

**THE ITALIAN ADMINISTRATIVE PROCEDURE ACT:
PROGRESSES AND PROBLEMS**

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Prof. Giacinto DELLA CANANEA

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1. INTRODUCTION

Italian public law, in particular administrative law, is undergoing a fundamental transformation that calls into question not only its adequacy, but also its traditional relationship with the State. This transformation, which is largely the outcome of constitutional reforms and judicial innovations, becomes evident when considering administrative procedures.

Taking advantage of the growing body of literature, and especially of a recent comparative analysis carried out on the twentieth anniversary of the law (n. 241 of August 7th, 1990) which regulates administrative procedures and access to files¹, this report's basic approach will be both descriptive and critical.

The report is divided into four sections. The first provides a brief description of the situation that existed in 1990, before the approval of the Administrative Procedure Act. The second section illustrates some general features of the Act. It argues that, unlike the German law, the one enacted in Italy is not a code, insofar as it lays down general principles and rules concerning only some aspects of administrative procedures. The third section reconsiders critically the traditional opinion, according to which due process of law does not have a constitutional status. It takes into account, however, the problems raised by the constitutional reform of 2001, aiming at strengthening the autonomy of regions and local authorities. In the fourth section, the widespread opinion according to which the Act introduces a sort of procedural democracy will be critically considered. It will be argued that the Act, as it was interpreted by the courts, has provided a stronger procedural protection for a variety of old and new interests, but it was and is still weak with regard to

¹ See the special issue of *Italian Journal of Public Law* (2), 2010, edited by Giacinto della Cananea & Aldo Sandulli, with the English translation of the law, also available at www.ijpl.eu. See also Mario P. Chiti (ed.), *General principles of administrative action* (2006).

rule-making and planning procedures, which are particularly important from the point of view of procedural democracy.

2. DUE PROCESS IN THE TRADITIONAL MODEL OF ADMINISTRATIVE LAW: A CRITIQUE

The traditional model of administrative law developed out of few statutes and judicial decisions since the last decades of the nineteenth century. Such model had sought to reconcile the claims of governmental authority and the increasing range of citizens' rights with regard to public administrations (dialettica autorità-libertà) essentially within the judicial process. Whatever the division of powers between ordinary courts and administrative courts (which were and are still conceived as two distinct systems of courts)², the judicial process was at the heart of administrative law, even though at least a part of the academy favoured a broader vision, including the organization and functioning of public authorities.

Three fundamental strains of criticism have been directed against this traditional model. First, it has been often said that such model focused essentially on the final measure taken by the public authority, that is to say the individual decision (provvedimento

² See Franco G. Scoca, *Administrative Justice in Italy: Origins and Developments*, 1 It. J. of Public. L. 121 (2009) (arguing that in the last ten years not only has the scope of activity of administrative judges has been enlarged, but that their role has been strengthened after the legislator entrusted them with the power to grant financial compensation to private parties).

amministrativo). Like the German conception of the VerwaltungsAkt³, this model recognized several peculiarities to the measure adopted by the public authority, including the power to impinge on individual and collective rights and in some cases that to execute the measure coercively.

Second, the individual and collective rights recognized by both the Constitution of 1947 and parliamentary legislation lacked an adequate procedural protection. Procedural requirements existed in legislative provisions regulating several administrative procedures, in particular those leading to expropriation of private ownership and issuing of other measures adversely affecting individuals. However, procedural safeguards lacked in other fields of administrative action, including those concerning government subsidies and planning and rule-making activities, in spite of the proliferation of administrative activities governed only by broad legislative directives.

Third, it was often asserted that too much power was concentrated in the hands of the courts, especially of the Consiglio di Stato. In some cases, the administrative judge conceived the rules laid down by specific statutes as manifestations, or symptoms, of broader principles. In this way, when administrative control of citizens and businesses grew more pervasive, and often intrusive, a body of doctrines and techniques was developed by the courts, in order to reconcile the exercise of power by a more fragmented administrative universe (including regions and several other public bodies) with traditional concerns for private liberties. In other cases, however, the process of abstraction from existing legislative rules was weaker, or even impalpable. In spite of the frequent re-assertions of allegiance to positivistic assumptions, the courts did not hesitate to lay down new principles, such as the principle of reasonableness. Several commentators, therefore, advocated a legislative

³ See Otto Mayer, *Deutsches Verwaltungsrecht* (1895). See also Giacinto della Cananea, *On Bridging Legal Cultures: The Italian Journal of Public Law*, 11 *German Law Journal* 1281-1291 (2010) (observing that the German influence on Italian administrative scholarship has weakened since the 1970's) and, for further remarks, Sabino Cassese, *Science of Administrative Law in Italy from 1971 to 1985*, in *Jahrbuch des öffentlichen Rechts der Gegenwart* (1985), 123.

regulation of administrative procedures as an instrument for a more balanced approach in shaping administrative law⁴.

3. THE ITALIAN ADMINISTRATIVE PROCEDURE ACT (1990)

3.1 Judges, professors, and the new legislative framework

The rising expectations of administrative reform were met, at the beginning of last decade of the twentieth century, by three legislative innovations. First and foremost (for our purposes), after decades of debates, in 1990 Parliament decided to adopt an Administrative Procedure Act (APA). Second, the old legislative framework concerning local government was replaced by a new one, soon followed by a constitutional reform, which produced an unexpected contrast with the APA. Third, an antitrust Act was passed by Parliament and an independent authority was set up.

With regard to administrative procedures, why did the Parliament decide to adopt the APA act in 1990, it remains to be explained. There is need for further empirical and historic analysis, therefore. However, at least two things are clear enough. First, although the state of administrative justice, especially before ordinary courts, was far from being satisfactory, there was not a strong pressure coming from the bar. A difference thus emerges with regard to the United States, where the Federal APA (1946) was a product of the reaction against what was perceived as an excess of discretionary powers in the hands of the New Deal agencies.

Second, while most laws are drafted by ministerial bureaucracies, this was drafted by a number of committees made up of academics, judges, and senior officers. They took

⁴ For a comparative analysis, see Sabino Cassese, *Legislative Regulation of Adjudicative Procedures: an Introduction*, 3 *European Review of Public Law* 15 (1993).

into account both existing case-law and foreign legal materials⁵. They aimed at generalising and improving existing standards of administrative action. In this respect, it can be said that the new legislative framework was more the product of judges and professors, than of politicians and bureaucrats. This may explain why the latter constantly tried to dilute the potential for innovation, sometimes successfully.

3.2 An Act laying down general principles, not a code

When considering the contents of the Act of 1990, two things should be made clear. First, the Act is not simply a codification of existing case-law. Second, it is not a code.

With regard to adjudication, the Act codified three fundamental principles: the right to be heard by the authority before a final measure is decided, the right to have access to the files, and the duty to provide reasons (with the notable exception of regulations and administrative acts that lay down rules). However, it would not be fair to say that Parliament has merely codified case-law. Indeed, new procedural safeguards have been introduced, including the duty of public authorities to assign specific responsibility for every kind of administrative procedure. This has gradually attenuated the traditional secrecy of public authorities. Moreover, other rules, aiming at simplifying administrative activities have been introduced, in particular with regard to the situation in which several public authorities are involved in the same procedure⁶.

⁵ An interesting collection is contained in Giorgio Pastori (ed.), *La procedura amministrativa* (1964).

⁶ For further details, see Giorgio Pastori, *Recent Trends in Italian Public Administration*, 1 *Italian Journal of Public Law* 15 (2009).

As a second general feature, unlike the German *Verwaltungsverfahrensgesetz*, the legislative framework adopted in Italy is not a code. Not only does it not regulate entirely all the aspects of administrative procedures, although new provisions were added in 2005, but in many respects it only lays down some general principles and rules. The question thus arises whether such principles and rules provide only a loose frame of reference for due process of law. The Act codified the principle of legality, as binding public administrations with regard to the goals to be achieved. It was conventional wisdom that, in this way, private autonomy was secured against administrative activities that were *ultra vires*, to borrow an English expression. The Act affirmed other principles, of transparency and effectiveness⁷. It also recognized the right to have access to the records and information held by every public authority. In this respect, a very broad concept of document was adopted, and this applies not only to public authorities, but also to private providers of public services, for example in the area of postal services. A certain degree of cautiousness emerges, instead, with regard to the holders of the right of access, because a specific condition is laid down. As a matter of fact, the exercise of this right is allowed only for the protection of an interest that is legally relevant.

4. IS (PROCEDURAL) DUE PROCESS OF LAW A CONSTITUTIONAL PRINCIPLE?

In the light of this sketchy description of the contents of the APA, two questions arise, that is to say whether (procedural) due process of law has gained a constitutional status, and whether it has produced a sort of procedural democracy.

⁷ Another important provision, that cannot be adequately examined here, is the new part of Article 1, as amended in 2005, that refers to the “principles of the legal order of the European Community”, thus opening up the whole system of administrative law to the principles of EU law : for further remarks, see Giacinto della Cananea, *Articolo 1. Il rinvio ai principi dell’ordinamento comunitario*, in Maria Alessandra Sandulli (ed.), *Codice dell’azione amministrativa 20* (2010).

4.1 A 'cold' case: due process as a general principle of law

Despite the attempts made by a handful of academics, for a long time the prevailing opinion has been that due process of law did not have a constitutional status⁸, for two reasons. First, from a formal point of view, the Constitution lays down only broad principles of impartiality and sound governance. In other words, there is no such thing as the Due Process Clause of the U.S. Constitution or Article 105 of the Spanish Constitution (1978). Second, and consequently, the Constitutional Court has refrained from interpreting the Constitution in a radically innovative way.

Consider, for example, a 'cold' case, but a very significant one. In 1962, the Constitutional Court was requested to assess the validity of a regional statute that limited directly the building rights of private owners, with providing them with any possibility to be heard by the public authority. A viable option for the Court might have been to say that, although separation of powers was not to be interpreted rigidly, when adopting individual measures public authorities had to respect procedural requirements, including the right to have some kind of hearing. However, the Court declined to do so. Rather, it affirmed that due process of law was a general principle of law, but not a constitutional principle. As a result of this, due process of law was regarded as binding for regional authorities, but not the State. In other words, it could be derogated by Parliament⁹.

This ruling, especially in an era of gradual implementation of constitutional principles, was regarded by most observers as a self-restraint. This brought into question the ability of the Constitutional Court to establish coherent principles of law in an area which had been largely the province of the Consiglio di Stato (only in 1971 were regional

⁸ See, in particular, Feliciano Benvenuti, *Contraddittorio (principio del) – diritto amministrativo*, in *Enciclopedia del diritto* (1961), 721

⁹ See Constitutional Court, judgment n. 13/1962, commented by V. Crisafulli, *Principio di legalità e <<giusto procedimento>>*, *Giurisprudenza costituzionale*, 1962, 130.

administrative courts set up). It ought to be observed, however, that this conception of procedural due process of law was quite similar to the conception of general principles of law, not binding on legislators, that had emerged in France after 1944¹⁰.

4.2 The constitutionalization of due process of law

After 1970, the conclusion reached by the Constitutional Court in 1962 was not changed, although a slightly different awareness of the need to ensure respect for some procedural requirements gradually emerged, especially with regard to the pervasive administrative regulation enacted by regions. At the basis of this, due to the lack of direct access to the Court, there was not only the continuation of concern, expressed by private litigants before administrative courts, about the adequacy of existing procedural rules, but there was also a gradual, but steady re-interpretation of the constitutional paradigm expressed by both lower administrative courts and the Consiglio di Stato. In this process, at least two distinct phases may be identified.

In a first phase, before the APA, the administrative courts sought to redefine their consolidated standards of judicial review, in order to better structure exercise of administrative discretion in procedures open to the holders of individual and collective interests. Consider, for example, the following case concerning the municipality of Rome. In the mid 1980's, the mayor issued an order severely limiting the circulation of private vehicles, without any public hearing or adequate information. When a group of residents and traders from the area affected by such limitation challenged the legitimacy of the order, the administrative court quashed it on procedural grounds. It argued that if the administration introduces new policy and rules, it must respect the principles of reasonableness and accuracy of fact-finding. It observed, in particular, that no accurate fact-

¹⁰ See Benoit Jeanneau, *Les principes généraux du droit de la jurisprudence administrative* (1954).

finding had been carried out, nor had any notice been given¹¹. Whether the underlying rationale was the traditional doctrine of Rechtsstaat or a utilitarian approach (in the sense that an administration that hears citizens works better), it remains to be seen¹². What matters, for our purposes, is that a new interpretation of the Constitution did not emerge.

Such an interpretation did emerge a decade after the entry into force of the APA. The occasion came again from the exercise of power by a municipality. A licence, initially issued to the owner of a shop, had been withdrawn without any notice being given to the licensee. As a result, the latter had not been able to exercise his right to be heard by the administration before the license was withdrawn. The court argued, first, that the right to be heard is a general principle of law. Second, and more important, the court upheld the thesis according to which the right to be heard is ‘directly connected’ with the constitutional principles of impartiality and sound administration¹³. As a consequence of this, the court held that every other legislative provision limiting or excluding the exercise of the right to be heard must be interpreted very strictly, in order to safeguard such a right. It was not yet a brand new doctrine of due process. However, it did not only exclude any doctrine of unfettered discretion, even if exercised by political bodies, it also implied the need to consider all relevant interests, with all the well-known difficulties inherent to this kind of intellectual exercise. It excluded, accordingly, that the individual interest of a citizen or an undertaking could simply be left outside the process of interest balancing.

¹¹ Tribunale amministrativo regionale per il Lazio, second section, judgment n. 21/1984, published in Sabino Cassese & Aldo Sandulli (eds.), *Casi e materiali di diritto amministrativo* 335 (1998, 2nd)

¹² For an interesting discussion, see Juli Ponce, *Good Administration and Administrative Procedures*, 12 *Indiana Journal of Global Legal Studies* 551 (2005).

¹³ Consiglio di Stato, Vth panel, judgment n. 2823/2001, available at www.giustizia_amministrativa.it.

4.3 Procedural due process of law between national and regional legislation

Thus far, a gradual evolution has emerged. However, the story of procedural requirements imposed on public administration is not a linear and progressive one. It is full of old and new obstacles, including the unexpected consequences of the strengthened legislative autonomy granted to the regions.

As a starting point, there is no doubt, on the basis of parliamentary records, that the Act was designed to achieve relative uniformity in the administrative machinery, with regard not only to the State, but also to regional and local authorities. However, the Constitution recognized legislative autonomy to regions (and an even greater autonomy was left to the five regions having special status). As a consequence of this, one of the final provisions of the Act specified that the principles and rules contained in the APA applied directly to regions and local authorities so long as they did not adopt their own norms. This permitted, but did not mandate, regions and local authorities to adopt such norms. Additional procedural requirements, crafted by the courts on the basis of national legislation, would still apply. When, in 1992 a region argued that its sphere of autonomy had been infringed, the Constitutional Court dismissed the case, affirming that administrative procedures fell within the domain of organization, as the result of which regional legislation had to respect the basic principles laid down by State legislation.

The problem re-emerged after the constitutional reform of 2001. Briefly, while the original provisions of the Constitution left only some specific legislative competences to regions, in 2001 this choice was reversed. As a result, the State only enjoys legislative competence where this is expressly provided by Article 117 and no mention is made of administrative procedures therein. The assertion of the State's power to legislate in this field, therefore, may be contested. As was mentioned earlier, the courts have indicated their readiness to consider the procedural requirements laid down by the Act as inherent in the fundamental principles of sound administration and impartiality laid down by Article 97. However, the possibility that one or several regions might contest the lack of an adequate constitutional basis could not be excluded. At least, this is what a clear majority in the

Italian Parliament thought, when approving an amendment to the Act in 2010. Article 29, as amended, now establishes that:

Section 29. (Scope of Application)

1. The provisions of the present Law shall apply to state authorities and national public bodies. The provisions of the present Law shall likewise apply to wholly or prevalently publicly-owned companies, limited to when they carry out administrative functions. The provisions contained in sections 2-bis, 11, 15 and 25 (5), (5-bis) and (6), as well as those of Chapter IV-bis shall apply to all public authorities.

2. Within their respective fields of competence, the regions and the local authorities shall regulate the subject-matters governed by the present Law in observance both of the constitutional system and of the guarantees for citizens with regard to administrative action, as such guarantees are established by the principles laid down by the present Law.

2-bis. The provisions of the present Law concerning the public administration's duties to guarantee the participation of affected parties in procedures, to identify an officer responsible for such procedures, to conclude them within the pre-established timeframe and to guarantee access to administrative documentation, as well as those relating to the maximum duration of procedures, shall pertain to the essential levels of benefits and service provision referred to in Article 117(2)(m) of the Constitution.

This provision has several important implications. First, the Constitution is interpreted by Parliament as providing a legal basis for statutory requirements of notice and hearing in administrative procedures, access to documents and identification of who is responsible for managing a procedure and ensuring its conclusion within the deadline. This solution, already envisaged by some academics, may certainly be upheld by the Constitutional Court.

Secondly, the distinction laid down in 1990 between principles and rules becomes all the more important, since only the principles produce binding effects on regions and local authorities. Whether a certain norm belongs to principles or to rules, however, is not always easy to determine. As a result, it will be a task for the courts to specify the scope that principles and rules have, respectively. The courts' broad language about general principles of administrative law can certainly cover a number of procedural requirements, even beyond what the legislation provides for. Finally, for all its ambiguity, this legislative language does not rule out, nor it could have done so, the possibility that regional legislation differ at the level of rules. Whether this possibility will be used to improve standards of effectiveness and transparency, for example by reducing the length of administrative procedures, or to protect public administrators from citizens and businesses' rising expectations, remains to be seen.

5. TOWARDS PROCEDURAL DEMOCRACY?

5.1 From right to defence to participation?

The *caveat* mentioned earlier with regard to the linear and progressive narratives of the legislative framework governing administrative procedures applies, *a fortiori*, to the widespread opinion according to which the APA has achieved a sort of procedural democracy. An accurate analysis should take into account at least two fundamental weaknesses of the Act.

First, with regard to the right to be heard in the field of adjudication, what the Act ensures is only the right to present evidence and documents and that to have access to documents, but not the right to be 'heard', by way of a hearing before a specific public officer, such as hearing officers or administrative law judges as happens in the U.S. Nor, consequently, is there any chance for opposing parties to carry out a cross-examination. A narrative emphasising the progress towards procedural democracy is, therefore, far from being convincing.

Second, for all the importance of the rules governing administrative procedures (article 7-12 of the Act), such rules do not apply to what is probably the most salient exercise of discretion, that is to say planning and rule-making. Indeed, Article 13 of the APA excludes planning and rule-making procedures (as well as those concerning taxation) from the scope of application of the Act. To make a brief comparison with the U.S., in Italy there is no such thing as formal on-the-record rule-making. There is not even an informal notice and comment. In conclusion, although rule-making involves the exercise of discretion concerning not only the technical means of implementing a policy, but also the priorities to be accorded to relevant and competing interests, nothing is specified by the law, except the fact that everything is left to specific statutes.

The question thus arises whether the widespread opinion according to which the Act of 1990 creates at least the preconditions for administrative or deliberative democracy – that which in other countries is used in order to enrich political democracy or to overcome some of its limits – is, therefore, simply wishful thinking¹⁴

5.2 The negative impact of the new legislative rules

The conclusion just reached is confirmed by the legislative changes that occurred in 2005. Whether such legislative changes reflected a real shift in the opinion of Parliament, it remains to be seen. Some observers have argued that the amendments introduced in the

¹⁴ The drawbacks of making administrative procedures a sort of ‘surrogate’ of political process have been pointed out by R.B. Stewart, *The Reformation of American Administrative Law*, 88 Harvard Law Review 1668 (1974-75). See also Carol Harlow, *Interest Representation in Administrative Procedures. Representative Democracy vs. Participatory Democracy in the EU and the US: A Comment*, in Roberto Caranta (ed.), *Interest Representation in Administrative Proceedings* (2008), 86 and Fabrizio Fracchia, *Administrative Procedures and Democracy: The Italian Experience*, 12 Indiana Journal of Global Legal Studies 580 (2005) (holding that democratic principles also apply to administration).

APA reflected, rather, a reaction by bureaucrats against legislative standards that were regarded as being too demanding. This applies, in particular, to the controversial increase of the default rule (Article 2, last paragraph) concerning the deadline for concluding administrative procedures, which was modified from thirty days to ninety.

However, the least that can be said is that this is not an entirely accurate analysis of legislative changes. Indeed, one of the most controversial changes was supported by some administrative scholars. Regardless of its limited capacity to gain consent within academic circles, a group of scholars advocated a vigorous reaction to what was perceived as an excess of formalism, mentioning the examples of Germany and the EC¹⁵. In line with this school of thought, the amendment introduced by Parliament aims at preventing the annulment of administrative acts for the infringement of ‘formal’ requirements (Article 21-octies).

This amendment, and the interpretation according to which such formal requirements include the reasons the authority omitted to specify, may reflect a cultural shift, the idea that procedural constraints are only obstacles to a well-intentioned decision-maker. Or, it may reflect another idea, notably that the individual interest of that party claiming a procedural due process right may not be weighed against the collective interest that the administrative decision maximizes. The risk that the courts defer to the discretion enjoyed by administrators in this respect is not at all a theoretical one, as some judgments show, for example with regard to the duty to give reasons¹⁶.

¹⁵ See, however, Jurgen Schwarze, *Legal Protection by and within the Administrative Procedure. Some Observations on the Legal Situation in German and European Community Law*, in Alberto Massera (ed.), *Le tutele procedimentali. Profili di diritto comparato* (2007), 53.

¹⁶ See, for example, Consiglio di Stato, fifth section, judgment n. 5271/2007 (holding that the prohibition of an *ex post* integration of the reasons adduced by the public administration has been attenuated by the new legislative provision). For a different line of reasoning, see the 6th panel’s judgment n. 6386/2009 (pointing out that, if the

5.3 A re-interpretation of the Act based on Article 6 ECHR

Legal positivists, of course, express a different point of view. If Parliament, so their argument goes, decided to amend the APA, it means that the interest that gives rise to the due process claim must be balanced against other competing interests. In particular, quashing an administrative measure only on ‘formal grounds’ would be unjustified or excessive.

Yet this position is far from satisfactory for at least three reasons. First, unlike economists, lawyers should be aware that formalism is often a shield against the arbitrariness of public authorities, especially in view of the growing importance attached to the majority principle for all levels of government. Second, the positivist and anti-formalist position (two strange bedfellows) provides no basis for considering the balance of interests that the legislator has provided in the light of the general principles laid down by the Act. Indeed, if the APA has any purpose, it is to lay down some procedural requirements for the protection of the individual and collective interests recognized by the legal order.

Third, and probably most important, especially after the constitutional reform of 2001, all legislation must be in line with Union law and the European Convention of Human Rights. This is recognized by positive law. Article 117 of the Constitution now clarifies that national and regional legislation must be in line not only with the Constitution itself, but also with the legal order of the European Community and with the obligations deriving from international agreements. That such agreements include the European Convention on Human Rights is beyond any shadow of doubt. In the past, administrative courts hesitated to draw all necessary conclusions from this, in particular, that the traditional criterion of *lex posterior* does not apply in this context. A change occurred, however, when the Constitutional Court affirmed that the Convention may not be

administration must take a discretionary decision, the participation of private parties cannot be regarded as irrelevant).

derogated¹⁷. The question thus arises whether Article 21-octies of the APA may only be interpreted in conformity with Article 6 ECHR. In my view, whatever the legislative intent expressed by elected politicians in 2005, we must have a clear idea of what counts as a constitutional value, and if we balance interests, we must be aware that when balancing the elements that count against each other, procedural due process of law has not only a considerable weight, but also an increased one, within all the States that have signed the ECHR.

6. FINAL REMARKS

Although this report raises some doubts with regard to the widespread, and optimistic, vision of the APA, the importance of this Act may not be overlooked. It was one of the most important innovations ever introduced by national legislation in the field of public law. It is, beyond any shadow of doubt, the Act most frequently invoked by lawyers and judges in this field. It raised, more than any other piece of legislation, questions for academics and practicing lawyers. The conclusion that emerges from the remarks made thus far is that such questions can be properly assessed only from a satisfactory constitutional perspective that takes into account the constitutional relevance of due process.

¹⁷ For further details, see Silvia Mirate, *The Role of the ECHR in the Italian Administrative Case Law. An Analysis after the two Judgments of the Constitutional Court No. 348 and No. 349 of 2007*, 2 *Italian Journal of Public Law*, 260 (2010), available at www.ijpl.eu