

ITALIAN REPORT

reporter

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1. (1,2,7) The legislative basis of the public administration's powers (*).

In Italy all statutory powers regarding citizens must have their basis in the legislation. This is true for both decisions and regulations.

The Administration does not act as a private citizen but as an authority in its relations with individuals. There is, therefore, a need for a law, that is an Act of the Parliament, to enable the Administration to use its power, considering that the results of administrative action are, usually, a constriction of citizens' interests.

The Act always points out the public interest that has to be sought and the kind of decisions that can be issued by the Administration in such cases. Therefore, the number of possible acts or decisions is limited to those present in the Acts of Parliament («*numerus clausus*»). As a corollary, the Administration, acting as an authority, may not freely choose a suitable instrument, a choice which is permitted, within limits, in the area of «*private law*».

Moreover, the Administration may not issue administrative acts in areas which are reserved, by the Constitution, to Parliamentary action only (the so-said «*riserva assoluta di legge*»). In yet other cases, the Constitution requests a law which conditions administrative action by establishing limits to the acts themselves (the so-said «*riserva relativa di legge*»). In this case the administrative acts are bound).

However, with the exception of these areas, the legislation grants the Administration a considerable freedom («*discretion*»). It can choose whether pursuing or not public interest, eventually deciding on the time and the way of using its powers («*an*», «*quantum*», «*quando*», «*quomodo*»).

For example, an act may describe a situation from which the power arises by referring to indeterminate concepts (e.g. urgency), pointing out the public interest that must be assured (e.g. health) without describing in detail the contents of the administrative act. These are exceptional cases in which the «*rule of law*» gives way to the unexpectedness of the situation that has to be dealt with.

Otherwise the Law may establish the details of the «*modus procedendi*» (e.g. the hearing of the concerned individual) or the time-limit within which the power has to be exercised (especially if the administrative act is unfavourable to the private citizen), as well as the public interest pursued and the «*kind*» of act needed.

Moreover, in all these situations the Administration's decision is never completely free, as is the case amongst private citizens, but always «*discretionary*» because the Administration itself has to protect and pursue (that is assure) the public interest and insure the equal treatment of the citizens involved (art. 97 Cost.).

As we shall see further, the discretionary power exercised within these limits is subject to judicial review.

However, one cannot define as discretionary the Administration's action in the «*private law*» sector, where, for example, it acts as a citizen in concluding contracts. In these cases the «*public*» phase generally ends before the contract's stipulation (e.g. choice of the contractor by means of a tender or a private negotiation, popular housing allotment to the assignee).

In the following phase (the contract's execution), the Administration's acts according to «*private law*» (e.g. it may ask for the discharge by breach) even if it may still retain some powers of «*public law*» (e.g. cancellation of the popular housing allotment).

2. (3) Administrative acts' motivation.

Until recently Italy did not possess a Law regulating the issuing of administrative acts, as is the case of other nations with a similar administrative law regime.

(*). The numbers in brackets correspond to those of the questionnaire.

Rules were present in acts concerning specific matters, or could be inferred from the decisions of the Council of State. Obvious examples were the duties of motivating unfavourable decisions, of hearing the individual concerned in sanctionary proceedings, of employing a suitable judicial instrument (that is a certain «kind» of act) with reference to the sought goal and of the fairness of administrative action.

In August 1990 the Parliament issued an Act regarding administrative proceedings and access to documents of the Administration (l. 7/8/90 n. 241), thus introducing some new principles while it retained and gathered all previous regulations.

Above all this Act states (art. 2) that all administrative decisions must be motivated. This means that the reasons, both of fact and of law, on which the decision is based must be evident in the text. Reference must be made to the single results of the inquisition.

If such reasons are due to the opinion of another authority, this must be included in the text or also made available to the interested parties.

The need for a motivation had been upheld by the judges for a long time, especially for decisions contrary to citizen's interests. However the Act has now made it a general principle (even for favourable acts) in order to ensure the equal treatment of the citizens and the favourable course of administrative action by making it more «transparent».

The only exceptions to the rule are the «general regulations», that is normative acts or acts containing general rules.

3. (4) «Audiatur et altera pars».

Before Act n. 241 the hearing of the individual concerned was compulsory, for the Administration, only for some proceedings (e.g. disciplinary, dispossessions) while the case-law had established it was necessary only for unfavourable decisions.

The Administration could always decide voluntarily to consult the concerned individual, and, in such a case, it had to explain, eventually, why the private's opinions had not been shared.

Now, Act n. 241 states that all directly concerned individuals which can be easily traced must be informed of the proceeding's beginning (art. 7). They can enter the proceeding by submitting comments which the Administration must examine (art. 10).

The Act does not discipline public hearings and, on the contrary, it openly states that such rules do not apply to general regulations and to programmatic proceedings (where, however, the private's intervention is, in some cases, possible e.g. town-planning).

4. (5) Access to administrative documents.

Act n. 241 also states that all administrative documents must be placed at the disposal of interested parties (art. 22). A governmental regulation will discipline the availability, and it may also introduce variations to the present legislation in the field of office and services organization.

Previously, only single acts had disciplined such an access (e.g. documents concerning the environment, acts of the local authorities and, in a lesser degree, opinions of the Council of State) while the case-law had introduced it in other limited areas (for administrative petitions whose decision had to be preceded by the Council of State's opinion, for the public employee's personal file).

The only exceptions to the rule, according to Act n. 241, occur when the documents concern national security, international relations, or military secrets or to protect the monetary policy or other citizens' privacy.

Act n. 241 provides for a special law-suit to protect situations arising from this discipline. It takes place in front of the TAR (Regional Administrative Tribunal) as Court of first instance and in front of the Council of State as appellate Court.

The proceeding is relatively quick.

A non-judicial procedure, similar to the French one, for example, is not provided for.

5. (6) The administration's «silence».

Act. n. 241 expressly states the Administration's duty to respond to an application if the Law considers it compulsory.

In other words, the Administration must respond to a private's application if the Law states that such an application must be followed by an administrative proceeding and, therefore, by a final act (favourable or unfavourable).

Even before Act n. 241 such a duty had been established by case-law if the application was not belated or absurd and if administrative action was required by the Law.

The lack of decision («silence») is illegal and the private can go before a judge who will state the Administration's duty to respond or, if the application concerned a bound act, the right of the citizen to obtain the requested act.

The persisting lack of decision will entitle the individual either to ask the judge to force the administrative authority into a decision or, alternatively, to take the decision himself in substitution of the public authority (see *infra* 9).

6. (End of 7, 8, 9, 10) Judicial review of administrative action.

Law-suits concerning administrative decisions - or, as already mentioned, the lack of them - take place in front of the TAR as Court of first instance and in front of the judiciary chambers of the Council of State as appellate Court.

Such law-suits deal both with flaws and defects of procedure in administrative acts and with the misuse of discretionary power (the so-said «excess of power»). The latter occurs when an administrative act seeks a different result from the public interest that should be sought according to Law, with that kind of act.

This kind of scrutiny has enabled the administrative judge to spot faults of the administrative action from which a misuse of discretionary power can be inferred (e.g. inadequate motivation, illogicality, distortion of facts, error in the preliminary assumptions, evident injustice).

This kind of law-suit can also deal with «règlements» any time they could cause a damage to a private's interest, even if they contain general regulations. This is true both if the damage is a direct consequence of the regulation (e.g. the public employee's position in the administrative organization) and if it is an indirect consequence, following the act issued according to the regulation.

In Italy there is no non-judicial authority which is empowered to judge upon administrative acts.

Administrative decisions can also be challenged within the Administration itself. There are two possibilities: a petition to the hierarchical superior of the authority which issued the act or a petition formally addressed to the Head of State but effectively decided with an act of the government, following a relatively binding opinion of the Council of State (the opinion may be disregarded by the competent Minister only by involving the whole government and, therefore, causing a motivated decision of the Cabinet itself).

The petition to the Head of State is, in many ways, similar to the proceeding of judicial review, both because of the impartiality of the involved authorities and because in each proceeding debate plays a major role. Because of this similarity, the petition to the Head of State is an alternative to judicial review and, therefore, the final decision cannot be challenged before Administrative Courts unless faults of procedure are present.

On the other hand, the decision - or lack of one - following a «hierarchical petition» may be challenged before a Court on the same grounds on which the petition was originally based.

7. (11) The rapidity of administrative law-suits.

Law suits dealing with administrative acts should always be especially rapid, in view of the public interest involved.

It is also true, however, that such law-suits always begin following the party's request, and the law keeps this fact well in mind.

Therefore a law-suit, started by an application, can reach its final stage (judgment) only if the party requests the setting of a hearing. This has to be done within two years, otherwise the trial is extinguished. Furthermore a hearing has to be set, once again on the parties' request, following a decision of the Court during the inquisition.

Once the application has been filed and the debate established, the law-suit ends in one hearing (provided there are no inquisitory requirements), set within a lapse of time related to the work load of the single Court.

At the moment the Parliament is studying a reform of administrative law-suits. The Council of State has advised the Legislator to include a rule enabling the judges to render a judgment, in some cases, when the plaintiff requests a cautionary decision. The result would be a merger between the cautionary proceeding and the proceeding on the merits in order to quicken the whole law-suit.

8. (12) Cautionary measures in administrative law-suits.

During the duration of the law-suits, that is, while pending an ordinary case, the judge, on the plaintiffs request, can issue «ad interim» or cautionary judgment which grants the stay of execution of the administrative decision in order to avoid a serious and irreparable damage.

The «stay of execution» may also grant directly and in advance, within certain limits, the hoped-for result.

Such measures last only for the duration of the law-suit and are granted to the private party - and enforced upon the Administration - only if the application seems reasonable («*fumus boni iuris*»).

The typical cautionary measure is the total or partial suspension («stay of execution») of the administrative decision; the latter, therefore, cannot be enacted until the Court's final judgment.

However the judge may sometimes, in case of negative administrative decisions, grant the final result in advance even though he may decide differently with the final judgment (e.g. he may allow the citizen's participation to an exam or public competition from which he had been excluded, thus acting in contrast with the Administration's decision).

If the prudential measure requires the Administration's action and the latter does not act in accordance, the citizen may once again go before the judge, within the same cautionary proceeding, to force the implementation of the judge's decision.

9. (13) The law-suit to enforce the administrative judge's decisions.

Any judgment given against the plaintiff does not imply an execution (except for costs).

On the other hand, a favourable judgment to the plaintiff has three effects: elimination of the administrative act («annulment») or assessment of the illegality of the lack of decision, re-establishment of the situation «*quo ante*» («restitution»), statement of the Administration's duties towards the plaintiff.

Annulment and restitution take effect immediately after the judgment of the lower Court, no matter if still subject to appeal, or already appealed.

As to the *statement of duties*, if the judgment is subject to appeal, or appealed, the authority can choose whether to comply (for instance, making a new decision in accordance with the judgment), or suspend any activity.

Of course the former defendant, or the former counter-interested party can, as an appellant, ask for a stay of execution of the judgment appealed. And, if the stay is granted, no *annulment* or *restitution* is deemed to have occurred.

Once the favourable judgment is final, it is possible to start a special law-suit in front of the same Court that has rendered the judgment in order to enforce it upon the Administration. The TAR is competent if no appeal has been made or if the judgment has been confirmed after an appeal; the Council of State is competent if the judgment has been amended.

If the judgment is unfavourable to the administrative authorities, the execution of it may cause particular problems which do not arise in a litigation between individuals. Indeed, following the act's cancellation, the Administration is entrusted with a discretionary power regarding the way of executing the judgment.

It is, in such cases, possible for the original plaintiff to ask the judge to force the administrative authority into taking particular actions or to void decisions taken in contrast with the judgment.

If the judgment enables the administrative authority to choose between different ways of execution, the citizen must file a new petition.

If the administrative authority denies the execution or remains idle or eludes the judgment with actions which are only apparently executive, the judge may directly issue the requested act. Eventually, he may also nominate a commissioner (generally an administrative official) who shall act as the judge's organ with direct effects upon the administrative activity.

The commissioner's decisions which are in contrast with the administrative judge's guidance may be opposed before the same judge within the same law-suit.