

# **REPORT FROM ITALY**

Presented by

GIOVANNI PALEOLOGO,  
Conseiller d'Etat

1. In Italy, an administrative case is a case conducted in front of an administrative Court.

Administrative Courts are the nineteen TAR, or Administrative Regional Tribunals, (a twentieth should be soon added) and the Council of State, the latter almost exclusively as a Court of appeal.

Apart from special fields, the administrative judges decide complaints concerning ill usage - or non usage - of statutory powers.

These powers are very frequently discretionary. The plaintiff knows that it is not for him, or for the judge, to decide how the discretion should, in any given instance, be used. But he is entitled to demand that it be used by the right Authority, with the due forms, after due procedure, and in accordance with ordinary standards of common sense and accuracy.

Any other complaint against public authorities, brought by private subjects in matters (such as contracts or torts) common to individuals, is tried by civil tribunals, according to the civil law and to the eventual special rules established for the matter. In the same way is tried any likely complaint against private subjects, brought by public authorities. These law-suits, to which an administration is a party, are not called administrative, but civil, cases and thus will not be taken into account in the present paper.

2. Proceeding to sketch some definitions useful to establish further points, we can perhaps assert that:

a) in order to be entitled to bring an action against an administrative decision - or the lack of it - in front of a higher administrative authority or in front of the administrative judge, it is necessary to have a legal interest in winning the case.

Such an interest (*interesse a ricorrere*) exists, as a rule, only when the decision - or the lack of it - is prejudicial to an interest of the plaintiff.

This interest must be personal, present and concrete. It can be aimed to secure a gain (*interesse pretensivo*) or to avoid a disadvantage (*interesse oppositivo*).

b) A subject has then an interest to seek annulment of an administrative decision as a rule only when such interest is, *inter alia*, personal. This happens, of course, if the gain denied or the disadvantage inflicted by the Authority concerns a single subject. But also if it concerns many subjects, provided they are identifiable by a special connection with the decision, and not only by their being members of a category not directly considered by it: for instance, taxpayers, or citizens of a given Borough.

The distinction is difficult to establish when the decision concerns directly numerous citizens, as in the case of a new regulation of shop closing hours in a town (in this instance, it has been ruled that every shopkeeper has a personal interest to complain).

The expression «collective interest» is employed in Italy as a *quid medium* between public and personal interest.

Public interest is that of the general public, represented by some public body. Personal is a private interest. Collective is the interest of a class of persons that can be better fulfilled by the same class acting as a unit rather than by single individuals. Collective interests are chiefly mentioned in connection with those pursued by the Trade Unions. As a rule, these interests are actionable by one or some members of the collectivity if they aim at the respect of the Law rather than at the change of it, or at a particular use, by the public authorities, of discretionary powers.

*Actio popularis* is the power to sue, very exceptionally granted by some Statutes to each and every member of a given class.

In Italy such actions are divided into two types. Actions in substitution (*sostitutive*) of a public body which does not defend its rights against a third party; and actions in correction (*correttive*) of such a body, which acts wrongly. In the first case the citizen sues a third party as an agent of the negligent public authority. In the second, he sues the Authority. The latter is the case of the elector, who can oppose any decision concerning candidates, lists of electors, polling operations and proclamation of the elected.

c) Environment is the portion of the physical world which surrounds us. For legal purposes, it is that part of the natural world which can be influenced by human activity and, in turn, influences public health.

As to the rules of Law concerning the environment, it can be said that a larger space was given to Civil Law rules when man's technical capacity of modifying the face of the earth was négligeable and when human aggregations, being very small, could not significantly accrue to these changes.

In general, Civil Law takes care of microalterations of the environment, which concern a few neighbours only, and Public Law of alterations possibly dangerous to collectivities.

Aspects of the environment are water, air, soil and sound.

A second group of subjects concerns more indirectly health, and directly agreeability and cultural values. This includes some aspects of planning of towns and public works, afforestation, preservation of historic sites and natural beauty spots, protection of animal and plant species.

Of course, statutes concerning some of these matters, chiefly those connected with towns and such industries as then existing, were known from ancient times.

But as population, machines and industry grew, so legislation increased.

In general, the Statutes require the Authorities to draw up certain plans, to forbid activities exceeding given standards, to allow other activities only when specifically authorised, to create public services or controls, to allot powers to the various Authorities.

3. To quote a few of the more significant Statutes, it may be referred to the Law 17 August 1942 n.1150 and subsequent modifications, on town-planning and building; to the Law 13 July 1966 n.615, on air pollution from heating apparatuses, industrial plants and car-engines; to the Law 10 May 1976 n.319, on water pollution. The Law 20 March 1941 n.366, on solid refuse, is being revised in order to take into account industrial waste in addition to town garbage, previously predominant.

Quite a few other Statutes are aimed at the defence of the environment, and important provisions on the subject exist in Statutes concerning the powers of local and central authorities.

Legislative powers are given in Italy to the twenty Regions which compose the Republic, and to the two Provinces of the Trentino-Alto Adige Region. That is why regional Statutes are to be added to the above mentioned, which are all central, or State, Statutes.

4. The interested party can ask the administrative judge to annul any administrative decision. But he can also, if he so prefers, seek annulment of certain decisions in front of a higher administrative authority, when such an authority exists. If necessary, he can then challenge in Court the latter's decision; or again the former's, if the latter does not decide within ninety days.

Administrative decisions which can be challenged in front of a higher administrative authority are called non-definitive decisions.

As a rule, these are the decisions taken by a branch of a public authority, subordinate in the last instance to a higher level of decision. Thus, administrative litigation (as opposed to litigation in front of an administrative judge) is tied to administrative organisation.

In Italy, the State as a whole has a legal entity. That is why the decision reached by the Headmaster of a school, or by the Prefect of a provincial town, or by the Head of a Governmental office, can be challenged in front of the competent Minister. And yet the existence of various levels does not permit the superior to take himself the decisions reserved to the lower levels.

Also every Borough has a legal entity. But its Authorities - the Mayor, the Junta, the Municipal Council - are not subordinate to one another. That is why no decision taken by any of them can be challenged in front of another.

To all this there are exceptions, created by Statutes. Certain decisions taken at an inferior level are declared definitive (i.e. not subject to administrative challenge); and other decisions, reached by local authorities which have no superior in their own organisation, are still subject to administrative challenge in front of a different subject (i.e. from the Mayor to the President of the Regional Council, or to a certain Minister).

The points made above can be specified as follows: a) Complaints to higher administrative authorities against administrative decisions are allowed - as a rule - only if the same legal entity has one or more public authorities in the same field and on a higher level than the one which decided. In any case, only one complaint is permitted, to the top Authority (e.g. against the decision of the Headmaster of a School one goes to the Minister of Education, not to the provincial Procuratore degli Studi). After the complaint to the administrative authority one can still apply to the administrative judge. b) The right to complain in front of a higher Authority is granted along the same lines as the right to go to the administrative Court. c) At times the superior administrative authority has a right to control *ex officio* the decisions taken by minor authorities and - if the case be - to annul them.

The annulment is allowed either within a given period or without any fixed period.

In order to annul *ex officio*, it is necessary not only that the decision be contrary to Law, but also that the annulment serve some specific public interest.

This power does not necessarily coincide with the power to decide complaints. To start with, the Authorities which respectively hold them are not necessarily the same. To this must be added that the first is discretionary, whilst the second is bound. Finally, the Authority which acts *ex officio* can take into consideration any illegality, whilst the Authority which decides litigation must consider only the points of Law listed by the plaintiff.

5. As already stated, when the administrative complaint has been disposed of, or ignored, by the higher Authority, the party who has an interest to reverse the decision can go to Court. This will be an administrative Court, since the recourse to a higher administrative Authority has been given against ill - or non - use of statutory powers.

a) Concerning the party who has a right to go to Court, we must distinguish between the case in which the first decision was upheld, and the opposite possibility of that decision being - in part or entirely - repealed.

In the first instance the right to go to Court is reserved, almost by way of appeal, to the same party or parties which complained in front of the administrative authority. The party cannot then file allegations of illegality not previously made in front of the administrative authority, or not deriving from the latter's decision. Other parties, who are directly interested in the annulment of the first decision (and who have not complained to the higher administrative authority) can, in their turn, challenge it in Court, if the term to do so is for them still open.

In the opposite instance, the party whose direct interests were better served by the first decision than by the second is entitled to seek in Court annulment of the latter.

b) The judges have held that an interest shared in equal measure by the public (*interesse diffuso*), regarding a certain quality of environment, cannot be defended in Court by a single individual. The citizen can defend only a special interest of his own, such as preserving a particular view seen from his window, which would be obstructed by a new building; or the salubrity of the air surrounding his land, which would be spoilt by a planned industrial plant.

The lack of right to sue of the single citizen is reflected by a similar lack, of an association of citizens interested in protecting the environment.

Even if such an association has been incorporated, thus becoming an artificial juridical unit, and if its aim is by charter the protection of environment, the judges still deny it a right to sue.

It is in fact held that the interest of the new private subject is still similar to the general interest in the defence of environment. Of course the association, incorporated or not, could sue in defence of its special interest in the view and better light from its windows, in the salubrity of the air surrounding its premises, etc.

Only if an association has become a public body, whose purpose is the defence of a particular interest, is it then assumed that the Law has intended that this body could act, *inter alia*, in Court for the fulfillment of its tasks.

These principles have been contradicted by the Council of State, in a well known sentence (V, 9 March 1973 n.253). But this sentence was quashed by the United Chambers of the Court of Cassazione (\*) 8 May 1978 n. 2207, which stated the points of Law mentioned above. This position has since been confirmed by the Plenary Session of the Council of State 19 October 1979 n. 24.

Of course, one or more Statutes could modify the Law, allowing the actions of some associations against administrative decisions which the associations held prejudicial to collective or general interests.

The Statutes could also require that the Authorities ask or allow - before making use of certain statutory powers - the advice of some association, and give reasons for any finding contrary to it. That would be tantamount to recognising that the association has a right to challenge any decision reached without a previous hearing, or which, in the opinion of the former, had not given a fair consideration to the reasons enlisted in the advice.

The problem of the desirability of free access to the Courts by private individuals and associations, in defence of general interests (*interessi diffusi*), has been of late much debated.

On the subject of environment and public health, that question is connected with two sections of our Constitution (1948):

- Section 9 states that the Republic protects the environment and the historic and artistic patrimony of the Nation;
- and
- Section 32 adds that the Republic protects health, which is a fundamental right of citizens and interest of the collectivity.

These clauses have been constructed by some as implying that individuals have (or should have) a right to challenge in Court any public decision or activity which undermines environment or health.

This would introduce *actioes populares* in the matters now considered; and if actions would be permitted in front of a civil Court, before asking the annulment of the administrative decisions in front of the administrative Court, this would mean the end of the administrative régime of those decisions as well.

It is perhaps too early to assess the attitude of the United Sections of the Court of Cassazione on the important matter, whilst it seems clear that the administrative judge would resist any change of the traditional distinction between civil and administrative fields.

In two cases strictly concerning health, the United Sections (9 March 1979 n. 1463 and 6 October 1979 n. 5172) have in practice held that *actioes populares* are permitted in front of the civil judge.

7. In favour of the extension of the right to go to Court in defending general interests it can perhaps be said:

- i) it is incongruous to consider personal and sufficient motivation for suing the more tenuous economic right, and not the right to health and agreeability of life;
- ii) it is impossible to distinguish between personal and general interest, when identical interests of persons belonging to large classes are already admitted, as allowing any of these subjects to sue, provided he can show an immediate and personal pecuniary loss;
- iii) by allowing spontaneous associations as litigants one admits to Court the true interests of the people, as opposed to their nominal interests, represented by some public Authority which should act differently, or should sue;
- iiii) by admitting the defence in the Courts of general interests one furthers the concrete participation of all the citizens, both as individuals and in their free organisation, to the management of the Country. That is just what is required by Sections 2 and 5 of the Constitution;
- iiiii)... and, after all, one furthers the enforcement of the Law in matters of the greatest importance.

In the opposite direction lead the following arguments:

- i) the administrative judiciary is geared to protect personal, and not general, interests. For the latter's protection the Law plans different controls: see, for instance, § 4, c). That is why the judge can only go into the complaints alleged by the plaintiff. He cannot annul for a reason - however self-evident, or of urgent public interest - not given by the party;
- ii) any general decision influences general interests. The administrative judge - who is neither politically responsible, nor representative of the people's will - should not be made to review too frequently such decisions, entering as deeply as he is used to do in questions of reasonableness, common diligence, and equity. Nor should the judge be pushed too frequently into the limelight, and exposed to the temptations of political controversy. On the other hand, the most important decisions of general interest would always be excluded from Court, as acts of government, rather than administrative decisions;
- iii) also, the common administration of justice could be brought to a standstill by an onslaught of cases artificially originated and heatedly fought for political purposes;
- iiii) one should beware of allowing parties who are not directly interested, to harass the Authorities, perhaps in order to seek a compromise out of Court with them, and with eventual private opponents;
- iiiii) of course, there are other occasions, and forums, for denouncing, debating and voting.

On these subjects the present writer would not venture to forecast any present majority view held by his colleagues. On the other hand, opinions must take into consideration the full complexities of the existing judicial and legal system of the Country considered.

8. Is it true that anybody's right is nobody's business? It is true that he who condemns the loudest a public injustice is on the way to planning some greater iniquity? Is it true that within voluntary associations as within monetary systems the bad coins turn away the good ones?

All those *dicta* are certainly far too flippant to be relevant to the present subject.

In any democracy citizens must evidently debate and decide matters of general concern; and private associations are expected to fulfill tasks of immediate public interest in many fields, to help disinterestedly in others, and to shape and select future holders of positions of responsibility.

The point is then solely to decide whether the judicial arena is to be included among those congenial to this sort of contribution; and that, according to the Law as it now stands, or after possible modifications.

As to the present situation, the judicial rulings have been stated. Any further debate on their merits would enter too deeply into the details of the Italian legal system to be practical or profitable here.

Regarding the future, consideration is perhaps to be given to the following points:

- i) to expand the area of judicial control does not mean necessarily to improve the quality - whilst it does mean to reduce the tempestivity - of it. Delay in deciding Law-suits of general interest is costly for the community;
- ii) the quality of the control of reasonableness tends to be more doubtful as the decision challenged in Court concerns larger and more unusual matters. If litigation is to be so orientated, either that control is to become perfunctory, or the uncertainty of the result of it will be high;
- iii) if we are going to admit Law-suits in defence of general interests, we must clearly expect to have them used also as a stick to beat political opponents on local, and even national, levels;
- iiii) as far as associations are concerned, it will prove impossible to distinguish between objective interests of the individuals (e.g.: associations of the blind, associations of ethnic minorities), and their subjective interests (associations of individuals desiring to assist the blind, etc.). It should then be left to the Statutes to define the

minimum qualities required from associations in order to go to Court, or be opened to any association to defend in Court the interests indicated in its own charter;

iiii) finally, it must be recognized that allowing individuals and free associations to defend in Court general interests means allowing them to become private prosecutors of public Authorities, and establishing judicial pressure groups.

A further step would be to allow them to claim and recover in front of a civil Court, presumably after an annulment of the administrative decision (or a statement of the illegality of the lack of a decision) by the administrative Court.

This would mean recognising to private individuals and free associations a right, infringed by the conduct of the Authority.

It would not be easy to establish what sort of damages should then be granted. If for a moral tort, they would be practically symbolic; if for a material tort, they would be very difficult to assess.

Of course, the civil judge could address injunctions to the Authorities, not to bring to execution and administrative decision, or to adopt one. But that runs contrary to the rule of separation of powers, as it now stands.

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The United Chambers of the Court of Cassazione have in Italy the function of a Tribunal deciding over conflicts of jurisdiction between civil and administrative judges. In the last decades the United Chambers have consistently held that they have also the power to quash sentences of the administrative judge when these are wrong or certain other grounds, among which the appreciation of the existence, on the part of the plaintiff, of an interest to sue.