

Rapport pour l'Italie

présenté par

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THE COURTS OF LAW AND THE EXECUTION OF ADMINISTRATIVE DECISIONS, ESPECIALLY ON ENVIROMENT AND POLITICAL REFUGEES. ITALIAN REPORT

SUMMARY:

- I. Generalities;
- II. Judicial control of the enforcement of administrative decisions by administrative authorities;
- III. Stay of execution, and some of its rules;
- IV. Judicial annulment of administrative decision, and its enforcement;
- V. Some instances of decisions on environment and on political refugees.
- VI. Desirable legal changes.

I

1. Under the Law, Italian administrative authorities can modify the position of individuals by issuing administrative decisions.

Nowadays, this happens in innumerable instances.

Though in fact these instances are numbered, as each of them must be regulated by Statute. That is to say, they must fall into certain categories.

Thus perhaps the first rule on administrative decisions is that administrative authorities cannot enact any decision of a category not foreseen by Statute, however these authorities may feel some other type would better suit a given public interest.

The authorities have at times a wide discretion to choose ways and means, within the frame of their statutory powers. But they do not have freedom to shape — so to speak — their own instruments of action.

The very opposite is true in civil Law (*vide* section 1322, first aline, of the civil code).

But then, contracts are voluntarily entered into by all the parties directly concerned with the changes they affect; whereas administrative decisions are unilateral, and citizens must bear their brunt.

Before issuing them, the authorities may or may not have to listen to

the interested parties, or to consult with some other authorities: this depends upon the provisions of the particular Statute. But the final decision is their own.

2. On the other hand, any administrative decision taken with disregard to the Statutes or to general principles of Law is voidable; but, as such, remains operative, for the time being, just as any legitimate one.

And it becomes definitively operative if it not repealed by administrative authorities, or annulled by the administrative Courts.

Furthermore, the time allowed to the interested parties for submitting it to judicial scrutiny is fairly restricted: sixty days from notification, or full knowledge, or (in certain instances) publication.

That is a far cry from the instances of nullity of contracts. But then, the rules of administrative Law stem from a stronger need for certainty and speed, in dealing with matters of public interest.

No doubt, one can imagine actions (and documents) which could in no way be constructed as administrative decisions, although a pretence to that effect be made by their authors. Or one can imagine decisions taken by a public authority on a subject so abysmally removed from its province, that they must be considered void.

But these instances are so rare as to become irrelevant; whereas in civil Law any contract, or part of it, entered into despite the prohibition of the civil code or of a Statute is void (civil code, section 1418); and cases of nullity and voidability tend to arise — from a statistical point of view — in comparable numbers.

3. Many effects resulting from administrative decisions, as from contracts, are automatic.

They do not need any physical execution: once the papers are signed — that is to say, the decision is taken — one can *ipso facto* give professional services, or build a house, or conduct a commercial activity, as one acquires automatically ownership of some land by exchanging the appropriate deeds with the vendor.

In other fields, though, many provisions can only be implemented by a material change.

The funding of a private enterprise to further some public interest means that payments must be made; and orders issued — say, by the police, or by a health-authority — mean that compliance must follow. As, in civil Law, the lease of real property means that keys must be handed over, and the building made suitable for habitation.

In civil Law the enforcement is not left solely to the creditor. It is entrusted to certain officials, if necessary under the supervision of a civil Court.

On the contrary, in administrative Law authority has, as a rule, powers to enforce the decisions it makes.

The various Statutes may specify how this enforcement must be effected. Otherwise, the principle is that the authority shall proceed *manu militari* as it thinks fit, provided it keeps within bounds of reasonableness and fairness.

And this general power of enforcement can perhaps be counted as a third rule concerning the administrative decisions.

4. From the three rules hitherto outlined certain conclusions may be drawn.

With regard to self-executing decisions, as to self-executing contracts, there cannot be question of a physical execution.

But the very fact that administrative decisions are not, as a rule, void means that they are, if that is the case, self-executing; as they are liable to be compulsorily executed by the administrative authorities.

It is irrelevant that interested parties can still go to the Law against them; or have already done so.

Only a provisional judgment by the administrative Court can suspend the effect of the administrative decision, pending the action.

That can be done in respect both of self-executing administrative decisions, and of those needing a physical execution.

As a matter of fact, a provisional judgment can be issued also with regards to legal actions concerning the lack of any decision; or the lack of a given decision, that the plaintiff had hoped for.

In the first two cases, the judicial pronouncement is itself self-executing, and is a proper *stay of execution*; in the last two, it is an order addressed to the relevant administrative authority, and enjoining it to do something, pending the Law-suit.

Although for simplicity's sake one calls these pronouncements of the administrative Courts with the same name of *stay of execution*, and one treats them always as orders, or injunctions. This course will be followed in the present paper.

Once established that all administrative decisions are either self-executing or compulsorily enforceable by the administrative authority according to a general rule of administrative Law, it follows that there is no question of

given privileges in special fields, as there is no presumption of conformity of the decision to the Law.

That is, unless the whole administrative Law be regarded as a gigantic and monolithic privilege.

As, from a certain point of view, of course it is.

But then, it would be no *privilegium*, no advantage given to private individuals; but rather, to coin a neologism, a *publilegium*, or advantage given to public bodies, with regards to their very special duties.

And the fact that all administrative decision attacked in the administrative Courts are still self-executing, or compulsorily executable, whereas a fair proportion of them is daily quashed by the judges, shows that no presumption of legitimacy can reasonably be held existent.

On the other hand, one could not go into the peculiarities of execution of the various kinds of administrative decisions, without considering one by one the statutory powers of all administrative authorities with regards to decisions which imply a direct physical compliance.

It is clear that there can be no execution of a decision which is not yet standing; or has been subjected to *stay of execution* by the Courts; or is null and void, that is to say, a mere resemblance of decision.

In these cases, the so-called execution must be regarded exclusively by itself, as an unwarranted act.

When maliciously carried out by the officials concerned, it would not at times be credited to the public body, but instead considered a criminal action of the individuals as such.

Otherwise, such action is just an illegal activity of the administrative authority, constituting tort, and resulting in responsibility for damages.

No doubt, the officials who implemented the action would, in turn, be responsible towards their employer, having to refund it for damages paid to a third party; and could be disciplined.

They are also directly responsible to the citizens for damages. But there are reasons according to which individuals will find it easier to sue the administrative authority.

5. However, seems fair to stress two further points:

a) in certain fields, administrative authorities could find it difficult to enforce their decisions.

For instance, at times disturbances will arise if they use the police-force in order to eject inhabitants from houses which must be destroyed.

Or when a borough employs a private firm to carry out demolitions which should have been implemented by the owners, it could be hard put to obtain reimbursement by the latter. All this says much for prevention as opposed to sanction: or for early action; or, in other fields, for stipulating a monetary deposit as a guarantee, etc.;

- b) in many cases, the ways and means of compulsory execution must be determined beforehand by the administrative authority; or anyway, at times it happen to be so.

That lays open a path for a further legal action against this new administrative decision, and perhaps for an application for *stay of execution*.

II

As it has already been stated, when an administrative decision needs to be enforced, that is done by the administrative authorities. Not by judicial agents, under control of the Courts, on application of the interested administrative authority.

This is always the case, irrespective of the fact that the decision be legal or voidable, and still open to opposition in the administrative Courts or already contested in a pending judicial action.

It is only required that the decision be:

- a) already effective (that is to say, already come into being, and — when necessary, according to the statutes — checked by a relevant controlling body);
- b) not null and void;
- c) not subjected to *stay of execution*, ordered by an administrative Court.

On the other hand, any activity of so-called execution which is not authorised by the terms of the decision (for instance, any occupation in excess of land, or of different land) would be done in trespass, and could bring an action for damages.

That is to say that, in our sphere, judicial control takes place *post factum*. But that is common ground in matters of tort.

The judge to whom damages are to be asked is always the civil judge. To this general picture two *provisos* can perhaps be appended:

- a) administrative Courts can direct *ex ante* the authorities by granting partial *stays of execution*, and so shaping the kind of execution they deem fit, pending the Law-suit;
- b) if an administrative decision has been taken on the ways and means of execution, then the administrative Court can make its views known by granting or refusing *stay of execution* of it.

III

The *stay of execution* is an injunction granted, on application only and within days of this, by the regional administrative Court (tribunale regionale amministrativo, or TAR), in the course of a Law-suit already pending.

The injunction is issued *in camera*, after a hearing, *audita altera parte*, and with very little explanation of its motives.

Although written, and signed by the Court, it is almost always published on the same or following day of the hearing.

If the applicant is endangered only by the effects of the administrative decision as it stands (that is to say, if his only interest is to oppose), the *stay of execution* quashes, for the time being, those effects: it is self-executing.

The *stay of execution* itself takes effect *ex tunc*, and can be applied to decisions already carried out. In this case the administrative authority is under an obligation to restore the situation, as far as possible, as it was originally.

But it is open to the Court to limit the scope of the *stay of execution*.

If the applicant fears the ill-effects of administrative inactivity (that is to say, if he has an interest to seek), the administrative Court orders the authority to do something for the time being. It is, then, a proper order, which needs administrative compliance.

The effects of any *stay of execution* are, in principle, temporary.

The *stay* is only effective pending proceedings in front of the Court which has granted it.

But of course also here there are effects which cannot be removed.

Against the *stay of execution* granted by the regional administrative Court (that we shall from now on call TAR, as it is common usage in Italy), or against the refusal of it, there can be appeal to the judicial committees of the Council of State.

This appeal is usually heard in a matter of weeks.

If it is upheld the *stay of execution* is either denied or granted by the higher judges; but only for the duration of the first instance.

The procedure is the same as that in use before the TAR.

When the TAR has given its principal judgment, annulling or not annulling the administrative decision, any party can (as a matter of right) file an appeal to the judicial committees of the Council of State.

Then, the chamber of the Council of State to which the case goes can grant — always on application — a *stay of execution* of the judgment which has annulled the administrative decision; or a *stay of execution* of the judgment which has not annulled that decision, *and* of the decision itself, possibly adding an order to the administrative authority, with regard to the action the latter must take, pending the appeal.

IV

1. When the administrative decision is annulled by the administrative Courts, it is deemed, in principle, never to have taken place.

A judgment passed in favour of the plaintiff has three effects:

- of annulment: it quashes *ex tunc* the decision;
- in consequence, of revival: it brings back, without any interruption, the situation which existed before;
- and eventually of declaration: if the authorities must still act, with regard to the plaintiff, in the field concerned by the decision, it states which principles must be followed in so doing.

In no case can the authorities disregard the judgment of the administrative Courts; not even on the grounds that its effects would run against public policies.

Any administrative activity entered into in disregard of the judgment would either constitute tort, in so far as it is a material activity; or would be voidable, as an administrative decision taken against the *res iudicata*. We shall see that in cases of blatant disregard, the new decision would be null and void.

2. That is not to say that implementation of administrative justice reduces to irrelevance the effects of voidable administrative decisions, any more than the exercise of penal justice rubs out all the effects of committed crimes.

For instance, any administrative authorisation illegally denied rules out

for the time being certain actions, which will never be possible to perform on the intended date.

And any administrative order compels the individual to do something which can perhaps be compensated, but certainly not erased from the course of reality.

True, there is the *stay of execution*.

But also this could come too late.

Or it could be wrongly granted, or wrongly refused: of course, the danger with this cautionary injunction lies in it eventually running contrary to the direction of the concluding judgment.

When that happens, a party will have paid a price for the delay in concluding the case. And let us note that the delay is double if an appeal is allowed.

Nor can the individual always rely for redress on the prospect of monetary compensation.

In fact (apart from the new delays and costs of that separate litigation) civil Courts consistently rule that compensation is only to be granted when the individual had a full civil right, which has been infringed by the administrative decision.

To explain these rulings would involve us in the technicalities of torts in the Italian civil code.

From the point of view of plain common sense, it seems possible to argue that if a very accurate and far reaching judicial scrutiny of administrative decisions is admitted by the Law also in cases in which the plaintiff has no full civil right to protect, it would be unfair to make the public foot bills for the costs, at times enormous, arising from pardonable misinterpretation of Statutes, or from minor lapses in the logic of administrative actions.

3. Let us then list, by way of example, some cases of limited effect of an administrative judgment favourable to the plaintiff:

a) somebody claims to have been discriminated against in a civil Service entrance exam.

If he is proved right, and if it follows from the judgment that he must have the job, payments shall still be made only from the time in which he starts work: administrative Courts (on whom the whole province of public service devolves) have consistently ruled that no salary can in any case be payed before a person has in fact interred public service;

b) The opposite is — in principle — true for *increases* of salaries, irrespective of the kind of administrative decision which has unjustly refused them.

But if an official has been denied a post involving free use of a residence, special status, and acquisition of experience leading to a further advancement, judicial quashing of that decision could give to the individual *ex tune* salary and, on the paper, status; but not the accomodation or the experience or — say — special emoluments connected with the actual carrying out of certain duties;

c) let us now imagine the judicial annulment of refusal of a building permission, on grounds implying that permission should in fact have been granted.

Permission can still be refused in accordance with town planning established *after* the first refusal, if the authorities feel no exemption can be given in this special case.

And it *must* be refused if a Statute enacted after the annulment runs against the application, for instance, forbidding all private building within a certain distance from the coast;

d) if an order of compulsory acquisition of land is annulled when a public work has already been built on the site, there is no right of repossession, as the land is deemed to have by now changed qualification, and become public.

There is, of course, a right to damages, as the dispossession must by now be seen as tortuous.

4. On the other hand, as far as the execution of (administrative and civil) judgments given against any administrative authority must proceed according to the principles of Law, there is a quick and fairly efficient way of securing it through the administrative Courts.

The individual can (according to the case) go to the TAR or to the judicial committees of the Council of State; and ask either that a final date be fixed, or that the Court appoint an authority, which shall act *in lieu* of the contumacious one, as a delegate of the Court itself. The Court can also issue (in the form of a judgment) the administrative decision it deems necessary.

All this has been largely established through rulings of the Council of States, and in part subsequently enacted by Statutes.

At present, it is still not clear whether the position of the authority ordered to act *in lieu* of the other is quasi-judicial or administrative.

Certainly, its decision cannot be submitted to any other judge than the Court which has appointed it.

But full consideration must also be given to the position of other parties, who could be endangered by any high-handed and hasty ministrations.

Administrative Courts ruling in *implementation of judgment* can, at times, clarify to the parties the implications of their previous *dicta*.

They can plainly disregard any new administrative decision which they feel has been taken in order to circumvent their previous judgment.

In so ruling, the Council of state has established a new kind of administrative decision null and void; and in fact almost the only kind of it one can sometimes observe in practice.

The application for *implementation of a judgment* follows a summary procedure: it is heard *in camera* in a matter on weeks, although the judgment (always written and signed by the court, but in the present case fully motivated) can take some more weeks or months to be published.

When the application must be made to the TAR, it could in this case happen that there be no right of appeal.

Officials obstructing the implementation of judgments can be disciplined, or be made to answer for it in a penal or civil Court.

It must however be said that these developments are of service chiefly as a general deterrent. In themselves, they are less satisfactory to the individual concerned than the application to the administrative Courts for implementation of a judgment.

After all, delays occur in most cases because of genuine difficulties; and here the intervention of the administrative Courts is both a stimulus and an authoritative assistance.

Let us take two instances, in the fields of environment and protection of human rights.

a) A company obtains from the borough a building permission in the country-side, which exceeds in area and in density of houses the plans laid down by the town-council.

Any inhabitant of the borough can go to Court in order to get the permission annulled.

But months, or even years, could pass before the judgment is given.

In the meantime the plaintiff can ask for a *stay of execution*.

This application submits the TAR to a very heavy responsibility: if the *stay* is denied, destruction of the natural habitat will take place, to some extent beyond any possibility of remedy; if the *stay* is allowed, the company will suffer severe losses which would be irredeemable, and would at times become bankrupt, going out of business for ever.

All this would seem — and be — very unfair if the eventual result of the legal action would be contrary to that of the cautionary application.

Anyway the *stay of execution* is either granted or denied in a matter or fays.

If it is denied, there is obviously no ground for its execution.

If it is granted, and the administrative authority does not see to it that construction has stopped, the plaintiff can apply for a new *stay of execution*, by which the TAR will appoint an official (for instance, a government, or regional, official), and will prescribe which action he is going to take.

The TAR can also report the mayor to the office of public prosecution.

It is also likely that the case will soon be called for principal (as opposed cautionary) judgment.

Once this judgment is given, any delay in putting it into effect could cause an action by the interested party for the execution of it.

b) A couple of citizens of an East-European republic have come to Italy as recognized political refugees under the Geneva Convention.

Following their abortive attempt to move on to the United States, the Home and Employment ministries withdrew their residence and working permits, and the individuals applied for annulment of these decision to the TAR.

In such cases, *stays of execution* are generally granted, as the expulsion of aliens *manent proces su*, and even more their forced repatriation, would very likely deprive of any significance the further proceedings.

In balancing the points of *eventus damni* (here, very strong), and of *fumus boni iuris*, the TAR would deny *stay of execution* only if it felt perfectly sure that the action will fail both in the first Court and in case of appeal to the council of State.

It has so happened that in the particular case mentioned above, the principal judgment has been in both Courts for the plaintiff, on the grounds that the Geneva Convention, ratified by Italian Statute (1), provides that any alien, who is a political refugee under the terms of it, can only be expelled for specified reasons concerning the security of the State, or public order (2).

So everything went well, and one likes to think that the individuals

concerned have by now been granted Italian citizenship, and have lived happily ever since.

On the other hand it is clear that if, in spite of a *stay of execution*, or in spite of the judgment of annulment, the police had seized the refugees, dragged them along to the airport, and embarked them on their national airline, it would have acted on a totally unwarranted basis.

Exactly the same thing could happen without any previous order of expulsion.

Of course, mistakes will happen.

Although it is difficult to imagine that any such action would be taken by the police, without all possible previous checks and enquiries.

In any case, there is nothing the administrative Court can do about that.

VI

Any remarks on desirable legal changes can only state the personal point of view of the present reporter.

a) At the present stage, the main way of improving administrative justice consists, perhaps, in speeding up its course.

What must be speeded up is, in particular, the principal (as opposed to cautionary) judgment.

Stays of execution can help only to limited extent. And are paid for by compelling the Court to study twice the same case.

Implementations of judgments by the Courts seem to be fairly efficient and quick.

Something might be done in the field of the techniques of sentencing; in limiting the number of local seats of administrative Tribunals; in bringing cases of the same kind to the same hearing, or in front of the same team of judges, etc.

But the speeding up of justice is mostly dependent on the reduction of the number of cases brought to it.

Something must be done to keep out of Court plaintiffs who are clearly in the wrong, or would litigate for a trifle.

The Courts will then be in a better position to consider cases of real (and at times very great) importance.

It might be added that the slower the proceedings, the more they can be used for aims inconsistent with the expectation of a straight solution of the case.

b) Interpretation of the Law or, if need be, new legislation should enable a winning plaintiff to secure as frequently as possible an effective advantage from his paper victory.

In particular, when the plaintiff is entitled to a new administrative decision on the subject in dispute, it should be understood that this decision must be based on all elements of Law and of facts existing when it should have been taken in the first instance. Or, if such a date does not exist at Law, the new decision must be based on the situation existing when the previous decision was taken in the first place.

This runs contrary to what is now happening, as seen *above* on point IV, 3, c) (page 16).

c) In executing their own judgments, or their own *stays of execution*, the administrative Courts are reluctant to pass administrative decisions which would settle the matter in question, as they feel some specialistic elements or some points of fact may still remain beyond their knowledge.

This is why they have for many decades resorted to the custom of appointing a commissioner *ad acta*, and have given him the power to decide *in lieu* of the reluctant administrative authority.

This system has not been hitherto challenged by anyone.

But it would be time that a Statute lays down the rules on the whole procedure, and on the *status* of the commissioner.

For instance, whether he has on any conceivable grounds the possibility of declining the unsolicited task; whether, and eventually how, it will be compensated; which remedies are given against the commissioner's decision or action; which remedies are given against his inactivity; whether he can ask for further guidance from the Court; and whether an appeal brought to the judicial committees of the Council of State against the judgment appointing a commissioner *ad acta* would suspend this appointment, or the beginning of the period of time given to him for action.

(1) 1. 24 July 1954, n. 722.

(2) TAR Latium I, 20 November 1974 n. 80 (TAR 1974, parte spec. 402), upheld by Council of State, IV, 9 December 1975 n. 1206 (C. St. 1975, I, 1326).