italian legal order, in the sense of participation by interested parties in the process leading to the formation of new regulatory acts. Only recently, also influenced to some extent by cross-border binding commitments, consultation processes began to take place at domestic level, with the aim of bringing the new rules nearer and possibly with consensus, to those affected by them.

The so-called "simplification acts" (*leggi di semplificazione*) offered the opportunity for some early attempts in regulating this phenomenon, namely those legal acts which annually introduce measures simplifying the administrative system. In implementing the simplification act for 2003[106], a consultation procedure was put in place on an experimental basis, involving parties interested in specific Government legislation, by publishing certain draft decrees on the Government's website. The interested parties can transmit their views on them to the Government, in electronic form. The 2005 simplification act too, concerned with an analysis of the impact of the regulation, provides for and reinforces the use of consultation of interested parties[107]. Consultation procedures are provided for more systematically in the formative process leading to the production of regulations by independent administrative authorities[108]. In some cases, this is established by law; in others, it is a case of normal practice. It is provided for by law in the procedures regulating the activity of authorities governing broadcasting services (AEEG e AGCOM). In relation to the protection of savings, too, the law

[105] Legislative decree 82/2005
[106] Act 229/2003.
[107] Act 246/2005.
[108] P. Fava, *Promozione della concorrenza attraverso la regolazione delle Autorità dei servizi a rete (l'AEEG)*, in AA.VV. (ed.), *La concorrenza* (2005).

provides that the relevant regulatory authorities (CONSOB, Banca d'Italia, ISVAP and UIC) carry out economic analyses and consultation of interested parties[109] .

Consultation procedures involving citizens in the regulatory process are increasingly seen at regional level, too, both on the basis of specific provisions and spontaneously, as normal practice, with no legal obligation, based on an evaluation of their expediency[110]. At regional level in particular, measures aimed at encouraging participation in general regulatory decision-making procedures are contained in new regional statutes [111] and in the laws which implement them [112] . The Constitutional Court has upheld the provision in the Statute for Region Emilia Romagna for a consultation procedure in the formative process for legal acts, reasoning, in the absence of a general regimen for consultation, on Community law principles on the subject and on the basis of comparative law studies on the consultation process in other legal systems[113].

In general, however, it must be recognised that participation processes, open to all, continue to be the exception in Italy and that the practice indicated appears to be quite heterogeneous, both with respect to the cases where they apply and to the consultation methods used.

Finally, in dealing with democratic status, as regards the administration, the principle of subsidiarity should not be overlooked, here in the horizontal sense, that is, in the relationship

[109] Act 262/2005.

[110] Camera dei Deputati, *Rapporto sullo stato della legislazione 2004-2005 tra Stato, Regioni e Unione Europea (Osservatorio sulla legislazione)*, 11 July 2005, 117-133.

[111] The new "second generation" Statutes, innovative in comparison to the past, contain many provisions on the subject of consultation of interested parties (Statute of Piedmont arts.– 2, 12, 72 e 86; Statute of Calabria art. 4, par. 2;; Statute of Tuscany arts. 19, par. 3, 72 and 73; Statute of Umbria arts. 20 and 21) including, more generally, in the area of the quality of regulation, even introducing, in certain cases, the duty to set out the reasoning underpinning the regional acts (arts. 17 and 19 Statute of Emilia-Romagna, art. 39 Statute of Tuscany) and the economic analysis of the regulation (Tuscany 45 St.; Marche 34 St. and Umbria 61 St.).

[112]The Tuscany regional Act 69/2007 and the Lombardy act 15/2008 govern participation by stakeholders in common and individual interests in processes aimed at developing general regional policy or in specific sectors.

[113] Constitutional Court 379/2004.

between public power and organisations in society. The Constitution in fact provides, alongside the principle of vertical subsidiarity, the criterion for function distribution between various levels of government, that the public administration should "promote the autonomous initiative of citizens, both as individuals and as members of associations, relating to activities of general interest" (art. 118 (4)). The measure aims at transforming citizens, from simply being the objects of administrative action into active subjects, promoting activity to the benefit of society as a whole. It falls to the administration not to treat them merely as persons who are administered and to facilitate them in taking up activity which is in the general interest, either as individuals or as spontaneously organised groups in society[114].

4. The legal protection against administration

a. Institutions of administrative justice

In 1865, on the eve of Italian unification, the Italian Parliament abolished the system of special courts for administrative disputes then in force in the Kingdom of Sardinia and opted for the unified court system:[115] ordinary courts were to concern themselves with the protection of "civil and political rights" of private parties in relation to the administration. For these purposes they were given powers to deal "incidentally" with administrative acts and to disregard (technically 'disapply') them if they were unlawful. To disregard an act means, in practical terms, to exclude it from consideration.

However, right from the beginning, the ordinary courts demonstrated their marked unwillingness to treat as true "rights" the positions of private parties in relation to administrative power, and consequently to take on the task of protecting them. Not only did they refuse to consider the expectation of a favourable decision by the administrative authority as a right (such as the concession of a benefit or an authorisation, for example) but in relation to real individual rights (such as rights of property) they also adhered to the theory of

[114] G. Arena, *Cittadini attivi*, Bari, Laterza, 2006

[115] Act 2248/1865 on administrative disputes.

so-called 'downgrading" ("*degradazione*"). On this basis, the right affected by the exercise of administrative power ceased to be a right as such and turned into a mere interest. The ordinary courts had no competence regarding legitimate expectations, nor over 'downgraded' rights.

The necessity to provide protection regarding competence in relation to these lesser positions too, known at the early stage simply as interests and subsequently as "legitimate interests" (*interesse legittimo*) , which, in the absence of a special court, remained for all purposes under the supervision of the administration, led the legislators in 1889 to confer upon the extant Council of State the function of the court of legitimate interests. To this end, the Council of State, IV Session, was established, with powers to quash administrative decisions, unlawful on the basis of lack of competence, violations of law and excess of power (*eccesso di potere*)[116]. The Council of State, which until then had operated in three Sessions, as a consultative body for issues relating to administrative disputes, thus became an administrative court. Two other Sessions, the IV and V, were subsequently created, and in 1971, in late implementation of constitutional provisions for decentralised administrative courts (art. 103, par. 1, of the Constitution), the Regional Administrative Courts were established (known by the acronym TAR, *Tribunali amministrativi regionali*, in Italian)[117]. This is the origin of the dualism of jurisdiction in Italy and of the special criterion for the division between ordinary courts, with jurisdiction over the protection of rights, and administrative courts, responsible for the protection of those positions which ordinary courts in the 19th century did not consider as having the status of true rights.

The system of administrative jurisdiction in Italy therefore consists of the TAR, which act as courts of first instance and sit in each regional capital (with separate sessions in the bigger regions) and the Council of State, with competence as a court of appeal from decisions of the TAR. Council of State judgments may be reviewed by the United Sessions (*Sezioni Unite*) of the Italian ordinary Supreme

[116] Art. 29 unified text of the rules regulating the Council of State.
[117] Act 1034/1971 on administrative judicial review in first instance.

Court (*Corte di Cassazione*), for certain specific points of law, of which the most important by far concern errors of jurisdiction.

On the basis of the criterion mentioned in the previous paragraph, the Italian administrative courts are not in fact the exclusive courts for administrative matters. The 1865 law is still in force, and the ordinary courts maintain their ancient jurisdiction over rights in relation to administrative authority. The highest of the ordinary courts, namely the *Corte di Cassazione*, resolves cases involving a conflict between the two jurisdictions.

Today, protection regarding jurisdiction in administrative matters in Italy is therefore still divided between two separate jurisdictional divisions, ordinary courts and administrative courts. The criterion for the division is based on the individual claim being made by the interested party: to protect a legitimate interest, the action is brought in the administrative court; for an individual right, it is heard before the ordinary court.[118] This may appear to be a heavy-handed mechanism but, in fact, after more than a century of experience, the two distinct ambits have achieved quite clear lines of demarcation. Issues of identifying jurisdiction seldom arise, and only then in relation to novel or borderline issues.

To this should be added that in certain sectors, where the distinction between rights and interests appears more complex, the legislators have opted to assign the whole subject-matter to the administrative courts, which thus become courts of rights as well. Until it was privatized in 1993 this was the case regarding employment in the public sector, and this has applied since 1998 for issues relating to public utilities, the assignment of public works, public supply contracts and public service contracts, planning and the building sector.[119]

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[118] A general overview on the situation and the problems of the administrative justice in Italy is offered by G. Falcon, *Judicial Review of Administrative Action in Italy*, in L. Vandelli (ed.), *The Administrative Reforms in Italy: Experience and Perspectives* (2000), and by F. G. Scoca, *Administrative Justice in Italy: Origins and Developments*, 1 It. J. Publ. L 118 (2009).

[119] Legislative decree 80/1998, later amended by act no. 205/2000 approving the reform of administrative judicial review.

Since 2000 the administrative courts have also had to decide on compensation for loss arising out of damage to legitimate interests. Once the *Corte di Cassazione* had established that damages arising from unlawful provisions should also be compensated [120], administrative courts were given jurisdiction over compensation claims for loss occurring as a result of unlawful administrative acts. Putting all matters before the administrative court avoids the private individual having the burden of starting two sets of proceedings before two different courts. However, the problem of the so-called *pregiudiziale amministrativa* (prior annulment of the relevant decision) has not been resolved, which arose following the judgment in case no. 500/1999. The issue is whether or not the decision relating to compensation for the loss presupposes that the decision giving rise to the damage has been quashed, prior to the question of compensation being decided. Whereas the ordinary courts tend to a position of reciprocal autonomy of the actions for compensation and for annulling the decision, with the effect that compensation can be claimed directly from the ordinary court, with no need for the prior annulment of the decision, the administrative courts, which since 2000 have been the courts for deciding the liability of administrative authorities for unlawful administrative acts, seem inclined in the opposite direction, albeit with a degree of uncertainty[121].

The extension of the administrative courts' exclusive jurisdiction – with the conferring of new subject areas – and the assignment to them of general competence regarding compensation for consequential loss, have posed new questions of demarcation between the two jurisdictions, problems which therefore have not been completely eliminated.[122]

In general, however, it is clear that, even leaving aside the areas of exclusive jurisdiction, the cases which fall within the jurisdiction of administrative courts are more numerous by far than those involving the ordinary courts. Whenever a private party's position is pitted against a power exercised by an administrative

[120] *Corte di Cassazione*, United Sections 500/1999.
[121] Art. 7 Act 205/2000
[122] Constitutional court, 204/2004, 191/2006, 259/2009 e 35/2010.

authority, this tends to take the form of a legitimate interest and therefore comes under the administrative courts' jurisdiction.

Furthermore, the results achieved in the area of judicial protection with regard to administrative authority and in particular the considerable effectiveness and wide-ranging nature of appeals for judicial review of administrative action are primarily the results of the work of the administrative courts. They have developed the criteria for judicial review of the administrative exercise of discretion, and have modelled the administrative process in order to provide fuller legal protection for the positions of private individuals. The administrative courts reach decisions in the context of a specific process, namely the administrative process, which untill 2010 was regulated in a fairly approximate way, with few legal rules.[123]. Administrative jurisprudence had filled this gap brilliantly, whether by applying civil procedure rules as far as possible, or finding original solutions which are the product of their creative law-making. Many of these solutions had in fact been codified by the legislators and incorporated into the administrative procedure reform of 2000[124]. In 2009, Parliament delegated to the Government the task of producing legislation reorganizing the process of administrative judicial review, aimed at ensuring a speedy and concentrated procedure, in order to guarantee effective protection for private parties. The new "Code of the administrative process" entered into force in September 2010.[125]

Despite the introduction by the new Code of general remedies of declaration and injunction, the classic remedy in the administrative process remains the quashing order. Quashing the decision usually results in complete satisfaction of the private party's claim, when the act which is challenged restricts the latter's legal sphere. It is less adapted to satisfying the substantive interest of someone challenging the denial of a decision in their favour. Quashing the decision in such a case does not produce the concrete benefit which the private party is hoping for, but merely opens the way for a new administrative

[123] Royal decree 1054/1924 and Act 1034/1971
[124] Act. 205/2000.
[125] Legislative decree 204/2010.

decision, which, in making fresh provision, has no other limitation on it than the legitimacy of the renewed exercise of its power.

Missing from the Italian administrative process are mandatory orders similar to the German *Verpflichtungsklage*, aimed at asking the court to declare whether or not the claimant's grounds are founded and to make an order that the administration should consequently take a particular decision. Even when the decision requested is refused, therefore, the interested party under the current Italian system can only ask for an order quashing the refusal. The only case in which, as the law provides, "the administrative court may examine weather the application to the administration is properly founded" is silence on the part of the administration[126]. A claim against silence, introduced in 2000 and actionable under a special procedure[127], is aimed at ensuring that the court is not limited to declaring the failure to decide on the part of the administration, but may examine the grounds of the claimants application directly and give judgment, indicating the way in which the administration must subsequently decide. Naturally the court, in deciding the lawfulness of the matter, can only evaluate the basis of the claim to the extent that the exercise of administrative power is covered by the law, and it may not, on the other hand, substitute itself for the administrative authority in the exercise of its discretionary power.

Remedies which differ from the quashing order, and in particular, actions for a declaration or an injunction against administrative authorities, enter into the judicial review process whenever the administrative court is also a court of rights, and therefore when it has jurisdiction over compensation for loss arising out of the infringement of a legitimate interest, or, more generally, when it has exclusive jurisdiction.

Italian judicial review is characterized by a process aimed at safeguarding the individual against public power, typical of many other legal systems. Its features are: a particular locus standi, based on an individual position, in this case a legitimate interest, which differs from and is potentially wider than the right protected by the

[126] Art. 2 (5) Act 241/1990)
[127] Art. 21 *bis* Act 205/2000.

ordinary jurisdiction; the short time-limit, sixty days, in which to ask for the decision to be quashed; the continuing central importance of the decision and its review, rather then other evaluation criteria; certain limits on the courts powers of investigation and judicial action, in the sense for instance that the court must refrain in the face of choices on the merits made by the administration and certain conditions relating to the enforcement of judgment.

The reform of the judicial review process which took place in 2000 redesigned the system of *interim* relief, in line with case-law principles and Community legislation. It established that courts could take the most effective interim measures with no limitation as to type[128]. In fact, for some time the courts had been developing some forms of interlocutory relief differing from the suspension of the challenged act, which had been the only one available under the previous legislation. Immediacy of the provisional protection is assured, by the fact that the judge hearing the case must rule at the first available hearing and also by the possibility that provisional measures can be ordered by the President even at an *ex parte* application (*inaudita altera parte*) which are valid until the ruling is given by the full court. The Constitutional Court did not consider the absence of *interim* remedies *ante causam* as being of importance, holding that the protection afforded by the new law was able to satisfy constitutional parameters[129]. Legislators have introduced legal protection *ante causam* in disputes concerning public contracts [130], in order to fulfil the requirement which the Court of Justice has held to be applicable under the relevant Community legislation[131].

A special remedy for enforcing the judgment of the administrative court is the so-called *giudizio di ottemperanza* (judgment for compliance), which permits the execution of judgment under the control of the same judge who granted the relief [132]. Originally conceived to ensure the enforcement of a judgement of an ordinary court against an administrative authority, the remedy allows recourse

[128] Art. 21 (8), Act 1034/1971.
[129]Constitutional Court 179/2002.
[130] Art. 245 (3), legislative decree 163/2006, contracts code.
[131] CGCE 29 April 2004 in case C-202/03 *Dac spa*.
[132] Art. 27, no. 4, royal decree 1054/1924.

to the court in order to determine whether compliance with a ruling has been incorrect or omitted, and to enforce it. The Council of State has extended the use of this remedy without a specific provision of law to include even its own decisions[133] so that the administrative court itself has become the watchdog for the effectiveness of its own decisions. If the administration does not comply, the court considers the merits of the claim too, or the omission by the administration and can nominate a person responsible, the so-called "commissioner *ad acta*", who takes the place of the administration and makes provisions on its behalf, in conformity with the court's ruling.

With respect to the compliance process, complaint can be made that the administrative authority has infringed or avoided the final judgment. To this end, judgment is extended to include, in addition to the order quashing the act, the reasons which underpin this result, namely the legal framework outlined by the court which will form the basis for the future conduct of the administration. From this perspective, as we shall see more clearly later, the remedy of compliance reinforced the order for annulment, going beyond its merely quashing effects, conferring a declaratory value upon it, which to a certain extent also affects the nature of an administrative judgment, giving it weight more in terms of individual protection than a merely objective review.

The operational ambit of the ordinary courts is rather restricted. It may be that the court, during the course of a dispute between private parties, is called upon incidentally to examine an administrative act – for example, a piece of planning legislation in a property dispute between neighbours – which is relevant to resolving the case. However, this is an uncommon occurrence. In disputes between private parties and the administration, the action which ordinary courts can take is limited, in principle, to those cases in which it is not the exercise of public power which has harmed the legal sphere of the private party . Otherwise, indeed, the right downgrades to a legitimate interest, and comes within the jurisdiction of the administrative courts.

[133] Council of State, Sez. IV, 241/1928.

The ordinary courts have attempted, in various ways, to regain ground for their own jurisdiction. The *Corte di Cassazione*, which is the arbiter of jurisdiction, has developed the notion of "lack of power" (*carenza di potere*) to illustrate the case in which the administrative authority, albeit acting as if it were exercising a power, in point of fact does not possess such a power. This would prevent the downgrading of the affected rights, which consequently would continue to be protected by the ordinary courts. It has then gone on to interpret the notion extensively, holding that there is a lack of power even when the administrative provision is so seriously defective as to result in nullity or not to exist at all, or even when the administrative power, although it exists in the abstract, in actual fact has not been exercised within the temporal and territorial constraints which the law concedes to the administrative authority. As an example, when an administrative authority makes provisions referring to a territorial context beyond its sphere of influence or outside the time-limits imposed by law. Furthermore, the ordinary courts have created categories of individual rights which cannot be downgraded (such as health and the environment) which, therefore, are not subject, as an effect of the provision, to being transformed into interests. The 2000 reform of the judicial review process codified the cases of nullity of decisions, which, since they do not give rise to void decisions or downgrading effects, normally come under the jurisdiction of the ordinary courts[134].

However, generally speaking, the kinds of disputes which typically occupy the ordinary courts are those dealing with events which have not involved an exercise of power. All cases concerning non-contractual liability for damage caused by conduct, such as loss arising from an accident involving a public vehicle, failure to maintain a road, or the wrongful occupation of private property.

Following the legislative reforms at the turn of this century, the Italian justice system seemed to on the way to overcoming the duality of jurisdiction in disputes involving the public administration. The instrument responsible for this transformation

[134] Art. 21 *septies* APA 241/1990. An exception is nullity for infringement and avoidance of final judgements; in such cases, jurisdiction remains in the administrative courts.

was the upgrading of the institution of exclusive jurisdiction by legislators, noted above, namely conferring full jurisdiction on the administrative courts over wide, new legal areas. However, the Constitutional Court has slowed down the process, and has intervened by laying down specifications regarding the constitutional room for manoeuvre available to the legislators and ruling as unconstitutional the broad devolution in the fields of public services, town planning and construction.

According to the Constitutional Court, under art. 103 of the Constitution, legislators may only assign "special maters" exclusively to administrative courts, and only on condition that in relation to these "the administration acts as an authority against which protection is available to the citizen with regard to the public authority"[135]. That is, administrative jurisdiction must nevertheless remain one which "also", rather than "exclusively", covers individual rights. However, the administrative courts' new area of jurisdiction regarding compensation for loss arising from unlawful decisions remains intact, since in this case it is not a "special matter", in the constitutional sense, but merely a different technique for protecting legitimate interests.

Therefore, aside from the matters left to the exclusive jurisdiction of the administrative courts – which should be treated as exceptions to the normal rule governing the division between ordinary and administrative courts, it falls to the ordinary courts to safeguard the individual rights of private parties in relation to the public administration. In such cases, the process is conducted according to the rules of civil procedure, and, in principle, the protection afforded to the rights (where they are and remain as such) is not subject to any limitation by reason of the fact that the damage was been caused by the administration. Therefore in such cases the court can also give different types of rulings, which include orders for quashing, declaration and injunction). If, in order to achieve this, it is necessary to deal with an administrative act, then the court can do this. It can decide questions of its lawfulness - that is, immunity from the defects of lack of competence, infringement of the law or

[135] Constitutional Court, 204/2004.

excess of power – and, where such defects are found, it can disapply the act. What it cannot do is quash it. The court will rule upon the dispute, disregarding the decision; this will remain effective, however, until the administrative authority itself resolves to quash it.

b. Forms and intensity of judicial review

Protecting individuals in the face of administrative power thus remains principally, although not exclusively, in the hands of the administrative courts, which are entrusted with the task of ascertaining that it has been correctly exercised. With regard to the comments which now follow, the explanation refers to their jurisdiction and the specific process, the judicial review process, in which it occurs. In Italy, as already noted, the ordinary courts may find themselves, in their turn, incidentally performing an evaluation the lawfulness of an administrative act. The cases where this occurs are, however, rather rare. Moreover – and perhaps for this very reason – their approach to issues involving the exercise of power demonstrates their lack of familiarity with the techniques which are appropriate for this type of review and consequently a certain amount of restraint: the same kind of inhibition which has impeded the achievement of the original scheme of a unique jurisdiction from the beginning.

Administrative courts have not been so timid. The Council of State has shown great awareness of its own function of protecting private parties in the face of public power and it has not been backward in confronting the issue, even going beyond a simple evaluation of its conformity with the law. Its judgments have made a decisive contribution to shaping the administrative process, ensuring an evolution in the direction of providing guarantees, and it has developed more effective forms of review in relation to administrative discretion and techniques for safeguarding interests brought before court, increasingly oriented to the concrete practical satisfaction of the claimant[136].

[136] The most important decisions of the administrative courts are collected in G. Pasquini, A. Sandulli (ed.), *Le grandi decisioni del Consiglio di Stato* (1998).

By law, the courts' role in evaluating administrative acts is to consider their lawfulness and, in particular, the potential defects of lack of competence, infringement of the law and excess of power. This distinction is now conventional and there is a certain amount of overlap between the three aspects, even more marked since the law codified the rules of procedure and action, typically making such violation a case of infringement of the law, which case law had previously categorised as symptomatic of excess of power.

Given that the major part of administrative action is regulated by legislation, the formal comparison of legal rules and administrative acts allows the court to make an evaluation of the administrative action in terms of both procedural as well as substantive correctness. Beyond the legal provision, however, the defect of excess of power permits a full exploration of the correctness of both the formative procedural process underlying it the administrative decision, as well as the reasonableness and coherence of its contents. Thus the review looks at the steps taken in course of the administrative inquiry and completeness and correctness of the recognition of interests at stake, the effectiveness of participation by the private parties and a consideration of the position which it has set out in the procedure. In addition, with regard to the contents, whether the logical steps are consistent and the solution reached is reasonable.

The courts' action, in so far as it is established by law, in reviewing the lawfulness of administrative acts, tends to manifest itself as an objective protection, aimed, in principle at least, at safeguarding the lawfulness of the exercise of public powers. Furthermore, the typical outcome of the judicial hearing - an order for quashing - corresponds to this, in quashing the act and thereby offering protection to the private party.

Nevertheless, since its beginnings the *raison d'être* of Italy's administrative jurisdiction has always been, as we have noted, to protect the individual's legitimate interest. So that only someone who has an individual position of this type to defend may have recourse to the court, to ask for an order quashing the decision which is

prejudicial to him; class actions are not admissible, unless in exceptional cases; group interests may be brought without distinction, but only by organised bodies which have a particular interest in bringing them. Moreover, the whole judicial review process is guided by the adversarial principle and develops stage by stage on the basis of the initiatives taken by the interested parties.

If the functions of subjective protection of legitimate interests and objective protection of the lawfulness of the administration have therefore, since the founding of the system, come together in the administrative judicial review process; the balance between the two perspectives has tended, over the course of time, to show a clear emphasis on the function of subjective protection. The progress also made towards according declaratory weight to the judgments of the administrative courts is significant in this regard. The Council of State has long approved the interpretation by legal scholars that quashing orders, besides their natural effects of removing the decision, also have declaratory effects on the claimant's legal position, which bind the administration in the subsequent exercise of its power[137]. For this reason, after the quashing of the decision by the court, the administration does not have an entirely free hand in its provision-making, but must respect the legal framework laid down in the ruling.

The trend towards the gradual transformation of the process, from ruling on the act to ruling on the relationship, can be demonstrated by three phenomena characterising the developments taking place in Italian administrative law at the turn of the 21st century. Firstly, the extension of exclusive jurisdiction (that is, in relation to rights as well as to legitimate interests) to include new and important subject matter, has undoubtedly had an impact on the general nature of the administrative jurisdiction. Although as a rule its nature remains as the jurisdiction for the lawfulness of public action, the great extent and the importance of sectors such as public services, contracts, town planning and construction, which are the subject-matter of a very large number of the disputes with the administration, clearly tend to increase the power of the courts. These

[137] M. Nigro, *Giustizia amministrativa* (2002).

are steadily becoming accustomed to adopting a more attentive approach to the concrete relationship and concentrating to a lesser extent on the decision as such. The courts' own limits of judicial review have been superseded, without their acknowledged advantages being lost. To describe this, legal scholars refer to the "full jurisdiction" ("*giurisdizione piena*") of the administrative courts[138].

As noted, it is true that the Constitutional Court has, through various judgments, reduced the scale of the matters of exclusive jurisdiction, placing limits on devolution to the administrative courts. Nonetheless, the devolved area remaining within their competence is still extensive, including among other things the whole new jurisdiction over compensation for consequential loss which, besides making the legal protection obviously more effective, also contributes in its turn to guiding judicial action steadily towards the direct protection of the concrete positions of the interested parties.

Secondly, since the court must decide on compensation arising from the unlawful exercise of the administrative function, it cannot stop at merely determining the lawfulness or otherwise of the challenged decision, but must go on to examine the underlying "goods of life", with respect to which compensation is sought and must be quantified. This operation, while instrumental in ruling on liability, clearly makes its effects felt on the whole ambit of the case before the court which, in the last analysis, must consider the relationship under the court's scrutiny in a more direct way. Thus, for example, albeit in the absence of mandatory orders, the court which is required to adjudicate upon the lawfulness of the refusal of an authorisation and the damage suffered by the claimant as a result cannot, when evaluating the loss, stop at merely reviewing the lawfulness of the denial but, in order to determine compensation, must go on to establish whether or not the applicant had legitimate grounds to expect a favourable outcome. Thus scholars refer to the jurisdiction of "entitlement" (*spettanza*")[139].

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[138] A. Police, *Il ricorso di piena giurisdizione davanti al giudice amministrativo*, vol. I (2000) and vol. II (2001).

[139] G. Falcon, *Il giudice amministrativo tra giurisdizione di legittimità e giurisdizione di spettanza*, 1 Dir. Proc. Amm. 287 (2001).

The third important factor, noted above, is the provision, in the law reforming administrative procedure, for non-invalidating formal defects. In this case, too, the choice made to consider certain legal defects, which do not substantially influence the relationship with the administration, as irrelevant to the decision to quash the act, presupposes the idea that what matters to the private individual is not so much the formal correctness of the administrative decision, but the substance of the relationship with the administrative body concerned.

The exercise of discretion is not an area of administrative action which cannot be reviewed by the court. On the contrary, the Italian administrative courts have always reviewed the use of discretionary power. The notion of deviation of power already by implication supersedes the idea that the court cannot concern itself with the way in which the administration exercises its discretion. Then, judicial review has gradually been extended and has steadily increased its impact over the course of time. Without doubt, this is a form of control that is always applied externally, as it were, in the sense that the court cannot substitute for the administration in making the discretionary choice. But the review mechanisms developed by the Council of State, above all through the excess of power and the cases which are symptomatic of it, permit a thorough review of the correctness of the use made by the public authority of its power of choice. Thus the court examines the discretionary choice directly, considering its consistency, its correspondence with the facts and its reasonableness. Hence, if it finds substantial inconsistency, unreasonableness or that the choice has been based on an incorrect or untruthful representation of the facts, it will quash the decision.

Research into the issue of discretion by Italian legal scholars, and an analysis of its construction in terms of the comparative evaluation of interests according to the model already mentioned, have contributed to the extension of the objective ambit of judicial review. The court may in fact review in intimate details the completeness and congruity of the recognition of the interests by the administrative authority and hence the real choice of interests. What remains outside the scope of its inquiry are the merits of the

discretionary evaluation, namely the choice of the solution to be adopted between those available within the parameters of consistency, correspondence with the facts and reasonableness. Identifying the best option from amongst those which are possible in principle, remains a matter for the administrative authority.

The question of proportionality has already been considered and the fact that, to some extent, a review of proportionality had already been carried out by Italian courts before its imposition by Community law. In particularly sensitive areas, such as expropriation, or penalties, the combination of the criterion of reasonableness together with the correct recognition and comparative evaluation of the interests at stake, in fact permitted a very accurate analysis of discretionary choices and a comparison in practical terms of public advantage as against the prejudice caused to the private party. Let us not forget that, in its turn, the Community test of proportionality, while giving rise to a more effective review than arises from a general test of reasonableness, does not in any case bring about, at least in the Court of Justice's view, the substitution of appraisal by the competent body for the court, from which, in the evaluation of its expediency, it remains excluded[140].

Conversely, the issue of the degree of control over discretion has developed less rigorously than has the identification of the demarcation lines of what can be considered to be areas of discretion. As has already been noted, interpretations made in applying imprecise provisions or debateable technical rules have already been treated as discretionary evaluations for a long time, as the phenomenon, known in Italy by the formula "technical discretion" (*discrezionalità tecnica*), underlines. Towards the end of the 1990s, and encouraged in this by legal scholars as well[141], administrative courts have partly overcome their own self-restraint in this area, affirming the rule of the availability of review regarding technical evaluations, at least in terms of a review of their reliability[142].

[140]EC J, 18 January 2001, in case C- 361\98.
[141] D. de Pretis, *Valutazione amministrativa e discrezionalità tecnica* (1995).
[142] The landmark case is considered to be Cons. St., IV, n. 601/1999.

There are some exceptions. One concerns review of evaluations made by independent administrative authorities, over which the Council of State considers that in certain cases it can only exercise "weak" control. The justification for this is found, from the subjective viewpoint, in the particular technical classification of the authority and its special accountability deriving from specific expertise and independence. From the objective viewpoint, in the uncertainty of results from the applied sciences (especially economics) and in the very complexity of their application. In the weak review which courts can undertake, while they can verify the factual assumptions underlying the authorities' decisions directly, the review must however confine itself to criticism of the technical evaluations, through monitoring reasonableness, principle and technical consistency, from the standpoint of their reliability only [143]. This is the case, for example, of the application by the Competition Commission of legal concepts of economic importance such as "relevant market", "agreement restricting competition" and "dominant position". To conclude, what distinguishes "weak" control from "powerful" control over technical evaluations performed by the administration is not whether it is more (or less) complete – indeed, it has been appositely emphasised by the case-law on the topic, that the fact that the authority is placed outside the sphere of political control makes it all the more necessary that the court's review should be complete [144] - but only the result achieved, which in one case is to substitute, and in the other to quash. Other technical evaluations which are debatable but not discretionary, nor subject to full control by the courts, are those performed in the context of examinations and competitions, where the fact that they can not be repeated plays a decisive role.

c. Alternative remedies

There are some remedies under the Italian system, as alternatives to action in the courts, for protecting those who interests

[143] Council of State., Sez. VI, n. 5156/2002; 2199/2002.
[144] Council of State,, Sez. VI, n. 926/2004, 280/2005.

may have been prejudiced by a public administration[145]. They are mainly administrative means of recourse, from arbitration to the Ombudsman. These are of minor importance, given the traditional degree of diffidence about forms of protection which differ from the usual judicial channels. Only recently has the overloading of the administrative justice system, and the need to find a solution to the excessive length of trials, encouraged an increase in alternative remedies, both through the reinforcement of existing institutions and, especially, administrative routes for review, as well as the introduction into the Italian system of new forms of dispute resolution, brought in from other legal cultures and from the common law systems in particular.[146]

The recourse to administrative procedures for review is a very old legal remedy, which constitutes what is known as the "judicial function" ("funzione giustiziale") of the public administration[147]. It involves a direct appeal to an administrative authority to seek protection through the quashing or reformulation of an administrative decision. The special feature of administrative action in this case lies in the fact that in deciding the issue, the authority does not pursue a particular, concrete public interest, but, as an institution, acts only in the interests of justice. There are three types of ordinary administrative recourse (hierarchical, quasi-hierarchical and in opposition) and a special recourse to the President of the Republic. The 'hierarchical' recourse lies to the authority in the hierarchy above the one which made the decision. The remedy is general in nature, but now is of little application because the organisational model of the hierarchy upon which it is based has practically disappeared. The quasi-hierarchical recourse lies to a body which is not above the deciding authority in the hierarchy and the recourse in opposition is laid against the same authority which made the challenged decision. However, neither of the latter two have

[145] M. Giovannini, *Amministrazioni pubbliche e risoluzione alternativa delle controversie* (2007).
[146] M.P. Chiti, *Le forme di risoluzione delle controversie con la pubblica amministrazione alternative alla giurisdizione*, 1 Riv. It. D. Pubbl. Com. 8 (2000).
[147] F. Benvenuti, *Funzione amministrativa, procedimento, processo*, 1 R. T. D. Pubbl. 139 (1952).

general characteristics, since they only apply to particular types of acts, expressly provided for by law. So far as the 'hierarchical' and quasi-hierarchical recourse are concerned, defects on the merits can also be put forward and their decisions can be reviewed by the courts.

The special recourse (*ricorso straordinario*) is decided by the relevant Minister for that area, in conformity with the required prepared advice of the Council of State. It is only possible to depart from the advice by a resolution of the Council of Ministers. In terms of form, the decision is framed as a decree made by the President of the Republic. The remedy lies for defective acts and only on grounds of unlawfulness. It is an alternative procedure to pursuing the case through the courts and the decree which decides the matter can only be challenged with respect to defects of form and *in procedendo*. This remedy, which many now consider superseded and whose constitutional basis has raised doubts in the past, still retains a certain practical importance, because of the long time-limit (120 days) within which it can be lodged, and consequently because it can be raised when the time-limit for judicial review has expired (appeal to be lodged within 60 days). As with other administrative remedies, it also has the economic advantage that it can be pursued without the assistance of a lawyer.

Arbitration is a general form of alternative dispute resolution which can also be used in dealings with the administration for questions relating to individual rights. For this reason it is mainly used in disputes concerning public tenders. The dispute is resolved by a panel of arbitrators nominated by the parties. Their decision can be appealed to an ordinary appellate court. The advantage of this procedure lies in its simplicity and speed.

Although strictly speaking the Ombudsman cannot be collocated in the system of alternative remedies, this office usually takes preventive action and occasionally also operates as a mean of alternative dispute resolution. Established in Italy by the 1990 reform of local government, the Ombudsman can be set up by municipalities or regions, with the function of making the relationship between individual citizens and the administrative authorities more flexible

and less formal, and of ensuring greater transparency of public action, creating points of contact and reciprocal clarification between the administration and private parties. Its powers are slight, however, and take the form of requests, letters, reminders and points of information transmitted to the administration. It is only in relation to access to documents that the Ombudsman has an effective power, namely reviewing refusals by the administration to deal with private parties' applications.

d. Impact of European principles on Italian justice system

The Italian constitutional provisions on legal protection from administrative action express the principles and values which resemble those contained in art. 13 of the European Convention of Human Rights (ECHR) and art. 47 of the Nice Charter: legal protection of rights and legitimate interests must be full and effective (art. 24 of the Constitution); it may not be excluded or limited to particular remedies or avoided by special acts (art. 113 of the Constitution); judicial independence is guaranteed (art. 101 (2) and art. 108 (2)of the Constitution). For this reason, the impact of the European principles on the Italian justice system did not affect its structure, which remains substantially unchanged, nor the fundamental nature of the protection provided, but, here too, only particular aspects regarding the detailed implementation of these principles. More precisely, it affected certain procedural mechanisms and some substantive types of protection offered by the courts. As already noted, the most important are the strengthening of the *interim* protection and more generally the adoption of instruments aimed at streamlining the protection for claims brought to court and making them more effective, the recognition of the right to compensation for loss arising from the wrongful exercise of power and the generalised control of proportionality of administrative discretion.

The fact that in Italy too, the same judge may be called upon to act simply as a national court and simultaneously as a judge dealing with European precepts, therefore applying procedural and substantive Community rules, has had the effect that the domestic legal system tends to systematically adopt European standards of

protection. This has sometimes come about through legislative choice, which has implemented the solution imposed by the Community system in a generalised way, and at others by the spontaneous application of a measure by the courts, which, once familiar with the instruments and techniques of review imposed in disputes under European law, have continued to make use of them, applying them to resolve questions of purely domestic law.

Moreover, in giving force of law to the European solutions – if necessary even generalising them, beyond the narrow scope prescribed by Community law – the Italian legislators do not refrain from preserving the special features of the legal system where necessary. So for example, the above-mentioned reform of the *interim* relief in administrative procedure in 2000, while observing Community principles, maintains the traditional framework of Italian provisional protection, which continues to evidence atypical features and generality.

A phenomenon which should be noted, in any case, is the ever-increasing sensitivity of national courts to seeing themselves as part of supranational legal systems, both the European Community and the European Convention of Human Rights. This receives important confirmation, in addition to the growing number of preliminary references to the Court of Justice, the ever-greater familiarity of the courts with principles and concepts deriving from the Community legal system, which are to be seen in the judgments and in the ever-more frequent references to the ECHR and citations from the case-law of the European Court of Human Rights (ECtHR). For some time now, the Italian Council of State has been reconstructing the relationship between national and Community law in terms of reciprocal integration and therefore considers that Community laws constitute a direct parameter for the lawfulness of national administrative acts, and demonstrates that for these purposes it believes that Community law is "part of" national law[148]. The Constitutional Court itself, which until recently tended to define the relationship between the systems in terms of separateness and

[148] Council of State, Sez. V, 35/2003.

autonomy, seems in its turn to have left this outlook behind[149], as shown by the well-known declarations, already referred to, on the constitutional value of the provisions of the ECHR, as interpreted by the ECtHR [150], and on its own accountability in making preliminary references on the compatibility of national legislation with Community law , when the former may be constitutionally doubtful.[151].

5. The concept of "good administration"

The concept of "good administration" in Italian administrative law includes the notion that the administrative act, besides being an instrument for the correct and faithful implementation of the law (the lawfulness of administrative action), which aims at pursuing the public interest according to criteria of efficacy, efficiency and economy (*buon andamento*), should be carried out in an objective and impartial way (*imparzialità*) in relation to the private parties involved. In this context, the canon of good administration and its "efficiency" in particular (art. 97 of the Constitution), demonstrates in principle an objective value, defending the effectiveness of administrative action, rather than the subjective one of providing guarantees or giving attention to the interests and positions of private parties which come into contact with the administration. In short, we are dealing here with the administration's duty to pursue the interests entrusted to its care, respecting certain rules of organisation and action, rather than with a true private right, to be obtained by observing those rules.

The principle of *buon andamento* has, according to some commentators, a broader scope than "good administration" and, according to others, a more limited one; this, under art. 41 of the Human Rights Charter, is a specific fundamental right of the individual. Broader, because it responds to the concern for an effective, permanent functioning of administrative activity in pursuit

[149] Constitutional Court 406/2005; 129/2006; 50/2007, on the duty of interpretation in conformity with the Community law
[150] Constitutional Court, 348/2008 and 349/2008.
[151] Constitutional Court, 103/2008.

of the public interest, a concern to which, understandably, the Human Rights Charter draws only incidental attention, to the extent that it affects the protection of the position of the individual. But it also has a more restricted content, because this latter, more as it were guarantee-oriented, perspective, which is only set alongside the national notion of good administration as an after-thought, still remains secondary in constitutional jurisprudence and in the manner in which it is treated by legal scholars who work in this field.[152]

Furthermore, a main objective perception of the requirement of good administration is confirmed by the emphasis of the organisational importance of the constitutional declaration. The constitutional provision (art. 97 of the Constitution: "Public offices are organized according to law in order to ensure good functioning and impartiality of administration") links the canons of *buon andamento* and impartiality to the "organisation" of public administration, rather then directly to its actions. This approach was then superseded by the strengthening of the link between activity and organisation. In effect organisation should precede and shape the activity and by the express recognition of a immediate value of the principles also at the level of action[153]. Nevertheless, even applied directly to administrative action, the canons of impartiality and *buon andamento* maintain their primary objective valency as criteria which are not strictly linked to any specific citizen's right.

The evolution of *buon andamento* towards the so-called "administration by result" is also significant in this regard, namely the type of administration whose hallmarks are the criteria of efficiency, effectiveness and economy, as functions of achieving the result[154]. And, regarding the impartiality of the administration, the undervaluing of the principle as the basis for recognising the general principle of due process The Constitutional Court favours placing due process, rather than under impartiality under (art. 97 of the Constitution), within the general principle of equality (and the

[152] F. Trimarchi Banfi, *Il diritto ad una buona amministrazione*, in M.P. Chiti, G. Greco (ed.), *Trattato di diritto amministrativo europeo* (2007).
[153] M. Nigro, *La funzione organizzatrice, cit*. at 24.
[154] C. Pinelli, *Responsabilità per risultati e controlli*, 1 Dir. Amm. 408 (1997).

prohibition on making unreasonable distinctions or unreasonably treating different situations as if they were equivalent) under art. 3 of the Constitution [155] .

The encouragement given by legal scholars, the approval of the general law on administrative procedure and its committed application by the administrative courts, have without doubt contributed, over the last decade of the 20th century, to guiding the notion of *buon andamento* along more subjective lines. The codifying of general institutions of participation and the expansion itself of the principle of due process – to which the Constitutional Court has finally given constitutional weight [156] - is changing the traditional perspective, which now progressively includes the guarantee of positions and the citizen's expectations which are closer and closer to those covered by the Human Rights Charter.

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