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***The impact of article 6(1) of the European Convention on Human Rights on the procedures of the Supreme administrative Courts and Councils of State*.**

ITALIAN REPORT

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1. PRELIMINARY REMARKS

(reference to 1, 1, 2, 9, 4 and 5) In Italy every individual has the right to use the Administrative Court of first instance (Administrative Regional Tribunal) to review administrative decisions which are prejudicial to him.

By "administrative decisions" is here meant:

- all decisions issued by purely administrative authorities;
- all administrative decisions issued by authorities which do not act exclusively in the administrative field. This, with the following exceptions: questions concerning the elections and incompatibilities of members of Parliament; nomination for life of Senators; decisions on the status and discipline of members of Parliament and on the functioning of Parliament in general; employment and career of parliamentary staff, tenders decided by parliamentary authorities, appointments made by parliamentary authorities, similar matters concerning the Constitutional Court; discipline of civil and penal judges and of members of the public ministry (= public prosecutions' office). Some of these matters are reviewed by parliamentary committees, some are exempt from any review, and some are reviewed by the Court of Cassation: as already stated, none of them can be brought to an Administrative Court. Acts issued by Government but having force of law are of course not administrative decisions: they are reviewed by the Constitutional Court. On the contrary regulations issued by Government fall within the province of Administrative Courts.

In some cases the action or inactivity of administrative authorities amounts to tort. The effects of such conduct are judged as a rule by the Civil but in many instances by the Administrative Courts.

All administrative litigation starts in the Administrative Regional

Tribunals. The party who looses its issue in the first instance is admitted as of right to appeal to the judicial committees of the Council of State.
Statutes cannot in any case reduce the grounds either of applications for legal review or of appeals to the Council of State. These grounds are: incompetence of the deciding administrative authority, violation of the Law, wrong implementation of discretionary powers. In matters of tort, the grounds of litigation are the same as in any civil case.
Of course the appellant can complain either of fault of procedure incurred by the Court of first instance, or of wrong decision of the initial complaint, or of both alleged errors.

Administrative Courts never judge penal offences. At times the same action can be deemed to be both penally punishable and wrongful in an administrative context. In which case the administrative decision which has sanctioned it can be reviewed, on application of the interested party, by the administrative Court, while the penal Court will pass sentence on the alleged crime or misdemeanour.
On the other hand, Administrative Courts protect not only civil rights (say, private property against an act limiting it) but also - and much more often - simple interests of private individuals to the correct usage of public powers. Say, the expectation of being appointed to some job, or of being asked to bid for a public tender. In fact the Courts protect all such interests which can be deemed to be present, personal and direct for the plaintiff.

(reference to 1,3) When the Council of State disagrees with the Court of first instance, it quashes the judgment under appeal and judges the case anew. But there are faults of procedure which require a re-trial by the judge below.

When the administrative Court finds against the Administration, it quashes the latter's decision. If the matter must be decided again by the Administration, the latter must obey, in its future action, any direction which can be derived from the reasoning of the judgment. In fact this reasoning contains parts of the res judicata.

On the other hand, if litigation concerns civil rights (i.e. rights similar to those existing in Civil Law) the Administration has no discretionary powers and the Court defines directly all aspects of the right in question.

(reference to 1, 6-10) As to the procedural rules concerning the Administrative Courts at both levels, there is no distinction between cases which fall or do not fall within the scope of article 6 (1) of the Human rights European Convention.

As already said, in case of infringement by the Administration of somebody's civil rights - taking this expression in the Italian meaning of it - there is in Italy always an obligation by the Administration to pay damages. On the contrary, in case of illegitimate usage by the Administration of a public power, followed by the annulment of the administrative decision by the Administrative Court, obligation for damages arises only if the administrative decision has been prejudicial to a previously established civil right.

For instance: when a land-owner has received building permission and then the Administration illegally annuls that permission, the quashing by the Court of this last decision means that an already existing civil right of the owner of the site to build on it has been infringed. Hence the Administration's liability for damages. On the contrary, when the land-owner has been illegally refused building permission and this decision is quashed by the Court, there is still only an interest to obtain a favourable development for one's ownership. Hence the lack, at present, of a civil

right to build, and hence the absence of liability for damages.
It is only fair to add that in the field of compensation for violation of personal interests to the legitimate use of administrative powers, the trend both of recent Italian legislation and of European Community law, as well as the trend of judicial interpretation by the Court of Cassation of previous Italian Statutes, leads to the enlargement of administrative liability.

2. SCOPE OF APPLICATION OF ARTICLE 6

A) The notion of civil rights and obligations in general

(**2**. 1-3) The Italian Constitution (1948) directs that:
- nobody can be deprived of a judge, pre-determined by the law (art. 25[1]);
- justice is, as a rule, handed down by the ordinary Courts (art. 102[1]); but in administrative matters it is handed down by the Council of State (art. 103[1]) and in first instance by Administrative Tribunals sitting in the Regions (art. 125[1]); in matters of public accounts, and for other specific subjects, by the Court of Accounts (art. 103[3]); while the Constitutional Court deals with the constitutionality of Statutes and with other constitutional matters (art. 134);
- There cannot be any other Court dealing with special subjects, not even on exceptional occasions (art. 102[3]). But tax cases are dealt with for the first two instances by a special judge: the Tax Committees.

The independence and impartiality of the judiciary are carefully provided for in the Constitution and Statutes with regards both to civil rights and obligations and to the interests of private individuals as protected by the Administrative Courts. These provisions are the same for Civil, Penal and Administrative Courts.

The distinction between cases falling or not falling within the scope of application of art. 6 (1) of the Convention could be relevant under the following items:

a) public hearing;

b) fair hearing with regard to the collecting of evidence;

c) fair hearing with regard to the giving of detailed reasons for judgment;

d) judgment given within a reasonable time.

Each of these points will be briefly referred to in this paper. But it must be understood that the Italian law aims to inforce the same standards, with regards to the matters in question, in all the Courts of law of the land:

B) <u>"Disputes on civil rights and obligations" and other particular circumstances of the case</u>

To start with, art. 6 (1) aims to limit its scope to a given section of the disputes that parties could start in each country. That brings forth the necessity of distinguishing between "civil rights and obligations" on one side and litigation of different kinds on another.

By reading some of the fourteen ECHR judgments quoted in the Questionnaire, it is evident that the European Court has considered carefully and repeatedly that distinction. The fact remains that the present writer cannot be sure of having completely understood it.

On the other hand, it should perhaps be stated again that the Italian law aims to enforce the same standards of fairness for all kinds of litigation. That concerns security of tenure of the judicial office, oral and public hearings, appeals, etc.

A distinction is drawn up in Italian constitutional law between, on one side, (full) civil rights which are judged, as a rule, in the mainstream Courts (i.e. civil and penal Courts; also called ordinary Courts) and, on the other side, interests vested in individuals to a legitimate use of public

powers by administrative authorities, interests which are always judged by Administrative Courts. Although it is true that Administrative Courts can be called by single Statutes to judge also on full civil rights of public individuals towards public administrations, which occurs very frequently. On the contrary, interests to the legitimate use of public powers are reserved by the Constitution for legal review by the Administrative Courts.

Those interests must be taken to Court within a much shorter period than civil rights; and Administrative Courts follow, of course, special procedural rules. As already seen, also the effects of the res judicata are different in the two fields: simple interests and full civil rights.

C) Spécific fields of public administration

Please refer to point B). In Italy, most cases quoted in the Questionnaire. at C) come normally under the province of administrative litigation. That is because in them the Administration makes use of Statutory powers; besides, it seems also to have always discretionary powers, which is a sure sign of the fact that individuals do not have a civil right to a certain result.

The opposite is true for the field referred to in point 2,7 and 2,8:

- tax matters are not, as a rule, judged in Italy by the Administrative Courts. This, except for the legal review of regulations issued mostly by local authorities and determining rates. In fact, the duty to pay taxes and rates according to already established rules and according to the situation of each tax-payer is considered in Italy a civil law obligation.
- social security is again considered a civil law field, except when administrative authorities are given by Statute a discretionary power.
- the same considerations apply to other financial contributions to public bodies.

3. FAIR TRIAL

A judge who sat in the Court of first instance cannot sit in a judicial committee of the Council of State and hear the same case in appeal.

(3.3) A judge who in some other quality, or as a private individual speaking to third parties, has given his opinion on a case, or at any rate discussed it, cannot sit in judgment.
But it is considered in Italy that a case can be decided by judges who have taken part, in the same instance, in dispatching applications for stay of execution or for temporary orders: they have done so on a prima facie exam, on the basis of the evidence collected till then and also in comparing the hardship for each party in the intermediate situation. The latter being a point which is obviously irrelevant at the moment of conclusions. For a different case also below, 9,2.
Of course a judge cannot sit in Court if he has significant links with one of the lay parties: as to public authorities, if he has significant links with the person who took the administrative decision under review and at times with the person who advised it.

(3,1 and 2) In considering applications for stay of execution or for other temporary orders, the Court hears counsel in camera, which means that the lay client and the public in general are not admitted to the proceedings. Perhaps one could argue that this practice runs counter to the principle of public hearing detailed in article 6(1) of the Convention. The defence is that informal discussion speeds up business, which is especially necessary in a matter of urgency. In fact the EHRC has held that publicity must not necessarily rule the whole course of the law-suit: it

must be coordinated with other principles, and here with expediency under the aspect of comparative speed.

Reasons for decisions on stay of execution or on other temporary orders are, as a rule, given very summarily. At times there is only mention of the parties, of the reviewed administrative decision, of the presence of Counsel, of the article of the Statute authorising the stay of execution when circumstances allow for it, and of the measure taken by the Court on the basis of the simple formula that legal conditions for stay of execution are met or not met.

Of course, the giving of reasons for the single judgment is an important aspect of fair process. The question is whether detailed reasoning can be waived in matters of urgency.

For the affirmative, one can say that: (a) whilst reasons must touch on all the relevant points ofjudicial opinion, or be incongruous and capricious, a Court cannot anticipate its judgement on a case from its very beginning; b) on the other hand it would be irresponsible for the Court to give its simple first impressions on points of law; (c) all matters of urgency must be dealt with immediately, whatever the number of applications submitted during a certain day. Hence the impossibility of writing down a decision complying with the usual standard of the Court; d) there is a contradiction between the summary contribution of Counsel and the incomplete collection of evidence at this stage on one side, and the request for a reasoned temporary decision on another.

As to the reasonable delay of definitive judgments, see below, under number 8.

3.4 Under the item "equality of arms" one can mention the collecting of evidence in Italian administrative law-suits. Whilst all parties can produce documents, most relevant documents are here in possession of the

Administration. If the latter refuses to disclose them, the last resort for the Courts is to judge against it.

In practice, Administrative Courts do not hear witnesses. Verification of places can be delegated by the Courts to an administrative authority of their choice, which will act under the adversarial system or cross-control. The same is true for medical visits or expertises. Or the Courts can, if they choose, refer the case to private consultants. They can order the administrative authorities that they deem appropriate, to hear witnesses.

4. ORAL PROCEDURE

4.1,2 e 7) Properly speaking, hearings must always be oral, as their use is to allow judges to hear what parties have to say. All Administrative Courts hold (oral) hearings. No case can be decided without one. That is true also for stays of execution and for other temporary orders. The secretariat advises Counsel on the date of the hearing. If Counsel does not wish to attend, he is of course not compelled to; and the case proceeds in his absence. It is not possible to waive the right to an (oral) hearing. There are no recorded cases of decisions reached without a previous hearing. Counsel can of course declare that he has nothing to add to his written defence. In fact he frequently does so.

(**4**.4 and 5) It could happen that notice of a future hearing is served by the Secretariat to a wrong address or otherwise incorrectly, that the Court does not perceive this, and that Counsel neither sends a written defence nor appears. Judgment then passed by an Administrative Court and contrary to the party who could not speak out in its defence would be quashed on appeal by the Council of State; who would then send the case back to the first instance for re-trial. Similar is the case of a notice

received too late. Only if the party defends itself in a way which makes clear that it has received no disadvantage by the fault of procedure, or if the party waives its right to make use of the full time allotted to the defence, will the fault incurred by the Secretariat become irrelevant.
Judgments passed by the Council of State without previous notification of the date of the hearing to the parties would be subject to revocation, on application by the interested party to the Council of State; and the appeals would be judged anew by the Council. As to notices received too late, see above.
All this is irrespective of the fact that single cases fall or do not fall within the scope of Art. 6 of the Convention.
Other relevant breaches of procedure can be imagined as incurred either by the Secretariat, or by the Court itself, or initially by the parties. Let us take the three following instances: a) when showing to a party the documents deposited by the opposite party, the Secretariat leaves out certain papers, which are misplaced; b) the Court takes into consideration evidences pertaining to a different case; c) whilst in Italy it is for the plaintiff to notify to its opponents the original writ, a plaintiff has omitted to do so, without the Court perceiving this.
But such complicated subjects tend not to apply to the matter in hand, which is the need of a hearing. So that they should better be ignored.

(**4**.6) As stated under **3**.1 and 2, applications for stay of execution or for other temporary orders are heard in camera by the Administrative Courts. That means that the lay clients and the public cannot be present.

5. RULES OF EVIDENCE

Vide **3**.4. In practice Administrative Courts review administrative

decisions on the basis of the file of documents pertaining to the case, which the Administration is obliged to submit. If there is any doubt on the existence of further documents, the Court makes the relevant order for obtaining them or a formal denial of their existence. If it is necessary to inspect a site the Court chooses which administrative authority must do it with the presence and collaboration of all parties.

If it is necessary to obtain expert opinion the Court can choose which administrative authority will give it. Or the Court can, if it so wishes, ask private experts to act on its behalf, under control and with the collaboration from experts representing the parties.

It is finally for the Courts not to consider evidence that they would deem illegal.

(5.4) It is of course possible that after quashing a judgment passed in favour of the Administration on a point of procedure, the Council of State should require new evidence from the Administration on a point of substance. That would happen if the Administration has not fulfilled its duty, to submit in any case and immediately the relevant file, or if this file should prove unsatisfactory. One must remember that here the Court of first instance has thought possible to decide on a point of procedure. That is why that Court has considered irrelevant the absence of the file or its incompleteness and has not ordered the Administration to fulfill its duty. Of course, it is up to all parties to produce evidence at their disposal and favourable to themselves. On this the Court normally does not interfere.

A different situation arises when a party wishes to submit documents in its own favour during the appeal, after having negligently omitted to produce them in the first instance. This point is doubtful for the Italian Council of State. The laxer and favourable opinion is perhaps prevalent.

6. PARTIES OF THE CASE

An Administrative law-suit is a law-suit brought against the Administration which has issued a decision, or has otherwise acted in a way deemed illegal by the plaintiff. The two necessary parties of that litigation are then the plaintiff and the defendant Administration.

At times the plaintiff complains that the Administration has issued a decision non only detrimental to himself but also favourable to third parties. For instance, the Administration has granted his neighbour permission to build an ugly and very large building; or it has filled the places to the public University which he had asked to be admitted to, with many other applicants whilst excluding him. When these administrative decisions are brought to Court for legal review, the third parties just mentioned are necessary parties in the law-suit. Only the Administration can give redress; but when judgment is passed points of fact and of law established by the Court will be res judicata for all parties.

Any other individual whose interests are involved in the law-suit (say the contractor who had undertaken to build the large house in project) and who happens to know of the existence of the litigation, can take part in it, backing one of the litigants. But the position of these interveners, or subsidiary parties, is quite different from that of the principal parties. The subsidiary parties cannot enlarge the ground of complaint established by the plaintiff; and their possibility of appealing against the judgment of first instance is severely restricted.

7. PUBLIC PRONOUNCEMENT OF JUDGMENT.

No judgment on administrative litigation is pronounced orally in Italy.

The written judgment, consisting in an exposition of facts, reasons and conclusions, signed by the judge-reporter and by the presiding judge, is deposited in the secretarial office. After which any individual (for instance, any journalist or legal review) has a right to obtain a copy of it.
This placing of the written judgment in the public records is called publication.
In some exceptional fields the Court must publish the conclusions as soon as possible, and only later the full reasoning which led to them.

8. REASONABLE DELAY OF DEFINITIVE JUDGMENT.

Delays of definitive judgments (as opposed to decisions on request of stay of execution or other urgency orders) are at present very worrying in Italy. The administrative judiciary feels that radical changes must be introduced: the number of cases judged every year must not only be equal to that of cases brought yearly in front of the Administrative Courts, but must indeed be higher, in order to eliminate the back-log after a certain period.
Realistic, and no doubt long-range, planning should be made to this purpose. As to the present, the situation is certainly very far from this. One is astonished by the lack of attention paid by educated public opinion to a problem which seems central to democratic society, as a delayed check is no check to ill-administration.

(8.1) Present situation: judicial organisation.

At present there are in Italy no complaints to administrative or quasi-judicial authorities, which must precede application for judicial review: everything goes directly to the Administration Courts.

At times the plaintiff delays matters by not notifying his application to all the necessary parties. In the public hearing the Court is then reduced to deciding who these parties are, rather than dispatching the case.

The defendant Administration can delay matters by not producing immediately the necessary documents. Again the Court will then make an order to this effect, rather than deciding the case for good.

In three-cornered litigation (see above, **6**) it is especially difficult to punish there and then the negligent Administration by finding against it, as delay in producing the file should not prejudice the innocent co-defendant. But in any case this extreme sanction seems then too early and hence unduly prejudicial to public interest.

As already stated (see page 1), there are always in Italy two layers of litigation, with full right to appeal to the higher Court.

On the other hand, the Council of State has no separate route for dispatching appeals clearly inconsistent: as article 24[2] of the Italian Constitution declares that defence is an inviolable right in every degree and part of the law-suit, one wonders whether that prevision would not cover in any case a right to oral defence in appeal.

It has been already said (see page 2) that, as a rule, when the Council of State quashes the previous judgment, it judges also the merits of the case; but (see above, **4** 3,4 and 5) that there are faults of procedure incurred by the judge below which call for a re-trial in the first instance.

Various Statutes have established a certain order of priority in the hearing of cases. For instance, litigation on local, regional or supra-national elections, or on public works, must be very speedy.

Such priorities concern both degrees of litigation. Otherwise, the calling of cases follows normally seniority, or taxi-rank, principle. Even so, there is in practice a certain discretion by the president of the Division in altering that order.

(**8**.2) Present situation: legal correction of effects of delay.

As stated before (**1**, 6-10), the defendant Administration could be responsible for damages. Action for damages is normally brought to the Civil Courts; but sometimes to the Administrative Courts themselves. Damages are fixed according to normal Civil Law practice.

The annulment of a decision which has put an end to (or suspended) public service does automatically entitle the civil servant to payment of past salaries and to reconstruction of status. But such a reconstruction does not neutralise, on one hand, loss of past opportunities: On the other hand it leads at times to undue advantages for the plaintiff, who may have been partly, or even entirely, responsible for the events leading to his dismissal or suspension.

In my country there is no internal procedure which allows individuals to recover from a public body damages caused by unreasonable delays in judgment by Administrative Courts.

(**8**.3) present situation: statistics:

In Italy there are judgments which do not conclude the case in the Court which passes them (some judgments on points of procedure, partial judgments and the other judgment on which below. at **9**, 2); and there are single judgments which dispatch many cases, started separately by various plaintiffs. So the significant statistics must concern above all the back-log of cases, as it stands at the beginning and at the end of a given period. Less important, from this point of view, is the number of judgments passed.

Taking into consideration the year 1998, it appears that at its beginning the back-log of Administrative regional tribunals was of 819.000 cases. At the end of that year, it was 856.000. New cases inscribed in the rolls of first instance during the year were over 90.000. Judgments passed were

52.700.

In the judicial committees of the Council of State the figures of back-log are 32.200 and 32.900 cases respectively. New appeals brought up during the year were 12.300. Judgments of appeals passed were 11.600.

Supposing that on average every judgment dispatches one case, if the Administrative regional tribunals had to deal from now on with their back-log only, setting aside all new incoming cases, at the present rate they would take more than sixteen years to get through it. The Council of State would take more than two years and a half.

Judges of first instance were 288. Judges of appeal, 58. The proposition of appeal was 25% of first instance judgments. If the Administrative regional tribunals would dispatch yearly all the cases that they receive, the number of appeals would be more than double that the present one. In order to deal with them (not to speak of appeals concerning the back-log), the size and the composition of the Council of State would change beyond recognition, as the judicial committees would became a hugely preponderant part of it.

Of course the two layers of Administrative Courts also decide application for stay of execution and for other temporary measures - statistic given above do not consider this different and considerable task, which is fulfilled more or less within the minimum delay necessary to insure a proper representation for all parties concerned.

It would seem extremely difficult to establish the average length of administrative law-suits. Such statistics could be drawn up with many years' delay, considering all law-suits started in a certain year. Then every single law-suits should have to be checked till the last of them would be judged.

The presuntive formulae otherwise put forward are open to doubts..

It can be safely guessed that at present in Italy the average length of administrative law-suits increases every year. According to the right of precedence enjoyed by certain cases, some of them are now dispatched in a few weeks or months in the first instance, and similarly on appeal. Other cases, which are being decided now in appeal have been started in the first instance up to ten or more years ago.

In such a situation the stays of execution and other temporary orders - which are always decided, in the first instance and on appeal, in a matter of weeks - acquire an all-important relevance for the transaction of administrative business.

Hence the multiplication of application for such measures. 52% of administrative law-suits are now accompanied in the first instance by one of these applications.

Hence the branching out of administrative litigation along the double track of application for temporary measures, and of application for the judgment proper.

Hence important business temporarily decided on the basis of prima facie impressions, and of prevalent hardship for one of the parties, although this last point will be - as already remarked above 3,3 - irrelevant for the judgment proper.

Differences of direction between decisions on applications for temporary measures and delayed definitive judgment can then exacerbate the ill-feeling of the private individual who finally wins the law-suit. Of course, according to the ECHR back-log of judicial business will not excuse unreasonable delays.

(8.4) Improvements open to the Supreme Administrative Courts.

One has to agree with all the points made by the General Reporter:

- it would certainly be right to make sure that cases of the same kind,

lodged to the same Court, follow a roughly corresponding time table. In order to do so, it would of course be necessary to monitor each case from the start;

- it would save judicial time and insure a more complete equality of treatment if cases of similar content were put together in the same hearing;
- in general, endowing all Courts with competent secretarial staff would save plenty ofjudicial time, and increase efficiency;
- briefing the Government on the scale of problems of administrative justice is certainly useful. A happy consideration must be that this scale would appear very much smaller, in terms of involved personnel, than that concerning penal and civil justice. All Supreme Courts - and perhaps particularly the Councils of State - would seem especially competent to give advice on such legislation.

9. DECISIONS OF COUNCILS OF STATE OR SUPREME ADMINISTRATIVE COURTS.

(**9**, 1 and 3) As to the limits of competence of the Italian Administrative Courts, it is perhaps sufficient to refer to the answers given at page 2: Administrative Courts can quash administration decisions on the ground of wrong usage of discretionary administrative powers; and this judgment directs the administration as to the further usage of that power when dealing again with the matter already judged. But the Courts cannot issue administrative decisions themselves under, the appearance of delivering a judgment.

An exception to this last principle can be found only in the case of application to the Court for the execution of a judged matter, if it follows from a judgment of annulment that the Administration is bound to decide

anew, and the latter repeatedly and perversely refuses to do so. But even in this case the Courts usually prefer to appoint a commissioner ad acta. charging him to decide on behalf of the recalcitrant Administration.

(**9**.2) In Administrative litigation any case is dealt with, as a rule, during one single hearing. Many cases are called at the same hearing, and some are discussed more or less extensively. After which everybody else retires and the Court considers the decision of each application. On occasions the Court feels unable to decide a case there and then: it is perhaps necessary to call for the presence of another party, or to ask for some document or expertise, etc. On these occasions the Court makes (in the form of a judgment) the appropriate orders; and on the next hearing the same Court could well be formed by different judges. The new team is free to decide all points left unresolved by the previous one, and normally to dispatch the whole law-suit. See also **3**.3.